

The Constitutional Role of the
Solicitor-General:
An Historical, Legal and Lived Portrait

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I was, when younger, much given to films about wagon trains which braved the dangers of the unchartered plains lying westward of the settled and effete eastern seaboard of Northern America. Their dangerous journeys were imperilled by constant Indian attacks, bands of renegade whites, fires, arrows, hails of bullets and hordes of menacing bison. Vividly portrayed in bloody detail was the heart-rending destruction of other adventurers less fortunate or less skillfully guided.

Always a bearded, wise, alert, quick-thinking wagon master led the train. He rose to every challenge, surmounted every danger and dominated every crisis. He was assisted, if you could so describe his role, by a half-caste Indian scout who, when danger threatened, was summoned to locate, pacify, mislead or fight – of course, off camera – the hostile, cunning and noble Indians. They were led of course by a wise, brave, handsome and handsomely head-dressed chief who always raised his right hand in a vaguely Nazi salute and said “How!” whenever spoken to, speaking, or seemingly thinking.

Oh my prophetic soul! Little did I realize that these films were allegories of ten years of my life. The wagon train of course the Commonwealth Government, the Indians – the courts, the States and all the citizens of Australia – the bearded wagon master the Attorneys-General past, and may I say it, present, and the half-breed scout is of course the Solicitor-General. The destroyed wagon trains were, naturally, those cases other people lost. Those other half-breed scouts – other Solicitors-General.

*Sir Maurice Byers QC, speaking at a dinner given in his honour by Gareth Evans
8 February 1984*

National Library of Australia, 'Papers of Sir Maurice Byers' (1975-1999)

ABSTRACT

This thesis introduces the Solicitor-General as an important actor in the modern Australian constitutional order. The Solicitor-General's significance lies in the office's role as the final and authoritative legal adviser to government. This function is combined with that of government advocate, defending the legality of government action and protecting the institutional interests of the body politic. This research provides the first portrait of the office from an historical, legal, and lived perspective. I hope that it will be a valuable tool for officeholders and government officials seeking to understand the role.

The modern Australian Solicitor-General is a uniquely Australian institution. Its design is underpinned by the objective of creating an independent, exclusively legal officer to complement the Australian Attorney-General, who has become increasingly political. On the one hand, the office's framers sought to create an office that would be beyond criticism because of improper political or administrative influence. On the other, the officeholder's continuity of service to the Crown would mean they would be understanding of, and responsive to, government's interests. This thesis considers the extent to which this delicate balance has been achieved. It embarks upon an analysis of the legal position, complemented by a qualitative analysis of interviews with Solicitors-General, and others closely associated with the office.

I conclude that removal of the Solicitor-General from the political realm has not been wholly achieved. However, I argue that politics and the public interest remain legitimate, and not inappropriate, influences on the office in many circumstances. The Solicitor-General acts as counsel for *the Crown*. The Crown's legitimacy rests on a complex amalgam of democratic and liberal theory that emphasises empowerment and the necessity of restraint. Because of the Solicitor-General's close relationship with the Crown, it is inevitable that political and public interest considerations continue to influence and inform the office. These considerations dictate that the advisory and advocacy functions must be performed differently, they influence how the office ought to resolve legal ambiguity, and they import an obligation to advise the government, not only on the legal position, but on the impact of policies on the whole of government, the long-term interests of the polity, and those principles that underpin our constitutional order – which I have termed 'core government principles'.

Emphasis was placed on the structural independence of the statutory office when it was created. However, in practice the office's independence largely rests on the commitment of individual officeholders to this independence. This commitment can be compromised because the office operates in a wider bureaucratic and government setting where at times it may be competing for legal work. My findings reveal that these and other pressures have resulted in two different approaches. Both have the object of securing the place of the Solicitor-General in the government order, but each emphasises the importance of independence *or* involvement. I call these the 'team member' and 'autonomous expert' approaches.

DECLARATION

I, Gabrielle Appleby, certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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Signature: Gabrielle J Appleby

26 September 2012

Date

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I owe so much to my principal supervisor Professor John Williams. His encouragement and confidence in my ability gave me the confidence to embark on this research. His patience and understanding gave me the time to make my own mistakes and learn from them. Chief Justice Patrick Keane always provided me with insightful feedback ‘from the inside’. I must also thank him for being the inspiration behind the thesis itself. Professor Clem Macintyre had the innate ability of good supervisors to drop encouragement and sage words at the exact moment that they were needed to ensure my dedication to the project was not lost (and saved me from a number of novice political faux pas!).

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GLOSSARY OF ACRONYMS

ABA	Australian Bar Association
AGD	Attorney-General's Department (Commonwealth)
AGS	Australian Government Solicitor
ACTGS	Australian Capital Territory Government Solicitor
APS	Australian Public Service
DFAT	Department of Foreign Affairs and Trade (Commonwealth)
DPP	Director of Public Prosecutions
GBE	Government Business Enterprise
ICAC	Independent Commission Against Corruption (New South Wales)
OIL	Office of International Law (Commonwealth, Attorney-General's Department)
OLC	Office of Legal Counsel (United States)
OLSC	Office of Legal Services Coordination (Commonwealth, Attorney-General's Department)
OPC	Office of Parliamentary Counsel
OSG	Office of Solicitor-General (United States)
SCAG	Standing Committee of Attorneys-General*
SCSG	Special Committee of Solicitors-General
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS III	United Nations Convention on the Law of the Sea III
VGSO	Victorian Government Solicitor's Office

* Now called Standing Council on Law and Justice.

1 INTRODUCTION

1.1 Why study the Solicitor-General?

A constitution does not work itself; it has to be worked by men.

Ivor Jennings (1959)¹

This thesis critically analyses the role of the Solicitor-General by reference to its history and the law, as well as the lived experience of the office. I will establish a portrait of the role informed by the perceptions and experiences of officeholders and those who work closely with them.

1.1.1 The constitutional order

Embarking on a study of the role of the Solicitor-General is underpinned by the broader objective of understanding more about our Constitution's 'working',² or 'complete',³ form. Arguably, the study of constitutional law has been excessively focused upon the constituting document and judicial interpretation of it.⁴ At times it appears that constitutional law is coextensive with the constitutional text and judicial doctrine. Myopic focus upon these institutions is 'hopelessly misdescriptive'⁵ and has led to the undervaluing and therefore the understudying of other key constitutional institutions. Because of our Westminster heritage, there is a wide acceptance that Australia's Constitution transcends the text and judicial pronouncements to include those political understandings and rules of practice known as constitutional conventions. Once conventions are accepted as fundamental facets of our constitutional system, it is clear that the focus on text and judicial interpretation (remembering that conventions do not generally raise justiciable questions) is insufficient. The necessity arises for a broader definition of what our Constitution is.

¹ Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 82. Of course to the conclusion of this quote must today be added 'and women'. This omission does not, however, undermine Jennings' meaning.

² This is the terminology preferred by Llewellyn: Karl Llewellyn, 'The Constitution as Institution' (1934) 34 *Columbia Law Review* 1, 6.

³ This is the terminology introduced by Palmer: see, eg, Matthew S R Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *The American Journal of Comparative Law* 587.

⁴ Karl Llewellyn refers to this as 'orthodox constitutional theory': Llewellyn, 'The Constitution as Institution', above n 2, 3-4. See also Richard Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) 18. In the Australian context, this focus has also been identified: see, eg, John McMillan, 'Rethinking the Separation of Powers' (2010) 38 *Federal Law Review* 423; John McMillan, 'The Ombudsman and the Rule of Law' (2006) 44 *AIAL Forum* 1.

⁵ Llewellyn, 'The Constitution as Institution', above n 2, 4.

Martin Loughlin proposed that ‘public law’ includes those other mechanisms beyond the constitutional text that facilitate the governance of a community: ‘The assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing.’⁶ Loughlin’s definition introduces the possibility of a second definition of the Constitution, one that includes not simply rules but also their *usage*.⁷ Loughlin further argued that public law scholarship ought first to explore this usage before drawing conclusions about the nature of the law behind it.⁸

For Karl Llewellyn, a legal institution is ‘in first instance a set of ways of living and doing. It is not, in first instance, a matter of words or rules.’⁹ Drawing extensively on Llewellyn’s work, Matthew Palmer wrote of ‘constitutional realism’: to understand the ‘complete’ constitution, Palmer suggested we must understand ‘what factors affect the exercise of power and how’.¹⁰ Mark Tushnet referred to a ‘constitutional order’ or ‘regime’ rather than a constitution. By this he meant ‘a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions.’¹¹ Tushnet also postulated that a constitutional order will be constructed and transformed over time.¹² At any moment, a constitutional order contains residues of the past and hints of the future. Many new mechanisms have been introduced in Australia in the last thirty years to bring greater accountability to the exercise of public power. As a result, the current constitutional order has grown in size and complexity.¹³

Our society has a normative expectation that those in government will act legally, constrained by the limitations placed on them by the law. This is the fundamental tenet of the rule of law,

⁶ Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 115. See also Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 11.

⁷ See also Michael J Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Law Book Co, 1985) 5; Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2007) 4.

⁸ Loughlin, *The Idea of Public Law* above n 6, 44.

⁹ Llewellyn, ‘The Constitution as Institution’, above n 2, 17. See also Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 1930, 1960 reprint) 4, 7, 16, 79; Karl N Llewellyn, *The Theory of Rules* (University of Chicago Press, 2011) 63.

¹⁰ Matthew S R Palmer, ‘What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders’ (2006) 17 *Public Law Review* 133, 134. See also Palmer, ‘Using Constitutional Realism’, above n 3, 589.

¹¹ Mark Tushnet, *A New Constitutional Order* (Princeton University Press, 2003) 1.

¹² *Ibid* 2.

¹³ See, eg, the recognition in Australia that we must ‘update our constitutional thinking to take account of the more complex dispute resolution and accountability framework’ that has arisen since the 1970s: McMillan, ‘Rethinking the Separation of Powers’, above n 4, 423. See also J J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724.

and reflects an embedded norm of constitutionalism. It is this tenet that places on the Executive an obligation to first interpret, and then obey, the law. In our tri-partite system, many see the task of interpreting the law as it limits government power as residing with the Judiciary.¹⁴ This is, in the last instance, undeniably correct: the existence of an independent judicial branch is one of the bulwarks on which governance under the rule of law rests. The perception of the ‘great powers’¹⁵ of the Judiciary has meant that in Australia there is much concern over, and therefore consideration of, this institution’s independence and impartiality.¹⁶ However, if interpretation were left only to the Judiciary, our constitutional system would have stalled at its inception. ‘After-the-fact’ judicial review alone does not explain how constitutionalism is achieved.¹⁷

Thomas Hobbes observed, ‘[a]ll laws, written, and unwritten, have need of Interpretation.’¹⁸ Words consistently prove to be imperfect vehicles to convey unambiguous meaning, and one would add this is particularly the case with those words that form part of a constitutional text, forged from political compromise.¹⁹ If the court has not considered (or in rare instances, cannot consider) a question of interpretation, the words of the Constitution and other laws must still be given meaning. Therefore, those with the mandate of administering and implementing the Constitution and the laws have been bestowed with a constant task of interpretation.²⁰ Often the Executive receives no guidance from the courts in this endeavour. According to David Luban, there is still ‘indeterminacy in legal doctrine’ with which administrators must grapple despite (or even if) courts assist in the interpretation of statutes.²¹ Similarly, indeterminacy will often plague common law doctrines. To understand how our

¹⁴ The famous pronouncement of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, 177, that ‘It is, emphatically, the province and duty of the judicial department to say what the law is’, while not expressly adopted by the framers, has been embraced by the Court as ‘axiomatic’ (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J)). See also McMillan, ‘The Ombudsman and the Rule of Law’, above n 4, 1.

¹⁵ Sir Ninian Stephen, ‘Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion’ (1982) 13 *Melbourne University Law Review* 334, 338.

¹⁶ This has led to detailed analysis of the structural and other mechanisms that exist to protect these traits. Judicially, this concern was evident from the inception of the Commonwealth and has continued in its Chapter III jurisprudence.

¹⁷ Dawn E Johnsen, ‘Faithfully Executing the Laws: Internal Legal Constraints on Executive Power’ (2007) 54 *UCLA Law Review* 1559, 1564.

¹⁸ Thomas Hobbes, *Leviathan* (Penguin Books Ltd, 1651, 1968 reprint) Part II, Chapter 26, 322.

¹⁹ David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 196; Llewellyn, *The Theory of Rules*, above n 9, 42.

²⁰ See, eg, John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901, 1976 reprint) 791; Cornelia T L Pillard, ‘The Unfulfilled Promise of the Constitution in Executive Hands’ (2005) 103 *Michigan Law Review* 676, 687.

²¹ Luban, above n 19, 197.

Constitution and laws are interpreted, it is necessary to study and understand many more institutions in the system than simply the Judiciary.²²

1.1.2 The constitutional role of government lawyers

This thesis identifies for study one major actor in the contemporary Australian constitutional order: the Solicitor-General.²³ Before turning to an explanation of that specific office's role and how this research contributes to an extended understanding of its workings, the generic role of government lawyers, of which the Solicitor-General is one, needs further explanation. To apply constitutional rules (written and otherwise) the Executive needs assistance from those skilled in understanding the law to interpret them. It is the *understanding* of the constitutional text and judicial pronouncements held by public officials (elected and appointed) that guides their actions. It is often the legal advice they receive that forms the basis of their understanding. Luban argued that 'the most significant actors are not judges, not ... officials more generally, but lawyers.'²⁴ It is through the lawyer-client interface that 'law in books becomes the law in action'.²⁵ Similarly, Cornell Clayton explained:

Today, most government action takes place in a twilight zone that exists between what the clear commands of law authorize and what they prohibit. Within this zone, custom, convention, professional norms, and institutional cultures merge to authorize and constrain discretionary conduct. It is the work of government attorneys, ... to construct and define these informal understandings and to assist their political superiors in navigating through them.²⁶

Comprehension of a working constitution therefore requires considered study of those actors who guide the conduct of government officials by providing them with an understanding of the constitutional text, other laws and judicial pronouncements. Further, it is the officials' understanding, combined with their conduct, that eventually becomes accepted as constitutional convention, particularly in light of the requirement for normative-based

²² Palmer, 'What is New Zealand's Constitution', above n 10; See also Mark Tushnet, 'Non-Judicial Review' (2003) 40 *Harvard Journal on Legislation* 453, 492 and footnote 228.

²³ In 1964, the seminal work on the British Law Officers said they comprised 'integral parts of our constitution': John LJ Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 11.

²⁴ Luban, above n 19, 131. See also at 140.

²⁵ Ibid.

²⁶ Cornell W Clayton, 'Introduction: Politics and the Legal Bureaucracy' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 13.

practice.²⁷ Government lawyers ensure that the government operates within the law, and also facilitate the operation of rigid legal frameworks in a climate of evolving social needs and political ideas.²⁸

Government lawyers, as this thesis argues, are key components in achieving constitutionalism.²⁹ They can act as guards against tyranny and abuse within government. In many unstable fledgling democracies, government legal officers are quickly targeted by those leading revolutionary coups, or despotic leaders.³⁰ It is the rule of law and the striving for constitutionalism that serves to explain and provide the rationale for the constitutional role of government legal officers, including the Solicitor-General.³¹

1.2 The goals of the thesis: the role of the Solicitor-General

Across the Australian jurisdictions, the Solicitor-General provides legal advice to the Executive on significant constitutional and public law matters, and otherwise legally or politically important issues. The Solicitor-General also defends the position of the Crown in the superior courts, including the High Court of Australia. The office is a relatively modern statutory one with roots in the antiquity of the British Law Officers (the Attorney-General and the Solicitor-General). The contemporary Australian Solicitor-General is a constitutional specialist, although, as this thesis will demonstrate, this has not always been the case.³² Today, the role of Solicitor-General is *central* to the regulation of public power in every Australian jurisdiction. While the function of day-to-day legal adviser to the government is filled by a vast number of legal professionals both within and outside government, at the apex of these sits the Solicitor-General. Subject only to a future contrary judicial ruling, the office provides the final word on significant legal questions within the Executive. In a system of separation of powers between the federal Judiciary and the Executive, the office also provides

²⁷ Jennings, above n 1, 135.

²⁸ See, in the context of conventions: *ibid* 101.

²⁹ American scholarship has recognised the idea that a significant part is played by non-judicial actors (including government legal officers) in the operation of the Constitution, and there has been increasingly concerted study of these actors. See, eg, Tushnet, 'Non-Judicial Review', above n 22; Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999); Pillard, above n 20; Michael J Gerhardt, 'Non-Judicial Precedent' (2006) 61(3) *Vanderbilt Law Review* 713; Michael J Gerhardt, *The Power of Precedent* (Oxford University Press, 2011) ch 4.

³⁰ See, eg, the analysis of the coup in Fiji of December 2006 in Peter Larmour, 'Guarding the Guardians: Accountability and Anticorruption in Fiji's Cleanup Campaign' (2008) 4 *Pacific Islands Policy* and the government of Prime Minister Manasseh Sogavare in the Solomon Islands in Clive Moore, 'Uncharted Pacific Waters: The Solomon Islands Constitution and the Government of Prime Minister Manasseh Sogavare' (2008) 6(2) *History Compass* 488, 498.

³¹ Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) iii.

³² Chapter 3.4.1.

an important conduit between these branches. It ensures the Executive's interests and views are represented before the Judiciary in constitutional matters that fall for decision. It is the combination of these functions that makes the Solicitor-General unique among statutory officeholders in Australia. The office both ensures the integrity of the exercise of government power by actors within government, and defends the exercise of government power from external legal challenge. The Solicitor-General is, then, an important link in the chain between simply having rules, and achieving effective constitutionalism. The centrality and uniqueness of the office justifies, in part, the need for further study of it. It is axiomatic that offices that affect the exercise of public power need to be properly understood.

In pursuit of the identified research objective of investigating our working Constitution, this thesis embarks upon a study of the Solicitor-General in the Australian constitutional context. My purpose is to consider both the legal theory underpinning the role of the Solicitor-General, and the operation of the role in its richness, depth, nuance, context and complexity. The thesis analyses the historical, legal, political and cultural position of the office to determine its normative and behavioural characteristics. 'Culture' is a notoriously difficult and ambiguous concept. My research draws from Clifford Geertz's explanation:

Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law, but an interpretative one in search of meaning.³³

My analysis of the Solicitor-General's 'cultural' position therefore researches the practices, relationships, norms and customs that surround the office. By not only drawing on traditional historical and legal methodology, but also undertaking a qualitative survey of the views of officeholders, the thesis will provide a portrait of the office in practice, rather than simply theorising the role in its abstract form. This is congruent with the principles on which constitutional realism has been founded, with its emphasis on 'multi-causal, nonlinear, reciprocating, recursive interactions between law, the environment in which it works and the ideas that people have about it.'³⁴

³³ Clifford Geertz, 'Thick Description: Toward an Interpretative Theory of Culture' in Clifford Geertz (ed), *The interpretation of cultures* (Basic Books, 1973) 5.

³⁴ Palmer, 'Using Constitutional Realism', above n 3, 593. See also the growth of the idea of 'New Legal Realism': *New Legal Realism: Empirical Law and Society* <www.newlegalrealism.org>.

Little research exists on the special nature of the Australian Solicitor-General.³⁵ This thesis facilitates insight into the operations of Australia's most influential legal advisers and government lawyering more generally. The centrality of these roles to the constitutional system also means that a better understanding of these roles will further elucidate our understanding of the wider government order.

It is not my intention in this thesis to advocate normative changes to the role of Solicitor-General, but to identify its nature and the potential implications for the constitutional order that follow. A deeper understanding of the role will provide officeholders with a more secure theoretical base, particularly when confronted with situations of conflict between the institutions of government, and between those institutions and the broader public interest. The relationships between other government actors and the Solicitor-General will also be improved if a greater understanding of the office is developed across government. To take a single example, I examine the difficult question of who is the Solicitor-General's client, and particularly whether the Solicitor-General can advise the Viceroy if that officer is in conflict with the elected Executive.³⁶ Already many officeholders in a number of Australian jurisdictions have been confronted with this question.³⁷ My conclusions provide theoretical and practical guidance to Solicitors-General, Viceroys and the elected Executive in times of constitutional crisis when such conflicts can arise.

1.3 Methodology and structure

This section of the introduction details the methodology through which the argument advanced in this thesis was developed and tested. It also explains how the findings of the thesis will be set out in the following chapters.

The thesis adopts a triangulation of research methodologies, some of which are well known to law, others of which are more commonly applied in social science disciplines.³⁸ The methodologies are informed by the comparative studies outlined in Chapter 2. The underlying object behind employing the different methodologies is two-fold. First, the different nature of a number of my research questions naturally suggests one methodology or another. Questions

³⁵ See discussion of the literature in Chapter 2.2.

³⁶ See legal analysis of the position in Chapter 4.4.2.1.

³⁷ See analysis of the practice in Chapter 5.2.2.1.3.

³⁸ Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Allyn & Bacon, 7th ed, 2009) 5. See also Norman K Denzin and Yvonna S Lincoln, 'Introduction: Entering the Field of Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, 1994) 1, 2.

around the historical development of the Australian Solicitor-General are informed by a traditional historical methodology; understanding the legal framework in which the Solicitor-General operates must be achieved through doctrinal research; and finally, questions relating to the operation of the role in practice must be informed by a qualitative assessment of it. Secondly, by considering my overarching research question through these different prisms, a richer picture of the Solicitor-General is provided. The reliability and depth of the argument has its foundations in the different methods that have been employed.

Part 1 of the thesis provides a comparative, historical and legal overview of the Australian Solicitor-General. **Chapter 2** surveys the Australian and some comparative scholarship on the Law Officers. Because of the absence of literature directly considering the role of the Australian Solicitor-General, this review considers the generally comparable offices³⁹ in Britain (the Attorney-General and the Solicitor-General), the United States (the Attorney-General, the Solicitor-General, and the Office of Legal Counsel) and New Zealand (the Solicitor-General).⁴⁰ This review is vital in framing the questions for research. It demonstrates the lack of scholarly attention to the Solicitor-General in Australia and postulates why such an important office has been understudied. It also highlights the uniqueness of Australia's constitutional arrangements and the position that the Solicitor-General occupies in relation to the Attorney-General.

What emerges from the literature is evidence that commentators continue to struggle with how best to resolve the tensions that arise in the Law Officers' roles because of the conflict between three interests: the law and justice; the public interest; and the political objectives of the government. While each of these interests can be a legitimate influence on an officeholder's functions, in the exercise of other functions, it is inappropriate that any one interest should govern an officeholder's conduct. Often more than one interest can legitimately be considered by an officeholder, which gives rise to the possibility of the interests coming into conflict. Commentators have argued that the tensions can be resolved by several different (often themselves conflicting) normative perspectives that emphasise the importance of one of the interests over the others. The comparative literature provides the

³⁹ A rough 'functionality' test of comparability was applied in identifying these offices: Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law 2* (Tony Weir trans, 3rd ed, 1998); Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1238.

⁴⁰ The hyphenation of Attorney-General and Solicitor-General varies between jurisdiction. In Australia and New Zealand, it is more commonly hyphenated, while in the Britain and the US it is not. For consistency, this thesis will adopt the hyphenation.

necessary background to understanding the genesis of these underlying tensions and how different structural, normative and behavioural models could address these. With these in mind, the thesis then turns to a consideration of the unique set of arrangements in Australia.

Chapter 3 develops an understanding of the origins of the contemporary Australian Solicitor-General and the reasons and theories that governed its creation. This chapter chronicles the evolution of the colonial position that led to the development of the modern Solicitor-General in the States, Territories and the Commonwealth.⁴¹ The current constitutional moment was preceded by two major periods. The first, which I call the ‘British Colonial Period’, commenced with the creation of the Law Officers in many of the colonies and was defined by the replication, as far as possible, of the British position. For example, after the introduction of representative and responsible government in the colonies, *both* Law Officers sat in Parliament. However, even in this early period the first Law Officer, the Attorney-General, was far more intertwined with the political fortunes of the government than the equivalent British office. It was the continued progression of the first Law Officer towards the political that led to the development of the second period, which I call the ‘Public Service Period’. Colonies (and later States, the Commonwealth and the Territories) started to adopt a non-political, public service model for the Solicitor-General. The chapter then explores the factors behind the move from this public service model to the independent statutory officer model that has defined what I refer to as the ‘Modern Period’. While the move started in Victoria in 1951, it was not until 2011 that the Australian Capital Territory became the final Australian jurisdiction to adopt the statutory model.

In **Chapter 4**, a doctrinal analysis of the legal position builds from the historical chapter, considering whether ‘insights of history’ persist or whether the position has moved so far from its origins as to be a completely new office.⁴² With the creation of a statutory position, much of the framework that governs the office is now legislative. One of the underlying objectives in creating the statutory office was to provide guarantees of tenure and remuneration to ensure against improper political influences on the officeholder. The office is given the statutory function to act as ‘counsel for the Crown’. The chapter considers how the Crown as an entity must be defined, and how this may affect the Solicitor-General’s function to act as counsel. The thesis demonstrates that the relationship to the Crown is ultimately what continues to define the tensions inherent in the office today. The chapter explores how

⁴¹ This study does not include the external Territories.

⁴² Mathias M Siems, ‘Legal Originality’ (2008) 28(1) *Oxford Journal of Legal Studies* 147, 150.

the different aspects of counsel's functions, particularly those of advocate and adviser, are incorporated into the Solicitor-General's role in this context. I assert that the understanding of the legal framework requires the rather stark legislative provisions to be supplemented by professional ethical obligations and some residual common law duties of the Law Officers to the public interest. While many of the traditional free-standing public interest functions of the Law Officers have fallen away, I argue that the public interest must remain relevant in the Solicitor-General's conduct of litigation on behalf of the Crown, and in the advisory function, in the form of warning and advising on adherence to doctrines and principles that underpin our constitutional system, what I term 'core government principles'.

In accordance with its focus on the realist perspective, the thesis ultimately provides a 'thick description' of the role of the Solicitor-General.⁴³ A picture of the office is fully constructed by understanding perceptions of, and experiences in, the role. This proceeds upon the ontological assumption that the manifestation of the Solicitor-General's role is greatly influenced by the views, understandings, interpretations, and perspectives of that role held by the Solicitor-General and others closely associated with the office.⁴⁴ This requires an understanding of the cultural norms and individual conceptions that give meaning to the role in practice. Drawing on extensive interviews with current and former Solicitors-General and those closely associated with the office (including Attorneys-General, judges, and other government legal professionals) (n=40) and analysis of memoirs, oral histories, government reports and Cabinet papers, manuscript collections, legal opinions (where available) and biographies, **Part 2** of the thesis (Chapters 5, 6 and 7) explains how individuals perceive and perform the role of Solicitor-General. Further details on the methodology are provided in the introduction to this part and the research design, including the sampling and recruitment of interview participants, development and conduct of interviews, and analysis, is set out in **Appendix A**. A full list of interview participants and the details of each interview is set out in **Appendix B**.

Chapter 5 illustrates that the *advisory* function was viewed by all participants as the most significant to the broader constitutional system. However, the effectiveness of the Solicitor-

⁴³ Geertz, above n 33.

⁴⁴ This is an assumption 'endemic' in most versions of role theory: Bruce J Biddle, 'Recent Development in Role Theory' (1986) 12 *Annual Review of Sociology* 67, and underpins much qualitative research relying upon the interview method: Jennifer Mason, *Qualitative Researching* (Sage Publications, 2002) 63. See also Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 3rd ed, 1994) 4.

General's advisory function rests on a number of assumptions: that the Solicitor-General advises the 'Executive'; that the Executive will seek the Solicitor-General's advice and treat it as determinative of the legal issue; and that the Solicitor-General will provide objective advice 'independently' of the desires of the client. Against the background of my conclusions in Chapter 4 about the obligation to warn and advise on the application of 'core government principles', the chapter also explores the extent to which the Solicitor-General does and ought to provide advice to the Executive beyond strictly legal issues.

Chapter 6 examines the Solicitor-General's other significant function: advocacy. The analysis in this chapter focuses on the extent to which the performance of this function is unique to the Solicitor-General, comparing the role to that of other advocates. My data reveal that while in many respects there are great similarities, the Solicitor-General exercises greater *de facto* independence in determining the government's position. In this role, the Solicitor-General must make determinations about where the government's interests lie, which will require consideration not necessarily of the short-term interests of the incumbent government, but of how to preserve the government's institutional powers, and whether this objective ought to be balanced against other competing constitutional principles. The chapter also explores the relationship between the Solicitor-General and the court, particularly when the officeholder acts as an interface between the Judiciary and the Executive.

Chapter 7 returns then to the central idea of 'independence' and canvasses the views of the participants on the extent and protection of the Solicitor-General's independence in the different jurisdictions. What it reveals is that in Australia, even with our specific arrangements aimed at providing structural safeguards for independence, the office's independence still rests upon the professional integrity and ethics of the officeholder. The chapter traces two approaches to how participants saw independence in the context of the Solicitor-General's overall role. Some participants perceived the independence of the office as so vital for government that it must be protected from all political interference, removing the Solicitor-General somewhat from the Executive even at the expense of engagement in all matters in which the Solicitor-General's advice ought to be sought. This I call the 'autonomous expert' approach. This approach has many similarities with the characteristic of 'independent aloofness' that was advocated in the 1970s by Peter Rawlinson, former Solicitor-General and Attorney-General of England and Wales. For Rawlinson, 'independent aloofness' denoted a desirable level of detachment from political matters through the maintenance of an often symbolic formal distance from the officeholder's Cabinet

colleagues.⁴⁵ Others regarded the independence of the Solicitor-General as existing for an overarching constitutional purpose and must be balanced against the objective of ensuring that during the development of policy the government is provided with high quality legal advice. This may, at times, undermine the autonomy of the Solicitor-General as the officeholder becomes closer to government and the subtle pressures associated with that, but it comes with the benefit of ensuring greater integrity across the larger spectrum of government action. This I call the ‘team member’ approach.

Finally, **Chapter 8** draws together my conclusions about the historical moment of the Solicitor-General’s development, the legal framework in which individuals must operate, and the actual manifestations of the role. In the ‘Modern Period’, the framers of the statutes sought to compartmentalise the legal responsibilities of the Solicitor-General from politics and insulate the office from political influences. However, I argue that the continuing close relationship between the Solicitor-General and the Crown has meant politics and ideals relating to the public interest continue to influence, inform, and antagonise the office. I substantiate this conclusion by reference to four of my major findings: first, the impact of the complex nature of the Crown on the conceptualisation of the Solicitor-General’s client; secondly, the division amongst participants as to the continuing relevance of the public interest even to the advisory function of the Solicitor-General; thirdly, the freedom of governments to *choose* to seek the advice of the Solicitor-General; and finally, my finding that the office’s independence continues to rest, ultimately, upon the strength of the individual’s commitment to it, and how this has resulted in the adoption of different approaches by individuals (the ‘team member’ and ‘autonomous expert’ approaches).

⁴⁵ Peter Rawlinson, ‘A Vital Link in the Machinery of Justice’ (1977) 74 *Guardian Gazette* 798, 799. See further discussion of Rawlinson’s approach, and other philosophical approaches that emerged in England, in Chapter 2.4.1.

PART 1 AN HISTORICAL AND LEGAL PORTRAIT

The Australian Solicitor-General has evolved from an office introduced almost 200 years ago that was closely modelled on the British Law Officers. Today, the Australian model exhibits many unique characteristics, while continuing to share the core function of providing legal services to the government on significant issues. In **Part 1** of the thesis, the Australian office is introduced in its comparative, historical and legal context. **Chapter 2** first examines the literature on the Australian Law Officers and comparable offices in Britain, the US and New Zealand. It relates some of the criticisms and controversies that surround the foreign offices. **Chapter 3** then provides a study of the historical evolution of the Solicitor-General from its colonial iteration in the early part of the nineteenth century to its modern form. **Chapter 4** concludes the part with an analysis of the constitutional, statutory and common law position of the office.

2 THE SOLICITOR-GENERAL IN THE LITERATURE: AUSTRALIAN AND COMPARATIVE PERSPECTIVES

2.1 Introduction

Chapter 1 introduced the Solicitor-General's prominent role within the Australian constitutional order. There is currently minimal literature, academic or otherwise, dedicated to describing or probing the role. This chapter introduces the scholarship on the Australian Law Officers that does exist, and considers how the Australian debate has been, and further research can be, informed by studies of the Law Officers in other common law jurisdictions. I demonstrate not only the absence of a systemic and critical study of the theoretical, legal and practical aspects of the role of the Australian Solicitor-General, but that scholarship across common law jurisdictions will benefit from a better understanding of the Australian office.

The chapter starts by reviewing the limited scholarship on the Australian Solicitor-General. I will also explore the possible reasons behind the lack of critical engagement with the office, before turning to the literature on the Australian Attorney-General and considering its relevance to the Solicitor-General.

In John Edwards' influential work on the British Law Officers, he raised the importance of comparative endeavour to understanding the different aspects of, and influences on, the Law Officers' roles.¹ Australia, together with other common law systems, has adopted a modified version of the British Law Officers.² Even with local modifications, however, the fundamental role across these jurisdictions has remained the same.³ Exploration of comparative literature from Britain, the US and New Zealand on the Law Officers in this chapter provides an opportunity to reflect on how to understand, and perhaps improve, the functioning of the offices not only in Australia, but in these other jurisdictions. As with any comparative endeavour, it is fundamental to remember that the constitutional system in which the Solicitor-General operates is necessarily underpinned by the philosophical basis, history, traditions, values, and other traits (political, social, legal and economic) of the particular

¹ John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 61-2.

² This chapter considers Britain, the US and New Zealand. Literature does exist on the Law Officers of other jurisdictions. See, eg, H M Seervai, 'The Legal Profession and the State: The Place of Law Officers and Ministers of Justice' (1977) 22 *Journal of the Law Society of Scotland* 265 (India); Kent Roach, 'Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law' (2006) 31 *Queen's Law Journal* 598 (Canada).

³ Commonwealth Secretariat, 'Meeting of Commonwealth Law Ministers: Selected Memoranda' (August 1977) [22].

community.⁴ In this thesis, the comparative literature is introduced with the aim of developing a deeper understanding of the tensions surrounding the role of the Law Officers and the place of the Solicitor-General as the junior Law Officer; of the possible ways to resolve these tensions using different legal and other frameworks; and of the types of criticisms that may be made of these resolutions. In the introduction to the literature of each jurisdiction, I explore in greater detail its relevance to the Australian office.

The chapter concludes by drawing out the themes that emerge from the comparative studies that inform the direction of my research into the role of the Australian Solicitor-General.

2.2 Australian Solicitors-General

The role of the Solicitor-General in Australia's constitutional system has gone largely unstudied.⁵ The role of lawyers in government has been discussed more generally in some literature, although the scholarship is still relatively sparse. This section doesn't directly canvass this literature, but it will be drawn upon, where relevant, in the analysis of the Solicitor-General's legal role.⁶

There have been some, largely historical, pieces written on the Solicitor-General in New South Wales,⁷ and more recently Queensland,⁸ but no dedicated consideration of the simultaneous development of the office across the Australian jurisdictions.⁹ There are also some brief sketches of the position outlined in speeches delivered, or papers written, by

⁴ Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 *National Taiwan University Law Review* 1, 9-11; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 7.

⁵ A similar conclusion was reached in a survey of the Australian position conducted in Christopher Goff-Gray, 'The Solicitor-General in Context: A Tri-Jurisdictional Study' (2011) 23 *Bond Law Review* 48, 82-3.

⁶ Three works stand out: L Curtis and G Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights' (1975) 49 *Australian Law Journal* 335; Michael Sexton and Laurence W Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (Angus & Robertson Publishers, 1982) ch 6; and Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114.

⁷ Keith Mason, 'The Office of Solicitor General for New South Wales' (Autumn 1988) *Bar News* 22; M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86; Terry Kass, *A Brief History of the Attorney-General's Department* (Attorney General's Department, 1996). See also *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83, 91-2 (Jordan CJ).

⁸ Crown Law, *In My Opinion: The History of Crown Law Queensland 1859-2009* (Department of Justice and Attorney General, 2009).

⁹ Edwards, *The Attorney General*, above n 1, 367-88, also provided a brief and largely historical description of the Australian Law Officers.

officeholders.¹⁰ These accounts provide a generally uncritical description of the office, peppered with interesting anecdotes, rather than offering any robust analysis of it. This, of course, is understandable; officeholders must be cognisant of the need to maintain the integrity of the office and their own objectivity. Detailed consideration in general constitutional texts is also lacking, often overlooked in the abundance of analysis of the constitutional documents and judicial interpretations. State constitutional texts, which have tended to focus more on the workings of government and the exercise of public power than their federal counterparts, give some consideration to the role.¹¹ In the 1980s Pat Brazil, with Bevan Mitchell, compiled two volumes of selected opinions from the (Commonwealth) Attorney-General, Solicitor-General and Attorney-General's Department,¹² providing a valuable insight into the breadth of the advisory function of the federal office in the early twentieth century.¹³ This exercise has not continued, and later opinions lie in archival storage, contemporaneous public release by governments being the exception rather than the norm.¹⁴

Many reasons exist for the lack of analytical, or generalised,¹⁵ study of the Australian Solicitor-General. First, consistent with the narrow focus of orthodox constitutional study

¹⁰ See, eg, Pamela Tate, 'The Role of the Solicitor-General for Victoria' (Speech Delivered at the University of Melbourne, 12 November 2003); Robert Meadows, "'Perhaps the Most to Be Desired'" The Role of the Solicitor-General in Western Australia' (Paper presented at the Western Australia Bar Association Conference, Perth, 2009); Sexton, 'The Role of the Solicitor-General', above n 7; Gavan Griffith, 'Solicitors-General' in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007). There is also some discussion in memoirs, papers, and interviews of former officeholders and tributes to them. See, eg, Robert R Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958); National Library of Australia, 'Papers of Sir Maurice Byers' (1975-1999); Daniel Connell, Interview with Maurice Byers (Law in Australian Society Oral History Project, 10 January 1997).

¹¹ See, eg, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 714-15; Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 81, 156-7; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 187-9.

¹² Pat Brazil, *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 1 (1901-1914)* (Australian Government Publishing Service, 1981); Pat Brazil, *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 2 (1914-23)* (Australian Government Publishing Service, 1988).

¹³ John Farquharson, Interview with Pat Brazil (Law in Australian Society Oral History Project, 12 and 26 September, 26 October 1995 and 27 February and 20 March 1997) 12-14.

¹⁴ For example, the release of the Solicitor-General's advice after the dismissal of Prime Minister Whitlam in 1975: Opinion from Kep Enderby and Maurice Byers, 4 November 1975; during the controversy over the actions of Justice Murphy: Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 102-3; and more recent releases by the Rudd/Gillard Labor government: eg, Letter of advice from Stephen Gageler SC, *In the Matter of the Office of the Speaker of the House of Representatives*, 22 September 2010.

¹⁵ In the sense of going beyond the individual recollections or descriptions by officeholders.

upon the role, independence and doctrinal reasoning of the courts,¹⁶ the opinions of government legal advisers have been largely overlooked. There is greater difficulty in accessing Solicitor-General opinions compared with publicly accessible judicial decisions, although they are gradually released under archival requirements, and some are voluntarily released by the government contemporaneously. Nonetheless, for the most part, they stand unscrutinised,¹⁷ either for their legal reasoning or as part of a broader analysis of the office's involvement in the government system.¹⁸

Secondly, the study of the role of Solicitor-General straddles the disciplines of both law and political science.¹⁹ In the US, much of the literature on government lawyers has come from political scientists.²⁰ In Australia, however, political scientists have generally left the study of the law and the courts to the lawyers.²¹

Thirdly, in Britain and the US, much of the scholarship on the Law Officers was generated after public outcry over overt political interference with officeholders. In contrast, in Australia there have been no significant public scandals that have raised allegations that Solicitors-General have failed to fulfil the appropriate or desirable functions of the office.²² There has therefore been little sustained impetus for the dedicated study of the office in

¹⁶ This is introduced in Chapter 1.2. See also Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 15; Rachael Gray, *The Constitutional Jurisprudence of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 4; Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 7; John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 119, 119.

¹⁷ Although Solicitor-General advices released more recently (2009-11) have been subjected to some criticism. See, eg, critiques in Memorandum of Advice from Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill, *On the Justiciability of Social and Economic Rights under a Commonwealth Human Rights Act*, 8 December 2009; Australian Capital Territory Economic, Social and Cultural Rights Research Project, 'Final Report' (Australian National University, September 2010), 132-3; James Allan, 'Stephen Gageler too risk-averse in his advice on Nauru option', *The Australian* (Sydney), 16 September 2011 <<http://www.theaustralian.com.au/business/legal-affairs/stephen-gageler-too-risk-averse-in-his-advice-on-nauru-option/story-e6frg97x-1226138211343>>.

¹⁸ Similar observations have been made in the British context, see K A Kyriakides, 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73.

¹⁹ Cornell W Clayton, 'Introduction: Politics and the Legal Bureaucracy' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 21.

²⁰ See further analysis of the nature of the US scholarship in Chapter 2.5.

²¹ Pierce, above n 16, 15; Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 3.

²² There have been small-scale scandals that have generated localised interest. Many of these are canvassed in more depth in Chapters 5 and 6 which consider the operations of the office. Attention has materialised mostly in parliamentary debate and only limited media coverage. This has been negligible compared to the public outcry following the 'Torture Memos' in the United States, or the revelations of the pressure placed on the British Attorney-General in relation to the Iraq War advice.

Australia. Even the Solicitor-General's role in the dismissal of the Prime Minister in 1975 was given only passing attention,²³ perhaps overshadowed by the events themselves, the controversial role of the Chief Justice of the High Court, and the other difficult constitutional questions the events raised. On occasion there have been concerns voiced about the independence, accountability and integrity of the office in the Parliament, but in the absence of significant media or public interest, the Solicitor-General has been left to perform the office's fundamental tasks within the government structure subject to little public understanding or scrutiny.

Finally, historically, the Australian Attorney-General has received wider attention than the Solicitor-General. This can be readily understood in Britain, where the Solicitor-General is a deputy for the Attorney-General. But in Australia, the Solicitor-General is more than simply the deputy to the Attorney-General. In his or her own right, the Solicitor-General is the chief legal adviser to the Crown. The Australian office is unique and therefore deserving of its own scholarship.

2.3 Australian Attorneys-General

While there has been little literature directly considering the Solicitor-General, this is not the case for the Attorney-General. In Australia, the Attorney-General has been a steady feature of the constitutional landscape since its introduction in the first colonies in 1824. But since the Attorney-General's role within the political side of government has become more and more entrenched in Australia, it is the Solicitor-General's position that has undergone significant change.²⁴ The progression in the first Law Officer's role has been marked by the devolution of many of the traditional legal and public interest functions of the Law Officers to the Solicitor-General, the Crown Solicitor, Parliamentary Counsel and more recently, the Director of Public Prosecutions (DPP).

The increased political focus of the first Law Officer has not gone without public and academic critique. As early as 1906 a Royal Commission was established in Tasmania to consider the desirability of making the Attorney-General of that state non-political,²⁵ to

²³ See eg Interview of Robert Ellicott by Kel Richards, *AM Broadcast*, 17 November 1975. At the State level there has been some discussion of the Solicitor-General's role in these circumstances: Twomey, *The Constitution of New South Wales*, above n 11, 635; Anne Twomey, 'The Governor-General's Role in the Formation of Government in a Hung Parliament' (2011) 22(1) *Public Law Review* 52, 60.

²⁴ See Chapter 3.

²⁵ Royal Commission on the Proposal to Make the Office of Attorney-General Permanent Non-Political, *Report of the Commission* (Hobart, John Vale, Government Printer of Tasmania, 1908) iv.

remove ‘the administration of justice from political life and the vicissitudes of the State’.²⁶ Despite the Report’s recommendations,²⁷ the Attorney-General continued in the political realm, and continued to be heavily assisted by a non-political Solicitor-General. Nevertheless, academic and government interest into how to ensure the appropriate balance between politics and the law was achieved in the Australian Attorney-General’s role continued.

The tension between the Attorney-General’s position as a political Minister and his or her obligations to make decisions regarding the initiation or termination of prosecutions, or to bring proceedings more generally in the public interest, has been particularly exacerbated in the Australian context.²⁸ With the creation of the DPP in the Australian jurisdictions during the 1980s and 1990s, many of the tensions around the Attorney-General’s involvement in prosecutorial decisions were alleviated; this has not meant, however, that all of the tensions in the role and debates about it have subsided.²⁹

The federal Attorney-General’s role was thrust into the spotlight in the 1990s,³⁰ and it was in this period that the predominance of scholastic debate over the role emerged. Comments of then shadow Attorney-General, Daryl Williams, that any convention that the office acted independently of the political Executive in Australia was ‘erroneous or at least eroded’ sparked the debate.³¹ He highlighted the departure of Australia from the British traditions.³²

²⁶ Ibid.

²⁷ Ibid v (Commissioners Wise and Davies); contra v-vi (Commissioner Wood).

²⁸ See comments to this effect in the courts, law reform and royal commissions, and academically: *Victoria v Commonwealth* (1975) 134 CLR 338 (‘AAP Case’), 425 (Murphy J); *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (‘Defence of Government Schools Case’), 634 (Murphy J); *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 (Gaudron, Gummow and Kirby JJ), 280 (McHugh J), 284 (Hayne J); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 451 (Kirby J). Australian Law Reform Commission, ‘Standing in Public Interest Litigation (Report 27)’ (1985) <<http://www.alrc.gov.au/report-27>> 85-102; Australian Law Reform Commission, ‘Beyond the Door-keeper: Standing to sue for public remedies (Report 78)’ (1996) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html>> [2.36], [4.15]; WA Inc Royal Commission, ‘Report, Part II’ (12 November 1992) [3.6.4]; Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, ‘Report of a Commission of Inquiry Pursuant to Orders in Council (‘Fitzgerald Report’)’ (1989) 138; R Plehwe, ‘The Attorney-General and Cabinet: Some Australian Precedents’ (1980) 11 *Federal Law Review* 1; Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) ch 4. See also consideration of the Australian position in Edwards’ second work: Edwards, *The Attorney-General*, above n 1, ch 12, 379-88.

²⁹ For a discussion of the evolution of the DPP across the Australian jurisdictions, see Damian Bugg, ‘The independence of the prosecutor and the rule of law’ (Paper presented at the Rule of Law: the challenges of a changing world, Brisbane, 31 August 2007) <<http://www.cdpp.gov.au/Director/Speeches/20070831db.aspx>>.

³⁰ Although note commentary on it in Queensland earlier: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, above n 28, 138. See also Electoral and Administrative Review Commission, ‘Report on Review of the Independence of the Attorney-General’ (1993).

³¹ Daryl Williams, ‘Who Speaks for the Courts?’ (1994) *AJJA* 183, 192.

Additional comments made by Williams doubting the Attorney-General's constitutional duty to defend the courts from political attacks³³ caused outcry among the Judiciary and their supporters.³⁴

Scholars clambered aboard the brewing controversy, and interest developed in the role of the Australian Attorney-General, and more specifically the balance that is, or ought to be, struck in the Australian legal paradigm between the office's obligations to politics, law and the public interest.³⁵ Divisions were most evident over whether to accept the idea of an established doctrine of independent judgment (that is, independent from the Cabinet) as had developed in Britain.³⁶ A number of academics noted the vague definition of the role in Australia. For example, Ben Heraghty concluded that the nature of the office in Australia is 'left open to wide interpretation and is therefore interpreted by the particular officeholders

³² Ibid 191-2.

³³ Ibid; Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252.

³⁴ See Gerard Brennan, 'The State of the Judicature Address' (Paper presented at the 30th Australian Legal Convention, Melbourne, 19 September 1997) 30; Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35(11) *Law Society Journal* 51.

³⁵ See, eg, Gerard Carney, 'Comment - The Role of the Attorney-General' (1997) 9 *Bond Law Review* 1; a conference was held in Melbourne on the Attorney-General's role and many of the papers subsequently published: Bradley Selway, 'The Different Role of an Australian Attorney-General' (2002) 13 *Public Law Review* 263; Ruth McColl, 'Reflections on the Role of the Attorney-General' (2003) 14 *Public Law Review* 20; Tony Abbott, 'Reflections on the Role of the Attorney-General' (2002) 13 *Public Law Review* 273. See also Ben Heraghty, 'Defender of the Faith? The Role of the Attorney-General in Defending the High Court' (2002) 28(2) *Monash Law Review* 209; David Bennett, 'The Roles and Functions of the Attorney-General of the Commonwealth' (2002) 23 *Australian Bar Review* 61; Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) *Murdoch University Electronic Journal of Law*; Christos Mantziaris, 'The Federal Division of Public Interest Suits by an Attorney-General' (2004) 25 *Adelaide Law Review* 211; Gareth Griffith, 'The Office of Attorney General in New South Wales' (2007) 11 *Legal History* 79; Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD, University of Melbourne, 2007); Fiona Hanlon, 'Death of the Rule of Law? The Attorney General - First Law Officer of the Crown, Political Guardian of the Rule of Law, or just Another Politician? - An Historical Assessment of the Office in Australia and Directions for the Future' (Paper presented at the Twelfth Annual Public Law Weekend, National Museum of Australia, Canberra, 9-10 November 2007); Keyzer, above n 28, ch 4. The scholarly literature has been supplemented by the views of officeholders: see, eg, L J King, 'The Attorney-General, Politics and the Judiciary' (2000) 74 *Australian Law Journal* 444; Bob Debus, 'Maintaining the Rule of Law: The Role of the Attorney General' (2006) *Bar News* 5; John Hatzistergos, 'The evolving office of the New South Wales Attorney General' (2012) 86 *Australian Law Journal* 197. And also a number of government-commissioned reports during the 1990s that investigated the provision of legal services to government in the context of the inter-governmental commitment to the National Competition Policy: see, eg, Basil Logan, David Wicks, Stephen Skehill, *Report of the Review of the Attorney-General's Legal Practice* (March 1997); Maurice Byers and Michael Gill, 'Review of Legal Services to Government' (New South Wales Attorney General's Department, 1993). The reports have been drawn on in academic works, but the material they contain is informative about, rather than critical of, the Attorney-General's role.

³⁶ This doctrine is discussed further in Chapter 2.4.1. For example, King, above n 35, 449, 451; Hanlon, *An Analysis of the Office of Attorney General*, above n 35; contra McColl, above n 35; Gareth Griffith, above n 35, 98-104.

themselves.³⁷ Bradley Selway confronted two fundamental differences between the British Attorney-General and the office that has developed in Australia, noting first the Australian office's intimate involvement with Cabinet, and second the office's responsibility and control for the provision of legal services to the *whole of government*. While sacrificing some independence from politics, Selway argued that the Australian office's advantage lay in a more engaged and influential Attorney-General, capable of monitoring and ensuring compliance with the rule of law.³⁸

Australian academic scholarship on the role of the Attorney-General can be broadly described as reactive and focussed upon the influence of the senior Law Officer's *political* position on the office's other functions, particularly the exercise of prosecutorial discretion, the conduct of public interest litigation, and the defence of the Judiciary. Scholars have engaged in analysis of the extent to which British traditions are of continuing relevance in Australia. In this context, scholars have at times also raised the question of the proper role of the Solicitor-General,³⁹ but this has not developed into comprehensive or systematic study. However, while much of the scholarship's focus has little direct relevance to the Australian Solicitor-General, it raises pertinent questions about how this office can resolve tensions between politics, the law and the public interest in an environment where the Attorney-General has evolved toward politics. The creation of the modern Solicitor-General in Australia was intended to defuse many of the debates surrounding the 'independence' of the senior Law Officer by creating an independent, non-political office to assist the Attorney-General in the fulfilment of the legal services functions.⁴⁰ The time is ripe for a full analysis of the Solicitor-General to consider the office's effectiveness in doing so.

2.4 The Law Officers of England and Wales: the source of conflicting obligations

Australian scholars have focussed their inquiries on whether the British traditions aimed at protecting the independence of the Law Officers from political influences were brought across to, or have evolved autonomously in, Australia. Almost all of the Australian literature

³⁷ Heraghty, above n 35, 220.

³⁸ Selway, 'The Different Role of an Australian Attorney-General', above n 35, 271. See also Selway, 'The Duties of Lawyers Acting for Government', above n 6.

³⁹ See, eg, Hanlon, *An Analysis of the Office of Attorney General*, above n 35, 249-50; Electoral and Administrative Review Commission, above n 30, 14, 16-17; Byers and Gill, above n 35, ch 4; Logan, Wicks and Skehill, above n 35, 59.

⁴⁰ See discussion of the reasoning behind the move in Chapter 3.4.4.

on the Attorney-General is informed by the two works of John Edwards on the British Law Officers.⁴¹ This section introduces these, and another major piece on the British Law Officers by Neil Walker. Walker offers a more theoretical insight into the tensions that underpin the role of the Law Officers than was attempted by Edwards, whose focus was predominantly historical and practical. The section concludes by a brief consideration of the debates that have informed recent constitutional reform of the Law Officers' role.

2.4.1 Defining the tensions: John Edwards

Although Edwards' work on the British Law Officers was seminal, some historical accounts and expositions by officeholders preceded it.⁴² His first volume (1964) provided what has become an authoritative account of the historical transformation of the British office,⁴³ and is heavily referenced in any discussion of the Law Officers. His historical analysis is supplemented by detailed consideration of the practice of the Law Officers. Edwards articulated the many tensions in the role of the Law Officers in twentieth-century Britain, and stressed that greater understanding of the tightrope walked by Law Officers between the law, the public interest and politics was needed.⁴⁴

Edwards' first work explained that the tensions between these obligations are a relatively recent phenomenon, evolving with the change in the role of the Law Officers. The Law

⁴¹ For shorthand in this thesis, the Attorney-General and Solicitor-General of England and Wales will be referred to as the British Law Officers. Scotland has its own Advocate-General. Edwards, *The Attorney-General*, above n 1; John L J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964). See also John L Edwards, 'The Office of Attorney General – New Levels of Public Expectations and Accountability' in PC Stenning (ed), *Accountability for Criminal Justice: Selected Essays* (University of Toronto Press, 1985) 294.

⁴² See, eg, James William Norton-Kyshe, *The Law and Privileges Relating to the Attorney-General and Solicitor-General of England: With a history from the earliest periods, and a series of King's Attorneys and Attorneys and Solicitors-General from the reign of Henry III to the 60th of Queen Victoria* (Stevens and Haynes, 1897); George Stuart Robertson, *The Law and Practice of Civil Proceedings by and against The Crown and Departments of the Government: with numerous forms and precedents* (1908) 9-16; Hugh H L Bellot, 'The Origin of the Attorney-General' (1909) 25 *Law Quarterly Review* 400; William Holdsworth, *A History of English Law, Volume VI* (Methuen & Co Ltd, Sweet and Maxwell, 1924, 1937 reprint) 457-80; W S Holdsworth, 'The Early History of the Attorney and Solicitor General' (1918-19) 13 *Illinois Law Review* 604; Hartley Shawcross, 'The Office of the Attorney General' (1953) 7 *Parliamentary Affairs* 380; Rita W Cooley, 'Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies' (1958) 2 *American Journal of Legal History* 304. See also an early account of the role of the Attorney-General provided in *R v Wilkes* (1768) Wilm 320; 97 ER 123, 327-30, 332 (Wilmot CJ).

⁴³ See, eg, Elwyn Jones, 'The Office of Attorney General' (1969) 27 *Cambridge Law Journal* 43, 43. While Edwards draws on the earlier sources, he does note that these have been plagued by much 'conjectural effort', and warns against making absolute analogies between modern and ancient offices: Edwards, *The Law Officers of the Crown*, above n 41, 13.

⁴⁴ Edwards, *The Law Officers of the Crown*, above n 41, ix.

Officers' early role (the role of Attorney-General emerged in the thirteenth century and the role of Solicitor-General in the fifteenth) was exclusively as legal counsel: professionals engaged in the service of the Crown.⁴⁵ Throughout the seventeenth century, they were considered 'always zealous and subservient in the interests of the Crown'.⁴⁶ With the increasing acceptance of the Monarch's obligations to the public interest, the Law Officer's roles became more complex, with the potential for officeholders to be pulled between the Monarch's immediate wishes and a broader concept of the public interest.

For example, in 1641 the Attorney-General, Edward Herbert, fulfilling orders from Charles I, brought a prosecution of high treason against five members of the House of Commons. In a turn of the tables, Herbert quickly found himself on trial before the Lords for breaching the privileges of the Commons.⁴⁷ The Attorney-General pleaded that the actions had been taken under the orders of the King, that 'he did not conceive there could be any offence, in what was so done by him, in this honourable house, in obedience to those his majesty's commands.'⁴⁸ The prosecutor rejected the plea, alleging that where the orders were 'against the weal-public' they are void and the Attorney-General must refuse to obey.⁴⁹ This put the Attorney-General in a very difficult position; the King indicated that *had* he refused to obey, 'we would have questioned him for the breach of his oath, duty and trust.'⁵⁰ Herbert was ultimately found guilty of treason, but his only punishment was that he was forbidden from holding any other office in the Parliament.⁵¹

The disparate pull of interests an individual faced in the role of Law Officer was highlighted in those functions which were thought to be exercised on behalf of the Crown acting on behalf of the community, namely in whether to determine whether to bring proceedings in the public interest, including prosecutions.⁵²

⁴⁵ Ibid 3-4.

⁴⁶ Ibid 54.

⁴⁷ Ibid 56-7. See also William Cobbett, Thomas Bayly Howell and Thomas Jones Howell, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the Earliest Period to the Present Time: Vol IV Comprising the Period from the Sixteenth Year of the Reign of King Charles the First, A.D. 1640 to the First Year of the Reign of King Charles the Second, A.D. 1649* (R Bagshaw, 1809) 119-120 [160] and discussion in Norton-Kyshe, above n 42, 27-31.

⁴⁸ Cobbett, above n 47, 122.

⁴⁹ Ibid 125.

⁵⁰ Edwards, *The Law Officers of the Crown*, above n 41, 57.

⁵¹ Ibid.

⁵² Ibid chs 10-11.

The advent of the Law Officers sitting in the House of Commons (which started in the sixteenth century on the part of the Solicitor-General, and the late seventeenth century on the part of the Attorney-General) created further tensions, particularly when the Law Officer advised the House on Bills and in other areas.⁵³ Edwards explained:

Whereas a Minister is normally expected to make a controversial speech, when a Law Officer participates in a Commons debate involving any questions of law he is generally expected to assume an attitude of some independence and to speak as a lawyer, not as a politician bent on defending the position adopted by the government.⁵⁴

The responsibility of the Law Officers to the Parliament also introduced a form of accountability for the exercise of the officeholders' independent responsibility for decisions in the public interest.⁵⁵

The Law Officer's obligations to the public interest over politics was highlighted in the question as to whether the Law Officers ought to be members of Cabinet or the Privy Council. In Britain, at least since the early twentieth century, as a general rule neither the Attorney-General nor the Solicitor-General have been appointed to Cabinet,⁵⁶ on the grounds that it is more appropriate for the maintenance of their independence and impartiality that they be seen as less political Ministers.⁵⁷ The Law Officers will, however, advise Cabinet frequently, and it has been argued that to do so in an impartial manner it is better they were not involved in earlier Cabinet deliberations.⁵⁸

Edwards' work gave detailed attention to the evolution of the encroachment of politics into the independence of the Attorney-General. 'The principle of independence', Edwards said, 'is a recurring theme in the chapters that follow'.⁵⁹ In fact, it has become the recurring theme for all subsequent study of the British Law Officers, and the Law Officers in other jurisdictions.⁶⁰

⁵³ Ibid ch 3.

⁵⁴ Ibid 51.

⁵⁵ Ibid ch 12.

⁵⁶ This has been the absolute position since 1928 for the Attorney-General, and prior to that date, the office was included in Cabinet as an exception rather than the rule: *ibid*, 174.

⁵⁷ *Ibid* 174-5.

⁵⁸ Viscount John Allsebrook Simon, *Retrospect: the memoirs of Viscount Simon* (Hutchinson, 1952) 89-90, extracted in *ibid* 171-2.

⁵⁹ Edwards, *The Law Officers of the Crown*, above n 41, 11.

⁶⁰ See, eg, Jones, above n 43, 49.

Edwards' 1984 volume continued his detailed consideration of the delicate balance between politics and the public interest (which he often appears to equate with the law and justice). In this work he introduced different 'philosophic' approaches to protecting the Attorney-General's independence. One of the earliest approaches was the doctrine of 'independent aloofness': the Attorney-General does not engage too closely in government policy, political debates and party politicking.⁶¹ A second model is described by Sam Silkin's doctrine of 'intimate but independent involvement'. This doctrine recognises a number of benefits from a more politically involved, but still independent, officeholder.⁶² In assessing these two competing philosophies, Edwards warned of the 'disproportionate' cost of Silkin's approach, being 'a further erosion in the public's perception of an independent Attorney General'.⁶³ Lord Shawcross proposed a third approach: a non-elected, non-political, public service model to achieve *absolute* independence from the political milieu.⁶⁴ Edwards considered that this suffered from a fundamental weakness: the removal of the office from the line of accountability.⁶⁵

Edwards' enduring conclusion was that the key to the independence of the Attorney-General did not lie in formal constitutional structures, or informal conventions, but rested, ultimately, upon 'the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office'.⁶⁶ This conclusion continues to be reflected in the Australian scholarship which has noted the influence of individuals on the role of the Attorney-General,⁶⁷ and is reflected in the methodology and findings of this thesis.⁶⁸

The different philosophic approaches to the Attorney-General's independence introduced by Edwards continue to frame contemporary articulation of the appropriate balance between the Law Officers' conflicting obligations. Further, his warnings about accountability and the trade-off between involvement in, and independence from, political matters endure, arising

⁶¹ Peter Rawlinson, 'A Vital Link in the Machinery of Justice' (1977) 74 *Guardian Gazette* 798, 799.

⁶² S C Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978) 59 *The Parliamentarian* 149.

⁶³ Edwards, *The Attorney-General*, above n 1, 75.

⁶⁴ Lord Shawcross' proposal is in a letter to *The Times* (1977), extracted in *ibid* 63-4.

⁶⁵ *Ibid* 66-7.

⁶⁶ *Ibid* 67.

⁶⁷ Chapter 2.3.

⁶⁸ See further explanation of how this has influenced my research in Part 2.

for example in the Australian debates at the introduction of a non-ministerial office of Solicitor-General.⁶⁹

2.4.2 Drawing out the tensions: Neil Walker

In 1999, Neil Walker introduced three important facets to the British debate.⁷⁰ His contribution to the scholarship places the tensions inherent in the Law Officers' roles as manifestations of the greater underlying tensions that exist in the major contemporary legal and political philosophical debates.

First, he introduced the idea that tensions in the role exist not simply between the law and politics, but also between politics and the public interest. The public interest was often equated with the law by Edwards, but Walker emphasised their distinct nature.⁷¹ Walker thus posited that the antinomies of the Law Officers are, in fact, twofold:

The first lies within the legal conception of the role and concerns the opposition between the function of legal agent of government and that of independent custodian of fundamental legal values. The second lies within the political conception of the role and concerns the opposition between a politically partisan approach and one which seeks to identify a broader conception of the public interest as a guiding political value.⁷²

These antinomies are explained by two divergent underlying philosophies in both law and politics. In the legal sphere, one view of law is as 'an instrument or vessel for the achievement of externally-derived ends' and the other where law is 'an autonomous source of moral and political values'.⁷³ These views reflect the division in jurisprudence between positivism and natural law theory. In the political sphere, there is a distinction between a view that focuses upon individual preferences and therefore embraces pluralism and discord, and another that accepts some underlying concerns transcending individual preferences.⁷⁴ These divergences give rise to two normative models: one as legal agent of the Executive of

⁶⁹ See discussion in Chapters 3.3.2 and 3.4.2.

⁷⁰ Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135.

⁷¹ Ibid 135, 144-5.

⁷² Ibid 145.

⁷³ Ibid 145-6.

⁷⁴ Ibid 146.

the day, acting in pursuit of partisan interests; and the other as independent upholder of freestanding, enduring moral norms.⁷⁵

Secondly, Walker explained that the Law Officers' long association with the abstract idea of the 'Crown' underlies and obscures the tensions in the role. Because of the historical evolution of this term, it is no longer possible to sufficiently distinguish between the enduring 'Executive government' (divorced from the political Executive), and the 'government of the day' and its political objectives.⁷⁶ This confusion has allowed unscrupulous officeholders to pursue narrowly political ends in the name of the public interest, and invoke, as an alibi, the gravitas of the position.⁷⁷

Finally, Walker, like Edwards, denied that there was any easy answer to resolving the tensions in the Law Officers' role through institutional design. The Attorney-General's different roles fail one-dimensional classification as political or non-political, and therefore many reform models are inadequate in so far as they seek to isolate political from non-political functions.⁷⁸

2.4.3 Reflections on the British literature

In 2007, a number of inquiries into the contemporary constitutional role of the British Attorney-General were announced as part of a broader constitutional reform agenda. The Constitutional Affairs Committee of the House of Commons issued a report that, in contrast with the views of both Edwards and Walker, recommended the separation of the role of legal adviser to government from the political government Minister 'to ensure clear lines of responsibility for particular decisions and to remove any credible allegation of political pressure'.⁷⁹ The House of Lords Select Committee on the Constitution also issued a report. It considered how to ensure accountability if a non-ministerial Law Officer was introduced (mirroring Edwards' concern), whether political and non-political decisions could usefully be distinguished in practice (mirroring Walker's question), and an argument that only a *political*

⁷⁵ Ibid.

⁷⁶ Ibid 147.

⁷⁷ Ibid 161. See also Bruce Ackerman, 'Abolish the White House Counsel: And the Office of Legal Counsel, too, while we're at it', *Slate*, 22 April 2009.

⁷⁸ Walker, above n 70, 162-5. See also Clayton, 'Introduction', above n 19, 18.

⁷⁹ House of Commons Constitutional Affairs Committee, 'The Constitutional Role of the Attorney General: Fifth Report of Session 2006-07' (2007) 4.

Attorney-General's opinions could carry sufficient weight among Cabinet ministers.⁸⁰ The government conducted its own inquiry, and ultimately retained both Law Officers as chief legal advisers to the Crown, members of Parliament and government ministers. Small, non-legislative reforms were instituted.⁸¹

The recent attempts at reform demonstrate two things: the tensions identified by Edwards and Walker continue to plague the British Law Officers; and that officeholders, politicians and scholars continue to hold divergent views on the most appropriate legal or normative framework to allay them. Understanding the British scholarship and experience is fundamental to understanding the role of the modern Australian Solicitor-General. The historical origins of the Australian Solicitor-General in Britain have influenced its development and therefore the constitutional questions around the British Law Officers continue to arise in the Australian context. As discussed above, this has been explored in Australia to some extent in relation to the role of the Attorney-General; but the effects of establishing an independent, non-political Solicitor-General has not, as yet, received this attention. Given Britain's fleeting engagement with developing a non-political officer to perform the legal functions of the Law Officers, such study is now also a pertinent comparative exercise.

2.5 The US experience: advisers and advocates

Outside Australia, other countries have also adopted a non-political model for the Solicitor-General while maintaining many of the British traditions of the office. In attempting to articulate more clearly the role of the Solicitor-General in Australia, it is therefore informative to consider the literature and debates that have occurred in these other jurisdictions. The literature in the US and New Zealand will be briefly canvassed here, and returned to in the subsequent analysis in the thesis where it provides relevant examples, analogies, contrasts and critiques.

The US Attorney-General was, largely, modelled on the equivalent office in Britain.⁸² Today the Attorney-General performs a highly political role with large administrative

⁸⁰ House of Lords Select Committee on the Constitution, 'Reform of the Office of Attorney General: Report with Evidence' (2008) Appendix 2, 'Written Evidence by Professor Anthony Bradley', Appendix 3, 'Written Evidence by Professor Jeffrey Jowell QC'.

⁸¹ See United Kingdom, 'The Government's Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General' (April 2008) 2.

⁸² Charles Fahy, 'The Office of the Solicitor General' (1942) 28 *American Bar Association Journal* 20, 20; Rex E Lee, 'Lawyering in the Supreme Court: The Role of the Solicitor General' (1988) 21 *Loyola of*

responsibilities and is assisted in the legal functions by the more independent Office of Solicitor-General (OSG) and Office of Legal Counsel (OLC).⁸³ The OSG performs the primary function of prosecuting and conducting all suits in the Supreme Court on behalf of the government.⁸⁴ The advisory function of the Solicitor-General is now performed by the OLC.⁸⁵ The OLC assists the Attorney-General by providing advice on the constitutionality of proposed legislation, advising on the legality of executive actions, reviewing executive orders and settling disputes among executive agencies.⁸⁶

In the US, much of the scholarly debate around the Attorney-General, the OSG and the OLC has been driven by the search for a model to explain and analyse the offices in light of allegations of inappropriate behaviour on the part of officeholders.⁸⁷ In 1987, the publication of Lincoln Caplan's *The Tenth Justice: The Solicitor General and the Rule of Law* generated substantial legal and political interest in the office.⁸⁸ It alleged that Solicitors-General for

Los Angeles Law Review 1059, 1064; contra Erwin N Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* (West Publishing Co, 1992) 258.

⁸³ Cornell W Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (M E Sharpe, Inc, 1992) 52-3.

⁸⁴ US Code, Title 28, Part II, Chapter 31, § 518(a). See further description of the general functions of the office in US Code of Federal Regulations, Title 28, § 0.20.

⁸⁵ Clayton, *The Politics of Justice*, above n 83, 33-4; Cornelia T L Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (2005) 103 *Michigan Law Review* 676, 710.

⁸⁶ US Code of Federal Regulations, Title 28, § 0.25.

⁸⁷ For example, Daniel J Meador, *The President, The Attorney General and the Department of Justice* (White Burkett Miller Center of Public Affairs, 1980) followed the Watergate affair; Clayton, *The Politics of Justice*, above n 83; Nancy Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990* (University Press of Kansas, 1992); Douglas Kmiec, *The Attorney General's Lawyer: Inside the Meese Justice Department* (Praeger Publishers, 1992) were published about the Reagan administration, and a large number of publications followed the revelations of the Torture Memos, see, eg, Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W W Norton & Company, 2009); David Cole, *The Torture Memos: Rationalizing the Unthinkable* (New Press, 2009); David Cole, *Justice at War: The Men and Ideas that Shaped America's War on Terror* (New York Review of Books, 2008); Pillard, above n 85; Dawn E Johnsen, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2007) 54 *UCLA Law Review* 1559; Dawn E Johnsen, 'Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?' (2004) 67(2) *Law and Contemporary Problems* 105; Dawn E Johnsen, 'What's a President to do? Interpreting the Constitution in the Wake of Bush Administration Abuses' (2008) 88 *Boston University Law Review* 395; Ackerman, 'Abolish the White House Counsel', above n 77. Although note earlier studies of the office prior to this event: eg, Randolph D Moss, 'Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel' (2000) 52 *Administrative Law Review* 1303; Frank M Wozencraft, 'OLC: The Unfamiliar Acronym' (1971) 57 *American Bar Association Journal* 33.

⁸⁸ Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Vintage Books, 1987). Subsequent studies have included political science treatises: eg, Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Temple University Press, 1992); Richard L Pacelle Jr, *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender and Reproductive Rights Litigation* (Texas A&M University Press, 2003); Peter N Ubertaccio III, *Learned in the Law and Politics* (LFB Scholarly Publishing LLC, 2005); academic symposiums (the first of these was held in 1988, the papers of which were subsequently published in the *Loyola of Los Angeles Law Review*, in 2003 the Rex E Lee Conference on the OSG was held, the proceedings of which were published in the *Brigham Young*

President Reagan abused the position, and critiqued their conduct against a normative model of the office emphasising independence from the Administration and commitment to the coherence of Supreme Court jurisprudence (giving rise to the idea of the ‘Tenth Justice’).⁸⁹

As the US studies have been largely driven by political catalysts, much of the research has been dominated by case studies of the events. The research methodology employed is diverse. It ranges from anecdotal and memoir-type recounts from individual officeholders and others who worked in the OSG or OLC,⁹⁰ to political treatises that have used quantitative analysis of the Solicitor-General’s involvement and influence in Supreme Court cases,⁹¹ and qualitative analysis, including the use of interviews to establish the influences of politics on the officeholders, and their political influence within the Executive.⁹² Caplan’s methodology, for example, relied heavily on interviews with anonymous sources; although the reliability of his findings was heavily criticised because of its lack of transparency.⁹³ While most of the research has come from political scientists, legal academics have also ventured into the field. In the US, as in Australia, the offices are governed by statute, within the context of a written

University Law Review); PhD theses: eg, Salokar, *The Solicitor General*, above n 88; James L Cooper, *The Solicitor General and Federal Litigation – Principal-Agent Relationships and the Separation of Powers* (PhD, Indiana University, 1993); Corey A Ditslear, *Office of the Solicitor General Participation before the United States Supreme Court: Influences on the Decision-Making Process* (PhD, Ohio State University, 2003); quantitative analyses: see, eg, Jeffrey Segal and Cheryl Reedy, ‘The Supreme Court and Sex Discrimination: The Role of the Solicitor General’ (1988) 41(3) *The Western Political Quarterly* 553; Jeffrey Segal, ‘Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts’ (1989) 41 *The Western Political Quarterly* 135; autobiographical and biographical accounts: eg, Charles Fried, *Order and Law: Arguing the Reagan Revolution - A Firsthand Account* (Simon & Schuster, 1991); Griswold, *Ould Fields*, above n 82; Ken Gormley, *Archibald Cox: Conscience of a Nation* (Da Capo Press, 1997); and other academic literature in the fields of both political science and law, although much of the analysis continues to come from officeholders, and employees within the OSG.

⁸⁹ Caplan, above n 88, xiv.

⁹⁰ See, eg, Fried, above n 88; Griswold, *Ould Fields*, above n 82; Gormley, above n 88; Goldsmith, above n 87.

⁹¹ See, eg, Salokar, *The Solicitor General*, above n 88; Pacelle Jr, above n 88, Segal and Reedy, above n 88; Segal, above n 88.

⁹² See, eg, Salokar, *The Solicitor General*, above n 88; Caplan, above n 88; Pacelle Jr, above n 88; Jeffery A Burt and Irving S Schloss, ‘Government Litigation in the Supreme Court: The Roles of the Solicitor General’ (1969) 78 *Yale Law Journal* 1442.

⁹³ See, eg, Brian K Landsberg, ‘The Tenth Justice (Book Review)’ (1989) 6 *Constitutional Commentary* 165, 180-1; Roger Clegg, ‘The Thirty-Fifth Law Clerk’ (1987) *Duke Law Journal* 964; Louis Fisher, ‘Is the Solicitor General an Executive or Judicial Agent? Caplan’s *Tenth Justice*’ (1990) 15 *Law and Social Inquiry* 305, 305; contra Craig R Callen, ‘Stare Decisis and the Case for Executive Restraint’ (1988) 9 *Mississippi College Law Review* 79.

constitution. Scholars have considered questions of statutory interpretation,⁹⁴ constitutional theory,⁹⁵ and professional ethics,⁹⁶ to inform their analysis.

The US does not operate under a Westminster system of responsible government, emphasising rather the strict separation of institutional functions that, some argue, has served to inflate tensions between the Judiciary and the Executive. The US also has a history of highly politicised judicial decision-making partly referable to the inclusion of the Bill of Rights in their constitutional text. Like in Australia, the US Attorney-General has tended to play a far more overtly political role than the British Law Officers. Despite many differences in constitutional structure and history, the types that have dominated the US literature continue to divide over the same questions seen in the Australian and British literature about the appropriate level of independence of the office from politics and the role of the office in protecting the public interest or justice.

While it is not necessary for the purpose of this study to consider exhaustively the US literature, it is informative to review the different normative models, which I will call ‘archetypes’, that have vied for acceptance in the US scholarship. These have many similarities to the different views put forward by Edwards and Walker in the British context as they reflect attempts to reconcile the same ongoing tensions in the Law Officers’ role.⁹⁷ They provide additional lenses through which to consider the Australian position in this thesis, particularly in the analysis of the lived experience of officeholders in the role (Chapters 5, 6 and 7).

Unique in the US context is the division of functions between the OSG and the OLC, which has caused a division of opinion over the proper archetype that applies to the advocacy and advisory functions. The ‘Government Advocate’ type is the most dominant view of the role of the OSG as an advocate. The ‘Public Interest Advocate’ type, however, is favoured for the advisory function of the OLC. Lincoln Caplan’s ‘Tenth Justice’ type has been heavily criticised academically and is a relatively weak model; as is the ‘Peacemaker’ type. Finally

⁹⁴ One of the first to do this was Burt and Schloss, above n 92.

⁹⁵ See, eg, Janene M Marasciullo, ‘Removability and the Rule of Law: The Independence of the Solicitor General’ (1988-89) 57 *George Washington Law Review* 750; John O McGinnis, ‘Models of the Opinion Function of the Attorney General: A Normative, Descriptive and Historical Prolegomenon’ (1993) 15 *Cardozo Law Review* 375; Pillard, above n 85; Joseph Blocher, ‘Popular Constitutionalism and the State Attorneys General’ (2011) 122 *Harvard Law Review* 108.

⁹⁶ See, eg, David Luban, ‘Liberalism, Torture and the Ticking Bomb’ (2005) 91 *Virginia Law Review* 1425.

⁹⁷ Clayton, *The Politics of Justice*, above n 83, 6.

the ‘Bureaucrat’ type will be considered. This is less a normative type than an explanation of why an individual may choose to act in accordance with one type over another.

2.5.1 Government Advocate

The Government Advocate has at its core the idea of the Executive as the client, requiring the office to pursue zealously the Executive’s interests, and lacking independence from the Executive in this sense.⁹⁸ It may be used as a synonym for the lawyer as a hired gun. The type emphasises that accountability for the office’s actions lies through its subordination to the political direction of the elected President. Caplan’s book was extremely critical of the Government Advocate type in the context of the OSG, although it has risen as the dominant view, particularly among officeholders. A number of studies of the OSG and OLC support the conclusion of subordination to the political Executive and zealous pursuit of its interests on varied bases, including analysis of the constitutional and statutory obligations of the Solicitor-General, and particularly focussing upon where responsibility and accountability lie in the US structure;⁹⁹ the implications from the US separation of powers;¹⁰⁰ the adversarial nature of common law proceedings;¹⁰¹ theories of constitutional interpretation;¹⁰² and democratic theory.¹⁰³

The Government Advocate type, however, contains the same paradox that Walker identified in the British concept of the ‘Crown’: is the ‘government’ the long-term institutional interests

⁹⁸ See, eg, comments *Ponzi v Fessenden* 256 US 254 (1922), 262 (Taft CJ).

⁹⁹ See, eg, Burt and Schloss, above n 92, 1444; See also Note, ‘The Solicitor General and Intragovernmental Conflict’ (1977) 78 *Michigan Law Review* 324, and a 1977 Opinion of the OLC authored by John Harmon, Assistant Attorney General, on the ‘Role of the Solicitor General’ published as John M Harmon, ‘Memorandum Opinion for the Attorney General: Role of the Solicitor General’ (1988) 21 *Loyola of Los Angeles Law Review* 1089. See also Caplan, above n 88, 39 ff; Drew S Days III, ‘In Search of the Solicitor General’s Client: A Drama with Many Characters’ (1994-95) 83 *Kentucky Law Journal* 485, 487; Samuel A Alito Jr, ‘Change in Continuity at the Office of Legal Counsel’ (1993) 15 *Cardozo Law Review* 507, 510; John O McGinnis, ‘Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory’ (1992) 44 *Stanford Law Review* 799, 803; Salokar, *The Solicitor General*, above n 88, 174-5; Brian C Kalt, ‘Wade H McCree, Jr., and the Office of the Solicitor General 1977-1981’ (1998) 3 *Detroit College of Law at Michigan State University Law Review* 703, 738.

¹⁰⁰ See, eg, Marasciullo, above n 95; Clayton, *The Politics of Justice*, above n 83, 103-11.

¹⁰¹ See, eg, Michael W McConnell, ‘The Rule of Law and the Role of the Solicitor General’ (1988) 21 *Loyola of Los Angeles Law Review* 1105, 1111; Jim Rossi, ‘Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?’ (2000) 28 *Florida State University Law Review* 456, 469; David A Strauss, ‘The Solicitor General and the Interests of the United States’ (1998) 61 *Law and Contemporary Problems* 165, 172.

¹⁰² See, eg, McGinnis, ‘Principle Versus Politics’ above n 99, 803; McGinnis, ‘Models of the Opinion Function of the Attorney General’, above n 95, 382, 397-8; Pillard, above n 85; Johnsen, ‘Functional Departmentalism’, above n 88, 106-7; Callen, above n 93, 93.

¹⁰³ See, eg, Landsberg, above n 93, 168; Nelson Lund, ‘Rational Choice at the Office of Legal Counsel’ (1993) 15 *Cardozo Law Review* 437, 447-52.

of the Executive, or the short term interests of the incumbent Administration?¹⁰⁴ This distinction has been developed by some commentators into two separate types.¹⁰⁵ It is often the case that the two coincide, but in some instances there is divergence (for example, a particular Administration may seek larger protection of individual rights for ideological reasons at the expense of executive power, which may be seen to run counter to the long-term interests of the Executive).¹⁰⁶

Criticisms of the Government Advocate type fall into two categories. The first is ideologically driven, arguing that the type undermines the broader government system and the rule of law, and that it does not reflect the President's obligation to act in the public interest. The second category is more practically focussed, arguing that the longer-term interests of the government will be served better by an independent officer. In most instances, the Executive itself seeks *independent* analysis of its position, not advice biased towards its interests.¹⁰⁷ Further, perceptions that legal advisers are acting upon the direction of the Executive can undermine the confidence of the public,¹⁰⁸ the Judiciary,¹⁰⁹ and of government itself.¹¹⁰ This criticism has given rise then to a 'sub' type: the 'Autonomous' Government Advocate.

The Autonomous Government Advocate type recognises that at times the office ought not to pursue zealously the client's interests (at least overtly), but act in a more impartial manner.¹¹¹

¹⁰⁴ See, eg, Nelson Lund, 'The President as Client and the Ethics of the President's Lawyers' (1998) 61 *Law and Contemporary Problems* 65, 74; and Clayton, *The Politics of Justice*, above n 83, 90.

¹⁰⁵ See, eg, Joshua Schwartz, 'Two Perspectives on the Solicitor General's Independence' (1988) 21 *Loyola of Los Angeles Law Review* 1119.

¹⁰⁶ Rebecca Mae Salokar, 'Politics, Law, and the office of the Solicitor General' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 59, 79.

¹⁰⁷ Harmon, above n 99, 1094; Landsberg, above n 93, 168; Joshua Schwartz, 'The President's Lawyer as Frie(n)d - A Review of Order and Law: Arguing the Reagan Revolution - A Firsthand Account' (1992) 60 *George Washington Law Review* 1081, 1122; Drew S Days III, 'The Solicitor General and the American Legal Ideal' (1995) 49 *Southern Methodist University Law Review* 73, 494-5; William P Barr, 'Attorney General's Remarks, Benjamin N Cardozo School of Law, November 15, 1992' (1993) 15 *Cardozo Law Review* 31, 34-5; Moss, above n 87, 1308.

¹⁰⁸ Moss, above n 87, 1311.

¹⁰⁹ Kristen Norman-Major, 'The Solicitor General: Executive Policy Agendas and the Court' (1994) 57 *Albany Law Review* 1081, 1109; Rex Lee, 'Lawyering for the Government: Politics, Polemics & Principle' (1986) 47 *Ohio State Law Journal* 595, 597; Richard Wilkins, 'An Officer and an Advocate: the Role of the Solicitor General' (1988) 21 *Loyola of Los Angeles Law Review* 1167; Barr, above n 107, 36; Fisher, above n 93, 306-9; David M Rosenzweig, 'Confession of Error in the Supreme Court by the Solicitor General' (1994) 82 *Georgetown Law Journal* 2079, 2084-7; James L Cooper, 'The Solicitor General and the Evolution of Activism' (1990) 65 *Indiana Law Journal* 675, 684, and n 54.

¹¹⁰ Wilkins, above n 109, 1171.

¹¹¹ Eric Schnapper, 'Becket at the Bar-the Conflicting Obligations of the Solicitor General' (1988) 21 *Loyola of Los Angeles Law Review* 1187, 1195; Harmon, above n 99, 1097.

Criticisms of the Autonomous Government Advocate flow from the difficulty in reconciling *de jure* subservience with *de facto* independence, and the possibility for the practical autonomy of the office to be simply a myth, used to provide the veneer of integrity to government policies and programs.¹¹²

2.5.2 Public Interest Advocate

The second type promotes the office as an independent protector of the Constitution, the public interest and the people. This type requires the officeholder to bring independent thought to legal interpretation to come to the *best* conclusion, bearing in mind the role of the government to promote the public interest and protect the rights of individuals. A Public Interest Advocate will not advance arguments that don't accord with this view. The type has foundations in the republican ideals of government and liberal democracy,¹¹³ and strong correlations with the general duties of civil servants and the canons of public service.¹¹⁴

The characteristics of the Public Interest Advocate type have been picked up in the controversies over the advisory function of the OLC after the release of the Torture Memos.¹¹⁵ It has been asserted that the Public Interest Advocate type is preferable for government lawyers in advisory functions.¹¹⁶ Adopting this normative role meets a number of objectives. It increases confidence within the Executive in the correctness of OLC opinions and public confidence that the government is acting in accordance with the best interpretation

¹¹² Ackerman, 'Abolish the White House Counsel', above n 77.

¹¹³ See further discussion of this in Ubertaccio III, above n 88, ch 1, 10 ff; Charles Fahy, 'Special Ethical Problems of Counsel for the Government' (1950) 33 *Federal Bar Journal* 331, 332, see also 334-5; Simon E Sobeloff, 'The Law Business of the United States' (1955) 34(3) *Oregon Law Review* 145, 147-8; Erwin N Griswold, 'The Office of the Solicitor General - Representing the Interests of the United States before the Supreme Court' (1969) 34 *Missouri Law Review* 527, 528, 534-5; Philip Elman, 'The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History (interview by Norman Silber)' (1987) 100 *Harvard Law Review* 817, 847; and Written Responses to Questions for the Record from Senator Arlen Specter, Committee on the Judiciary, Senate, United States, (Elena Kagan).

¹¹⁴ See James R Harvey III, 'Loyalty of Government Litigation: Department of Justice Representation of Agency Claims' (1996) 37 *William and Mary Law Review* 1569, 1603, 1615; and Conference Papers, 'In Memory of Rex E Lee (1937-1996)' (2003) *Brigham Young University Law Review* 1 (Charles Fried), 84-5.

¹¹⁵ Jay S Bybee, Assistant Attorney General, Office of Legal Counsel, to Albert R Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (1 August 2002); Jay S Bybee, Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting General Counsel, Central Intelligence Agency, *Interrogation of al Qaeda Operative* (1 August 2002); John Yoo to William J Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (13 March 2003).

¹¹⁶ Moss, above n 87. Contra the analysis of the OLC in Steven G Calabresi, 'The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law' (1998) 61 *Law and Contemporary Problems* 61, 79.

of the law available, not merely a reasonably arguable one. Further, it gives the President the necessary tools to fulfil the constitutional obligation of faithfully executing the laws.¹¹⁷ The 2004 memorandum on the guiding principles of the OLC, drafted by former members of that office directly in response to the release of the Torture Memos,¹¹⁸ similarly asserted that the office must advise based on its best view of what the law requires, in order to assist the President to fulfil his constitutional duty to uphold the laws.¹¹⁹ The memorandum emphasised the distinction between the ethical framework governing an adviser as against that of an advocate.

The Public Interest Advocate type has been subjected to heavy criticism. A definitional-based critique asserts that it is impossible to act in accordance with a universal public interest, because the term lacks definition.¹²⁰ It can be a cloak for decisions affected by personal biases, and desires to achieve personal, financial and career goals.¹²¹ From a democratic viewpoint, the Public Interest Advocate may undermine public accountability of executive decisions about the public interest.¹²² An adversarial critique argues that the adversarial system which underpins the common law legal system *requires* the government's interests to be put forward as forcefully as the other side.¹²³ Finally, Nancy Baker noted that neutral, independent officeholders may find themselves isolated from important policy areas, including those which have important legal repercussions, because of the perception of aloofness from the political agenda of the President which can erode trust in the office.¹²⁴

¹¹⁷ Ibid, 1311-5. See also *Principles to Guide the Office of Legal Counsel* (21 December 2004) 1-2.

¹¹⁸ *Principles to Guide the Office of Legal Counsel*, above n 117. See also US Department of Justice, Office of Legal Counsel, *Memorandum for Attorneys of the Office Re: Best Practice for OLC Opinions*; and the recommendations to similar effect in Harold Hongju Koh, 'Protecting the Office of Legal Counsel from Itself' (1993) 15 *Cardozo Law Review* 513, 523.

¹¹⁹ Office of Legal Counsel, above n 117, 2.

¹²⁰ See, eg, Glendon A Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (Free Press, 1960); Geoffrey P Miller, 'Government Lawyers' Ethics in a System of Checks and Balances' (1987) 54 *University of Chicago Law Review* 1293, 1295-6. See also Lund, 'The President as Client', above n 104, 77; Steven K Berenson, 'Public Lawyers, Private Values, Can, Should, and Will Government Lawyers Serve the Public Interest?' (2000) 41 *Boston College Law Review* 789, 802-5; Jeremy Waldron, 'Gangsters, Statesmen and their Lawyers: The Rule of Law on Matters International' (Paper presented at the ALTA Conference, Auckland, 5 July 2010) 5-6.

¹²¹ Berenson, above n 120, 807-11.

¹²² See, eg, *ibid* 806; Miller, above n 120, 1295; McConnell, above n 101, 1116.

¹²³ McConnell, above n 101, 1107.

¹²⁴ Baker, *Conflicting Loyalties*, above n 87, 145-6; contra the role of the 'Advocate' type at 93, 173-4. See also Meador, above n 87, 40 (quoting from Antonin Scalia, then assistant Attorney General for the OLC); Norman W Spaulding, 'Professional Independence in the Office of the Attorney-General' (2008) 60(6) *Stanford Law Review* 1931, 1935.

2.5.3 The Tenth Justice

The third type is captured by the title of Caplan's book: the Tenth Justice.¹²⁵ Obligations to the Executive under this type are less important than those to the law as a stable institution and to its orderly development by the Judiciary, and so Caplan asserted the office's role as promoting the 'rule of law'.¹²⁶ The sustainability of the type against doctrinal analysis of the Constitution and statute, and historical practice has meant that it has not seriously been embraced by subsequent studies.¹²⁷ The adversarial critique outlined above can also be levelled against it.¹²⁸

2.5.4 Peacemaker

The fourth type considers the client of the office as encompassing all arms of government.¹²⁹ This type emphasises the OSG's concomitant, although at times conflicting, obligations across the different branches of government, and its peculiar place to engage and moderate between the institutions to ensure the appropriate functioning of the system. One of the key dimensions of this type is that to serve effectively all three branches of government, the office must act with a large degree of independence from each.¹³⁰ The Peacemaker type includes obligations not only to the Executive and the Judiciary, already discussed, but also to the Legislature. This is justified on the basis that Congress generally relies upon the OSG to defend the constitutionality of its legislation in the courts.¹³¹

¹²⁵ Caplan, above n 88, 151. See also Charles Fried in his Senate confirmation hearing, referred to in McGinnis, 'Principle Versus Politics', above n 99, 802.

¹²⁶ Caplan does not go so far as to assert any legal justification for this claim, and does acknowledge that the Solicitor-General has historically enjoyed a large amount of independence with limited interference, he does not allege that this has been absolute or legal autonomy: See, eg, Caplan, above n 88, 18, 34, 50.

¹²⁷ See, eg, Strauss, above n 101, 168-9.

¹²⁸ Chapter 2.5.2.

¹²⁹ Elena Kagan, Address to the Georgetown University Law Center Conference, 10 May 2009, extracted in Harvard Law School, *Executive Counsel: Meet the President's New Lawyers - And Their New Lawyers* <www.law.harvard.edu/news/spotlight/alumni-pusuits/counsel.html>. See also Archibald Cox, 'The Government in the Supreme Court' (1963) 44 *Chicago Bar Record* 221, 222; comments of Solicitor-General Seth Waxman, extracted in Dalena Marcott, 'The Duty to Defend: What is in the Best Interests of the World's Most Powerful Client?' (2004) 92 *Georgetown Law Journal* 1309, 1311.

¹³⁰ Marcott, above n 129, 1312, 1313-14; Schwartz, 'Two Perspectives on the Solicitor General's Independence', above n 105, 1159-60.

¹³¹ See, eg, Schwartz, 'Two Perspectives on the Solicitor General's Independence', above n 105, 1123, 1152; Conference Papers, above n 114, (Frank Easterbrook) 30-2; Marcott, above n 129, 1318 ff; Douglas W Kmiec, 'OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive' (1993) 15 *Cardozo Law Review* 337, 351-2; Seth P Waxman, 'Defending Congress' (2001) 79 *North Carolina Law Review* 1073, 1084-88. The US Congress also has legal representation that it may call upon in the event that the Solicitor-General refuses to defend its legislation: see The Ethics in Government Act 1978 US Code, Title 2, § 288k(b).

The Peacemaker type has been subjected to three criticisms. The first is definitional, targeting the illusory nature of true ‘whole of government’ interests that can transcend the Executive’s interest in times of conflict. The second is more pragmatic, arguing that the type insufficiently guides an individual when conflict occurs between branches. The third critique asserts that the type is not required by the constitutional system of government: neither the Judiciary nor the Parliament requires the assistance of the OSG or OLC to carry out their constitutional functions.¹³²

2.5.5 Bureaucrat

Finally, a type has arisen from rational-choice theory, informed by the bureaucratic setting in which government lawyers operate. The Bureaucrat type focuses on the office as a self-interested institutional actor, eager to reinforce the complexity, necessity and importance of its role within the larger bureaucracy. For example, James R Harvey III argued that the OLC, upon the creation of the Office of White House Counsel, attempted to maintain its relevance and importance by ‘redefin[ing] its role, becoming a more neutral, quasi-judicial decision-maker in order to preserve its position in the bureaucracy.’¹³³

The Bureaucrat contrasts with the other types that are motivated by principles such as the autonomy of the client, the public interest, justice, or the proper functioning of the whole of government. This theory has been used predominantly by those studying the OLC rather than the OSG, as the latter has statutorily guaranteed roles within the administration and therefore is not competing within the larger bureaucracy for work.¹³⁴

2.5.6 Reflections on the US literature

The voluminous US literature continues to struggle with the tensions between the law, politics and the public interest in the Law Officers’ traditional role. Some have argued that these tensions are even more pronounced in the US context because the Attorney-General’s role has been increasingly politicised.¹³⁵ Much of the disagreement and obvious tension arises between whether an officeholder should play a narrow role, loyal to the Executive’s political interests, or should act in the broader public interest (this may be framed in terms of justice,

¹³² Miller, above n 120, 1296.

¹³³ Harvey III, above n 114, 1590. See also Jeffrey K Shapiro and Lee A Casey, ‘Let Lawyers be Lawyers’ (2004) September *American Lawyer* 73, 73; McGinnis, ‘Principle Versus Politics’, above n 99, 810-1.

¹³⁴ See, eg, Harvey III, above n 114, 1587-91; Lund, ‘Rational Choice’, above n 103, 496-7; McGinnis, ‘Models of the Opinion Function of the Attorney General’, above n 95, 423; James M Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* (Phd, Johns Hopkins University, 1992).

¹³⁵ Clayton, *The Politics of Justice*, above n 83, 13-14.

or a morally focussed ideal). The US debate has been framed in a context where the OSG and OLC are now filled by independent appointees whose role is to assist the Attorney-General fulfil his or her legal functions. The US constitutional framework has also developed a division between the advisory and advocacy functions that, at least for some commentators, has helped alleviate some of the tensions inherent in the combination of these functions.

The US literature has explored the extent to which these aspects of constitutional and legal design have alleviated tensions between politics, the law and the public interest. The development and critique of the different models in the US literature, while they must be seen of course in their unique jurisdictional context, provide an informative platform and framework with which to approach the questions surrounding the constitutional role of the non-political Australian Solicitor-General. They provide an important point of comparison when looking at the legal position of the Solicitor-General in Chapter 4, and also provide evaluative models for my analysis of the views and experiences of officeholders, set out in Chapters 5, 6 and 7.

2.6 New Zealand: an ‘all in one’ office

Like Australia and the US, New Zealand inherited the concept of the Law Officers from Britain. As in Australia, the modern Solicitor-General is contrasted with the Attorney-General because of the non-political and non-responsible nature of the second Law Officer (in the sense that the Solicitor-General does not sit in the ministry).¹³⁶ The New Zealand arrangements differ from those in Australia in two key respects. First, the office has no statutory basis (and therefore institutional safeguards of independence, for example, in the form of security of tenure or remuneration). Secondly, the Solicitor-General’s functions are much broader in nature.¹³⁷ The New Zealand Solicitor-General is, in effect, Chief Executive of the Crown Law Office, leading counsel for the Crown in both advocacy and advisory roles, and chief Crown prosecutor.¹³⁸ The Solicitor-General is therefore aware of, and responsible for, almost all of the legal work of the Crown. Since 1993, some areas of work, predominantly the government’s commercial work, can be briefed to other legal service

¹³⁶ John McGrath, ‘Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General’ (1998) 18 *New Zealand Universities Law Review* 195, 198.

¹³⁷ The Australian Capital Territory Solicitor-General does perform this breadth of functions. This office was only introduced in 2011. See further Chapter 3.4.5.

¹³⁸ David Collins, ‘The Role of Solicitor-General in Contemporary New Zealand’ (Paper presented at the conference on The Role of the Solicitor-General in the Australasian legal and Political Landscape, Gold Coast, 15 April 2011) 2.

providers with the caveat that the Solicitor-General can intervene in any disputes in this category.¹³⁹ The Solicitor-General's continuing close association with the Crown Law office, and the office's supervision of government litigation, has secured a number of benefits, including consistency in legal advice, the strategic planning of litigation, and the ready involvement of the Solicitor-General in important cases.¹⁴⁰

In New Zealand, just as in Australia, Britain and the US, debates about divorcing politically dictated agendas from decisions made in the public interest and the provision of legal advice have arisen. The two major works on the office epitomise conflicting positions, reflecting the divide that can arise between a pragmatic analysis of the office and a normative critique of the office underpinned by constitutional theory. A 1998 article by then Solicitor-General John McGrath considered the Solicitor-General's functions *in practice*;¹⁴¹ his analysis is optimistic and uncritical of the current balance between politics, the law and the public interest in the Solicitor-General's role. McGrath started with the axiomatic premise that the Attorney-General is the responsible Minister.¹⁴² However, he argued that the highly political nature of the New Zealand Attorney-General can cloud clear vision of justice and the public interest. This highlights the importance of the Solicitor-General's role.¹⁴³ The officeholder often, in practice,¹⁴⁴ independently exercises those functions that have caused great controversy in Britain, particularly the prosecution of criminal law,¹⁴⁵ the provision of independent advice,¹⁴⁶ the conduct of public interest litigation, and the development of legal argument for the government.¹⁴⁷ In doing so, the Solicitor-General should consider 'public governmental interest rather than the partisan political government interest'.¹⁴⁸ McGrath's uncritical appraisal of the modern arrangements governing the functions of, and relationships between,

¹³⁹ Cabinet Rules for the Conduct of Crown Legal Business 1958, extracted in *ibid* 6.

¹⁴⁰ *Ibid* 19-20.

¹⁴¹ McGrath, above n 136.

¹⁴² *Ibid* 204, 209-10.

¹⁴³ *Ibid* 204, 216.

¹⁴⁴ Duncan Webb has gone so far to say that there exists in New Zealand a constitutional convention of independence: Duncan Webb, 'Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel' (2007) 5 *New Zealand Journal of Public and International Law* 243, 258; Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (LexisNexis NZ Limited, 2006) 269.

¹⁴⁵ McGrath, above n 136, 207.

¹⁴⁶ *Ibid* 206, 215.

¹⁴⁷ *Ibid* 214.

¹⁴⁸ *Ibid*. See also at 206.

the Law Officers in New Zealand has been adopted by the government in official documents.¹⁴⁹

In response to McGrath's article, Grant Huscroft argued that the New Zealand Solicitor-General is in fact *not* well-suited to conducting public law litigation independently, and that the politically accountable Attorney-General ought to reassert authority in this area.¹⁵⁰ The current arrangements, Huscroft asserted, have been politically expedient for Attorneys-General, eager to avoid politically contentious issues that often surround involvement in the criminal process.¹⁵¹ Huscroft's final position is that McGrath's analysis fails to take into consideration the inherently political nature of public law litigation.¹⁵²

The contrast between the pieces by McGrath and Huscroft reveals the different facets of the debate as to the proper role of the Law Officers in the context of a framework that attempts to alleviate the political pressures on the Law Officers' functions through the appointment of non-political officers. The divide between the positions emphasises the fissures Walker identified amongst scholars and practitioners regarding the importance of majoritarian accountability, as against the protection of higher, free-standing, moral objectives, and as are reflected in the contrast between the US Government Advocate and Public Interest Advocate types.

2.7 Conclusions: reflections on the literature and goals of the thesis

The literature considering the Australian Law Officers, and those in Britain, the US and New Zealand, demonstrates the importance of the research question being addressed by this thesis, while also providing a solid base from which to commence an analysis of the constitutional role of the Australian Solicitor-General.

In 1964, Edwards emphasised the need for a better understanding of the tightrope that Law Officers walk within the British constitutional system.¹⁵³ Dedicated and rigorous study of Australia's Solicitor-General will contribute greatly to the overall understanding of our own

¹⁴⁹ His position is adopted in the briefing note from the Solicitor-General to the incoming Attorney-General: New Zealand Crown Law Office, *Briefing for the Incoming Attorney-General* (November 2008), 22. (It appears this note was instituted during McGrath's tenure: Letter from J J McGrath, Solicitor-General to Attorney-General, *Role of the Attorney-General, Solicitor-General and Crown Law Office and Issues of Importance* (16 December 1996). The substance has changed little.)

¹⁵⁰ Grant Huscroft, 'Politics and Principle in Public Law Advocacy - The Role of the Solicitor General' (1999) 18 *New Zealand Universities Law Review* 584, 584-5.

¹⁵¹ *Ibid* 587-8.

¹⁵² *Ibid* 592-3.

¹⁵³ Edwards, *The Law Officers of the Crown*, above n 41, ix.

constitutional system. While sharing core functions and dimensions with the comparable offices considered in this chapter, the Australian Solicitor-General is unique in many respects. Its non-political nature distinguishes it from the elected ministerial office in Britain. In the US, the OSG is also non-political, in the sense of not being an elected official; but it is unlike the Australian office, because it is appointed to serve during the tenure of a single Administration and is therefore expected to be more politically aligned and sensitive. Further, the OSG is an advocate only, a function that is statutorily guaranteed. Division of functions between the OSG and OLC in the US has led to the dominance of different normative models for the different offices. While the Australian Solicitor-General shares many similarities with the New Zealand office, as is explained in the next chapter, in the twentieth century all of the jurisdictions introduced a statutory basis for the office.¹⁵⁴ Further, Australian Solicitors-General have been largely relieved of administrative responsibilities and in the 1980s and 1990s responsibility for the administration of criminal justice was also removed. The analysis undertaken in this thesis will therefore not only provide the first explanation of the role in the Australian context, but provide a further comparator for other jurisdictions considering the institutional arrangements governing their own chief government legal officers.

The central issue that exercises the minds of governments and commentators across all constitutional systems is how to reconcile the tensions that inhere in the Law Officers' functions. Three interests can affect these functions: the political objectives of the government, law and justice, and the public interest. The tensions exist because of the historical combination of political, legal and public interest functions in the British model of the Law Officers. Each interest can be a legitimate consideration in some of the Law Officers' functions, but can be inappropriate in others. However, they often offer conflicting conclusions. Edwards emphasised the 'independence' of the Law Officers as the touchstone to resolving the tensions. This dimension of the role has remained the focus of all subsequent analyses.

The debate over the proper role of the Law Officers continues to be defined by diversity of opinion rather than commonality. Much has been written on the desirable level of independence and the best informal approaches that may facilitate this, or the formal institutional arrangements that can achieve it. Contrasting normative models have evolved in many jurisdictions, each emphasising the desirability of the influence of one interest over the

¹⁵⁴ Chapter 3.4.

others. The US literature and Walker's more recent British analysis introduce the idea that the different models are underpinned by diverse philosophical approaches and public law ideals, including republican theory, democratic theory, liberalism and communitarianism, natural and positive law theories, the nature of justice and the common law process, the separation of powers and the rule of law. Division amongst scholars and practitioners over guiding theory, unsurprisingly, has led to division over the appropriate interest to emphasise: the political interests of the elected government; the integrity of the law and the legal system; or enduring moral values that underpin the government system. Walker argues that this division is also reflected in the nature of the Crown; and so it is the Law Officers' service to the Crown that underpins these debates. The rest of the thesis will employ and challenge the frameworks in an analysis of the historical, legal and lived position of the Australian Solicitor-General.

An individual's approach to the office has been the predominant focus in the literature. However, the importance of institutional arrangements has not been overlooked, as the recent British experience demonstrates. This chapter has considered the literature from several jurisdictions with different constitutional arrangements. It has provided insight for this study into the degree to which these arrangements can allay the tensions in the role, and the potential criticisms that can be made of the arrangements.

Numerous methodologies are employed in the comparative studies.¹⁵⁵ The comparative scholarship provides important foundations for the methodology adopted for this study. First, it is necessary to understand the historical development of the office: events driving the development of the Australian statutes will provide an understanding of the intention of the drafters. Next, each jurisdiction has a statute governing the role and it is therefore necessary to consider the interpretation of the law, in light of constitutional theory and the common law. Finally, it is also important to develop an understanding of the office in practice. One of the pivotal US works, that by Caplan, undertook a qualitative analysis reliant on anonymous interviews that left the integrity of his research open to criticism.¹⁵⁶ I will be relying on

¹⁵⁵ For example, Edwards' works rely heavily on historical explanation and case studies of the office in practice. In contrast, Walker provides a theoretical approach. However, the contrasted New Zealand pieces of McGrath and Huscroft emphasise that often a divide occurs between the office in practice and a largely theoretical view. Much of the US scholarship focuses upon the interpretation of statute and the Constitution.

¹⁵⁶ See discussion of Caplan's methodology above at Chapter 2.5.

qualitative interviews but I have provided readers with the identity of my sources where I have obtained permission to do so.¹⁵⁷

The next chapter provides an historical analysis outlining the development of the Australian office as a result of the distinct constitutional forces at play in the colonies, and after Federation. It reveals that the evolution of the Australian office occurred in three distinct phases, ultimately driven by experimentation with institutional arrangements to combat those tensions in the Law Officers' role that have been presented in the comparative literature reviewed in this chapter.

¹⁵⁷ See Part 2.

3 THE EVOLUTION OF AN AUSTRALIAN SOLICITOR-GENERAL

3.1 Introduction

Chapter 2.4 introduced the British Law Officers. The British tradition of the Law Officers heavily influenced the early Australian roles of Attorney-General and Solicitor-General. Since the mid-nineteenth century, the evolution of the Australian Law Officers has taken its own path. A very different, non-political role has been forged for the Solicitor-General to complement a now overtly political Attorney-General. However, the story of the Australian Solicitor-General is largely untold.¹ It is necessary to study the historical evolution of the Australian Solicitor-General to understand the underlying objectives behind the modern framework, and therefore better comprehend the features of the office. This chapter provides an historical overview of the office, and as such it contextualises the foreign literature discussed in Chapter 2 and provides the foundations for the analysis in Chapters 4, 5, 6 and 7. An historical list of officeholders in each jurisdiction is set out in **Appendix C**.

I chronicle the story of the Australian Solicitor-General across three phases. The first phase, the ‘British Colonial Period’, commenced in the early nineteenth century. In this phase the Law Officers, as best they could in the colonial conditions, mirrored the British tradition.

In the second phase, the ‘Public Service Period’, the Solicitor-General became a non-political public service position. This period commenced in Tasmania as early as the 1860s and was gradually adopted across the other jurisdictions. During this phase the office closely mirrored the modern New Zealand model, often with heavy responsibilities in administration and criminal law as well as civil advocacy and advising.²

The third phase, the ‘Modern Period’, started in Victoria in 1951 with the introduction of a quasi-independent statutory office of ‘counsel’. In some respects this period represents a regression back to the purely professional role of the very early British Law Officers. The statutory office emerged as the preferred model across all of the jurisdictions in the second-half of the twentieth century (and in the Australian Capital Territory as late as 2011). Since

¹ The exception being histories available in New South Wales: Keith Mason, ‘The Office of Solicitor General for New South Wales’ (Autumn 1988) *Bar News* 22; and more recently in Queensland: Crown Law, *In My Opinion: The History of Crown Law Queensland 1859-2009* (Department of Justice and Attorney General, 2009). A general history is provided in John L I J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 367-88.

² See further discussion of the New Zealand model in Chapter 2.6.

the stabilisation of this phase, the Solicitor-General has become a specialist in constitutional and public law advice and litigation of significance. This chapter concludes by explaining the impetus for the creation of the modern office with its distinct features, leaving a full examination of the legislative framework and its practical operation to the following chapters.

3.2 The ‘British Colonial Period’

In the colonies of New South Wales, Van Diemen’s Land and, slightly later, Victoria, the roles of the Law Officers were modelled on the British tradition as far as was practicable.³

The modern tradition of the British Law Officers was not entirely settled at the time of its reception into the Australian colonies. A number of characteristics were, however, stable. From origins as the personal legal representatives of the Monarch in the thirteenth century, by the nineteenth century both Law Officers sat in Parliament,⁴ but it was a generally accepted practice that neither Law Officer sat in the Cabinet.⁵ Both Law Officers were responsible for the legal and public interest functions, with the Solicitor-General acting as a general deputy to the first Law Officer.⁶ As support for liberalism became stronger in Britain, the Law Officers were expected to exercise a degree of independent judgment in the fulfilment of these functions, and not to act for the narrow interests of the Monarch, but to pursue justice and further the ‘public weal’ in accordance with the Crown’s obligations to the community.⁷ There was also a growing recognition of the importance of attracting qualified and capable people because of the position’s importance to the constitutional structure.⁸

³ In Western Australia and, by and large, in South Australia and Queensland the position of Solicitor-General did not emerge until the twentieth century (there had been single, brief appointments of Solicitor-General in the 1890s in the latter two jurisdictions, but the office was not established permanently). In these colonies other officers, while they lacked the appellation, carried out the functions of Law Officer. For example, in 1836 when the province of South Australia was established it had an Advocate-General: Order-in-Council Establishing Government February 23, 1836 (Imp); Gordon D Combe, *Responsible Government in South Australia* (Government Printer, 1957) 8; *Attorney-General v Adams* [1965] SASR 129, 132 (Napier CJ); *The Cyclopaedia of South Australia* (1907) 335.

⁴ John L J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) ch 3. See further discussion in Chapter 2.4.1.

⁵ Edwards, *The Law Officers of the Crown*, above n 4, 174-5. See further discussion in Chapter 2.4.1.

⁶ James William Norton-Kyshe, *The Law and Privileges Relating to the Attorney-General and Solicitor-General of England: With a history from the earliest periods, and a series of King’s Attorneys and Attorneys and Solicitors-General from the reign of Henry III to the 60th of Queen Victoria* (Stevens and Haynes, 1897) 4.

⁷ Edwards, *The Law Officers of the Crown*, above n 4, ch 4. See further discussion in Chapter 2.4.1.

⁸ Edwards, *The Law Officers of the Crown*, above n 4, 112.

The ‘British Colonial Period’ was characterised by a number of issues. Questions arose over how to adjust the British traditions to colonial circumstances. The necessity of having two Law Officers was queried in light of concerns about finances and over-governance. Concerns appeared about the independence of the Law Officers from politics in their legal and public interest functions, particularly as they became responsible ministers and took up seats in the Executive Council. The Law Officers also bore responsibility for the provision of legal services across the whole of government – a wider mandate than existed in Britain. Government responses to these issues would lead to the evolution of the role of the Australian Solicitor-General towards the non-political.

3.2.1 Colonial beginnings: adopting and adapting the British tradition

The appointment of the first New South Wales Attorney-General, Saxe Bannister, in 1823 was quickly followed by the appointment of John Stephen as Solicitor-General to act as his deputy. From this beginning, the evolution of the two offices was closely related. These first Law Officers were appointed from the English Bar.⁹ The appointment of the Attorney-General was made pursuant to the recommendations of the Bigge Report.¹⁰ Prior to that, the colonial Governor would refer important questions of law to the British Law Officers.¹¹ Prosecutorial functions were performed by the Deputy Judge Advocate, who was also called upon for legal advice.¹² Bigge was critical of the concentration of powers in the Judge Advocate and recommended the appointment of an Attorney-General to act as grand jury and prosecute criminal matters, as well as draft legal documents and legislation for the

⁹ Edwards, *The Attorney-General*, above n 1, 367; James William Norton-Kyshe, *The Law and Privileges Relating to the Attorney-General and Solicitor-General of England: With a history from the earliest periods, and a series of King’s Attorneys and Attorneys and Solicitors-General from the reign of Henry III to the 60th of Queen Victoria* (Stevens and Haynes, 1897) 49, n 1. As a general rule, the appointment of Law Officers from the English Bar continued during this period. See analysis of appointments in Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD, University of Melbourne, 2007) 45-6; 73-4.

¹⁰ John Thomas Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen’s Land (Common’s Paper 33, ordered to be printed 21 February 1823, Lords Paper (118) ordered to be printed 4 July 1823) Facsimile* (Libraries Board of South Australia, 1966) 56-7. The appointment was made pursuant to the *New South Wales Act 1823* (Imp).

¹¹ For example, J M Bennett and Alex C Castles, *A Source Book of Australian Legal History* (The Law Book Company Ltd, 1979) 263-6. See also Herbert Vere Evatt, ‘The Legal Foundations of New South Wales’ (1938) 11 *Australian Law Journal* 409, 416.

¹² Evatt, ‘The Legal Foundations of New South Wales’, above n 12, 416; J M Bennett, ‘The Status and Authority of the Deputy Judge Advocates of New South Wales’ (1956-8) 3 *Sydney Law Review* 501; Terry Kass, *A Brief History of the Attorney-General’s Department* (Attorney General’s Department New South Wales, 1996) 5.

Governor.¹³ Once appointed, the Attorney-General's other functions included providing legal advice to the Governor and acting as counsel in civil matters.¹⁴

Stephen was appointed the colony's first Solicitor-General in 1824.¹⁵ The letter to the Governor regarding the appointment read:

The Solicitor-General will by virtue of his appointment be considered as the legal adviser of Her Majesty's Government in the Colony, either in cases where sickness or absence of the Attorney-General or any other unavoidable cause may render it necessary to employ a substitute for that Office, or in cases which for their peculiar difficulty or importance require that the Attorney-General should have the professional assistance of another Counsel.¹⁶

Van Diemen's Land was established as a separate colony from New South Wales in 1824 with a Governor advised by a Crown Council. An Attorney-General, Joseph Gellibrand, was appointed in 1824, and a Solicitor-General, Alfred Stephen, in 1825 (who was also shortly thereafter appointed Crown Solicitor, a position which came with a salary of £300).¹⁷

The appointment of Law Officers early in the history of New South Wales and Van Diemen's Land demonstrates that even in the context of a penal colony, the importance of government within the law, and that this required access to independent legal advisers, was recognised.

The creation of the colonial Law Officers was considered to have brought with it all the common law duties and powers exercisable by the British Law Officers as were applicable to the circumstances of the colony.¹⁸ These included, for example, the power to initiate and terminate criminal prosecutions, to advise on the grant of pardons, to grant immunities from prosecution, to issue a fiat in relator actions in defence of public rights, to institute

¹³ Bigge, above n 10, 56-7, 59.

¹⁴ Kass, above n 12, 6.

¹⁵ Letter, Earl Bathurst to Sir Thomas Brisbane, 21 January 1824, extracted in The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XI, January 1823 - November 1825* (1922) 198-9.

¹⁶ *Historical Records of Australia, Series I, Vol XI*, above n 15, 199.

¹⁷ The Library Committee of the Commonwealth Parliament, *Historical records of Australia, Series 3, Despatches and Papers Relating to the Settlement of the States, Vol IV, Tasmania 1821 - 1825* (1921), 265, see also 270 and The Library Committee of the Commonwealth Parliament, *Historical records of Australia, Series 3, Despatches and Papers Relating to the Settlement of the States, Vol V, Tasmania* (1921), 61; A Colonist, 'Correspondence: To His Honor Lieutenant Governor Arthur', *Hobart Town Gazette and Van Diemen's Land Advertiser* (Hobart), 10 June 1825 1825, 3; Martha Rutledge, 'Stephen, Sir Alfred (1802 - 1894)' in *Australian Dictionary of Biography* (Melbourne University Press, 1976) vol 6, 180.

¹⁸ *Historical Records of Australia, Series I, Vol XI*, above n 15, 883-4; Gareth Griffith, 'The Office of Attorney General in New South Wales' (2007) 11 *Legal History* 79, 95-6.

proceedings for contempt of court, to intervene in any case where the validity of a colonial law was under challenge, and to provide legal advice to the Executive Council and Governor.¹⁹

The early appointments of the Law Officers in both colonies mirrored as far as possible that in Britain, despite dramatic differences in constitutional context, namely the absence of representative or responsible institutions and therefore the absence of direct accountability of a Law Officer for the exercise of the public interest functions. Throughout the 1820s and 1830s confrontations arose between the Law Officers over the division of work, and the Colonial Office had to repeatedly confirm that the roles of the Law Officers ought to be replicate (as close as possible) the roles in Britain.²⁰ Some of the Attorney-General's counsel functions were delegated to the Solicitor-General.²¹ As in Britain, the Solicitor-General was the more junior Law Officer appointed to assist the Attorney-General and a natural stepping stone to the senior position during this period. The Law Officers were supported by a Crown Solicitor,²² although at times in Van Diemen's Land, where the profession was fused, the Solicitor-General held this post as well.

As in Britain, officeholders enjoyed the right to private practice until the 1890s.²³ The Bigge Report had recommended that the Attorney-General be given the right to private practice to induce English barristers of appropriate calibre to make the journey to the colonies.²⁴ In New

¹⁹ Gareth Griffith, above n 18, 95-6.

²⁰ See the correspondence in relation to a number of disputes between the Law Officers in The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XIV March 1828 - May 1829* (1922), 371-3; The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XV July 1829 - December 1830* (1922) 10; The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XVII 1833 - June 1835* (1922) 284-94. See also T Chisholme Austey, *A Statement of the case of Herbert George Jones: Serjeant-at-Law, Late Her Majesty's Solicitor-General of Van Diemen's Land, as evidenced by the official correspondence and other documents relating thereto* (T Brettell, 1846).

²¹ Kass, above n 12, 6.

²² In New South Wales, a Crown Solicitor was appointed in 1829 at the request of the Attorney-General Saxe Bannister who wanted to delegate some of the Attorney-General's more mundane tasks: Kass, above n 12, 7.

²³ Ibid 6; Edwards, *The Law Officers*, above n 4, 98, 100; *The Cyclopaedia of Tasmania: An Historical and Commercial Review: Descriptive and Biographical Facts, Figures and Illustrations: An Epitome of Progress: Business Men and Commercial Interests* (Maitland and Krone Publishers, 1900); Letter to Editor from N E Lewis, *The Mercury*, 12 December 1905, extracted in full in Royal Commission on the Proposal to Make the Office of Attorney-General Permanent Non-Political, *Report of the Commission* (Hobart, John Vale, Government Printer of Tasmania, 1908) 39.

²⁴ Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 50. See also Austey, above n 20.

South Wales the right to private practice was abolished in 1894.²⁵ This followed the resignation of Attorney-General Edmund Barton and Minister for Justice²⁶ Richard O'Connor in 1893 after it was revealed they had accepted private briefs against a statutory government authority.²⁷

The Law Officers quickly came to be among the appointed advisers to the Governor. In New South Wales, both Law Officers sat on the Executive Council advising the Governor,²⁸ and in Van Diemen's Land the Attorney-General sat on the Crown Council.²⁹ At this time the Governor was not bound to follow the Council's advice. The practice of appointing the Law Officers to the Executive Council was a departure from that in Britain,³⁰ although unlike the British Cabinet, the Councils lacked actual political power at this early stage. However, the practice set a precedent that would continue when responsible government was introduced and substantial public power vested in the Executive Council.³¹

In 1836 the role of New South Wales Solicitor-General was abolished and Attorney-General John Plunkett found himself burdened with the responsibilities of both offices. This was probably caused by the bickering between the Law Officers over the division of responsibilities.³² In 1840 the Governor petitioned the Colonial Office for the re-establishment of the office to allay concerns about delays in the law business of the Crown and also to ensure there was a person to perform the Law Officers' duties during the

²⁵ Edwards, *The Law Officers of the Crown*, above n 4, 98, 100; Keith Mason, 'The Office of Solicitor General', above n 1, 22; Gareth Griffith, above n 18, 88-9; M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86, 87.

²⁶ An office that arose in the ministry during the period of the Solicitor-General's abolition in New South Wales which is detailed below, Chapter 3.2.4 and 3.3.3.

²⁷ For a full account of the story, see 'Political Crisis in New South Wales - Defeat of the Government - Debate in the Assembly - The Proudfoot Case - Retainer of Legal Ministers - An Unexpected Result - Intentions of the Government', *The Brisbane Courier* (Brisbane), Friday 8 December 1893, 5 <<http://newspapers.nla.gov.au/ndp/del/article/3570462>>; Martha Rutledge, 'Barton, Sir Edmund (1849 - 1920)' in *Australian Dictionary of Biography* (Melbourne University Press, 1979) vol 7, 194; Martha Rutledge, 'O'Connor, Richard Edward (1851 - 1912)' in *Australian Dictionary of Biography* (Melbourne University Press, 1988) vol 11, 56; Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000) 118-20.

²⁸ Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans Green, 2nd ed, 1894) 25-6; Edwards, *The Attorney General*, above n 1, 367.

²⁹ Parliament of Tasmania, *Members of the Legislative Council of Van Diemen's Land 1825-1856* <<http://www.parliament.tas.gov.au/History/taspar/mlcs1825to1855.htm>>.

³⁰ Edwards, *The Attorney General*, above n 1, 367-8; 369; Gareth Griffith, above n 18, 85. See further discussion Chapter 2.4.1.

³¹ See discussion below, Chapter 3.2.3 and 3.2.4.

³² *Historical Records of Australia, Series I, Vol XVII*, above n 20, 298. See also 585.

Attorney-General's absence.³³ However, the Colonial Secretary refused the request because of concerns about the finances and over-governance of the colony.³⁴ Despite this, in 1841 the Governor appointed an acting Solicitor-General.³⁵ The Colonial Secretary refused to confirm the appointment,³⁶ and the position remained acting until 1843 when the new Colonial Secretary decided to revive the office before the first elections for the newly created Legislative Council.³⁷

3.2.2 The colonial Law Officers take their seats in Parliament

In 1842 the creation of a Legislative Council in New South Wales highlighted the increasingly political nature of the role of the Law Officers in the colonies.³⁸ The new Council was made up of 24 elected members and 12 appointed members. Lord Stanley, the Colonial Secretary, noted that it would be desirable for some of the Governor's executive officers in the Council to be popularly elected, but it would be 'unadvisable' that other officers, including the Attorney-General and the Solicitor-General, 'should be dependent on particular constituencies, and appear to represent particular interests' other than the Governor's.³⁹

During this period, a Legislative Council was also created in the other colonies, and the Law Officers took seats in that body. In 1850, a Legislative Council of appointed and elected members was created in Van Diemen's Land. As was the case in New South Wales, the Attorney-General and Solicitor-General were appointed and expected to be the 'Governor's men' in the Council.⁴⁰ Prior to Victoria's separation from New South Wales, the Law Officers of New South Wales were technically also those for the Port Phillip District, although in practice the Superintendent for the District received advice from the local Crown

³³ The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XX, February 1838 - September 1840* (1922) 524.

³⁴ Ibid 716.

³⁵ The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XXI, October 1840 - March 1842* (1922) 299.

³⁶ Ibid 468; 524.

³⁷ The Library Committee of the Commonwealth Parliament, *Historical Records of Australia, Series I, Governors' Despatches to and from England, Vol XXII, April 1842 - June 1843* (1922) 592.

³⁸ *Australian Constitutions Act (No 1) 1842* (Imp). New South Wales at that time included Victoria and Queensland.

³⁹ Letter Lord Stanley to Governor Gipps, Private, 5 September 1842, CO 202/45, extracted in A C V Melbourne, *Early Constitutional Development in Australia: New South Wales 1788-1856 Queensland 1859-1922* (University of Queensland Press, 1963) 275.

⁴⁰ Parliament of Tasmania, above n 29.

Clerk.⁴¹ After separation in 1851, Victoria appointed its own colonial Law Officers. Both officers were appointed members of the Victorian Legislative Council (composed of nominated and elected representatives),⁴² and the Attorney-General was also a member of the Executive Council, highlighting the more senior and already more politically important nature of this office.⁴³ Fiona Hanlon's analysis of the qualifications of both Law Officers during this period demonstrates that the Attorney-General was more politically qualified than the Solicitor-General across the colonies.⁴⁴

3.2.3 Responsible government and the Solicitor-General: further breaks with tradition

The New South Wales, Victorian and the Tasmanian *Constitution Acts* of 1855 brought responsible government to the colonies, and made the Law Officers among the first responsible ministers of the Crown.⁴⁵ Under these constitutions, the Governor was no longer solely responsible for the government of the colony and had to act on the advice of his elected Ministers. In each colony the Law Officers formed part of the Executive Council, the core group of Ministers that advised the Governor on the exercise of his power.

In New South Wales the Law Officers were named amongst the five permanent heads of departments who made up the Executive Council.⁴⁶ The Solicitor-General shared departmental responsibility with the Attorney-General.⁴⁷ While it may appear strange that a small colonial government would need two Law Officers in the Executive Council, this reflected its colonial past, largely defined by legal and convict business.⁴⁸ In Victoria the

⁴¹ Letter, Colonial Secretary to C J La Trobe 9 January 1840, extracted in Pauline Jones, *Beginnings of Permanent Government*, Historical Records of Victoria Foundation Series (Victorian Government Printing Office, 1981) 288, referred to in Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 42.

⁴² Edward Sweetman, *Constitutional Development of Victoria 1851-6* (Whitcombe & Tombs Limited, 1920) 28.

⁴³ Ibid 73; Public Record Office Victoria, *Function VF 169, Solicitor-General* <www.access.prov.vic.gov.au/public/component/daPublicBaseContainer?component=daViewFunction&breadcrumbPath=Home/Access%20the%20Collection/Browse%20The%20Collection/Function%20Details&entityId=169#>.

⁴⁴ Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 73-4; 86-7; 91; 96; 99.

⁴⁵ *Constitution Act 1855 (New South Wales)* (Imp); *Constitution Act 1855 (Victoria)* (Imp); *Constitution Act 1855 (Tas)*; Hilary Golder, *Politics, Patronage and Public Works: The Administration of New South Wales Volume 1, 1842-1900* (UNSW Press, 2005) 108; John Michael Bennett, *A History of the New South Wales Bar* (Law Book Company Ltd, 1969) 72.

⁴⁶ Kass, above n 12, 9.

⁴⁷ Golder, above n 45, 121.

⁴⁸ Arthur McMartin, *Public Servants and Patronage: The Foundations and Rise of the New South Wales Public Service 1786-1859* (Sydney University Press, 1983) 267.

Solicitor-General also joined the Executive Council,⁴⁹ although sometimes the Solicitor-General would also be appointed Minister of Justice, or the portfolios would occur in the alternative.⁵⁰

For the first time, the Law Officers were, as in Britain, made responsible and accountable to the Parliament for the exercise of their independent discretions (such as the prosecutorial discretion).⁵¹ However, responsible government also saw the introduction of collective accountability, and the inclusion of the Law Officers in the Executive Council brought different challenges to bear on an officeholder's independence.⁵² Three episodes from Victoria during this period highlight the tensions between the Law Officers' loyalty to the political Executive as members of the Executive Council on the one hand, and their legal and public interest obligations on the other.

In 1864, the independence of advice provided by George Higinbotham (the Victorian Attorney-General) and Archibald Michie (the Solicitor-General) that the tacking of a tariff reform Bill onto an appropriation Bill was lawful was brought into question by the Legislative Council because of Higinbotham's well-known political ambitions.⁵³ When the Council refused supply, the Law Officers advised the Governor that an arrangement entered into with the London Chartered Bank to obtain money without appropriation from the legislature was legal.⁵⁴ When the matter finally came to a head, the Governor refused to accept advice from the British Law Officers, claiming he must accept the opinions of his local Law Officers.⁵⁵

In 1878 the Governor sought advice from the British Law Officers after receiving conflicting advice from his colonial Law Officers over whether approval of the Council was required in relation to Bills of supply.⁵⁶ In a statement that is clearly based on a British assumption that Law Officers operated with a large degree of independence, the Colonial Secretary said that in such cases, the Governor should request the advice of the Law Officers in their capacity as

⁴⁹ Sweetman, above n 42, 81, 83.

⁵⁰ James Smith, *The Cyclopaedia of Victoria: An Historical and Commercial Review: Descriptive and Biographical, Facts, Figures and Illustrations: An Epitome of Progress* (The Cyclopaedia Co, 1903) 205.

⁵¹ In the British context, see further Chapter 2.4.1.

⁵² Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 91, 127.

⁵³ Charles Parkinson, 'George Higinbotham and Responsible Government in Colonial Victoria' (2001) 25 *Melbourne University Law Review* 181, 187.

⁵⁴ *Ibid* 201.

⁵⁵ *Ibid* 204.

⁵⁶ Todd, above n 28, 725-6.

‘the authorised exponents to the law’ and not as political advisors.⁵⁷ In a debate in the House of Lords over the issue, Lord Carnarvon asserted that in the circumstances he would have preferred for the appointment of ‘one permanent and impartial legal advisor, who might be in a position to advise a colonial Governor as emergencies arose.’⁵⁸ This suggestion was strongly refuted by Higinbotham as contrary to British tradition, ‘illegal’ and ‘absurd’.⁵⁹

Independence from the Cabinet in the exercise of the Law Officers’ prosecutorial function emerged as an issue in Victoria in 1893. The Solicitor-General, Isaac Isaacs, was directed by the Attorney-General to drop certain charges that he had brought in a high-profile prosecution. Isaacs refused and ultimately resigned, ostensibly to protect his independence.⁶⁰ Isaacs argued that the prosecutorial function of the Solicitor-General had to be exercised independently of the Cabinet and even of the Attorney-General.

In Queensland, there was no tradition of a Solicitor-General appointed to the Legislative Council. The position was created for only a short period in 1890 due to Premier and Attorney-General Samuel Griffith’s immense involvement in the federation movement and the need for him to be relieved of many of the day-to-day obligations of the Attorney-General.⁶¹ On his appointment, Solicitor-General Thomas Byrnes was also appointed to the Legislative Council,⁶² and retained his right to private practice.⁶³ Indicating that the position was seen as necessary only for the exigency created by Griffith’s workload (rather than broader constitutional need) after Byrnes’ elevation to Attorney-General in March 1893, the position disappeared until it was recreated as a public service position in 1922.

3.2.4 Debate over the Law Officers in Cabinet

The inclusion of the Law Officers in the Executive Council (essentially the Cabinet) under a system of responsible government, was a major break with British tradition and likely

⁵⁷ Ibid 726-7, see also Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Frank Cass & Co Ltd, 2nd ed, 1967) 189-90.

⁵⁸ Extracted in Evatt, *The King and His Dominion Governors*, above n 57, 190.

⁵⁹ Ibid 190.

⁶⁰ Edwards, *The Attorney General*, above n 1, 374-5; Although there has been surmise that it was also caused by person machinations between Isaacs and the Attorney-General over priority between them as Ministers: Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 93-4.

⁶¹ Crown Law, above n 1, 29. There had been earlier requests for a Solicitor-General to relieve the Crown Solicitor and Attorney-General of work: Crown Law, above n 1, 25, 27; Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1985, 4096 (N J Harper, Minister for Justice and Attorney-General).

⁶² Crown Law, above n 1, 29.

⁶³ Ibid 30.

contributed to the increased politicisation of the Law Officers. The move was the result of several factors. The colonial practice of including the Law Officers in the Executive Council (before this body wielded any power beyond advising the Governor) set a precedent from which it was difficult to resile. The colonies had also never had an office akin to the Lord Chancellor (who, in Britain, sat in Cabinet and performed legislative, executive and judicial roles), and many of that office's obligations were met by the colonial Law Officers.⁶⁴ The move did not take place without debate in these early years.

In New South Wales the inclusion of the Law Officers in the Executive Council was particularly controversial in relation to the officeholder's exercise of the prosecutorial function, which led to the drafting of legislation for an independent public prosecutor (although this was never passed).⁶⁵ At times during the 1850s and 1860s the New South Wales Attorney-General was not included in the Executive Council, owing to concerns that the officeholder could not properly perform the public interest functions of the office if the role was considered too political.⁶⁶ In 1859 the New South Wales Law Officers were relieved of administrative duties in an attempt to remove the incompatibility of these functions with their position as legal advisers, although the strength of vested interests saw the Attorney-General retained in the Executive Council 'for the present'.⁶⁷

In 1873 substantial reform was achieved, albeit fleetingly, when the Attorney-General became a non-Executive Council Minister presiding over the newly created Department of Justice and Public Instruction. The role of Solicitor-General was abolished for a period during this time.⁶⁸ The change took place for a number of reasons. Foremost was an attempt to improve efficiency in the colonial administration by removing the necessity of having *two* Law Officers in a ministry that was only composed of between six and eight departments.⁶⁹ Another reason was the desire to increase the independence of the Law Officers in advising and prosecuting by bringing the nature of the roles closer to that in Britain, where they were

⁶⁴ Keith Mason, 'Aspects of the History of the Solicitor-General in Australia: 1788 to 1970' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011) 15.

⁶⁵ Golder, above n 45, 121.

⁶⁶ Kass, above n 12, 10, referring to Peter Loveday and A W Martin, *Parliament Factions and Parties: The First Thirty Years of Responsible Government in New South Wales 1856-1889* (Melbourne University Press, 1966) 116.

⁶⁷ Golder, above n 45, 133; McMartin, above n 48, 273.

⁶⁸ Golder, above n 45, 186. The abolition of the Solicitor-General in New South Wales during this period is returned to in more depth at Chapter 3.3.3.

⁶⁹ 'Legislative Assembly: Thursday 27 November 1873', *Sydney Morning Herald* (Sydney) 28 November 1873, 2 <<http://nla.gov.au/nla.news-article13327384>>.

less overtly political and did not sit as members of Cabinet.⁷⁰ In the course of this debate an alternative proposal to have one of the Law Officers appointed outside the Parliament was rejected on the same basis that Edwards dismissed it in the 1970s:⁷¹ that the responsibility of the Law Officers to Parliament was a fundamental principle of the operation of British parliamentary government.⁷² The 1873 reforms to the Attorney-General's role were short-lived; by 1878 the Attorney-General had returned to the Executive Council.⁷³

In the 1850s, the Province of South Australia was debating whether to require both Law Officers to sit in the Executive Council under its new Constitution Bill. Justice Benjamin Boothby was strongly against the move and warned that the early colonial practice must not be allowed to continue under responsible government:

The Crown cannot be compelled to seek legal advice from law officers who, after the advice is given, have the power, it may be, by a casting vote to compel that advice to be adopted ... Such a position would unfit the Law Officers of the Crown for the impartial consideration of questions necessarily requiring their decision, and so lessen their power of efficient service to the Crown.⁷⁴

Boothby's warnings drew heavily upon the ideal of having Law Officers within government but aloof from politics: someone who has, as Boothby said, the ability to conduct 'impartial consideration of questions'. It is this ideal that characterised much of the development of the British tradition of the Law Officers, and would be the driver for continuing reform of the office in Australia into the twentieth century. Ultimately under the South Australian *Constitution Act 1856* the Attorney-General was included in the Executive Council, but the office of Solicitor-General was not, and was disqualified from sitting in the Parliament.⁷⁵ This was on the basis of a prohibition on members of the Parliament accepting any office of profit from the Crown, during pleasure, excepting those listed.⁷⁶ From 1 August to 1 September 1857 John Tuthill Bagot briefly held a ministerial office of Solicitor-General.⁷⁷

⁷⁰ Ibid.

⁷¹ Edwards, *The Attorney-General*, above n 1, 66-7. See further discussion in Chapter 2.4.1.

⁷² 'Legislative Assembly: Thursday 27 November 1873', *Sydney Morning Herald* (Sydney) 28 November 1873, 2 <<http://nla.gov.au/nla.news-article13327384>>.

⁷³ Golder, above n 45, 186.

⁷⁴ Benjamin Boothby, 'Memorandum' (1862) 37 *House of Commons Papers*, extracted in Edwards, *The Law Officers*, above n 4, 167-8.

⁷⁵ *Constitution Act 1856* (SA) ss 17, 32, 34.

⁷⁶ Ibid ss 32; 34; 17 (office of profit under the Crown).

⁷⁷ 'The State's First Parliament: A Dip into History', *The Advertiser* (Adelaide), 20 April 1917, 9 <<http://newspapers.nla.gov.au/ndp/del/article/5579748>>.

This appointment, however, was successfully challenged by Richard Hanson on the basis it was in breach of the prohibition in the *Constitution Act*.⁷⁸

3.2.5 The Law Officers and an integrated government legal service

In a further break with British tradition, the move to responsible government also saw the centralisation of legal services in the colonial Law Officers' departments.⁷⁹ This was the continuation of a trend that had started when the administration of legal services was a relatively small task overseen by the Law Officers personally. The Law Officers' department eventually became responsible for providing legal services across the whole of government, with relatively few exceptions. Bradley Selway asserted there were probably a number of reasons for this: 'governments were smaller [in the colonies than in England] and centralisation was easier', 'colonial Attorneys-General were adequately paid' and 'usually had the support of competent professional lawyers in the Solicitor-General ... and Crown Solicitor'.⁸⁰

The first century of the office of the Solicitor-General in Australia was, this chapter has demonstrated, one heavily influenced by the British model, but struggling to adapt its conventions to the circumstances of the colony and the personalities of the colonial appointees. When responsible government was introduced to the colonies, those that had Solicitors-General retained the office in the ministry, as was convention in Britain, at least initially. However, one major change between the Australian and British history, evident even at this stage in the colonial history, was the increased politicisation of the Law Officers and particularly the Attorney-General. This would be the impetus for the increased depoliticisation of the office of the Solicitor-General in the late nineteenth and early twentieth centuries.

⁷⁸ See 'The State's First Parliament: A Dip into History', *The Advertiser* (Adelaide), 20 April 1917, 9 <<http://newspapers.nla.gov.au/ndp/del/article/5579748>>; 'South Australian Parliament: Legislative Council, Tuesday, April 30', *The South Australian Advertiser* (Adelaide), 1 May 1861, 2 <<http://newspapers.nla.gov.au/ndp/del/article/24479756>>; 'The Parliament: Legislative Council, July 2', *The Advertiser* (Adelaide), 3 July 1889, 6 <<http://newspapers.nla.gov.au/ndp/del/article/24479756>>. See also Boyle Travers Finniss, *The Constitutional History of South Australia: During 21 Years from the Foundation of the Settlement in 1836 to the Inauguration of Responsible Government in 1857* (R V C Rigby, 1886) 470; R M Hague, *Hague's History of the Law in South Australia 1837-1867* (University of Adelaide Barr Smith Press, 2005, first submitted 1936) 721.

⁷⁹ For an overview of the British position, see Edwards, *The Attorney General*, above n 1, ch 7.

⁸⁰ Bradley Selway, 'The Different Role of an Australian Attorney-General' (2002) 13 *Public Law Review* 263, 266-7.

3.3 The ‘Public Service Period’

The depoliticisation of the Australian Solicitor-General and the creation of a public service office was a major break with the British tradition of the Law Officers. This movement predated Lord Shawcross’ calls for a similar model in Britain by over a century.⁸¹ As is often the case with constitutional transitions, the change was predominantly made to meet the exigencies of a particular situation (namely, to reduce government expenditure) rather than resting on high constitutional principle, but it led to significant, widespread and ongoing change. This trend started in Tasmania in the 1860s. It was adopted in Western Australia in 1902.⁸² The Commonwealth introduced a similar office in 1916, and New South Wales and Queensland in 1922. While the public service basis for the position was broadly consistent across these jurisdictions, some Solicitors-General performed more administrative functions within the department than others.

3.3.1 Tasmania breaks with British tradition

In the 1860s the Tasmanian office was the first in Australia to become non-political on a permanent basis.⁸³ After 1855 there had been occasions where there was no Solicitor-General in the ministry,⁸⁴ although it was not until 1863 that the ‘firm decision’ was made to remove the Solicitor-General from a ministerial and political post.⁸⁵ The development was advanced at the time simply as a cost-cutting measure.⁸⁶

The Attorney-General continued the duties of first Law Officer, assisted now by a public service Solicitor-General. Gradually, the legal duties of the Attorney-General declined, and he became the political and administrative head of the department only, although he

⁸¹ See further discussion in Chapter 2.4.1.

⁸² J S Batty, *The Cyclopaedia of Western Australia: An Historical and Commercial Review: Descriptive and Biographical Facts, Figures and Illustrations: An Epitome of Progress* (The Cyclopaedia Company, 1912), 479. See also ‘The Public Service: Classification of Professional Division: The Commissioner’s Proposals’, *The West Australian* (Perth) 14 September 1907, 5.

⁸³ R L Wettenhall, *A Guide to Tasmanian Government Administration* (Platypus Publications, 1968) 94; *The Cyclopaedia of Tasmania*, above n 23, 61; B E Briggs and C K Murphy, ‘Presidents - Speakers - Ministers - Members - Officers’ in F C Green (ed), *A Century of Responsible Government 1856-1956* (L G Shea, Government Printer, 1956) 277, 301. Tasmania also led the way for the colony of New Zealand, which experimented with a non-political Attorney-General in 1866 but it wasn’t until 1873 that a non-political Solicitor-General was appointed: John McGrath, ‘Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General’ (1998) 18 *New Zealand Universities Law Review* 195, 199.

⁸⁴ James Fenton, *A History of Tasmania* (Walch & Sons, 1884) 310.

⁸⁵ Wettenhall, above n 83; ‘Political Changes’, *The Mercury* (Hobart), 12 January 1864, 2.

⁸⁶ Royal Commission to Inquiry into the Accounts, and the Departments of Government, Southern Side, *Report of the Royal Commission* (Hobart, Government Printer of Tasmania, 1963) 27.

continued to appear as counsel for Tasmania on occasion in high-profile matters.⁸⁷ There was a concomitant rise in the legal duties of the Solicitor-General.⁸⁸ The centralisation of legal services in the one department meant the Solicitor-General became ‘the core of legal administration’ in the colony.⁸⁹ The office conducted all civil and criminal litigation for the Crown,⁹⁰ performing from 1887 the role of Crown Prosecutor.⁹¹ In Tasmania, where there was a fused profession, the Solicitor-General would often appear in a single case as both counsel and instructing solicitor.⁹² This continued even after 1983 when Tasmania adopted the modern statutory model and the Solicitor-General was designated ‘counsel’ for the Crown.⁹³

The advantages of the new model for the Solicitor-General were described as bringing continuity of practice and knowledge of government to the role.⁹⁴ Depoliticisation meant that the Solicitor-General was no longer a stepping stone to Attorney-General, but a purely professional position.⁹⁵

3.3.2 A Commonwealth office

At Federation, two models for the Solicitor-General had emerged in the colonies: a ministerial officeholder who assisted the Attorney-General and a public servant who conducted the predominance of legal business to assist an increasingly politicised Attorney-General.

⁸⁷ See, eg, *D’Emden v Pedder* (1904) 1 CLR 91, Attorney-General Herbert Nicholls appeared with Solicitor-General Edward Dobbie for Pedder against the Commonwealth Deputy Postmaster-General.

⁸⁸ Letter to Editor from N E Lewis, *The Mercury*, 12 December 1905, extracted in full in Royal Commission on the Proposal to Make the Office of Attorney-General Permanent Non-Political, *Report of the Commission* (Hobart, John Vale, Government Printer of Tasmania, 1908) 39.

⁸⁹ Wettenhall, above n 83.

⁹⁰ *The Cyclopaedia of Tasmania*, above n 23, 129.

⁹¹ *Ibid* 129.

⁹² See, eg, *D’Emden v Pedder* (1904) 1 CLR 91, when Solicitor-General Edward Dobbie junioried the Attorney-General, instructed by the Tasmanian Crown Solicitor; *Enever v The King* (1906) 3 CLR 969, when Dobbie appeared both as counsel for the Crown (Tas) and as the instructing solicitor.

⁹³ See below, Chapter 3.4. During his tenure, William Bale would either act as both counsel and instructing solicitor in a single case under the title Solicitor-General, or at other times, he held joint appointments as Solicitor-General and Crown Solicitor. See, eg, in *Bath v Alston Holdings* (1988) 165 CLR 411; *McGinty v Western Australia* (1996) 186 CLR 140.

⁹⁴ Royal Commission on the Proposal to Make the Office of Attorney-General Permanent Non-Political, *Report of the Commission* (Hobart, John Vale, Government Printer of Tasmania, 1908) 7.

⁹⁵ After the adoption of a public service model and into the ‘Modern Period’, the Solicitor-General was never elevated to Attorney-General directly. Robert Ellicott, former Commonwealth Solicitor-General, was appointed Attorney-General, but this was after he had resigned from office in 1973 and won a seat in the House of Representatives as a member of the then Opposition led by Malcolm Fraser in 1974. When the Opposition won government in 1975 he was appointed Attorney-General.

Despite the historical pedigree of the office, a Solicitor-General for the new Commonwealth was not considered during the constitutional conventions of the 1890s. The framers were aware of the need of the different polities to have authoritative legal advice to ensure the smooth operation of the new federal system. The important role of the Attorney-General in providing legal advice on constitutional questions was referred to on several occasions.⁹⁶ The framers also considered the prospect of obtaining advisory opinions from the High Court. The majority of the delegates however were wary of an amendment to implement such a measure, fearful that, *inter alia*, it would compromise the Judiciary and draw them into the political arena.⁹⁷

Why, if the framers were aware of the practical need for a definitive, non-political legal adviser (particularly on constitutional questions), was there no discussion of the role of a Commonwealth Solicitor-General? The likely explanation is two-fold. First, it may have been anticipated that the legal work of the new government would not be so large as to require the assistance of a second Law Officer. Secondly, the idea that the Attorney-General would continue to operate as an impartial and properly qualified legal adviser was pervasive. While this did not reflect the growing trend in the colonies towards an increasingly political Attorney-General, it followed the British tradition of the Law Officers.

After Federation, both of these assumptions proved untrue. The first Attorney-General, Alfred Deakin, appointed Robert Garran as Secretary of his Department.⁹⁸ Included in the Department's responsibilities was drafting legislation,⁹⁹ advising the government on legal and constitutional issues and conducting litigation on behalf of the government.¹⁰⁰ Garran described his functions 'as those of the Chief Permanent Law Officer of the Commonwealth', although he noted he lacked such a title.¹⁰¹ The position Garran filled was akin to that of the Tasmanian public service-style Solicitor-General. As the Commonwealth grew, so did the

⁹⁶ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 7 April 1891, 858 (John Cuthbert); *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 8 March 1898, 2008 (Joseph Carruthers); *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 9 March 1898, 2094 (George Reid).

⁹⁷ For a historical account of the attempts to include a mechanism that would allow advisory opinions, see Helen Irving, 'Advisory Opinions, The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105; John M Williams, 'Advisory Opinions: "A well-covered harbour"' (2010) 22(3) *Bond Law Review* 169.

⁹⁸ Robert R Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 143.

⁹⁹ *Ibid* 143-5.

¹⁰⁰ *Ibid* 151.

¹⁰¹ Letter from Robert Garran to C W Harriott, Secretary of the New South Wales Council of the Bar, 5 March 1915, in National Library of Australia, 'Family Papers of Sir Robert Garran' (1860-1957).

work of the Attorney-General's Department, which followed the colonial model of providing legal services across the whole of government. This largely devolved onto Garran, although he rarely appeared as counsel.¹⁰² Instead, Commonwealth appearance work was briefed out to the private Bar,¹⁰³ or with increasingly less frequency the Commonwealth Attorney-General would appear in major cases.¹⁰⁴

In 1910, William Harrison Moore commented:

It must be remembered that in Australia, unlike England, the Attorney-General is a member of the Cabinet, so that the office may be filled by reference to political rather than professional qualifications. It is, therefore, the more important that there should be a permanent official of high legal qualification, a necessity which has been recognised in some of the colonies by the appointment of a Solicitor-General as a non-political and permanent officer.¹⁰⁵

In 1916, during World War I, William (Billy) Hughes, the Prime Minister and also Attorney-General, introduced the Solicitor-General Bill which contained skeletal provision for a public service office.¹⁰⁶ The purpose of the new office was to provide Hughes with additional support and assistance during the War.¹⁰⁷ Garran was the first appointment to the position, while continuing in his position as permanent head of the Attorney-General's Department. On its face, it seemed little had changed. Indeed, it was questioned at the Bill's introduction

¹⁰² Exceptions being *Roche v Kronheimer* (1921) 29 CLR 329; *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36.

¹⁰³ In particular, Commonwealth interests were regularly protected by leading counsel of the period, including P D Phillips, E M Mitchell, C I Menhennitt, Rae Else-Mitchell, W Ham, J D Holmes, E G Coppel, Bruce Macfarlan, A R Taylor, W J V Windeyer, T Bavin, W K Fullagar, H E Starke, O Dixon, Weston, Dr Cullen, D I Menzies, A Knox, J Latham, A F Mason, J R Kerr, F Gavan Duffy, F W Kitto and K A Aickin. Many of these counsel went on to appointment to the High Court, or other superior courts in the State jurisdictions.

¹⁰⁴ See, eg, *D'Emden v Pedder* (1904) 1 CLR 91; *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208; *Deakin v Webb* (1904) 1 CLR 585; *Federated Amalgamated Govt Railway and Tramway Service Assoc v NSW Railway Traffic Employes Assoc* (1906) 4 CLR 488; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087; *New South Wales v Commonwealth* (1908) 7 CLR 179 ('*Surplus Revenue Case*'); *James v Commonwealth* (1936) 55 CLR 1 (PC); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*State Banking Case*'); *Dennis Hotels v Victoria* (1961) 104 CLR 621 (PC); *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54 ('*Second Airlines Case*'); *Kotsis v Kotsis* (1970) 122 CLR 69; *Strickland v Rocla Concrete* (1971) 124 CLR 468 ('*Concrete Pipes Case*'); *Bonser v La Macchia* (1969) 122 CLR 177; *Gould v Brown* (1998) 193 CLR 346; *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391. No federal Attorney-General has appeared since this date.

¹⁰⁵ William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 1910, 2nd ed, 1997 reprint) 179-80.

¹⁰⁶ National Archives of Australia, Canberra, A 2863 1916/28.

¹⁰⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8996 (William Hughes, Prime Minister and Attorney-General).

why the new title was required at all.¹⁰⁸ The major change, according to Hughes, was the ability for the Attorney-General to delegate powers under a wide range of legislation.¹⁰⁹ It is unclear why it would not have been possible to delegate powers to Garran as the Secretary of the Department. While it was more traditional for the Attorney-General to delegate the office's function to the Solicitor-General, it is not constitutionally mandated.

The passage of the Solicitor-General Bill in 1916 engaged the Parliament in debate about the accountability of a non-political Solicitor-General. In introducing the legislation, Hughes briefly explained how the new office was intended to operate to ensure accountability despite the change from British practice:

The Minister will declare the policy of the Government in every case, and the Solicitor-General will give effect to it. Thus Ministerial discretion will remain, and Ministerial responsibility will not be lessened. The Government will be as much responsible for every act done by the Solicitor-General as if it had been done by the Attorney-General ...¹¹⁰

The debate over ensuring the accountability of a non-ministerial Solicitor-General would continue across the Australian jurisdictions until the 1980s. The point had been used in 1873 to reject a similar move in New South Wales, and again by Edwards in the 1970s in Britain.¹¹¹

3.3.3 Other jurisdictions: move to the public service

With the exception of Victoria, the other jurisdictions followed Tasmania's move towards a public service position for the Solicitor-General. In New South Wales the move to a public service model was incremental. After the Solicitor-General was abolished in 1873,¹¹² an 1891 Public Service Inquiry Commission found that the Attorney-General's ability to meet his responsibilities as a Law Officer and political Minister had been seriously affected by the removal of the Solicitor-General.¹¹³ The Commission recommended its re-introduction (or

¹⁰⁸ Ibid 8998 (James Page, Labor).

¹⁰⁹ Ibid, 8998 (Hughes); Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (Albert Gardiner, Labor, Vice President of Executive Council). The delegation was included in the Solicitor-General Bill 1916 cl 3.

¹¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (Hughes). See also 8998 (Littleton Groom, Commonwealth Liberal Party) and the debate in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (Robert Guthrie, Labor, James Stewart, Labor). See also Garran, above n 98, 221-2.

¹¹¹ See further explanation in Chapters 3.2.4 and 2.4.

¹¹² Kass, above n 12, 13. Chapter 3.2.4.

¹¹³ 'Report on the Attorney-General's Department' (Public Service Inquiry Commission, 1891) 2-3.

the introduction of an equivalent office).¹¹⁴ The office reappeared as a ministerial appointment for brief periods in the 1890s, although these correlate with the absence of the Attorney-General from the jurisdiction, rather than as a response to the Inquiry.¹¹⁵ The office reappeared permanently in 1900. During its period in abeyance, the office was substantially depoliticised.¹¹⁶ In 1884 it was removed from the responsible ministry.¹¹⁷ Despite the change in 1884, the office was held by both political (in the form of a non-remunerated appointment or an upper-house appointment to avoid the prohibition on a member of the Legislative Assembly holding an ‘office of profit under the Crown’) and non-political appointments during the early twentieth century.¹¹⁸

In 1922 New South Wales permanently adopted a public service model, and the officeholder, Cecil Weigall, performed both administrative and legal functions within the Crown Law Department.¹¹⁹ In 1953, for the first time, the government appointed a well-known Queen’s Counsel, Harold Snelling, as Solicitor-General. During Snelling’s tenure, the office evolved into a non-political and non-departmental officer. He largely acted as counsel, and did not have large administrative responsibilities, which devolved instead to the Crown Solicitor.¹²⁰ Snelling appeared regularly as counsel in the High Court, although predominantly in criminal, property and taxation matters initially.¹²¹ It was only in the late 1960s, when other

¹¹⁴ Ibid 3.

¹¹⁵ For example, Richard O’Connor (MLC) was appointed Solicitor-General for a short duration between July and September 1893 to deputise for Attorney-General Edmund Barton who was overseas in Canada: ‘The Solicitor-General’, *Sydney Morning Herald* (Sydney), 19 July 1893, 4 <<http://nla.gov.au/nla.news-article13918822>>; ‘Ministerial Movements’, *Sydney Morning Herald* (Sydney), 13 September 1893, 6 <<http://nla.gov.au/nla.news-article13928783>>. During his premiership in the 1890s, George Reid also held the office for brief periods for the same reason. See, eg, New South Wales, *Parliamentary Debates*, Session 1894-5 Volume 75, First Series, 12 December 1894-14 March 1895, 26 February 1895, 3912 (George Reid, Premier).

¹¹⁶ Bennett, *A History of the New South Wales Bar*, above n 45, 72, n 168.

¹¹⁷ The office was removed as an exception to the disqualification of persons eligible to sit in the House of Assembly on the basis of holding an ‘office of profit under the Crown’: *Constitution Act 1855* (NSW) s 18 amended by *Constitution Act Amendment Act 1884* (NSW). Sexton, ‘The Role of the Solicitor General’, above n 25, 88.

¹¹⁸ Keith Mason, ‘The Office of Solicitor General for New South Wales’, above n 1, 25.

¹¹⁹ Keith Mason, ‘Weigall, Cecil Edward (1870–1955)’ in *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12.

¹²⁰ Keith Mason, ‘The Office of Solicitor General’, above n 1, 25.

¹²¹ See, eg, *Basto v The Queen* (1954) 91 CLR 628; *Australian Provincial Assurance v Roddy* (1956) 95 CLR 478; *Le Brocque v Mason* (1956) 96 CLR 213; *Davis v Commr of Stamp Duties (NSW)* (1958) 100 CLR 392. Weigall, Solicitor-General from 1922 to 1953, had appeared less frequently as counsel for the State, predominantly in criminal matters: see, eg, *Eade v The King* (1924) 34 CLR 154; *Dawson v King* (1927) 40 CLR 206; *Russell v Bates* (1927) 40 CLR 209; *Whittaker v The King* (1928) 41 CLR 230.

jurisdictions had moved towards the statutory counsel model of Solicitor-General, that he started to appear regularly in constitutional matters alongside the other Solicitors-General.¹²²

In Western Australia, the Solicitor-General emerged for the first time as a public service appointment in 1902 with the appointment of William Sayer.¹²³ Officeholders tended to serve long periods, and engaged in administrative duties rather than acting as counsel for Western Australia.¹²⁴ During this period, the Solicitor-General did not appear in the High Court to represent Western Australia. Rather, demonstrating the nature of the fused profession in Western Australia, it was the Crown Solicitor who often appeared as instructing solicitor and counsel.¹²⁵ The office was abolished when Sayer's appointment finished in 1930, and James Walker was appointed Crown Solicitor.¹²⁶ Five years later in 1935, Walker was elevated to Solicitor-General. The position continued as a public service one until the introduction of the statute to establish a changed form of the office in 1969.

In Queensland, the Solicitor-General reappeared in 1922 as a non-political public servant within the Crown Law Department.¹²⁷ William Flood Webb was appointed Solicitor-General from the position of Crown Solicitor and Secretary of the Attorney-General's Department. As Solicitor-General, Webb started to appear in the High Court for Queensland;¹²⁸ however this was not a trend that continued amongst the public service appointed Solicitors-General of Queensland.¹²⁹ When Webb retired, the Crown Solicitor, H J H Henchman, was not elevated

¹²² This became regular after *Western Australia v Hammersley Iron Pty Ltd* (1969) 120 CLR 42.

¹²³ *Wise's Western Australian Directory* (H Wise & Co, 1935-1936) 773.

¹²⁴ See explanation of the role in Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) 135, 153.

¹²⁵ For example, Dr Stow, Crown Solicitor for Western Australia, often appeared in criminal and tax matters for the State. Stow would however brief out the important constitutional cases. J L Walker, as Crown Solicitor, also appeared for the State as counsel and instructing solicitor. The Crown Solicitor continued to appear regularly for the State as counsel (more often than the Solicitor-General) until the late 1950s. When G J Ruse was appointed Crown Solicitor, Ronald Wilson, who was Chief Crown Counsel in the Attorney-General's Department, started to appear for Western Australia. In 1969, Wilson was appointed Solicitor-General. For further information on representation of Western Australia in the High Court, see Appendix D.

¹²⁶ 'Crown Law Officers, Western Australia Appointments', *The Brisbane Courier* (Brisbane), 5 April 1930, 16 <<http://www.trove.nla.gov.au/ndp/del/article/21505110>>.

¹²⁷ Crown Law, above n 1, 2, 89.

¹²⁸ See, eg, *Public Curator (Qld) v Union Trustee Co of Australia* (1922) 31 CLR 66; *Commr Stamp Duties (Qld) v Lightoller* (1922) 31 CLR 382; *Mount Morgan Gold Mining Co Ltd v Commr Income Tax (Qld)* (1923) 33 CLR 76. See also Crown Law, above n 1.

¹²⁹ Webb's public service successors appeared less often in the High Court as counsel for Queensland, and again the Attorney-General would exercise this function on occasion. After the tenure of Neil Macgroarty as Attorney-General in the early 1930s, private counsel were briefed to appear for Queensland until the appointment of the first silk as Solicitor-General in 1989, Geoffrey Davies.

to Solicitor-General. Eventually this occurred in 1937, to give Henchman ‘higher status in the courts as representative of the Attorney-General.’¹³⁰

South Australia created a public service office of Solicitor-General in 1969 by simply changing the title of the Crown Solicitor, Andrew Wells, to ‘Solicitor-General’.¹³¹ Because of the fused profession in South Australia, prior to this time the Crown Solicitor had often appeared as counsel in important High Court litigation.¹³² From the office’s establishment, the South Australian Solicitor-General appeared regularly as counsel. In 1970, with a new appointment, Brian Cox, the Solicitor-General was taken outside of Crown Law. The officeholder was still a public servant within the Attorney-General’s Department until the statute was introduced in 1972.

In 1978 the Solicitor-General of the Northern Territory was created at the time of self-government by the *Law Officers Act 1978 (NT)*.¹³³ At that time, it was a public service appointment with the administrative responsibility of a departmental head. The legislation establishing the office was sparse. The Chief Minister, Paul Everingham, said that it was intended the office would deal with ‘more important legal matters’ and be briefed as a barrister.¹³⁴

The Tasmanian model of a public service Solicitor-General was influential in many jurisdictions, even into the second half of the twentieth century. It not only offered the advantage of a non-political officer to assist the predominantly political Attorney-General, but it was a relatively cost-effective model. Within the model, however, there was significant variation, with most appointees bearing a heavy administrative burden but some appointees taking on the function of counsel. The counsel function became the fundamental feature of the office in the ‘Modern Period’.

¹³⁰ Extract of report from the *Courier Mail* (6 August 1937) in Crown Law, above n 1, 103.

¹³¹ South Australia, *Parliamentary Debates*, House of Assembly, 1 March 1972, 3563 (L J King, Attorney-General).

¹³² From the 1920s, A J Hannan, the Crown Solicitor, appeared in constitutional cases. When Hannan retired, R R St C Chamberlain was appointed Crown Solicitor and he often appeared in the High Court as counsel for South Australia. In 1960, on the appointment of a new Crown Solicitor J R Kearnan, Wells began to appear regularly as primary counsel for South Australia (Kearnan did not appear regularly as counsel, as Hannan and Chamberlain had). For further information on representation of South Australia in the High Court, see Appendix D.

¹³³ Prior to then, the Northern Territory’s legal interests were served by the Commonwealth. See, eg, *McKinnon v King* (1927) 40 CLR 217; *Tuckiar v The King* (1934) 52 CLR 335 and *Bailey v Kelsey* (1959) 100 CLR 352. The first recorded appearance by the Northern Territory Solicitor-General, Ian Barker, in the High Court was a criminal matter, *Stephens v The Queen* (1978) 139 CLR 315.

¹³⁴ Northern Territory, *Parliamentary Debates*, House of Assembly, 10 May 1978, 948 (Paul Everingham, Chief Minister).

3.3.4 Common law powers and privileges

The adoption of a public service Solicitor-General raised a question about whether the office still exercised the powers and enjoyed the privileges of the office under the common law. The Supreme Court of New South Wales confirmed on two occasions that it did. In 1900, the New South Wales Solicitor-General was appointed from the private Bar and held a non-political appointment.¹³⁵ He was nonetheless, in accordance with tradition, listed in 1902 next in order of precedence to that of the Attorney-General in the Bar listing. The Council of the Bar was firmly against such a characterisation, believing that the Solicitor-General did not hold ‘the office of Solicitor-General as known to the Constitution; that is, he is not, though called Solicitor-General in the Commission, entitled by virtue of this Commission to any precedence.’¹³⁶ The government asked the Supreme Court to consider the question. The Court advised that while the non-political nature of the office was a substantial break with Britain, it still received the privileges conferred on the office, including the right of precedence.¹³⁷

In 1945 the matter was considered again in *Solicitor-General v Wylde*.¹³⁸ The case concerned the validity of an information laid by the Solicitor-General against the Bishop of Bathurst. The information alleged that the Bishop had acted illegally by administering the Holy Communion other than as required by the Book of Common Prayer of 1662. A preliminary issue arose as to whether the Solicitor-General had the necessary standing to lay the information. It was argued unsuccessfully that the Solicitor-General was ‘in a radically different position’, not comparable to his British counterpart, because the position was only that of a civil servant, and not the agent of the King in the same sense as in Britain.¹³⁹ Jordan CJ (with whom Halse Rogers J agreed) said that the change in New South Wales from a responsible minister to a member of the Bar had not removed the Solicitor-General’s common law powers and prerogatives.¹⁴⁰ Nicholas CJ (in equity) wrote a strong dissent. He echoed the concerns raised at the introduction of the 1916 Commonwealth legislation,¹⁴¹ relying heavily upon the ability in Britain to bring the office to account for its decisions and

¹³⁵ Peter J Tyler, *Humble and Obedient Servants: The Administration of New South Wales* (University of New South Wales Press, 2006) 17.

¹³⁶ Resolution of the Council of the Bar, extracted in Bennett, *A History of the New South Wales Bar*, above n 45, 147.

¹³⁷ Decision extracted *ibid* 147.

¹³⁸ (1945) 46 SR (NSW) 83.

¹³⁹ *Ibid* 85-6.

¹⁴⁰ *Ibid* 93; relying on *Attorney-General v Belson* (1867) 4 WW & a’B (E) 57, 62 (Molesworth J); [1867] VR 57, 62-3 and *Solicitor-General v Dunedin* (1875) 1 NZ Jur R N S 1, 15.

¹⁴¹ *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83, 108.

actions before Parliament: ‘it is because he is in Parliament that there is a safeguard against the abuse of his power.’¹⁴² I return to the continuation of the common law functions of the modern office in Chapter 4.6.2.

3.4 The ‘Modern Period’

In 1951, Victoria was the last State to remove its Solicitor-General from the ministry.¹⁴³ In the years before the move, the Victorian office had often been simultaneously held with the Attorney-General.¹⁴⁴ Since 1900 both Law Officers were generally politically qualified and no longer engaged in the day-to-day provision of legal advice and representation, relying instead on their officers in the Law Department.¹⁴⁵ The 1951 legislation created a new office with two functions: representative of, and chief legal adviser to, the Crown. While the Victorian Attorney-General said that the move brought the State into line with the other jurisdictions in Australia, it was actually an innovative step.¹⁴⁶ Other jurisdictions had depoliticised their offices, but Victoria was the first to create it as a quasi-independent, statutory one without large administrative duties within the department.

The statutory framework that Victoria adopted for its Solicitor-General was largely based on a formalisation of the non-statutory office of ‘Senior Counsel to the Attorney-General’ that was established in January 1950 and filled by Henry Winneke.¹⁴⁷ Winneke had a large influence over the features of the legislation, including the requirement to appoint from King’s Counsel and to remunerate the appointee appropriately so to compensate him for loss of income at the Bar. Winneke insisted that the office be outside the public service:

One thing I would insist on, though, is that it should not be a Public Service appointment. He might be required to report on senior officers, including, say, members of the Public Service Board. That would be an embarrassment if he were a public servant himself.¹⁴⁸

¹⁴² Ibid 108.

¹⁴³ *Solicitor-General Act 1951* (Vic).

¹⁴⁴ Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (F W Cheshire, 1968) 268; Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 219 (John Cain, Premier).

¹⁴⁵ Dean, above n 144, 269.

¹⁴⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5682 (Thomas Mitchell, Attorney-General).

¹⁴⁷ Robert Coleman, *Above Renown: Biography of Sir Henry Winneke* (Macmillan Company, 1988) 160-2.

¹⁴⁸ Ibid 160.

With only minor changes, the position established in 1951 continues in Victoria to this day.¹⁴⁹ The Victorian paradigm was the main template for the fundamental shift at the Commonwealth level from a public service appointment to the independent counsel system introduced by the *Law Officers Act 1964* (Cth). It also drove change in the other States and the Northern Territory between the 1960s and 1980s.¹⁵⁰ So while Victoria had lagged behind in removing the Solicitor-General from the rough and tumble of party politics in the ministry, it was the first Australian jurisdiction to adopt the paradigm of a permanent statutory office of Solicitor-General appointed outside of politics and the public service and relieved from large administrative burdens. The new model recognised the desirability of having a legally qualified officer with some statutory guarantees of tenure, status and remuneration. While not removing the constitutional and statutory links of accountability between the office and the responsible minister (the Attorney-General) it did go some way towards providing formal guarantees of independence from arbitrary interference by the government of the day.

3.4.1 The rise of a constitutional specialist

It was not until the 1960s that Solicitors-General started to emerge as leaders of the constitutional Bar, developing in the 1970s and 1980s the stranglehold on this work that now defines the contemporary office. In many of the States the Solicitor-General, in accordance with the traditional Law Officers' responsibilities, also had responsibility for the prosecution of the criminal law until the creation of the DPP in the 1980s and 1990s.¹⁵¹ For many Solicitors-General, this consumed a large amount of their time. When the Commonwealth adopted the Victorian paradigm in 1964, with its smaller responsibility in the criminal sphere, the intention was to develop an officer who would bring coherency and expertise in the areas of *constitutional and public law*.¹⁵² The States would also move towards this model. So while in the first decades of the High Court Solicitors-General played no great part in the

¹⁴⁹ The position in Victoria was updated and consolidated in the *Solicitor-General Act 1958* (Vic) and the *Attorney-General and Solicitor-General Act 1972* (Vic).

¹⁵⁰ See, eg, *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83 (Jordan CJ); New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (Kenneth McCaw, Attorney-General).

¹⁵¹ *Director of Public Prosecutions Act 1982* (Vic); *Director of Public Prosecutions Act 1984* (Qld); *Director of Public Prosecutions Act 1986* (NSW); *Crown Advocate Amendment Act 1986* (Tas) amended the *Crown Advocate Act 1973* (Tas) to become the *Director of Public Prosecutions Act 1973* (Tas); *Director of Public Prosecutions Act 1990* (NT); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA).

¹⁵² Interview, Anthony Mason.

constitutional jurisprudence that would define the Australian system,¹⁵³ they have subsequently appeared to defend the interests of their polities in the vast majority of constitutional cases. Chapter 5.2.2.3 explains the nature of the work that will be briefed to the Solicitor-General in the ‘Modern Period’. **Appendix D** provides further details of the trends in representation before the High Court in constitutional cases.

3.4.2 Balancing responsibility and independence

The move towards greater independence for the Solicitor-General did not come without consternation from Parliaments across the jurisdictions. This was primarily for the same reasons that questions had been raised in 1916 at the Commonwealth level and in 1873 in New South Wales: it was perceived by many in the Parliament that this move was accompanied by less accountability and responsibility. The Victorian government was keen to emphasise that the Solicitor-General had no continuing political role, becoming subject to direction by the Attorney-General, who remained responsible for all actions taken and decisions made by the Solicitor-General.¹⁵⁴ In New South Wales, much was made of ensuring the Solicitor-General was not a Minister of the Crown,¹⁵⁵ so as to make him ‘aloof from matters of policy of a political kind.’¹⁵⁶ The Attorney-General would remain responsible for all decisions of the Solicitor-General,¹⁵⁷ and the decisions of the Solicitor-General would be regarded as those of the Attorney-General.¹⁵⁸ The Attorney-General emphasised that the Solicitor-General would remain ‘always under ministerial control.’¹⁵⁹

When the position of ‘Senior Counsel to the Attorney-General’ was originally proposed to Winneke in Victoria, he rejected the argument that security of tenure would be necessary to protect the officeholder’s independence. He was said to have asserted ‘[t]he right man would need none, if he became dissatisfied, he could always return to the Bar.’¹⁶⁰

¹⁵³ In the first decades of federation, the interests of the States and Commonwealth were represented by private counsel in major constitutional litigation or, on rare occasion, the Attorney-General. The States were less involved in constitutional litigation during this period and there were less interventions in constitutional matters. It was only very occasionally that appearances were noted for the Solicitor-General.

¹⁵⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684 (Mitchell); Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 223 (Cain).

¹⁵⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 971 (McCaw).

¹⁵⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1478 (McCaw).

¹⁵⁷ *Ibid* 1480 (McCaw).

¹⁵⁸ *Ibid* 1481 (McCaw).

¹⁵⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (McCaw).

¹⁶⁰ Coleman, above n 147, 160.

However, many other jurisdictions included guarantees of tenure in the statute establishing the new Solicitor-General.¹⁶¹ This, and other measures in the new model not seen before in the Solicitor-General's office, were lauded for the independence they would foster. At the introduction of the Law Officers Bill 1964 (Cth), Attorney-General Billy Sneddon emphasised the importance of retaining a member of the practising Bar to ensure they continued to enjoy the independence of counsel. This would be reinforced by statutory tenure.¹⁶² The intention of the Act was described later by Justice William Gummow of the High Court as to give 'independence (and thus added value) [to] the office.'¹⁶³

In the Northern Territory it was asserted that the new Solicitor-General was to be considered 'more akin to a judicial or Ombudsman appointment than that of a departmental head'.¹⁶⁴ Therefore, removal was by the Administrator for enumerated reasons only.¹⁶⁵ This, however, caused some debate. The Opposition wanted a less restricted enumeration of the reasons for which the Solicitor-General could be removed by the Administrator, noting that any abuse of the removal power would be closely monitored by Parliament.¹⁶⁶ The amendment was strongly rebutted by the government, arguing that it widened the provision so that the Administrator could be advised to remove the Solicitor-General on purely political grounds: for example if the government did not like the Solicitor-General, or worse, the advice provided in a particular instance.¹⁶⁷ The Attorney-General, Marshall Perron, said: 'Political removal can only bring into question the Solicitor General's ability to give advice without fear or favour.'¹⁶⁸

Emphasis was also placed on the provisions relating to the salary, pension and, in the event of a person not being reappointed so as to qualify for such a pension, a payment to allow them

¹⁶¹ See full analysis of the current tenure provisions in Chapter 4.2.2.

¹⁶² Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Sneddon, Attorney-General).

¹⁶³ William M C Gummow, 'The 2005 Sir Maurice Byers Lecture: Statutes' (Summer 2005/2006) *Bar News* 30, 30.

¹⁶⁴ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 21 November 1985, 2108 (Marshall Perron, Attorney-General).

¹⁶⁵ Law Officers Amendment Bill 1986 (NT), inserting s 15 in the *Law Officers Act 1978* (NT).

¹⁶⁶ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 20 March 1986, 2324-6 (Brian Ede, Labor). See also similar debates in South Australia: South Australia, *Parliamentary Debates*, House of Assembly, 7 March 1972, 3651-2 (Robin Millhouse, Liberal and Country League, Deputy Leader of the Opposition and King).

¹⁶⁷ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 March 1986, 2422-8 (Perron).

¹⁶⁸ *Ibid* (Perron).

to re-establish themselves at the private Bar.¹⁶⁹ These provisions, it was thought, would ensure the best legally qualified candidate could be induced to take the position, and guarantee the independence of the office from political considerations.¹⁷⁰

In the Solicitor-General Bill 1983 (Tas) there was even greater focus on preserving the independence of the office, and a number of new mechanisms were introduced aimed at protecting the officeholder from undue interference from the Executive.¹⁷¹ This was said to be in recognition of the fact that the office required not only a person of requisite legal expertise, but also ‘the utmost integrity and independence on the part of the incumbent.’¹⁷² The legislation required a resolution of both Houses of Parliament prior to removal on the grounds of misconduct or incapacity, and required the Solicitor-General to tender an annual report to be tabled in Parliament. The provisions were defended on the basis that they would ensure the independence of the office, and set it apart from the administration of the department.¹⁷³

In Chapter 7 I consider the protection of the independence of the office in practice. What emerges from my data is the importance of an individual’s commitment to professionalism and ethical probity, less so than the structural guarantees so carefully crafted at the time of the introduction of the statutes.

The focus of the parliamentarians on the professional qualifications of the officeholder and the independence from the political branch cemented the change in the nature of the position from politician to professional. Reflecting this, Solicitors-General are no longer elevated to the position of Attorney-General; but are more likely to receive judicial appointment.¹⁷⁴

¹⁶⁹ See further analysis of these provisions in Chapter 4.2.

¹⁷⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (McCaw); Commonwealth, *Parliamentary Debates*, Senate, 30 October 1964, 1493 (Samuel Cohen, Labor). See also Coleman, above n 147, 160. When the provisions relating to salary were originally proposed by Winneke their objective was to offset the disadvantage he might suffer when approached to suggest names for judicial appointments, and he could ‘scarcely’ suggest his own: at 165.

¹⁷¹ Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 1983, 825 (Geoffrey Pearsall, Minister for Tourism).

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ This is particularly the case in the States, where judicial appointment from the office occurs often, and is reflected in many of the statutes that count tenure served as Solicitor-General towards an individual’s entitlement to the judicial pension. See further discussion in Chapter 4.2.3. At the Commonwealth level, only one Solicitor-General in the modern period, Stephen Gageler, has been appointed directly from the office to the federal bench (in Gageler’s case, the High Court). Anthony Mason was appointed to the New South Wales Court of Appeal from Solicitor-General, and then elevated to the High Court. Maurice Byers was offered an appointment to the High Court during his tenure as Solicitor-General but this was

3.4.3 Private practice in the ‘Modern Period’

Chapter 3.2.1 explained that after the 1890s, Solicitors-General had ceased to engage in private practice. In some jurisdictions, the right was reintroduced in the modern statutes.¹⁷⁵ Under the 1951 Victorian model and in accordance with the practice that had arisen since the 1890s across the colonies, the Solicitor-General was in the exclusive employ of the Crown.¹⁷⁶ This was also the case in the New South Wales statute.¹⁷⁷ In the other jurisdictions, however, when the legislation was introduced it included a provision that enabled the Solicitor-General to engage in private practice with the permission of the Governor or the Attorney-General.¹⁷⁸ This has affected the office in different ways.

In Western Australia and South Australia, when concern was raised over this arrangement, it was explained that it was *not* intended to allow the Solicitor-General to engage in extensive private practice, but to allow for small, discrete private employment such as at a university.¹⁷⁹ Nonetheless, with the appointment of Grant Donaldson as Western Australian Solicitor-General in 2012, consent was granted for him to retain an ongoing right to limited private

withdrawn. Similarly, Robert Ellicott was offered appointment to the High Court in 1979, but this was during his tenure as Attorney-General. He was appointed to the Federal Court in 1981. See further Troy Simpson, ‘Appointments that might have been’ in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007).

¹⁷⁵ Although note in the first decades of federation Attorneys-General continued to engage in private practice. The last Attorney-General to engage in extensive private practice was Robert Menzies. When he was appointed Commonwealth Attorney-General he continued to exercise a right of private practice but this did not go without controversy in the political sphere, and no Attorney-General since has engaged in such practice. See the discussion of the controversy that surrounded Menzies’ acceptance of a fee in *James v Commonwealth* (1936) 55 CLR 1 (PC) for appearing for Victoria when he was also appearing for the Commonwealth: Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 1936, 685-702; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1936, 707-8; Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1936, 770-1. See full recount in Allan W Martin, *Robert Menzies: A Life* (Melbourne University Press, 1993) 189-90.

¹⁷⁶ *Solicitor-General Act 1951* (Vic) s 3(b).

¹⁷⁷ *Solicitor-General Act 1969* (NSW) s 2(5)(f), although note this prohibits engagement in *remunerated* private practice only.

¹⁷⁸ See table of provisions in Appendix E and further discussion of the statutes in Chapter 4.2.3.

¹⁷⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 1969, 3611 (A F Griffith, Minister for Justice); South Australia, *Parliamentary Debates*, Legislative Council, 14 March 1972, 3796 (Sir Arthur Rymill, Liberal and Country League); South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3963 (Albert Shard, Chief Secretary and Minister for Health). Similar concerns were raised in other jurisdictions, see Northern Territory, *Parliamentary Debates*, Legislative Assembly, 20 March 1986, 2324-6 (Ede); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 March 1986, 2422-8 (Terry Smith, Leader of Opposition, Labor and Dan Leo, Labor).

practice.¹⁸⁰ In the Northern Territory the provision was included to provide flexibility *should* it be required to attract appropriate candidates to the position.¹⁸¹

In Queensland it was intended *at the time of the legislation's enactment* (1985) to allow the Solicitor-General to engage in private practice in a manner not seen since the nineteenth century. It was thought 'necessary for senior counsel to be permitted to supplement the income which he receives from his statutory duties in order to attract the most capable counsel.'¹⁸² This reasoning echoes that of the Bigge Report to the colonies back in 1823.¹⁸³

The right to private practice was opposed in Queensland by the Opposition, arguing that the post should be filled on a full-time basis,¹⁸⁴ and that modern government work required it.¹⁸⁵ A further concern was raised: it might compromise the independence of an officeholder who did not wish to lose the favour of the government in case it resulted in the loss of the right to continue to engage in private practice.¹⁸⁶ However, one member asserted the provision in fact supported the independence of the office because of the increased ease of returning to full-time private practice.¹⁸⁷

The practical effect of the right to private practice on the office in these jurisdictions is returned to in Chapter 7.5.3.

3.4.4 Reasons for the move to the 'Modern Period'

The reasons for the change in Victoria can be distilled into three strands that were largely mirrored in the other jurisdictions in the following decades (with the exception of New South Wales, which is considered separately below).

¹⁸⁰ Christian Porter, Attorney-General, 'New Solicitor General for Western Australia' (Ministerial Media Statement, 23 February 2012).

¹⁸¹ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 21 November 1985, 2108 (Perron). Michael Grant had considered taking the appointment in 2007 with a right to private practice, but eventually decided against it: Interview, Michael Grant.

¹⁸² Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1985, 4098 (N J Harper, Attorney-General and Minister for Justice). These were the reasons provided by the Western Australian Attorney-General in 2012 to provide a limited right to private practice in 2012. See Christian Porter, Attorney-General, 'New Solicitor General for Western Australia' (Ministerial Media Statement, 23 February 2012).

¹⁸³ See Chapter 3.2.1, above note 24, and accompanying text.

¹⁸⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4374-5 (Wayne Goss, Leader of the Opposition, Labor). Although note that as Premier, Goss made Patrick Keane's appointment under the Act with the right to private practice.

¹⁸⁵ *Ibid* 4389 (Angus Innes, Liberal).

¹⁸⁶ *Ibid* 4380 (Paul Braddy, Labor).

¹⁸⁷ *Ibid* 4384 (Douglas Jennings, National).

First, the complexity of legal problems faced by government in both advisory and advocacy settings required a dedicated and enduring counsel position: ‘a pilot to guide the ship of State through troublous waters’.¹⁸⁸ The increased constitutional complexities arising from the federal compact had given rise to an increase in constitutional litigation. This was coupled with the rise of the interventionist state and the increase in legal work associated with it.¹⁸⁹ When Western Australia introduced the Solicitor-General Bill 1969, the Attorney-General noted the advantages of an enduring, politically astute but non-political legal counsel for the State.¹⁹⁰ In some jurisdictions, the focus was less on the legal advisory function, and more on the function of the Solicitor-General as an advocate for government interests before the High Court. Commonwealth Attorney-General, Billy Sneddon, said that the success of the cases in which the Solicitor-General had appeared previously¹⁹¹ indicated ‘Crown counsel permanently associated with government legal work can bring special qualifications to the conduct of a case or the furnishing of an opinion at the highest level.’¹⁹²

Secondly, the limits of the Attorney-General’s ability to continue personally to play a part in providing legal services to government necessitated an alternative and non-political officer to take over this heavy responsibility. The position of the Attorney-General had developed in Australia to such a degree that it was almost wholly political. Sometimes officeholders had little, or even no, legal qualifications and experience.¹⁹³ In many jurisdictions it was often held with other important portfolios leaving the officeholder little time to devote to legal duties.¹⁹⁴

¹⁸⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5683 (Mitchell); See also: Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3524 (Arthur Griffith, Minister for Justice).

¹⁸⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5682-3 (Mitchell). See similar reasoning was given later in Queensland: Crown Law, above n 1, 227, referring to Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1985, 4097. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4388 (Innes).

¹⁹⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 April 1969, 3436 (Charles Court, Minister for Industrial Development).

¹⁹¹ The Solicitor-General at that time, Kenneth Bailey, had only appeared in a handful of litigious matters as counsel, many of which occurred towards the end of his tenure. Bailey himself described his role in the *Victoria v Commonwealth* (1957) 99 CLR 575 (‘*Second Uniform Tax Case*’) as the ‘nominal leader’ of the team only: Mel Pratt, Interview with Sir Kenneth Bailey (Mel Pratt Collection, June 1971-March 1972). It was not until Garfield Barwick was appointed Attorney-General in 1958 that Bailey started to appear as leading counsel in a more significant number of high profile cases for the Commonwealth.

¹⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Snedden).

¹⁹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 222-3 (Cain); Hanlon, *An Analysis of the Office of Attorney General*, above n 9, 154-5; 184-5.

¹⁹⁴ John Hatzistergos, ‘The evolving office of the New South Wales Attorney General’ (2012) 86 *Australian Law Journal* 197, 199-200.

Finally, in many jurisdictions the post was established to provide an incentive to allow the government to retain the services of particularly talented individuals serving in the Attorney-General's department.¹⁹⁵

The change in the position in New South Wales was, unlike the other jurisdictions, not driven by the above reasons. By the time of the introduction of the Solicitor-General Bill 1969 (NSW), the public service appointee had little administrative work and was largely acting as counsel, analogous to the position in the 'Modern Period'.¹⁹⁶ Codification of the position in the Act recognised the importance of the formerly public service position. It also added a number of additional provisions, for example, relating to the delegation of powers of the Attorney-General, and the appointment of a deputy for the Solicitor-General.¹⁹⁷ It was the need for an express delegation of the Attorney-General's powers that was the catalyst for the introduction of the legislation.¹⁹⁸ During the Attorney-General's absence or illness the common law allowed the Solicitor-General to fulfil the Attorney-General's functions,¹⁹⁹ but not otherwise. Section 36 of the *Constitution Act 1902* (NSW) prohibited the appointment of an Acting Attorney-General or for other Ministers to fulfil the role of Attorney in respect of the 'powers, duties, and obligations by law annexed or incident to the office.'²⁰⁰ The new Act allowed the Attorney-General to delegate the office's powers to the Solicitor-General in the interests of the efficient administration of justice.²⁰¹

3.4.5 A late addition: the Australian Capital Territory

Upon attaining self-government in 1988,²⁰² the Australian Capital Territory was serviced by the Government Solicitor, a body corporate that was headed by a public service appointee,

¹⁹⁵ For example, in Victoria, the move was to retain the services of Winneke: Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 224 (Cain). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 568 (Mitchell); Coleman, above n 147, 167. This was also behind the move in Western Australia, which wanted to keep Ronald Wilson: Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 April 1969, 3436-7 (Court), then Crown Counsel; and in South Australia, which wanted to keep Brian Cox: South Australia, *Parliamentary Debates*, House of Assembly, 7 March 1972, 3651 (King).

¹⁹⁶ Chapter 3.3.3.

¹⁹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (McCaw).

¹⁹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1475 (McCaw).

¹⁹⁹ *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83.

²⁰⁰ See the lengthy discussion in the Second Reading Speech of the inconveniences caused by this, particularly in relation to the commencement of prosecutions: New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1475 ff (McCaw). For the history of s 36, see Maurice Byers and Michael Gill, 'Review of Legal Services to Government' (New South Wales Attorney General's Department, 1993) [2.12]-[2.14] 5.

²⁰¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1478 (McCaw).

²⁰² *Australian Capital Territory (Self-Government) Act 1988* (Cth).

the Chief Solicitor.²⁰³ The Chief Solicitor performed the functions of a Crown Solicitor, although he would attend the Special Committee of Solicitors-General.²⁰⁴ This remained the position until 2011.

In 2011, the Australian Capital Territory introduced a new statutory office of Solicitor-General.²⁰⁵ The move was driven by two factors. First, there was a perception that the Australian Capital Territory's position in the national arena was being undermined because of the lack of a statutorily appointed Solicitor-General.²⁰⁶ The second reason was one seen in the other jurisdictions, that the 'increased complexity of the constitutional framework in which the ACT operates' required a Solicitor-General.²⁰⁷ It seemed to have been assumed that these more complex constitutional questions, and the advocacy function, were more properly performed by 'an independent statutory Solicitor-General'.²⁰⁸ The comment seems to accept that, today, the role of the Solicitor-General has stabilised enough so as to prescribe particular functions and a status to the position.

However, while the Australian Capital Territory government wanted a statutory Solicitor-General like the other jurisdictions, it was concerned that there was insufficient work for two separate offices – the Solicitor-General and the Chief Solicitor. The Territory wanted a 'part-time Solicitor-General'. One solution to such a problem would be to appoint a Solicitor-General from the private Bar with a right to continue his or her private practice (as in Queensland, and more recently Western Australia).²⁰⁹ However, the Territory opted for a different system: the Solicitor-General could be directed to exercise the Chief Solicitor's functions by the Attorney-General.²¹⁰ In this way, the two offices could be filled by the same person.²¹¹

²⁰³ *Government Solicitor Act 1989* (ACT).

²⁰⁴ See further Chapter 3.4.7.

²⁰⁵ *Law Officers Act 2011* (ACT) part 3.

²⁰⁶ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2353 (Simon Corbell, Attorney-General). See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 August 2011, 3629 (Shane Rattenbury, Greens, supporting the Bill).

²⁰⁷ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2353 (Corbell).

²⁰⁸ *Ibid.*

²⁰⁹ Provision was made for this in the ACT legislation. Under the *Law Officers Act 2011* (ACT) s 19, the Solicitor-General may engage in private practice with the consent of the Attorney-General.

²¹⁰ *Ibid* s 17(1)(d).

²¹¹ The first appointment, Peter Garrisson, was already Chief Solicitor, and was appointed to fulfill the functions of both offices: 'ACT Appoints Solicitor-General', *ABC News* 24 August 2011 <<http://www.abc.net.au/news/2011-08-23/act-solicitor-general/2852006>>.

By the time the Australian Capital Territory introduced its statutory Solicitor-General, a number of changes in emphasis had occurred. No longer was the Parliament concerned about maintaining ministerial responsibility for the actions of a non-ministerial Solicitor-General, and questions over whether the officeholder's independence was properly protected also failed to arise. It would seem that by this stage, these concerns about establishing a 'statutory' position of Solicitor-General had been settled by the relatively uncontroversial manner in which the officeholders in the other jurisdictions had performed their functions.

3.4.6 The remuneration dilemma: judicial salary or public servant's wage?

An effort to define the historical characteristics of the Solicitor-General is not complete without consideration of the basis for the remuneration of the office. The question of how to remunerate the Solicitor-General highlights the difficulty governments have had in defining exactly what the Solicitor-General is: no longer a politician, not quite a judge, and not just another public servant in the Attorney-General's department.²¹² Indeed, it is the office's remuneration that has been the cause of the greatest number of amendments to the legislation in the jurisdictions. Since the introduction of the model of an independent statutory officer, the jurisdictions have experimented with several models, including models that tie the Solicitor-General's remuneration to that of a public servant, or link the salary and/or pension entitlements to those of the Judiciary (which continues in Victoria, New South Wales Queensland, South Australia, Tasmania and the Northern Territory). More recently, in the Commonwealth, Western Australia and the Australian Capital Territory, a new model has emerged which sets the wage and/or entitlements and pension of the Solicitor-General independently from both the public service and the Judiciary through remuneration tribunals.

The following discussion will use the Commonwealth regime as an example. When it was enacted, the *Law Officers Act 1964* (Cth) set the salary at the level of a permanent head of a department (the same as that paid to the public service appointee under the *Solicitor-General Act 1916* (Cth)).²¹³ However, under the 1964 Act, the officeholder was granted the pension of a High Court judge under the *Judges' Pensions Act 1948* (Cth).²¹⁴ Parity with the Judiciary

²¹² A different, although related, dilemma had arisen in England. The Law Officers were initially paid on a fee basis, reflecting their role as lawyers, but were eventually provided with a base salary, which gave rise to an expectation that the Law Officers would be available as full time advisers to the government and the House of Commons: Edwards, *The Law Officers of the Crown*, above n 4, 4-5, 80, 90.

²¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Sneddon).

²¹⁴ *Law Officers Act 1964* (Cth) s 16 (note s 16(4)).

was further cemented in the 1980s with a judicial salary and long-service leave.²¹⁵ These moves were explained in 1983 by then Deputy Prime Minister Lionel Bowen as demonstrating ‘a clear intention to equate the Solicitor-General with the status of a judge of the Federal Court’.²¹⁶ As already explained above, these provisions also assisted in attracting the most qualified people to the position.

However, this trend ceased in the Commonwealth sphere in 1998 with the retirement of Gavan Griffith as Solicitor-General and the Howard Liberal/National Coalition government’s appointment of David Bennett to the position. Pension and long-leave entitlements of the Solicitor-General were brought into line with those of a public servant.²¹⁷ The purpose was to equate the office with a senior member of the Australian Public Service (APS).²¹⁸ The Opposition opposed the move, reminding the government that when the new office was established in 1964 it was expressly intended to be ‘outside the public service’.²¹⁹ Daryl Melham, Shadow Minister for Aboriginal and Torres Strait Islander Affairs, argued the Bill ‘diminish[ed]’ the office, ‘striking at the very heart of the independence of the Solicitor-General’ and undermining the government’s ability to attract quality candidates.²²⁰ The Attorney-General defended the Bill, arguing that it was likely the salary and entitlements would be set above the current rate (which was then equivalent to a judicial salary) by the Remuneration Tribunal and that it removed provisions in the legislation that may provide an incentive to individuals to stay in the job ‘simply to get a pension’.²²¹ These types of provisions are returned to in Chapter 4.2.3 when the current remuneration provisions are analysed.

Related to the question of remuneration is that of tenure. In the Commonwealth a limited form of tenure exists in the legislation – the term must not exceed seven years.²²² In many

²¹⁵ Long leave: *Statute Law (Miscellaneous Provisions) Act (No 2) 1983*; The salary was increased by the Governor-General under s 7 in 1980: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1983, 1046 (Lionel Bowen, Deputy Prime Minister and Minister for Trade).

²¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1983, 1046 (Bowen).

²¹⁷ *Law Officers Amendment Act 1998* (Cth).

²¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1997, 11925 (Daryl Williams, Attorney-General). See also Commonwealth Parliamentary Library, ‘Law Officers Amendment Bill 1997’ *Bills Digest No 124 1997-8* (Anne Pyle, 18 December 1997).

²¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1998, 874 (Daryl Melham, Labor).

²²⁰ *Ibid.*

²²¹ *Ibid* 882 (Williams).

²²² *Law Officers Act 1964* (Cth) s 6(1). See also *Solicitor General Act 1985* (Qld) s 5(2); *Solicitor General Act 1969* (NSW) s 2(2); *Solicitor-General Act 1969* (WA) s 3(1a); *Law Officers Act 2011* (ACT) s 16(3).

State jurisdictions appointment may be for an indefinite period, mirroring judicial tenure.²²³ In New South Wales in 2007 and Western Australia in 2006, the position has changed from life tenure to an appointment for a limited period.²²⁴ In New South Wales, Attorney-General John Hatzistergos introduced the amendment as follows:

Life tenure is an anachronistic concept. ... Life tenure fails to provide an incentive for continuous performance improvement. It also fails to acknowledge that turnover can be appropriate, particularly in positions as difficult, demanding and high profile as those covered by this bill.²²⁵

The move was opposed in Parliament. Opposition parties claimed that limited terms and the desire to obtain reappointment would leave officeholders vulnerable. Further, it was argued that life tenure assisted in attracting the highest calibre persons for the positions by providing ‘the certainty of independence and non-interference’.²²⁶ Greg James, who had conducted a review for the government that had preceded the amendments, had anticipated these criticisms. He said that other mechanisms sufficiently protected the independence of officeholders, including professional obligations and ethics of independence and detachment, and protection against improper dealings by government through the variety of integrity offices including, for example, the Ombudsman.²²⁷

James’ focus on the professional obligations and ethics of officeholders as legal practitioners guaranteeing independence, rather than statutory guarantees of tenure, to some extent undermines the assertion by politicians that the statutory guarantees of independence in the legislation establishing the Solicitor-General were fundamental. How, in practice, independence has been protected – through the professional obligations and integrity of the individual as against the statutory guarantees such as tenure and remuneration – will be considered in Chapter 7.²²⁸

²²³ *Solicitor-General Act 1983* (Tas) s 5(3); *Law Officers Act 1978* (NT) s 13(1); *Solicitor-General Act 1972* (SA) s 5; *Attorney-General and Solicitor-General Act 1972* (Vic) s 4.

²²⁴ *Solicitor General Act 1969* (NSW) s 2(2) inserted by *Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Act 2007* (NSW); *Solicitor-General Act 1969* (WA) s 3(1a), inserted by *Solicitor-General Amendment Act 2006* (WA).

²²⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2671 (John Hatzistergos, Attorney-General).

²²⁶ See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2007, 3030 (John Ajaka, Liberal); *ibid*, (Lee Rhiannon, Greens).

²²⁷ Quoted in *ibid* 3030 (Fred Nile, Christian Democratic Party); access to the full report was sought through Freedom of Information but it was denied on the basis of cabinet confidentiality.

²²⁸ See particularly Chapter 7.3 and 7.4.

3.4.7 The Solicitors-General of Australia

The greatest little club in the country.²²⁹

The most exclusive club in Australia.²³⁰

The history of the Australian Solicitors-General shows the situation to be different from that in Britain, the US and New Zealand in a very important respect. In our federal system, the modern institutions of Attorney-General and Solicitor-General have developed largely simultaneously across the jurisdictions. In the course of this development, a ‘club’ of Solicitors-General has emerged, known formally as the Special Committee of Solicitors-General (SCSG). (Although Anthony Mason has postulated that the correct collective noun is a ‘slurry’ of Solicitors-General.)²³¹

Starting in the 1970s, at around the same time as the statutory counsel model was being adopted across the Australian jurisdictions, regular meetings between Solicitors-General started to occur.²³² This started when the State Solicitors-General were called upon as a collective to assist the Attorneys-General develop a legal proposal for the severing of constitutional links with Britain.²³³ This group came to include the Commonwealth and became more formalised. The SCSG is now a sub-committee of the Standing Committee of Attorneys-General (SCAG).²³⁴ Today, the Committee meets regularly (between two and four times a year). The Committee’s agenda items include providing advice to SCAG on matters referred to the Committee; providing SCAG with recommendations in relation to possible areas of law reform of its own volition; and reviewing upcoming constitutional litigation. In this last respect, Solicitors-General may take the opportunity to divide arguments in upcoming cases between themselves, or consider tactics in the presentation of argument.

²²⁹ Interview, William Bale.

²³⁰ Interview, Chris Kourakis.

²³¹ Anthony Mason, ‘Interveners and Amici Curiae in the High Court: A Comment’ (1998) 20 *Adelaide Law Review* 173, 175.

²³² This group included Crown Solicitors and the Chief Solicitor of the Australian Capital Territory before the Solicitor-General model was adopted in all of the jurisdictions. It also includes, from time to time, the New Zealand Solicitor-General: Standing Committee of Attorneys-General, *Procedures for the Standing Committee of Attorneys-General* (August 2009) [7.5].

²³³ For a full telling of the history of the *Australia Acts*, and the role of the Solicitors-General, see Anne Twomey, *The Australia Acts 1986: Australia’s Statutes of Independence* (Federation Press, 2010).

²³⁴ From 2011, this has been renamed the Standing Council on Law and Justice: New South Wales LawLink, Attorney-General and Justice, *Standing Council on Law and Justice* (20 October 2011) <<http://www.scag.gov.au/>>.

The SCSG is now a well-established institution within the Australian constitutional order. Since 1996, it has reported annually to SCAG.²³⁵ In addition to its important contribution to drafting the *Australia Acts 1986*, it has also had significant involvement in other nation-wide constitutional initiatives. Examples include negotiations over the jurisdiction of the seabed off the coast of Australia,²³⁶ the creation of the cross-vesting scheme,²³⁷ the drafting of the crimes at sea legislation and the choice of law scheme.²³⁸ The SCSG has also initiated consideration of potential areas of national policy reform, such as the integration of the Australian courts.²³⁹

Peculiar to the Australian context, the Solicitors-General *as a collective* have evolved into an important institution in the federal constitutional system. The role and influence of the group in its advisory function, its impact on constitutional litigation in the High Court, and in supporting individual Solicitors-General in performing their respective functions is returned to in Chapters 5.3.2, 6.4.3 and 7.5.4.

3.5 Conclusions

The historical narrative of the Australian Solicitors-General reveals an evolution driven largely by the desire to create a paradigm in which the legal functions of the Law Officers, at least, are freed from many of the controversies that continue to surround the offices in Britain. The contemporary model, with its placement of the Solicitor-General outside politics with a statutory basis, was intended to create an officer that provided both the actuality and appearance of independence from politics in the discharge of the Law Officers' legal functions. The non-political nature of the office and its exclusively legal focus has also meant that there has been a shift in its essence: officeholders have moved away from being politicians with some legal qualifications and are now highly qualified legal professionals.

²³⁵ Gavan Griffith, 'Report: Second Law Officer to the First Law Officer 1 July 1995-31 December 1996' (Solicitor-General of Australia, 1996) (on file with author) [7.2].

²³⁶ This was necessitated by the High Court's decision in *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'). Buti, above n 124, 173-4.

²³⁷ This was found partly unconstitutional in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, but in so far as it vested federal jurisdiction in State courts, remains operative.

²³⁸ See 'Report of the Special Committee of Solicitors-General to the Standing Committee of Attorneys General for year ended June 30, 1995' (Secretary, SCSG, 1995) 1 (on file with author). The SCSG was also consulted in 2009 by SCAG regarding the constitutional difficulties of implementing a national mechanism for handling complaints against judicial officers. See Senate Legal and Constitutional Affairs References Committee, 'Australia's Judicial System and the Role of Judges' (2009), 'Additional Information, Attorney-General's Department, 29 September 2009, 1, referred to in the Senate Report, 93.

²³⁹ See 'Report of the Special Committee of Solicitors-General to the Standing Committee of Attorneys General for year ended June 30, 1995' (Secretary, SCSG, 1995) 2. Interview, John Doyle.

This is more akin to the early appearance of the British Law Officers in the thirteenth century as legal professionals to the Monarch. The Australian Attorney-General has been, almost since inception, at the core of government as a member of the Executive Council and later Cabinet, heading a large administrative department. This is in direct contrast with Britain. The Australian system secures the benefit of a politically integrated Attorney-General with oversight across all government legal services but, as this chapter has shown, acknowledges the increased danger of political and administrative pressures in this environment through the development of independent statutory officers of the Solicitor-General and later the DPP to complement and assist the Attorney-General.²⁴⁰

The codification of the Solicitor-General's role in the second-half of the twentieth century acknowledges the growing importance of the Solicitor-General to government across the Australian jurisdictions. Since its enshrinement in statute, the role has been a stable part of all Australian constitutional orders.

The evolution of the Solicitor-General has allowed it to remain relevant in the Australian constitutional order into the twenty-first century. While this chapter has provided an understanding of the intention and events that have driven this evolution, to fully understand the contemporary role of the Solicitor-General also requires a close examination of the statutes, considering the extent to which the traditional Law Officers' functions remain and the impact of the new legislative characteristics of the office. It will also be necessary to examine how the office's functions have been exercised and consider the extent to which the goals of the statutes' framers have been realised. In Chapter 4 I turn to a full analysis of the legislative framework; detailed consideration of its operation is contained in Chapters 5, 6 and 7.

²⁴⁰ Edwards identified this as a weakness in the overly political Law Officer model: Edwards, *The Attorney General*, above n 1, 75. See further Chapter 2.4.1.

4 COUNSEL FOR THE CROWN

4.1 Introduction

The evolutionary moment in which the Australian Solicitor-General now rests differs markedly from the British tradition received into the colonies in the nineteenth century. This chapter places the historical developments traced in the previous chapter into their contemporary legal setting. In doing so, it will assess the extent to which the intentions of the framers of the statutes have been realised in the legal sphere. The next chapters (Chapters 5, 6 and 7) consider the realisation of the historical intentions and legislative framework in practice.

The Solicitor-General's evolution has created a unique interplay of statute, common law, constitutional theory and convention. For reference, a comparative matrix of the statutes across the jurisdictions is contained in **Appendix E**.¹ This chapter starts with a review of the statutory provisions establishing the office, including those governing the office's appointment, tenure, removal and remuneration. The statutory establishment, together with these provisions providing some guarantee of tenure, was one of the innovations in the move from the 'Public Service Period' to the 'Modern Period' in the second half of the twentieth century. Next, the chapter considers the different functions of the Solicitor-General. While subtle differences exist across the Australian jurisdictions, broadly speaking the office's core function is to act as counsel for the Crown. This wide formulation provides the statutory touchstone which guides the office's role and the normative ethical framework in which it must operate.

The chapter then turns from the functions of the Solicitor-General to the difficulty of accurately defining the nature of the Solicitor-General's client. My review of the foreign literature in Chapter 2 demonstrated that it is often the conceptualisation of the nature of the client that influences the different normative types of the office. The statutes refer to the 'Crown', and the chapter explores the nature of the Crown in the Australian constitutional order, paying particular attention to the disparate interests that can arise within an indivisible Crown. It will discuss the impact of the peculiarities of the Crown on the Solicitor-General as a legal practitioner.

¹ In this chapter, reference to the different statutes establishing the office of Solicitor-General will be made simply by reference to the jurisdiction.

To understand properly the legal nature of the Solicitor-General's role, the statutory position must be informed by an understanding of the Law Officers' common law obligations to the public interest. I argue in the final section of the chapter that the best interpretation of the statutory provisions is that the Solicitor-General's traditional role as a Law Officer to protect the public interest continues to exist, but this has been curtailed so that it now only manifests in the Solicitor-General's conduct of litigation and in the office's advisory function, with any obligation to *act* independently in the public interest removed.

4.2 Appointment, tenure, removal and remuneration

Appointment and protections afforded to tenure and remuneration are important dimensions of the independence from government of any statutory office. Amongst the Australian jurisdictions, there is a large degree of variation between the statutory provisions relating to appointment, tenure, removal and remuneration of the Solicitor-General. This raises real questions about how the different provisions assist in protecting the office's independence. This section will explain the different statutory provisions before considering the impact they may have on an officeholder's independence.

4.2.1 Appointment

The previous chapter explained that the move from a ministerial position was driven, in part, by the perceived advantages of having an officer who could offer continuity of advice and representation across administrations.² Appointment of the Solicitor-General is by the Executive. The Commonwealth and Victoria have introduced a formal, merits-based appointment process with a selection panel, but this is not mandated by statute and in the other jurisdictions it continues to be a closed process. In many jurisdictions the Solicitor-General's term is temporally limited, ranging from between five and ten years; although an officeholder may be reappointed.³ In the other jurisdictions, the term may be unlimited, although in some it is subject to a mandatory retirement age.⁴

Qualification for appointment is similar across jurisdictions and largely mirrors that for appointment to a superior court. In some jurisdictions qualification for appointment as

² Chapter 3.4.4.

³ Cth s 6(1); NSW s 2; Qld s 5(2); WA s 3(1a); ACT s 16(3).

⁴ SA ss 5(1), 8(2); Vic s 4(1); Tas ss 4(1) and 6(1)(a); NT s 13(1).

Solicitor-General is less strict than for appointment to the bench,⁵ and in some, more so.⁶ The stricter qualifications in Queensland and Victoria emphasise the position of the Solicitor-General as a senior member of the Bar, rather than the legal profession more generally.

4.2.2 Tenure and removal

The move from a public service Solicitor-General to a statutory office was explained in many jurisdictions by reference to the increased independence that would be guaranteed by statutory tenure.⁷ Despite the large degree of symmetry in the underlying purpose of the statutes, the power of removal, and therefore the strength of the security of tenure, differs across the jurisdictions.⁸ Four types of removal mechanisms can be identified.

The first is located in the federal and Northern Territory statutes: the Governor-General or the Administrator ‘*shall* remove the Solicitor-General from office’ in the event of incapacity (except by reason of temporary illness), misbehaviour, or bankruptcy/insolvency.⁹

In contrast, the second type, found in South Australia and Western Australia, provides that the Governor *may* remove the Solicitor-General on similar grounds.¹⁰ The use of the word ‘*may*’ implies a discretion as to whether the Governor must actually remove the appointee in event of the contingencies.¹¹

The statutes in Queensland and the Australian Capital Territory combine these two types of mechanisms.¹² For example, in Queensland the Governor in Council *may* terminate the appointment for misbehaviour or incapacity, but the Governor in Council *shall* terminate the appointment if the Solicitor-General becomes bankrupt, is absent from duty, or contravenes

⁵ In South Australia the appointee must be a legal practitioner for not less than 7 years (as opposed to 10 years for the Supreme Court): SA s 4(1); in Tasmania 7 years (as opposed to 10 years): Tas s 4(3); in Northern Territory 5 years (as opposed to 10 years): NT s 13(1)(a).

⁶ In Queensland, the appointee must be a barrister: Qld s 5(3) (contra *Constitution of Queensland Act 2001* (Qld) s 59); In Victoria the appointee must be Senior Counsel: Vic s 4(1) (contra *Constitution Act 1975* (Vic) s 75B). The New South Wales legislation initially provided that the Solicitor-General must be one of her Majesty’s Counsel (s 2(1)), but this was removed in 1993 by the *Legal Profession Reform Act 1993* (NSW).

⁷ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Snedden, Attorney-General). See further discussion in Chapter 3.4.2.

⁸ The security of tenure afforded to Solicitors-General is in many jurisdictions not replicated in relation to an acting appointment: see Cth s 11(3); Qld s 7(1); Tas s 4(5); WA s 8(1); NT s 13(4).

⁹ Emphasis added. Cth s 10; NT s 15.

¹⁰ SA s 7; WA s 7.

¹¹ See further the explanation of this presumption of statutory interpretation in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Australia, 6th ed, 2006) 333; and its expression in *Acts Interpretation Act 1915* (SA) s 34; *Interpretation Act 1984* (WA) s 56.

¹² Qld ss 17(3) and (4); ACT s 21.

the conditions of the office's right to private practice.¹³ Within the first two types, whether the enumerated grounds for removal are the *only* basis on which removal can take place is unclear,¹⁴ although there are strong statutory presumptions, reinforced by the purpose of the provision, that support such a conclusion.¹⁵

The third type is in the Tasmanian statute, and most closely resembles the guarantees of judicial tenure. A Solicitor-General cannot be removed by the Governor unless he or she 'receives from both Houses of Parliament resolutions requesting that the person be so removed and not otherwise'.¹⁶ The Governor can suspend the Solicitor-General on grounds of incapacity, bankruptcy, conviction of a crime punishable by imprisonment for a period of 12 months or more, or misconduct.¹⁷ If the Solicitor-General is suspended and there is no resolution from each House of Parliament requesting the Governor to remove the person from the office, the person will be reinstated as Solicitor-General.¹⁸

The final type, found in New South Wales and Victoria, is markedly different in that the statute provides for an apparently discretionary removal mechanism, more akin to the notion of appointment at pleasure seen in the early British and colonial appointments.¹⁹

4.2.3 Remuneration

The basis for remuneration of the office, including any entitlement to a pension, is another important aspect of the security of tenure afforded to it. Since the introduction of the model of an independent statutory officer, the jurisdictions have experimented with several methods of remuneration, including those linking the salary and/or pension entitlements to that of the Judiciary,²⁰ replication of the public service remuneration packages, and more recently a new model which sets the wage of the Solicitor-General independently from both the public

¹³ Qld ss 17(3) and (4).

¹⁴ This ambiguity exists in all jurisdictions other than Northern Territory. Section 15 of the NT Act provides the Administrator shall remove the Solicitor-General from office 'if, and only if,' the grounds exist.

¹⁵ Embodied in the latin maxim *expressum facit cessare tacitum*. See discussion in Pearce and Geddes, above n 11, 142-4; *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529, 550 (Dixon J).

¹⁶ Tas s 6(3).

¹⁷ Tas s 6(4).

¹⁸ Tas s 6(5).

¹⁹ NSW s 2(5)(a) (note under s 2(5) other grounds on which the Solicitor-General is deemed to have vacated office are enumerated); Vic s 4(1).

²⁰ Which continues in various guises. See NSW s 6; Qld s 11; SA s 10; Tas s 5(1)(ab) and (b); Vic ss 4(3) and 6; NT s 13(5).

service and the Judiciary through remuneration tribunals.²¹ The historical context behind these changes is further explained in Chapter 3.4.6.

Throughout most of the nineteenth century in the colonies, a Solicitor-General could engage in private practice to supplement his income. This privilege was removed under the public service model but has re-emerged, in more restricted forms, in a number of the statutes. In Victoria, the office may not engage in any other employment,²² and in New South Wales the office may not engage in any other remunerated employment.²³ In contrast, in the Commonwealth and the other States and Territories remunerated employment may be engaged in with the consent of the Attorney-General,²⁴ the Governor,²⁵ or the Governor in Council.²⁶ In Queensland, a general right to engage in private practice has been approved since the first appointment under the Act in 1992,²⁷ and in Western Australia this was granted in 2012. The impact of this on how the office operates, and particularly its independence, is explored in the following chapters.²⁸

4.2.4 Impact on independence

Considerable variation across the jurisdictions exists in terms of the Solicitor-General's tenure, removal, remuneration and pension entitlements. In light of the largely uniform objectives of the legislation and the cross-fertilisation across jurisdictions when the statutes were drafted, this is surprising. The distinctions raise potentially fundamental questions about the level of independence that the office enjoys.

Limited terms with the prospect of reappointment immediately raise questions about the office's independence. Term appointments may contribute to an environment in which an officeholder seeks to ingratiate themselves, perhaps through the provision of accommodating advice, in the hope of reappointment. In some jurisdictions, there is the possibility of removal on discretionary grounds. As Geoffrey Hazard and W William Hode postulate in the general lawyering environment: 'the lawyer wishing to maintain employment may be tempted to play

²¹ Cth s 7(1); WA s 4; ACT s 16(4).

²² Vic s 4(3)(b).

²³ NSW s 2(5)(f).

²⁴ Cth s 9; SA s 6(b); Tas s 10(2)(v); ACT s 19; NT s 14(c).

²⁵ WA s 6.

²⁶ Qld s 16.

²⁷ Although note the conditions that attach to this right relating to priority of work and conflicts of interest: Qld s 16(1A).

²⁸ See particularly Chapter 7.3.1 and 7.5.3.

sycophant to [the] client'.²⁹ Even if this does not occur in practice, the possibility of removal or reappointment may create this perception.

In some jurisdictions, the pension entitlements create a fiscal incentive to seek reappointment as Solicitor-General, or appointment to the bench. This is because under some of the statutes, the pension provisions establish a situation where appointees may not be entitled to a full pension, or a pension at all, *unless* they are either reappointed as Solicitor-General,³⁰ or are appointed as a judge.³¹ Appointment of officeholders may be for a fixed term, and those officeholders who may not be entitled to a full judicial pension *unless* they are reappointed. For example, in Victoria prior to 2006, the judicial pension entitlement applied in full only to those officeholders who had served 10 years *and* had attained the age of 65 years.³² Thus, a Solicitor-General appointed for a 10-year-term (which is the practice in Victoria) at the age of 54 (or younger) would *not* be eligible for the full judicial pension at the end of that term. This created, at least in theory, a financial incentive for that officeholder to seek reappointment. In 2006, legislation was introduced to alleviate this possibility, giving former Solicitors-General full entitlement to a pension upon attaining the age of 65 years if the officeholder had served a 10-year-term.³³ In South Australia and the Northern Territory the issue has not arisen because, in practice, appointment is for life. The possibility of such a problem has however been highlighted in New South Wales with the introduction of a statutory maximum 10-year-term in 2007,³⁴ with the possibility of reappointment. The full pension entitlement requires an officeholder to have completed a 10-year-term *and* attained the age of 60, thus potentially disadvantaging any officeholder appointed younger than 50 years old.³⁵

Some statutes provide that the service of an individual as Solicitor-General may be counted as service as a judicial officer if the individual is subsequently appointed to the bench. In

²⁹ Geoffrey C Hazard and W William Hodes, *The Law of Lawyering* (Aspen Publishers, 3rd ed, 2001) § 23.2, 23-3, referred to in Kevin H Michels, 'Lawyer Independence: From Ideal to Viable Legal Standard' (2010) 61(1) *Case Western Reserve Law Review* 85, 112.

³⁰ See NSW s 2(g). This was also the position in Victoria under s 6(3) prior to amendments in 2006 by *Justice Legislation (Further Amendment) Act 2006* (Vic); contra position in SA, Tas and NT with life appointments (see full references above n 4).

³¹ NSW s 6(3)(a); Qld s 13.

³² Or have served 20 years; or were appointed prior to the age of 60 years and have been afflicted with a permanent incapacity: *Constitution Act 1975* (Vic) s 83(1).

³³ Vic s 6(3), amended by *Justice Legislation (Further Amendment) Act 2006* (Vic).

³⁴ This amendment is to commence with the next appointment of Solicitor-General in that State. The terms and conditions of the incumbent, Michael Sexton SC, have been grandfathered by transitional provisions: *Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Act 2007* (NSW) Schedule 1, cl 5.

³⁵ NSW s 2(g).

those jurisdictions where the Solicitor-General is appointed for an unlimited term and is otherwise entitled to the pension, this gives rise to no issue.³⁶ In contrast, in Queensland there is no general entitlement to a judicial pension for the Solicitor-General; however, if the person who holds or has held office as Solicitor-General is appointed to the Supreme or District Courts, then for the purposes of the *Judges (Pensions and Long Leave) Act 1957* (Qld) any period of service as Solicitor-General will be counted as service as a judicial officer.³⁷ In New South Wales, where, as explained above, the Solicitor-General may not receive the full pension because of their age at the time of appointment, the legislation makes similar provision.³⁸

The possibility of appointment to the bench itself raises questions as to whether a Solicitor-General, seeking appointment, may try to impress the government. Equally, the possibility of future appointment to the bench, where pension entitlements may be carried across from time served as Solicitor-General may assist the government in securing lawyers of outstanding merit who might otherwise have aspired to the bench. The roll-over of pension entitlements means there is no *disincentive* for these individuals to accept appointment as Solicitor-General.

The divergent protections of tenure and remuneration provide *theoretically* differing levels of protection for the independence of the office. However, despite these differences, the following chapters demonstrate that the degree of independence that officeholders exhibit in practice across the jurisdictions differs very little, and that those divergences that do arise are not readily related to the differences in statutory regimes. Despite the intentions of the legislation, this raises questions about the effectiveness of ‘statutory tenure’ in the protection of independence. The operation of the statute in practice and its importance in protecting the independence of the office is returned to in Chapter 7.

4.3 ‘Counsel’ for the Crown: adviser and advocate

The statutory functions of the Solicitor-General are substantially uniform across the jurisdictions and can be broken down into core and peripheral functions. Acting as counsel for the Crown is the core function of the Solicitor-General. None of the statutes provides a monopoly to the Solicitor-General over particular types of counsel work, or obliges the

³⁶ SA s 10; NT s 13(7); *Constitution Act 1975* (Vic) s 83(6)(a).

³⁷ Qld s 13.

³⁸ NSW s 6(3)(a).

government to use the office as counsel. It is curious that the articulation of the Solicitor-General's core function is so sparse in the statutes, particularly given the rich history of the role in Britain and Australia.

The precise statutory expressions of the office's core function fall into three categories. The statutes in the first category state that the Solicitor-General is to act as counsel for the Crown of the State or 'her Majesty'.³⁹ The second category provides that the Solicitor-General acts as counsel for the Crown *at the request of the Attorney-General*.⁴⁰ This recognises the Attorney-General's role in representing the Crown and emphasises the relationship between the two Law Officers. The relevance of this relationship is returned to in the analysis of the extent to which the Solicitor-General continues to perform any of the traditional Law Officer functions.⁴¹

Categories one and two make no distinction between the two main functions of counsel: advocacy and advising. These functions are subsumed in the general function to act as counsel. The dichotomy between the two functions is drawn out in the third category, which exists in the federal statute. In drawing the dichotomy, the Commonwealth Act picks up the different emphases of the first two categories in an interesting combination. The Solicitor-General is to act as counsel for the 'Crown in right of the Commonwealth', together with a number of other listed entities.⁴² The Solicitor-General is also to furnish his or her opinion *to the Attorney-General* on questions of law referred to him or her by the Attorney-General. The presence of the dichotomy implies the obligation to act as counsel in the first paragraph includes only the representative functions of counsel. This formulation of the function confirms that the natures of the two functions are distinctly different.⁴³

Setting aside the core functions, the predominance of the Solicitor-General's other functions are common to all jurisdictions. The Solicitor-General must perform other acts as counsel as the Attorney-General requests.⁴⁴ In some jurisdictions, the Solicitor-General has the express

³⁹ NSW s 3(1)(a); Tas s 7(a); Vic s 5(a); WA s 9(a); NT s 14(a).

⁴⁰ Qld s 8(a); SA s 6(a)(i); ACT s 16(1)(a).

⁴¹ Chapter 4.6.

⁴² The different entities are returned to in the discussion below at Chapter 4.4.1.

⁴³ See further analysis in Chapter 4.3.1.3.

⁴⁴ Cth s 12(c); NSW s 3(1)(a); Qld s 8(b); SA s 6(a)(ii); Tas s 7(b); Vic s 5(a); WA s 9(a); ACT s 16(1)(b); NT s 14(b). Presumably this includes other roles of counsel that do not fall strictly within the advocate or adviser functions, this may include prosecuting matters on behalf of the Director of Public Prosecutions (see eg, *Director of Public Prosecutions Act 1983* (Cth) s 15(e)), or acting to assist executive investigative bodies, such as the Australian Crime Commission (see, eg, *Australian Crime Commission Act 2002* (Cth) s 50).

function of performing duties bestowed on the office by other statutes;⁴⁵ and in the other jurisdictions, while not express, this occurs.⁴⁶ In the Australian Capital Territory, the Solicitor-General may also be directed to exercise the Chief Solicitor's functions.⁴⁷ Other functions have arisen in practice, most notable in international forums, and are outlined at the commencement of Part 2.

4.3.1 The Solicitor-General's independence

Independence as a dimension of the Law Officer's role is prominent in the debate in the Australian and foreign literature.⁴⁸ In this literature, the Law Officers' independence is thought to be required for two fundamental reasons. The first is to protect officeholders from the influence of politics in the exercise of their public interest functions. The second is to ensure that officeholders can discharge their legal functions free from pressures of political agendas.

The statutory functions of the Solicitor-General emphasise the legal nature of the role in the 'Modern Period'. This emphasises the importance of the legal profession's ethical obligations in maintaining an officeholder's independence. The statute itself provides some guarantees of independence through the tenure, removal and remuneration provisions.⁴⁹ This section considers the extent to which, by defining the Solicitor-General's role as counsel, the statutes import professional obligations to retain independence. I return in the last section of this chapter to consider the extent to which the Solicitor-General retains any obligations to the public interest and the importance of independence in discharging them.⁵⁰

In the British law tradition counsel refers to practising barristers.⁵¹ The statute dictates therefore that the Solicitor-General's role must be largely informed by that of a barrister,⁵²

⁴⁵ Tas s 7(c); Vic s 5(b); WA s 9(b); ACT s 16(d); NT s 14(c).

⁴⁶ See those functions listed in Appendix E.

⁴⁷ ACT s 16(c).

⁴⁸ See Chapter 2; for similar comments in the US context see: Kristen Norman-Major, 'The Solicitor General: Executive Policy Agendas and the Court' (1994) 57 *Albany Law Review* 1081, 1084.

⁴⁹ Chapter 4.2.

⁵⁰ Chapter 4.6.2.

⁵¹ Daniel Greenberg (ed), *Jowitt's Dictionary of English Law* (Sweet & Maxwell Thomson Reuters, 3rd ed, 2010) 569; Bryan A Garner (ed), *Black's Law Dictionary* (Thomson Reuters, 9th ed, 2009) 'counsel'.

⁵² In Queensland and Victoria, this relationship between the Solicitor-General and barristers is reinforced by particular qualification requirements: Qld s 5(3); Vic s 4(1). With very few exceptions across the jurisdictions, Solicitor-General appointments after the introduction of the statutory counsel paradigm have been of barristers. The exceptions to this rule have occurred in those jurisdictions operating with a fused profession (for example, Bradley Selway (SA), who was appointed from Crown Solicitor and Robert Meadows (WA), was appointed from a partnership at Freehills).

and the independence expected of the office will be predominantly influenced by the professional obligations of barristers. The content of the Solicitor-General's independence will be informed by the formal professional obligations of the Bar (for example, those contained in the Australian Bar Association's Model Rules (ABA Model Rules)). In this section, I explain that the reference to counsel has imported into the statute a minimum level of independence in the office, although this differs between the advisory and advocacy functions.

To understand the expression of independence caught by the reference to counsel in the statute, this discussion first turns to the meaning of independence and the three dominant types of independence associated with legal professionals.

4.3.1.1 Independence in theory

Independence as a conceptual idea implies a level of freedom or autonomy. A distinction is often drawn between the 'freedom *from*' external constraints, an extrinsically focussed freedom, and the 'freedom *to*' achieve some objective, which requires an intrinsic capacity to do so.⁵³ The freedom from external influences requires consideration of the constraints from which an individual is free.⁵⁴ Because of its extrinsic nature, this aspect of independence is the most easily identified and assessed. Often, therefore, conceptions of independence within professional regulatory regimes focus only on external influences, for example compromising relationships, or monetary influences. (Although, on one level, the regulatory regime themselves could be seen as an external constraint.) Focus on external constraints will often overlook more subtle pressures that exist and require internal fortitude, that is to say capacity, to overcome.

In the legal context, capacity requirements are closely associated with the characteristics of integrity. Ronald Dworkin described individual integrity as the capacity to act 'according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically'.⁵⁵ Sharon Dolovich said it:

⁵³ The two definitions of freedom have been closely associated with the work of Isaiah Berlin: Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin (ed), *Four Essays on Liberty* (Oxford University Press, 1958) 1, 7, 19. The dichotomy has been applied in the legal context: Pamela S Karlan, 'Two Concepts of Judicial Independence' (1999) 72 *South California Law Review* 535.

⁵⁴ Maurice Cranston, *Freedom: A New Analysis* (Longmans, Green & Co, 1953) ch I.

⁵⁵ Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 166.

implies the capacity for and willingness to engage in critical reflection on one's values and principles, a process that involves at the minimum the careful consideration of alternative viewpoints, a logical assessment of relevant evidence, and an openness to the possibility that one could, in the face of sufficiently persuasive arguments, be convinced to re-think one's preferred approach. The engagement in this deliberative process distinguishes the person of integrity.⁵⁶

Integrity as a characteristic of the lawyer is reflected, for example, in the character tests for entrance into the legal profession.⁵⁷

Analysis of the independence of legal professionals is informed by the theoretical discourses on independence. The degree to which the two aspects of independence is required and correlate will be driven by the underlying objective of independence in a particular context. In *Valiente v The Queen*, the Canadian Supreme Court said in reference to constitutional guarantees of judicial independence, that independence:

connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.⁵⁸

Similarly, the content of the independence of legal professionals will need to be defined in terms of the freedom from certain defined external constraints; coupled with an internal capacity. But what are the external constraints from which the legal professional must be independent from, and for what purpose?

4.3.1.2 Three conceptions of lawyers' independence

There are three dominant conceptions of lawyers' independence. Each is defined by reference to a different underlying purpose and incorporates different degrees of the two types of independence discussed above.

The dominant conception of lawyers' independence underpins the dominant conception of lawyers' ethics.⁵⁹ This conception is driven by the principle that the client acts as instructor and principal decision-maker; thus implicit in this formulation is a recognition of the inherent

⁵⁶ Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2002) 70 *Fordham Law Review* 1629, 1651.

⁵⁷ See, eg, 'fit and proper' person test that the Supreme Courts apply for admission in the Australian jurisdictions.

⁵⁸ *Valiente v The Queen* [1985] 2 SCR 673, [15].

⁵⁹ Note, 'Rethinking the Professional Responsibilities of Federal Agency Lawyers' (2002) 115 *Harvard Law Review* 1170, 1171.

legitimacy of the interests of the client.⁶⁰ Under this conception, the lawyer remains independent from the *moral* position of the client, but ‘zealously’ pursues the client’s interests professionally.⁶¹ This moral independence provides the foundation for the ‘principle of non-accountability’:⁶² a lawyer is not called to account for their clients’ action, even where those actions are based on legal advice.⁶³ Deborah Rhode suggested this type of independence ‘serves fundamental interests of individual dignity, privacy and autonomy’.⁶⁴ From this underlying liberal objective, independence in this conception is predominantly viewed as independence from the external influence of the *state* – both in terms of its influence on the lawyer-client relationship, and the regulation of the profession – as the legal profession stands between the individual and the state (at least in the criminal context).⁶⁵ However, there is a degree of internal capacity involved as well: there must be independence from the subtle pressures of personal interests and other improper motives, to prevent conflicts of interest with the client and abuse of the relationship.⁶⁶

It is immediately apparent that applying this conception of independence to the government lawyer creates fundamental difficulties.⁶⁷ The government lawyer simply does not stand between the state and the people.⁶⁸ However, the government lawyer is called upon to assist in achieving and defending the policies and actions of the democratically elected government.

⁶⁰ This conception models Neil Walker’s explanation of the law as ‘an instrument or vessel for the achievement of externally-driven ends’: Neil Walker, ‘The Antinomies of the Law Officers’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 145-6. See further discussion Chapter 2.4.2.

⁶¹ This model is akin to the ‘adversarial advocate’ model of lawyers ethics developed in the Australian context by Christine Parker: Christine Parker, ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30 *Monash Law Review* 49.

⁶² David Luban, ‘Twenty Theses on Adversarial Ethics’ in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System* (Federation Press, 1999) 134, 140.

⁶³ Christine Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (2002) 25(3) *University of New South Wales Law Journal* 676, 686; for a critique of the position, see Lizzie O’Shea, ‘Advocacy on trial’ (2011) 36(2) *Alternative Law Journal* 87.

⁶⁴ Deborah L Rhode, ‘Ethical Perspectives on Legal Practice’ (1985) 37(2) *Stanford Law Review* 589, 605. See also Robert W Gordon, ‘The Independence of Lawyers’ (1988) 68 *Boston University Law Review* 1, 10; Duncan Webb, ‘Keeping the Crown’s Conscience: A Theory of Lawyering for Public Sector Counsel’ (2007) 5 *New Zealand Journal of Public and International Law* 243, 245.

⁶⁵ Evan A Davis, ‘The Meaning of Professional Independence’ (2003) 103(5) *Columbia Law Review* 1281, 1281.

⁶⁶ Michels, above n 29, 97-8.

⁶⁷ Webb, above n 64, 246.

⁶⁸ Adam M Dodek, ‘Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law’ (2010) 33(1) *Dalhousie Law Journal* 1, 23.

It is on this basis, rather than defending the people from the state, that the Government Advocate type is often argued in the US literature.⁶⁹

The dominant model has also been supported on the basis that in the adversarial system, truth and justice are achieved only if the judge is provided with the strongest possible arguments for each side.⁷⁰ This justification is more easily transposed across to the government lawyers and the Solicitor-General, and in the US, the Government Advocate has been adopted most readily in the OSG's advocacy role.⁷¹ David Luban points out, however, that this defence of the model can hold only in an adjudication context.⁷²

The second, albeit related, conception of independence is that the lawyer exercises 'independent professional judgment', but not for the public interest (which correlates with the third conception), but for the benefit of the client. In this respect, it is akin to the Autonomous Government Advocate that was identified in the US literature.⁷³ Independence in this context largely mirrors what is often referred to as 'decisional independence' in the judicial arena. Legal opinions must be formed in accordance with law and not improper considerations: whims, prejudices, fear or other, including the desires of the client.⁷⁴ Such a view of independence assumes clients seek legal advice and representation to be better informed in their own decision-making, rather than to be provided with *any* legally available argument in the blind pursuit of their interests. This conception of independence taps more strongly into the requirement for an internal capacity: a capacity to analyse and evaluate the legal position with integrity; and a capacity to balance the competing interests of justice and the client. In its manifestation, it will often look very similar to the third conception of independence.

The third conception is that independence exists to allow the legal practitioner to aid the broader public interest.⁷⁵ Its tenets mirror those of the Public Interest Advocate from the US

⁶⁹ Chapter 2.5.1.

⁷⁰ Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 10; David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 25; Karl N Llewellyn, *The Theory of Rules* (University of Chicago Press, 2011) 119; Rhode, above n 64, 595; Dolovich, above n 56, 1634.

⁷¹ Chapter 4.3.1.2.

⁷² Luban, *Legal Ethics and Human Dignity*, above n 70, 28.

⁷³ Chapter 2.5.1.

⁷⁴ See, eg, Vincent R Johnson, 'The Ethical Foundations of American Judicial Independence' (2002) 29 *Fordham Urban Law Journal* 1007, 1012. In the Australian context, see *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 (Gleeson CJ); Michael Kirby, 'Independence of the Legal Profession: Global and Regional Challenges' (2005) 26 *Australian Bar Review* 133, 134.

⁷⁵ Note, above n 59, 1171-2. It reflects Walker's explanation of the law as 'an autonomous source of moral and political values': Walker, above n 60, 145-6. See further discussion Chapter 2.4.2.

literature.⁷⁶ Acting in the public interest can manifest in two ways. First, simply by providing robust and independent advice, the lawyer encourages the client to act in accordance with the law, not just for the client's benefit, but in the communal interest.⁷⁷ The second takes a more proactive form, which finds expression in Anthony Kronman's ideal 'lawyer-statesman'. Such a lawyer requires two traits: 'first, love of the public good, and second, wisdom in deliberating about it.'⁷⁸ It requires counsel to operate autonomously from all influences so as to provide the necessary space for that practitioner to determine the best interpretation of the law for the public interest.⁷⁹ In many respects it reflects Kant's ideal internal capacity that allows an individual to make decisions that accord with his or her 'universal moral law'.⁸⁰ If the actions of the client do not accord with the lawyer's view of the public interest, there is an obligation to try to change the client's position, or refuse to act.

4.3.1.3 Advocate and adviser: a dichotomy of independence

This thesis will argue that the most appropriate way of understanding the obligations to exercise independence in the context of government lawyers, and more specifically by reference to the statutory functions of the Solicitor-General, is to adopt a dichotomy drawn by Luban.⁸¹

In examining the obligation to exercise independent professional discretion, Luban drew a distinction between counsel's independence as an advocate and as an adviser. As an advocate, in defending the client's actions from legal challenge, the lawyer can resolve doubts about the law in favour of the client because, at least in orthodox theory, the adversarial system will check against excesses.⁸² Joseph Jaconelli said 'the process of adjudication is fuelled by the presentation of competing arguments from advocates

⁷⁶ Chapter 2.5.2.

⁷⁷ Michels, above n 29, 100.

⁷⁸ Anthony T Kronman, *The Lost Lawyer: Failing the Ideals of the Legal Profession* (Harvard University Press, 1993) 54.

⁷⁹ This model reflects both the 'Responsible Lawyer' and the 'Moral Activist' put forward by Christine Parker. Parker distinguishes the two on the basis that the Responsible Lawyer will look to advise and encourage action that is most in accordance with the legal system and the spirit of the law, whereas the Moral Activist will pursue substantive moral outcomes: Parker, 'A Critical Morality for Lawyers', above n 61, 62-3. See also Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) ch 2.

⁸⁰ Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals* (Thomas Kingsmill Abbott trans, 1724-1804).

⁸¹ Luban, *Legal Ethics and Human Dignity*, above n 70, 131; 153-4; 201; further developing this dichotomy, see Michels, above n 29. See also Llewellyn, above n 70, 119, ch IV (the dichotomy between judge and advocate).

⁸² Luban, *Legal Ethics and Human Dignity*, above n 70, 153-4, 201. Michels, above n 29, 103.

representing opposing perspectives on the legal issue at stake'.⁸³ Thus, in advocacy, the dominant model of lawyers' independence and ethics is attractive. In contrast, the adviser must provide an independent and candid professional opinion as to the law; their arguments are unchallenged by opposing counsel or the overarching decision of the judge.⁸⁴ It remains the client's decision whether they choose to follow the advice. In this function the third view of lawyers' independence must apply although probably not in its proactive form. In so far as the ethical obligations of the lawyer to the client or to the public interest and concomitant obligations of independence are concerned, the functions of adviser and advocate are fundamentally different.

The dichotomy that Luban drew is largely reflected in the ABA Model Rules, which distinguish between advocacy and opinion work. As an advocate the barrister is a fierce proponent for, but morally independent from, the client's cause.⁸⁵ This is subject to the exercise of the barrister's independent forensic judgment in the conduct of a case,⁸⁶ and the overarching duty of frankness to the court.⁸⁷ In contrast, in opinions, the barrister must step away from the client's interests, and 'must give the barrister's *truthful opinion* on any matter submitted to the barrister for advice or opinion.'⁸⁸

The attraction of the dichotomy becomes readily apparent when transposed into the setting of the Solicitor-General and the government lawyer. The obligation to exercise independent judgment in advising ensures that the best possible legal advice is provided to government about the exercise of government power. This is congruent with the government lawyer's internally focussed position within the machinery of government, acting as a 'check' on government power and ensuring compliance with the rule of law. John Edwards said that as adviser, the Law Officer 'occupies the same degree of constitutional independence as that associated with his position as the State's chief prosecutor'.⁸⁹ Of course, the government may always choose not to comply with the government lawyer's advice. This is a necessity in the Australian system to ensure the proper operation of responsible government.⁹⁰ However, the

⁸³ Jacob Jaconelli, 'Hypothetical Disputes, Moot Points of Law, and Advisory Opinions' (1985) 101 *Law Quarterly Review* 587, 587.

⁸⁴ Michels, above n 29, 103.

⁸⁵ Australian Bar Association, *Model Rules* (effective 8 December 2002) rule 16.

⁸⁶ *Ibid* rules 18 and 19.

⁸⁷ *Ibid* rules 21-31.

⁸⁸ *Ibid* rule 73, emphasis added.

⁸⁹ John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 190.

⁹⁰ See further analysis of this at Chapter 4.6.2.

fact the advice has been given creates a very large incentive to comply with it, and in Australia the accepted practice is that the Solicitor-General's advice is treated as binding.⁹¹ It is in this function that the Solicitor-General is sometimes referred to as the 'conscience of government'.⁹² If Solicitors-General remain true to this obligation in the advisory function, they also avoid the risk that their advice may be labelled partisan, creating the potential for distrust upon a change of government.

As an advocate, however, the Solicitor-General has an obligation to defend the actions of the Crown. This is subject to a number of ethical considerations: it can only be done with reasonably available legal argument; it is subject to the forensic decisions of the barrister in court; and, in the government context, it is subject to the model litigant framework within which the Crown has an obligation to act.⁹³ This paramount duty to the client as advocate exists not, as it may in relation to private clients, to protect their autonomy and liberty from the behemoth of the state, but to ensure against improper external attack on government power and that the democratic mandates of the government are defended in the adversarial context. The Solicitor-General operates as one part of the machinery in the adversarial system of justice. Adopting the zealous advocate conception of independence in the advocacy function, Solicitors-General are again able to avoid allegations of partisanship and ensure they remain above party-politics in the event of a change of government. Within this conception, the Solicitor-General remains morally removed from the position taken by the government, whatever political persuasion the government happens to be.

In Australia, the Solicitor-General as a fierce, but fair, advocate in litigation is reflected in the parallel historical development of the Commonwealth and States' Solicitors-General. Federal issues (which dominate our constitutional text) are now predominantly resolved in an adversarial setting between the Commonwealth and States' Solicitors-General. Chapter 3.4.4 demonstrated that one of the chief drivers behind the adoption of a statutory counsel model across the jurisdictions was to provide the Commonwealth and the States with consistent representation in the High Court, particularly in these cases. Section 78A of the *Judiciary Act 1903* (Cth) now grants each Attorney-General the right to intervene in matters arising under the Constitution or involving its interpretation; it ensures that each political unit in the

⁹¹ See further explanation of this practice in Chapter 5.2.2.2.

⁹² Charles Fahy, 'Special Ethical Problems of Counsel for the Government' (1950) 33 *Federal Bar Journal* 331, 335.

⁹³ Chapter 4.6.1.2.

federation has an opportunity to put forward its case whenever a constitutional issue arises that affects its interests.

In furnishing opinions, the Solicitor-General must operate with absolute independence from the direction of the Crown,⁹⁴ and any other constraints to ensure that the opinion reached is his or her best opinion on the law. This conclusion raises one further question about the ethical framework that surrounds the Solicitor-General: what normative rules guide the Solicitor-General if there is no clear legal conclusion?

4.3.1.4 How does the Solicitor-General resolve legal ambiguity?

To understand the advisory function of the Solicitor-General more fully it must be placed in the context of an accepted level of indeterminacy in the law. Contemporary legal theory has tended away from traditional formalism that emphasised the application of legal method that could always reveal an underlying *corpus juris* of ‘correct’ legal principle.⁹⁵ Legal culture is now generally accepting of subjective influences on legal interpretation.⁹⁶ The focus of this literature and analysis has been on the judicial task. However, it also complicates the function of the Solicitor-General as adviser.⁹⁷ How should the Solicitor-General resolve ambiguities within the law ‘independently’ if the application of traditional legal method yields no objectively ‘correct’ answer?

Often, the question simply does not arise: there exists a clear legal conclusion to an issue arising on a particular set of facts by the application of traditionally accepted legal-reasoning techniques.⁹⁸ In a second set of circumstances there may be legal ambiguity as to the state of legal authority or its application to particular facts, but this can be resolved in favour of a preferable view by the application of traditional legal method: the one that provides the *most coherent* explanation of the text, previous case authority and the purpose behind the principle.⁹⁹ In this case, it is generally accepted to be the role of counsel to present their view

⁹⁴ In some statutes, the Solicitor-General is expressly removed from the public service, taking the office out of the system of public service directions. See NSW s 2(9); Qld s 5(5); SA s 5(4); Tas s 4(4).

⁹⁵ Rachael Gray, *The Constitutional Jurisprudence of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 22, 27.

⁹⁶ This is consistent with the realist focus that underpins the basis for the thesis.

⁹⁷ Luban, *Legal Ethics and Human Dignity*, above n 70, 132. Some application of this question to government legal advisers has been attempted in the US, see, eg, W Bradley Wendel, ‘Government Lawyers, Democracy and the Rule of Law’ (2009) 77(4) *Fordham Law Review* 1333.

⁹⁸ Luban, *Legal Ethics and Human Dignity*, above n 70, 192-3.

⁹⁹ In relation to how the most preferable view of the law can be arrived at, see, eg, the influential description of the legal method by Dworkin, above n 55.

as to the best legal position.¹⁰⁰ The advice should also give some indication that the matter lacks the type of clarity as seen in the first instance,¹⁰¹ and good advice should also consider whether the court before which the client may appear is likely to take that view given what is known about how they have decided similar decisions. A third set of circumstances arises less commonly in practice, but presents the Solicitor-General with the most difficulty: genuine indeterminacy in the legal position, where the application of legal method reveals no preferable view, a number of views are plausible, and there has been no indication about the preferred view of the court. The Solicitor-General's involvement in complex constitutional issues may increase the frequency with which this arises, given the necessarily broad and often ambiguous nature of constitutional provisions. Further, the Solicitor-General is often briefed when an issue raises complex or novel issues, or where there has been disagreement on the legal position between government departments and agencies. It is likely therefore that the Solicitor-General confronts these types of issues in the advisory role more than most barristers.

In such an instance is the Solicitor-General, like a Government Advocate, obliged to take a partisan view of the adviser function, resolving legal ambiguity in favour of achieving government objectives?¹⁰² Should the Solicitor-General simply indicate to the government that the matter is 'arguable' and leave it to the discretion of the government as to whether to pursue it?¹⁰³ Should the Solicitor-General adopt the view that is most consistent with what they consider to be the ongoing interests of the government?¹⁰⁴ Should the Solicitor-General adopt a Public Interest Advocate approach, and determine the position based on his or her view of where the public interest lies? Should the Solicitor-General, as Jeremy Waldron argued in the context of government lawyers more generally, have an obligation to advise the government that it *cannot* avoid the impact of legal constraint where it is ambiguous or

¹⁰⁰ Randolph D Moss, 'Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel' (2000) 52 *Administrative Law Review* 1303, 1321-2.

¹⁰¹ Michels, above n 29, 118.

¹⁰² Luban, *Legal Ethics and Human Dignity*, above n 70, 163; *ibid*, 90. See the strong argument made against this position in Wendel, above n 97, 1356-62.

¹⁰³ For example, in 1974, the Commonwealth Solicitor-General Maurice Byers, when asked his opinion as to whether the Whitlam Government's loan authorisation for \$4 billion fell within a loan for 'temporary purposes' under the Financial Agreement, replied that it was 'arguable' although 'drawing a long bow': see *Sankey versus Whitlam* - Maurice Byers QC regarding involvement in the Loans Affair (April 1976), National Archives of Australia, Canberra, M4081 3/25, 4. See further discussion of this incident in Chapter 5.2.1.2.

¹⁰⁴ For a description of this theory of interpretation, see Mark Tushnet, 'Non-Judicial Review' (2003) 40 *Harvard Journal on Legislation* 453, 467.

unclear?¹⁰⁵ Waldron based his thesis on the fundamental philosophical difference between the position of the private client, with no duty to go out of his or her way to be constrained by the law, and the government. The government, Waldron asserted, ‘does not have an interest in being unconstrained by law in the way that the individual does. Its freedom of action is in the service of *our* interests and *our* freedom of action; it is not something valued for its own sake.’¹⁰⁶

Waldron’s assertion that, in those hard cases where the legal position is *genuinely indeterminate*, the nature of the government as a client must inform the obligation of the Solicitor-General as an adviser, must be correct.¹⁰⁷ But, Waldron’s conclusion that the government’s interests lies in more regulation, not less,¹⁰⁸ overlooks an important part of the role of government and the fundamental duties of the state to the citizen.¹⁰⁹ The government’s pursuit of these duties necessarily requires a varied and flexible store of power. Indeed, it is for this very reason that the limits of the ‘executive power’ of the state are difficult to define.¹¹⁰ French CJ said of the executive’s power:

While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.¹¹¹

Government power must be both sufficiently flexible to ensure the state can respond to its duties on behalf of the community, but confined by appropriate legal constraints, so that it does not intrude, unwarranted, into the individual sphere. In pursuit of this ideal equilibrium, it is argued that in instances where legal constraints are genuinely ambiguous, the Solicitor-General has two obligations. The first is to make his or her best assessment of the law. However, in recognition of the impact that legal advice can have on the scope of government power and the lives of citizens, the second is to indicate the indeterminate nature of the legal

¹⁰⁵ Jeremy Waldron, ‘Gangsters, Statesmen and their Lawyers: The Rule of Law on Matters International’ (Paper presented at the ALTA Conference, Auckland, 5 July 2010) 11.

¹⁰⁶ Ibid.

¹⁰⁷ See also Webb, above n 64, 244, 249-50.

¹⁰⁸ Waldron, above n 105, 10-11.

¹⁰⁹ See, eg, explanation of these duties by Adam Smith, one of the first and most influential writers to question the relationship between sovereignty and the broader polity: Adam Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations* (Oxford University Press, 1776, 1976 reprint) vol II, 687. Waldron’s comments are made in the US context, where the role of public law in the constraint of government is particularly pronounced.

¹¹⁰ See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ).

¹¹¹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 38 [60].

position.¹¹² In some ways, this is putting the question back into the government's court. This should not be viewed with cynicism, but as consistent with the democratic mandate of the government, and their constitutional duties and responsibilities.¹¹³ It seems far more congruent with the constitutional system that the Solicitor-General, as counsel to the Crown, makes it very clear, where necessary, when the legal position is not clear and must be informed by a choice about where the greater good lies: a policy choice.

The Solicitor-General's function as 'adviser' must also be understood against the common law functions of the Law Officers. The last section of this chapter explains that this places obligations on the Solicitor-General to furnish advice to the government as to the appropriate exercise of government power, informed by what I refer to in this thesis as 'core government principles' (these arise from the concepts of the rule of law, democratic government and federalism).¹¹⁴ Often in cases of legal indeterminacy then, the Solicitor-General may proffer advice on what government *ought* to do, informed by these principles. Of course when providing non-legal advice such as this, the government is free to disregard it, and the convention that the legal advice of the Solicitor-General will be followed does not apply.¹¹⁵

My conclusions regarding the independence of the office, and the appropriate manner of resolving legal ambiguity, are based upon the legal framework in which the office operates. However, these twin issues have been matters of ongoing contention in the legal profession for decades. Unsurprising then, in my research different views emerged among participants as to the level of independence they must exercise as advisers and advocates, and how they ought to resolve questions of legal ambiguity. My findings are explained in Chapter 5.3.1.

4.4 The 'Crown'

The above review explained that the statutory framework provides, in various forms, for the proposition that the Solicitor-General acts as counsel for the Crown (although in some statutes this entity is identified in various guises). It is often said that the Crown is the 'client' of the Solicitor-General. The desire to articulate the client of the Solicitor-General is

¹¹² In the US, for example, the OLC has adopted a practice where conclusions on the constitutionality of proposed Bills are framed as 'litigation risk', 'constitutional concerns', and 'serious constitutional concerns'. This allows the final risk assessment to be made by the Executive, with the benefit of this assessment. See Tushnet, above n 104, 471; Luban, *Legal Ethics and Human Dignity*, above n 70, 199.

¹¹³ See, in the US context, Moss, above n 100, 1328-9, although note the impact of the *Chevron* doctrine in that context.

¹¹⁴ Chapter 4.6.2.

¹¹⁵ For more on this convention, see Chapter 5.2.2.2.

understandable; lawyers act for clients and in many respects the professional obligations of the lawyer are informed by reference to the client and their interests. However, the characterisation of the Crown as the client of the Solicitor-General carries with it a number of difficulties.

First, the Solicitor-General operates from within the client. In this respect it may be correct to view the Solicitor-General as roughly analogous with in-house counsel at a corporation. Adam Dodek has argued that this analogy is flawed, because government lawyers are in fact *exercising* public power.¹¹⁶ This conclusion, *prima facie*, appears attractive. There are judicial pronouncements to the effect that the executive power of the state includes the functions of the lawyer. The Privy Council in *Eastern Trust Company v McKenzie, Mann and Co* said, ‘It is the duty of the Crown and of every branch of the Executive to abide by and obey the law ... it is the duty of the Executive in cases of doubt to ascertain the law, in order to abide the law, not to disregard it.’¹¹⁷ In *Dixon v Attorney-General*, Jenkinson J found:

the power to conduct on behalf of the Commonwealth legal proceedings to which the Commonwealth is a party is in my opinion an inherent Executive power and within what is comprehended by the expression, ‘The Executive power of the Commonwealth’ in s 61 of the *Constitution*.¹¹⁸

However, the proper conceptualisation of the Solicitor-General is as a statutory officeholder appointed to *assist* the Crown in fulfilling these obligations. The Solicitor-General does not conduct proceedings on behalf of the Commonwealth. The Solicitor-General only represents the Attorney-General. It is the latter who brings or defends proceedings on behalf of the Commonwealth.¹¹⁹ As adviser, it is the Solicitor-General’s advice that *assists* the Executive to ascertain the law. The explanation of the proper role of the Solicitor-General in determining questions of genuine indeterminacy in the law given above buttresses this conclusion.

There are two statutory exceptions to this statement. In the Commonwealth, New South Wales, Tasmania and Western Australia, the Solicitor-General may exercise powers and

¹¹⁶ Dodek, above n 68, 18. See also Interview, Daryl Dawson.

¹¹⁷ [1915] AC 750, 759. See also Bradley Selway, ‘The Duties of Lawyers Acting for Government’ (1999) 10 *Public Law Review* 114, 115, fn 7 and reference.

¹¹⁸ (1987) 15 FCR 338, 343.

¹¹⁹ *Kidman v Commonwealth* (1925) 37 CLR 233 239-240 (Knox CJ). See also at 243 (Isaacs J); and extracted High Court transcript in *Fejo v Northern Territory* (1998) in Selway, ‘The Duties of Lawyers Acting for Government’, above n 117, 115. Note also *Judiciary Act 1903* (Cth) s 61.

perform functions *delegated* by the Attorney-General.¹²⁰ In New South Wales there is a unique provision that empowers the Solicitor-General to ‘exercise and discharge any powers, authorities, duties and functions conferred or imposed on the Attorney-General by or under any Act or incident by law to the office of the Attorney-General’ when the senior Law Officer is absent or ill, or the office is vacant.¹²¹ As delegates, Solicitors-General may not be directed by the Attorney-General as they must exercise the powers at their own discretion;¹²² although they will always be subject to any limitations in the delegation instrument.¹²³ The power of the Attorney to delegate to the Solicitor-General is a throwback to the traditional position of seniority between the Law Officers. In the current statutory context its existence blurs the line between counsel *to the client*, and acting *as the client*. The other exception is where legislation bestows functions directly on the Solicitor-General; this varies across jurisdictions.¹²⁴ In Chapter 7.5.1, I return to the extent to which these two exceptions have caused problems, in terms of the independence of the Solicitor-General, in practice.

Putting to one side these atavisms, it must be accepted that it is appropriate to speak of the ‘client’ of the Solicitor-General. Indeed, this conclusion reflects the historical establishment of the office as the King’s Solicitor. In those jurisdictions where the Solicitor-General acts as counsel for the ‘Crown’ (sometimes expressed as ‘her Majesty’¹²⁵) the ‘client’ of the Solicitor-General is the Crown.¹²⁶ As a concept, the Crown is indeterminate,¹²⁷ once famously described as an ‘abstraction’.¹²⁸ Its lack of definitional rigour has led a number of members of the High Court to criticise the use of the term.¹²⁹ Historically, the Crown meant simply the Monarch. The term has, however, evolved in its use. In the context of the

¹²⁰ Cth s 17(1); NSW s 4; Tas s 8(1); WA s 13 (note also *Supreme Court Act 1935* (WA) s 154(5a)). In Victoria, other Ministers may perform the Attorney-General’s functions: Vic s 3.

¹²¹ NSW s 3(1)(b).

¹²² See specifically Tas s 8(7).

¹²³ Cth s 17(3); NSW s 4(3); Tas s 8(2); WA s 13(2).

¹²⁴ See Appendix E.

¹²⁵ This reflects the fact that the Law Officers were originally the Monarch’s personal lawyers: it was only with the advent of the modern conception of the ‘Crown’ that the Law Officers came to be the legal advisers to a much larger, and more abstract, entity.

¹²⁶ NSW s 3(1)(a); SA s 6(a); Tas s 7(a); Vic s 5(a); WA s 9(a); NT s 14(a).

¹²⁷ Peter Johnston, ‘Going it Alone - Republican States in a Monarchical Commonwealth’ in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010) 82, 91. See also Anne Twomey, ‘Responsible Government and the Divisibility of the Crown’ (2008) *Public Law* 742, 747.

¹²⁸ *Dixon v London Small Arms Co LR* (1867) 1 App Cas 632, 652 (Lord Penzance).

¹²⁹ *Commonwealth v Western Australia* (1999) 196 CLR 392 (‘*Mining Act Case*’), 410 [33] (Gleeson CJ and Gaudron J), 429-31 [105-9] (Gummow J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 347 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Note also the criticism in P Cobbett, ‘The Crown as Representing the State’ (1903) 1 *Commonwealth Law Review* 23.

legislation establishing the office of the Solicitor-General, two meanings for the Crown can be isolated as relevant.¹³⁰

First, it means the body politic.¹³¹ P Cobbett points out that the Crown according to British constitutional theory has evolved to mean ‘the legal representative of the whole state’.¹³² Peter Hogg notes sometimes the term ‘State’ or the ‘Commonwealth’ is used in its place.¹³³ Thus in British tradition, the Crown represents the state as a juristic person. Australia’s federal system greatly complicates the concept of the Crown as representing the body politic of the state. Some statutes expressly state that the Solicitor-General serves the Crown in right of the State or Territory.¹³⁴ This assumes that there are separate Crowns in the federation, and even for the Territories; or at least that the Crown exists in different capacities. This is an accepted assumption in practice – it often appears in statutes – although as a matter of theory it has been contested.¹³⁵ Dixon J noted that while the Commonwealth and the States may not be, formally, separate juristic persons, under the Constitution ‘they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests.’¹³⁶

The *Australia Acts 1986* left the issue unclear, leaving two possibilities: there is a single Australian Crown, which includes the Commonwealth and the States in an indivisible sovereign entity; or there are separate Crowns in right of the jurisdictions, which form a single sovereign nation.¹³⁷ The possibility that there is only a single Crown would mean that all of the Australian Solicitors-General are serving, ultimately, a single entity. Dixon J pointed out that regardless of whether there exists separate Crowns in the federation, the Commonwealth, States and Territories are separate legal entities, with distinct legal interests, capable of suing, and being sued by, each other.¹³⁸ The statutes establishing the Solicitors-

¹³⁰ For a fuller discussion of meanings, see *Sue v Hill* (1999) 199 CLR 462, 498 ff (Gleeson CJ, Gummow and Hayne JJ).

¹³¹ *Ibid*; *Williams v Commonwealth* (2012) 86 ALJR 713, [154] (Gummow and Bell JJ).

¹³² Cobbett, above n 129, 25.

¹³³ Peter Hogg and Patrick J Monahan, *Liability of the Crown* (Carswell: Thomson Professional Publishing, 3rd ed, 2000) 11.

¹³⁴ Cth s 12; Qld s 8(a); Tas s 7(a); WA s 9(a); ACT s 17(1)(a)(i); NT s 14(a); contra NSW s 3(1)(a); SA s 6(a); Vic s 5(a).

¹³⁵ Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 271.

¹³⁶ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363.

¹³⁷ Twomey, *The Chameleon Crown*, above n 135, 271-2.

¹³⁸ See provision for this in the Constitution s 75. See also *Sue v Hill* (1999) 199 CLR 462, 525-6 (Gaudron J).

General in Australia make it clear that it is these disparate interests that the office represents, not a single, overarching entity. However, the location of each jurisdiction within a larger whole is a concept that may bear on the role of the Solicitor-General; this is returned to at the end of the chapter when I consider the Law Officers' role to advise the government on 'core government principles', which I argue includes the operation of the federation.¹³⁹

The next question that becomes relevant is what part of the juristic person of the 'state' does the Solicitor-General represent? The state, in Australia, is a tri-partite system of democratic government. The holistic juristic person of the state must be capable of legal representation and the appropriate counsel is, historically, a Law Officer. However, it must be informed by an appreciation that the state, as a juristic person, is represented in our system of government by the executive arm.¹⁴⁰ As already discussed above, the Attorney-General is the proper person to represent the Crown, in its guise as a juristic entity. It is in the exercise of *executive power* that litigation is conducted by and on behalf of the Crown. This raises the second relevant definition of the term.

In its second definitional form, the Crown is 'symbolic of the Executive power'.¹⁴¹ This power, in Australia, is wielded by the Crown's representative (the 'Viceroy') on the advice of the executive branch of government.¹⁴² The Crown therefore represents this branch of the government polity.¹⁴³ In this second sense, the Crown includes the Viceroy and the departments headed by the Crown's Ministers.¹⁴⁴ It also includes other bodies under the control of the Crown's Ministers: Crown agents.¹⁴⁵ This interpretation of the Crown is found in the various Crown proceedings statutes that regulate proceedings being brought against the

¹³⁹ Chapter 4.6.2.1.

¹⁴⁰ *Williams v Commonwealth* (2012) 86 ALJR 713, [21] (French CJ), [217] (Hayne J).

¹⁴¹ *McArthur v R* [1943] Ex CR 77, 104 Ex Ct (Thorson J). See also *Town Investments v Department of Environment* [1978] AC 359, 397 (Lord Simon of Glaisdale for the House of Lords); Cobbett, above n 129, 26

¹⁴² Except in exceptional circumstances when the Viceroy will act alone. The role of the Solicitor-General in acting as a legal adviser in relation to the exercise of these prerogative powers, known as the 'reserve powers', are returned to in Chapter 4.4.2.1.

¹⁴³ *Wardle v Management Farm Loan Association* [1956] SCR 3, 10, 18, 23; *Sue v Hill* (1999) 199 CLR 462, 499 (Gleeson CJ, Gummow and Hayne JJ). See also Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD Thesis, University of Melbourne, 2007), 103.

¹⁴⁴ Hogg and Monahan, above n 133, 11.

¹⁴⁵ *Ibid* 11, ch 13. See also Harold Edward Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 185; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 1013.

Crown.¹⁴⁶ The Crown therefore includes executive officers and individuals, agencies and organisations that operate as agents of the Crown in the one, unifying concept: giving rise to the principle of the indivisibility of the Crown.¹⁴⁷ The idea of the Solicitor-General acting as counsel for the Crown in the sense of the whole executive arm accords with the development of the colonial Law Officers as legal advisers to the whole of government.¹⁴⁸

However, the conclusion that these officers, individuals and other entities form part of the Crown is not the same as concluding that they may all *provide instructions* on behalf of the Crown to the Solicitor-General (or that they can never come into conflict, see Chapter 4.4.2 below). As the above authorities explain, the proper representative of the Crown is the Attorney-General.¹⁴⁹ Australia's system of responsible government and collective responsibility means that the Attorney-General, when representing the Crown in litigation and providing instructions, will be bound to implement the decisions of Cabinet (perhaps with some continuing exceptions where the Attorney-General has ongoing obligations in public interest litigation that separates the office from the collectivity of Cabinet decisions, see further discussion Chapter 4.6.1.1).¹⁵⁰ The Attorney-General (and often the Solicitor-General) will be advising Cabinet in coming to these decisions.

In practice, the Attorney-General is not always named in litigation as the representative of the Crown. However, the High Court has expressed its concern where other Ministers have purported to appear for the body politic (rather than in their official capacity for example, in judicial review proceedings where Ministers and other senior government officials are often named as respondents).¹⁵¹ In areas where other Ministers have administrative responsibility, they will often provide instructions, sometimes but not always in consultation with the

¹⁴⁶ *Crown Proceedings Act 1998* (NSW) s 3; *Crown Proceedings Act 1992* (SA) s 4(1); *Crown Proceedings Act 1993* (NT) s 4; *Crown Proceedings Act 1980* (Qld) s 7; *Crown Proceedings Act 1993* (Tas) s 4; *Crown Suits Act 1947* (WA) s 3.

¹⁴⁷ At least in respect of the Crown of a particular jurisdiction.

¹⁴⁸ See Chapter 3.2.5.

¹⁴⁹ See references above n 119. See also New South Wales Law Reform Commission, '*Circulation of Legal Advice to Government*, Report No 86' (1998) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R86TOC>>, [3.17].

¹⁵⁰ Chad Jacobi, 'How the ethical duties of the public lawyer are defined by the Constitution and structure of government' (Paper presented at the National Administrative Law Conference: Integrity in Administrative Decision-making, National Wine Centre, Adelaide, 19-20 July 2012) 8.

¹⁵¹ See extracted High Court transcript in *Fejo v Northern Territory* (1998) in Selway, 'The Duties of Lawyers Acting for Government', above n 117, 115. Jacobi equates representation in judicial review with representing the Crown, concluding therefore that Ministers often represent the Crown: *ibid* 8, 10. While the Ministers are undoubtedly *part* of the Crown, it would seem strained to say that the Crown is the respondent in a judicial review proceeding and that anyone other than the decision-maker could defend the proceeding.

Attorney-General.¹⁵² If disputes arise between Ministers and the Attorney-General, these will be resolved by the Cabinet.¹⁵³ While acknowledging this practice, it must be accepted that the Attorney-General has primacy in constitutional theory as the representative of the Crown, and as ultimate instructor for the Solicitor-General.¹⁵⁴

The principle of indivisibility of the Crown is reflected in the statutes that indicate there can be only one ‘client’ of the Solicitor-General: the Crown. In theory, therefore, there can be no conflict of interest between clients that arises for the Solicitor-General. However, the complexity of the modern Crown means this assumption is often threatened. Before turning to this, it is necessary to briefly consider those three jurisdictions in which the assumption that the Solicitor-General has only one client is not reflected on the face of the statute: the Commonwealth, Queensland and the Australian Capital Territory.

4.4.1 Enumerated clients: Commonwealth, Queensland and Australian Capital Territory

The *Law Officers Act 1964* (Cth) provides that the Solicitor-General acts as counsel for:

- (i) the Crown in right of the Commonwealth;
- (ii) the Commonwealth;
- (iii) a person suing or being sued on behalf of the Commonwealth;
- (iv) a Minister;
- (v) an officer of the Commonwealth;
- (vi) a person holding office under an Act or a law of a Territory;
- (vii) a body established by an Act or a law of a Territory; or
- (viii) any other person or body for whom the Attorney-General requests him or her to act.¹⁵⁵

In the Solicitor-General’s function of furnishing opinions, these must be to the Attorney-General only.¹⁵⁶

¹⁵² Jacobi, above n 150, 8; Anthony S Blunn and Sibylle Krieger, *Report of the Review of Commonwealth Legal Services Procurement* (Commonwealth Government, 6 November 2009) 39.

¹⁵³ Jacobi, above n 150, 8.

¹⁵⁴ Note the Attorney-General’s position is reflected in the Cth, Qld, SA and ACT Acts, to greater or lesser degree: Cth s 12(b); Qld s 8(a); SA 6(a); ACT s 17(1)(a).

¹⁵⁵ Cth s 12(a).

¹⁵⁶ Cth s 12(b).

The *Solicitor-General Act 1985* (Qld) combines the features of the other State jurisdictions with the Commonwealth. Many of the similarities between the two are explained by the fact that the Queensland legislation was largely modelled on the Commonwealth legislation.¹⁵⁷ Under this statute, the Solicitor-General acts as counsel, upon the request of the Attorney-General, for:

- (i) the Crown in right of the State;
- (ii) the State;
- (iii) a person suing or being sued on behalf of the State;
- (iv) a body established by or under an Act; and
- (v) any other person or body where it is to the benefit of the State that the Solicitor-General should so act.¹⁵⁸

In the Australian Capital Territory, the Solicitor-General is to act, at the request of the Attorney-General, as counsel for:

- (i) the Crown in right of the Territory; or
- (ii) the Territory; or
- (iii) any other entity.¹⁵⁹

The detailed list of potential ‘clients’ of the Solicitor-General in these statutes is confusing and appears largely tautological. The above discussion indicates that the Crown as a legal concept in British constitutional theory, and informed by the principle of indivisibility, includes many of the other listed entities,¹⁶⁰ and is viewed as the legal representative of the ‘Commonwealth’, ‘State’ or ‘Territory’. The terms – Crown and Commonwealth, State or Territory – are, in a legal sense, synonymous.¹⁶¹

¹⁵⁷ Interview, Ian Callinan.

¹⁵⁸ Qld s 8(a)

¹⁵⁹ ACT 16(1)(a). Interestingly, the list of those for whom the Government Solicitor may act is much larger, and reflects largely the Territory equivalent entities of the federal legislation. See ACT s 26(3).

¹⁶⁰ Selway, ‘The Duties of Lawyers Acting for Government’, above n 117, 116.

¹⁶¹ See, eg, F W Maitland, ‘The Crown as Corporation’ (1901) 19(1) *Legal Quarterly Review* 131, 140. Contrast the position taken by the minority in the report on the conduct of the Solicitor-General when called before the Senate in 1975 (this is discussed in further detail below at Chapter 4.5.1). Dissenting from the majority, Senators Greenwood, Webster and Wright said: ‘The distinction between the expression in the Act ‘second Law Officer of the *Commonwealth*’ and Mr Byers’ expression, ‘second Law Officer of the *Crown*’, he unfortunately failed to explain. It is, we suggest, most important. As second Law Officer of the Commonwealth surely he has a duty not merely to advise the Executive on proper occasions but also a duty – and maybe a higher duty – to advise the Senate on proper occasions. The Senate is a vital part of the constitutional government of ‘the Commonwealth.’ Senate Standing

The most convincing explanation for the inclusion of the listed entities in s 12(a) of the *Law Officers Act 1964* (Cth) comes from a survey of the historical and legal context in which it was drafted. It is likely that the Queensland and Australian Capital Territory legislation was drafted by reference to the Commonwealth Act, so to understand the Commonwealth Act may also be to understand the others.

In the Commonwealth legislation, it is likely the term Crown was included to reflect the history of the Law Officers, and there would have been a general reluctance in 1964 under the Menzies Liberal/National Coalition government to abandon the term, the Crown. However, the need to include the ‘Commonwealth’ was driven by the use of the term throughout the Constitution to describe the body politic.¹⁶² The enumeration of ‘a person suing or being sued on behalf of the Commonwealth’ and ‘an officer of the Commonwealth’ again reflected the constitutional text.¹⁶³ When the legislation was drafted, the Territories did not have self-government or their own Solicitors-General, so references to ‘a person holding office under an Act or a law of a Territory’ and ‘a body established by an Act or a law of a Territory’ were probably included to ensure representation by the Commonwealth Solicitor-General was available to them.

The reference to ‘Minister’ may have been because Ministers have increasingly been established as corporations sole, giving them the ability to sue and be sued in their own names. Another overarching reason for the enumeration may have been that, because the Attorney-General is the proper officer to represent the interests of the Crown, and therefore to provide instructions on behalf of the government polity, the inclusion of other entities may have been thought to be necessary to allow the Solicitor-General to accept instructions from government officers *other than* the Attorney-General.

In summary, the Commonwealth, Queensland and Australian Capital Territory statutes appear, on their face, to differ markedly from those statutes that capture the client of the Solicitor-General in the entity of the Crown. However, it would appear that the inclusion of a list of entities for whom the Solicitor-General may act was not intended to imply a divisibility between the Crown, but reflects the historical, constitutional and practical context in which the statutes were drafted.

Committee of Privileges, ‘Report on Matters Referred by Senate Resolution of 17 July 1975’ (7 October 1975) (Minority Report) 55.

¹⁶² See, eg, Constitution s 75(iii).

¹⁶³ Constitution ss 75(iii) and 75(v).

4.4.2 The indivisibility of the Crown

In theory the Crown, while it may present itself in different emanations, is indivisible. For the Solicitor-General, therefore, there can be no conflict of interest when acting for any individual or entity that is the Crown. However in practice there are manifestations of the Crown that may come into conflict with each other, raising the potential for division in the loyalty of the Solicitor-General. A notable example of this is the difficult issue of whether the Solicitor-General can provide advice to a Viceroy directly. This is particularly difficult in circumstances where the Viceroy may be seeking advice in relation to an action that is in conflict with the incumbent government's interests, such as the exercise of the reserve power to dismiss a government, or when the Viceroy invites a party or coalition to form government after an election where there is no party with a clear majority in the lower house. Another problem has arisen from the proliferation of Crown agents enjoying statutorily directed objectives that may, from time to time, bring them into conflict with the Executive's interest. These agents often have independent authority to sue and be sued. These two possible conflicts will be considered in turn.

4.4.2.1 Viceroys and the Solicitor-General

The relationship between the Viceroy and the Solicitor-General raises three questions.¹⁶⁴ The first two are threshold questions to the relevant issue: what is the relationship between the Solicitor-General and the Viceroy? To consider briefly the threshold questions, which are: does the Viceroy have a role that requires the officeholder to make decisions on the boundaries of the law, and if so, can the Viceroy seek technical legal advice from those other than his or her ministerial advisers?¹⁶⁵

Walter Bagehot famously said that the Queen has 'the right to be consulted, the right to encourage, the right to warn'.¹⁶⁶ This is a role that allows the Viceroy (as the Queen's representative) to police the legality and regularity of executive conduct.¹⁶⁷ There are also

¹⁶⁴ These questions do not arise in the Australian Capital Territory as there is no Administrator.

¹⁶⁵ Two types of advice in this context must be distinguished. The Viceroy, with the exception of the reserve powers, acts on the recommendations of the Executive Council. This is advice in the constitutional context and has the effect that the responsibility for the Viceroy's actions devolves on the Ministers. However, in the course of exercising his or her powers, the Viceroy may seek technical legal advice.

¹⁶⁶ Walter Bagehot, *The English Constitution* (Thomas Nelson & Sons, 1867) 150.

¹⁶⁷ See discussion in George Winterton, 'The Evolving Role of the Australian Governor-General' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 51 and further Paul Hasluck, *The Office of Governor-General* (Melbourne University Press, 1979) 17-20; 29, 38-42. Note also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 365 (Mason J).

circumstances in which the Viceroy can act independently from the recommendations of the Executive ministry, known as the reserve powers, and these include when the government is acting illegally, or unconstitutionally.¹⁶⁸ As such, the Governor has an important role in the overall functioning of the rule of law.¹⁶⁹ The Viceroy, in the proper fulfilment of his or her functions, may therefore need to seek technical legal advice.

As a legal principle, whether the Viceroy can go beyond the ministerial Law Officers (in Australia, this is only the Attorney-General) for technical legal advice has been the subject of differing academic opinion. Alpheus Todd, in his early treatise on colonial government, espoused that Governors must be able to seek legal advice from sources beyond the Law Officers (who at that time sat in the Cabinet), as the Governor may have ‘reason to believe that their legal judgment has been unconsciously biased by political considerations, so that he cannot accept their interpretation of the law.’¹⁷⁰ Former Governor-General Paul Hasluck said that the Governor-General, if concerned about the legality of the government’s actions, could seek assurances from the Attorney-General, or ‘eminent authorities of his choosing’.¹⁷¹ George Winterton noted that ‘strangely’ Hasluck omits to include in this group the Solicitor-General, a source of advice that Winterton referred to as ‘the usual source of quasi-independent advice’.¹⁷²

The opposite position was taken by H V Evatt. For Evatt the Governor ought to avoid seeking advice – even in the sense of technical legal advice – external to the ministry at all costs, limiting the Governor’s recourse to Ministers and ministerial Law Officers.¹⁷³

In Queensland, the position is somewhat clarified by the inclusion of s 34 in the *Constitution of Queensland 2001* (Qld) that provides the Governor, in the exercise of the powers of

¹⁶⁸ The most famous exercise of these reserve powers was the dismissal of the Lang Government in New South Wales by the Governor Philip Game, see Anne Twomey, ‘The Dismissal of the Lang Government’ in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 129.

¹⁶⁹ Guy Green, ‘Governors, Democracy and the Rule of Law’ (2006) 9(1) *Constitutional Law and Policy Review* 11, 15.

¹⁷⁰ Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans Green, 2nd ed, 1894) 59. See also Royal Commission into an Attempt to Bribe a Member of the House of Assembly and other matters, *Report of the Royal Commission* (Hobart, Government Printer, 1991), Exhibit 43 (Proof of Evidence of John Alexander Ramsay, Annexure JAR3, Advice of Bill Bale QC, ‘Governors Role in Appointing Administration: Some General Considerations’, 4), Exhibit 60 (Memorandum of advice from Professor Colin Howard, *In the Matter of the Tasmanian House of Assembly Election of May 1989 and In the Matter of the Powers and Responsibilities of the Governor or Tasmania*, 23 June 1989, 19-20).

¹⁷¹ Hasluck, above n 167, 21.

¹⁷² Winterton, above n 167, 51. See also Green, above n 169, 15.

¹⁷³ Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Frank Cass & Co Ltd, 2nd ed, 1967) 191.

appointment and dismissal of Ministers, 'is not limited as to the Governor's sources of advice.'¹⁷⁴

If the legal position that a Viceroy can request legal advice outside the responsible Ministers is accepted, the question arises as to whether, according to the statutory terms of the Solicitor-General's office, the Solicitor-General may so advise the Viceroy. In South Australia and Queensland, acting for the Governor would be possible only at the request of the Attorney-General: this is a statutory requirement.¹⁷⁵ In the other statutes, excepting the Commonwealth, the Crown as client would include the Governor, but this would be subject to the constitutional position of the Attorney-General as the appropriate officer to give instructions on behalf of the Crown. At the Commonwealth level, s 12(a)(i) of the *Law Officers Act 1984* (Cth) makes it clear that the Solicitor-General can act as counsel for the Governor-General in so far as that office is the one of the emanations of the Crown, without the necessity of requiring that office to seek the permission of the Attorney-General. This is in direct contrast to the function of furnishing opinions to the Governor-General on legal questions, which must come through the Attorney-General under s 12(b).

My research reveals that in practice, the Solicitor-General has been called upon in a number of different situations to advise the Viceroy. While governed at one level by the legal position outlined above, the next chapter explores how, as a matter of practice, protocols have been developed between the relevant players to deal with this delicate issue in the most politically appropriate manner.¹⁷⁶

4.4.2.2 The Solicitor-General and independent Crown agencies

The Solicitor-General may act for any number of agencies under the umbrella of the Crown, raising the second situation in which possible conflicts may occur. While some bodies are expressly designated as being part of the Crown,¹⁷⁷ it is otherwise determined based on the specific facts of each body whether they fall within the rubric of the Crown.¹⁷⁸ There are also instances where an agency has been held to have a separate identity only in the exercise of

¹⁷⁴ Note also that The Governor of New South Wales is required in certain instances to act on the advice of people other than the responsible Ministers: *Judicial Officers Act 1986* (NSW) s 43. See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 633.

¹⁷⁵ Qld s 8(a); SA s 6(a).

¹⁷⁶ Chapter 5.2.2.1.3.

¹⁷⁷ Bodies can also be designated as *not* representing the Crown.

¹⁷⁸ Hogg and Monahan, above n 133, ch 12.

some of its powers.¹⁷⁹ In some jurisdictions, the Solicitor-General may act for a person or body not falling within the Crown (with the consent of the Attorney-General), creating a further level of complication.¹⁸⁰

Even within the Crown, many agencies may sue or be sued in their own capacity, having separate *legal* personality from the Crown.¹⁸¹ In such cases, Bradley Selway explained:

[W]here a lawyer acts for a body which is intended by Parliament to have a separate legal existence from the sovereign, it is the body itself which is the relevant client. Assuming that there is a justiciable dispute, that body can sue other government agencies or the sovereign itself and the possibility exists that a government lawyer acting for such a body could have a conflict of interest if that lawyer also acts for the sovereign.¹⁸²

Thus, the theoretical idea that the Solicitor-General's client is the Crown as an indivisible entity belies the complexity that arises because many emanations of the Crown have been statutorily established to have separate legal personalities and statutory objectives that don't necessarily always correlate with the elected government's interests.

The Solicitor-General may encounter matters in which there are conflicts between the emanations of the Crown: be that because the entity is pursuing a legal position under its own statutory mandate that conflicts with the whole of government legal position, or a more direct conflict caused by a desire to bring legal proceedings against another emanation of the Crown.¹⁸³ *Momcilovic v The Queen* represents an example of the former, where the Queen of Victoria was represented by a Crown Prosecutor, instructed by the Solicitor for Public Prosecutions, the Victorian Attorney-General as second respondent was represented by the Victorian Solicitor-General, instructed by the Victorian Government Solicitor's Office (VGSO), and the Victorian Equal Opportunity and Human Rights Commission was represented by private counsel, instructed by the Commission. While the litigation didn't involve these state actors bringing litigation *against* each other, French CJ did note that the

¹⁷⁹ *Campbell v Employers Mutual; Yaghoubi v Employers Mutual* (2011) 110 SASR 576. See discussion in Jacobi, above n 150, 5.

¹⁸⁰ Cth s 12(a)(viii); Qld s 8(a)(5); Tas s 7(a); WA s 9(a); ACT s 17(1)(a)(iii); NT s 14(a).

¹⁸¹ Hogg and Monahan, above n 133, 340-1.

¹⁸² Selway, 'The Duties of Lawyers Acting for Government', above n 117, 117-18.

¹⁸³ G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 4th ed, 2010) 307. Concluding that there are different emanations of the Crown that may have conflicting interests is different to saying that those entities that do not have a separate personality from the Crown can conflict with each other: contra Dal Pont at 300, who notes that different agencies have different objectives and compete for funds. This, *of itself*, is not a legitimate conflict of interest. See strong riposte to this position in Jacobi, above n 150, 6.

Queen and the Attorney-General were on opposite sides on at least one contested point,¹⁸⁴ although not the question of the validity of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).¹⁸⁵ It was explained that each did so under separate statutory authority.¹⁸⁶

How should the Solicitor-General resolve a possible conflict between the emanations of the office's client? Maurice Byers and Michael Gill in their 1993 review of New South Wales government legal services argued:

Even where, as is increasingly the case, there is a separate corporate identity we believe it is ludicrous to consider various arms of Government becoming involved in litigation. It is essential that the Government have in place a system to resolve such disputes ...¹⁸⁷

Any possible conflict ought to be resolved by returning to theoretical underpinnings of the Solicitor-General's client as the Crown and the proper representative of that sovereign polity. The Attorney-General, as the ultimate representative of the sovereign, must be able to make the determinative call as the position the Crown must take. (Although, in this role, the Attorney-General would be bound by a decision of Cabinet on the matter).¹⁸⁸ The Attorney-General would also be able to decide whether the different emanations of the Crown, in accordance with their statutory mandates, could bring actions conflicting with the interests of the Crown proper and whether the Solicitor-General may act for them in this situation. This is reflected in those statutes that allow the Solicitor-General to act for non-Crown agents *at the request of the Attorney-General*. This conclusion is reinforced by the *Judiciary Act 1903* (Cth). This Act allows a lawyer in the Attorney-General's Department or the Australian Government Solicitor to act for two or more parties, even if they have conflicting interests, if to do so has been approved by the Attorney-General.¹⁸⁹

¹⁸⁴ Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 2.

¹⁸⁵ Ibid 13 (Pamela Tate, Victorian Solicitor-General, and French CJ).

¹⁸⁶ Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 261 (8 October 2010) 7 (G J C Silbert, and French CJ); Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 16 (9 February 2011), 104 (Silbert and Gummow J).

¹⁸⁷ Maurice Byers and Michael Gill, 'Review of Legal Services to Government' (New South Wales Attorney General's Department, 1993) 16 [3.33].

¹⁸⁸ Chapter 4.4.

¹⁸⁹ Sections 55F and 55R.

How conflicts of interest are resolved in practice is considered in the next chapter. My data reveal that while a *theoretical* possibility, it has rarely occurred, and when it has, officeholders have generally been able to manage any potential conflicts of interest.¹⁹⁰

4.5 A duty of confidentiality? The Solicitor-General, the Executive and the Parliament

Before turning from the Solicitor-General's function as counsel for the Crown, it is necessary to review briefly its impact on the confidentiality of the Solicitor-General's advice. As a general rule, legal advice is afforded confidentiality on the basis that the balance between the social benefit of disclosure and the social benefit of confidentiality tilts towards the latter. Confidentiality encourages people to seek frank and objective legal advice in relation to their activities; this, in turn, fosters a community operating within the bounds of the law.¹⁹¹ The privilege attaching to legal advice belongs to the 'client' and not the adviser; although the latter has a professional obligation to maintain confidentiality.

The justification for the existence of the duty must apply, *a fortiori*, to the government as a 'client'. Mason and Wilson JJ said in *Waterford v Commonwealth*:

To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers.¹⁹²

The Solicitor-General is requested by the government to advise on significant legal matters, in the course of which highly sensitive information is provided. A duty of confidentiality encourages recourse to the Solicitor-General by the government in all appropriate circumstances and the frank disclosure of information by the government to ensure the most accurate and objective advice is provided.¹⁹³ The confidentiality of the Solicitor-General's advice is reinforced in some jurisdictions where the Solicitor-General is made an exempt agency under freedom of information regimes.¹⁹⁴ When speaking of the applicability of the

¹⁹⁰ Chapter 5.2.2.1.2.

¹⁹¹ Michels, above n 29, 138.

¹⁹² (1987) 163 CLR 54, 62.

¹⁹³ See Letter from Pamela Tate SC, Solicitor-General, to Mr Richard Willis, Secretary, Select Committee on Gaming, 11 April 2007, extracted in Select Committee of the Legislative Council on Gaming Licensing, *First Interim Report Upon Gaming Licensing* (Legislative Council of Victoria, 2007) [3.9]. See also Anthony Mason, 'The Parliament, The Executive and the Solicitor-General' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011) [4].

¹⁹⁴ See, eg, *Freedom of Information Act 1991* (SA) schedule 2, item k; *Freedom of Information Regulations 2009* (Vic) reg 6(c), *Freedom of Information Regulation 1991* (ACT) schedule 2, item 4. In other

duty of confidentiality to the Crown one thing must be noted: because the Crown is indivisible, the sharing of advice among the emanations of the Crown is not in breach of the duty of confidentiality and does not waive the Crown's privilege.¹⁹⁵

The justification for the existence of the duty of confidentiality is complicated in the parliamentary sphere. To hold the exercise of executive power to account, the Parliament requires a large volume of information about government processes, including, potentially, advice taken into consideration in the executive decision-making process. A difficult question therefore arises as to whether the public interest in protecting the confidentiality of legal advice to government is outweighed by the public interest in ensuring the Parliament is fully informed of the government's process to scrutinise its actions properly. Britain has resolved this tension in practice by what has become known as the 'Law Officer Convention'.¹⁹⁶

4.5.1 The 'Law Officer Convention' in Australia

A practice whereby Parliament will refrain from requiring the divulgence of confidential Law Officers' opinions has been recognised in Britain since at least the mid-nineteenth century.¹⁹⁷ Since the advent of the statutory basis for the Solicitor-General, two incidents have arisen in which the Solicitor-General has been called before the Parliament to produce documents and give evidence: one in 1975 involving Maurice Byers, Solicitor-General of the Commonwealth, and the second in 2007 involving Pamela Tate, Solicitor-General of Victoria. In both instances there was heavy reliance on the existence of the Law Officer Convention in the Australian system.

In the first instance, Byers was called to the Bar of the Senate to answer questions on the matter commonly referred to as the 'Loans Affair' and 'to produce all documents, files or papers in [his] possession, custody or control relevant to these matters'.¹⁹⁸ The government

regimes, the Solicitor-General's legal advice would be exempt on the basis that it is protected by legal professional privilege: See, eg, *Freedom of Information Act 1982* (Cth) s 42.

¹⁹⁵ New South Wales Law Reform Commission, above n 149, [3.15]; Tasmania, Attorney-General, Guidelines for Seeking Advice from the Office of the Solicitor-General (The Hon Brian Wightman MP, February 2012), [14]; Solicitor General, Parliament of Tasmania, Solicitor-General Report for 2010-2011 (2011); *Mann v Carnell* (1999) 201 CLR 1, [16] (Gleeson CJ, Gaudron, Gummow and Callinan J).

¹⁹⁶ John L J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 260; K A Kyriakides, 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73.

¹⁹⁷ See further Edwards, *The Law Officers*, above n 196, 256-61; Edwards, *The Attorney General*, above n 89, 223-7; Kyriakides, above n 196.

¹⁹⁸ Commonwealth, *Parliamentary Debates*, Senate, 9 July 1975, 2710.

claimed executive privilege over the material, and issued a direction to a number of public servants (who had also been called) to comply with that claim.¹⁹⁹ The Solicitor-General wrote a letter to the Senate explaining that he could not comply with the summons based on the Executive's claim of privilege. His argument rested on two broad propositions.²⁰⁰ First, Byers acknowledged that the Crown had made a valid claim of privilege based on the secrecy of Crown deliberations.²⁰¹ This privilege, he said, extended to the opinions of the Law Officers as recognised by convention in the House of Commons.²⁰² Secondly, he argued that the Solicitor-General stood in a particular relationship to the Crown that required him to act consistently with the government's claim of privilege.²⁰³

Byers was dismissed by the Senate but the matter was referred to the Committee of Privileges to report on, *inter alia*, the claim for privilege by the Solicitor-General. The majority report accepted the Solicitor-General's arguments.²⁰⁴ The Minority Report, (Senators Ivor Greenwood, James Webster and Reg Wright) found, relevantly:

[The Solicitor-General] erred in not discharging his higher duty to give evidence before a House of Parliament when lawfully required – subject to all proper privilege in respect of any particular question or class of questions – e.g. questions which impaired the confidentiality on which his relationship with an Executive was based.²⁰⁵

An important caveat that the Minority Report makes is that the Solicitor-General did not explicitly rely upon the confidentiality of the Law Officers' opinions because of the legal professional privilege that attached to them; it seems therefore they were willing to entertain the existence of the privilege. The New South Wales Court of Appeal has subsequently held that the government cannot claim legal professional privilege to resist a call for documents from the Parliament.²⁰⁶

¹⁹⁹ Letter from E G Whitlam to the President of the Senate, 15 July 1975 (extracted in full in Commonwealth, *Parliamentary Debates*, Senate, 15 July 1975, 2729).

²⁰⁰ See further analysis in Anthony Mason, 'The Parliament, The Executive and the Solicitor-General', above n 193.

²⁰¹ See Letter from Maurice Byers to the President of the Senate, 15 July 1975 (extracted in full in Commonwealth, *Parliamentary Debates*, Senate, 15 July 1975, 2730-1); Commonwealth, *Parliamentary Debates*, Senate, 16 July 1975, 2781, 2787-8 (Maurice Byers).

²⁰² Letter from Maurice Byers to the President of the Senate, 15 July 1975.

²⁰³ Commonwealth, *Parliamentary Debates*, Senate, 16 July 1975, 2782-3 (Byers).

²⁰⁴ Senate Standing Committee of Privileges, above n 161, 13.

²⁰⁵ *Ibid* (Minority Report) 56.

²⁰⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, discussed below.

In the second incident, the claim for privilege over the Solicitor-General's advice was more directly made. Tate, as Victorian Solicitor-General, was summoned to produce to the Legislative Council Select Committee on Gaming Licensing all documents relating to advice she had given to the government about a probity investigation conducting in the course of issuing gaming licences.²⁰⁷ The government claimed privilege over the documents on three bases: first, the confidential nature of legal advice between the Solicitor-General and the Executive; secondly Cabinet confidentiality; and thirdly the confidentiality obligations in the *Gambling Regulation Act 2003* (Vic). In a letter to the Secretary of the Select Committee, Tate claimed that she must decline to produce the documents in the summons on the basis she could not act contrary to the privilege asserted by the Executive.²⁰⁸

The assertion of the Law Officer Convention in Australia must be informed by an understanding of the legal powers of the Parliament in its function of bringing the Executive to account. The Houses of Parliament have power to order the attendance of persons or the production of documents.²⁰⁹ In Australia, the extent to which these powers extend to compelling the production of documents that may be legally professionally privileged, such as the advice of the Law Officers, was established in the leading case of *Egan v Chadwick*.²¹⁰ That case considered the refusal by the Treasurer and member of the Legislative Council of New South Wales, Michael Egan, to table documents called for in a Council resolution on the basis of legal professional privilege and public interest immunity. Two questions arose for determination: first, whether the Council had power to order the production of documents protected by reason of legal professional privilege or public interest immunity; and secondly, if it did not, who was to decide the veracity of such a claim? All of the judges found that the Council had power to require production in relation to documents that fell within legal professional privilege.²¹¹

²⁰⁷ Select Committee of the Legislative Council on Gaming Licensing, above n 193, 7, 15.

²⁰⁸ Letter from Pamela Tate SC, Solicitor-General, to Mr Richard Willis, Secretary, Select Committee on Gaming, 11 April 2007.

²⁰⁹ See, eg, Constitution s 49, *Parliament of Queensland Act 2001* (Qld) s 9; *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19; *Parliamentary Privileges Act 1891* (WA) s 4; *Parliamentary Privileges Act 1858* (Tas) s 1; in NSW, this rests on the common law: *Egan v Willis* (1998) 195 CLR 224.

²¹⁰ *Egan v Chadwick* (1999) 46 NSWLR 563.

²¹¹ A full account and critique of the Court's reasoning in relation to the public interest immunity, which is not relevant to the current discussion, can be found elsewhere: Anthony Mason, 'The Parliament, The Executive and the Solicitor-General', above n 193.

The Court of Appeal had to reconcile the principle of legal professional privilege with the fundamental nature of the Legislative Council's accountability function to the constitutional system of government. Ultimately the judges held that the latter prevailed.²¹² Spigelman CJ contrasted the position of a litigant in legal proceedings to the special relationship of accountability that existed between the government and the Parliament; and found that to scrutinise the conduct of the Executive adequately, the Parliament may need recourse to the legal advice on which the Executive acted.²¹³

All of the judgments emphasised that, despite their conclusions as to the legal existence of the power to order the production of documents, even those subject to legal professional privilege, the *exercise* of that power was governed by practical and political pressures. Spigelman CJ said: 'What, if any, access should occur is a matter "of the occasion and of the manner" of the exercise of a power, not of its existence. If the public interest is thereby harmed, the sanctions are political, not legal.'²¹⁴ This principle is an important acknowledgement of the role of the courts and the Parliament in these situations, where competing appeals to the public interest are made. The practical exercise of the power ought to be, and is, governed by political convention and custom.

Parliament has, as confirmed in *Egan v Chadwick*, the power to order the production of documents even if they are subject to a valid claim of legal professional privilege. This would, of course, include the opinions of the Law Officers. However, as a matter of political practice that has probably developed to the status of convention in Australia, the opinions of the Law Officers will be kept confidential and not laid before the Parliament.²¹⁵ A responsible Parliament, in flexing its powers, will keep the underlying reasons for the

²¹² *Egan v Chadwick* (1999) 46 NSWLR 563, 578 (Spigelman CJ, with whom Meagher J agreed); 593 (Priestley JA).

²¹³ *Ibid*, 578 (Spigelman CJ, with whom Meagher J agreed).

²¹⁴ *Ibid*, references omitted.

²¹⁵ I say the practice has probably developed to the status of convention in Australia because the strength of the convention and the respect of the Parliament for its underlying justification in Australia have been reaffirmed by the relinquishment of the claims by the Senate in 1975, and the Victorian Select Committee in 2007, after its assertion. See also in October 2011 in Tasmania, the Government refused to table the Solicitor-General's advice on the basis of 'a longstanding convention in our system of government that legal advice to government should be treated judiciously and confidentially': Tasmania, *Parliamentary Debates*, Legislative Council, 25 October 2011 (Doug Parkinson, Leader of Government Business in the Legislative Council). The position accords with explanations of parliamentary practice, see Harry Evans (ed), *Odgers' Australian Senate Practice* (CanPrint Communications Pty Limited, 12th ed, 2008) 488.

existence of the convention firmly in mind, exercising them only in exceptional circumstances.²¹⁶

As counsel for the Crown, the Solicitor-General has a professional duty to maintain confidentiality in the office's legal opinions. Like all legal advice, there are heavy justifications weighing in favour of ensuring that the Solicitor-General's opinions remain confidential. However, as counsel for the *Crown*, the social benefit that is achieved by retaining the confidentiality of these opinions must be weighed against the public interest in seeing the Parliament scrutinise executive conduct and decision-making. The Solicitor-General's advice will often be an integral part of understanding what informed particular decisions and conduct. The apparent antinomy between these two principles has been resolved in British tradition by the 'Law Officer Convention', in which the paradox is resolved politically. The above analysis has demonstrated that the Convention accords with the Australian position, apparent from both practice and authority.

4.6 The Solicitor-General as Law Officer

While the Solicitor-General has changed significantly from its origins in the British Law Officers, it continues to fulfil some of those traditional functions. The office maintains a 'special relationship' with the Attorney-General.²¹⁷ This is clear, to differing degrees, from the statutes. The Solicitor-General of the Commonwealth is the 'second Law Officer of the Commonwealth'.²¹⁸ Other statutes emphasise the relationship in other ways.²¹⁹ This relationship, it is argued, continues to inform the role of the Solicitor-General, especially in the conduct of litigation and the advisory function, despite the office's position outside the responsible ministry. At the introduction of the Victorian statute in 1951, the Attorney-General said 'the office, which is ancient in its tradition and establishment, will remain. This Bill merely creates a new class of person who can fill that office.'²²⁰ It is necessary therefore

²¹⁶ Anthony Mason, 'The Parliament, The Executive and the Solicitor-General', above n 193.

²¹⁷ South Australia, *Parliamentary Debates*, House of Assembly, 7 March 1972, 3651 (L J King, Attorney-General).

²¹⁸ *Law Officers Act 1964* (Cth) s 5.

²¹⁹ In New South Wales, Tasmania and Western Australia, the Attorney-General can delegate functions to the Solicitor-General. In all jurisdictions the Solicitor-General must perform other duties as counsel as the Attorney-General directs. See also NSW s 3(1)(b); Vic s 5(c); Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3436 (Charles Court, Minister for Industrial Development); Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 1983, 825 (Geoffrey Pearsall, Minister for Tourism). In the Australian Capital Territory and Northern Territory the Solicitor-General is established under legislation bearing the title the 'Law Officers Act'.

²²⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 231 (Thomas Mitchell, Attorney-General).

to consider the traditional functions of the Law Officers that still exist in the Australian jurisdictions.

4.6.1 The Law Officers

The traditional role of the Law Officers included, in addition to their political functions as members of the ministry and their legal functions, a role in acting for and protecting the public interest. While initially these offices were established as representatives of the Monarch's interests, they gradually developed duties and obligations to act for, and in protection of, the public interest, the common good or common weal.²²¹ This development reflected the idea that the Law Officers were taking up the Crown's obligations to act in the public good.²²² In this sense, the client of the Law Officers greatly influenced the evolution of their functions. In Australia, even with the politicisation of the Attorney-General's position, the office's role in protecting the public interest has been considered broadly the same as that in Britain.²²³ The obligation to act in the public interest manifests itself in a number of ways: in bringing litigation 'in the public interest', in the fair and objective conduct of litigation, and in the advisory function. The tension between the public interest and politics has often been the driver for calls for the Attorney-General to operate with 'independence' from the government of the day.²²⁴

²²¹ Edwards, *The Law Officers*, above n 196, 295. See further Chapter 2.4.1.

²²² Hanlon, *An Analysis of the Office of Attorney General*, above n 143, 7-8; 27. This accepts the explanation of the Crown by Walker that the interests of the Crown may transcend individual preferences, pluralism and discord and there may exist some underlying public good: Walker, above n 60, 146. See further discussion Chapter 2.4.2.

²²³ Selway, 'The Duties of Lawyers Acting for Government', above n 117, 270. See also Gareth Griffith, 'The Office of Attorney General in New South Wales' (2007) 11 *Legal History* 79, 95. Although note the alternative view that received prominence under former Federal Attorney-General Daryl Williams which was discussed in Chapter 2.3. Many authorities confirm that the Attorney-General in the Australian context possesses those public interest functions bestowed upon the office at common law. See, eg, Australian Law Reform Commission, 'Standing in Public Interest Litigation (Report 27)' (1985) <<http://www.alrc.gov.au/report-27>> ch 6; *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employés Union of New South Wales* (1908) 6 CLR 469 ('*Union Label Case*'), 499 (Griffith CJ); *Williams v Attorney-General (NSW); Ex rel Cocks* (1913) 16 CLR 404, 415 (Barton ACJ); *Kidman v Commonwealth* (1925) 37 CLR 233, 240 (Knox CJ); 243 (Isaacs J); *Tasmania v Victoria* (1935) 52 CLR 157 ('*Potato Case*'), 171 (Rich J), 188 (Dixon J); *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, 256-7 (McTiernan J); *Victoria v Commonwealth* (1975) 134 CLR 338 ('*AAP Case*'); cf *Attorney-General v Adams* [1965] SASR 129, 132 (Napier CJ); *Hubbard Association of Scientologists International v Attorney-General (Victoria)* [1976] VR 119, 125 (Gowans J).

²²⁴ See further discussion in Chapter 2.3 and 2.4.

4.6.1.1 Litigation

The customary role of the Law Officers in representing the ‘public good’ manifests itself most prominently in litigation in the protection of the public interest, distinct from government interests.²²⁵ This arises, for example, in the Attorney-General’s function in prosecuting crimes, protecting ‘public rights’ such as in matters relating to charities, and conducting litigation ‘in the public interest’, such as in actions for injunctions or declarations for public nuisance, where public bodies may have acted in excess of their powers or for breach of statutory provisions enacted for the benefit of the public, in applications for vexatious litigant declarations and in prosecutions for contempt of court.²²⁶ The Attorney-General can grant his or her fiat for a private litigant to use the office’s standing to bring proceedings in the public interest through relator actions.²²⁷ In Australia, the Attorney-General’s function to bring proceedings in the public interest on behalf of the public, separate from ‘the body politic of the government unit in which he holds office’,²²⁸ has been widely accepted,²²⁹ although the ability of an officeholder to exercise the function non-politically has been criticised.²³⁰

4.6.1.2 Conducting litigation

The Attorney-General’s role in protecting the public interest in litigation, Edwards argued, expanded to reflect a philosophical conception as ‘guardian of the public interest generally’.²³¹ This has manifested, for example, in an obligation to make submissions to the court in pursuit of the Crown’s interest, particularly in criminal cases, that represent a fair and objective view of the law, and not give legal argument to assist the Crown’s case in a misleading or one-sided fashion. It must be ‘accurate, objective, and restrained, and founded firmly on a tenable exposition of the applicable legal principles.’²³²

²²⁵ Edwards, *The Law Officers*, above n 196, 286.

²²⁶ *Ibid* 295.

²²⁷ *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 (Lord Wilberforce). See also 494 (Viscount Dilhorne), 508-10 (Lord Edmund Davies), 518 (Lord Fraser).

²²⁸ *Queensland v Commonwealth* (1977) 139 CLR 585, 615 (Aitkin J); *Australian Conservation Foundation Inc v Commonwealth* (1980) 136 CLR 483, 526 (Gibbs CJ), 537 (Stephen J).

²²⁹ These have even been codified in Queensland. See *Attorney-General Act 1999* (Qld) ss 7(1) and 8.

²³⁰ See references in Chapter 2.3, note 27.

²³¹ Edwards, *The Law Officers*, above n 196, 286.

²³² John McGrath, ‘Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General’ (1998) 18 *New Zealand Universities Law Review* 195, 206. See also *Berger v United States* 295 US 78 (1935), 88 (Sutherland J).

To a large extent, the obligation of the Law Officers is now captured in the Crown's obligation to act as a model litigant. The obligation itself was originally recognised under the common law,²³³ and at the federal level in Australia is now embodied in the *Legal Services Directions 2005* (Cth).²³⁴ According to this instrument, the obligation arises from the Attorney-General's responsibility for the maintenance of proper standards in litigation. The older British authorities have referred to the Crown's role as 'the source and fountain of justice',²³⁵ and have equated the obligations with those of probity and fair dealing for judicial officers.²³⁶ In Australia, Finn J explained that the model litigant obligation is based on the notion that public bodies are owned by the Australian community, and that any agency of government 'has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve.'²³⁷ Other rationales for the principles rest on the litigation advantage of the government: as a repeat player with large resources at its disposal and the higher public profile of government lawyers.²³⁸

The obligation is, generally speaking, to 'act honestly and fairly in handling claims and litigation brought by or against' the Crown and goes beyond the normal ethical obligations of

²³³ See, eg, *Melbourne Steamship Ltd v Moorhead* (1912) 15 CLR 333, 342 (Griffith CJ); *Kenny v South Australia* (1987) 46 SASR 268, 273.

²³⁴ Appendix B. The Directions are issued under *Judiciary Act 1903* (Cth) s 55ZF. See also guidelines in New South Wales, Victoria, Queensland and the Australian Capital Territory: New South Wales LawLink, Legal Services Coordination, 'Model Litigant Policy for Civil Litigation' (8 July 2008) <<http://www.lsc.lawlink.nsw.gov.au/agdbasev7wr/lsc/documents/pdf/cabinetapp-mlp.pdf>>; Appropriate Dispute Resolution Directorate Victorian Department of Justice, 'Victorian Model Litigant Guidelines' (March 2011) <<http://www.justice.vic.gov.au/resources/3/4/34fd7f00459fb2b0b6a2b6e6d4b02f11/revisedmodellitigantguidelines.pdf>>; Queensland Department of Justice, 'Cabinet Direction: Model Litigant Principles' (4 October 2010) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/43881/20100505095729872.pdf>; *Law Officers Act 2011* (ACT) Division 2.2 (Legal Services Directions), *Law Officer (Model Litigant) Guidelines 2010 (No 1)* (ACT). Western Australia has refused to issue formal guidelines, relying instead on the common law: Western Australia, *Parliamentary Debates*, Legislative Council, 21 September 2010, 6886 (Giz Watson (Greens, WA), Michael Mischin (Parliamentary Secretary representing the Attorney-General, Liberal)).

²³⁵ *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409, 413 (Vaisey J). See also *Pawlett v Attorney-General* (1667) Hardres 465; 145 ER 550, 552; *Dyson v Attorney-General* [1911] 1 KB 410, 421.

²³⁶ See discussion of *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409, 413 (Vaisey J) and *R v Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd* [1988] 1 AC 858 in Camille Cameron and Michelle Taylor-Sands, "'Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497, 499 and fn 18.

²³⁷ *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 196-7. See also *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, [716]; Conrad Lohe, 'The Model Litigant Principles' (Paper presented at the Legal Managers' Breakfast Briefing, Queensland, 28 June 2007) 1; Basil Logan, David Wicks, Stephen Skehill, *Report of the Review of the Attorney-General's Legal Practice* (March 1997), 42.

²³⁸ Cameron and Taylor-Sands, "'Playing Fair'" above n 236, 499-506; Camille Cameron and Michelle Taylor-Sands, "'Corporate Governments" as Model Litigants' (2007) 10 *Legal Ethics* 154, 156.

private practitioners.²³⁹ The Crown must still act firmly to protect its interests.²⁴⁰ The duty to ensure the Crown acts as a model litigant therefore does not negate the Law Officer's obligations to pursue and protect the Crown's interests as an advocate, only tempers them.

4.6.1.3 Advisory function

Finally, the Law Officers' obligation to the public interest has manifested in the advisory function. In a primary sense, providing objective legal advice itself contributes to the rule of law and the public interest. The Law Officers also have an obligation to ensure government complies with the law, because of the Crown's obligations to the rule of law.²⁴¹ In this sense, the Law Officer's duty as a legal adviser to the Crown is distinct from other lawyers because private lawyers must not assist the client commit illegal acts, but don't have a positive obligation to prevent them from doing so.²⁴²

The Law Officers' advisory function can have a further impact on the public interest by fostering government action and policy in accordance with those principles that underpin its existence.²⁴³ It has been said that one of the common law functions of the Attorney-General is to ensure 'that the laws which the State might propose are both constitutional and accord with generally accepted principles of natural justice.'²⁴⁴ Edwards refers to this type of advice as providing opinions on the 'Law Officers' points'.²⁴⁵ Such advice will look at matters such as the onus of proof, the form and quality of a Bill, the grant of indemnities, and the retrospective operation of legislation.²⁴⁶

²³⁹ *Legal Services Directions 2005* (Cth) Appendix B, cl 2, this clause sets out in detail the specifics of the obligation. The other jurisdictions who have formalised these obligations have relied heavily on this formulation.

²⁴⁰ *Ibid* note 4.

²⁴¹ *Eastern Trust Co v McKenzie, Mann & Co* [1915] AC 750, 759.

²⁴² Dodek, above n 68, 24.

²⁴³ Some have even argued that lawyers acting for private clients hold an obligation to draw the client's attention to underlying principles within the legal system. See, eg, Tony Greenwood, 'Ethics and Avoidance Advice' (1991) 65(8) *Law Institute Journal* 724; Barry Dunphy, 'Being a Government Lawyer: A Practitioner's Observations' (Paper presented at the Queensland Law Society Government Lawyers Conference, Brisbane, 17 April 2008).

²⁴⁴ Y Omergee, 'Is there an Independent Government Lawyer in the House?' (September 1997) *International Legal Practitioner*, 102, extracted in Selway, 'The Duties of Lawyers Acting for Government', above n 117, 121. See also L J King, 'The Attorney-General, Politics and the Judiciary' (2000) 74 *Australian Law Journal* 444, 453; Rebecca La Forgia, 'Attorney General, Chief Law Officer of the Crown: But where is the law?' (2003) 28(4) *Alternative Law Journal* 163, 164.

²⁴⁵ Edwards, *The Attorney General*, above n 89, 189.

²⁴⁶ *Ibid*, and note Edwards discussion of the use of indemnity legislation in the Clay Cross affair at 347. Sam Silkin said 'no Law Officer of the Crown, of any political party, would be likely to advise the Government of which he was a member to initiate such legislation' adding it would 'contravene all constitutional practice and set a dangerous precedent.' See also at 352.

In Britain Lord Goldsmith QC, during his tenure as Attorney-General, said:

It is very important that new proposals, from early on in the policy making process, are worked up and developed with the aim of ensuring that they achieve proper respect for the rule of law, for human rights and for our domestic and international legal obligations.²⁴⁷

This conception of the Law Officers' role strongly correlates with the Public Interest Advocate seen in the US literature.²⁴⁸

There has been some recognition in Australia that the Attorney-General's traditional public interest functions also extend to providing advice to government on the congruency between government action and the principles that underpin the government system.²⁴⁹

The goal of achieving legislative and executive action that accords with the principles that underpin our governance system is statutorily recognised in several jurisdictions across Australia. In Queensland the *Legislative Standards Act 1992* (Qld) aims to achieve legislation that has sufficient regard to the principles 'that underlie a parliamentary democracy based on the rule of law'.²⁵⁰ These include that legislation has sufficient regard to the rights and liberties of individuals²⁵¹ – in this respect the legislation lists considerations such as natural justice, onus of proof, retrospectivity, indemnity, clarity and precision²⁵² – and the institution of Parliament.²⁵³ In Victoria, legislative and executive action is assessed against the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In the Australian Capital Territory, a similar scheme is contained in the *Human Rights Act 2004* (ACT). At the Commonwealth level, there is a Joint Committee on Human Rights that, *inter*

²⁴⁷ Lord Goldsmith, 'Politics, Public Interest and Prosecutions - A View by the Attorney General' (Paper presented at the 13th Annual Tom Sargent Memorial Lecture, London, 20 November 2001), extracted in Kyriakides, above n 196, 74. See also Evidence to Constitutional Affairs Committee, *Inquiry into the Constitutional Role of the Attorney General*, House of Commons, 7 February 2007 (Lord Goldsmith), 11. In 2007, the reforms to the Law Officers saw the introduction of an oath to 'respect the rule of law'. See also comments of Anthony Mason in relation to the Australian Attorney-General's responsibility to the rule of law: Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35(11) *Law Society Journal* 51.

²⁴⁸ Chapter 2.5.2.

²⁴⁹ See, eg, Electoral and Administrative Review Commission, 'Report on Review of the Independence of the Attorney-General' (1993) 24 (submission of Dennis Rose); John Hatzistergos, 'The evolving office of the New South Wales Attorney General' (2012) 86 *Australian Law Journal* 197, 203.

²⁵⁰ *Legislative Standards Act 1992* (Qld) s 4(1). Similar regimes exist for delegated legislation, see, eg, *Legislative Instruments Act 2003* (Cth) s 16, which states the Secretary of the Attorney-General's Department 'must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.'

²⁵¹ *Legislative Standards Act 1992* (Qld) s 4(2)(a).

²⁵² *Ibid* s 4(3).

²⁵³ *Ibid* s 4(2)(b). See also ss 4(4) and (5).

alia, examines proposed legislation and legislative instruments for compatibility with human rights.²⁵⁴ The Senate Scrutiny of Bills Committee also reports on the extent to which Bills trespass on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; make rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny.²⁵⁵

This is also reflected in drafting practice. At the Commonwealth level, the Office of Parliamentary Counsel (OPC) Drafting Directions require the referral of draft legislation to various agencies, other than the instructing agency, who have rights and responsibilities in relation to the legislation.²⁵⁶ The types of provisions that must be referred to the Attorney-General's portfolio are numerous, including legislation that might attempt to ouster judicial review of administrative action;²⁵⁷ discriminate against an individual or raise human rights issues under international instruments or infringe civil, political or other human rights relating to privacy or freedom of speech;²⁵⁸ affect social justice for Aboriginals, Torres Strait Islanders or South Sea Islanders;²⁵⁹ or affect relations between the Commonwealth and the States and Territories.²⁶⁰

This aspect of the Law Officers' traditional advisory function, taking the Law Officer beyond the legal, is closely associated with the relatively recent concept of 'integrity' in government. In Australia, Chief Justice Spigelman argued that bodies fill an 'integrity function' (improving integrity in government) when they 'ensure that each government institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other

²⁵⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

²⁵⁵ Senate, *Standing Orders and other Orders of the Senate* (Senate Printing Unit, Parliament House, June 2009), order 24(1)(a).

²⁵⁶ Parliamentary Counsel, *Drafting Direction* (2 May 2007) <http://www.opc.gov.au/about/draft_directions.htm>, Direction 4.2.

²⁵⁷ *Ibid* item 4.

²⁵⁸ *Ibid* items 5, 6 and 52.

²⁵⁹ *Ibid* item 8.

²⁶⁰ *Ibid* item 48. The OPC has also developed a 'complexity flag system', where the Office of Parliamentary Counsel (OPC) flags provisions for the instructing department where OPC considers that there is undue complexity. This initiative was implemented at the request of the Attorney-General. See further Parliamentary Counsel, *Drafting Direction* (2 May 2007) <http://www.opc.gov.au/about/draft_directions.htm>, Direction 4.1A. See also G C Thornton, *Legislative Drafting* (Butterworths, 4th ed, 1996) 134; David R Miers and Alan C Page, *Legislation* (Sweet and Maxwell, 2nd ed, 1990) 61.

purpose'.²⁶¹ Edwards' 'Law Officers' points', and the other concepts formulated by officeholders and commentators set out above, are iterations of the generally accepted principles that ensure that government power is exercised in accordance with its overarching purpose: to protect and provide for the citizenry while ensuring regulation is clear for that citizenry. The Law Officers' traditional advisory function can thus be viewed as an important integrity function.

In addition to the public interest at large informing the role of the Attorney-General in his or her advisory capacity in Australia, the office has responsibility for the provision of legal services to the 'whole of government'. Britain lacks a fully integrated legal service under the responsibility of the Law Officers;²⁶² however the Attorney-General in the Australian jurisdictions has, since colonial times, had a responsibility for providing legal services not just to the Cabinet, but to the 'whole of government'.²⁶³ The responsibility of an Australian Attorney-General for the provision of legal services to the government is encapsulated by the responsibility to ensure 'whole of government' issues are taken into account by the emanations of the Crown, rather than the sometimes narrower interests of an individual department or agency, captured, as they may be, by narrow bureaucratic interests.²⁶⁴ While this is not analogous to the 'public interest', it produces a number of public interest-related benefits. It ensures the Crown takes a unified legal position in respect of issues, giving consistency to the actions of government across departments and agencies. It ensures government resources are not wasted pursuing litigation between government departments and agencies, and ensures the broader impact of government policies are considered by individual departments and agencies.

²⁶¹ James Spigelman, 'The Integrity Branch of Government' (Paper presented at the National Lecture Series for the Australian Institute of Administrative Law, Sydney, 29 April 2004) 2-3.

²⁶² See discussion of the traditional legal services arrangements in England in Edwards, *The Attorney General*, above n 89, 192.

²⁶³ Chapter 3.2.5.

²⁶⁴ Electoral and Administrative Review Commission, above n 249, [3.79]; Basil Logan, David Wicks, Stephen Skehill, *Report of the Review of the Attorney-General's Legal Practice* (March 1997), 38. Selway has argued that this function is no longer part of the Commonwealth Attorney-General's role because of amendments to the arrangements of the Australian Government Solicitor. However, this position fails to consider the full extent of the changes and the mechanisms put in place by those amendments to ensure the continued responsibility of the Attorney-General for the oversight of government legal services: *Report of the Review of the Attorney-General's Legal Practice*, 7. See also 15 (recommendation 11). See also similar concerns in Queensland when the move to commercialisation was considered: Parliamentary Committee for Electoral and Administrative Review, 'Report 21: Report on Review of Independence of Attorney-General' (Legislative Assembly of Queensland, December 1993) 12 [4.2.16]; Electoral and Administrative Review Commission, above n 249, 42.

The traditional functions of the British Law Officers, as were initially adopted in the early colonial system, together with the changes that have developed in Australia in relation to the provision of legal services across government, emphasise the obligations those offices held to the public interest. These manifested in obligations of the Law Officers in litigation and also in the advisory function. The next section will juxtapose these traditional and common law functions against the statutory framework in which the Solicitor-General operates, concluding that the public interest obligations – although only in so far as they manifest themselves in relation to the conduct of litigation and in the advisory function – remain relevant to the role of the modern Solicitor-General.

4.6.2 The Australian Solicitor-General: reconciling common law and statute

The transposition of the traditional public interest duties of the Law Officers to the Australian Solicitor-General must be approached with caution. When the statutory office of Solicitor-General was introduced, many questions were raised about how it would relate to the traditional functions of the Law Officers.²⁶⁵ Any obligation to act in the public interest must be reconciled with the professional duties of the Solicitor-General, and the necessity of maintaining accountability within the government system and fidelity to the statutory provisions.

This thesis argues that the most satisfactory manner of doing so is to conclude that while the Solicitor-General may have an obligation to the public interest because of the relationship with the Attorney-General, this must be limited by the strict delineation of the functions of the office. The Solicitor-General cannot continue to have any obligation to act independently – in the sense of bringing proceedings – to further the public interest, except where such a function is bestowed by statute. Nevertheless, insofar as the Solicitor-General represents the Crown in those proceedings, the Solicitor-General must conduct them with fairness and objectivity. In the office's advisory function, the Solicitor-General must be cognisant of the Law Officers' obligation to provide advice that reflects the core principles that underpin our system of government.

²⁶⁵ See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 227 (Lieut-Colonel William Leggatt, Liberal), who asked whether the appointment of a non-political Solicitor-General would cut across the whole traditions of the Law Department.

Underlying my argument for a limited public interest function is the effect of the Solicitor-General's removal from the responsible ministry.²⁶⁶ In the US, the suggestion that the Attorney-General and Solicitor-General possess independent powers to defy the direction of the (elected) Executive in the pursuit of the public interest has been rejected on the basis that 'the Solicitor-General does not have the political legitimacy to advocate on behalf of "the United States" independent of Congress and the President.'²⁶⁷ Likewise, in Australia, the Solicitor-General is an appointed official with no electoral mandate to 'speak for the public'.²⁶⁸ Indeed, responsible government and ministerial accountability through the political process for the actions of non-political officers would not be able to operate if the Solicitor-General had an independent obligation to act in the public interest other than that determined by the elected government.

However, dismissing the existence of the Solicitor-General's common law powers to act in the broader public interest because of these conceptual difficulties runs contrary to the only Australian authority directly on point. In *Solicitor-General v Wylde*,²⁶⁹ the New South Wales Supreme Court held that the removal of the Solicitor-General from the responsible ministry had not removed the common law powers and prerogatives that attached to the office.²⁷⁰ More recent *obiter* comments from the Full Court of the South Australian Supreme Court suggest that the powers of the Solicitor-General must be determined by reference to the constituting statute.²⁷¹ As far as this goes, it must be correct, in that now that the functions of the Solicitor-General are set out in statute, the statute governs what functions the Solicitor-General performs. Whether the common law functions continue to inform the Solicitor-General's statutory functions is, however, a different issue.

The best way to reconcile the common law functions of the Law Officers with the statute establishing the Solicitor-General is to start from the proposition that any actions in the public interest must be undertaken through the accountable Attorney-General. The Attorney-General's public interest functions manifest themselves predominantly in respect of litigation:

²⁶⁶ Some of the statutes *expressly* remove the Solicitor-General from the responsible ministry. See: NSW s 2(6); Qld s 6, referring to *Constitution Act 1867* (Qld) s 14 (now repealed); Vic s 4(2).

²⁶⁷ Note, 'The Solicitor General and Intragovernmental Conflict' (1977) 78 *Michigan Law Review* 324, 344-5, 356.

²⁶⁸ *Ibid* 345. See different views on this issue in the New Zealand context in Chapter 2.6.

²⁶⁹ *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83. See further discussion of this case and an earlier NSW Supreme Court decision in 1902 in Chapter 3.3.4.

²⁷⁰ *Ibid* 93.

²⁷¹ *Question of Law Reserved on Acquittal (No 3 of 1995)* (1996) 66 SASR 450, 456.

the prosecutorial function, and the power to otherwise bring actions in defence of public rights and in the public interest. The Australian Solicitor-General is now wholly independent from the political realm; because of this the Solicitor-General can no longer have an independent function to bring proceedings or take other *actions* in this way. There can be no ability for the Solicitor-General to *act* independently in the public interest because there is no political mechanism to hold those actions to account.²⁷² This position can, of course, be changed by statute, and as a remnant of the office's common law origins, in many jurisdictions the Solicitor-General has express statutory authority to instigate certain proceedings, many of which have a public interest element.²⁷³

However, this does not mean that the obligations to the broader public interest fade into irrelevancy. These conclusions about *bringing actions* in the public interest do not prevent the Solicitor-General ensuring that in the conduct of Crown litigation, the model litigant principles are followed by themselves, as advocates, or bringing them to the attention of the client where appropriate. This is an obligation shared by all government legal service providers.

Finally, and most importantly, the Solicitor-General may also provide *advice* on actions or policies proposed by the government in respect of the congruence between these and the 'core government principles', as well as taking into account the 'whole of government' implications of a policy. The Solicitor-General's role is limited to providing advice on these matters: the final decision is taken by responsible government officers. This accords with much of the US scholarship which has emphasised the Public Interest Advocate type in relation to the advisory function of the OLC only. This ensures that the Solicitor-General is not substituting his or her opinion on where the public interest lies in a particular case, but ensuring the government is well-advised as to the various considerations that ought to be taken into account in making that decision. This view does not deny that the public interest is a contested idea, but gives the Solicitor-General a role in assisting the government to define its position in light of the many overarching principles that inform it.²⁷⁴

My conclusions are consistent with a number of other arguments made in relation to government lawyers. L Curtis and G Kolts, commenting on the ability of government lawyers

²⁷² For similar conclusions, see Parliamentary Committee for Electoral and Administrative Review, above n 264, (i), 13 [5.2.2].

²⁷³ See those listed in Appendix E.

²⁷⁴ For a similar analysis in relation to government lawyers, see Note, above n 59, 1186.

to influence the formation of government policy, also asserted it is open, and implicitly proper, for a government lawyer to call to the Attorney-General's attention proposed actions that 'would ignore or prejudice rights given to a citizen by the law.'²⁷⁵ Similarly in Canada, John Tait said that lawyers for the government have a key responsibility 'to discern how [democracy, the rule of law, fairness, the rights of citizens] are relevant and to bring them to the attention of ministers and officials.'²⁷⁶ He went on:

The importance of such advice applies with its greatest force to the Constitution, including the conventions, such as responsible government. It is crucial for public service lawyers to *remind* officials of the sources of their authority and the democratic context in which it must be exercised; this is why elected officials, either Cabinet for the government as a whole or Ministers within departments, are the authoritative clients. It is they who decide, within the rule of law, on what the public interest is for government officials.²⁷⁷

Drawing on Tait's work, Bradley Selway has also advocated for government lawyers to become involved in advising upon ethical issues, although they must be careful not to impose their moral perspectives upon the government.²⁷⁸

On the one hand, our constitutional system recognises the capacities and interests of individuals within the community, emphasising the law as a vehicle to achieve individual interests, and politics as an arena in which divergent interests are pursued. The Solicitor-General must, in accordance with this view, act on the instructions of the political Executive and assist it in achieving its democratic mandate. On the other hand, most philosophers, other than ardent majoritarian democrats, would accept there are at least some moral and political values that can be objectively ascertained and therefore transcend discord and pluralism. The Solicitor-General has an important role in bringing these to the attention of the political Executive.

There is some disconnect between the Solicitor-General's statutory function to act as counsel and this principle that the office ought to provide advice beyond the law. Christine Parker observed:

²⁷⁵ L Curtis and G Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights' (1975) 49 *Australian Law Journal* 335, 339.

²⁷⁶ John Tait, 'The Public Lawyer, Service to the Client and the Rule of Law' (1997) *The Commonwealth Lawyer* 58, 65.

²⁷⁷ *Ibid* 65-6 (emphasis added). See also Alan C Hutchinson, 'In the Public Interest: The Responsibilities and Rights of Government Lawyers' (2008) 46 *Osgoode Hall Law Journal* 105, 118-9.

²⁷⁸ Selway, 'The Duties of Lawyers Acting for Government', above n 117, 121. See also Bradley Selway, 'The Different Role of an Australian Attorney-General' (2002) 13 *Public Law Review* 263, 271.

In practice, lawyers frequently assume that the client's interest requires the lawyer to maximise and exercise all the client's legal rights and financial interests. It is not the lawyer's role to concern himself or herself with preserving relationships, caring about the impact of the client's actions (or the lawyer's actions as the client's agent) on other people or things (such as the environment), or even common human decency.²⁷⁹

However, there has also been recognition that legal advice extends beyond simply advising the client on their legal rights and liabilities, and that 'it must include advice as to what should prudently and sensibly be done in the relevant legal context'.²⁸⁰

How the tension between this traditional position of the lawyer, and that of the Solicitor-General as a Law Officer of the Crown, is resolved by individual officeholders is canvassed in Chapter 5.3.3. What my research reveals is that many officeholders do not countenance the idea they should provide advice beyond the law. However, others recognise this is an important, if difficult, aspect of their function.

4.6.2.1 'Core government principles'

If the Solicitor-General has a role in advising the government on the congruence of the government's actions with core principles that underlie our constitutional system, what are those principles?²⁸¹ Officeholders must ensure that they do not become involved in advising upon substantive policy, substituting their personal views for those of elected officials; but that they remain within the sphere of promoting better governance.

In legal and political spheres, any attempt to articulate principles that underlie the constitutional system will always be contested, and always susceptible to the criticism that a formulation allows for too much subjective discretion on the part of an individual.²⁸² Majoritarian democrats often argue that because deciding on the content of these principles involves controversial moral and political choices that lack coherency across the community, these decisions ought to be made by those with 'with a superior democratic pedigree', that is, directly elected officials.²⁸³ This criticism, however, overlooks that there is a broad consensus

²⁷⁹ Parker, 'A Critical Morality for Lawyers', above n 61, 679. References omitted.

²⁸⁰ *Balabel v Air India* [1988] Ch 317, 330 (Taylor LJ), followed more recently by the House of Lords in *Three Rivers District Council v Bank of England* [2004] UKHL 48.

²⁸¹ Mark A Sargent, 'Lawyers in the Perform Storm' in N B Rapoport, J D Van Niel and B G Dharan (eds), *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (Thomson Reuters, 2nd ed, 2009) 796.

²⁸² The criticisms leveled at this reflect many of the criticisms leveled at the Public Interest Advocate in the United States scholarship that has been outlined in Chapter 2.5.2.

²⁸³ Cass R Sunstein, 'Review: Justice Scalia's Democratic Formalism' (1997) 107(2) *Yale Law Journal* 529, 530. See also Note, above n 59, 1177. The 'Government Advocate' type in the US literature has been

about the nature of government in Australia, and that concepts such as the rule of law and democracy are generally accepted as core assumptions on which the constitutional system operates, even if the precise definition of these principles remains out of grasp.

Even to the extent that the principles are objectively incapable of definition, this does not rebut the need for the Solicitor-General to try to identify and advise on them. In fact, it is for precisely this reason that the Solicitor-General, or government lawyer, is simply bringing the government's attention to *their interpretation* of these principles, informed by their education, professional training and experience and also their independent judgment. Alan Hutchinson explained:

[G]overnment lawyers have a significant contribution to make in debates within government about how to determine what the public interest demands; they often have the training, experience, and knowledge to help develop a nuanced and sophisticated approach to identifying the public interest and crafting a range of practical strategies for its realization in practical circumstances. Indeed, being relatively independent of political pressures and partisan agendas, government lawyers are well placed to act as trusted advisors to their political superiors.²⁸⁴

The Solicitor-General's expertise in the law and institutional knowledge of the government's broader legal position provides the office with superior qualifications to provide advice to the government on the impact of actions and policies on legal institutions and principles. This is accentuated in the Australian system where the Attorney-General is almost always a member of Cabinet and has moved away from the ideal of 'independent aloofness' that has developed in Britain.²⁸⁵ The Solicitor-General's security of tenure and remuneration provide a level of independence not enjoyed by the Attorney-General.

Many scholars have attempted to articulate the amalgam of principles that are sometimes equated with the public interest.²⁸⁶ In Canada, the Supreme Court has explained that the four 'fundamental and organizing principles of the Constitution' relevant to addressing the

advocated on the basis of its democratic credentials, and the Public Interest Advocate criticised for this reason. See further Chapters 2.5.1 and 2.5.2.

²⁸⁴ Hutchinson, above n 277, 120-1.

²⁸⁵ Bob Debus, 'Maintaining the Rule of Law: The Role of the Attorney General' (2006) *Bar News* 5, 5; Gerard Carney, 'Comment - The Role of the Attorney-General' (1997) 9 *Bond Law Review* 1, 3-4, Gareth Griffith, above n 223, 80; King, above n 244, 158.

²⁸⁶ For alternative formulations of similar principles, see Selway, 'The Duties of Lawyers Acting for Government', above n 117; Paul Finn, 'A Sovereign People, A Public Trust' in P D Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (The Law Book Company Limited, 1995) 1, 232-32; David Collins, 'Address by Dr David Collins QC, Solicitor-General of New Zealand to the Australian Law Teachers Association 65th Annual Conference' (Paper presented at the ALTA Conference, Auckland, 6 July 2010), 4 fn 10; Tait, above n 276, 65.

particular question of whether Quebec could unilaterally secede from Canada, were ‘federalism; democracy; constitutionalism and the rule of law; and respect for minorities’.²⁸⁷ These were ‘vital unstated assumptions upon which the text is based’²⁸⁸ and, in the Canadian context, inform the interpretation of the text,²⁸⁹ and may, in some circumstances, give rise to substantive legal obligations.²⁹⁰

Our constitutional system gives rise to three broad principles, the ‘core government principles’. These are the rule of law, the democratic principle and the federal principle. There is some degree of interplay between them. The similarity between these, and those set out by the Supreme Court in Canada, no doubt rests on a shared common law Westminster tradition.²⁹¹

Since colonial times, government in Australia has operated on the assumption that the Executive will act under the rule of law and not according to the arbitrary whim of the rulers. The principle is subject to robust academic disagreement over its precise content, but without too much controversy, and by avoiding conceptions emphasising respect for individual human rights that have not gained universal recognition,²⁹² it can be accepted that the rule of law includes a system of laws that are capable of guiding the behaviour of individuals. Thus, the rule of law requires that the system consist of general, open and relatively stable laws that avoid retrospective operation. They must apply equally and must be promulgated according to clear rules. Individuals have the right to be treated according to the rules of natural justice, and with recourse to an independent Judiciary that oversees the implementation of the other principles.²⁹³

²⁸⁷ *Reference re the Succession of Quebec* [1998] 2 SCR 217, [32].

²⁸⁸ *Ibid* [49].

²⁸⁹ *Ibid* [52]-[53].

²⁹⁰ *Ibid* [54].

²⁹¹ Although the principle of ‘respect for minority rights’ is unique to the Canadian context, informed by its particular federal system and the province of Québec, the protection of religion, education and language, and more recently, the protection of minorities in the Canadian Charter of Rights and Freedoms.

²⁹² For proponents of this view see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978); and Lord Bingham of Cornhill, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67.

²⁹³ See, eg, A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co Ltd, 10th ed, 1959); Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979), 210ff; Lon Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1969).

In Australia, the rule of law is closely associated with the doctrine of legality.²⁹⁴ This doctrine requires the Judiciary to construe legislation as not infringing on rights and interests considered fundamental under the common law in the absence of an express intention to do so, or necessary implication. This rests on an assumption that the Parliament does not, generally speaking, intend to transgress these rights.²⁹⁵

The rule of law creates a framework of legality in which government operates; but alone this does not provide government power with its legitimacy. It is the second principle of democratic government that, when combined with the rule of law, provides this.

The democratic principle in Australia is informed by the twin pillars of representative and responsible government. These find expression in, *inter alia*, ss 7, 24, 64 and 128 of the Commonwealth Constitution. The principle requires, in a procedural sense, the exercise of the right to vote and to participate in government affairs.²⁹⁶ In this way the citizen is able to hold the government to account. Its operation carries with it implicit requirements of freedom of communication, at least regarding matters pertaining to government,²⁹⁷ together with openness and transparency within government.²⁹⁸

The final principle of the ‘core government principles’ is federation. John Quick and Robert Garran famously observed that ‘the Federal idea ... pervades and largely dominates the structure of the newly-created community, its Parliamentary, executive and judiciary departments.’²⁹⁹ As the dominant organising feature of our Constitution, federalism is, of course, very relevant in the interpretation of the Constitution and has given rise to an implied, substantive, limitation on State and Commonwealth power.³⁰⁰ Beyond the legal consequences

²⁹⁴ See, eg, *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 (Gleeson CJ).

²⁹⁵ A recent analysis of the breadth of the principle is contained in Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449.

²⁹⁶ As to the content of this in the Australian constitutional context, see *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

²⁹⁷ As to the content of the implied freedom of communication on government and political matters in Australia, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²⁹⁸ See eg, comments in *Nationwide News v Wills* (1992) 177 CLR 1, 139 (Mason J); *Commonwealth v John Fairfax* (1980) 147 CLR 39, 52 (Mason J).

²⁹⁹ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901, 1976 reprint) 332.

³⁰⁰ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (‘State Banking Case’); *Austin v Commonwealth* (2003) 215 CLR 185; *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1966) 108 CLR 372; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410 (‘Henderson’s Case’).

of federalism however, the federal *idea* ought to inform the actions of government; and thus the impact upon the role of the Law Officers.³⁰¹

In the context of articulating ‘core government principles’ on which the Law Officers ought to proffer advice, where relevant, to the government, the *proper functioning* of the federal system must be a guiding principle. The federal idea is informed, as it must be, by the judicial interpretations of the constitutional text that have exhibited a clear trend against compartmentalising federal and state jurisdiction, in favour of broad readings of the grants of central power. This, as former Commonwealth Solicitor-General Stephen Gageler has argued, allows flexibility in responding to social, economic and political change within the federal constitutional framework.³⁰² Within this flexibility, the political actors should nonetheless remain cognisant of the federal principle and strive for those benefits that its *proper* operation promises:³⁰³ that is, federalism as a flexible system capable of uniting diverse populations, increasing local participation in self-government, fostering diversity, creativity, experimentation, competition and increased popular participation in governance.

The idea that a Law Officer ought to bring to the attention of the government the impact of policies on this federal idea, is of course ameliorated by acknowledging that if disputes between the States and the centre eventuate, the functioning of the adversarial system requires counsel to put forward the strongest arguments available for the entities they represent.³⁰⁴

In summary, the ‘core government principles’ that inform the advisory role of the Solicitor-General in Australia are taken from the ideas of the rule of law, democracy and federation. These, in turn, emphasise equality, prospectivity, consistency, certainty and publicity of the law, the right to natural justice and an independent Judiciary, the protection of fundamental common law rights and interests, the right to vote and participate in government affairs, accountability, freedom of communication and association, openness and transparency, and the proper functioning of the federal system. What is clear from this articulation of the principles is that in drawing on them, the Solicitor-General will not be dictating to the

³⁰¹ H M Seervai, ‘The Legal Profession and the State: The Place of Law Officers and Ministers of Justice’ (1977) 22 *Journal of the Law Society of Scotland* 265, 266.

³⁰² Stephen Gageler, ‘The Federal Balance’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27.

³⁰³ See, eg, Terry Moran, ‘The Challenges of Federalism’ (Paper presented at the Eidos Institute, Brisbane, 8 June 2011) <www.dpmc.gov.au/media/speech_2011_06_08.cfm>.

³⁰⁴ See my analysis of the Solicitor-General’s advocacy function in Chapter 4.3.1.3.

Government a single, substantive policy outcome. Instead, the Solicitor-General will be using them as tools to remind government of its commitment to a fair and open process in pursuing its objectives.³⁰⁵

4.7 Conclusions

The legal framework in which the Solicitor-General operates is a unique combination of statute, informed by an understanding of the professional obligations of the legal profession and the common law and constitutional obligations of the Law Officers inherited from Britain, although evolving to exhibit a number of local features. The role of the Solicitor-General in the Australian system is that of counsel, but counsel of a special kind that exhibits several distinguishing characteristics. I have argued in this chapter that as counsel the Solicitor-General is unique among statutory officeholders. As an adviser, the Solicitor-General acts as a check on government power from internal abuse and in this function must exercise a high degree of independent legal judgment. But the office is also a defender of the exercise of power against external challenge, and in this function acts as a fierce, but fair, advocate for the Crown's interests.

As the discussion of the historical development of the office in the previous chapter explained, and is clear in the legislation, the primary shift between the traditional Law Officer role and that now embodied in the statutory Solicitor-General's office has been its removal from the responsible ministry. This chapter demonstrated that while the statute has in this way effected a large modification of the common law position of the Solicitor-General, crucial aspects of the Law Officers' public interest responsibilities remain in the conduct of litigation and the provision of legal advice. The Law Officers are consulted not simply as the final word on the legal position, but one that takes into account first, whole of government interests in the matter, and secondly, the congruence between the Crown's proposed actions and 'core government principles'. The Solicitor-General, often setting the outer limits of state power in the advisory function, has enormous potential to influence the relationship between the citizen and the state. It is only appropriate that in this function the Solicitor-General, first and foremost, offers the state the best legal advice possible. But this should be accompanied, where relevant, with his or her opinion, informed by knowledge and experience, as to whether the government's legislative or executive action has met the ideals of good government – informed by the 'core government principles'. While it may be an imperfect

³⁰⁵ Note, above n 59, 1181.

obligation,³⁰⁶ and only one of many checks and balances within the system of government, it is important. As a statutory officer removed from the rough and tumble of policy-making, the office is in a unique position to offer a perspective on these principles.

The next part of this thesis will test the legal principles deduced in this chapter against the experiences and role perceptions of those who have held, or hold, the office of Solicitor-General, and those closely associated with that office.

³⁰⁶ George Rainbolt, 'Perfect and Imperfect Obligations' (2000) 98(3) *Philosophical Studies* 233, 233.

PART 2 A LIVED PORTRAIT

Upon his appointment as South Australian Solicitor-General, and after reading the legislation governing his new office, Martin Hinton was dismayed. He was left with no great guidance as to what was expected of him.¹ The underlying objective of this thesis is to construct a better understanding of the functions and place of the Solicitor-General within the constitutional system. I am exploring not just the office's 'status', but also how individuals perform the role and the extent to which that is influenced by the role perceptions of those individuals and others who interact with the office. Ralph Linton described 'status' as 'simply a collection of rights and duties'. In contrast, the concept of role 'represents the dynamic aspect of a status'.² To understand the dynamic aspect of the Solicitor-General requires an examination of the 'norms, attitudes, contextual demands, negotiation, and the evolving definition of the situation' as understood by officeholders and those interacting with them.³ It requires an examination of the 'actual workings of the office and the traditions and conventions' around it.⁴ Compiling a 'thick description'⁵ of the lived experience of the Solicitor-General in this way is driven by the objective of lifting the veil on the true nature of an office that, through its advising and advocacy, has enormous potential to influence the normative framework of government.

Chapters 3 and 4 considered the *status* of the Solicitor-General, describing and analysing the historical evolution of the office and its current legal position. The combination in Australia of a non-political Solicitor-General with a highly politicised Attorney-General was underpinned by the objective of achieving independent and impartial legal advice and representation for government through the Solicitor-General, while maintaining a framework of accountability and the benefits of a politically engaged Attorney-General. These historical origins and objectives gave rise to the current status of the office which is now articulated in

¹ Martin Hinton, 'Secundarius Attornatus: The Solicitor-General, the Executive and the Judiciary' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011).

² Ralph Linton, *The Study of Man: An Introduction* (Appleton-Century, 1936) 113-14.

³ Bruce J Biddle, 'Recent Development in Role Theory' (1986) 12 *Annual Review of Sociology* 67, 72.

⁴ H M Seervai, 'The Legal Profession and the State: The Place of Law Officers and Ministers of Justice' (1977) 22 *Journal of the Law Society of Scotland* 265, 266.

⁵ Clifford Geertz, 'Thick Description: Toward an Interpretative Theory of Culture' in Clifford Geertz (ed), *The interpretation of cultures* (Basic Books, 1973).

statute.⁶ The statute provides the basic normative fabric of the Solicitor-General's role. But the legal picture provides only a broad framework in which the office's functions must be performed:⁷ there is more depth and complexity to the office than this.⁸ It is necessary therefore to examine the extent to which the historical objectives are realised, how (if at all) the statutory framework has had an impact upon the office's functions, and the divergences in the practices of individuals to approaching the office's functions.

A common response of participants in this study was that the nature of the Solicitor-General's role was largely dependent on the perspective of the individual who held the office, the attitude of the Attorney-General and the political circumstances in which the office operated.⁹ This conclusion is consistent with earlier assertions that the Attorney-General's role in Australia is greatly influenced by the individual.¹⁰ The role of Solicitor-General has manifested itself differently across jurisdictions and even, within the same jurisdiction, across different eras. This phenomenon has occurred despite the similarities of function that is found in the statutes and their largely shared provenance.¹¹ The generational changes and the distinct versions of the offices that have materialised across the jurisdictions do not readily correlate to changes or differences in the legislative framework, but relate to the role perceptions of individual officeholders and others in contact with the office, together with the political and other practical pressures faced by the office. This observation, of course, applies across many other public (and private) offices and institutions. Iain McGilchrist explained that 'things only are what they are because they find themselves in the surroundings in which they find themselves, and are connected to whatever it is that they are connected to.'¹²

⁶ John C Wahlke et al, 'The Roles of Legislators in the Legislative Process from *The Legislative System: Explorations in Legislative Behaviour*' (Wiley, 1962) in Bruce J Biddle and Thomas J Edwin (eds), *Role Theory: Concepts and Research* (John Wiley & Sons Inc, 1966) 243, 243.

⁷ Bruce J Biddle and Edwin J Thomas, 'The Nature and History of Role Theory' in Bruce J Biddle and Edwin J Thomas (eds), *Role Theory: Concepts and Research* (John Wiley & Sons Inc, 1966) 3, 4.

⁸ Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 5, 9.

⁹ See, eg, Interview, Daryl Dawson; Interview, Trevor Griffin; Interview, Martin Hinton; Interview, Pamela Tate. In the US context, see Nancy Baker, 'The Attorney General as a Legal Policy-Maker' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 31.

¹⁰ Chapter 2.3. The same point has been made in Britain by John Edwards: John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 67. See further discussion in Chapters 2.4.1.

¹¹ See, generally, Chapters 3 and 4.

¹² Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009) [3029].

The workings of the office of the Solicitor-General and views concerning the role have previously been unpublicised and little understood. Many of those who have taken up the office have admitted to knowing little to nothing about it.¹³ A telling factor in the lack of understanding of the office was the scarcity of evidence of a formal induction to the position.¹⁴ The lack of induction and a more detailed and formalised description of the role meant an individual's background and perceptions of the role is likely to have far more influence than in a situation where the role is largely formalised.

The research presented in this part will draw predominantly upon a series of interviews (n=40) that I conducted with current and former officeholders across Australian jurisdictions, as well as persons with a close relationship to the office: Attorneys-General, government legal officers and members of the Judiciary. I conducted interviews only with those who held office during the 'Modern Period' of the role. A full list of interview participants, together with the date and place of the interview, is provided in **Appendix B**. In the body of the thesis, I refer to interviews that I have conducted by reference to the participant only, except where the participant has requested anonymity. When I refer directly to an interview participant in the body of the text, I have not included an additional footnote reference to the interview. In addition to interview data, this Part will draw upon documentary sources: biographies and biographic dictionaries, memoirs, oral histories, manuscript collections, newspaper reports, government reports and other documents (such as Cabinet documents), and the writings of officeholders.¹⁵ Where it has been possible, the views of participants have been illustrated, and the recollections and examples participants have used have been substantiated, by examples from case law, written opinions and other sources.¹⁶

¹³ Eg, Interview, Chris Kourakis; Interview, Keith Mason; Interview, Leigh Sealy. Contra Interview, William Bale; Interview, John Doyle; Interview, Robert Ellicott; Interview, Michael Grant; Interview, Tom Pauling; Interview, Michael Sexton; Interview, Walter Sofronoff.

¹⁴ Interview, William Bale; Interview, John Doyle; Interview, Martin Hinton; Interview, Patrick Keane; Interview, Chris Kourakis; Interview, Michael Sexton; Interview, Pamela Tate. In their interviews, William Bale and Patrick Keane referred to the assistance in understanding the scope of the role provided by other officers, particularly in Crown Law, when they first took office.

¹⁵ Including, for example, National Library of Australia, 'Papers of Sir Maurice Byers' (1975-1999); Daniel Connell, Interview with Maurice Byers (Law in Australian Society Oral History Project, 10 January 1997); Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010); Robert Coleman, *Above Renown: Biography of Sir Henry Winneke* (Macmillan Company, 1988); Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114; Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007).

¹⁶ The support of many of the interview findings by independent measures in this way operates as a form of triangulation: Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 3rd ed, 1994) 266.

As the focus of this research is qualitative in nature, this Part uses the interview data to identify the presence or absence of particular views, rather than measuring the degree to which those views are present.¹⁷ Nonetheless, in presenting the findings, I will note broad consensus among participants, exceptions and contrary positions, and views evident among only a small number of participants to provide perspective on the findings. I will also explain causal relationships that can be identified, and the frequency with which these occur. Further explanation on the methodology including the selection of interview participants, the development of the interview questions, the conduct of the interviews and the analysis of the data is provided in **Appendix A**.

The detailed research findings are set out in the following three chapters. **Chapter 5** explains participants' views in relation to the advisory function of the Solicitor-General. **Chapter 6** turns to participants' views on the advocacy function, and also any continuing obligation to the public interest. **Chapter 7** concludes the qualitative research chapters with a detailed consideration of participants' perspectives on the independence of the office.

Before turning to the participants' views on the role it is necessary to provide a few contextualising comments about the office's functions in practice. These, largely, reflected the statutory function to act as counsel but also included a number of other functions.

The Solicitor-General's function was described by former Commonwealth Solicitor-General and Attorney-General Robert Ellicott as being to assist or 'support' the Attorney-General to fulfil his or her legal services function. Some officeholders saw the Solicitor-General as performing the *entire* legal services function,¹⁸ although often in conjunction with other actors, such as the Crown Solicitor.¹⁹ Prior to the adoption of the DPP the Solicitor-General also had extensive obligations in the criminal sphere, bringing prosecutions and no bills.²⁰ Those participants who held office during the statutory position's nascence in the 1960s and 1970s indicated that the Attorney-General had taken a larger role in the provision of legal services,²¹ although even during this period, the politicisation of the Attorney was evident

¹⁷ J Kirk and M L Miller, *Reliability and Validity in Qualitative Research* (Sage Publications, 1986) 9.

¹⁸ Interview, William Bale. See also Interview, Ian Callinan; Interview, Greg Cooper; Interview, Gareth Evans; Interview, Linda Lavarch; Interview, Robert McClelland; Interview, Michael Sexton; Interview, Terence Sheahan.

¹⁹ Interview, Rodney Welford.

²⁰ Interview, Daryl Dawson.

²¹ Interview, Thomas Hughes; Interview, Anthony Mason.

and the office's role in legal advising and advocacy was necessarily curtailed.²² The last Commonwealth Attorney-General to appear in court was Daryl Williams in the 1990s.²³ Michael Lavarch, his predecessor, said personally advocating the Crown's interests before the court 'in my view ... wasn't actually the role the Attorney should play in the contemporary structure'.

Solicitors-General engage in a small number of functions that are not strictly within the legal services function. In New South Wales, the Solicitor-General assists the Attorney-General in fulfilling his or her public interest functions through a series of delegations relating to charitable trusts, warrants for surveillance devices, criminal contempt proceedings and claims of public interest immunity.²⁴ Chapter 4.3 identified that in New South Wales there is also a statutory provision that requires the Solicitor-General to act for the Attorney-General in the event of the office's vacancy or the officer's absence.²⁵ From time to time in some jurisdictions the Solicitor-General has also been involved in assisting the Attorney-General develop law reform proposals.²⁶ Historically, at the Commonwealth level, the Solicitor-General also represented Australia in a number of international forums, including, for example, the United Nations Commission on International Trade Law (UNCITRAL).²⁷ This involvement ceased in 1998 with the appointment of David Bennett and the function was absorbed into the Department of Foreign Affairs and Trade.²⁸ At the State level, Solicitors-General were also previously involved in attending bi-annual meetings in relation to the Law

²² Interview, Thomas Hughes; Interview, Anthony Mason.

²³ Williams was a practicing silk when appointed Attorney-General, and appeared in two cases, *Gould v Brown* (1998) 193 CLR 346 and *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

²⁴ M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86, 92. John Hatzistergos, 'The evolving office of the New South Wales Attorney General' (2012) 86 *Australian Law Journal* 197, 206. No other office has such broad ranging delegations.

²⁵ *Solicitor General Act 1969* (NSW) s 3(1)(b). See also Interview, Keith Mason.

²⁶ Interview, Robert Ellicott; Interview, Martin Hinton; Interview, Anthony Mason; Interview, Keith Mason; Interview, Michael Sexton; Interview, Pamela Tate (see below Chapter 7.5.1); Anthony Mason, 'Administrative Law Reform: The Vision and the Reality' in Geoffrey Lindell (ed), *The Sir Anthony Mason Papers* (Federation Press, 2007) 167, 169; Coleman, above n 15, 208-9; Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31(2) *Melbourne University Law Review* 20; Buti, above n 15, 159-60; 165.

²⁷ See list of international matters that were within the responsibility of the Attorney-General and Solicitor-General set out in Letter from Prime Minister to Ministers upon the announcement of Mr E Lauterpacht QC as the Legal Adviser to the Department of Foreign Affairs, 21 November 1974, National Archives of Australia, Canberra, M133/25.

²⁸ Interview, David Bennett (SG); Interview, Robert Ellicott; Interview, Gavan Griffith; Interview, Anthony Mason; Gavan Griffith, 'Report: Second Law Officer to the First Law Officer 1 July 1995-31 December 1996' (Solicitor-General of Australia, 1996) 8.

of the Sea Convention²⁹ and the United Nations Working Group drafting the Convention of Rights of Indigenous Peoples as part of the Australian delegation,³⁰ but these functions have fallen away as they too have been subsumed within other departments.³¹

By and large, my findings are consistent with the statutory position that the majority of the work of the Solicitor-General is to provide legal advice on significant legal issues and legal representation to the Crown in major litigation, mostly appellate and constitutional.

²⁹ United Nations Convention on the Law of the Sea III (UNCLOS III).

³⁰ 'Report of the Special Committee of Solicitors-General to the Standing Committee of Attorneys General for year ended June 30, 1995' (Secretary, SCSG, 1995) 3; John McDonnell, 'Special Committee of Solicitors General Meeting' (Secretary, Special Committee of Solicitors-General, 18 October 1996) (on file with author) 9. See explanation of history behind the State Solicitors-General in these negotiations in R A Herr and B W Davis, 'The Impact of UNCLOS III on Australian Federalism' (1986) 41(3) *International Journal* 674; Legislative and Constitutional Affairs Committee, 'Trick or Treaty: Commonwealth Power to Make and Implement Treaties' (Senate November 1995) <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/index.htm>, [13.44]. Note current arrangements: Department of Foreign Affairs and Trade, *Principles and Procedures for Commonwealth-State Consultation on Treaties* <www.austlii.edu.au/au/other/dfat/reports/infokit.html#sect8> [6.1]-[6.3].

³¹ See discussion of involvement of Solicitors-General at overseas meetings in McDonnell, above n 30, 9. See also Interview, Martin Hinton.

5 THE ADVISER

5.1 Introduction

This chapter explores participants' perceptions about the advisory function of the Solicitor-General. The functions of adviser and advocate were perceived very differently.¹ There was overwhelming consensus that the importance of the office to the government system and the overarching concept of the rule of law was defined through the advisory aspect of the role. It was this function that gave the office constitutional significance. This is despite emphasis upon the benefits of having a permanent advocate available to government when the position was introduced.²

For a Solicitor-General to fulfil the advisory aspect of the role in a manner that assisted in achieving governance under the rule of law, my data demonstrate that four assumptions must be met: the client is the Executive; the Solicitor-General's advice is final within government; government seeks the advice of the Solicitor-General when appropriate circumstances arise; and the office enjoys a level of independence. This chapter explores the first three assumptions. 'Independence' is returned to separately in Chapter 7 as it transcends all aspects of the Solicitor-General's role.

The chapter concludes by considering the extent to which participants viewed the advisory function of the Solicitor-General as extending beyond a neutral arbiter of the law. This section of the chapter explores the views on whether the Solicitor-General ought to assist in achieving executive policy outcomes and protecting government power, and to advise on the impact of proposed policies and actions on 'whole of government' questions and those 'core government principles' identified in Chapter 4.6.2.1. This section of the chapter therefore considers the continuation of the traditional tensions of the Law Officers' role in the contemporary context by analysing the extent to which the incumbent government's political agenda and the Crown's obligations to the public interest affect the Solicitor-General's performance of the advisory function.

¹ This accords with conclusions drawn regarding the statutory position in Chapter 4.3.1.3.

² See Chapter 3.4.4. The advocacy aspect of the role of the Solicitor-General is returned to in the next chapter.

5.2 Advisory function and the rule of law

Overwhelmingly, participants emphasised the importance of the Solicitor-General within the government system by reference to the office's advisory function. James Faulkner, who heads the Constitutional Policy Unit in the Attorney-General's Department, said that this function is not necessarily 'visible to the outside' and so often its significance is overlooked. A number of participants stressed the importance of the advisory function over the advocacy work.³ This finding is entirely congruent with my explanation that to better understand our constitutional requires us to give greater scholarly attention to offices such as the Solicitor-General in their advisory role.⁴ Former Tasmanian Solicitor-General William Bale noted the increased importance of the function given the rise of the modern administrative state and the expansion of the government and government activity into many spheres of private and commercial life.

The Solicitor-General in the advisory function is policing the legal boundaries of government power; filling the role of a 'judge' before a matter reaches the judicial branch. Former Queensland Crown Solicitor and Acting Solicitor-General Barry Dunphy explained that, because in Australia the High Court has no jurisdiction to issue advisory opinions,⁵ the rationale underpinning the role of the Solicitor-General is strengthened.

The Solicitor-General's opinions on the outer limits of government power are, of course, subject to the court's view on the position. However, often *in practice* the Solicitor-General's advice establishes these limits, or at least influences them. Often government actions are not challenged: they may remain unknown to people they affect, or if they are known, people may not be in a position to challenge them. In other cases the government may abstain from acting on the basis of the Solicitor-General's advice. In the absence of a forensic context, former South Australian Solicitor-General Chris Kourakis explained he believed the Executive's obligation to act lawfully becomes more pronounced, and the work of the Solicitor-General more fundamental.⁶

³ Interview, William Bale; Interview, Catherine Branson; Interview, James Faulkner; Interview, Stephen Gageler; Interview, Leigh Sealy.

⁴ Chapter 1.1.

⁵ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

⁶ See also Richard Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) 16.

Some members of the High Court have recognised the inherent benefit in the stability of the law and have been informed in their decisions by longstanding government practice.⁷ Insofar as the Solicitor-General's opinions are relied upon in the creation of such practice, the office's advisory function can be viewed as contributing directly to the development of the government's legal paradigm. For example, when he was Commonwealth Solicitor-General, Gavan Griffith advised the government that it was constitutional to create posts for 'junior Ministers'.⁸ When the matter was challenged in the High Court in 2001, the majority accepted the practice as constitutional. Gleeson CJ commented: 'The practice of appointing Ministers, and Assistant Ministers, is well established.'⁹ The High Court has also recently held that a constitutional amendment may be interpreted using a Solicitor-General's opinion on the meaning of the proposal that has been provided to voters during a referendum (at least in so far as the opinion discloses what the contemporary and intended meaning of the text may have been).¹⁰

5.2.1 Rule of law: three perspectives

The Solicitor-General's advisory function assists in policing the boundaries of government power and ensuring the integrity of government action. But to what end? Participants justified the function in three different ways. Each of these saw the function as existing for overarching 'rule of law' objectives but emphasised a different public ideal encompassed within its parameters. First, the function existed to 'check' government from over-extending its powers into the individual sphere. Secondly, the function existed to assist the democratically elected government achieve its policy agenda with certainty and security. Thirdly, it facilitated the smooth operation of the separation of powers in times of conflict between institutions or of uncertainty over their proper roles. The differences in these perspectives resonate with the differences in the normative types distilled from the US and British scholarship in Chapter 2.¹¹

⁷ See, eg, comments in *Victoria v Commonwealth* (1975) 134 CLR 338 ('AAP Case'), 417-9 (Murphy J), and the comments of Gleeson CJ referred to below, n 9.

⁸ Interview, Gavan Griffith.

⁹ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 403.

¹⁰ *Wong v Commonwealth* (2009) 236 CLR 573, 591 [52] (French CJ and Gummow J); 625 [185] (Hayne, Crennan and Kiefel JJ); 657 [277] (Heydon J).

¹¹ See further Chapters 2.4 and 2.5, and particularly the Autonomous Government Advocate, Public Interest Advocate and Peacemaker types.

5.2.1.1 Checking power and protecting the public

The first perspective saw the Solicitor-General's advisory function as operating for the benefit of the public *directly* by ensuring the government does not act illegally.¹² Queensland Solicitor-General Walter Sofronoff commented that the office's advice places government in a position so that: 'if it were tempted to do something that crossed the line, or came close to the line, it has to deal with the fact that there is a piece of written advice that is there that one day might be uncovered by somebody in the course of time, and it makes it harder.'¹³ However, the view of the Solicitor-General as acting for the direct benefit of the public and community was less prevalent in the interview responses than the second perspective.

5.2.1.2 Certainty and security for government

The Solicitor-General's advice gives confidence to government to pursue policies that are legally sound, and gives government security if its actions are called into question in the future.¹⁴ In a society that is underpinned by the rule of law and where legislative and executive action is challengeable in the courts for its constitutionality, it is imperative for the government to be able to act with some constitutional certainty.

Former Commonwealth Solicitor-General and Attorney-General Robert Ellicott referred to this type of function as a 'protective role'. The Law Officers have a duty *to the government* to speak out if government is doing something beyond its legal boundaries. This second perspective closely aligns with the Autonomous Government Advocate type that was identified in the US literature.¹⁵ To illustrate this perspective, Ellicott used the advice that the then Commonwealth Solicitor-General, Maurice Byers, tendered on what eventually became known as the 'Loans Affair' and led to the dismissal of the government in 1975. On the question as to whether a proposed loan was a 'loan for temporary purposes', and therefore did not need the permission of the Loans Council, Byers' oral view was sought. The Solicitor-General indicated it may be 'arguable'.¹⁶ Ellicott surmised whether Byers could have prevented the entire affair by putting forward his legal view more forcefully. In Ellicott's

¹² Interview, Catherine Branson.

¹³ Interview, Walter Sofronoff. See also Interview, Pamela Tate.

¹⁴ Interview, Peter Garrisson; Interview, Patrick Keane; Interview, Chris Kourakis; Interview, Leigh Sealy; Interview, Walter Sofronoff.

¹⁵ Chapter 2.5.1. See also the second conception of lawyers' independence explained in Chapter 4.3.1.2.

¹⁶ *Sankey versus Whitlam* - Maurice Byers QC regarding involvement in the Loans Affair (April 1976), National Archives of Australia, Canberra, M4081 3/25, 3-4; See also Daniel Connell, Interview with Maurice Byers (Law in Australian Society Oral History Project, 10 January 1997) 52.

view, Byers' responsibility to do so would have been for the objective of protecting the government from harm.

This idea of the Solicitor-General providing security and certainty to the government on legal issues – particularly controversial ones – was common in the views of Solicitors-General, and held even more strongly by Attorneys-General. Rodney Welford, former Queensland Attorney-General, said that in relation to controversial issues or issues that may adversely affect the interests of different stakeholders, the government 'want[s] the Solicitor-General to be fiercely independent because the last thing you need is gratuitous advice that gets you ... hosed out in court.'

The government often publicly relies upon, or occasionally even releases, the Solicitor-General's advice. Former Northern Territory Solicitor-General Thomas Pauling said that advice is sometimes used as a political counter-attack to any doubts as to the constitutionality or general legality of its actions. In the US context, Trevor Morrison has argued that the Executive's 'self-binding' approach to OLC opinions enhances the Executive's claims of respect for the law, which can be used to generate credibility and public support.¹⁷ Gareth Evans, former Commonwealth Attorney-General, explained that sometimes to relieve political pressure, the Solicitor-General's advice was sought '*for the record*'. He saw 'the label of Solicitor-General' as being important. He explained:

[T]hese were people of real stature, and it meant something having the Solicitor-General signing off on something. ... A bit like [British Prime Minister Tony] Blair and the business with the Iraq ... I mean Blair was desperate to have the advice that he wanted ... not just from any old character at the Bar, he wanted it from his own Law Officers. That's the way in which you think about these things when you're in government.

The use of the Attorney-General's opinion by the British government to give credibility to arguments about the legality of Iraq invasion relies on the stature and authority of the Law Officers' position. Pauling explained that government attempts to gain public support, relieve political pressure and cloak their actions with the legitimacy of a Law Officers' opinion introduces the potential for political abuse of the Solicitor-General.

The political use of the Solicitor-General by the Executive as described by Evans is illustrated by a 2011 incident in Queensland. Political and public concern erupted over the

¹⁷ Trevor W Morrison, 'Libya "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation' (2011) 124 *Harvard Law Review Forum* 62, 64.

proposed reform of the parliamentary committee system that reduced many of the traditional roles of the Speaker.¹⁸ A letter was written to the editor of the *Courier Mail*, authored by a number of distinguished jurists, academics, practitioners and politicians, amongst others, alleging that the reforms were ‘an insult to the doctrine of the separation of powers’ and undermined the independence of the Parliament from the Executive by undermining the position of the Speaker.¹⁹

The government responded by seeking the Solicitor-General’s opinion on, *inter alia*, whether the proposed Committee structure would be ‘a breach of the doctrine of the separation of powers’. This was not simply a legal question, as the doctrine of the separation of powers does not exist in the State constitutional systems.²⁰ The Solicitor-General and Crown Counsel concluded that the proposal did not breach the doctrine of the separation of powers, and ‘[e]ven if the proposal did amount to a breach, there are no legal consequences.’²¹ This advice was tabled in Parliament by the government,²² and relied on extensively in debate as a political shield.²³

However, by turning to the Solicitor-General the government does not have a guaranteed ‘stamp’ of validity to show the public, its political opponents, and the media.²⁴ If the Solicitor-General were simply a stamp, the Solicitor-General’s opinion would lose its status and respectability, and therefore its worth to the government. Evans explained that a

¹⁸ Parliament of Queensland (Reform and Modernisation) Amendment Bill 2011 (Qld) (particularly cl 7) and Parliamentary Service and Other Acts Amendment Bill 2011 (Qld).

¹⁹ David Russell QC, Hon Ian Callinan; Suri Ratnapala; Nicholas Aroney; Dr Michael White QC; Scott Prasser; David Muir; Kevin Rozzoli; Dr Ken Coghill; Jim Fouras; Mike Reynolds; Neil Turner; Lin Powell; Ray Hollis; Rob Borbidge; Terry White; Beryce Nelson; Tom Gilmore; Bill Hewitt; Manfred Cross; David Watson; Judy Gamin; Brian Cahill, ‘Avoid Assault on Democracy’, *Courier Mail* (Brisbane), 20 April 2011, 32 <<http://www.couriermail.com.au/ipad/we-need-global-carbon-deal/story-fn6ck620-1226041789703>>.

²⁰ Although the federal separation of powers has some impact at the State level because of the inclusion of the State courts in the federal system: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

²¹ Memorandum of Advice from Walter Sofronoff QC, Solicitor-General and Steve Marton, Crown Counsel, *Re: Draft Parliamentary Service and Other Acts Amendment Bill 2011 - Matters relating to the Committee of the Legislative Assembly*, 9 May 2011, 2.

²² Queensland, *Memorandum of advice, dated 9 May 2011, from the Solicitor-General Queensland regarding the Draft Parliamentary Service and Other Acts Amendment Bill 2011 - matters relating to the Committee of the Legislative Assembly*, Parl Paper No 5311T4402 (2011).

²³ See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 2011, 1493 (Anna Bligh, Premier and Minister for Reconstruction).

²⁴ A good example of this was referred to in Interview, David Bennett (SG). In 2000 the Howard Government had to retreat from its policy on using the electoral roll to mail out information on the incoming GST because of Solicitor-General advice on the issue. See Commonwealth, *Parliamentary Debates*, House of Representatives, 8 June 2000, 17442 (Daryl Williams, Attorney-General).

‘Solicitor-General who was prepared to do something that was intellectually indefensible, or intellectually disreputable’ would ‘diminish the credibility of that person, the office, and your capacity to rely on him, and your *own* capacity to avoid criticism from the public, from the press, and so on.’²⁵

In 2011, the Commonwealth government relied heavily on the Solicitor-General, Stephen Gageler, to give public credibility to its actions. This led to the office becoming embroiled in political controversy. The incident commenced with a federal government announcement of a new measure to process asylum seekers (arriving by boat) offshore.²⁶ The measure included sending 800 asylum seekers to Malaysia, and came to be known as the ‘Malaysia Solution’. The Minister for Immigration issued a declaration under the *Migration Act 1958* (Cth) that Malaysia was a country to which ‘offshore entry persons’ could be taken.²⁷ A number of Afghani asylum seekers sought judicial review of that declaration in the High Court.

In response to this legal threat to a very politically important policy, the Minister defended the legality of his decision, repeating that ‘The Commonwealth Government is on very strong legal grounds.’²⁸ He also indicated that the Solicitor-General had been involved in ensuring the scheme was strongly defensible in the High Court, although the Solicitor-General’s advice was never released. Academic commentators shared the view that the government would prevail in the challenge.²⁹ The High Court found the Minister’s declaration invalid because of jurisdictional error.³⁰

After the decision, two remarkable events occurred. First, a number of journalists drew the conclusion that the government’s legal advice (which, based on the Minister’s comments,

²⁵ For a similar view about the OLC’s value to government in the US context, see Morrison, above n 17, 67.

²⁶ Prime Minister and Minister for Immigration, ‘The Regional Cooperation Framework’ (Press Release, 7 May 2011).

²⁷ *Migration Act 1958* (Cth) s 198A.

²⁸ Chris Bowen, Minister for Immigration, ‘Malaysia transfer arrangement, High Court case’ (Press Conference, 8 August 2011).

²⁹ See, eg, George Williams, ‘Malaysia court case pitches minister against basic refugee rights’, *Sydney Morning Herald* (Sydney), 16 August 2011 <<http://www.smh.com.au/opinion/malaysia-court-case-pitches-minister-against-basic-refugee-rights-20110815-1iuni.html>>; Paul Barry, ‘Government power tested in High Court challenge’, *The Power Index: Who Really Runs Australia* 9 August 2011 2011 <<http://www.thepowerindex.com.au/head-to-head/government-power-tested-in-high-court-challenge/20110809246>>; Ken Parish, ‘Legal heaven on a stick’, *Club Troppo* 9 August 2011 <<http://clubtroppo.com.au/2011/08/09/legal-heaven-on-a-stick/>>. See post-case comments by David Bennett (SG), reported in Joe Kelly, ‘Bench ruling on Malaysian Solution slammed as narrow’, *The Australian* (Sydney), 2 September 2011 <<http://www.theaustralian.com.au/national-affairs/bench-ruling-on-malaysian-solution-slammed-as-narrow/story-fn59niix-1226127651701>>.

³⁰ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (‘*Malaysia Solution Case*’).

was assumed to have come from the Solicitor-General) must have been inadequate as it had not reflected the High Court's decision.³¹ A number of legal professionals came to Gageler's defence.³² The legal advice itself was not released. Darren Ferrari noted that there was a possibility the Minister had misrepresented the strength of the legal advice.³³ It has subsequently been reported that the Solicitor-General had not even been involved in advising the Minister on the matter *prior* to the High Court challenge. Rather, the advice had come from lawyers within the Attorney-General's Department.³⁴ The events demonstrate that the Solicitor-General has no control over how the government uses or represents his or her advice (or lack thereof), and misrepresentation (intentional or otherwise) is very possible, particularly when political stakes are high and the legal issues are complex.

The second event occurred at the government level. At a press conference a day after the decision, the Prime Minister, Julia Gillard, made the comment that 'The High Court's decision, basically, turns on its head the understanding of the law in this country prior to yesterday's decision.'³⁵ Reasons behind the Prime Minister's comments can be postulated. On one level, there must have been a degree of political manoeuvring, attempting to deflect the fallout of the decision from the government actions to the Court and giving expression to political frustrations. However, other compelling reasons exist. It is important the government be seen to be acting lawfully, with integrity and within the bounds of the legal framework. The Prime Minister was publicly defending her government as one that respected the rule of law and believed it was acting within the bounds of what was proper, that is, they had acted

³¹ See, eg, Michelle Grattan, 'Incompetence and disaster: another grim day for Gillard', *The Age* (Melbourne), 1 September 2011 <<http://www.theage.com.au/opinion/incompetence-and-disaster-another-grim-day-for-gillard-20110831-1jm5a.html?skin=text-only>>; Michelle Grattan, 'Gillard needs show of control', *The Age* (Melbourne), 2 September 2011 <<http://www.theage.com.au/opinion/gillard-needs-show-of-control-20110901-1joau.html>>. See also Michael Gordon, 'The Malaysia solution is shipwrecked', *The Age* (Melbourne), 1 September 2011 <<http://www.theage.com.au/national/the-malaysia-solution-is-shipwrecked-20110831-1jmf.html>>.

³² Letter from Ron Merkel QC, Peter Hanks QC, Debbie Mortimer SC, Richard Niall SC, Kristen Walker and Graeme Hill, extracted in Michael Gordon, 'Support for Top Lawyer', *The Age* (Melbourne), 2011 <<http://www.theage.com.au/national/support-for-top-lawyer-20110915-1kbyd.html>>. Mortimer, Niall and Walker appeared for the asylum seekers in the *Malaysia Solution Case*.

³³ Darren Ferrari, 'Political pundits commenting on legal issues, what could go wrong?', *Crikey* 2 September 2011 <<http://blogs.crikey.com.au/purepoison/2011/09/02/guest-post-journalists-judging-lawyers/>>.

³⁴ Richard Ackland, 'Order in the High Court a cinch as taekwondo judge takes seat', *Sydney Morning Herald* (Sydney), 24 August 2012 <<http://www.smh.com.au/opinion/order-in-the-high-court-a-cinch-as-taekwondo-judge-takes-seat-20120823-24p2j.html>>.

³⁵ Prime Minister and Minister for Immigration, 'Malaysia Agreement' (Joint Press Conference, 1 September 2011).

according to a general understanding of what the law was, and that the High Court had dramatically changed this.

The Prime Minister may also have been defending the Solicitor-General from an anticipated attack. The government needed to rely almost immediately on the status of the office to deal with the aftermath of the High Court's decision.³⁶ In the following days, the Solicitor-General and two private Senior Counsel gave written advice on the implications of the High Court's judgment for taking asylum seekers to be processed in the Republic of Nauru (where the Opposition was strongly advocating asylum seekers be sent) or Papua New Guinea (where the government had also made arrangements). The opinion was released by the government. A summary of its conclusions stated that the authors were not confident a declaration could be made in relation to either country,³⁷ emphasising that it would depend upon 'complex issues of fact and degree requiring detailed assessment and analysis'.³⁸

The legal community and political commentators quickly entered a debate around the correctness of the Solicitor-General's advice on the High Court's decision.³⁹ James Allan, in attacking the conclusions, alluded to a political reason existing behind them. He described the Solicitor-General's position as 'just so risk-averse and so full of giving every single benefit of the doubt to those against the legality of the Nauru solution under the current legislation.'⁴⁰ 'Those' to whom Allan referred were the government's Ministers, and implicit in his criticism is the idea that the Solicitor-General was resolving (or perhaps using) legal ambiguity in a manner that assisted the political objectives of the government. Chris Merritt, Editor of Legal Affairs in *The Australian*, similarly labelled the advice 'an intensely political document', a 'guide to avoiding trouble' and giving the 'shattered government an out'.⁴¹ The Minister for Immigration described the advice as confirming 'the significant doubts over

³⁶ Ibid.

³⁷ Opinion of Stephen Gageler, Stephen Lloyd and Geoffrey Kennett, *In the Matter of the Implications of Plaintiff M70/2011 v Minister for Immigration and Citizenship for Offshore Processing of Asylum Seekers under the Migration Act 1958 (Cth)*, 2 September 2011, 2 [3].

³⁸ Ibid.

³⁹ See, eg, David Bennett, 'Offshore processing still possible despite High Court decision', *Sydney Morning Herald* (Sydney), 12 September 2011 <<http://www.smh.com.au/opinion/politics/offshore-processing-still-possible-despite-high-court-decision-20110911-1k40s.html#ixzz1xdRigCg6>>; James Allan, 'Stephen Gageler too risk-averse in his advice on Nauru option', *The Australian* (Sydney), 16 September 2011 <<http://www.theaustralian.com.au/business/legal-affairs/stephen-gageler-too-risk-averse-in-his-advice-on-nauru-option/story-e6frg97x-1226138211343>>.

⁴⁰ Allan, 'Stephen Gageler too risk-averse', above n 39.

⁴¹ Chris Merritt, 'Advice gives shattered government an out', *The Australian* (Sydney), 5 September 2011 <<http://www.theaustralian.com.au/national-affairs/opinion/advice-gives-shattered-government-an-out/story-e6frgd0x-1226129287924>>.

whether or not the government and Immigration Minister could make a valid declaration for either Papua New Guinea or Nauru'.⁴² The Opposition accused the government of misrepresenting and even 'verballing' the Solicitor-General.⁴³

Within the ensuing debate about the need to amend the *Migration Act*, the Opposition was very careful to maintain that it did not disagree with the Solicitor-General's advice (or to avoid any allegations that Gageler's position was itself politically motivated),⁴⁴ but focused upon the government's representation of it. The Opposition leader agreed to a briefing by the Solicitor-General and other government officials. A telling exchange occurred between Opposition Leader Tony Abbott and Radio Broadcaster Alan Jones, where Abbott denied that the Solicitor-General may have even been involved in the initial advice.⁴⁵

Even if it be accepted, and based on a proper reading of the advice it should be, that the Gageler's position was *not* politically motivated, his involvement in the intensely political 'Malaysia Solution' episode demonstrates a number of aspects of the office's advisory function, particularly when used to give the government security and certainty in its public position. This often places the Solicitor-General at the fulcrum of policy direction. At least at the federal level, this position is respected and defended by the government and the Opposition (who, of course, would want to rely on the office to maintain the credibility of its own actions if it won government in the future).⁴⁶ However, as a pivotal player in the creation of government policy, the office becomes open to criticism, whether that be on the grounds of incompetence or politicisation of the role. If, as many participants indicated, government

⁴² Chris Bowen, Minister for Immigration, 'Government Releases Solicitor-General's Advice On High Court Decision' (Press release, 4 September 2011).

⁴³ Simon Benson and Gemma Jones, 'Abbott says no deal on PM's asylum seeker solution', *The Daily Telegraph* (Sydney), 2011 <<http://www.dailytelegraph.com.au/news/national/abbott-says-no-deal-on-pms-asylum-seeker-solution/story-e6freuzr-1226141282905>>. See also comments by George Brandis, Shadow Attorney-General, that the Immigration Minister had 'misrepresented' the Solicitor-General's advice: AAP, 'Nauru still a possibility: opposition', *Sydney Morning Herald* (Sydney), 4 September 2011 <<http://www.smh.com.au/national/nauru-still-a-possibility-opposition-20110904-1js2q.html>>.

⁴⁴ This was later confirmed when Gageler's appointment to the High Court was announced, Brandis welcomed the appointment, indicating he had recommended Gageler to the Attorney-General. See Dan Harrison and Richard Willingham, 'Gageler Appointed to High Court', *Sydney Morning Herald* (Melbourne), 21 August 2012 <<http://www.smh.com.au/opinion/political-news/gageler-appointed-to-high-court-20120821-24jqb.html>>.

⁴⁵ Alan Jones, Interview with Tony Abbott (Radio 2GB, Sydney, 20 September 2011, <http://www.tonyabbott.com.au/News/tabid/94/articleType/ArticleView/articleId/8338/Interview-with-Alan-Jones-Radio-2GB-Sydney.aspx>).

⁴⁶ See similar conclusions in the US: Joshua Schwartz, 'Two Perspectives on the Solicitor General's Independence' (1988) 21 *Loyola of Los Angeles Law Review* 1119, 1165-6. Although note the exceptional circumstances that occurred in Victoria in the late 1990s when the Shadow Attorney-General publicly attacked the Solicitor-General. See further explanation of this event in Chapter 5.2.2.3.2.

wishes to rely on the status, independence and integrity of the Solicitor-General to deflect political attacks, this opens the office to criticism that the particular advice has been politically expedient, and the functions have not been exercised with the necessary independence and integrity. This is perhaps particularly the case where the Solicitor-General's advice is not released, and only representations of the advice are relied upon. During the 'Malaysia Solution' incident, Gageler made no attempt to defend his advice or the office.

Gageler's reaction may be contrasted with that of former Commonwealth Solicitor-General Maurice Byers in 1975. On 4 November 1975, Byers signed his name to an opinion that stated that the Governor-General was not entitled to dismiss the Prime Minister on the basis that the Government was unable to guarantee supply.⁴⁷ The advice was given to the Governor-General by the Attorney-General on 6 November 1975. After the dismissal, the written advice was leaked to the *Australian Financial Review* and extracts of it were published on 17 November 1975. In an unusual and unprecedented turn, on 18 November 1975 the Solicitor-General wrote a letter to the editor of that paper to remove 'misunderstandings of and misstatements concerning the effect of that opinion'.⁴⁸ Chapter 7.5.1 explores further some of the difficulties associated with the Solicitor-General's engagement with the media and the public.

In summary, the Solicitor-General's advisory function was seen by the predominance of participants through the lens of the Executive: providing security, certainty and credibility to government action. This raised the very real possibility that the government may use the Solicitor-General's advice in a way that brings the office into political controversy.

5.2.1.3 The separation of powers

The third view of the Solicitor-General's contribution to the public interest emphasises its role, in practice, as an independent adviser that can assist in the resolution of disputes between branches of government, particularly the Executive and the Parliament. This perspective is akin to the Peacemaker type in the US literature.⁴⁹

Former Queensland Crown Solicitor and Acting Solicitor-General Barry Dunphy explained that the government turns to the Solicitor-General when questions as to the proper

⁴⁷ Opinion from Kep Enderby and Maurice Byers, 4 November 1975, [39].

⁴⁸ Letter from Maurice Byers to the Editor, *Australian Financial Review*, 18 November 1975.

⁴⁹ See Chapter 2.5.4.

functioning of the branches of government arise. This is particularly so when the Executive's actions, policies or legislative agenda are being questioned in so far as they affect the operation of the other branches. Dunphy illustrated his statement by reference to the role the Commonwealth Solicitor-General played in resolving questions about the constitutionality of an agreement between the major parties and the Independents that was entered into after the 2010 federal election returned a hung Parliament.⁵⁰ Part of the agreement was that the Speaker of the House of Representatives would be granted a parliamentary 'pair' from a member of the opposite party to cancel out the loss of the Speaker's vote.⁵¹ In the midst of the controversy, legal experts and members of the Opposition called for the Solicitor-General's advice to resolve the issue.⁵² Ultimately, this was done and the advice made public.⁵³ This quietened (although did not completely dissipate) the controversy over the issue.⁵⁴ Dunphy stressed that the Solicitor-General was able to perform this role because of the respect across government, politics and by the public for the office's independence.

Former Queensland Solicitor-General Patrick Keane also noted that while the office does not often advise Parliament directly, Parliament benefits from the Solicitor-General's advice to the Executive because it ensures that 'the Parliament has the certainty it needs to legislate on a firm footing'.

Participants referred to a number of instances where the Executive used the Solicitor-General to assist in the functioning of government across the three branches. In many of these instances the Solicitor-General provided advice to Parliament, either through the Clerks, the Speaker, the President or Committees.⁵⁵ Two Solicitors-General recalled advising the

⁵⁰ See the reporting of the doubts: Chris Merritt and Patricia Karvelas, "'Pairing" Speaker a Recipe for Chaos, Legal Experts Warn', *The Australian* (Sydney), 18 September 2010.

⁵¹ Agreement between Australian Labor Party and the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott), 7 September 2010, [4], referring to Annex Z, [2.1], 2.

⁵² See comments of Geoffrey Lindell reported in Chris Merritt and Patricia Karvelas, "'Pairing" Speaker a Recipe for Chaos, Legal Experts Warn', *The Australian* (Sydney), 18 September 2010; and comments of Tony Abbott and Christopher Pyne reported in Sabra Lane, 'Knock Down Advice Amid Speaker Stand-off', *The World Today* (Canberra), 21 September 2010
<<http://www.abc.net.au/worldtoday/content/2010/s3017687.htm>>.

⁵³ Letter of advice from Stephen Gageler SC, *In the Matter of the Office of the Speaker of the House of Representatives*, 22 September 2010.

⁵⁴ Samantha Maiden, 'Legal Advice Clears Labor's Plan to 'Pair' Vote of Speaker to Protect Slender Majority', *The Australian* (Sydney), 2010; Katherine Murphy, 'Legal Advice Clears Path for Speaker Plan', *The Age* (Melbourne), 23 September 2010.

⁵⁵ For example, Interview, Peter Garrisson (who provided advice to the Clerk of the Parliament); Interview, Chris Kourakis (who provided advice on the definition of a 'money bill' to the Speaker and the President); Interview, Pamela Tate (who advised on the definition of a 'disputed Bill' to the Speaker and the Chief Parliamentary Counsel), see also Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011) ([1]). Note advice provided by the Commonwealth Attorney-General

Judiciary on administrative matters.⁵⁶ In each of the examples recalled by participants, advice was provided to the Parliament or the Judiciary with the knowledge and consent of the government of the day, through the government, or steps were taken to ensure that no conflict existed with the government: and so the Solicitor-General remained ‘the government’s barrister’.⁵⁷

Despite the evidence of this practice, some participants considered that it was unlikely the Parliament would directly seek the advice of the Solicitor-General because of the office’s association with the Executive.⁵⁸ This is exemplified in a disagreement in 1982 between the government and the Senate. The Senate had requested the production of a number of documents that related to what was known as the ‘Bottom of the Harbour’ tax-avoidance scheme, and other related schemes.⁵⁹ Some documents were produced, but executive privilege was claimed over other documents, including legal opinions and investigation reports, on the basis that the public disclosure of the contents would be ‘harmful to the administration of justice’. The government relied upon advice from the Solicitor-General in this privilege claim.⁶⁰ The government challenged the Senate to act contrary to the Solicitor-General’s opinion, ‘a person who is politically independent, statutorily independent, has high legal ability.’⁶¹

Despite the challenge, the Senate resolved to order the production of the documents. Senator Gareth Evans indicated that the Senate ought to take advice on this matter by an officer outside of the Executive:

We make it clear, finally, that we make no suggestion whatsoever that the Solicitor-General, Sir Maurice Byers, is in any way politically biased in the judgments that he may have made about the status of these particular documents. I do suggest that he may have erred on the side of caution in protecting information, in protecting documents in the hands of the Executive Government of the day. He may have erred in this respect on the basis of his well-known personal views about the proper extent

and Solicitor-General to the Parliament in 1970s: I J Greenwood and R Ellicott, ‘Parliamentary Committees: Powers over and protection afforded to witnesses’ (1973).

⁵⁶ Interview, Keith Mason; Interview, Pamela Tate.

⁵⁷ Interview, John Doyle.

⁵⁸ Interview, Patrick Keane; Interview, Robert McClelland; Interview, Philip Ruddock. See also Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 1983, 830 (Julian Amos, Labor).

⁵⁹ The scheme was so named because it operated by taking a company to the ‘bottom of the harbour’, that is stripping it of all its assets and profits, prior to its tax falling due.

⁶⁰ Commonwealth, *Parliamentary Debates*, Senate, 23 September 1982, 1250 (Fred Chaney).

⁶¹ *Ibid.*

of Executive privilege, the proper extent to which Executive information should be made available to the public. ...

I believe it is appropriate for someone totally outside the apparatus of full time Executive Government, someone who is not an officer in any sense, statutory or otherwise, of this Government, to perform this particular task.⁶²

There are times when legitimate conflicts of interests arise across the branches of government.⁶³ This has been particularly evident where Parliament is engaged in its function of holding the government to account.⁶⁴ Examples provided by participants indicate that in such situations, the Solicitor-General acts for the Executive. For example, in New South Wales, when litigation arose between the Treasurer and the Legislative Council over the production of documents by the Treasurer, the Solicitor-General was firmly in the corner of the Executive.⁶⁵

More subtle conflicts can occur where the Solicitor-General has advised government and the Parliament is reviewing the resulting executive action. To ensure the independent exercise of the oversight function in such a situation, the Parliament cannot be bound to use or follow the Solicitor-General's advice.⁶⁶

In the Northern Territory the Solicitor-General's advice would regularly be sought directly by the Speaker of the Legislative Assembly, even in circumstances where there was, at least potentially, a conflict between the interests of the Executive and the Parliament. Michael Grant, the incumbent Solicitor-General, explained this position on the basis that he had a 'standing instruction' from the Attorney-General to provide advice to the Speaker, and that 'the Speaker is effectively the head of the Department of the Legislative Assembly'. He saw

⁶² *ibid*, 1238ff (Gareth Evans). The continuing position of the Clerk of the Senate in 2008 that it is for the Senate to review claims of both legal professional privilege and other privilege to determine whether the claims are made out: Letter from Harry Evans, Clerk of the Senate, to Peter Hallahan, *Disclosure of Legal Advice*, 19 February 2008.

⁶³ The advent of this possibility was one of the strongest criticisms made of the Peacemaker type in the US: Chapter 2.5.4.

⁶⁴ See further discussion of the Parliament's accountability function in Chapter 4.5.1.

⁶⁵ *Egan v Willis* (1998) 195 CLR 224 and (1996) 40 NSWLR 650 (Court of Appeal); *Egan v Chadwick* (1999) 46 NSWLR 563. Interview, Keith Mason.

⁶⁶ See, eg, commentary after a situation like this arose in 2007 in Tasmania: Resources and Development Joint Standing Committee on Environment, 'Joint Venture Log Supply Deal' (Parliament of Tasmania, 2007); Michael Stokes, 'The Right of a Parliamentary Scrutiny Committee to Seek Independent Legal Advice', *TasmanianTimes.com*, 17 April 2007 <<http://tasmaniantimes.com/index.php/article/the-right-of-a-parliamentary-scrutiny-committee-to-seek-independent-legal-a>>; and note current position in Tasmania, Attorney-General, Guidelines for Seeking Advice from the Office of the Solicitor-General (The Hon Brian Wightman MP, February 2012) [5].

no necessary conflict of interest because his principal client, the Executive, and the Parliament both served the public interest.

The Solicitor-General's advisory function was perceived by all participants as integral to the proper functioning of the constitutional order. Its role in providing the limits on government power serves to promote the rule of law in three major ways. Primarily, as an adviser to the Executive, it gives certainty and security to its actions; although this can open the possibility for the government to use the Solicitor-General's advice as a shield in political manoeuvrings. Not always directly, but more often as a consequence of this first proposition, the office also serves the public interest by protecting the community from arbitrary interference by the government. Because the three arms of government exist to check and balance the others, keeping each other within the boundaries of these powers, the Solicitor-General has also been recognised as an important actor in ensuring the smooth operation of the three branches of government, assisting to resolve tensions when they arise. Is the Solicitor-General well-suited to fulfilling these very important constitutional jobs? The next part turns to the assumptions about the Solicitor-General that underpin the office's suitability for this function, and the extent to which they are met in practice.

5.2.2 Assumptions

Four assumptions are vital to understanding the importance of the advisory function of the Solicitor-General in advancing the rule of law under any of the three views listed above. First is that the Solicitor-General is operating as an adviser to the Executive – keeping executive power in its limits. So there is an assumption about who is the *client* of the office. The second assumption is that the Solicitor-General's advice is respected as the final word on a legal issue by government, and that the government will follow the office's advice. The third assumption is that the government will seek the advice of the Solicitor-General when appropriate circumstances arise and not seek advice from more friendly quarters. Finally there is an assumption that the Solicitor-General is providing independent, not accommodating, advice. If these assumptions are not met, then the capacity of the office to fulfil the advisory function in a manner that achieves its public interest objectives is diminished.

5.2.2.1 First assumption: the government as client

The first assumption that underpins the idea of the Solicitor-General's contribution to the rule of law is the identification of the 'Executive' as the office's client. While some benefits were

identified to the public and the other branches of government, ultimately participants accepted that the advisory function was primarily intended for the service of the Executive by giving the Executive confidence in its actions and a source of legitimacy for them.

With one exception, all participants accepted the proposition that the Solicitor-General had a ‘client’ and thus operated in a similar, but not entirely equivalent, paradigm to that of a legal practitioner.⁶⁷ Further, participants accepted that this client was the ‘Executive’. This accords with my legal analysis of the position in Chapter 4.4. The client was variously described as the Crown, the Commonwealth, the State, the government or the Executive. South Australian Solicitor-General Martin Hinton said he considered his client ‘the people of South Australia’, but he accepted that he must act on the instructions of the government.

5.2.2.1.1 *The government as an enduring entity and the political Executive*

The idea that the client is represented by the political Executive was recurrent across the interviews, and was generally influenced by a recognition that the political Attorney-General had the responsibility of determining what the interests of the Executive were.⁶⁸ This was the way in which many participants reconciled the idea that the Executive was both an enduring entity but represented, from time to time, by a political government.⁶⁹ Former Commonwealth Solicitor-General Stephen Gageler said he viewed the Commonwealth as his client; but who was the Commonwealth?

I’ve wrestled with this. It is bigger than the government of the day. There is a sense of the polity; there is a sense of a tradition, an ill-defined, tradition; of the common good; the common wealth. All of these things I take quite seriously. I recognise that I cannot easily define them. I also recognise that at the end of the day, I take instructions from the *Attorney-General* ... when I’m appearing for the Commonwealth proper.⁷⁰

Some saw the government as an enduring entity as being synonymous with the elected government of the day.⁷¹

⁶⁷ The exception was former Victorian Solicitor-General Daryl Dawson, who questioned the utility of the solicitor-client paradigm (Interview, Daryl Dawson).

⁶⁸ Interview, Thomas Pauling. See also analysis in Chapter 4.4 on the legal principle behind this.

⁶⁹ Interview, David Bennett (AGS); Interview, Geoffrey Davies; Interview, James Faulkner; Interview, Stephen McLeish; Interview, Thomas Pauling.

⁷⁰ See also comments in Interview, David Bennett (AGS) and Interview, James Faulkner, that in litigation it is the Commonwealth as manifested by the Attorney-General.

⁷¹ Interview, Greg Cooper; Interview, Robert Ellicott.

5.2.2.1.2 *The ‘whole of government’*

For many, the Solicitor-General serves the broad, overarching executive polity: the ‘whole of government’. Therefore, while the government presents as a ‘multi-headed beast’,⁷² the Solicitor-General’s client remains the sum of all of its permutations. In Victoria, former Solicitor-General Pamela Tate explained that while many agencies could request her advice directly, she developed a practice where she would always copy advice to the Attorney-General, with the knowledge of the agency concerned, where she believed the advice was relevant and significant to his role as first Law Officer of the Crown. In this way, she tried to ensure that while she advised many manifestations of the ‘client’, the Crown retained its status as a single entity and coherency across its legal position.

A small number of participants indicated that the question of who is the ‘client’ has become more difficult because of the increase in independent statutory bodies and Government Business Enterprises (GBEs) that may seek advice from the Solicitor-General. Former Commonwealth Solicitor-General Stephen Gageler and former Queensland Crown Solicitor and Acting Solicitor-General Barry Dunphy both said that when acting for an independent statutory body or GBE the client would be viewed narrowly. Gageler explained this was because the statute may require the body to act independently and sometimes come into conflict with the government proper. In such situations, participants stressed that they reviewed their instructions for potential conflicts of interest.⁷³ Tasmanian Solicitor-General Leigh Sealy indicated he advised GBEs and State owned companies *only if* they were part of the Crown. If not, Sealy believed it inappropriate to advise the body for two reasons: first, it offered the body a commercial advantage when it was operating in a competitive environment; and secondly, the body would not be bound by a Treasury Instruction that requires all requests for advice from government agencies to be referred to Crown Law, and not to private firms, and as such would be free to seek private advice on the same issue.⁷⁴

Northern Territory Solicitor-General Michael Grant explained that he advises many independent officers including the Auditor-General, the Electoral Commissioner, the Anti-Discrimination Commissioner and the Children’s Commissioner. However, he did not accept

⁷² Interview, Duncan Kerr. See also Interview, Keith Mason.

⁷³ Interview, Barry Dunphy; Interview, Stephen Gageler; Interview, Peter Garrisson; Interview, Michael Grant; Interview, Patrick Keane; Interview, Stephen McLeish.

⁷⁴ Treasury Department, ‘Treasurer’s Instruction No 1118: Procurement of Legal Services: goods and services (Version 6)’ (November 2008). See further discussion of the assumption that the government treats the Solicitor-General’s advice as final and authoritative in Chapter 5.2.2.2.

instructions from the Ombudsman in situations where there could be a conflict with government. He explained:

I don't do [the Ombudsman's] work, because by definition, every matter that she is involved in creates a potential conflict with government. Because that's her whole function: to investigate administrative action by government agencies. So she is *always* potentially in conflict with my primary client body.

Grant only felt comfortable advising the Ombudsman on questions relating to the extent of the office's powers in the abstract.⁷⁵ Sealy also noted that for many of the statutory officeholders, including the Ombudsman and the Auditor-General, individuals exercise independent statutory discretions, which require officeholders to form their *own* views of their powers; as such, they cannot be *bound* to follow the Solicitor-General's view in the same way the government, by convention, is. The convention exists primarily for the benefit of maintaining a consistent position across the whole of government; it is explained in more depth in Chapter 5.2.2.2.

Participants' views in this area demonstrate there exists some desire for the government to speak with one voice, but it also demonstrates an understanding that there are times when an agency may legitimately conflict with the Crown proper.⁷⁶

5.2.2.1.3 *Advising the Viceroy*

The question of whether the Solicitor-General can advise the Viceroy is directly relevant to the consideration of the office's role in contributing to the rule of law pursuant to its advisory function. There will be occasions where the Viceroy requires advice on whether the 'reserve powers' are triggered by illegal actions taken by the Executive. In other circumstances in which the Viceroy may have to exercise his or her powers, just like any other emanation of the Executive, he or she must ascertain the outer limits of those powers to act with certainty. While these occasions may be rare, when they do arise they are often in the midst of

⁷⁵ See also Interview, Stephen McLeish and Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011), [1] that sets out the independent agencies of the Auditor-General, Electoral Commissioner, Chief Commissioner of Police and Ombudsman as persons who brief the Solicitor-General.

⁷⁶ For discussion of the US position on this point, see Neal Devins, 'Unitariness and Independence: Solicitor General Control over Independent Agency Litigation' (1994) 82 *California Law Review* 255; Todd Lochner, 'The Relationship between the Office of Solicitor General and the Independent Agencies: A Reevaluation' (1993) 79 *Virginia Law Review* 549; and Robert L Stern, "'Inconsistency" in Government Litigation' (1951) 64 *Harvard Law Review* 759, 768-9; Robert L Stern, 'The Solicitor General's Office and Administrative Agency Litigation' (1988) 21 *Loyola of Los Angeles Law Review* 1073; Kathleen Clark, 'Government Lawyers and Confidentiality Norms' (2007) 85 *Washington University Law Review* 1033, 1059.

constitutional uncertainty. Where the reserve powers of the Crown are engaged, it falls on the Viceroy to exercise the Crown's powers alone.

Does the Solicitor-General perform the function of adviser to the Viceroy? Chapter 4.2.2.2 explains that the answer to this is governed by the legislation which recognises the Attorney-General as the appropriate office to provide instructions on behalf of the Crown. As a matter of principle, however, if the rule of law recognises the desirability of the Executive accessing high quality legal advice to finally resolve legal questions, such advice ought to also be available to the Viceroy in his or her constitutional role as head of state. This desirability is reflected in an attempt in the mid-1990s by the Special Committee of Solicitors-General to compile a document outlining a protocol on the role of the Solicitor-General in advising the Governor,⁷⁷ although no protocol was finally agreed upon.

At the State and Territory level, my interviews revealed a large consensus (at least in those jurisdictions where it had arisen as an issue from time to time) that the Solicitor-General *would* furnish advice to the Governor pursuant to either a standing arrangement with the Attorney-General, or ad hoc arrangements.⁷⁸ These jurisdictions were New South Wales,⁷⁹ Tasmania,⁸⁰ Victoria,⁸¹ and the Northern Territory.⁸² In the Northern Territory, Solicitor-General Michael Grant even took the view that he could advise the political Executive as well as the Administrator on the same legal question in circumstances where there was no conflict over issues of fact.⁸³ In many jurisdictions, the Solicitor-General was often called upon by the Viceroy when an election returned a hung Parliament. In that circumstance, the exercise of the Viceroy's power to commission a government becomes more complex and potentially controversial, and he or she may require advice from quarters outside the former government as to the constitutional powers and the conventions that guide their exercise.

Compared to the States and the Northern Territory, at the Commonwealth level there was much greater diversity as to the accepted practice, although more recently ad hoc

⁷⁷ John McDonnell, 'Special Committee of Solicitors General Meeting' (Secretary, Special Committee of Solicitors-General, 18 October 1996) 5ff.

⁷⁸ In Queensland the issue had not arisen in any contentious setting. In his interview, former Solicitor-General Patrick Keane recalled furnishing advice to the Governor at the request of the Attorney-General on a minor, personal matter. Other Queensland Solicitors-General and Attorneys-General interviewed could not recall the situation arising.

⁷⁹ Interview, Keith Mason; Interview, Michael Sexton; Interview, Terence Sheahan.

⁸⁰ Interview, William Bale; Interview, Leigh Sealy.

⁸¹ Interview, Pamela Tate.

⁸² Interview, Michael Grant; Interview, Thomas Pauling.

⁸³ Grant did so in the lead up to, and after, the resignation of a member from the Labor Party in 2009.

arrangements have reflected the practice in the States and Territories. An early position emerged in the 1970s under the Whitlam Labor government. Leading up to the constitutional crisis of 1975, former Prime Minister Gough Whitlam expressed a belief that the Governor-General had recourse to the Solicitor-General only through the government.⁸⁴ For example, when John Kerr, the Governor-General, asked for the Law Officers' advice in October 1975, Kerr wrote that he recalled Whitlam agreeing to get an opinion on Whitlam's own behalf, saying he would 'probably' pass it onto Kerr, but it remained a matter for Whitlam's discretion.⁸⁵

More recently, as had occurred earlier in the States and Territories, there seems to be a growing acceptance that making the Solicitor-General available to the Governor-General is something to be encouraged.⁸⁶ In 2010, under the Gillard Labor government, protocols were put in place that were very close to those used in the States. These would have allowed the Governor-General to access the Solicitor-General in the event of a hung Parliament after the election.⁸⁷

The interview data have demonstrated that participants viewed the primary client of the Solicitor-General as the Executive. The Executive manifested as, and was directed by, the government of the day, usually through the Attorney-General. This meant that the Solicitor-General's ability to advise government agencies and statutory offices was limited, to ensure no conflict would occur with the primary client, and also limited the office's ability to advise the Viceroy. However, in recognition of the desirability of allowing access to the Solicitor-General by the Viceroy, protocols have been developed in many jurisdictions to facilitate this when the necessity has arisen. While it has probably not gone so far as to develop a constitutional convention to this effect,⁸⁸ there is increasing uniformity of practice in this area.

⁸⁴ Although it appeared the Governor-General was seeking the Solicitor-General's advice under the Whitlam Government prior to this incident, see, *Sankey versus Whitlam* - Maurice Byers QC regarding involvement in the Loans Affair (April 1976), National Archives of Australia, Canberra, M4081 3/25, 5-6; John Kerr, *Matters for Judgment: An Autobiography* (Macmillan Press Ltd, 1979), 235.

⁸⁵ Kerr, above n 84, 271. See also Interview, Michael Lavarch.

⁸⁶ Interview, Stephen Gageler; Interview, Robert McClelland; Interview, Philip Ruddock.

⁸⁷ This more recent trend in facilitating advice between the Governor-General and the Solicitor-General also reflects earlier practice in the Commonwealth. In 1917, federal Attorney-General William Hughes agreed that the Governor-General was entitled to seek 'independent legal opinion' from a number of legal figures, *inter alia*, Robert Garran, the Solicitor-General. Don Markwell, 'Griffith, Barton and the Early Governors-General: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280, 288.

⁸⁸ See, eg, Jacob Jaconelli, 'The Nature of Constitutional Conventions' (1999) 19 *Legal Studies* 24.

5.2.2.2 Second assumption: the Solicitor-General as ‘trumps’⁸⁹

If it is accepted that the Solicitor-General’s advisory function assists in the promotion of the rule of law by policing the limits of government power, it is necessary that the Solicitor-General is not merely another legal adviser to government, but the *final* legal adviser to government. The Victorian Protocol for Briefing the Solicitor-General states that the Solicitor-General should only be briefed either exclusively or for the purpose of finality.⁹⁰ Tasmanian Solicitor-General Leigh Sealy also believed that the indivisibility of the Crown underscored the need for it to have a single, authoritative source of legal advice. Finality is thus closely associated with the authoritative nature of the Solicitor-General’s advice, that is, government won’t just treat the Solicitor-General as the final adviser, but respect and follow his or her advice.

Under the rule of law, one facet of the Judiciary’s ‘independence’ from the state is that decisions are respected as final and binding. Independence as the power to influence or achieve a desired outcome has also developed in political science.⁹¹ In the US, Morrison has explained that the significance of the OLC’s position rests on the presumption that its advice is final and binding. If this presumption is weakened, the OLC loses its institutional independence to provide advice free from institutional pressure, and may start to tilt its advice in favour of the client’s position. If this occurs, the Executive will no longer be able to rely upon the OLC’s advice to provide certainty, security and credibility to its actions.⁹²

No statutory provisions ground the principle that the Solicitor-General should be the final legal adviser to government, although in the British tradition the Law Officers’ opinions were used to settle disputes within government and thus settle legal questions with finality.⁹³ The tradition has been brought across to Australia. Michael Sexton, Solicitor-General for New South Wales, explained the reason for such a tradition:

I’ve tried to explain to people on occasions that the reason why the Solicitor-General’s opinion is or should be final is not because of the person who holds the

⁸⁹ McDonnell, above n 77, 7.

⁹⁰ Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011) [11]. See also [13] and [14]. Interview, Stephen McLeish.

⁹¹ See, eg, Steven Lukes, ‘Introduction’ in Steven Lukes (ed), *Power* (Basil Blackwell Ltd, 1986) 1 and analysis in the legal context in Suzanne Le Mire, ‘Testing Times: In-House Counsel and Independence’ (2011) 14(1) *Legal Ethics* 21, 34-5.

⁹² Morrison, above n 17, 69.

⁹³ John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 67; 181-2; 185; 190.

office, but because you have got to have some notion of finality, in terms of the use of government power.

Similarly, former Victorian Solicitor-General Pamela Tate said that the Solicitor-General was an ‘integrity office’, because once the Solicitor-General gives advice, it must be final and determinative. The Solicitor-General performs this role not because the person is an oracle, or is invariably right, but because there must be finality within government.⁹⁴

The government often finds having a definitive legal view politically expedient. Greg Parker, the South Australian Crown Solicitor, observed that ‘often you’ll find in the Parliament that the government likes to say, well, we’ve checked this with the Solicitor-General and he says it is okay. So they seek a little bit of political justification.’

Dr David Collins QC, former Solicitor-General for New Zealand, has emphasised the importance of a definitive legal position for the government by comparing it to policy advice. He wrote:

[T]he Crown can only have one view of the law. Ministers, Chief Executives and others in government who are dependent upon legal advice need to receive just one explanation of the law. That explanation must, of course, be authoritative. It must be right. This contrasts with policy advice. Ministers and other senior decision-makers within government often relish competing policy viewpoints. Competing policy advice assists Ministers and other senior decision-makers to shape and influence the ultimate policy outcome. Ministers and senior decision-makers cannot, however, influence and shape explanations as to what the law is, in order to achieve their objectives.⁹⁵

Reflecting the same view, Northern Territory Solicitor-General Michael Grant explained why he was always very careful not to provide policy advice to government officers and Ministers. He elaborated:

I have to be careful because they’re not very good at distinguishing between legal advice and policy advice. And because you’re in this position where they take everything you say as the final arbitration on the point, rather than seeing policy advice from me as simply just saying this is something you should take into account, they would probably take it as gospel and act on it.

⁹⁴ Tate’s comments are similar to those of Jackson J in *Brown v Allen* 344 US 443 (1953), 540. See also Interview, Catherine Branson; Interview, Daryl Dawson; Interview, Michael Grant; Interview, Stephen McLeish; Interview, Leigh Sealy; Interview, Walter Sofronoff.

⁹⁵ David Collins, ‘The Role of Solicitor-General in Contemporary New Zealand’ (Paper presented at the conference on The Role of the Solicitor-General in the Australasian legal and Political Landscape, Gold Coast, 15 April 2011) 18.

The finality of the Solicitor-General's legal advice is often used to resolve disputes about the correct legal position that arise from time to time across government (for example between departments or statutory bodies). The Solicitor-General is used in this situation as an 'arbiter' to provide the definitive advice to resolve the dispute.⁹⁶

At times, the Solicitor-General will be asked to advise the government on an issue when the legal position is unclear. In such instances, I have suggested the Solicitor-General is obliged to provide not only his or her assessment of the better legal position, but also an indication of the ambiguity of the position.⁹⁷ This could be observed in the Commonwealth Solicitor-General's advice on the *Malaysia Solution Case*, discussed in detail in Chapter 5.2.1.2.⁹⁸ However, the weight given to the Solicitor-General's opinion, and the need for finality in government for it to conduct its business, emphasises the significance of the Solicitor-General striving to make his or her best assessment of the legal position.

The finality of the Solicitor-General's advice within government was generally unquestioned. A notable exception was former Northern Territory Solicitor-General Thomas Pauling's recollection of the euthanasia debate in the Territory, where his opinion was sent off to Senior Counsel across the country for comment. Pauling said 'I was getting bombarded with opinions from Tom Hughes and all sorts of people saying that what we were doing was wrong.' Another Solicitor-General recalled times early in his tenure when the government indicated that it wished to seek a second opinion after receiving his advice. There had not been a Solicitor-General in office for a time, and at the political level there was relatively little institutional knowledge about the role or an understanding of the finality of the Solicitor-General's opinion. The public service had a greater understanding of the role and acceptance of the finality of the Solicitor-General's advice and counselled the government against seeking second opinions. The result was that the finality of the Solicitor-General's advice was eventually recognised and accepted by the government.

Finality of the Solicitor-General's advice is closely associated with its determinative nature. There is no statutory requirement for the Executive to follow the Solicitor-General's advice.⁹⁹ In Britain during the 2007-2008 consultations on reforms to the role of the Attorney-General,

⁹⁶ In New South Wales, South Australia and Queensland there is a Cabinet directive to this effect: McDonnell, above n 77, 8; Interview, Barry Dunphy. See also *Legal Services Directions 2005* (Cth) cl 10.6.

⁹⁷ Chapter 4.3.1.4.

⁹⁸ (2011) 244 CLR 144.

⁹⁹ Interview of Robert Ellicott by Kel Richards, *AM Broadcast*, 17 November 1975.

the view was expressed that the Attorney-General's advice commanded authority because of the Law Officer's position in the ministry.¹⁰⁰ Contrary to this statement, in Australia participants indicated advice from the non-ministerial Solicitor-General was invariably followed and the Solicitor-General enjoyed great respect within government. Former Tasmanian Solicitor-General William Bale indicated that following the Solicitor-General's advice in Australia was a 'constitutional given' or a 'constitutional convention'. Former Queensland Attorney-General Rodney Welford said that the opinions of the Solicitor-General were 'holy writ' and 'utterly unquestioned'. Examples of this expectation include one from as early as 1895 in Tasmania, when Andrew Inglis Clark resigned as Attorney-General because Cabinet failed to follow his legal advice.¹⁰¹ A more recent example comes from the period after the 1989 election in Tasmania, when a hung Parliament was returned and the government sought opinions from a number of leading barristers and constitutional experts.¹⁰² The Secretary of the Tasmanian Department of Justice expressed concern over the briefing out of constitutional advice, warning the Attorney-General not to undermine the 'strong tradition' that the government takes the Solicitor-General's advice on constitutional issues.¹⁰³

Two former Solicitors-General recollected instances where they *knew* their advice had not been followed by the government. This was exceptional among participants, but the two instances demonstrate fragility in the current arrangements. The most significant of these occurred in Tasmania in 2005. The then Solicitor-General, William Bale, had been asked about the legality of a proposed agreement between a Minister and a builder-accreditation firm, that would have created, in effect, a legal monopoly for that firm. This fettered the

¹⁰⁰ Evidence to Constitutional Affairs Committee, *Inquiry into the Constitutional Role of the Attorney General*, House of Commons, 7 February 2007 (Lord Goldsmith) 59-60. See also the report of Professor Anthony Bradley to the House of Lords Committee: Select Committee on the Constitution, House of Lords, 'Reform of the Office of Attorney General: Report with Evidence' (2008), as extracted at [37]; Appendix 2, page 25 [25] of his report. Contrast this with the position of Professor Jeffrey Jowell QC, extracted at [33], Appendix 3, page 30 [13] of his report. See further discussion in Chapter 2.4.3.

¹⁰¹ Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD Thesis, University of Melbourne, 2007) 93.

¹⁰² M G Sexton, 'The Role of Solicitors General in Advising the Holders of Vice Regal Offices' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Bond University, 15 April 2011).

¹⁰³ Letter from Mr J A Ramsay (Secretary of the Tasmanian Department of Justice) to Attorney-General J M Bennett, 14 June 1989 (see Annexure "JAR1" to the Proof of Evidence of John Alexander Ramsay before Royal Commission into an Attempt to Bribe a Member of the House of Assembly and other matters). See also the assertion by the federal government in 1982, when the Senate questioned its the advice of the Solicitor-General that supported the veracity of a privilege claim. Senator Fred Chaney, representing the Acting Attorney-General in the Senate, noted that it was the Government's view was that 'the only appropriate course the Government can take is to accept and act on the views of the Solicitor-General.' Commonwealth, *Parliamentary Debates*, Senate, 14 October 1982, 1487. See further discussion above at Chapter 5.2.1.3.

Minister's discretion under the *Building Act 2000* (Tas) to authorise accreditation providers,¹⁰⁴ and a summary of Bale's advice stated that any agreement 'must not give them [the building accreditation firm] "sole" authorised body status'.¹⁰⁵ Despite Bale's advice, the agreement included such a provision. When Bale became aware of it, he recalled 'I was astonished'.¹⁰⁶

The second instance occurred in the early 1990s in New South Wales and was less an example of wilfully failing to follow the Solicitor-General's advice than demonstrative of the need to disseminate the content of such advice to all relevant players in government. The then Solicitor-General, Keith Mason, had been asked on a number of occasions to advise upon whether Mr Phillip Smiles had ceased to be a Member of the Parliament. The question involved a legal issue about whether Mr Smiles had been convicted of an 'infamous crime' so as to disqualify him from receiving the non-contributory pension.¹⁰⁷ The Solicitor-General's advice had been requested and provided on the issue to the Clerk of the Legislative Assembly, the Speaker, the Attorney-General and a number of senior executives in the Cabinet Office and Attorney-General's Department.¹⁰⁸ The series of opinions made it clear that the question as to whether Mr Smiles had been convicted of an infamous crime was difficult and that the effect of a stay of the court's decision against Mr Smiles until an appeal further clouded the question. Despite the existence of these opinions, their content was not made known in full to the trustees of the superannuation fund, who resolved that Mr Smiles was entitled to his pension and payments were made accordingly. The matter was referred to the Independent Commission Against Corruption (ICAC); the finding was that the trustees had not known of the opinions.¹⁰⁹

The Solicitor-General as 'trumps' is vital to understanding the office's constitutional importance as an adviser. It prevents the temptation that will no doubt exist in government to

¹⁰⁴ *Building Act*, Part 4, s 20.

¹⁰⁵ Matthew Denholm, 'Warning on Monopoly', *The Australian* (Sydney), 22 November 2007 <<http://www.theaustralian.com.au/news/warning-on-monopoly/story-e6frg6ox-1111114933356>>.

¹⁰⁶ Simon Cullen, 'Bill Bale', *Stateline Tasmania* (ABC Online), 18 July 2008 <<http://www.abc.net.au/stateline/tas/content/2006/s2307818.htm>>.

¹⁰⁷ *Parliamentary Contributory Superannuation Act 1971* (NSW); *Constitution Act 1902* (NSW) s 13A(e).

¹⁰⁸ Sole and joint-authored advices were provided.

¹⁰⁹ Barry O'Keefe, 'Report on Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles: First Report' (Independent Commission Against Corruption, February 1995). The ICAC report resulted in an investigation by the New South Wales Law Reform Commission into the dissemination of legal advices among government agencies to try to prevent a similar incident: New South Wales Law Reform Commission, *Circulation of Legal Advice to Government*, Report No 86' (1998) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R86TOC>>.

find legal advice to accommodate the government's desires if the Solicitor-General's opinion does not. It is therefore strongly associated with the third assumption. The importance of the assumption is reflected in the interviews with very few indications that it is being undermined except in highly unusual circumstances.

5.2.2.3 Third assumption: the Solicitor-General and other sources of legal advice

The third assumption is that the government will seek the *Solicitor-General's* advice on matters; that is, not fail to seek advice at all, or to seek advice from quarters perceived to be more accommodating. Implicit in this assumption is also the principle that the government will not fragment its work, seeking advice from the Solicitor-General on only part of a larger picture.¹¹⁰ H M Seervai explained that there is an inherent weakness in the non-ministerial Law Officer system because officeholders must generally wait to be consulted by the government rather than actively overseeing the legal position of the government.¹¹¹ Former Commonwealth Solicitor-General Stephen Gageler has written that this is an 'obvious design flaw' in the context of government lawyering more generally.¹¹²

In Chapter 4.6.1.3 I introduced the Law Officer's obligation to ensure government complies with the law. This weakness in constitutional design has the potential to undermine this important principle. The third assumption is, in many ways, closely associated with the second assumption, in that by failing to seek the Solicitor-General's advice, the government is able to avoid treating the Solicitor-General's advice as final and authoritative.

The extent of the realisation of this assumption differed across jurisdictions. There was some indication that the government would, at times, intentionally *not* seek advice from the Solicitor-General.¹¹³ However this appeared to be the exception rather than the rule. Former Victorian Solicitor-General Pamela Tate explained in response to the 2007 summons for her to appear before a Select Committee of the Victorian Legislative Council, that one of the

¹¹⁰ On fragmentation of work, see, Robert Eli Rosen, 'Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence' (2001) 56 *University of Miami Law Review* 179, 199-200.

¹¹¹ H M Seervai, 'The Legal Profession and the State: The Place of Law Officers and Ministers of Justice' (1977) 22 *Journal of the Law Society of Scotland* 265, 267. See also Interview, John Doyle.

¹¹² Stephen Gageler, 'Values in Administrative Law and the Role of the Lawyer Acting for an Administrator' (Paper presented at the Australian Government Solicitor Administrative Law Forum, 22 October 2008) 4.

¹¹³ There are not always improper motives behind this. Tasmanian Solicitor-General Leigh Sealy, in his annual report in 2010, explained that 'it is now clear to me that, at least some agencies make conscious decisions to avoid seeking legal advice in order to save money.' See: Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2009-2010 (2010).

reasons that legal professional privilege must attach to the Solicitor-General's advice is that it encourages the government to seek the advice of the Law Office in appropriate instances.¹¹⁴

Two participants referred to instances in which the Solicitor-General was not briefed and legal advice was sought from other sources in significant matters where they believed the Solicitor-General ought to have been briefed.¹¹⁵ A prominent example recalled was the advice on the legality of the Iraq War provided to the government in 2003.¹¹⁶ Instead of emanating from the Solicitor-General, the advice was authored by the First Assistant Secretary of the Office of International Law (OIL) in the Attorney-General's Department (Bill Campbell) and the senior legal adviser to the Department of Foreign Affairs and Trade (DFAT) (Chris Moraitis). Former Commonwealth Solicitor-General Gavan Griffith publicly questioned the reliance on these relatively junior offices.¹¹⁷ Several international law experts criticised the legal reasoning in the advice.¹¹⁸ This raises questions as to whether the government believed advice from these lower level legal advisers who were in-house at OIL and DFAT and closely involved in creating policy would be more accommodating than referring the matter to the Solicitor-General (the disadvantages of relying upon in-house legal services are detailed further below).¹¹⁹ It could be argued that the Solicitor-General was not an expert in international law, and as such the government went to more junior officers who were more closely involved in the area with greater expertise. Other jurisdictions have, however, dealt with this problem in a way that ensures that the Solicitor-General's seniority, and finality, is respected. For example, former Solicitor-General William Bale said in Tasmania the Solicitor-General may author joint opinions in areas where the Solicitor-General does not have the requisite level of expertise.

¹¹⁴ Letter from Pamela Tate SC, Solicitor-General, to Mr Richard Willis, Secretary, Select Committee on Gaming, 11 April 2007. See also Letter from Rob Hulls MP, Attorney-General, to Richard Willis, Secretary, Legislation and Select Committees, Re: Summons to the Solicitor-General, 11 April 2007. Both letters are extracted in full in Select Committee of the Legislative Council on Gaming Licensing, *'First Interim Report Upon Gaming Licensing'* (Legislative Council of Victoria, 2007) 22.

¹¹⁵ Interview, Gavan Griffith; Interview, Duncan Kerr.

¹¹⁶ The Memorandum of Advice on the Use of Force Against Iraq, provided by the Attorney General's Department and the Department of Foreign Affairs and Trade, 12 March, 2003.

¹¹⁷ Gavan Griffith, 'This War is Illegal: Howard's Last Top Law Man: NOTES ON THE LEGAL JUSTIFICATION FOR THE INVASION OF IRAQ AND SECURITY COUNCIL RESOLUTIONS 678 AND 1441', *Sydney Morning Herald* (Sydney), 21 March 2003. See also Margo Kingston, 'The politics of war', *Sydney Morning Herald* (Sydney), 19 March 2003 <<http://www.smh.com.au/articles/2003/03/20/1047749837969.html>>.

¹¹⁸ See Cynthia Banham, 'Experts at odds as PM releases legal advice', *Sydney Morning Herald* (Sydney), 19 March 2003 <<http://www.smh.com.au/articles/2003/03/18/1047749774530.html>>; Andrew Byrnes and Hilary Charlesworth, *The illegality of the war against Iraq* (21 March 2003).

¹¹⁹ Chapter 5.2.2.3.3.

In the Commonwealth, Victoria and Tasmania, there are informal protocols that set out what matters are to be briefed to the Solicitor-General.¹²⁰ The Commonwealth Office of Legal Services Coordination (OLSC) Guidance Note refers to matters that raise ‘novel, difficult and important points of legal principle’, relate ‘to the implementation of Government policy or decisions of the highest importance’, raise ‘issues of the highest political sensitivity’, raise ‘legal issues resulting in conflict between agencies’ or that have ‘significant financial implications or very important whole-of-Government implications’. The Solicitor-General should be briefed to appear in matters where an agency is a party to an appeal before the High Court, is a party to an application for leave or special leave to appeal to the High Court, or is a party to a proceeding within the original jurisdiction of the High Court, other than proceedings of a kind that are routinely remitted.¹²¹ The Victorian protocol refers to matters arising from the performance of the functions of the Attorney-General, the Premier, the Governor, the President of the Legislative Council or the Speaker of the Legislative Assembly. Otherwise, it refers to briefs that ‘involve a matter arising under the Victorian or Commonwealth Constitution or involving their interpretation; or have whole-of-Government implications; or require a definitive authoritative opinion to resolve a matter about which conflicting legal advice has been obtained from Queen’s Counsel or Senior Counsel, or in relation to which legal advice has been obtained from a Queen’s Counsel or Senior Counsel which requires confirmation.’¹²²

The Tasmanian Guidelines refer to ‘matters of significance to the Tasmanian Government’ and representation in ‘cases of constitutional significance and other cases of special government interest.’¹²³

The existence of the protocol does not guarantee that the Solicitor-General will be briefed in the matters listed. For example, in 2010 it was revealed that the Commonwealth government had not sought the advice of the Solicitor-General on the constitutionality of its proposed

¹²⁰ Commonwealth, Office of Legal Services Coordination, Guidance Note 11: Briefing the Solicitor-General (Ms Janean Richards, 9 June 2011); Tasmania, Attorney-General, Guidelines for Seeking Advice from the Office of the Solicitor-General (The Hon Brian Wightman MP, February 2012); Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011). At the Commonwealth level as well, cl 10A.2 of the *Legal Services Directions 2005* (Cth) state that the Attorney-General’s Department or the AGS may consult with the Solicitor-General on whether constitutional advice should be given by the Solicitor-General or the AGS, although this does not *require* consultation.

¹²¹ Commonwealth, Office of Legal Services Coordination, Guidance Note 11: Briefing the Solicitor-General (Ms Janean Richards, 9 June 2011) 1.

¹²² Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011) [3]-[4].

¹²³ Tasmania, Attorney-General, Guidelines for Seeking Advice from the Office of the Solicitor-General (The Hon Brian Wightman MP, February 2012) [3].

Resources Super-Profits Tax regime;¹²⁴ it had instead been relying on advice from the Australian Government Solicitor.¹²⁵ This was in spite of the tax raising important points of legal principle, and relating to the implementation of an important government policy that was of the highest political sensitivity: all factors which should have meant the government sought the advice of the *Solicitor-General* under the OLSC Guidance Note. It was not until September 2011, when threats were made by mining companies and Western Australia to *challenge* the constitutionality of the proposed legislation implementing the Mineral Resource Rent Tax (the renegotiated version of the Resources Super-Profits Tax) that the Treasury sought the Solicitor-General's advice.¹²⁶

A similar point could be made about the Solicitor-General's involvement in the *Malaysia Solution Case* that was introduced in Chapter 5.2.1.2.¹²⁷ Reports suggested that the Solicitor-General was not briefed to advise the Minister at the time the declaration of Malaysia as a country to which 'offshore entry persons' could be taken. Rather, the Minister relied on departmental advice, and the Solicitor-General became involved only when the matter was challenged in the High Court.¹²⁸

These documents give an example of the type of issues that might be identified as those which ought to be briefed to the Solicitor-General. They also demonstrate the difficulty in attempting to define these matters. The terms used in the documents are not only imbued with subjectivity, their existence may also not immediately be apparent to government officers developing policy.

The difficulty in defining the types of matters that ought to be briefed to the Solicitor-General raises not only the possibility that these matters will not be identified, but its inverse. In an effort to keep the Solicitor-General updated on the identified matters, departments and agencies may forward matters that are not significant enough to require the Solicitor-

¹²⁴ Glenn Milne, 'Rudd did not ask Solicitor-General's Advice on Mining Compo', *The Australian* (Sydney), 22 June 2010 <<http://www.theaustralian.com.au/news/nation/rudd-did-not-ask-solicitor-generals-advice-on-mining-compo/story-e6frg6nf-1225882474994>>.

¹²⁵ Email from Analyst, Resource Taxation Unit to [redacted], Advice on the Constitutionality of the Minerals Resource Rent Tax (MRRT), 23 September 2011 (released by Treasury Department under FOI: <http://www.treasury.gov.au/Freedom-of-Information/DisclosureLog/2012/Constitutional-legality-of-the-MRRT-tax-and-the-PRRT>).

¹²⁶ Ibid.

¹²⁷ (2011) 244 CLR 144.

¹²⁸ See reporting of Richard Ackland, 'Order in the High Court a cinch as taekwondo judge takes seat', *Sydney Morning Herald* (Sydney), 24 August 2012 <<http://www.smh.com.au/opinion/order-in-the-high-court-a-cinch-as-taekwondo-judge-takes-seat-20120823-24p2j.html>>.

General's attention. This is not as harmless as it may appear: it may mean the Solicitor-General spends considerable time reviewing briefs.¹²⁹

Northern Territory Solicitor-General Michael Grant was wary of introducing written directions about the work that ought to come to the Solicitor-General. He believed that directions beget an undesirable level of inflexibility. Instead, he emphasised that in the Northern Territory it was the Crown Solicitor who ensured the proper requests for advice were briefed to the Solicitor-General. However, as is detailed below, relying on individual relations between the Solicitor-General and other government officers is no guarantee that the Solicitor-General will always be briefed in appropriate matters.¹³⁰

In those jurisdictions where the Solicitor-General has no monopoly on the provision of legal advice (that is, all with the exception of the Australian Capital Territory and Tasmania, which are discussed separately below), participants indicated that the Solicitor-General would be involved in constitutional and other public law advice,¹³¹ matters that concerned the government as a constitutional entity,¹³² matters with whole of government implications,¹³³ and matters that were particularly politically sensitive.¹³⁴ The types of matters Solicitors-General were involved in did not seem to vary between jurisdictions that had implemented protocols and those that had not. Former Queensland Crown Solicitor and Acting Solicitor-General Barry Dunphy said that in most jurisdictions, the role of the Solicitor-General is to make the 'big calls',¹³⁵ to determine the legal position 'for very novel, difficult issues'.¹³⁶ The Solicitor-General was thus involved in a wide variety of matters, many of which were not necessarily easily identifiable (even where written protocols attempted to define them).

Two Solicitors-General noted that with the commercialisation of government services, there had been a changing role for the Solicitor-General away from the strict constitutional work that may have characterised the office in earlier eras.¹³⁷ In South Australia, the Solicitor-

¹²⁹ Interview, Patrick Keane; Interview, Stephen Gageler.

¹³⁰ See further discussion of this in Chapter 5.2.2.3.2.

¹³¹ Interview, Anthony Mason; Interview, Keith Mason; Interview, Michael Sexton; Letter from Pamela Tate SC, Solicitor-General, to Mr Richard Willis, Secretary, Select Committee on Gaming, 11 April 2007.

¹³² Interview, Geoffrey Davies.

¹³³ Interview, Stephen Gageler.

¹³⁴ Interview, Stephen Gageler.

¹³⁵ Interview, Barry Dunphy.

¹³⁶ Interview, Barry Dunphy.

¹³⁷ Interview, Martin Hinton; Interview, Patrick Keane.

General also engaged in a large amount of criminal law work, despite the creation of the DPP to relieve the office of this work.¹³⁸

While there was no guarantee that matters of the type identified would be briefed to the Solicitor-General, most participants across the jurisdictions were comfortable that either the Crown Solicitor (or equivalent) would brief the Solicitor-General, or that government agencies and departments would seek the Solicitor-General's opinion directly when these issues arose. As had Grant, participants across jurisdictions emphasised that an excellent working relationship between the Solicitor-General and the relevant Crown law office was paramount.¹³⁹ Dunphy said there was a 'long history of practice, and I think people understand what work goes to [the Solicitor-General]'. Similarly, Queensland Crown Solicitor Greg Cooper indicated the 'eminence of the person who occupies the role' ensures that the Solicitor-General is resorted to appropriately. In South Australia, Crown Solicitor Greg Parker added that there is an additional check on this. He said '[The Solicitor-General]'s totally dependent on me or others to tell him what we're up to. ... But at the same time, we're conscious that if something goes wrong, or becomes a big issue, ... we get asked the question, why wasn't the Solicitor-General instructed or his opinion sought?'

Some Solicitors-General were much more actively involved in overseeing the legal affairs of government, rather than relying upon the Crown Solicitor's office to properly filter work through. For example, former New South Wales Solicitor-General Keith Mason explained that during his tenure there was an informal 'mini-committee' that was composed of the Solicitor-General, Parliamentary Counsel, the Director-General and the Crown Solicitor, that would meet regularly 'on the basis of keeping each other informed about what was happening in our legal bailiwicks.' Similarly, during his tenure as Victorian Solicitor-General, Daryl Dawson indicated that he had an informal relationship with the heads of department, which allowed him to be very aware of what was happening throughout government.¹⁴⁰

¹³⁸ Martin Hinton, 'Secundarius Attornatus: The Solicitor-General, the Executive and the Judiciary' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011) 4. See analysis in Appendix D.1.2.2. It may be that this is influenced by the expertise of appointees, with the two most recent (Chris Kourakis and Martin Hinton) having extensive criminal experience.

¹³⁹ See, eg, Interview, Geoffrey Davies; Interview, Michael Grant; Interview, Martin Hinton; Interview, Patrick Keane; Interview, Greg Parker.

¹⁴⁰ Ruth Campbell, Interview with Sir Daryl Dawson AC KBE CB (Law in Australian Society Oral History Project, 16, 23 July and 6 August 1998) 25.

More actively involved positions were generally taken by officeholders in the early period of the Solicitor-General's statutory creation and less by current officeholders. Dawson posited an explanation: 'things have got more complicated, numbers have got greater'. Former Victorian Solicitor-General Pamela Tate explained why she took a somewhat different view of the role. She saw her role as the 'final adviser' within government for reasons relating to the integrity of the office. As such, she did not think it was appropriate for her to be involved in matters at an early stage, advising informally, for example, on the development of policies. This ensured that when legal issues crystallised in such matters, she would be able to provide an unbiased, determinative opinion, in much the same way a court would. Tate's position accords with that taken in England by Viscount Simon, former Solicitor-General, Attorney-General and Lord Chancellor, that because of the importance of the impartiality of Law Officer opinions to the Cabinet, it was better that they were not involved in earlier Cabinet deliberations.¹⁴¹

In Tasmania an exceptional position developed during William Bale's tenure where *all* government requests for advice involving the scope and operation of the rights and duties of the Crown *must* come to the Solicitor-General. Bale explained that upon the creation of the statutory office in 1983, the Solicitor-General took on the traditional role of the second Law Officer. But during the term of the first appointment to the office it transpired that the Solicitor-General became too busy with litigious matters, and advising was performed by many different actors, with little supervision for consistency and quality. The government decided to remove the Solicitor-General's responsibility for civil litigation, giving the office sole responsibility for government advice involving the scope and operation of the rights and duties of the Crown. Bale explained the reasons behind the move:

The responsibility for advising lies with the Law Officers. Otherwise you shop around for advice and you take that which you like; and you become your own judge, because you've determined what legal advice you are willing to accept.¹⁴²

In New Zealand, the Solicitor-General performs quite a different role from that in Australia (with the exception of the newly created Australian Capital Territory position),¹⁴³ with the

¹⁴¹ Viscount John Allsebrook Simon, *Retrospect: the memoirs of Viscount Simon* (Hutchinson, 1952) 89-90. See further discussion in Chapter 2.4.1.

¹⁴² Although note that the current Solicitor-General, Leigh Sealy, is currently seeking reorganisation of the government legal service to return to the Crown Solicitor responsibility for advising to allow the Solicitor-General to concentrate more fully on litigation and advice on significant issues. See, eg, his reports on his project in: Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2008-2009 (2009); Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2009-2010 (2010) and Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2010-2011 (2011).

incumbent filling the functions of Chief Executive of the Crown Law Office, principal counsel for the Crown, principal legal adviser to the Crown, supervisor of the prosecution of indictable crime and traditional constitutional/Law Officer functions.¹⁴⁴ David Collins, former New Zealand Solicitor-General, stated that one advantage of having the Solicitor-General actively supervising and overseeing all the advice and representation of the Crown is that the Solicitor-General is able to identify those cases that require his or her immediate attention, minimising the risk that the Solicitor-General will fail to be involved in a matter that has significant consequences for the Crown.¹⁴⁵ This was also identified by Solicitor-General Peter Garrisson as an advantage under the new model in the Australian Capital Territory.

This more active involvement reflects the view of some commentators that part of the government lawyer's ethical duties, informed by the idea of government under the rule of law, is to raise matters with their instructors where they believe an incomplete question is being asked, or the wrong question is being asked.¹⁴⁶ Similarly, my data reveal instances where the Solicitor-General has become aware of legal problems and 'engineered' requests for advice.¹⁴⁷

5.2.2.3.1 *Exceptions*

Two exceptions to the general rule that the Solicitor-General's advice would be sought on appropriate matters arose in the interviews. These are explained by the bureaucratic difficulties that may lead to the Solicitor-General being 'frozen out' or 'starved' of work and the effect of outsourcing of government legal services and the increased use of in-house legal services providers in reducing the intimacy of the Solicitor-General's involvement in government.

5.2.2.3.2 *Exception 1: 'freezing out'*

Bureaucratic difficulties that led to the Solicitor-General being 'frozen out' or 'starved' of work occurred in a number of different jurisdictions for different reasons. It was explained in Chapter 2.5.5 that bureaucratic difficulties have been considered in the US context to have

¹⁴³ Chapter 3.4.5.

¹⁴⁴ Collins, above n 95, 2.

¹⁴⁵ Ibid 19-20.

¹⁴⁶ See, eg, Chad Jacobi, 'How the ethical duties of the public lawyer are defined by the Constitution and structure of government' (Paper presented at the National Administrative Law Conference: Integrity in Administrative Decision-making, National Wine Centre, Adelaide, 19-20 July 2012), 14.

¹⁴⁷ Interview, Pamela Tate; Interview, Robert Ellicott.

contributed to the OLC re-defining itself to ensure its survival and importance in the bureaucratic setting. In Australia, Solicitors-General have, at times, also been faced with the need to secure the office's position in the wider government setting.

My data revealed that several examples of 'freezing out' had occurred. Various causes existed: the introduction of the office into the existing bureaucracy proved difficult in some jurisdictions; in others it was caused by the souring of a relationship between the Solicitor-General and an Attorney-General, the Crown Solicitor or even a senior bureaucrat.

At the Commonwealth level, Robert Ellicott, appointed in 1969 after Anthony Mason's tenure, found that, although, when he became Solicitor-General, the office's position as second Law Officer had come to be accepted by the Attorney-General's Department there were occasions when difficulties arose.

Ellicott recalled an incident when he was invited by the Prime Minister to join him and his advisers, including the Secretary of the Department, in London for discussions about what should take place in talks to be held in the ensuing days with representatives of the British Government, including its Law Officers. The Prime Minister asked Ellicott to accompany him in those talks. This greatly upset the Secretary who was not invited. On another occasion, Ellicott learned that the Department had advised the Government of the day on a constitutional matter of considerable importance on which his view was contrary to that expressed by the Department. Without being asked, he immediately prepared an opinion to the opposite effect which he provided to the Attorney-General. The Prime Minister acted on that advice in relation to litigation in the High Court (which was successful).¹⁴⁸

As it turned out these were relatively minor difficulties when compared to those he encountered when Lionel Murphy became Attorney-General. Ellicott quickly realised that Murphy was ignoring him. Murphy appointed his own constitutional adviser and without consultation with Ellicott or his knowledge, took a submission to Cabinet to establish a number of Deputy Solicitors-General.¹⁴⁹ Ellicott concluded that, politically, Murphy did not trust him and thought to himself, 'This is stupid. I'm Solicitor-General but he doesn't want to recognise the fact.'

¹⁴⁸ This advice led to *Victoria v Commonwealth* (1971) 122 CLR 353 ('Payroll Tax Case').

¹⁴⁹ Submission from Lionel Murphy to Cabinet, *Law Officers Act - Deputy Solicitor-General* (23 February 1973, Submission No 153); M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86, 104.

The development of the role at the Commonwealth level contrasts starkly with the creation of the statutory role of Solicitor-General in Queensland. Former Crown Solicitor and Acting Solicitor-General Barry Dunphy described the new role as being almost immediately accepted and embraced across government, including in Crown Law.

There were three other instances of the Solicitor-General being starved of work.¹⁵⁰ In South Australia in the late 1970s the poor relationship between Crown Solicitor Graham Prior and Solicitor-General Malcolm Gray, coupled with a level of distrust between the incoming Liberal government towards Gray (who had been appointed by the outgoing Labor government), resulted in the Crown Solicitor refusing to brief the Solicitor-General. This was the case even in High Court constitutional litigation which, by that time, had become the Solicitor-General's speciality.¹⁵¹ In the Northern Territory in the late 1990s, a senior bureaucrat 'decided to put on a "freeze"' on Solicitor-General Thomas Pauling, after complaints were made about his handling of an intervention on the part of the Territory.¹⁵²

Also in the late 1990s, in Victoria, there was a vitriolic relationship between Solicitor-General Douglas Graham and incoming Labor Attorney-General Rob Hulls. When he was shadow Attorney-General, Hulls had alleged in Parliament that Graham had, unethically, advised the government in proceedings against BHP at the same time as being a shareholder and director of a family trust which held shares in the company. The attacks became quite personal. Hulls made statements to Parliament that Graham was 'absolutely incompetent to be in the position of Solicitor-General of this state, and as a result he must resign immediately, because the longer he stays in that position the longer the position continues to be tainted.'¹⁵³ These earlier tensions meant that, upon the election of the Labor government in 1999, Graham was simply not involved with the Attorney-General and therefore many sensitive government matters that would ordinarily come to the Solicitor-General went

¹⁵⁰ There was a period in New South Wales where the Solicitor-General stopped appearing for the government in the High Court, but this appears to be because of illness rather than 'freezing out'.

¹⁵¹ Interview, Martin Hinton; Interview Chris Kourakis. When Gray was appointed Solicitor-General in December 1978, the Solicitor-General ceased to appear in cases where the Solicitor-General of South Australia had, until that point, regularly appeared. Of the 16 cases in which South Australia's interests were represented in the High Court between Gray's appointment in December 1978, and Prior's retirement in 1984, the Solicitor-General appeared in just over one per cent (one constitutional matter and one criminal appeal, both in 1983, towards the end of Prior's tenure as Crown Solicitor); the Crown Solicitor, in contrast, appeared in over 50 per cent of matters (five constitutional cases and 4 others, including 3 criminal appeals). See further Appendix D.

¹⁵² Interview, Thomas Pauling.

¹⁵³ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 November 1996 (Rob Hulls), 1357. See also 1355-6.

elsewhere. While Halls did not remove Graham, during the rest of his tenure (until December 2002),¹⁵⁴ Graham took his sabbatical,¹⁵⁵ and otherwise received work from people within government with whom he had established relationships.¹⁵⁶ Graham was still briefed in the constitutional interventions before the High Court after Halls took over as Attorney-General. Tate explained, however, that it appeared that Graham was only used in cases that were not viewed as politically important by the Attorney-General.¹⁵⁷

Tate indicated that the relationship between Halls and Graham had created more general difficulties for the Solicitor-General in that State. It was a period where, in effect, the Solicitor-General had been ‘frozen out’ of the government machine. When Tate accepted her appointment, there was therefore no recent institutional knowledge within government about the office’s role and she needed to re-establish the authority of the position. In such circumstances, she found it very difficult to ensure she was briefed with the appropriate type of work. It was then (in consultation with the Secretary of the Department, Penny Armytage) that she implemented a formal protocol for briefing the Solicitor-General. It was designed to achieve the necessary equilibrium between involving the Solicitor-General in the development of government policy, and ensuring the office was not involved in informal advisings of an insignificant nature. Part of that protocol was that her advice would be provided in writing, to clarify the bounds of her view.¹⁵⁸

The above situations demonstrate a potential frailty of the current arrangements. South Australian Solicitor-General Martin Hinton indicated the potential for ‘freezing out’ to occur ‘is by no means ideal’ however, he explained ‘it is not the norm, and it has not been my experience’.¹⁵⁹ It is true that for most participants the possibility of being ‘frozen out’ of work

¹⁵⁴ Office of Attorney-General, ‘Halls Advertising for New Solicitor-General’ (Media release, 11 December 2002).

¹⁵⁵ Graham stopped appearing for Victoria for the final six months of his tenure, presumably as he was on sabbatical during this period. After May 2002, in the High Court Victoria was represented by Mark Dreyfus, Susan Crennan and Peter Hanks before Pamela Tate was appointed Solicitor-General on 8 July 2003.

¹⁵⁶ Interview, Pamela Tate.

¹⁵⁷ During this period, the majority of these cases were technical legal questions arising from *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, it is unlikely the Attorney-General could have seen these as politically important. Graham also appeared in some technical cases that concerned private international law questions. He appeared in some other constitutional cases representing the Attorney-General of Victoria, intervening, but he made written submissions only and did not address the court.

¹⁵⁸ As to the desirability of such a protocol, in the US context see Morrison, above n 17, 68.

¹⁵⁹ Hinton, above n 138, 5.

caused them little concern.¹⁶⁰ The above examples were exceptions rather than the general experience. However, the potential for it to occur has ramifications for the office's capacity to fill its advisory function in a manner that achieves the desired objectives. The office's lack of monopoly on any legal work in government may also have implications for the independence of the office, a topic to which I return in Chapter 7.7.

5.2.2.3.3 *Exception 2: outsourcing of government legal services*

Most day-to-day government legal advice is not provided by the Solicitor-General. Already, we have seen the Solicitor-General is consulted only on significant legal questions. Traditionally, in Australia government legal services were provided (almost) exclusively by legal practitioners operating within the Attorney-General's Department.¹⁶¹ This arrangement continues in South Australia, Tasmania, Western Australia and the Australian Capital Territory.¹⁶²

In the other jurisdictions (the Commonwealth, Victoria, New South Wales, Queensland and the Northern Territory), pursuant to reforms implemented throughout the 1990s, government departments are allowed to engage private law firms for advice and representation in certain areas of government legal work. This is referred to as the 'untying' of legal work. The areas of work that remained tied are in the core of the Executive's functions and/or strategically and politically sensitive (these include, for example, constitutional and national security work). In these areas it is perceived to be vital that whole of government implications are taken into consideration and consistency in the government's position is maintained.¹⁶³

¹⁶⁰ See particularly Interview, Michael Grant, who knew of Pauling's experience but did not feel his independence was threatened by the possibility.

¹⁶¹ Exceptions were made only where there was a conflict of interest, or where the government legal service provider gave permission for a government agency to engage a private firm.

¹⁶² Until 2005, the ACT government allowed government departments to brief private firms, but this decision was reversed after a report from Peter Garrisson, who has recently been appointed Solicitor-General: Interview, Peter Garrisson. See the position set out in *Law Officers (General) Legal Services Directions 2012* (ACT), Schedule, clause 1.

¹⁶³ Note Commonwealth tied work is more narrowly defined than that in New South Wales, Queensland and Victoria. See lists for Commonwealth: *Legal Services Directions 2005* (Cth) Appendix A; New South Wales: Bob Carr, 'M1995-39 Arrangements for Seeking Legal Advice from the Crown Solicitor's Office' (Department of Premier and Cabinet, 12 October 1995) <http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/1995/m1995-39>; and Queensland: Alan Girle, 'Commercialisation of State Government Legal Services' (2004) 63(3) *Australian Journal of Public Administration* 53, 55. In Victoria, the 'core government legal services' seem narrowly defined as well, although the full list is not publicly available. See Victorian Department of Justice, *Government Legal Services: Report to Attorney-General* (1 July 2002 - 30 June 2003). In the Northern Territory in 2008 the amount of tied work was increased. See Solicitor for Northern Territory, *Agency Legal Services* (20 April 2012) Northern Territory Department of Justice, <<http://www.nt.gov.au/justice/solicitor/legal/services.shtml>>.

Outsourcing of work has been controversial because of concerns over reduction in the independence of advice and overly client-focussed lawyering; reduction in the quality of advice; failures to consider whole of government interests; and failures to involve the Solicitor-General in appropriate matters.¹⁶⁴

In all jurisdictions, another phenomenon has been an increased use of lawyers working within departments and agencies (in-house). While separate each of these trends has had a similar impact on the role of the Solicitor-General.

5.2.2.3.3.1 Implications: Intimacy of Solicitor-General's involvement

The untying of work, together with other factors which have moved the provision of legal services away from the Attorney-General's immediate responsibility, have had significant impacts on the intimacy of the involvement of the Solicitor-General in government activities. Participants agreed that in tied areas of work the Solicitor-General continued to receive appropriate work and was adequately supported by the government legal services provider.¹⁶⁵

However, in untied areas, because of the decentralisation of legal advising, the Solicitor-General is no longer as aware of the legal issues facing government as in the past. In some jurisdictions, the outsourcing of work has led to some work going elsewhere when ordinarily it would have been briefed to the Solicitor-General. The loss of briefing to the Solicitor-General was sometimes exacerbated by the preferences of private law firms for particular counsel other than the Solicitor-General.¹⁶⁶

In New South Wales, Victoria and Queensland the outsourcing of work was not perceived to have affected the work of the Solicitor-General, although it increased the instances in which the Solicitor-General would be asked to provide a definitive opinion where individual agencies or departments had obtained differing opinions.¹⁶⁷

¹⁶⁴ See Roger Beale, *Organisational Audit of the Attorney-General's Department: Final Report* (Allen Consulting Group, January 2009); Anthony S Blunn and Sibylle Krieger, *Report of the Review of Commonwealth Legal Services Procurement* (Commonwealth Government, 6 November 2009); Crown Law, *In My Opinion: The History of Crown Law Queensland 1859-2009* (Department of Justice and Attorney General, 2009) 270.

¹⁶⁵ Interview, David Bennett (SG); Interview, James Faulkner; Interview, Stephen Gageler; Interview, Philip Ruddock.

¹⁶⁶ Interview, Thomas Pauling.

¹⁶⁷ Interview, Patrick Keane; Interview, Keith Mason; Interview Pamela Tate, and see also Victoria, Department of Justice, Protocol for Briefing the Solicitor-General (28 July 2011) [4].

At the Commonwealth level, former Commonwealth Solicitor-General Stephen Gageler was quite concerned about the effect of the outsourcing arrangements, together with the increase use of in-house legal services.¹⁶⁸ When he started in the position in 2008, Gageler found he was not being briefed regularly to provide written opinions to the government. As to why, he explained it was predominantly caused by the structure of government legal services:

[T]he sort of marginalisation and isolation that I sensed in my role fitted into a broader problem I think around the procurement of government legal services, and with the Attorney-General's Department, and with the spinning off of the Australian Government Solicitor's Office, with the growth of in-house legal services in Commonwealth Government departments.

The effect of these factors was investigated in two federal government commissioned reviews into the structuring of legal services. In January 2009, the Allen Consulting Group found outsourcing created a decentralisation of legal services, reducing the Attorney-General's Department's former 'intimate advisory relationship with departments as they develop proposals'.¹⁶⁹ This meant the Department no longer received 'early warnings' as issues arose in policy development. These disadvantages were most critically reflected in the weakening of the Attorney-General's capacity to fulfil the first Law Officer's legal services functions and the Solicitor-General's primary responsibilities in this area. This caused deterioration in the intimacy of the Solicitor-General's relationship with government. The report concluded that 'support for the Solicitor-General, and the intimacy and flexibility of his engagement in the Commonwealth's advice and litigation has deteriorated'.¹⁷⁰

This Report has not been released by the Government. I obtained a redacted version through the Commonwealth Freedom of Information legislation. There has been no public response to the report.

In November 2009, the Report of the Review of Commonwealth Legal Services Procurement echoed many of the concerns of the first report, also noting the impact of increased use of in-house counsel on the role of the Law Officers.¹⁷¹ One of this Report's recommendations was to introduce measures to reinforce and assist agencies to ensure the Solicitor-General and/or the Attorney-General are informed of potentially significant emerging issues.¹⁷² The

¹⁶⁸ See also Interview, Duncan Kerr; Interview, Leigh Sealy.

¹⁶⁹ Beale, above n 164, ix and 2.

¹⁷⁰ Ibid.

¹⁷¹ Blunn and Krieger, above n 164, recommendations 1 and 3, at 12, and recommendation 10, at 13.

¹⁷² Ibid recommendation 12, at 13.

Government has responded to this Report, but only with respect to its recommendations on the most efficient and effective means of delivering legal services.¹⁷³ The concerns regarding the involvement of the Law Officers and the Attorney-General's department in the development of government policy have not been addressed.

The Australian experience contrasts starkly with that of New Zealand. When outsourcing was introduced in that jurisdiction, the Solicitor-General maintained responsibility for the supervision of work that was undertaken by non-government legal service providers and the right to intervene in matters if he or she considered it appropriate.¹⁷⁴

5.2.2.3.3.2 The importance of individual role perception

The rearrangement of government legal services was identified as a significant factor in the change in the role of the Solicitor-General, particularly in the Commonwealth.¹⁷⁵ But the effect of the individual officeholder's perception of the role was also instrumental. For example, many officeholders saw their role as waiting for legal work to be briefed to them, acting as a private barrister would, and not to be intimately engaged with the business of government.¹⁷⁶ Others however were focussed upon being involved in appropriate legal issues to ensure that they were able to provide definitive legal advice, and that other issues were canvassed where necessary.¹⁷⁷

Former Commonwealth Attorney-General and Minister for Justice Duncan Kerr drew a distinction between political Solicitors-General, and non-political Solicitors-General. By 'political', he was not referring to party political, but those who actively sought to be the 'dominant legal influence for the Commonwealth', inserting their office into the development of policy and across all legal areas. Non-political Solicitors-General, in contrast, were 'hired guns', 'rather than working through the strategy of how the Commonwealth advances its broader legal interests'.

When Stephen Gageler became Commonwealth Solicitor-General in 2008, he found himself well serviced and integrated in constitutional litigation (an area of tied work), but not engaged as broadly across government as he thought necessary for the role. However,

¹⁷³ See, Attorney-General Robert McClelland, *Address to the National Legal Officers' Forum 2011*, 9 March 2011, Canberra.

¹⁷⁴ See discussion in Chapter 2.6.

¹⁷⁵ Interview, Stephen Gageler; Interview, Duncan Kerr.

¹⁷⁶ See, eg, Interview, John Doyle; Interview, Martin Hinton.

¹⁷⁷ Interview, Trevor Griffin; Interview, Keith Mason.

Gageler would find re-establishing the position of Solicitor-General to be difficult. Kerr noted that changing entrenched bureaucratic culture would be difficult. Change would need to address the temptation to use in-house and private lawyers because of their client-focus and more accommodating advice (or at least the perception of more accommodating advice).

Gageler had the support of then Attorney-General Robert McClelland and the Secretary of the Attorney-General's Department, Roger Wilkins, in his attempts to change the nature of the office. McClelland said 'Stephen is a new creature in the sense that he actually likes being involved in a range of matters'. McClelland's view was that Gageler viewed the role as 'not only giving constitutional advice and appearing in cases, constitutional and otherwise. But he thought that given that he may well be asked to appear in a matter of significance, he wanted to be on the ground floor of giving advice as to how those matters would be structured.' McClelland gave a number of examples of the types of questions Gageler had been constructively involved in, including the establishment of the national emergency warning system and the national health reforms.

Demonstrative of Gageler's increased involvement across government, since his appointment, he has regularly appeared in the High Court in administrative law appeals,¹⁷⁸ and also for non-constitutional matters for the Australian Crime Commission,¹⁷⁹ the Australian Competition and Consumer Commission,¹⁸⁰ the Australian Securities and Investments Commission,¹⁸¹ and the Federal Commissioner of Taxation.¹⁸²

The assumption that the Solicitor-General will be briefed by the government to advise in matters of constitutional and other significance is fundamental to the office's capacity to contribute to the promotion of the rule of law. However, the data demonstrate that while this is predominantly the position, there are no safeguards to ensure that the office is not 'starved' of work from within the bureaucracy or because of a sour relationship with the Attorney-General or others, or because possibly more accommodating advice is available elsewhere. Ultimately, the extent to which these factors affect the role of the Solicitor-General will

¹⁷⁸ See, eg, *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642.

¹⁷⁹ *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

¹⁸⁰ *ACCC v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305.

¹⁸¹ *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509.

¹⁸² *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443; *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510.

depend on the desire of the individual officeholder to ensure that his or her office is consulted in appropriate matters and the attitude of others in government. However, not all officeholders believe that it is appropriate for the Solicitor-General to become intimately involved in policy development, rather, the officeholder must remain appropriately aloof.

5.2.2.4 Fourth assumption: independence

The final assumption that underpins the Solicitor-General's advisory function is the objectivity and independence of the office's advice. Former Queensland Crown Solicitor and Solicitor-General Barry Dunphy explained 'it is really important that there is someone there who will call it straight down the line; who is accessible; and who is respected.' The finality of the Solicitor-General's opinion underscores the importance of this assumption. John Edwards said:

It is by virtue of this unique measure of constitutional independence that the Law Officers are able to insist on their being the 'court of last resort' to which the ranks of departmental legal advisers must defer.¹⁸³

The Solicitor-General's role in providing certainty and security to government also highlights how instrumental it is that the Solicitor-General's view is arrived at independently. However, because of potential political use that can be made of the Solicitor-General in this role, the office's independence may be called into question. The purpose and type of independence of the office is also instrumental in other functions of the Solicitor-General and will be returned to separately in Chapter 7.

5.2.2.5 Assumptions: summary

Advising on the limits of government power, the Solicitor-General's role can be an important one in promoting the rule of law and constitutionalism. For it to do so, a number of assumptions must be met. My research has revealed four of these assumptions; some of them are statutorily mandated, but others rest on practice and convention. The convention that the Solicitor-General's advice will be final within government and that the Solicitor-General will be briefed in appropriate cases are two of the latter. In the predominance of circumstances, these assumptions are met. However, there are instances of government disregard for them that demonstrate the frailty of relying on historical convention and principle, and undermining the contribution of the Solicitor-General's office to the rule of law.

¹⁸³ Edwards, *The Attorney-General*, above n 93, 190. For a similar view, see John McGrath, 'Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General' (1998) 18 *New Zealand Universities Law Review* 195, 214.

5.3 Advisory function: executive empowerment

The advisory function was predominantly described in terms of ensuring government operated within the rule of law, but that function, for many participants, had to be viewed in the context of the Executive's role within government and government's role in society more generally. In this sense, while checking and ensuring integrity of government power is important, the Solicitor-General's role must be seen in the context of the Executive's obligations to implement policies on behalf of the electorate and to govern within a public policy framework that reflects the core values of the government system ('core government principles').

5.3.1 Achieving executive policy outcomes: differentiating ends and means and impact on legal reasoning process

Many participants discussed the Solicitor-General's role in assisting the achievement of policy outcomes within the law. So in this respect the Solicitor-General is not a passive linesperson but *actively* assisting the government achieve its policy objectives within the law. Therefore, to describe the Solicitor-General's advisory function as 'quasi-judicial' as has been done in the US and British context is misleading.¹⁸⁴ This dimension of the Solicitor-General's role has a natural relationship with the idea of the Solicitor-General providing security and certainty to the government in advancing its agenda. As predicted by Neil Walker and Cornell Clayton, neat compartmentalisation of the 'legal' and the 'political' has proven elusive.¹⁸⁵

Theoretically, this perspective reflects the majoritarian, democratic view of the mandate of government. It also reflects Helen Irving's position, in the context of the High Court's inability to provide advisory opinions, that it is important for government to implement policies and programs that push the boundaries of government power, not simply operate safely within known limits. It is in this way the outer limits of government power may be

¹⁸⁴ Nancy Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990* (University Press of Kansas, 1992) preface; John L J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 1.

¹⁸⁵ Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 162-5. See also Cornell W Clayton, 'Introduction: Politics and the Legal Bureaucracy' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 18. See further discussion in Chapter 2.

determined and the law advanced.¹⁸⁶ Under this view, the Solicitor-General ought not to provide conservative advice based on a narrow interpretation of the law, but assist a government in achieving its policy objectives, alive to the possible development of the law.¹⁸⁷

The view that the Solicitor-General ought to assist in achieving government policy was particularly evident in the views of Attorneys-General. Michael Lavarch, former Commonwealth Labor Attorney-General said:

You expect [Solicitors-General] to be understanding of the government's policy position and, properly within the bounds of their office, to give proper and full advice: what they call fearless advice. ... But they are not there to be obstructionist and hostile, they try to implement and help implement the government's policy position, but ensuring that it was done *always* constitutionally and *always* lawfully.

Lavarch illustrated his point by reference to the Commonwealth's response to the High Court's *Mabo* decision in 1992.¹⁸⁸ This, he explained, was a complex issue that involved stakeholders from the Aboriginal and non-Aboriginal communities and various economic interests. It was 'a nice little mix of legal, political, moral, economic interests, all coming into the one frame.' The then Solicitor-General, Gavan Griffith, provided the solution to one of the issues by framing the legislation as a 'Special Measure' under the *Racial Discrimination Act 1975* (Cth). This allowed the government to argue 'with some credible legal force', that it was not suspending that Act. Lavarch explained 'But I don't think that it would be fair to say that [the Solicitor-General] was contributing to the policy position per se.' Rather, within a policy dilemma, the Solicitor-General assisted in finding a mechanism to achieve an outcome.¹⁸⁹ Other Attorneys-General held similar views.¹⁹⁰

Former Commonwealth Attorney-General Gareth Evans explained that he expected the role of the Solicitor-General in assisting the Executive to implement its agenda would affect the legal method employed by the Solicitor-General. He explained that in the 'many twilight areas where you could go one way or the other in terms of the advice' it was the role of the Solicitor-General to 'do what they possibly could to accommodate the wishes of their client, short of putting themselves in a position of saying something that was totally intellectually

¹⁸⁶ Helen Irving, 'Advisory Opinions, The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105, 106-7, 132.

¹⁸⁷ See also W Bradley Wendel, 'Government Lawyers, Democracy and the Rule of Law' (2009) 77(4) *Fordham Law Review* 1333, 1340.

¹⁸⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also Interview, Gavan Griffith.

¹⁸⁹ See also Interview, Gavan Griffith.

¹⁹⁰ Interview, Robert McClelland; Interview, Philip Ruddock.

disreputable.’ As Attorney-General, Evans was not looking for the Solicitor-General’s opinion on the best legal position. He was very clear however that he would not place undue pressure on the Solicitor-General to provide accommodating and ‘manifestly’ indefensible advice. The Solicitor-General needed to avoid intellectual disreputable positions, to maintain the ‘overall credibility of the office, and by extension the government of the day’. His comments align strongly with the tenets of the Autonomous Government Advocate that was prevalent in the US literature.¹⁹¹

One Attorney-General also indicated he would, on rare occasions, speak to the Solicitor-General as an opinion was being generated and emphasise the government’s objectives to the officeholder to ensure they were adequately considered. The Attorney-General described it as ‘a degree of mediation’. As a result of these discussions, the final advice might be ‘strengthened a bit from what it originally was’ so that the government ‘may have been buttressed by a more strongly worded opinion’. There was never a change in the outcome of the advice. The Attorney-General indicated to the Solicitor-General what issues the government saw as important, and these ‘may have been reflected more starkly in the depth of the advice, or illustrations contained in the advice’.

Current and former Solicitors-General shared, to an extent, the view of their role as assisting in the achievement of executive policy. In the Northern Territory, Thomas Pauling indicated that there were a small number of occasions during which he was called upon to assist the government achieve a particular policy objective in legally challenging circumstances. One occasion was in 2007 when Xstrata sought to convert its operations at the McArthur River Mine to open-cut mining. The Minister had purportedly approved this conversion, which involved the re-routing of the McArthur River. The Supreme Court of the Northern Territory found the Minister’s approval ineffective.¹⁹² Pauling was instrumental in pushing through legislation to remedy the defect: in four days he briefed Cabinet, Caucus, the Opposition and the Independents and oversaw the passage of legislation that retrospectively validated the Minister’s approval. Within a broad policy concept of keeping the McArthur River Mine running, he viewed the Solicitor-General’s role as doing whatever was legally needed to overcome any impediments.

¹⁹¹ Chapter 2.5.1.

¹⁹² *Lansen v NT Minister for Mines and Energy* [2007] NTSC 28.

Former South Australian Solicitor-General Chris Kourakis also saw his role in helping the government achieve overarching policy aims by considering legally available *means* to achieve the government's *ends*:

The only reason I am going into the policy area is to formulate a policy that does not have a particular legal risk that I have identified. I don't suggest a change in policy because I don't like it, or because I think a better public policy is this. I take for granted what they want to achieve, and just ... modify it to reduce legal risk.¹⁹³

Many officeholders, current and former, agreed that part of the role of the Solicitor-General was to assist the Executive in achieving its policy outcomes. Many Solicitors-General opined that it was appropriate to assist the Executive to find a legally appropriate means to achieve the desired political outcome. However, whether this changed how a Solicitor-General approached the question of whether a particular measure was legally justified differed markedly from the views of some Attorneys-General, set out above. In Chapter 4.3.1.4, I argued that the appropriate manner for the Solicitor-General to resolve legal ambiguity did not involve considering the underlying political objectives of a measure; but where there may be genuine indeterminacy in the law and there was no preferable answer, the Solicitor-General ought to indicate the position and allow the government to determine its course based on that information. The views of some Attorneys-General indicated that, where there was ambiguity in the law, they expected the Solicitor-General to take a position that would buttress executive policy, with the caveat that they would never want the Solicitor-General to take an 'intellectually indefensible' position.

Consistent with my conclusions from Chapter 4.3.1.4, many current and former Solicitors-General countered the idea that the legal method would be influenced by executive policy objectives. Anthony Mason, former Commonwealth Solicitor-General, explained that often:

politicians see the law as something that can be, as it were, I won't use the words bent or manipulated, they're too strong, but that can be *influenced* in a way that can advantage their position. And therefore, they want to deal with lawyers who are at least sympathetic to their political position.

However, he went on to say this was misguided:

Whatever a government thinks about how a Solicitor-General will act, almost certainly, they will find eventually that he answers legal questions impartially and objectively.

¹⁹³ See also Interview, William Bale; Interview, Stephen Gageler, Interview, Michael Sexton.

Former Victorian Solicitor-General Pamela Tate recalled that her Attorney-General, Rob Hulls, had made it very clear that the Solicitor-General was most valued in her office when she provided independent advice on her best view of the law.¹⁹⁴ She explained that trying to ‘assist’ the government by moulding advice to fit a government’s objectives was dangerous: the government doesn’t speak with one voice, it is dynamic. It is therefore inappropriate for the Solicitor-General to try to second guess what the government wants to hear.

A number of officeholders had been faced with a potential conflict of interest when requested to act for the Viceroy and the Executive, or the Parliament and the Executive. However, many believed that provided there was no conflict over the factual circumstances, there was no conflict in them providing advice, because the ‘advice would have been exactly what it was’, uninfluenced by the objectives of the party seeking it.¹⁹⁵ Former Commonwealth Solicitor-General Stephen Gageler said ‘I mean it is perhaps simplistic and naïve but my advice doesn’t change depending on who asks the question.’¹⁹⁶ It would appear that these comments related to briefs on strictly legal questions; it may have been different where a Solicitor-General was advising on areas beyond legal rights and obligations.¹⁹⁷

A number of officeholders expressly addressed the difficulty which arises for the Solicitor-General where the law is unsettled and ambiguous in a particular area. Former South Australian Solicitor-General Chris Kourakis explained his position:

If you can form a relatively clear opinion one way or the other, then you say, that’s the end of it. But you should be careful and recognise that there might be two sides to it and if there is an argument that both sides are fairly evenly balanced, it is not for the Solicitor-General or any Crown Law officer to pick which one they prefer and say, well, it is not lawful because in my opinion I would go this way on this argument. I think where there are arguments both ways, the proper thing to do is simply to point out the argument both ways, the risks in acting one way or the other, and then it is a matter for the government to decide.¹⁹⁸

Queensland Solicitor-General Walter Sofronoff explained that questions of this nature did not arise very often:

¹⁹⁴ See also Interview, Greg Cooper.

¹⁹⁵ Interview, William Bale. See also Interview, Michael Grant.

¹⁹⁶ Robert Ellicott had expressed a similar view. See Russell Schneider, ‘Exit the Liberal party’s Moralists’, *The Australian* 18 February 1981.

¹⁹⁷ See further Chapter 5.3.3, below.

¹⁹⁸ This is the same view taken in Interview, Greg Parker.

Sometimes, more rarely than you would think, it is not possible to give definitive advice, it is only possible to give advice, that this would be the more probable outcome ... That the legislation, for example, could be read this way or that way, there are factors going each way, but in my view, this particular way is the preferable way of looking at it because the legal logic is more compelling ... in that direction.

The division of opinions which emerged between Solicitors-General and Attorneys-General as to the appropriate manner to resolve legal ambiguity is unsurprising. The views of Solicitors-General accorded with my conclusions in Chapter 4.3.1.4. The positions of the officeholders on this point, however, do not entirely correlate with those of some Attorneys-General. Putting this division to one side, both Solicitors-General and Attorneys-General acknowledged the importance of the Solicitor-General being actively involved in pushing the Executive's policies. In this sense, rather than being a wholly independent, disinterested agent engaged to provide opinions on the legality of actions of the government, the Solicitor-General works with the government to achieve its agenda. Another way of framing this is that the Solicitor-General must accept the legitimacy of the government's goals in undertaking the role. This does not necessarily sit well with the regulatory, integrity-driven aspect of the role for the benefit of the community and the individuals within the community. It certainly adds a degree of complexity in the conception of the Solicitor-General as an independent oversight mechanism, and brings with it the potential for abuse by unscrupulous officeholders and government officers.

5.3.2 Policy outcomes and the SCSG

Australia's federal system further complicates the role of the Solicitor-General. Nationwide policy objectives often require the cooperation of all the governments of the federation. As Chapter 3.4.7 explained, during the early phase of the development of the modern model for the Solicitor-General, a collective group of Solicitors-General was formed: the Special Committee of Solicitors-General (SCSG). The need to receive the views of *all of the States* on legal proposals to sever the remaining constitutional links with Britain drove its immediate formation, but there have been a number of subsequent federal legal schemes of note that have involved the Committee, including the SCSG's involvement in the cross-vesting scheme, the crimes at sea legislation and the choice of law scheme,¹⁹⁹ although Northern Territory Solicitor-General Michael Grant noted that the SCSG's function as adviser to SCAG has diminished as SCAG relies increasingly on its own officers for advice.

¹⁹⁹ See further discussion of the SCSG in Chapter 3.4.7.

One example that former Queensland Solicitor-General Patrick Keane recalled the SCSG being involved in was the negotiations between the Commonwealth and the States after the decision in *Ha v New South Wales*.²⁰⁰ That case found the New South Wales tobacco-licensing system invalid. It was a decision that had wide ramifications for the States' capacity to raise revenue into the future under tobacco-licensing schemes (and similar alcohol and petroleum schemes). At the time of the decision States and Territories were raising 16 per cent of their total revenue through these business-franchise fees.²⁰¹ The case also raised serious questions about what would happen to the money collected under invalid schemes. The SCSG had anticipated the consequences of a finding of invalidity in *Ha* before it was even argued before the High Court. At a meeting on 18 October 1995, the SCSG discussed the possibility of the Commonwealth passing legislation to remedy any finding of unconstitutionality to provide a 'safety net' to the States.²⁰² The New South Wales Solicitor-General, for example, suggested the Commonwealth 'might be able to say it was reluctantly forced to have a GST'.²⁰³ The States eventually came to an arrangement with the Commonwealth so that, in the event of a finding of invalidity, the Commonwealth would increase the federal excise on tobacco, alcohol and petroleum, and pass this revenue back to the States. These arrangements were quickly enacted after the decision in August 1997;²⁰⁴ eventually a Goods and Services Tax (GST) was introduced to secure the source of revenue.²⁰⁵

The SCSG's establishment recognises the desirability of a legal advisory body constituted by representatives of all of the interests of the Commonwealth. Involvement in the SCSG reveals an aspect of the Solicitor-General's role in which tensions may arise between the interests of the federation, and the interests of an individual jurisdictional Crown. A Solicitor-General involved in a joint advice of the SCSG to the Standing Committee of Attorneys-General

²⁰⁰ *Ha v New South Wales* (1997) 189 CLR 465.

²⁰¹ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1060; John Harrison and Marilyn Stretton, 'The GST Debate: Chronology 1 1998-1999' (Australian Parliamentary Library, 1999) <<http://www.aph.gov.au/library/pubs/chron/1998-99/99chr01.htm>>.

²⁰² McDonnell, above n 77, 3.

²⁰³ *Ibid.*

²⁰⁴ Harrison and Stretton, above n 201. *States Grants (General Purposes) Amendment Act (No 2) 1997* (Cth) amending *States Grants (General Purposes) Act 1994* (Cth); and *Excise Tariff Amendment Act (No 5) 1997* (Cth). See discussion of the episode in M M Scollo and M H Winstanley, *Tobacco in Australia: Facts and Issues* Cancer Council Victoria <<http://www.tobaccoinAustralia.org.au>> [13.2.2].

²⁰⁵ Treasury Department, 'Tax Reform: Not a New Tax; a New Tax System' (13 August 1998). The tax reforms were implemented in 1999.

(SCAG)²⁰⁶ does so as a representative for their individual Crown, and as such must ensure the interests of that entity are protected; but also as an adviser to a collective group of Attorneys-General. In recognition of the potential for conflict, the Commonwealth Solicitor-General has, in recent years, been requested by the government to refrain from participating in joint opinions prepared by the SCSG for SCAG.²⁰⁷

5.3.3 Advising beyond the law

Some participants saw the manner by which the advisory function facilitated the Executive's policy agenda as not narrowly confined to developing different ways of achieving a policy objective within the strict letter of the law, but looking beyond this to broader issues. The Solicitor-General could also be involved in advising and warning the Crown on political consequences, 'whole of government' issues, and broader 'legal policy' questions. The latter would encompass the impact of policies on rule of law principles (including, for example, equality and consistency), on individual rights and on the principles of representative and responsible democracy. The idea of the Solicitor-General providing advice on these broader issues beyond the law – particularly in relation to whole of government and legal policy questions – reflects my conclusions in the previous chapter that the Solicitor-General has a duty to advise on 'core government principles' as an aspect of the traditional Law Officers' public interest functions.²⁰⁸

5.3.3.1 The role of good counsel: to advise and warn

For many participants, the proposition that the Solicitor-General ought to advise the government beyond strictly legal advice was part of the role of any good counsel.²⁰⁹ Former South Australian Solicitor-General John Doyle said he thought all good barristers should ask a client in certain circumstances whether they want to exercise a legal right. Former Commonwealth Solicitor-General David Bennett said this would include, for example, advice on how certain legal actions may be reported in the press, or that a certain legal case may set a disadvantageous precedent for future operations.²¹⁰ Similarly, Doyle explained that in the

²⁰⁶ Note, SCAG changed its name to Standing Council on Law and Justice in 2011.

²⁰⁷ Interview, Stephen Gageler.

²⁰⁸ See further analysis in Chapter 4.6.2.

²⁰⁹ Interview, David Bennett (SG); Interview, John Doyle; Interview, Robert Ellicott; Interview, Gareth Evans.

²¹⁰ Interview, David Bennett (SG). See also his view in James Eyers, 'Putting Words to Music in the Constitution's Case', *Australian Financial Review* (Sydney), 2008. He said 'You can't totally divorce yourself from political considerations in advising government ... one might warn the government that

role he also learnt to ‘keep an eye out for small p political factors’.²¹¹ Doyle observed that the Solicitor-General’s ongoing relationship with a single client means that an officeholder may become aware of aspects of the client’s operations or activities that, in the interests of the client, warrant a comment or cautionary note. This is more likely to happen in the Solicitor-General’s position than where a lawyer is engaged in a one-off relationship with a client.²¹²

Beyond warning and advising on potential tactical and publicity questions, some participants also thought the Solicitor-General had a duty to provide advice on whole of government issues and legal policy questions.

5.3.3.2 Whole of government

The idea that the Solicitor-General’s remit included protecting the interests of the ‘government as a whole’ arose in a large number of interviews across jurisdictions, eras, and among the different offices. The ideal that government legal services are provided within a whole of government framework comes from the common law duties of the Attorney-General, as was explained in Chapter 4.6.1.3. Anthony Mason, the first Solicitor-General appointed under the new legislation at the Commonwealth level, said:

Of course one of the ideas in having ... a professional barrister as Solicitor-General under the new legislation was that the Solicitor-General would be able to have ... a principled and coherent overview of Commonwealth legal policy, particularly in the area of constitutional and public law.²¹³

An example provided by former Queensland Solicitor-General Patrick Keane illustrates the type of advice that is encompassed by this whole of government perspective, and the importance of having the final, authoritative adviser to government considering this principle. During the 1990s, before the decision in *Ha v New South Wales*, there was increased litigation around s 90 of the Constitution and the question of what constituted an excise. The Solicitor-General was advising many different government departments against the backdrop of the High Court’s growing trajectory towards a broad reading of the section. Some departments were unhappy with the perceived pessimism of the advice. Keane explained that

fighting or not fighting a particular case may result in a measure of unpopularity with a section of the community.’

²¹¹ See also Interview, Keith Mason; Interview, Terence Sheahan; Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 187.

²¹² Letter from John Doyle to Gabrielle Appleby, 19 July 2012.

²¹³ See also Interview, Greg Cooper; Interview, Patrick Keane; Interview, Greg Parker; Gavan Griffith, ‘Report: Second Law Officer to the First Law Officer 1 July 1995-31 December 1996’ (Solicitor-General of Australia, 1996) [2.11], see also [2.2], [4.2], [10.6(2)], [10.8].

his role was to ensure that they operated consistently with the view taken across the whole of the government:

[W]hile I was necessarily sympathetic to their position and wanted to help them out, at the end of the day, we are the State of Queensland, and this is what we say, this is what we do and this is the State's position. And, they had to operate within that.

From the government's view, many Attorneys-General also stressed it was important to have a whole of government perspective taken by the final and authoritative adviser.²¹⁴

5.3.3.3 'Core government principles'

Within the whole of government perspective, former Commonwealth Attorney-General and Minister for Justice Duncan Kerr saw a role for the Solicitor-General in advising on individual rights issues in relation to the constitutional structure; in fact, for Kerr these questions were such that they 'cannot be avoided':

I do think that it is the job of the Solicitor-General always to at least alert their instructors of the long term consequences of taking some particular points that might have some short-term advantage but long-term detriments to the kind of constitutional structures that ... we would wish to see in place both to ensure that there is effective governance but also that citizens' rights are not ignored.

This idea of advising on principles that underpin the constitutional system arose in a number of interviews. Catherine Branson, former South Australian Crown Solicitor, referred to the idea of ensuring government operated 'with a high level of constitutional propriety as well as legal propriety.' She explained what she meant by constitutional propriety by reference to the authority of government resting on its citizens, and the ideals of a well-functioning democracy. In Victoria and the Australian Capital Territory, the Solicitor-General must advise in light of the standards set out in the statutory charters of rights in those jurisdictions, which have some overlap with the 'core government principles' set out in Chapter 4.6.2.1.²¹⁵

Many participants stressed that, while they rejected the notion of the Solicitor-General as an independent actor for the public interest (the views of officeholders in this respect are addressed separately in Chapter 6.6), they saw a role for consideration of the public interest

²¹⁴ See, eg. Interview, Duncan Kerr; Interview, Robert McClelland.

²¹⁵ Interview, Peter Garrisson; Interview, Stephen McLeish; Interview, Pamela Tate, who explained that in Victoria this involves, on occasion, expressly advising on the compatibility of a draft Bill with the human rights protected under the Victorian Charter in the light of which further policy development may be required.

in the Solicitor-General's *advisory* function. Former Commonwealth Solicitor-General Anthony Mason said:

Even if the advice that was sought did not seek advice in relation to the impact of policies on the rights of individuals, then if it occurred, that they had not been taken into account, or inadequately taken into account, then I would have felt it necessary to point that out. I just don't see in giving legal advice, how it would be proper not to draw to attention consequences of that kind.

Former Commonwealth Attorney-General Robert McClelland said that he welcomed advice that assisted the government in achieving its policy objectives while maintaining fidelity to broader governance objectives. McClelland's views were largely reflected in the position taken by his Solicitor-General, Stephen Gageler. Congruence between Attorneys-General and Solicitors-General on this issue is seen also in Queensland. Former Attorney-General Rodney Welford said the Solicitor-General was resorted to:

where you wanted a *legal* view but a legal view that wasn't based on the current law, that was based on what was the appropriate positioning of government in relation to the law. ... [I]f you wanted to ask a question, 'would it be *appropriate* for the State to legislate to do X?' the Solicitor-General would be able to give you that bigger picture issue based on a combination of legal philosophy, an understanding of the institutions of the State, and State interests.

His Solicitor-General for a large period of that time, Patrick Keane, echoed those views, saying that the Solicitor-General's office ought to be looking to promote the 'unifying themes of government'.²¹⁶

South Australian Solicitor-General Martin Hinton explained the 'ethical principles' that guide government lawyers and Solicitors-General are not a 'subjective appraisal of performance or any attempt to impose one's own value system'. The principles that the Solicitor-General should be taking into account are objective criteria discernible from history, convention, the Constitution, notions of representative government and responsible government, the rule of law and the common law. He also indicated that the ethical principles that should guide the Solicitor-General in providing advice apply to all lawyers acting for the government, but with particular force to the Solicitor-General:

²¹⁶ Greg Cooper, currently Crown Solicitor of Queensland, who held the position as Crown Counsel for a large part of Keane's tenure as Solicitor-General, also echoed these views.

The weight in government circles that will attach to an opinion of the Solicitor-General requires that he or she have a conception of the principles or values that shape how it is that government should be practised.²¹⁷

Former Northern Territory Solicitor-General Thomas Pauling used prospectivity as an example of when the Solicitor-General ought to provide advice on broader government principles. In relation to the impact of government on individual rights, he also said that while it did not often arise, ‘on occasions you would give the “this is using a sledgehammer to crack a nut” sort of advice.’ He saw his role as providing alternative legal options to achieve the government’s political objective that did not transgress basic rights.

The principle that the Solicitor-General must, or ought to, advise on underlying constitutional principles has resonances with the perspective that the office has a role in checking power for the benefit of the community and individuals within it. My findings revealed that this was not the preferred view of the role for officeholders; the role’s importance to giving certainty and security to the government was seen as far more vital. Within this paradigm, the acceptance by a number of participants of a role to advise the government on underlying constitutional principles demonstrates the difficulty of separating working for the Crown, and working for the public.

Not all participants agreed with this view. For example, in direct contrast to Pauling’s position, his successor, Michael Grant, emphatically took the opposite view.²¹⁸ He explained that he was not government’s ‘moral arbiter’: ‘So if it is within the ball park of being lawful, that is a matter for them.’ He provided a number of reasons why he took this view. He first emphasised a trust in government and majoritarian democracy: he trusted that the government, advised by the policy division, would respect the principles of government on which representative democracy is based in Australia.²¹⁹ He also believed it was important that politicians took full responsibility for the decisions as to when it was necessary for government to contradict those principles so as to be properly accountable.²²⁰ If he started to offer that sort of advice, ‘there is a tendency for politicians to abrogate their responsibilities in relation to those sorts of things, because that is what they’re elected for, and once you start

²¹⁷ Hinton, above n 138, 11. See also Interview, Leigh Sealy.

²¹⁸ See also the view of David Bennett (SG) in James Eyers, ‘Putting Words to Music in the Constitution’s Case’, *Australian Financial Review* (Sydney), 2008. He said as a barrister, including his time as Solicitor-General: ‘I don’t form a view on the justice, or correctness, or desirability, or moral worthiness or unworthiness, of my client – that’s not my job.’

²¹⁹ See also Interview, Stephen McLeish.

²²⁰ See also Interview, Geoffrey Davies.

doing that, you're undermining the democratic process'. And finally, he was concerned that the respect accorded by the government to his legal advice would be similarly accorded to other advice he may proffer on policy questions, an area where opinions are not final and where it is proper to engage in a dialogue about whether circumstances warrant deviations from a general position.²²¹ To Grant's views could be added the definitional criticism that is made of the Public Interest Advocate in the US literature: the public interest lacks definitional rigidity giving rise to concerns that individuals could use it as a cover to press personal political agendas.²²² Fiona Hanlon has also argued that if the Solicitor-General were to offer advice beyond the strictly legal, it could result in 'the executive government looking elsewhere for legal advice and encourage further the use of private sector lawyers.'²²³

Former South Australian Solicitor-General John Doyle could not see any role for the Solicitor-General to provide advice on the public interest in government policy creation and nor did he believe the office was well equipped to do so. He said:

No, not a role, nor is there a mechanism. In other words, government policies, even in the legal area, the loosely legal area, weren't routinely, as far as I'm aware, run past Solicitors-General, so the opportunity to comment didn't arise. In other words, the platform of information wasn't there.²²⁴

My data revealed counter-arguments to many of the objections. To avoid any potential confusion, advice on issues relating to the non-legal can simply be strictly delineated from legal advice. Former South Australian Solicitor-General Bradley Selway wrote:

A government lawyer must always be meticulous to ensure that advice only involves objective standards of behaviour or, at least, that it is clear to the client what parts of the advice relate to matters where the client is bound to comply and what parts relate to matters where the client's policy opinion is the ultimate determinant.²²⁵

The lack of democratic legitimacy of the statutory office of Solicitor-General reflects that the obligation is simply one of advice: the final decision rests with a democratically elected and

²²¹ See also Collins, above n 95, 5, where he makes the point that in any advice that encompasses both legal and policy issues these must be strongly delineated to ensure against confusion and the substitution of the elected officials' judgments about policy with those of unelected officeholders.

²²² See further Chapter 2.5.2.

²²³ Hanlon, *An Analysis of the Office of Solicitor-General*, above n 101, 250.

²²⁴ See also Interview, Gavan Griffith.

²²⁵ Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114, 121-2, referring to L Curtis and G Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights' (1975) 49 *Australian Law Journal* 335, 338-9, 342.

responsible officer, usually the Attorney-General.²²⁶ While there is debate around the idea of the ‘public interest’, the obligation is directed at procedural, formal issues that relate to good and ethical governance rather than the public interest at large.²²⁷ The operation of the rule of law, democracy and federalism are issues over which partisan division is irrelevant. Further, the operation of the ‘core government principles’ is, unlike perhaps other public interest questions, an area in which the Solicitor-General has particular acumen.²²⁸

In summary, my findings demonstrate that participants did not uniformly accept that the Solicitor-General ought to advise the government on the congruence between policies and ‘core government principles’. There was some consistency between the views held by Attorneys-General and their Solicitors-General (particularly when the Attorney-General had appointed the Solicitor-General). However, views diverged largely across political parties, jurisdictions and, as the Northern Territory demonstrates, within jurisdictions.

5.4 Discussion: the Solicitor-General as adviser

The interviews revealed that the advisory aspect of the Solicitor-General’s role is viewed as its most significant contribution to the constitutional system and particularly to the promotion of the rule of law. The office can, in this function, contribute to the protection of individuals against abuses of power by the government and assist in relations between the three branches of government. However, there was a large consensus among participants that the advisory function’s purpose was primarily to assist and protect the Executive as the office’s client, rather than indicative of a manifestation of the Public Interest Advocate or Peacemaker types seen in the US literature.²²⁹ The Solicitor-General’s advice gave the Executive legal and political confidence in its policies, although this role was open to abuse by government seeking to gain political security using the Solicitor-General’s advice.

Despite the general consensus on this point, there was some evidence of conflict in the perceptions between Attorneys-General and Solicitors-General as to the extent to which the Solicitor-General should be accommodating of Executive policy objectives in advising on areas of law where there was some ambiguity. My conclusion in Chapter 4.3.1.4 is that the Solicitor-General’s statutory function as counsel required them to provide their best possible

²²⁶ Interview, Martin Hinton; Interview, Greg Parker.

²²⁷ Interview, Martin Hinton.

²²⁸ Ibid.

²²⁹ See further Chapter 2.5.2 and 2.5.4.

objective assessment of the law. Or, in cases of genuine legal ambiguity where there was no clearly preferable answer, to inform the Executive that the position is genuinely indeterminate, allowing the government to decide the most appropriate path from there. What the interviews revealed was that Attorneys-General were more likely to view the Executive's political objectives as legitimate influences on the Solicitor-General's role than Solicitors-General themselves, who saw their role in terms of my analysis: to objectively expound the law without reference to political goals. My findings reveal that political pressures on the legal role that were present in the traditional ministerial model of the Law Officers therefore continue to exist, despite the intention behind the legislation to insulate the Solicitor-General from politics through statute.

My research has demonstrated that there was also a lack of consensus among participants about the office's role *beyond* advising on the strict legal position. There was a large amount of conformity in responses to the effect that the Solicitor-General has a role in advising and warning the government on strategic points, and also the government-specific concept of advice taking into account whole of government issues. However, there was significant division among responses about whether the office had an obligation to provide advice on the impact of executive policy on 'core government principles', or whether that was even desirable. This schism reflected a division about the extent to which the Solicitor-General could, or should, advise on issues that have no objective legal grounding, and are governed by concepts on which politicians often disagree. As such, many thought the Solicitor-General to be unqualified and unaccountable in this domain. Others, however, saw this as part of the office's role in assisting the government to fulfil its underlying duties to the public interest. What was clear from those who accepted some role in advising on the 'core government principles' was that the Solicitor-General was not in this respect advising on the substance of the government's policy. Instead, it was advising on the congruency between the proposed actions or decisions with underlying constitutional principles, and considering alternative methods to achieve the government's policy that had a greater degree of conformity to these principles.

The divergence among participants is not unexpected. While I conclude in Chapter 4.6.2 that the best interpretation of the statute, in light of its provenance, is that there exists a duty to advise on the 'core government principles, this is the first time this view has been definitively

put forward in relation to the Solicitor-General.²³⁰ Further, the relevance of the public interest to the advisory function, while it has been expounded in some British and Australian literature, is not a well-publicised aspect of the Law Officers' traditional public interest role.

While the difference of opinion transcended eras, jurisdictions and political parties, there was some congruence between the expectations of Attorneys-General who had appointed their Solicitors-General. Labor Attorneys-General were more likely to look for a Solicitor-General who provides advice across these 'core government principles', and this would often therefore be reflected in the views of officeholders that they had appointed (for example, the congruence between former Commonwealth Attorney-General Robert McClelland and former Commonwealth Solicitor-General Stephen Gageler; former Queensland Attorney-General Rodney Welford and former Queensland Solicitor-General Patrick Keane).²³¹

Based on the interview data, I have argued in this chapter that the importance of the advisory function of the Solicitor-General rests upon a number of assumptions: about the status of the Solicitor-General's office, the nature of the client (and whether it includes the Viceroy), the finality of the Solicitor-General's advice, the use of the Solicitor-General and the independence of the office. While, by and large, participants have indicated that these assumptions were met, there were a number of exceptions. The several examples that participants provided where the Solicitor-General was 'frozen out' of government work, whether because of conflicts with the Attorney-General or the bureaucracy, highlight a potential frailty in the office's framework and the lack of exclusivity of its functions. As long as these instances represent exceptions to the conventions, they are not necessarily cause for concern. But those within government should be vigilant to ensure this is the case, otherwise they may lose the relevance of an office that can play an important function in the overarching constitutional order.

There was remarkable variation among the participants' view of the role of the Solicitor-General as properly embedded in the government machine, being consulted on policy as it was developed, or simply being a barrister to be briefed on the occasions where the government decided it required advice. The responses demonstrate two emerging approaches to the role of the Solicitor-General, although within this dichotomy the approaches existed along a spectrum. The first approach mirrored, as closely as possible, a private barrister on

²³⁰ Note Selway, 'The Duties of Lawyers Acting for Government', above n 225, 8, but Selway did not consider whether this role continued for the statutory Solicitor-General position.

²³¹ See discussion in Chapter 5.3.3.3.

permanent retainer for the Crown. I will call this approach that of an ‘**autonomous expert**’. In accordance with this approach, the Crown chooses when to consult the Solicitor-General and on what issues. This raises questions about whether the Solicitor-General is able to fulfil the traditional role of Law Officer of monitoring the Crown’s compliance with the law.²³² The Solicitor-General may be called upon to assist from time to time, but is by no means an integral and essential part of policy development. Epitomising this approach, for example, was the Queensland framework where the Solicitor-General retains his private chambers, and private practice. In Western Australia, where this framework has just been introduced with the appointment of a leading barrister from the private Bar, a similar trend may emerge.

The second approach was of the Solicitor-General involved as a vital part of the policy development process and proactively involved in it. This approach manifested itself to differing degrees along a spectrum. This is a far more integrated view of the office, and I will call it the ‘**team member**’ approach to the role. Under this perception, the office is not only involved in constitutional advice, but in assisting government achieve the legally most appropriate outcome in a variety of policy areas. These two approaches – that of an ‘autonomous expert’ and a ‘team member’ – will be returned to in Chapter 7.7 as they are important to understanding the office’s independence.

The breadth of the legal framework governing the office means that both of these approaches are able to be accommodated within it. A number of tentative observations can be made about the nature of those who preferred one approach over another. It appeared that there had been a generational shift from the second approach towards the first in the last decade. In the last half of the twentieth century, there were a number of Solicitors-General actively involved in government. Examples of this are former Victorian Solicitor-General Daryl Dawson’s regular meetings with the heads of departments, or former New South Wales Solicitor-General Keith Mason’s mini-committee comprised of the Solicitor-General, Parliamentary Counsel, the Director-General and the Crown Solicitor. More recently, however, this has decreased. In Victoria, former Victorian Solicitor-General Pamela Tate actively attempted to ensure that legal issues crystallised before she was asked to consider them, especially when different government departments or agencies had differing perspectives on those issues, so that she had not tarnished her ability to consider those issues objectively by close involvement early on. Similarly, it appeared that after the commercialisation of legal services at the

²³² Chapter 4.6.1.3.

Commonwealth level, the Solicitor-General operated as a barrister briefed, predominantly, in the government's High Court constitutional litigation but not involved in the plethora of issues that arose in the myriad of other policy areas. The removal of the office from involvement in the negotiation of international agreements and attendance at UNCITRAL reinforces the evidence that the approach was more withdrawn from government policy development than previously.

Findings of two recent reviews into government legal services at the federal level also commented on the less intimate involvement by the Commonwealth Solicitor-General in broader government policy development. The reports not only support the interview data to the effect that during the 1980s and 1990s, the engagement of the Solicitor-General with government became less intimate (resulting in the distance that is characteristic of the 'autonomous expert' approach), but they also introduce another important explanatory factor to the approaches. The institutional structure of government legal services may influence the approach taken. In a system where government legal services are being provided from the government provider (for example, the AGS) in fierce competition with private firms, firms who have their own set of favourite barristers, it seems natural that the Solicitor-General drifts towards an 'autonomous expert'.

'Transition' between the two approaches has at times been difficult to implement. Ralph Turner has described the phenomenon of 'role persistence': role structures, once stabilised, tend to persist despite changes in actors who may be filling the roles.²³³ There is some evidence of this phenomenon in the transitions attempted in Victoria and the Commonwealth. Tate explained how she, in consultation with the government, developed a written protocol about how she intended to operate as Solicitor-General to effect changes in the governmental culture. Gageler had similar difficulties trying to place the Solicitor-General into the development of policy across many areas of government to better accord with his view of the proper role of the Solicitor-General.

The next chapter turns to the second aspect of the Solicitor-General's statutory function: to act as advocate for executive interests before the courts. In contrast to the advisory function, participants viewed this function as a hired gun role. However, a number of subtleties emerge

²³³ Ralph H Turner, 'Role Theory' in Jonathan H Turner (ed), *Handbook of Sociological Theory* (Springer, 2001) 233, 241, 251.

that demonstrate a remarkable degree of independence expected of the office, challenging this initial hired gun perception.

6 THE ADVOCATE

6.1 Introduction

In Chapter 5, participants' perceptions of the Solicitor-General's advisory function were outlined and evaluated. This chapter continues to explore the role of the Solicitor-General by turning to participants' views and experiences of the office's second core statutory function: advocacy. The chapter also analyses participants' responses to the proposition that the Solicitor-General has an obligation to pursue the public interest independently of the Executive.

The perceived benefit of permanent counsel appearing with regularity in court to protect the interests of the government underpinned the establishment of the position in many jurisdictions.¹ The advocacy function is certainly the most public face of the office. The Solicitor-General's advocacy function differs from providing advice on actions not yet taken, or bills not yet passed. As an advocate, the Solicitor-General is defending government action from external attack; as an adviser, the Solicitor-General has a role within a system operating under the rule of law in which the office can assist in checking the legality and integrity of future exercises of government power. Apparent in the US literature is the potential for the two functions to attract different dominant normative frameworks;² this tendency in the Australian context is explored in this chapter.

The chapter commences by explaining the dominant view of the advocacy function as a hired gun for the government, tempered only by overriding professional obligations to the court. Participants were divided over what is meant by being an advocate for the government's interests. Two views of the government's interests emerge: one that stresses the protection and advancement of executive power, and the other that places executive empowerment as only one aspect of the government's interests.

The chapter then turns to the tempering of the advocate's function by the Crown's model litigant obligations, and other unique aspects of the relationship between the Solicitor-General and the court. I then discuss the disconnect between the view of the Solicitor-General as an advocate acting on instructions, and the level of instruction actually provided by the

¹ See Chapter 3.4.4.

² See Chapter 2.5.

government, as against the reliance on the Solicitor-General's judgment about the appropriate position of the Crown and where the government's interests lie.

Finally, in this first part of the chapter, I consider the dynamics of the relationship between the court and the Solicitor-General as the Executive's representative before the Judiciary. It was strongly denied by participants that the Solicitor-General did, or ought to, enjoy any sort of deference from the court as has been postulated in the US scholarship pursuant to the Tenth Justice type.³ However, there are several examples of instances in which the Solicitor-General acted as an important conduit between the Judiciary and the Executive. There are examples of the Solicitor-General providing warnings to the court on the practical implications for government of particular decisions, confronting the court during times when the Executive believes that the judges may have overstepped their role, and conversely, taking a message back to the Executive from the judges.

The chapter concludes by considering the rejection by participants of an independent public interest function for the office.

6.2 A hired gun: government advocate

Despite the large volume of time devoted in practice to the advocacy aspect of the role, participants' perception of its significance to the constitutional system was that it was not as great as the significance of the advisory function. Rather than operating to ensure the integrity of government action and protection of the rule of law and the separation of powers, the advocacy function was seen, in a primary sense, simply as acting on the instructions of the Executive to defend its actions in the court. As such, participants believed the importance of the assumption of 'independence' was dramatically decreased in this function. South Australian Solicitor-General Martin Hinton said:

[T]he relative freedom that the Solicitor-General has in advising government as to the practice of government is constrained when he or she appears in court. In court, the Solicitor-General must act in accordance with instructions.

This accords with my analysis of this function under statute in Chapter 4.3.1.3. Former Commonwealth Attorney-General Robert Menzies said in 1936:

When an Attorney-General goes into court to argue on behalf of the Crown, he has exactly the same duty as any other advocate. He owes to his client all the zeal, all the

³ See Chapter 2.5.3.

industry, all the honesty, all the skill that he possesses. If he allows his own personal views and prejudices to cloud the submission that he will make, then he fails in his duty as an advocate. If it were not so – if an advocate presenting a case were at liberty to say ‘I will not have that because I hold views to the contrary’ – he would be acting as a judge rather than an advocate.⁴

When the Opposition commented that perhaps there ought to be a distinction between acting for the Crown, and appearing for a private client, Menzies asserted that such a proposition would mean ‘a government is to go into court crippled’.⁵

The ‘hired gun’⁶ or ‘warrior’⁷ perception was tempered by what all participants accepted were the overarching obligations of the Solicitor-General to the court as a legal professional. Former New South Wales Solicitor-General Keith Mason’s summary of the advocacy function captured these sentiments. He said ‘I think, by and large, ... I felt able to operate the way barristers do. I’m a hired gun. I’ll fight as hard as I can, within the limits of what is proper, for you.’

Many participants stressed that their obligations to the court meant that they would only act on instructions where the position was ‘legally available’⁸ or ‘arguable’.⁹ Former South Australian Solicitor-General Chris Kourakis explained how he grappled with this obligation when asked to bring a controversial appeal in the case of *R v Nemer*.¹⁰ The case was an appeal against a sentence imposed in accordance with a plea bargain that had been made between the DPP and defence counsel.¹¹ There was a large public outcry at the perceived leniency of the sentence.¹² The DPP advised that he would be reluctant to lodge an appeal, and the Premier announced he would have the matter re-examined by the Solicitor-General, who advised there were good prospects of success. A direction was issued by the Attorney-

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1936, 770.

⁵ Ibid.

⁶ Interview, Keith Mason.

⁷ Interview, Dean Wells.

⁸ Interview, Patrick Keane.

⁹ Interview, Geoffrey Davies; Interview, Patrick Keane.

¹⁰ (2003) 87 SASR 168.

¹¹ *R v Paul Habib Nemer and K* (Sentencing Remarks, Supreme Court of South Australia, Sulan J, 25 July 2003, No 146/2003).

¹² C Hockley, ‘Power of the People’, *The Advertiser* (Adelaide), 31 July 2003, 1. See further discussion of the case in Robert N Moles, *A State of Injustice* (Thomas C Lothian, 2004) ch 14.

General to the DPP to lodge the appeal, although it was argued by the Solicitor-General.¹³ Kourakis' decision to argue the appeal was very controversial. He recalled:

[T]he DPP people were literally lobbying me not to bring that appeal, and giving me authority after authority about it, about Crown appeals only being brought when there's something that shocks the public conscience, and the whole double jeopardy thing. They had formed the opinion that because they as DPP officers thought the appeal would be unsuccessful it should not be brought.

Kourakis, however, disagreed. As counsel representing the Crown and acting on the instructions of the Cabinet, it was not his decision to make:

The Government wanted to appeal. They are the client: the Cabinet. They took the view that the sentence didn't reflect the public conscience as to the sentence that should have been imposed. My opinion was that if they wanted to appeal, then the appeal should be brought as long as I thought it had reasonable prospects.

His conviction that he must act in accordance with the wishes of his client was tempered only by his obligation to the Court:

As Solicitor-General ... I would have thought I had made the wrong call ... if the Court were to say that my appeal was completely unarguable. From my point of view provided the appeal was properly and reasonably arguable, then that would have vindicated my decision to appeal.

The State won the appeal 2:1.

The idea of the Solicitor-General as a hired gun, acting in cases even where they may disagree with the cause, or think the government may be unsuccessful, came out in a number of interviews in the context of the State anti-organised crime legislation introducing control order regimes.¹⁴ Both South Australia and New South Wales had parts of their legislative schemes challenged in the High Court on the basis of a breach of implications arising out of Chapter III of the Constitution.¹⁵ The Solicitors-General of these States were called upon to defend the State legislation's constitutionality and were supported by other Solicitors-General representing their Attorneys-General, intervening. One Solicitor-General said:

¹³ C Hockley, 'What judge wasn't told', *The Advertiser* (Adelaide) 7 August 2003, 1.

¹⁴ This has been introduced in a number of jurisdictions, see, eg, the *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT).

¹⁵ *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

See, I have a personal view about the [Act]. I think it is a stupid law. I think it will not achieve what it is intended to achieve. I think to have control orders as the centre of your approach to dealing with organised crime is ... just lax, considering what is organised crime and how it spreads its tentacles. I just think it is ill-conceived. And yet I have to stand up and sound all very convincing, or attempt to sound like I believe what I'm saying before the High Court, when I say there is nothing wrong with this law.

Another took the view:

The legislation is there. Some jurisdictions have this kind of legislation, some don't: that is a policy question. Once the legislation is in existence then of course we would, or I would, argue for its validity, in the High Court. And while I might have, I'm not saying what it is, while I might have, or I could have, a view on the merits on that kind of that legislation, or whether it is a good policy proposal, that would be completely irrelevant to the function of defending its validity.

In a broader context, Queensland Solicitor-General Walter Sofronoff said that like any barrister, the Solicitor-General must act even when they personally disagree with the government's case, commenting that the 'psychology is no different in the context of defending repellent legislation, as when acting for a repellent client.'

The hired gun perspective of many of the participants demonstrated that an important aspect of the Solicitor-General's role was to remain objective and independent from their own moral views as to the government's position, in accordance with the dominant view of legal ethics and independence already discussed in Chapter 4.3.1.2 and the ideals of the Bar as reflected in professional obligations such as the cab rank rule.

Most participants saw the advocacy function as mirroring the function performed on behalf of a private client. However, as the *government's* advocate, the function had some constitutional significance. It ensured that the powers of the government as a polity were protected so that it could meet its obligations and implement its policies. Further, some participants commented that the Solicitor-General's advocacy function ensured that an officeholder was aware of the current position of the High Court on legal questions and therefore was able to advise the government with far greater accuracy about the strength of a legal argument.¹⁶ Thus, the

¹⁶ Interview, Michael Grant; Interview, Walter Sofronoff.

Solicitor-General's advocacy function significantly strengthened the office's advisory function and gave greater security and certainty to government action.¹⁷

6.2.1 The government's interests

If the Australian Solicitor-General is a hired gun for the government's interests, how are these defined? In Britain, Neil Walker identified the difficulty of differentiating the long-term interests of the Crown from those of the democratically elected government of the day.¹⁸ In the US scholarship on the Government Advocate type the divergence between serving the short-term interests of an incumbent administration and the long-term interests of the Executive has also been noted.¹⁹ My research showed that participants saw the Solicitor-General as a hired gun not for the short-term political interests of the government of the day, but for the government's interests as an enduring constitutional polity. As such, the Solicitor-General had a role in advising the government on the most appropriate position to be taken in relation to protecting the long-term interests of the constitutional polity, which from time to time is occupied by different administrations. Former Commonwealth Solicitor-General Stephen Gageler explained that he saw his role as an advocate as putting forward arguments that would protect the polity in a sense of its long-term interests, and not simply for the short-term political interests:

[The Commonwealth] is ill-defined: there are tensions; there are ambiguities. I think that I have not, in my two and a half years in office, encountered circumstances where I felt that my instructions were inconsistent with what I regarded as the long-term interests of the polity, where I was not able to seek a revision to those instructions, to really fit with my own view as to what is to be done. Minor adjustments.

Do you think it is part of your role to seek those revisions, and perhaps advise on those broader issues?

Yes, absolutely. I feel to some extent I'm a custodian of a legal tradition, and a moral tradition.

While ultimately participants who took this position accepted that their advice on what was in the best interests of the polity could be overridden by the Attorney-General as the elected and responsible member of the government and the representative of the Crown in litigation, there

¹⁷ See further discussion of this part of the Solicitor-General's role in Chapter 5.2.1.2.

¹⁸ Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 147. See further Chapter 2.4.2.

¹⁹ See further discussion of this literature in Chapter 2.5.1, nn 104-106.

was still an important role in having the Solicitor-General providing a legal perspective on the position that ought to be taken.²⁰ This view reflects the position introduced in Chapter 4.4 that the Solicitor-General's 'client' is the enduring government polity, but accepted that this polity is represented by the accountable government of the day.

Perceptions of the government's interests manifested differently among participants, and two main positions can be extracted from my data. The first equates the government's interests with government power and the protection of it. The second defines the government's interests in a more holistic way, and so protection of government power is only one aspect of the Crown's interests, and must be balanced against other public policy principles, such as democracy or the protection of individual rights. These other principles accord with the 'core government principles' I introduced in Chapter 4.6.2.1.

Under the first view, locating the government's interests is relatively easy. However, under the second view, in balancing the different principles, there is the possibility that legitimate differences will emerge. The Solicitor-General's legal expertise and experience and understanding of the government's position will place the officeholder in a unique position to advise the government on the intersection of these interests and the appropriate position of the government. However, ultimately the possibility of legitimate divergence of views means that the Solicitor-General ought to seek the Attorney-General's instructions to ensure contentious decisions about the government's interests are made within an accountable framework, even at the expense of consistency in the government's position before the court.

6.2.1.1 First view: protecting government power

In 1996, then Commonwealth Solicitor-General Gavan Griffith expressed the following view in a report to the Attorney-General, in reference to the case of *Victoria v Commonwealth*:²¹

[T]his litigation confirms the truism that it is always in the interests of an incumbent Government to argue for the vindication of Commonwealth power. It is a matter of policy rather than power whether constitutional power should be exercised. But all

²⁰ David Bennett (AGS) in his interview commented that the AGS and the AGD also have an important role in keeping this institutional knowledge and ensuring government litigation was conducted in a manner that furthered the interests of the polity. It is not a role limited to the Solicitor-General, but one in which the Solicitor-General works as part of a team.

²¹ (1996) 187 CLR 416 (*Industrial Relations Act Case*).

exercise of power must be defended. There is a very limited scope for policy input where the Commonwealth appears to defend the Constitution.²²

Former Queensland Solicitor-General Geoffrey Davies recollected his role in protecting the Queensland body politic's power in the *Mabo* litigation.²³ The litigation involved claims for legal recognition of indigenous land rights. In 1982, three plaintiffs commenced proceedings against Queensland. The Queensland National Bjelke-Petersen government, which was in power, had initially rigorously defended the action. After the change of government in 1989, Davies advised the Goss Labor Cabinet on the matter. Davies recalled that the Labor government did not want to continue to defend the claims because politically it supported the plaintiffs. Davies, however, counselled against this position:

I was really telling them I thought they should [defend the claims] because it did involve governmental powers which they would lose, and they did. But they were very keen, for political reasons, to be seen to be not standing in the way of land rights for Aboriginal people. And I remember having to go to Cabinet, and speak to Cabinet about that to tell them why I thought that it should be argued. And my arguments were entirely legal and constitutional arguments. And they kept coming back to me with political things, and I kept telling them, well I'm not going to answer political questions, ... these are the reasons why I say we should. And eventually, because we had a lawyer as Premier I think, they went ahead to argue it.

Another example comes from the constitutional position adopted by former Commonwealth Solicitor-General Maurice Byers throughout his tenure. Byers had been appointed by the Whitlam Labor government. The Whitlam government had views that accorded with Byers' own that the grants of legislative power to the Commonwealth in s 51 of the Constitution ought to be interpreted broadly.²⁴ After the dismissal of the Whitlam government in 1975, Byers served under the Liberal Fraser Government, which was more committed to federalism and the autonomy of the States within the federation. When asked about how the change affected his approach to the role of Solicitor-General, Byers said:

Well, [the Fraser government] were no different from the others. They were as much in favour of wide Commonwealth powers as any other government, and all Commonwealth governments will be in favour of wide powers ... When a question comes to the validity of their legislation, you watch, they'll be in favour of it. All

²² Gavan Griffith, 'Report: Second Law Officer to the First Law Officer 1 July 1995-31 December 1996' (Solicitor-General of Australia, 1996) [1.9]. See also Interview, Thomas Hughes.

²³ *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁴ Daniel Connell, Interview with Maurice Byers (Law in Australian Society Oral History Project, 10 January 1997) 47.

governments want to preserve their legislation; it's like their self-respect, because it looks like a slap in the face, and they're always thinking about votes. They think, well, the population will think we've been behaving illegally, if their legislation is held to be invalid, so they behave in the normal way...²⁵

One former High Court Justice, Ian Callinan, perceived that in many cases the States and the Commonwealth were *not* acting in accordance with the long-term interests of the government in the sense of protecting government power. In his view, both State and Commonwealth Solicitors-General were arguing robustly for the protection of short-term political interests, at the expense of the longer-term interests of the polity in terms of legislative and executive powers. Callinan pointed to two cases – *Mabo (No 2)* and *Coleman v Power*²⁶ – to demonstrate his point. In relation to *Mabo (No 2)*, Callinan asserted that the landmark native title case was won against a single, *weak* contradictor; the interests of the State (in terms of protecting the State's powers), were not robustly protected. As my discussion of Davies' experience above demonstrates, this probably reflects the fact that politically, the Goss Labor government of Queensland wanted to support the Indigenous claimants.

Coleman v Power, Callinan said, was a 'clear occasion' when no advocate provided the Court with arguments protecting the powers of the States or the Commonwealth. In that case, Queensland was defending a challenge to its legislation prohibiting the use of insulting words in a public place based on the implied freedom of political communication that limited Commonwealth and State power. In its submissions, Queensland, and many of the other States and the Commonwealth (intervening), accepted the correctness of the earlier judicial test expounded in *Lange v Australian Broadcasting Corporation* for when a law will be in breach of the implied freedom.²⁷ Further, Queensland conceded that the challenged legislation was capable of burdening communication, thus leaving the only question in issue whether the legislation was an appropriate and adapted means of achieving a legitimate government objective. In his judgment, Callinan J strongly criticised Queensland's position, on the basis that the government did not ask the Court to reconsider the *Lange* test, and the concession that the legislation was capable of burdening communication.²⁸

In a similar vein to Callinan's criticisms, James Allan publicly criticised the Commonwealth Solicitor-General for concessions made in the electoral case of *Rowe v Electoral*

²⁵ Ibid 60-1.

²⁶ (2004) 220 CLR 1.

²⁷ (1997) 189 CLR 520 ('*Lange*').

²⁸ *Coleman v Power* (2004) 220 CLR 1, 109, 112.

Commissioner.²⁹ The concessions accepted the plaintiffs' formulation of an implied constitutional test, based substantially on the earlier decision of *Roach v Electoral Commissioner*, that limited the Commonwealth's power to regulate the franchise.³⁰ Allan's view was that the Commonwealth Solicitor-General ought *never* concede arguments to the detriment of Commonwealth power. He said 'the Solicitor-General ought not to have relinquished, permanently, home-field advantage by assuming the correctness of the plaintiff's test, and hence of *Roach* itself'.³¹ His comments are consistent with a view of the Solicitor-General as protecting the scope of the government's power, even to the detriment of other constitutional principles, or their own reputation before the court.

Former Queensland Solicitor-General Patrick Keane responded to the criticism of the position taken by Solicitors-General representing their governments in these cases (he specifically referred to the States' position on the *Mabo* and *Lange* decisions). He explained that, particularly when a government is presented with a judicial test (that is, something drawn from the text and subject to judicial formulation), the position can be 'very unstable'. For example, in *Lange*, the High Court had formulated a 'less open-textured' statement of principle than had been given by many of the judges in *Theophanous* and *Stephens*.³² Once presented with *Lange* 'the last thing anyone wanted to do was open up the possibility of an even more unstable statement.' Therefore 'dying in a ditch' for an interpretation of the constitutional text in a way that better protected the plenitude of legislative power was strategically ill-advised. Often it was better to accept the current formulation of principle from the Court on the basis that at least this was a known principle, particularly if there was some likelihood that the government could win on the formulation. Keane explained:

If we fought that formulation, the likelihood that we would win on what may then emerge was something no one could guess. ... If you invite further judicial development, that development may not favour the party you are representing.

²⁹ (2010) 243 CLR 1.

³⁰ (2007) 233 CLR 162; James Allan, 'Until the High Court Otherwise Provides' (2011) 55(10) *Quadrant* 35. See also James Allan, 'Stephen Gageler too risk-averse in his advice on Nauru option', *The Australian* (Sydney), 16 September 2011 <<http://www.theaustralian.com.au/business/legal-affairs/stephen-gageler-too-risk-averse-in-his-advice-on-nauru-option/story-e6frg97x-1226138211343>>.

³¹ Allan, 'Until the High Court Otherwise Provides' above n 30, 40. See also 36-7. See similar criticisms made by Heydon J in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 94.

³² *Lange* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211.

Another way of thinking of the government's interests as the protection of executive and legislative power is from a democratic viewpoint.³³ This view is supported by comments of Callinan J in *Re McBain; Ex parte Australian Catholic Bishops Conference*.³⁴ In that case, the Victorian government had accepted a Federal Court decision that found s 8(1) of the *Infertility Treatment Act 1995* (Vic) (which, in effect, prevented single women or same-sex couples from receiving IVF treatment) was inoperative because of its inconsistency with the *Sex Discrimination Act 1984* (Cth) (which prohibited discrimination in the provision of services on the basis of marital status).³⁵ The defendants in the Federal Court action included Victoria and the responsible Minister. Neither had resisted the application for a declaration by the plaintiff (a doctor). The only 'contradictor' came in the form of the Conference of Catholic Bishops,³⁶ which made submissions in support of the Victorian law as *amicus curiae*. None of the respondents appealed the decision of the Federal Court, but the Conference sought to collaterally attack it through an action in the High Court's original jurisdiction. They did this both in their own name, and in a second application as relators in an action brought by the Commonwealth Attorney-General. The majority of the Court rejected the applications on the basis that the actions gave rise to no 'matter' so as to engage the jurisdiction of the Court because of the lack of any distinct interest in the question for either the Conference or the Commonwealth Attorney-General. Callinan J, in dissent, expressed his reservations that:

the State of Victoria, which is to say the Executive of that State, may deliberately and selectively abstain from enforcing an enactment, indeed a relatively recent enactment of the legislature of that State, whether it has or has not the capacity to persuade the legislature to change or repeal that enactment by a subsequent enactment: and whether in those circumstances some other person might be entitled to do so.³⁷

A similar situation arose in 2004 when the Commonwealth failed to defend its legislation before the High Court in the *Nauru Appeals Case*.³⁸ In this case the validity the *Nauru (High Court Appeals) Act 1976* (Cth) was challenged. Section 5 of that Act confers jurisdiction on the High Court to hear appeals from the Supreme Court of Nauru. Mr Ruhani, an asylum

³³ Interview, David Bennett (AGS). The US literature has recognised that Legislature relies on the Executive to defend its legislation and failing to do so would give the Executive a form of veto over the Legislature. See further discussion of the Peacemaker type in Chapter 2.5.4.

³⁴ (2002) 209 CLR 372 ('*Re McBain*').

³⁵ *McBain v Victoria* (2000) 99 FCR 116.

³⁶ And its corporate trustee the Episcopal Conference.

³⁷ *Re McBain* (2002) 209 CLR 372, 476.

³⁸ *Ruhani v Director of Police* (2005) 222 CLR 489 ('*Nauru Appeals Case*').

seeker transferred to Nauru by Australian authorities and placed in immigration detention, appealed to the High Court from a decision of the Supreme Court of Nauru denying his *habeas corpus* application. An objection was filed by the respondent, the Nauruan Director of Police, against the competency of the High Court on the basis that s 5 of the *Nauru (High Court Appeals) Act* was invalid. Despite s 78B Notices being issued to Commonwealth and State Attorneys-General,³⁹ and a direct challenge to the constitutionality of federal legislation being involved, the Commonwealth Attorney-General did not intervene in the proceedings and therefore the Commonwealth's view on the legal position was not presented to the High Court. It was revealed in the course of the written submissions around costs that the Nauruan Director of Police's costs were being indemnified by the Commonwealth.⁴⁰

Kirby J implied that the Commonwealth had taken its position for short-term, political interests, not to protect the institutional interests of the federal polity, which would have meant defending the constitutionality of its legislation and the breadth of its Parliament's legislative power.⁴¹ The federal government had invested a lot of political capital in the offshore processing of asylum seekers, and Nauru had done Australia a political favour in allowing a processing centre to be built in its jurisdiction.

There was some support among Solicitors-General, the Judiciary and academics that the Solicitor-General's role as an advocate is to protect the scope of executive and legislative power against *any* encroachment, although sometimes this position may be conceded strategically. This places government power as the ultimate public policy objective: necessarily conceding that other public policy objectives, including democratic values, the rule of law, and federalism ('core government principles'), are secondary principles. This is inconsistent with my argument in Chapter 4.6.2 that the Solicitor-General has a role in advising the government on how its actions accord with these 'core government principles'. Government power is not in itself the ultimate public good, but must be exercised consistently with its founding principles, even when this may be detrimental to its expanse. My position is, however, consistent with the second view of the government's interests.

³⁹ *Judiciary Act 1903* (Cth) s 78B requires notices to be issued to Commonwealth and State Attorneys-General in relation to any matter arising under the Constitution or involving its interpretation. Each Attorney-General has a right to intervene in such a matter under s 78A.

⁴⁰ *Nauru Appeals Case* (2005) 222 CLR 489, 558-9. See also commentary at 557-8 (Kirby J). The costs were paid pursuant to a Memorandum of Understanding between Nauru and Australia which stated that Australia: 'will assume full financial responsibility for the administration of activities related to asylum seekers': 531 (Gummow and Hayne JJ).

⁴¹ *Ibid* 558-9.

6.2.1.2 Second view: government power as one aspect of constitutional policy

The second view of the government's interests sees the protection of government power within a broader set of constitutional policy objectives. Participants who took this view did not always see protecting the government's power or defending the validity of legislation in any possible manner as the paramount interests of the Crown; rather adherence to the Constitution's integrity must be sought while defending the position of the government. James Faulkner, who heads the Constitutional Policy Unit in the Commonwealth Attorney-General's Department, explained 'it is not some sort of process of winning at all costs in terms of pushing back the frontiers of Commonwealth capacity.' The policy objective of protecting and expanding Commonwealth power, he argued, must be coupled with recognition of the natural limits of the propositions the Constitution throws up. South Australian Solicitor-General Martin Hinton has also said that in advising the government what position should be taken in constitutional litigation, an overall perspective of where the Executive sits within the polity and where the State sits in the federal structure needs to be appreciated:

It is true that at the State level the decision to intervene and what to put by way of submissions may be influenced by partisan political considerations. But those considerations must be informed by a contemporary and rational appreciation of the federal structure. In these determinations, a Solicitor-General has a real opportunity to play a leading role in the development of his or her body politic's theory of the *Constitution* and how it works, and to make submissions consistent with that theory. This requires that a Solicitor-General develop a coherent construct as to the interrelationship of the powers of the Legislature, Judiciary and Executive under the *Constitution* and the respective limits of the Commonwealth and State power.⁴²

Having a permanent officer in constitutional litigation means a level of expertise in this area can be built up, and the government's position can be presented with continuity across administrations.

A series of cases in the Northern Territory provides an excellent example of this position. The cases also emphasise why a Solicitor-General is better placed than private practitioners to represent the government polity in matters where the enduring interests of the government polity are concerned. During their successive terms as Solicitor-General, Thomas Pauling (former Solicitor-General) and Michael Grant (the incumbent Solicitor-General) have

⁴² Martin Hinton, 'Secundarius Attornatus: The Solicitor-General, the Executive and the Judiciary' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011) 16.

pursued a theory of the Constitution in which the Territories were treated as part of the federation. This can be contrasted with the ‘disparate’ theory in which the Territories sit somewhat outside the compact and do not enjoy the benefits afforded to, or the restrictions placed on, the States.⁴³ Pauling recounted that after the decision in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*,⁴⁴ where the High Court found that the Territories were excluded from imposing excise duties under s 90 of the Constitution in the same manner as the States, he made a *deliberate choice* to pursue equal treatment for the Territories under the various parts of the Constitution. Pauling decided to do so consistently, seeking both the benefits conferred on the States (such as the right to compensation for any acquisition of property under s 51(xxxi)) but also accepting any *limitations* on State power (such as s 90, or the *Kable* principle).⁴⁵ In this sense, he saw the long-term interests of the Territory as seeking equal status with the States in the federation, even if it did not always accord with the protection of the government’s power.

North Australian Aboriginal Legal Aid Service v Bradley, a challenge to the appointment of the Chief Magistrate of the Northern Territory, raised the question of whether the *Kable* principle applied to the Territory courts.⁴⁶ Precedent suggested that the Territory Courts sat outside Chapter III of the Commonwealth Constitution (reflecting the disparate view) and therefore any restrictions imposed on Chapter III courts.⁴⁷ Pauling, as Solicitor-General, was briefed to appear with Peter Hanks. In conference, Hanks suggested that the Northern Territory may be able to rely upon the disparate view as part of its defence. Pauling recalled:

I sat down with [Hanks] and I said I’m not going to do that; I haven’t spent 14 years turning the High Court’s mind around about where we sit in the federation only to throw it away for short-term gain. I am going to get up there and say *Kable* absolutely does apply; no question about it. But in this case, as [Hanks] will explain in his statutory construction point, this legislation doesn’t offend any of the principles espoused in *Kable* or in later cases.⁴⁸

⁴³ Tom Pauling and Sonia Brownhill, ‘The Territories and Constitutional Change’ (2007) 28 *Adelaide Law Review* 55, 56-9.

⁴⁴ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248.

⁴⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁴⁶ (2004) 218 CLR 146.

⁴⁷ *R v Bernasconi* (1915) 19 CLR 629; *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432, this view is canvassed in Pauling and Brownhill, above n 43, 56-9.

⁴⁸ See record of submissions in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 159-60.

Pauling said the case demonstrated the importance of having a permanently appointed barrister available to develop the government's position. He explained: 'if you were just briefing people at the Bar, it would be very, very difficult to get them to resist the short-term kill, in ignorance of what the long-term aim is.'

David Bennett, Deputy Government Solicitor in the Constitutional Litigation Unit at the AGS, gave a number of examples of where the Commonwealth did not seek to maximise government power because of broader constitutional considerations. In one example, he explained the position of the Commonwealth in the freedom of political communication case, *Lange*, and why it was taken.⁴⁹ That case followed *Theophanous* and *Stephens*, in which varying foundations for the implied freedom of political communication were relied on by the judges.⁵⁰ In *Lange*, the Commonwealth, rather than arguing against the implication entirely, argued for a more limited basis and therefore scope of the implied freedom.⁵¹ Bennett explained:

[T]he Commonwealth argued that the implication did exist, but it had to be soundly sourced in the Constitution, not as a freestanding implication from responsible government and representative democracy.

Another prominent example was the Commonwealth Attorney-General's position taken in *Re McBain* before the High Court.⁵² Hayne J noted that the Attorney-General, appearing both as an intervener and in granting his fiat, was arguing, not for the protection of any Commonwealth power, but for what the Attorney-General thought 'to be a desirable state of the general law under the Constitution'.⁵³

Government's pursuit of its interests in a broader constitutional context does not entirely discount arguing for the protection of government power, but rejects the view that this is a singular legal policy objective that a government ought to pursue at the expense of others. This understanding of the government's interests raises real questions about the role of the Solicitor-General in determining those interests, and the extent to which Solicitors-General can shape their own instructions, or ignore the instructions of the government that may not

⁴⁹ (1997) 189 CLR 520.

⁵⁰ See discussion of these cases above, Chapter 6.2.1.1.

⁵¹ See statement of argument in *Lange v Australian Broadcasting Corporation* (1989) 189 CLR 520, 529 (Gavan Griffith, Solicitor-General of the Commonwealth).

⁵² (2002) 209 CLR 372. The facts of this case have already been explained, above, at Chapter 6.2.1.1.

⁵³ *Ibid* 461; quoting from *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J).

accord with their own view of the position. All participants accepted that the Solicitor-General's understanding and pursuit of the government's interests in litigation will always be subject to the instructions of the Attorney-General. In Chapter 6.3, I consider the extent to which the Attorney-General (or others) will instruct the Solicitor-General, and find that the Solicitor-General is often given large discretion in determining the government's position in constitutional matters and in others cases, with few exceptions, the Solicitor-General's advice on the appropriate position is followed.

6.2.2 Unique obligations of the Solicitor-General: model litigant and beyond

In addition to the professional obligations to the court to present only those arguments with legal merit, some participants considered that there were additional expectations between the Solicitor-General and the court that would moderate the traditional hired gun persona of the barrister. The modification was not sufficient to bring the Australian position in line with the Tenth Justice type seen in the US jurisprudence,⁵⁴ but it did add some weight to the idea of *unique* obligations existing between the Crown and the courts. However, not all participants were of this opinion and some were notably against the proposition.⁵⁵

Many participants associated the higher standards of the government as a litigant with the obligations owed by the Solicitor-General, representing that litigant.⁵⁶ Many associated the additional obligations of the Solicitor-General with the Crown's obligations to justice and the model litigant principles that have been developed to reflect this, which have been discussed in Chapter 4.6.1.2.⁵⁷

Some participants believed there were additional expectations as to the standards of advocacy for the Solicitor-General.⁵⁸ Former South Australian Solicitor-General Chris Kourakis said '[the judges] plainly expect a higher standard of work'. Kourakis also said he thought there was an expectation that the Solicitor-General would bring 'an understanding of the policy

⁵⁴ See Chapter 2.5.3.

⁵⁵ Most notably see Interview, Gerard Brennan, where Brennan said: 'I don't think that the office *as such* contributed to any difference in relationship.'

⁵⁶ Interview, Geoffrey Davies; Interview, Trevor Griffin; Interview, Martin Hinton; Interview, Patrick Keane; Interview, Greg Parker; Interview, Walter Sofronoff; Interview, Dean Wells.

⁵⁷ Interview, Martin Hinton; Interview Patrick Keane; Interview, Greg Parker.

⁵⁸ Interview, Stephen Gageler; Interview, Martin Hinton.

issues behind a lot of the legal questions.’ The extent to which the court seeks guidance on the government’s policy from the Solicitor-General is returned to below.⁵⁹

Former Queensland Solicitor-General Patrick Keane rejected the idea that the judges expected more in the sense of ‘even-handedness’, because as a judge he expected *all* Senior Counsel to be ‘fair and even-handed and not to exaggerate their case one way or the other’. However, he did think the Solicitor-General was in a unique position in terms of resourcing to ensure all the relevant material and arguments were brought before the court and therefore there was an expectation of ‘greater thoroughness’.⁶⁰

There was also a sense that, at least since Solicitors-General have secured a stranglehold on constitutional litigation on behalf of the States and the Commonwealth, officeholders would bring great expertise and a wealth of experience in this area with which to assist the Court.⁶¹ Former Commonwealth Solicitor-General and Chief Justice of the High Court Anthony Mason said in addition to expertise, a Solicitor-General could bring institutional knowledge of the government to assist the High Court.

At least one participant was firmly of the opinion that the High Court had expectations of the Solicitor-General, particularly in relation to constitutional matters, that were difficult, if not impossible, to meet. Kourakis explained:

[The High Court] plainly had very different expectations not only of me but of most of the States’ Solicitors-General, as to what they wanted us to do. And we didn’t meet it.

And what was that?

Well, I frankly don’t know what they expected from us. Probably they expected us to just lay down and accept their increasingly centralised view of the Constitution. I think that is what they expected.

...

Was there a distinction then between what the States were doing and what the Commonwealth was doing? Were they more receptive to the Commonwealth Solicitor-General?

⁵⁹ Chapter 6.4.1.

⁶⁰ See also Interview, Robert Ellicott; Interview, Anthony Mason.

⁶¹ Interview, John Doyle; Interview, Michael Grant. See also Stephen Gageler, ‘Counsel, Role of’ in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007).

Well, not that much more actually. ... They had reached the position, when I was there at least, that they had formed some pretty strong views about the cases that were coming before them. ... And any sort of States' rights position was not where they wanted to go. So we copped a lot for that reason. And they also wanted to work at a fairly high level of abstraction in the development of those theories. And often it was in the States' interests to try and pull them back to the factual question involved in the particular case, for example, or to put it another way, the factual difficulties that might be occasioned by a development of principle in a certain way.

This view was echoed in an observation of the High Court during Kourakis' tenure by former Commonwealth Solicitor-General Gavan Griffith. He believed that the role of Solicitor-General as an advocate before the High Court was increasingly difficult. Griffith's view was that some of the High Court judges, in pursuing their own theory of the constitutional system, were simply not interested in submissions that may not advance the jurisprudence in the same direction.

The view of the Solicitor-General operating as a hired gun in the same way as other barristers was tempered for many, though not all, participants because the Solicitor-General had unique obligations to the court, both on the basis of the nature of the government as a client and its obligations to the court and justice; but also in relation to the expected standards of advocacy, availability of resources, expertise and experience.

6.3 Advocacy in practice: the Solicitor-General's instructions

If the perception of the Solicitor-General's advocacy function as a strong Government Advocate is accepted, one would expect to find the government closely instructing the Solicitor-General. Instructions in this context occur in three different instances: (1) where the government is a party to a matter there will be instructions to either prosecute or defend; (2) in constitutional cases where the Attorney-General has a right to intervene under s 78A of the *Judiciary Act 1903* (Cth) (and other matters where the government may intervene)⁶² there will be instructions about whether to intervene, and in support of which position; and (3) where a decision has been made about prosecution, defence or intervention, there will be instructions about the legal submissions advanced to support that position. However, while there was a large consensus among participants that the role of the Solicitor-General in advocacy was as a hired gun, the expected level of contact with the client and the degree to

⁶² See, eg. *Crown Proceedings Act 1992* (SA) s 9; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 34. Attorneys-General can also intervene in any matter when leave is obtained from the court.

which instructions were sought and received was surprisingly low.⁶³ This paradox tests the veracity of the hired gun thesis and raises doubts about the utility of the metaphor for the Solicitor-General. This was particularly the case in relation to instructions regarding constitutional interventions and the direction of legal submissions once a position had been decided upon.

6.3.1 Determining whether to prosecute, defend or intervene

Instructions regarding the prosecution or defence of a matter, or the intervention in non-constitutional matters by the Attorney-General, seemed to be strongly controlled by the government. An example of the breach of this proposition demonstrates its strength. In 1982 Mary Gaudron, Solicitor-General of New South Wales, without instructions to do so filed an intervention in the Attorney-General's name in support of a State ward's right to an abortion.⁶⁴ The action caused outcry in the New South Wales Cabinet, and the Attorney-General said the Solicitor-General had 'pushed a big boundary'.⁶⁵

Nonetheless, in determining whether to intervene in constitutional matters, the data demonstrates that often the Solicitor-General has a great deal of discretion, or influence, in determining the position of the government. In most jurisdictions there is a standing delegation or instruction from the Attorney-General allowing the Solicitor-General to make decisions about interventions, usually in consultation with the Crown Solicitor or equivalent, in relation to constitutional matters under s 78A of the *Judiciary Act*, although the scope of these varied.⁶⁶

⁶³ In the US, Kathleen Clark has noted that there are some government lawyers (including the Solicitor-General) who serve both as the lawyer and the 'trustee' of the client, entrusted to make decisions that clients ordinarily make: Kathleen Clark, 'Government Lawyers and Confidentiality Norms' (2007) 85 *Washington University Law Review* 1033, 1062. This also reflects the view of John McGrath in New Zealand: John McGrath, 'Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General' (1998) 18 *New Zealand Universities Law Review* 195.

⁶⁴ Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 192.

⁶⁵ *Ibid.*

⁶⁶ In the Commonwealth, see David Bennett, 'Constitutional Litigation and the Commonwealth' in John Wanna (ed), *Critical Reflections on Australian Public Policy: Selected Essays* (ANU Epress, 2009) 101, 104; Interview, David Bennett (AGS). In New South Wales, see M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86, 90. In South Australia, there are delegations to the Crown Solicitor and Solicitor-General, with the exception of industrial relations matters: Interview, Greg Parker. In Tasmania, see Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2007-2008 (2008). In the Australian Capital Territory there is a standing instruction to make decisions not to intervene (Interview, Peter Garrisson). In the Northern Territory, there is an informal delegation (Interview, Michael Grant).

In Chapter 2.6 I introduced the contrasting views of John McGrath and Grant Huscroft on this point.⁶⁷ Huscroft criticised McGrath's acceptance of the large discretion vested in the New Zealand Solicitor-General on the basis that the practice fails to take into account the inherently political nature of public law litigation.⁶⁸ It is more appropriate that the Attorney-General makes such decisions as the representative and accountable officer. With similar concerns in mind, Tasmanian Solicitor-General Leigh Sealy has attempted to fetter the discretion vested in the Solicitor-General to increase the Attorney-General's supervision over this function. He developed a protocol to define the manner and circumstances in which constitutional issues are referred to the Attorney-General.⁶⁹ However, when I asked him about this in his interview, he said that he had found that even when he tried to involve the Attorney-General more in the process, 'the reality is ... that there is really no one apart from the people in this office who are equipped to make these judgments'. It does not appear that a protocol exists in the other jurisdictions, although informally there have been lists developed that set out the types of factors that should be considered by the Solicitor-General in making decision not to intervene, or a recommendation to the Attorney-General to intervene.⁷⁰

While, in theory, the recommendation of the Solicitor-General as to whether to intervene can always be overridden by the Attorney-General, New South Wales Solicitor-General Michael Sexton explained this rarely occurs. This may largely be because the position the government will take is dictated not by political interests, but by the interests of the government polity, which are often easily determined. However, when a position protecting government power conflicts with other constitutional principles, the position becomes more controversial and the potential for divergent views arises.⁷¹

Some participants believed that in these cases there was a very important place for policy input from the government. Former Queensland Crown Solicitor and Acting Solicitor-General Barry Dunphy indicated that in most constitutional cases, while in theory the Solicitor-General would seek instructions from the Attorney-General as to whether to

⁶⁷ John McGrath, 'Principles for Sharing Law Officer Power - The Role of the New Zealand Solicitor-General' (1998) 18 *New Zealand Universities Law Review* 195; Grant Huscroft, 'Politics and Principle in Public Law Advocacy - The Role of the Solicitor General' (1999) 18 *New Zealand Universities Law Review* 584.

⁶⁸ Huscroft, above n 67, 592-3.

⁶⁹ Solicitor-General, Parliament of Tasmania, Solicitor-General Report for 2007-2008 (2008).

⁷⁰ See, eg, Bennett, above n 66, 104; See also Hinton, above n 42, 16.

⁷¹ Chapter 6.2.1.2.

intervene, the advice proffered by the Solicitor-General as to intervention and the position to take ‘was invariably accepted’. However, he went on to say that:

I think there is a position for government to actually make a call on their instruction on intervention. And that has occurred, we have seen that in the High Court when occasionally the States will split amongst themselves. Now, that is because it may well be in a particular case that a State sees, from their own perspective, a certain line of argument that another State is pushing may not be where they want to go. And that could be driven by a whole range of reasons.

In the freedom of political communication cases that gathered momentum throughout the 1990s, Dunphy believed there was no clear State interest to be protected, that is, it was not immediately apparent what position the government ought to take on a principle that would, on the one hand, limit the legislative power of the Parliament but, on the other, improve the functioning of the representative institutions of government.⁷² Therefore, Dunphy explained that there was legitimate scope for the government to be deciding on which side to intervene, influenced by political agendas.⁷³

Two other examples highlight instances when the government has actively pushed an agenda that doesn’t necessarily accord with the protection of government power because of a policy choice that prioritises other public law principles. In these cases, the government has exercised closer supervision over the Solicitor-General. These examples emphasise that often when questions of protecting government power arises against considering the government’s power as part of a broader public policy questions, the government plays an important role in resolving any tensions (or at least it does so when the issues are politically sensitive).

The first example comes from a series of cases in the 1980s that concerned the scope of the Commonwealth’s legislative power to enact treaties under the external affairs power (s 51(xxix) of the Constitution). The New South Wales government supported the policy objectives of the challenged Commonwealth laws (the protection of minority rights and the

⁷² The cases thus present tensions between the idea of protecting government power and government power being only one of many constitutional principles to protect. See further discussion of the cases in this context above, Chapter 6.2.1.

⁷³ See also Electoral and Administrative Review Commission, ‘Report on Review of the Independence of the Attorney-General’ (1993) submission of Patrick Keane, Solicitor-General. Note also Interview, Keith Mason, in which he recalled cases – both constitutional and non-constitutional – where for political reasons his overarching instructions would be changed. This occurred, for example, when a change of government may have brought a change of political viewpoint. See also this possibility being raised by Stephen McLeish for the Victorian Attorney-General in Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 261 (8 October 2010) 3, noting that there was an election scheduled prior to the pending date for trial and that a change of government might eventuate in the position where ‘a different Attorney may well take a different position, give different instructions on some of those matters.’

environment), but institutionally was worried about the breadth of the external affairs power on the residual legislative powers of the States. In considering whether to intervene in *Koowarta v Bjelke-Petersen*,⁷⁴ the New South Wales government was grappling with this ‘philosophical dilemma’: it supported the enactment of the challenged *Racial Discrimination Act 1975* (Cth) based on s 51(xxix); but supporting a federal power to implement treaty obligations unequivocally could mean a large erosion of State power.⁷⁵ Solicitor-General Mary Gaudron advised that New South Wales could try to walk the ‘elusive middle ground’, although, she admitted ‘no ready argument achieving these objectives springs to mind – although I am not yet convinced that none exists.’⁷⁶ Daryl Dawson, Gaudron’s colleague in Victoria, recalled that:

Mary Gaudron said I ordered her out of one meeting of Solicitors-General, I don’t remember it, but she said you did. ... New South Wales was contemplating, I’ve forgotten what it was, it was one of the external affairs cases, she was contemplating supporting the federal government, and I would have said you can get out, we don’t want you here.⁷⁷

Ultimately New South Wales did not intervene in *Koowarta*. However, the same issue arose in similarly difficult political circumstances for the New South Wales government in the *Tasmanian Dam Case*,⁷⁸ which involved a challenge to the federal *World Heritage Properties Conservation Act 1983* (Cth) and the regulations under it, enacted for the purpose of giving effect to treaty obligations under the *Convention for the Protection of the World Cultural and Natural Heritage*. Again, when New South Wales tackled the question of intervention, it was confronted with the institutional problem of ceding power to the Commonwealth by accepting the Commonwealth’s power to enact treaty obligations, against the political desire to support the federal scheme and the protection of the environment. New South Wales intervened in support of the Commonwealth on the basis of s 51(xxix) only (the Commonwealth was also relying on a number of other heads of power). Gaudron crafted an argument that, while the Commonwealth had power to implement treaty obligations under

⁷⁴ (1982) 153 CLR 168.

⁷⁵ Burton, above n 64, 195.

⁷⁶ Solicitor-General Advice (NSW), 9 November 1981, 302, extracted in *ibid* 196.

⁷⁷ Presumably this was in relation to *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, where Victoria (together with WA) supported Queensland; in *Commonwealth v Tasmania* (1983) 158 CLR 1 (*‘Tasmanian Dam Case’*), Victoria supported the Commonwealth legislation on a narrow reading of the external affairs power (not represented by Dawson but P G Nash).

⁷⁸ (1983) 158 CLR 1.

s 51(xxix), the power ought to be limited to cases where the treaty itself is of an international character.⁷⁹

The second example of when the protection of government power was juxtaposed against other public policy interests supported by the government of the day occurred in Queensland's intervention in the case of *McGinty v Western Australia*.⁸⁰ To understand this tension requires an explanation of the case and its political background, particularly in relation to Queensland's historical context. *McGinty* was a challenge to amendments passed in 1987 that effected an electoral malapportionment in the Western Australian Parliament by weighting non-metropolitan areas.⁸¹ While the amendments deepened the disparity in voting power, since before federation Western Australia had an unequal allocation of voting power among the regions of the State.⁸² A question arose as to whether the inequalities in voting power effected by the amendments meant that the members of Parliament were no longer 'chosen directly by the people' as required in s 73(2)(c) of the *Constitution Act 1889* (WA). There was also a question as to whether the requirements in ss 7 and 24 of the Commonwealth Constitution that members of the Parliament be 'directly chosen by the people' impliedly limited the State Parliaments' power to determining the voting power in State elections.⁸³ The Attorneys-General of the Commonwealth, New South Wales and Queensland all intervened in support of the challenge. The Attorneys-General of Victoria, South Australia and Tasmania intervened in support of the defendant, Western Australia.

The common interests of the State governments would have been protecting the plenary legislative power of the State against implied limitations in either the State or Commonwealth Constitutions. The division between the States instead reflected the political environment of 1995 and the emphasis of the Labor governments at that time on a countervailing constitutional principle: the importance of fair electoral systems. The Commonwealth, New

⁷⁹ This came from the judgments in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168: *Tasmanian Dam Case* (1983) 158 CLR 1, 48.

⁸⁰ (1996) 186 CLR 140.

⁸¹ See further explanation of the amendments in Kirsten Robinson, 'One Vote, One Value: The WA Experience' in Graeme Orr, Bryan Mercurio and George Williams (eds) *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 100, 105-6.

⁸² *McGinty v Western Australia* (1996) 186 CLR 140, 178 (Brennan CJ).

⁸³ Constitution ss 7 and 24. This argument was rejected in *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth* (1975) 135 CLR 1, but in the early 1990s, the High Court accepted an implied right to freedom of political communication from these provisions in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1. By parity of reasoning, it was argued in *McGinty* that the provisions would support an implied equality of voting power.

South Wales and Queensland each had incumbent Labor governments. Western Australia, Victoria, South Australia and Tasmania had Liberal governments. In 1988, the federal Hawke Labor government had sponsored a referendum that would have required the adoption of fair electoral systems around Australia.⁸⁴ The amendment was predominantly aimed at the large malapportionment in Queensland.⁸⁵ While the referendum was not successful, it raised significant public awareness of the question. After Labor won government in Queensland in 1989 the matter was referred to the Electoral and Administrative Review Committee and the malapportionment was substantially replaced by a modified ‘one vote, one value’ system that existed in many of the other Australian jurisdictions.⁸⁶

The Queensland Solicitor-General at the time, Patrick Keane, was ultimately instructed to *support* the limitation on State legislative power, demonstrating a strong commitment by a State government to support a federal Labor policy preferencing the principle of equal representation, a ‘core government principle’ identified in Chapter 4.6.2.1, regardless of the constitutional implications this may have had for State power.⁸⁷

6.3.2 The formulation of submissions

There was almost universal consensus that once instructions were received on whether to prosecute, defend or intervene, the Solicitor-General would be left to develop the ‘legal, actual nuts and bolts, argument’.⁸⁸ In very few jurisdictions would the Attorney-General (or another Minister if another department was instructing) regularly request to see the submissions prior to them being filed.⁸⁹ Just as McGrath had observed in New Zealand then, the Solicitor-General as an advocate has a wide, independent discretion to develop argument, perhaps even wider than the traditional forensic judgment enjoyed by the barrister.⁹⁰ New South Wales Solicitor-General Michael Sexton identified a disjunction between the theory that the government instructs the Solicitor-General and the practice, particularly in

⁸⁴ *Constitution Alteration (Fair Elections) 1988* (Cth).

⁸⁵ See discussion of the Queensland malapportionment during the Bjelke-Petersen period in Graeme Orr and Ron Levy, ‘Electoral malapportionment: partisanship, rhetoric and reform in the shadow of the agrarian strong-man’ (2009) 18(3) *Griffith Law Review* 638.

⁸⁶ Robinson, above n 81, 104.

⁸⁷ Interview, Patrick Keane.

⁸⁸ Interview, Dean Wells. This would happen in conjunction with his or her legal team. In this sense, what is meant by ‘left to’ the Solicitor-General in this sentence is that there will be no input from the client.

⁸⁹ This would vary depending on the views of the Attorney-General. For example, in Victoria under Attorney-General Robert Clark submissions are regularly presented to the Attorney-General, but this was not the case under the previous Attorney-General Rob Hulls. Interview, Stephen McLeish.

⁹⁰ McGrath, above n 67, 214. See further Chapter 2.6.

developing submissions. Former New South Wales Solicitor-General Keith Mason indicated that particularly in constitutional litigation, there was little instruction from the government, although the overall position would be set in consultation with the Attorney-General. He explained that ‘your instructions would be to oppose this, or to argue a 109 inconsistency, and you were given a free reign, basically, as to how you did it. Attorneys generally are far too busy to be involved with legal issues.’⁹¹

Among Attorneys-General, it was generally accepted that they left the running of litigation to the Solicitor-General except in relation to ‘big ticket’ items: items with large governmental or political consequences. There was a consensus that the Solicitor-General possessed a level of expertise in government litigation that meant the government should not try to direct them closely.⁹²

In this environment, whether to seek more specific instructions on a legal position was left to the Solicitor-General. Former South Australian Solicitor-General John Doyle explained that the question of when to seek instructions was something that was left to him under the Attorneys-General whom he served. So as Solicitor-General he was left with the discretion to determine whether a matter would have implications for the government that would require instruction. In Victoria, former Solicitors-General Pamela Tate and Daryl Dawson indicated they were fairly free of instruction once a broad position had been set. However, Tate recalled a couple of times when she specifically sought instructions on the submissions she was going to make, as she knew the Attorney-General, Rob Hulls, was particularly interested in them.⁹³ However, it was at *her* initiative that she sought instructions from the client.⁹⁴

Some participants noted that in important political cases, the Attorney-General would become closely involved, particularly when there were policy choices to be made about balancing constitutional principles. Former Queensland Solicitor-General Patrick Keane saw his level of instruction differ between cases. In interventions the government ‘basically left the running of it to us.’ However, he recalls in *Fardon v Attorney-General (Qld)*,⁹⁵ which concerned preventative detention of persons previously convicted of serious sexual offences

⁹¹ See also Interview, David Bennett (AGS); Interview, Michael Grant; Interview, Thomas Pauling.

⁹² Interview, Michael Lavarch; Interview, Robert McClelland; Interview, Philip Ruddock; Interview, Terence Sheahan; Interview, Rodney Welford; Interview, Dean Wells.

⁹³ For example in *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 she sought instructions from the Attorney-General on the legal argument, as Hulls had close contact with plaintiff lawyers. Other cases in which she did so included matters involving incursions into individual liberties.

⁹⁴ See also Interview, Greg Cooper.

⁹⁵ (2004) 223 CLR 575.

after the expiry of their initial period of imprisonment, the Attorney-General, Rodney Welford, was actively instructing. Keane explained why:

I think he was a very concerned civil libertarian and wanted to ensure that ... [the legislation] not be any more stringent than it needed to be. So I think he probably rode closer shotgun on that case than anything else that I experienced.⁹⁶

An illustrative case study demonstrating the parameters in which Solicitors-General operate in developing submissions can be taken from the 2011 High Court hearing of *Williams v Commonwealth*. The matter involved a challenge to the National School Chaplaincy Program on the basis, *inter alia*, that the Commonwealth lacked the power to fund the program. The Commonwealth defendants were represented by the Commonwealth Solicitor-General; the Attorneys-General of New South Wales, South Australia, Tasmania, Queensland, Victoria and Western Australia intervened, each represented by their Solicitor-General. In preparing for the oral argument, all of the parties operated under an assumption that the executive power of the Commonwealth described in s 61 of the Constitution included at least the power to spend money in areas that was or *could be* the subject of Commonwealth legislation. All the written submissions proceeded on this basis, focussing therefore on the necessity for some sort of intersection between the particular expenditure and a head of power. However, at the hearing, the Court questioned this assumption, raising the possibility that the Commonwealth's executive power to spend money and enter into contracts only exists if accompanied by legislative authority, with some exceptions.⁹⁷

The challenge to the assumed position meant that the parties had to reformulate their submissions on the Commonwealth's executive power at the hearing itself. The Solicitor-General of Queensland formulated a new interpretation that embraced the position that some of the members of the Court had suggested.⁹⁸ The Solicitors-General of South Australia and Tasmania requested further time from the Court to seek instructions from their Attorneys-General.⁹⁹ South Australian Solicitor-General Martin Hinton said:

⁹⁶ See also Interview Greg Cooper; Interview, Rodney Welford.

⁹⁷ See, eg, the first exchange between Bret Walker, French CJ and Gummow J on 9 August 2011: Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) 6-7; the possible interpretations of executive power if the assumption was abandoned are set out by Heydon J in *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011) 144-5.

⁹⁸ Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011) 97-113.

⁹⁹ Solicitors-General from New South Wales, Queensland, Victoria and Western Australia (acting) all made submissions without the need to seek further time to seek instructions. Whether or not they were able to obtain instructions in the short time period required, or whether they did not believe it was necessary

The alternative approach raises large questions as to the way in which the States on a daily basis, or agencies or instrumentalities of the States, do business with the Commonwealth. It was first raised yesterday. I do not point the finger or blame anybody for that, but we have been unable to obtain instructions.¹⁰⁰

Tasmanian Solicitor-General Leigh Sealy similarly said, while ‘we are strongly inclined to associate ourselves with the submissions made by the learned Solicitor-General for Queensland this morning in relation to the matter of the scope of the Commonwealth executive power’, he was unable to make further oral submissions because he did ‘not have instructions on what is a very large question’.¹⁰¹ Sealy’s statements are particularly telling. As a matter of pure government power, the States would have gained the most from submitting that the Commonwealth’s spending power was as narrow as possible, meaning the Commonwealth could not intrude into areas of State competence.¹⁰² This was Sealy’s initial reaction to Queensland’s submissions. However, the answer to the question had the potential to impact past and future agreements between the States and the Commonwealth, and the Commonwealth and parties within the States; as such, it may also have impacted on a State government’s political agenda (many States, for example, supported the policy behind the chaplaincy program, not wanting to see the individual contracts invalidated). It could also have had an impact on the theory of the *State’s* executive power. As such, it was a question with large political consequences.

In summary, the Solicitor-General as an advocate represents the government’s interests. To a large extent, these interests reflect stable positions that protect government policy from successful challenge, and the government’s place and powers in the federal system. This has meant that the Solicitor-General is largely trusted to defend these predetermined and stable interests as they see fit. Solicitors-General have a delegation to make decisions on interventions in some circumstances, and in others, the Solicitor-General’s recommendation

because they had the trust of the Attorney-General to make submissions that accorded with the interests of the government, is not known.

¹⁰⁰ Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011) 115.

¹⁰¹ *Ibid* 118.

¹⁰² This seemed to be the position taken by the Queensland Solicitor-General: see above n 98 above. It was also, ultimately, the position taken by Tasmania. See Attorney-General of Tasmania, ‘Further Submissions of Behalf of the Attorney-General of Tasmania, Intervening’, Submission in *Williams v Commonwealth*, No S307 of 2010, 19 August 2011. South Australia, in contrast, took the position that the Commonwealth executive power included the capacities of a natural person, but was limited in scope to the ambit of the legislative power, the execution or maintenance of the Constitution, and to the activities that fall within the executive ‘nationhood power’. See Attorney-General of South Australia, ‘Further Written Submissions of the Attorney-General for the State of South Australia Pursuant to Leave Granted on 10 August 2011’ Submission in *Williams v Commonwealth*, No S307 of 2010, 19 August 2011.

will be invariably followed. The development of the government's position in submissions is also largely left to the Solicitor-General. Many times, the appropriate position for the government to take is determined by an understanding of the constitutional position of the polity, and not the policy objectives of the government of the day.

That is not to say, however, that the government does not, or should not, have a role to play instructing the Solicitor-General. There is substantial evidence that, particularly in relation to constitutional litigation that raises the proper relationship between the government and the citizen when the government's interests may not be as readily identified,¹⁰³ the government has taken a more proactive role in instructing the Solicitor-General. Where there is the potential for underlying constitutional principles to conflict, the Solicitor-General may advise the government on an appropriate position, one that is most consistent with the integrated constitutional order and the government's previous positions, but ultimately the final position ought to be determined in these areas by an accountable Minister and it is entirely appropriate for the Attorney-General to provide close instructions. James Faulkner, head of the Constitutional Policy Unit in the Commonwealth Attorney-General's Department, explained that the Attorney-General has a real interest in knowing what the constitutional policy is behind particular positions (in litigation) even if the government ultimately chooses to pursue a different position. As former Commonwealth Solicitor-General Stephen Gageler explained, he saw it as his role in helping the government understand where its long-term interests lay.¹⁰⁴ This finding is consistent with my argument in Chapter 4.6.2 that while the Solicitor-General has a vital role in advising the government on the congruency of its actions and decisions with 'core government principles', ultimately, as a matter of constitutional principle, the final position must be determined by a politically accountable Minister.

6.4 The Executive and the Judiciary: conversations and confrontations

It has always been a law officer's function to be the public messenger between the government and the court, rather like an ambassador from Tudor times. Sometimes the message conveyed is the entirely silent one that the law officer has turned up because the wide ramifications of a possible outcome might otherwise be missed. In this function undue coyness can, however, backfire, as the interveners would learn to their cost in *Dietrich v The Queen*. Sometimes the law officer's role is to put on record a borderline submission close to the client's heart that a less experienced barrister will announce to be 'on instructions'. Sometimes the actual instructions do

¹⁰³ Chapter 6.2.1.2.

¹⁰⁴ See the full quote in Chapter 6.2.1 above.

not bear repeating in polite company, with the advocate coming under a professional obligation to put it in his or her own words, or merely to do no more than submit to the order of an angry court. Message-sending can be a two-way street. And sometimes the messenger gets shot at as the only available target.¹⁰⁵

The Solicitor-General operates as a conduit between the Executive and the Judiciary. The office's continuous involvement with government means the Solicitor-General is able to assist the Court in a coherent and consistent manner. The Commonwealth Attorney-General once said one advantage of having a Solicitor-General representing the interests of the government is that the High Court in particular may explore 'peripheral or related matters difficult to foresee and on which it is difficult to brief outside counsel adequately'.¹⁰⁶

This next section considers two aspects of the relationship between the Solicitor-General, as representative of the Executive, and the Judiciary. First, it may be that the Solicitor-General alerts the Judiciary as to the importance to the Executive of a particular principle, or the ramifications for the Executive of the Court's development of a principle in a particular direction. Secondly, I consider the role of the Solicitor-General during times of constitutional confrontation between the Judiciary and the Executive. The Solicitor-General may be used not simply to make the government's submissions on the proper operation of the constitutional order, but to remind the court of its constitutional position in that order and warn it against incursions into the executive domain. It may also be that the Judiciary wishes the Solicitor-General to take a message back to the Executive: that the Executive is acting inappropriately, or in a way that the court perceives is threatening to its independence or the administration of justice.¹⁰⁷

6.4.1 The implications of judicial decision-making

The Solicitor-General is in a unique position to inform the Judiciary of the views of the Executive on the policy behind particular actions and laws and the potential implications of

¹⁰⁵ Keith Mason, 'Aspects of the History of the Solicitor-General in Australia: 1788 to 1970' (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011) 8.

¹⁰⁶ Letter from Commonwealth Attorney-General to Western Australian Attorney-General, extracted in Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3436 (Charles Court, Minister for Industrial Development).

¹⁰⁷ The defence of the Judiciary was traditionally seen as part of the common law functions of the Attorney-General. However, in Australia, this convention has been substantially eroded by the actions and publicly expressed views of officeholders, and even their beliefs as to their role. See further discussion in Chapter 2.3.

particular decisions.¹⁰⁸ If it is accepted that judges are not merely passive interpreters of the law, but at times are confronted with judicial choices that actively engage them in value judgments that reflect policy choices, issues around practical consequences and policy implications become increasingly relevant to the judicial task. Thus submissions may be sought by courts, and particularly the High Court as the apex appellate jurisdiction, on the parties' views of the law, but also on practical and policy implications of a decision.¹⁰⁹

There are some indications that the High Court is open to, and even seeks, these submissions. In *R v Gee* the High Court considered the interpretation of s 68 of the *Judiciary Act 1903* (Cth), a provision that was intended to pick up the procedure for pre-trial, trial and appeal procedure from State criminal law and apply it to the federal criminal law, as well as vest federal criminal jurisdiction in State courts.¹¹⁰ Only the South Australian Attorney-General, represented by Solicitor-General Bradley Selway, intervened. In the course of Selway's submissions, Kirby J expressed disappointment that the Commonwealth Solicitor-General was not there to put forward *the Commonwealth's* view. He explained to Selway:

[I]t is really quite an important question of policy here as to how the *Judiciary Act* is to operate, and there are those competing approaches which I mentioned earlier to the appellant, and one would have thought that the Commonwealth would have had something to say. It is, after all, its Act. It is not your Act.¹¹¹

Former Queensland Solicitor-General Patrick Keane recounted that many Solicitors-General regarded the case of *Dietrich v The Queen* as a warning to the Attorneys-General (and Solicitors-General) to appear in important constitutional litigation.¹¹² The case turned on a question of whether a court's inherent power to stay proceedings to prevent an abuse of process extended to ordering a stay when a defendant in a criminal trial was unrepresented by counsel. Only the Attorneys-General for the Commonwealth and South Australia (represented by their Solicitors-General) intervened with leave. A possible effect of the failure of the Solicitors-General to appear en masse can be gleaned from the joint reasons of Mason CJ and McHugh J. The Court noted that a finding that a court could stay proceedings

¹⁰⁸ Interview, Michael Lavarch.

¹⁰⁹ Charles Sampford and Kim Preston, 'Introduction' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 1, 5.

¹¹⁰ (2003) 212 CLR 230.

¹¹¹ Transcript of Proceedings, *The Queen v Gee* [2002] HCATrans 384 (Kirby J, 13 August 2002) 27. See also Transcript of Proceedings, *The Queen v Gee* [2002] HCATrans 395 (Kirby and McHugh JJ, 14 August 2002) 73, 75 and discussion in Bradley Selway, 'The Different Role of an Australian Attorney-General' (2002) 13 *Public Law Review* 263, 269.

¹¹² (1992) 177 CLR 292.

was likely to result in the provision of counsel at public expense. In considering this repercussion, Mason CJ and McHugh J said:

[O]nly the Attorney-General for the Commonwealth and the Attorney-General for the State of South Australia intervened. But no argument was put to the Court that recognition of such a right for the provision of counsel at public expense would impose an unsustainable financial burden on government. In these circumstances, we should proceed on the footing that, if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, that approach is not likely to impose a substantial financial burden on government and it may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated.¹¹³

Keane recalled after *Dietrich*:

Daryl Dawson buttonholed ... one of the SGs, because I mean he is an ex-SG himself, and he got stuck into him. And he said, you know, where were the SGs? Why weren't they there making the argument that you can't just stay these cases? There are Legal Aid regimes where there are merits and means testing. This is a responsible response to having people who can't afford their own defence. It isn't perfect, but it is as good as you're going to get bearing in mind that the High Court can't levy the taxes and decide how they're spent. And Daryl was very upset that the Solicitors-General hadn't turned up, in a phalanx, to say you just can't pick and choose. ... So after that we were always very conscious that you should err of the side of intervening, at least to make sure it couldn't be said that these issues had gone by default.

More recently, in the High Court hearing of *RCB as litigation guardian of EKV, CEV, CIV and LRV v Forrest*, the Attorney-General for Western Australia, intervening, raised with the Court similar concerns to those raised by Dawson. The matter concerned a Family Court order ordering the return of four children from Australia back to their father in Italy. It was submitted that in making the order, the judge had not afforded the children procedural fairness because, *inter alia*, the children had not been provided with separate and independent representation. In the particular type of proceedings in issue, the *Family Law Act 1975* (Cth) provides that a judge may only order separate representation for a child's interests where 'exceptional circumstances' exist.¹¹⁴

Counsel for Western Australia (led by the Solicitor-General) submitted that the restriction on the circumstances where independent legal representation can be ordered was 'prudent' having regard to the 'reality' that '[t]here are limits to the capacity of government to fund

¹¹³ Ibid 312.

¹¹⁴ *Family Law Act 1975* (Cth) s 68L(3).

independent legal representation of children'.¹¹⁵ Further, the government's financial limitations had legal consequences the Court ought to take into account. The submissions explained:

Were the Court to order independent legal representation and a legal aid body not have capacity to fund that representation, staying the application [as occurred in *Dietrich*] is not a consequence that could properly be ordered. A stay simply defeats the purpose of the application by ensuring that abducted children are not returned, and is contrary to Australia's international obligations under the *Convention on the Civil Aspects of International Child Abduction*.¹¹⁶

The Court dismissed the proceedings, with reasons to be published at a later date.¹¹⁷

Another illustration of the type of interaction between the Court and the Solicitor-General that may prevent the type of outcome that occurred in *Dietrich* came in the case of *Re The Governor Goulburn Correctional Centre; Ex parte Eastman*.¹¹⁸ The case concerned a challenge to the appointment of an acting judge of the Supreme Court of the Australian Capital Territory on the basis it did not comply with s 72 of the Commonwealth Constitution. In his submissions, Northern Territory Solicitor-General Thomas Pauling drew the Court's attention to the potential 'dire consequences' of such a finding.¹¹⁹ He indicated that because, since self-government in the Territories, judges had not been appointed by the Governor-General as required by s 72, 'the consequence of a decision in this case is not just that decisions made by acting justices might be invalid because of an invalid appointment, it goes to the whole of the judiciary in both territories'.¹²⁰ He went on:

I was asked by one of my learned friends how many people – we only started locking up people in our own gaols after 1978¹²¹ – how many people might be there and I will not give evidence from here, your Honours, but it is a lot.¹²²

Kirby J responded to the submissions:

¹¹⁵ Attorney-General for Western Australia, 'Intervener's Submissions', Submission in *RCB as litigation guardian of EKV, CEV, CIV and LRV v Forrest*, No B28 of 2012, 20 July 2012, 5-6.

¹¹⁶ *Ibid* 6.

¹¹⁷ Transcript of Proceedings, *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest, One of the Judges of the Family Court of Australia* [2012] HCATrans 178 (7 August 2012).

¹¹⁸ (2000) 200 CLR 322 ('*Eastman*').

¹¹⁹ *Ex parte Eastman; The Governor, Goulburn Correctional Centre* [1999] HCATrans 65 (24 March 1999).

¹²⁰ *Ibid*.

¹²¹ The date of self-government in the Northern Territory.

¹²² *Ex parte Eastman; The Governor, Goulburn Correctional Centre* [1999] HCATrans 65 (24 March 1999).

Can I just raise in respect to that argument, which I really take the force of because it has very serious consequences, but presumably the same things were said from the Bar Table during the *Boilermakers' Case*.¹²³

Pauling's response to the question was that, unlike the industrial awards in the *Boilermakers' Case* that were able to be remedied by retrospectively validating the various decisions,¹²⁴ the retrospective validation of convictions and sentences of imprisonment could not be achieved by the Legislature. The Legislature is prohibited from exercising judicial power under the *Boilermakers'* doctrine and the punishment after determination of guilt is an *exclusively* judicial power.¹²⁵ Kirby J suggested that Pauling's submissions were, in effect, asking the Court to be bound by an understanding of the Constitution even if it was wrong. Pauling responded:

No, I do not suggest that, and there may come times when a major shift is dictated, but as my learned friend, the Solicitor-General for the Commonwealth put it, ultimately one has to put 'the dire consequences', to use your Honour's term, in the balance to see whether or not one solution is better than another. There is no doubt that there is no more vexing part of the Constitution than the relationship between section 122 and Chapter III and the likely reason for that is that it is badly drafted and whichever argument one runs, it comes to an intellectually unsatisfying result.¹²⁶

The exchange in *Eastman* demonstrates that the Court is, on occasion, responsive to such submissions. Ultimately, in *Eastman* the High Court held that the Territory courts were not federal Chapter III courts and therefore not required to comply with s 72 of the Constitution. Gleeson CJ and McHugh and Callinan JJ held that this conclusion was 'open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories.'¹²⁷

Another example occurred in 2011 during the *Momcilovic* High Court appeal.¹²⁸ After the initial hearing, the High Court posed a series of questions to the parties about, *inter alia*, the

¹²³ Ibid. Hayne and Gummow JJ also raised the possibility of retrospectively legislating as was done in *Presley v Geraghty* (1921) 29 CLR 154 but this was addressed by Pauling in the same manner.

¹²⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers Case*').

¹²⁵ See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

¹²⁶ Transcript of Proceedings, *Ex parte Eastman; The Governor, Goulburn Correctional Centre* [1999] HCATrans 65 (24 March 1999).

¹²⁷ *Re The Governor Goulburn Correctional Centre; Ex parte Eastman* (2000) 200 CLR 322, 332. See also the approach in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 ('*AAP Case*'), 417-9 (Murphy J).

¹²⁸ *Momcilovic v The Queen* (2011) 85 ALJR 957.

operation of s 109 of the Constitution. The Court had indicated in a previous case,¹²⁹ and during oral argument in *Momcilovic*, that it was considering reviewing the settled position on the operation of s 109. All of the government parties – the Attorneys-General for Victoria, Commonwealth, New South Wales, Western Australia, South Australia, Tasmania, and the Australian Capital Territory – filed a joint submission arguing to retain the settled construction.¹³⁰ The joint submission from the government parties was unprecedented.¹³¹ It served a very important purpose by demonstrating the concerns of all of the government polities that the Court was contemplating a radical departure from the settled interpretation of s 109. Such a shift had the potential to invalidate many State criminal regimes, including drug regimes, that had operated concurrently with federal schemes, and under which many people had been convicted and penalised.¹³² The submission also noted the practical problems that would arise if State law enforcement bodies were unable to investigate conduct in the area of drug offences.¹³³

The Court is not, however, always responsive to these submissions. When asked whether he thought it was proper for the Solicitor-General to alert the Court to practical consequences of decisions, former High Court Chief Justice Gerard Brennan said definitely not:

There is a great difference between being conscious that the legal consequence of a decision is X, and taking X into consideration in order to reach a decision. ... You are just conscious of the way in which the law operates. But seeking advice about what the results would be, and the sort of economic or political fallout would be, as a means of arriving at the decision, no. No, that wasn't on.

¹²⁹ *Dickson v The Queen* (2010) 241 CLR 491.

¹³⁰ Attorneys-General of Victoria, Commonwealth, New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory, 'Submissions of Second Respondent and Intervening Attorneys-General', Submission in *Momcilovic v The Queen*, No M134 of 2010, 28 March 2011, [6], [7]. All Attorneys-General with the exception of Victoria and the Australian Capital Territory were represented by their Solicitors-General. Victoria had no Solicitor-General at the time. Stephen McLeish was counsel for Victoria (he was subsequently appointed Solicitor-General). At this stage, the Australian Capital Territory had not created a position of Solicitor-General. Peter Garrisson appeared for the Australian Capital Territory (he was subsequently appointed Solicitor-General when the position was created).

¹³¹ Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 145 (7 June 2011, Bret Walker).

¹³² Attorneys-General of Victoria, Commonwealth, New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory, 'Submissions of Second Respondent and Intervening Attorneys-General', Submission in *Momcilovic v The Queen*, No M134 of 2010, 28 March 2011, [19]. Interview, Leigh Sealy.

¹³³ *Ibid* [25].

Former South Australian Solicitor-General Chris Kourakis said that he often felt the High Court was not receptive to submissions on the implications of a particular decision, preferring to work at a high level of abstraction.¹³⁴

Australia's constitutional order attempts to separate the Judiciary from the other branches of government. Nonetheless, the judicial task is still undoubtedly political in the sense that it involves the exercise of public power and the exercise of that power has direct and indirect influence on the Executive's policies; a fact that has only been highlighted by the acceptance of realism in legal reasoning and therefore of the influence of value and policy judgments. According to this view, the judicial function is properly and necessarily informed by the Executive's views on the impacts of the trajectory of legal principle. My findings have demonstrated that both Solicitors-General and some members of the Judiciary understand that in this environment, it is important to have the Solicitor-General informing the court of the possible larger policy implications of particular decisions. Such a role places the Solicitor-General as a mouthpiece for the Executive's interests before the Judiciary.

6.4.2 Confrontations over institutional roles

The Solicitor-General appears before the court to *assist* the court, as described above, but also as an *interface* when tensions arise between the two branches. Former High Court Justice Michael McHugh explained that the constitutional power of judicial review that has been vested in the High Court has meant there will be tensions, even animosity, between the Executive and the Judiciary.¹³⁵ The following section considers the relationship between the Solicitor-General and the Judiciary when there are confrontations and the Solicitor-General must act as a conduit between the Executive and the Judiciary.

6.4.2.1 Carrying the message from the Executive to the Judiciary

Former New South Wales Solicitor-General Keith Mason recalled two instances when the Solicitor-General has been required to put the position of the Executive to the Judiciary in a confrontation between the two arms of government, when it appeared to the Executive that the Judiciary was interfering in an executive issue.

The first instance was when he was counsel for the New South Wales government defending a case brought by stipendiary magistrates who had not been offered new positions as

¹³⁴ See full quote in Chapter 6.2.2.

¹³⁵ Michael H McHugh, 'Tensions Between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567, 570.

magistrates when the old Magistrates Court was reorganised. Five of the magistrates initially brought an action against the Attorney-General's recommendation not to appoint them and were successful on the basis that they had not been accorded natural justice.¹³⁶ After this, the government introduced a new policy whereby the five magistrates had to compete against new applicants in a merit-based process, while their former colleagues were re-appointed. The magistrates again brought an action against the government, this time claiming they had a legitimate expectation to be treated in the same manner as their former colleagues.¹³⁷ Keith Mason recalled 'I will never forget the instructions I got in the Magistrates case', which don't bear repeating in polite company. They were to the effect that Mason must tell the Court, firmly, to keep out of the Executive's affairs. In this instance, the Executive was using the Solicitor-General to take messages from the Executive to the Judiciary when it was anticipated by government that the court had, or would, overstep its constitutional role.

The second instance Mason referred to was the 1960s case of *Tait v The Queen*,¹³⁸ where the Victorian government also used the Solicitor-General as a messenger to the courts, warning them to leave executive processes alone. The case itself involved an appeal against Robert Tait's death sentence on the basis of a common law rule that he could not be executed as he was insane. However, there was a question about whether this position had been overridden by legislation. The government won an appeal in the Court of Appeal, and it was announced that the execution would take place two days after the decision. There was then an application to the High Court for special leave to appeal. Three High Court justices, including Dixon CJ, flew to Melbourne to hear the matter.¹³⁹ Tait was to be executed the day after the hearing. Then Victorian Solicitor-General Henry Winneke appeared for the government with instructions to finalise the matter as quickly as possible.

Exchanges between Winneke and Dixon CJ reveal the tensions between the government's position and the Court's desire to see justice done in the particular case. Winneke seemed somewhat embarrassed by the government's instructions, but delivered them all the same. Winneke said in light of the postponement of the execution on a number of previous occasions, 'it is the considered view of those who are responsible for advising his Excellency

¹³⁶ *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.

¹³⁷ The magistrates were successful in the Court of Appeal: *Quin v Attorney-General (NSW)* (1988) 16 ALD 550; but unsuccessful on appeal to the High Court: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

¹³⁸ *Tait v The Queen* (1962) 108 CLR 620. See also Creighton Burns, *The Tait Case* (Melbourne University Press, 1962), the Appendix which extracts the full Transcript of Proceedings in *Scott v The Queen; Tait v The Queen* (High Court of Australia, 31 October 1962).

¹³⁹ Burns, above n 138, 132.

in this State that it is essential in the public interest that this matter should be finalised.’¹⁴⁰ Dixon CJ responded, ‘When you say it to this court, you are saying it to a court which has supreme jurisdiction in Australia, and in effect saying, “Well, even if you want time to consider this case, we will not give it”. Is that what it means?’¹⁴¹ Winneke took a step back, indicating that the Executive would comply with any order made. When the Court did make the order staying the execution of Tait pending the disposal of the court proceedings and Dixon CJ asked whether the Court had Winneke’s undertaking that that would ‘be enough’ to stop the scheduled execution, Winneke could give no absolute assurance and suggested the Court make an injunctive order.¹⁴² Eventually the Court made a further order, restraining the Chief Secretary and the Sheriff and his deputy or deputies from carrying out the execution. This, it seemed, would ‘be enough’.¹⁴³

The Solicitor-General in these instances is used as a messenger from the Executive to the courts but, as Winneke’s position demonstrates, the officeholder retains his obligations to the administration of justice and the court itself. As such, the Solicitor-General is well placed to act as a respectable and fair conduit during these encounters.

6.4.2.2 The Solicitor-General carries the message back

In 2001, David Bennett, the Commonwealth Solicitor-General, found himself in the difficult position of being at the interface between the Judiciary and the Executive in the politically sensitive arena of immigration. This time, the courts wanted the Solicitor-General to take a message back to the Executive regarding its behaviour and what they saw as a perceived threat to the administration of justice by the courts.¹⁴⁴

After the Howard Liberal/National Coalition government’s strong stance against allowing the rescued asylum seekers onboard the Norwegian tanker, the *M V Tampa*, to disembark on the Australian territory of Christmas Island, the Parliament passed significant amendments to the *Migration Act 1958* (Cth). Among these was the insertion of a privative clause that attempted to remove judicial review of decisions made under the Act with few exceptions.¹⁴⁵ However,

¹⁴⁰ Ibid Appendix A, Transcript of Proceedings *Scott v The Queen; Tait v The Queen* (High Court of Australia, 31 October 1962), 174.

¹⁴¹ Ibid 174.

¹⁴² Ibid 180.

¹⁴³ Ibid 181.

¹⁴⁴ Interview, Keith Mason.

¹⁴⁵ *Migration Legislation (Judicial Review) Act 2001* (Cth) which inserted s 474 into the *Migration Act 1958* (Cth), which stated a ‘privative clause decision’ could not be challenged by any means.

the Federal Court approached the interpretation of the privative clause in a very restrictive manner, and therefore continued to review and overturn many migration decisions. Then Minister for Immigration, Philip Ruddock, told the media on 30 May 2002:

What we are finding is that, notwithstanding that legislation, the courts are finding a variety of ways and means of dealing themselves back into the review game. And what I have said to the Parliament is, look, we've passed this legislation, this was a decision of the Parliament. The High Court of Parliament is saying decisions of the Tribunal should be final and conclusive and if we need to give the court some further advice we may need your support again.¹⁴⁶

On 3 June 2002, the Solicitor-General, representing the Minister, defended a case in which the privative clause was challenged before the Full Federal Court. Black CJ made it clear that the Court was infuriated by what they saw as impropriety in the statements of the Minister:

Despite these statements I have not previously responded to any of them publicly. The most recent statement however raises a new issue since it would appear that it could only refer to the issues before the Court on these appeals – appeals to which your client is a party. ... The statement was made only a matter of days before the date fixed weeks ago for the hearing of the appeals. You would of course know Mr Solicitor that the Court is not amenable to external pressures from Ministers or from anyone else whomsoever, but we are concerned that members of the public might see the Minister's statements as an attempt to bring pressure on the Court in relation to these appeals to which he is a party.¹⁴⁷

Black CJ then called upon the Minister to explain himself, through the Solicitor-General, the next day in court. With the possibility of a finding of contempt of court for the Minister arising, the Solicitor-General responded the next day by reading from a statement that expressed the regrets of the Minister to the Court, claiming that his comments had been misinterpreted, that they had been aimed at the Opposition and not the Judiciary, and there was no intention to place any pressure on the courts.¹⁴⁸ Further, the Minister said that he respected 'the fundamental importance of the independence of the Judiciary and

¹⁴⁶ Extracted in Frank Brennan, 'The Law and Politics of Human Rights in an Isolated Country without a Bill of Rights' (Sir Ronald Wilson Lecture delivered at Perth, 12 May 2003).

¹⁴⁷ Transcript of Proceedings, *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, (Full Court of Federal Court of Australia, (N265 of 2002), (N282 of 2002), (N399 of 2002), (V225 of 2002), (S84 of 2002), Black CJ, Beaumont, Wilcox, French and Von Doussa JJ, 3 June 2002).

¹⁴⁸ Australian Broadcasting Corporation, 'Ruddock expresses 'regret' over court comments', *ABC News* 4 June 2002.

constitutionally entrenched principle of the separation of powers.¹⁴⁹ The Federal Court chose not to pursue the issue any further.

In the predominance of cases, relations between the Executive and the Judiciary are harmonious and the judges welcome and seek the assistance of the Solicitor-General as the Executive's representative. However, on occasion, the tensions in the constitutional relationship between these two branches of government are clearly evident. During these periods, it is natural that the Solicitor-General will be the sometimes reluctant interface between the conflicting interests. The office is uniquely positioned: loyal to the government as counsel, with overarching obligations to the court as a legal professional. As each of the examples illustrate, it is through the Solicitor-General with his or her mutual obligations that the tensions have always been resolved in a measured and respectful manner.

6.4.3 The Solicitor-General and the High Court's jurisprudence

Much academic literature has been dedicated to the subject of the influence of the Solicitor-General in the US over the Supreme Court's jurisprudence.¹⁵⁰ Anecdotally, similar ideas exist in Australia surrounding particular Solicitors-General – most notably former Commonwealth Solicitor-General Maurice Byers¹⁵¹ – but no evidence to suggest that the Solicitor-General operates as a 'cue' to the High Court (or any court), or enjoys any greater success rate than other Senior Counsel.¹⁵² Former Commonwealth Solicitor-General Gavan Griffith wrote:

It has been suggested that the American counterpart is the Tenth Justice of the United States Supreme Court. Similar influence cannot be claimed for the office in Australia, although as the senior counsel for each government in the federation, the Solicitors-General enhance the quality of practice in public law, and contribute to the depth and continuity of constitutional arguments presented for governments to the High Court.¹⁵³

¹⁴⁹ Benjamin Haslem, Barclay Crawford and Sophie Morris, 'Ruddock Regrets and Party Applauds', *The Australian* 5 June 2002.

¹⁵⁰ See, eg. Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Temple University Press, 1992).

¹⁵¹ Michael McHugh, 'Speech in Honour of Maurice Byers' (Speech delivered at the Dinner in Honour of Maurice Byers on behalf of the Australian and New South Wales Bar Associations, 8 February 1984), in National Library of Australia, 'Papers of Sir Maurice Byers' (1975-1999); Interview, Patrick Keane.

¹⁵² Although in Western Australia it was perceived Crown Counsel was not given the same respect and consideration as the Solicitor-General; it was even said the court would give particular attention to a Solicitor-General's submissions. Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3436 (Court). However, the Crown Counsel, Ronald Wilson, was immediately appointed Solicitor-General. Any effect this had on the respect given to him in the court is doubtful.

¹⁵³ Gavan Griffith, 'Solicitors-General' in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007).

Former Prime Minister Gough Whitlam wrote that Byers' advocacy 'was central to my government's success in the High Court'.¹⁵⁴ However, the myth of Byers' influence was not believed as strongly by some participants.¹⁵⁵ Anthony Mason, who sat on the High Court through much of Byers' tenure, disagreed with the proposition that Solicitors-General had 'influence' over the jurisprudence of the Court. Another participant commented that the proportionate success of Byers had more to do with his 'singing from the same song sheet' as the Mason Court than his particular skills as Solicitor-General.¹⁵⁶ At least one Solicitor-General was humble about his ability to influence the Court's trajectory in constitutional jurisprudence.¹⁵⁷

While perhaps not translating to 'influence', there was definitely a level of respect that many Solicitors-General earned before the Court. Anthony Mason believed it advantageous for the Court to have a Solicitor-General appearing before them with a broader vision of how the Constitution fits together, and an ability to develop that consistently through cases in the Court. Byers perhaps epitomised this. Similarly, former Commonwealth Attorney-General and Minister for Justice Duncan Kerr believed that a 'hired gun', advancing any argument that may help an individual case, diminishes respect for the polity.¹⁵⁸ Former Victorian Solicitor-General Pamela Tate also said she believed that as a repeat player, every time she appeared before the Court 'your integrity is on the line'. The consequences for losing the respect of the Court are enormous: 'they won't trust you, they won't rely on you'.

Former New South Wales Solicitor-General Keith Mason indicated that the SCSG would often indirectly influence the direction of the High Court by shaping its constitutional docket. The SCSG would monitor the constitutional cases coming through the courts:

And there were discussions about, well, that is not a suitable vehicle, we ought to slow that one down, and speed that one up, so as the right case would present itself and be argued. ... From a legal point of view, this case is a better vehicle than that. Or

¹⁵⁴ Gough Whitlam, 'Whitlam Era' in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007) .

¹⁵⁵ See, eg, Interview, Geoffrey Davies.

¹⁵⁶ Interview, Ian Callinan.

¹⁵⁷ See, eg, Interview, Chris Kourakis; note also comments of Gavan Griffith (see further discussion at Chapter 6.2.2.2).

¹⁵⁸ See also Interview, David Bennett (AGS); Interview, Thomas Pauling.

we would discuss sometimes, this case ought to be left where it is, or ought to be lifted into the High Court to become the vehicle for ... deciding that point.¹⁵⁹

This is an example of procedural, rather than substantive, influence.¹⁶⁰

In summary, there was a broad consensus in the interviews that the idea that Solicitors-General have particular ‘influence’ over the trajectory of the High Court’s jurisprudence through their submissions was simply unproven in Australia. While Solicitors-General were aware that they ought to maintain good relations with the court, this was simply prudence of repeat players before the court, and not because they thought that if they did so, they may stand better chances of success.

6.5 Discussion: the Solicitor-General as advocate

The first section of this chapter presented participants’ perceptions of the Solicitor-General’s advocacy function. Consistently with my arguments in Chapter 4.3.1.3, the Solicitor-General’s function as an advocate is, in many respects, perceived to be the same as an advocate for any client’s cause. There was little consensus that the Solicitor-General had significantly greater professional obligations in his or her relationship with the court, or any greater influence with the court, than any other Senior Counsel appearing before it.

From this standard position, subtle distinctions appeared in many participants’ views, demonstrating that the true picture is more complex. The Solicitor-General’s conduct of litigation, including making determinations and recommendations about interventions in constitutional matters, and the development of submissions, is not closely monitored by government. The discretion afforded to the Solicitor-General is even beyond the traditional forensic judgment enjoyed by the barrister. The Solicitor-General advocates for the government’s interests, and often these interests equate to the protection of executive and legislative power. In cases when this is a singular interest to protect, the Solicitor-General is generally trusted by the government to determine how to do so. However, in other cases the government’s interests may be difficult to determine because the protection of government power must be balanced against competing constitutional principles. In such circumstances, the Solicitor-General is relied upon to advise the government on the intersection of

¹⁵⁹ See also John McDonnell, ‘Special Committee of Solicitors General Meeting’ (Secretary, Special Committee of Solicitors-General, 18 October 1996) 1, where, for example, the Committee discusses whether to ‘defer’ the challenge to *Ha v Lim* to enable the case of *Jarpab* to ‘catch up’.

¹⁶⁰ Seth P Waxman, ‘Foreword: Does the Solicitor General Matter?’ (2001) 53 *Stanford Law Review* 1115, 117-18.

constitutional principles, but the final decision ought to be made by the Attorney-General as the accountable Minister. Because the Solicitor-General is largely left alone to conduct constitutional litigation for the Crown, it is often incumbent on the officeholder themselves to identify these cases. The findings therefore present a paradox which tests the hired gun metaphor in its application to the Solicitor-General even as an advocate.

The US institutional arrangements demonstrate that it is not imperative that the functions of adviser and advocate are combined in a single office.¹⁶¹ In Australia, many functions of the Law Officers have been separated. The ministerial function remains with the Attorney-General, the prosecutorial function now rests with the DPP, and the legal advocacy and advisory functions largely with the Solicitor-General and other government lawyers. This has been driven by the identification of the different focus of each: as a Minister, the Attorney-General is closely and almost exclusively attuned to politics; the DPP is given autonomy from political influences to make independent determinations about the public interest in the course of prosecutions; and the Solicitor-General is given independence from politics as a pre-eminent legal expert. But within the Solicitor-General's role there is a need to exercise independent judgment as an adviser (independence that John Edwards referred to as being of 'the same degree' as that required in relation to prosecutions)¹⁶² and also to act on the instruction of the political Attorney-General as an advocate. What are the implications of the fusion of the two functions under the Australian model for the office's role?

In the US, the division of the two functions between the Office of Solicitor-General (OSG) and the Office of Legal Counsel (OLC) was driven by practicalities: the OSG simply did not have time to continue attending to advisory matters. But it has subsequently been justified on the basis of the distinct ethical frameworks relating to the two functions and their different emphasis on independent judgment. The 2004 memorandum drafted by former members of the OLC in response to the controversy over the Torture Memos, emphasised the importance of maintaining the delineation between the functions, not allowing the advocacy framework to infiltrate into the advisory function.¹⁶³ Two justifications underpin this argument. First, it reduces the potential confusion for the lawyer between the functions and thus ensures against a lawyer employing any reasonably available legal argument in the advisory function as opposed to the *best* legal interpretation available. Secondly, and most importantly, it reduces

¹⁶¹ See Chapter 2.5.

¹⁶² John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 190.

¹⁶³ *Principles to Guide the Office of Legal Counsel* (21 December 2004). See discussion in Chapter 2.5.2.

the possibility that those in government will confuse advice provided in the course of advocacy to defend, *post-hoc*, government action, with independent advice given on proposed government action.

There have been warnings in the US that it is the combination of the functions, with their distinct ethical guidelines, that has led to certain instances of unethical lawyering (particularly the controversy over the Torture Memos).¹⁶⁴ This comparative scholarship raises the question for Australia about whether the institutional structure should separate the functions, guarding against the type of confusion and contamination observed in the US.

While this thesis has demonstrated the two functions are differently perceived, there is little evidence that in practice there is detriment being caused because of their fusion. For example, there is no evidence that Solicitors-General have inappropriately advised government in an advocacy framework; or that government has interpreted advice provided in an advocacy context as containing not simply a legally available argument, but the best view of the law.

There was disparity between the views of Attorneys-General and Solicitors-General as to whether the Solicitor-General's legal reasoning process ought to take into consideration the political objectives of the government.¹⁶⁵ Many Solicitors-General agreed that part of their job as adviser was to assist the Executive to achieve its policy objectives; but disagreed with the position of some Attorneys-General that this meant they would accommodate these goals in any way into their legal reasoning. However, there was no evidence that this disagreement had led to the contamination of the Solicitor-General's advice by an advocacy-driven model.

One exception to this conclusion may be former Commonwealth Solicitor-General Maurice Byers' advice allegedly provided to a number of Ministers in the Whitlam Cabinet (including the Attorney-General). He advised that the proposition that a particular loan fell within the definition of a 'loan for temporary purposes' was 'arguable'. One participant raised a question as to whether this advice misunderstood the Solicitor-General's obligations in the advisory context where the government had not yet taken action, providing instead advice appropriate for an advocacy framework.¹⁶⁶

While there is evidence that there is currently no detriment being occasioned by the fusion of the two functions, this is contingent on those in the office exercising their functions properly.

¹⁶⁴ See further discussion in Chapter 2.5.2.

¹⁶⁵ See Chapter 5.3.1.

¹⁶⁶ See further discussion of this in Chapter 5.2.1.2.

However, any advantages sought by the separation of the two functions in Australia must be considered against a weight of evidence as to the advantages of keeping the functions fused. The advocacy work, particularly in the High Court, was considered by many to be higher profile than the advisory work, thus providing an incentive to potential candidates to take the position. More fundamentally, many participants stressed that a deep knowledge of precedent together with an understanding of the trajectory of the current High Court was paramount for a good adviser. That understanding is grown out of regular exposure to the Judiciary and engagement with them during advocacy.

Finally, many participants emphasised that the Solicitor-General as an advocate is not merely akin to a private barrister in that same role. As an advocate the Solicitor-General is expected to provide a coherent, over-arching narrative to the constitutional position of the polity as presented to the court. In many cases, the Solicitor-General is given little guidance and instruction, leaving the actual position of the government to the Solicitor-General's discretion and independent judgment. The Solicitor-General is also involved in the decision-making process in relation to constitutional interventions across many jurisdictions. So the Solicitor-General as an advocate is often not simply advocating on instruction. In this context, there are significant advantages in having the same individual perform both the advisory and advocacy functions. The officeholder will have to consider the same questions about the intersection of constitutional principles in both functions. Having these functions vested in the same individual increases the likelihood of coherency and consistency in the government's position.

There are other ways, short of separating the two functions, of guarding against the fears of confusion and contamination between the functions. The 2004 memorandum drafted by former members of the OLC recommended that if the OLC did advise on the availability of legal arguments to defend actions already taken, this must be clearly indicated so the advice was not mistaken for an authoritative statement of the law.¹⁶⁷

In summary, despite what may appear as large theoretical divergences between the advisory and advocacy functions, seen in its extreme in the US scholarship, the Australian Solicitor-General's advocacy and the advisory functions in practice have much in common. This challenges the statutory position that was explained in Chapter 4.3 that the levels of independence between the advisory and advocacy function ought to differ dramatically. In

¹⁶⁷ *Principles to Guide the Office of Legal Counsel*, above n 163, 6.

each function, the Solicitor-General exercises a large amount of de facto independence. In each function the Solicitor-General may have to form an opinion about the proper place of the government in the constitutional system.

My findings also demonstrate that the nature of the government as part of the larger state entity, closely related and sharing interests with the judicial arm, influenced the relationship between the Solicitor-General and the Judiciary. There was some evidence to suggest the High Court, particularly in constitutional matters, actively sought assistance from the Solicitor-General as to the government's position on legal issues and the potential ramifications of progressing the law in particular directions.

6.6 The Solicitor-General and the public interest

Chapter 5.3.3.3 explained that some participants accepted that within the advisory function (and even the advocacy function), the Solicitor-General has a role to advise upon broader public interest principles, including the 'core government principles' relating to the rule of law, representative democracy, and the protection of individual rights and liberties. However, no participant accepted the broader function to act in the public interest that has arisen in the US scholarship.¹⁶⁸ Three reasons emerged for this. The first was an acceptance of the democratic legitimacy of the government. The second was the modern Solicitor-General's lack of responsibility to Parliament. And the final reason was the understanding of the role of counsel to operate as an agent of the client.¹⁶⁹

Former South Australian Solicitor-General Chris Kourakis dismissed an independent role to act in the public interest:

That is a complete fiction, and that is a fiction that designed to allow people to implement their personal views, that they say it is not my personal view, it is the public's view, or the public interest. ... But it is often put that we are the custodians of the wider public interest: governments come and go but we will do what the right thing is.

Former New South Wales Solicitor-General Keith Mason outlined why this desire to push a perception of what is right and fair may arise. He said it is a tension:

¹⁶⁸ Under the Public Interest Advocate type, see further Chapter 2.5.2.

¹⁶⁹ Interview, William Bale; Interview, Trevor Griffin; Interview, Martin Hinton; Interview, Thomas Hughes; Interview, Patrick Keane; Interview, Philip Ruddock.

which I think we are all slightly aware of. But, ... whether it is a product of the tenure that most [Solicitors-General] enjoy, or the status of the office, or the de facto durability of the office, as is certainly the case in New South Wales, I suppose it has the capacity to make a Solicitor-General think, well I am the real embodiment of what is right, and what is more, I don't have a political axe to grind like those people, so why don't they listen ... to me.

This unanimous consensus is entirely consistent with the intention behind the statute, and my conclusions in Chapter 4.6.2 about the proper interpretation of the legal position. That is not to say that participants thought that the role of the Solicitor-General did not contribute, in many other ways, to advancing the public interest. What participants refused to accept, however, was that the Solicitor-General may be able to act independently in what are essentially political matters. While many participants accepted that the Solicitor-General has an important role in *advising* the government about the appropriate position of the government in these matters – when they arise both in the development of policies and also in defence of the governments interests in the courts – this role is always circumscribed because final responsibility and decision remains with the Attorney-General or the relevant Minister.

6.7 Conclusions

Through individuals' views and experiences, Chapters 5 and 6 presented a lived portrait of the Solicitor-General's two core functions. Chapter 5 demonstrated that one of the key assumptions underlying the efficacy of the advisory function was its independence from the Executive. This chapter demonstrated that while the Solicitor-General must act on instructions, in practice the officeholder will often exercise a great deal of independent discretion in determining and advising on the appropriate position of government in the courts. Chapter 7 analyses participants' perceptions about this fundamental facet of the office.

7 INDEPENDENCE

7.1 Introduction

I'm independent but I'm not.¹

Independence is many things to many people.²

Independence is a 'recurring theme' in all analyses of the Law Officers.³ Participants commented that the relevance of the office rested on its independence.⁴ It is independence that makes all legal advisers relevant; but in the context of the Solicitor-General, as the final legal adviser to government, the office's independence is a dimension of added importance. Further, the recognition of the democratic legitimacy of government and the need for public accountability provides an additional layer of complexity to the question of the Solicitor-General's independence.

Traditionally, the 'independence' of the Law Officers was the touchstone by which individual officers could resolve tensions between conflicting interests – the law, politics and the public interest. Chapter 2 canvassed the diversity of opinion in international scholarship as to the best manner by which to facilitate independence in the office. Several scholars concluded that regardless of the constitutional and legal frameworks put in place to further an officeholder's independence, its protection rested on the internal ethics and fortitude of the individual.⁵

Chapter 3.4.4 demonstrated that in Australia the intention behind the establishment and reform of the Solicitor-General's statutory position was to shield the officeholder from political influences by removing the office from the ministry and the public service.⁶ In doing

¹ Interview, Martin Hinton.

² Interview, Peter Garrisson.

³ John L J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 11.

⁴ Interview, Robert Ellicott; Interview, Stephen McLeish. See also William M C Gummow, 'The 2005 Sir Maurice Byers Lecture: Statutes' (Summer 2005/2006) *Bar News* 30, 30.

⁵ See, eg, John L J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 67; Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 162-5. See also Cornell W Clayton, 'Introduction: Politics and the Legal Bureaucracy' in Cornell W Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 18.

⁶ See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 1 March 1972, 3563 (L J King, Attorney-General); Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 1983, 825 (Geoffrey Pearsall, Minister for Tourism); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1478 (Kenneth McCaw, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684 (Thomas Mitchell, Attorney-General).

so, the objective was largely to remove the tension that exists in the British tradition whereby individual officeholders are expected to be able to take off their ‘political hats’ when they come to providing legal opinions to the government.⁷

In Chapter 4.3.1.3 I argued that the creation of the Solicitor-General as counsel for the Crown impliedly introduced a dichotomy of independence between the zealous pursuit of the Crown’s cause as an advocate acting on instruction of a responsible Minister of the Crown, and the independence required as an adviser to come to the best legal interpretation. Participants identified independence as one of the assumptions that underpins the office’s capacity to fulfil its advisory function in a manner that progresses the rule of law.⁸ This is consistent with my conclusions about the legal framework. However, my findings in Chapter 6 challenge the metaphor of a hired gun for the Executive in the advocacy function, indicating that the government often relies heavily on the Solicitor-General’s independence and expertise to develop the government’s position before the court in a manner which considers the enduring interests of the Executive and its proper position in the overarching constitutional structure. Thus, the office must also exercise a great deal of *de facto* independent discretion in determining the proper position of government in litigation.

In this chapter, I first explore the mechanisms that participants perceived existed to protect the Solicitor-General’s independence. Consistently with previous scholarship, my findings reveal a focus upon individual’s professional competence and ethical commitment to probity and independence, rather than emphasising the formal statutory mechanisms designed to reduce the strength of inappropriate external pressures on an officeholder. Finally, I consider participants’ experiences of the respect afforded to the independence of the Solicitor-General. My final discussion focusses on the finding that independence is predominantly protected by an individual’s commitment, and the two different approaches to independence already introduced in Chapter 5: the ‘autonomous expert’ and the ‘team member’.

7.2 Protecting the Solicitor-General’s independence

The following analysis of the interview responses considers how participants thought the independence of the Solicitor-General was protected. The responses reveal that participants were predominantly concerned with ensuring that the Solicitor-General was able to operate absent of inappropriate *external* influences. There was particular focus on inappropriate

⁷ See Lord Dilhorne extracted in John L J Edwards, *The Attorney General*, above n 5, 200.

⁸ Chapter 5.2.2.4.

pressure from the client to achieve short-term political objectives. Because the client is the political Executive, independence from the client is intricately associated with independence from political pressures. The focus of participants on the absence of external pressures is consistent with the observations made in Chapter 4.3.1.1 that because external pressures are more overt, they are often the focus of regulatory regimes and ethical standards aimed at protecting independence.

While concern over an absence of external influence was predominant, the responses do demonstrate cognisance of the necessity to ensure the Solicitor-General had several *internal* qualities.⁹ These were usually expressed in terms of the ‘ability’ and ‘skill’ to make difficult determinations about the law, particularly when the law was not necessarily clear and unequivocal. Also prevalent was an emphasis on personal integrity. Some participants noted that the Solicitor-General was in a unique position to provide to the government advice on where the public interest may lie, which implied a capacity to make fine distinctions about this.

The vast majority of responses focused on an individual’s professional competence and commitment to ethical behaviour as the best way to ensure the two facets of independence, that is, to ensure against inappropriate external influences as well as to foster capacity. Former Victorian Solicitor-General Henry Winneke had said as early as the 1950s in relation to security of tenure, that ‘The right man would need none’.¹⁰ In contrast to my findings, judicial pronouncements on how to protect the independence of government lawyers have focussed upon structural protections.¹¹ Protections offered by the statute, and other written or structural protections, were not seen by participants as irrelevant, but more symbolic of normative ideals than influential in practice. Ideally then, independence should be protected by both. The next section of the chapter considers first participants’ perceptions of the protection provided by professional competence and commitment to ethical behaviour before turning to the importance participants placed on statutory and other structural mechanisms.

⁹ See, eg, Interview, Trevor Griffin.

¹⁰ Robert Coleman, *Above Renown: Biography of Sir Henry Winneke* (Macmillan Company, 1988) 160.

¹¹ See Suzanne Le Mire’s analysis of a number of Australian and foreign cases in the context of legal professional privilege and in-house counsel that draws the conclusion that the courts rely heavily on the ‘relational barriers’ aspect of independence, with only occasional recognition of capacity: Suzanne Le Mire, ‘Testing Times: In-House Counsel and Independence’ (2011) 14(1) *Legal Ethics* 21.

7.3 Professional competence and independence

When participants referred to the individual's professional competence and commitment to ethical behaviour, a number of different concepts were incorporated. The individual's experience and expertise at the time of appointment was important, as was their commitment to professional independence. Some participants saw the trappings of independence associated with barristers as important devices to assist in retaining professional independence. Some spoke of the importance of an individual's capacity to see the law in its broader social context.

7.3.1 Professional qualifications, experience and expertise

Overwhelmingly, participants believed it was fundamental that an appropriately qualified and experienced person was attracted to the position of Solicitor-General.

This appeared to be for two reasons. First, professional competence ensured an understanding of professional ethical obligations. Many participants emphasised the importance of the Solicitor-General's membership of the Bar in protecting independence, with the professional training, understanding and commitment to ethical standards that entails.¹² Dean Wells, former Queensland Attorney-General, referred to his confidence in the Solicitor-General's subscription to the ethics of the Bar, as 'a man of the law ... in all its majesty and independence of thought.'¹³

Former South Australian Solicitor-General John Doyle explained that for him, the independence of the Solicitor-General did no more than refer to 'the independence that applies to any barrister'.¹⁴ Maintaining this same level of independence may, however, be slightly more complicated for the Solicitor-General:

But the issue comes in a different guise in relation to a Solicitor-General. ... [T]hat is because the Solicitor-General has an ongoing relationship with the client, may well have chambers in premises occupied by the client, and by some may be seen as more than a legal advisor, and as someone who helps formulate policy. It is important that a Solicitor-General makes it clear that he or she provides the same independent and objective advice to the Executive Government that any barrister provides to the client.¹⁵

¹² Interview, Gavan Griffith; Interview, Robert McClelland; Interview, Anthony Mason.

¹³ See also Interview, Stephen Gageler; Interview, Pamela Tate.

¹⁴ Letter from John Doyle to Gabrielle Appleby, 19 July 2012.

¹⁵ Ibid.

Not everyone accepted that the Solicitor-General enjoyed the same level of independence as those at the private Bar. Former New South Wales Solicitor-General Keith Mason explained that when he was appointed Solicitor-General, the Bar Association did not recognise public barristers, including the Solicitor-General, as *independent* professionals. During his tenure he struggled hard to gain acceptance with the Bar Association that public barristers *did* exhibit the same independence as private barristers. It was a fight he eventually won.

Secondly, professional competence also ensured an individual had confidence in their opinion and were able to resist inappropriate pressures to change it. Keith Mason explained:

I don't think the tenure idea is a good thing, frankly. I don't think being tenured, gives your advice the status of being a judge, or gives you the security to give fearless advice, it is not a consequence of tenure, it is a consequence of your own value system, and your own confidence in your opinion.¹⁶

The statutory qualifications for appointment emphasise that the government is looking for a highly competent legal professional.¹⁷ They ensure the government is assisted by a qualified legal mind; but they also speak to a candidate's capacities. In New South Wales, when the Solicitor-General Bill was introduced in 1969, the Attorney-General indicated that the qualifications were that the appointee be one of her Majesty's counsel 'who has established his eminence and integrity.'¹⁸

Despite this focus, many participants noted the difficulty governments had encountered when trying to attract a qualified appointee of appropriate status and integrity. At the Commonwealth level, for example, when the statutory position was established in 1964 the government encountered difficulties attracting established Senior Counsel to the position. In finalising the pension entitlements for the position, the Cabinet 'recognised that the views of prospective appointees might also need to be taken into account'.¹⁹ The first two appointments offered were rejected.²⁰ Eventually, Anthony Mason, an established junior, was

¹⁶ See also Interview, Catherine Branson; Interview, Walter Sofronoff.

¹⁷ See further discussion of the qualifications for appointment in Chapter 4.2.1.

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1478 (McCaw).

¹⁹ Commonwealth, *Cabinet Decision 448* (27 August 1964).

²⁰ Interview, Robert Ellicott; Interview, Gavan Griffith; Interview, Anthony Mason. One was John Kerr, the other was a silk from Victoria. Ninian Stephen was also listed to be approached in the event that Anthony Mason did not accept the appointment: *ibid*.

approached and accepted the appointment; he took silk at the request of the government at a special ceremony just prior to his appointment.²¹

Upon Mason's retirement in 1969, the government again encountered difficulties attracting candidates. A Cabinet Submission from the Attorney-General dated 19 March 1969 noted:

It has been suggested to me that the conditions of appointment would be much more attractive and more likely to attract the kind of person we want if the provisions of sub-section (4.)²² applied to a Solicitor-General who had served for at least seven years, and who was not prepared to accept a further appointment.²³

The amendments were proposed 'to attract a particular man'.²⁴ Before the matter was finalised, the candidate who the Attorney-General was courting indicated he did not intend to accept the appointment, even if the amendment could be secured.²⁵ Within days, another Queen's Counsel, Robert Ellicott, accepted the appointment and the proposed amendments were dropped.²⁶

In South Australia, similar problems were encountered. Upon the retirement of Brian Cox, one of the leading Queen's Counsel at the South Australian Bar, John Doyle, was approached to take the position. He recalled that he initially declined as he did not want to leave his established practice at the Bar. It was not until he was approached for a second time that he accepted.

In a system that relies so heavily on an individual officeholder's competence and ethical commitment to probity and independence, the quality of candidates becomes paramount. The role of remuneration packages in attracting the best candidates to public positions is an eternal question of public policy.²⁷ It has not been ignored in relation to the Solicitor-General. The constant amendment of the remuneration and pension entitlements reflects an awareness

²¹ Interview, Anthony Mason.

²² This subsection provided that if a Solicitor-General was appointed for a 7 year term but not *offered* re-appointment and did not qualify for a pension, he was to be paid a lump sum payment of double his annual salary. If the Solicitor-General had been *offered* re-appointment for a period of at least five years, or sufficient so that he was eligible for the pension, the eligibility for this lump sum payment was removed.

²³ Commonwealth, *Cabinet Submission, Nigel Bowen, Attorney-General* (19 March 1969).

²⁴ Commonwealth Cabinet Office, *Note for File: Amendment to the Law Officers Act* (22 April 1969).

²⁵ *Ibid.*

²⁶ Commonwealth, *Appointment: Cabinet Minute: Decision No 956* (23 April 1969); Letter from E J Bunting, Secretary of Attorney-General's Department, to Nigel Bowen, Attorney-General, 16 May 1969; Commonwealth Cabinet Office, *Note for File: The Solicitor-General* (16 May 1969).

²⁷ See, eg, statement of this dilemma in Remuneration Tribunal (Commonwealth), *Annual Report 2007-2008* (Commonwealth of Australia, 2008) 1.

of the importance of the package to attracting candidates. In Queensland and Western Australia, one of the reasons for the inclusion of the right to private practice was to attract high quality candidates to the position.²⁸ When asked whether he would have accepted the position without the right, Queensland Solicitor-General Walter Sofronoff responded, ‘No I wouldn’t have; not a chance’.

7.3.2 Barristerial trappings

Many participants emphasised the desirability of replicating the processes of the private Bar so as to create distance between the office and the government, and reinforce their commitment to their professional obligations.²⁹

Former Victorian Solicitor-General Pamela Tate was very wary to ensure she operated in a manner analogous to that of a private barrister and kept appropriate distance – professionally and also physically – from the client. She was informed by the experience of Hartog Berkeley, who had been Solicitor-General during the Cain and Kirner Labor governments. She described Berkeley as ‘moving to government’: he had chambers in the Premier’s Department and the administrative arrangements order showed that the Solicitor-General fell under the responsibility of that department.³⁰ Responsibility for the office returned to the Attorney-General in 1992 with the election of the Kennett Liberal government.³¹

In contrast to Berkeley’s position, Tate emphasised the importance she placed on ‘actively protecting’ the independence of the office. After a brief period where she had chambers in the Attorney-General’s Department, she moved back to private chambers on the other side of the city. This removed her from government, ensuring she was not privy to the ‘gossip, hearsay and innuendo’ within government, she did not get too close to the officers within government or the politicians, and she did not become part of the ‘internal ethos’. She developed a number of protocols that reinforced this: she would require legal issues to be highly formulated, crystallised, before they were brought to her. In many ways it was like preparing a matter for determination by a court. She was also wary of becoming involved too early in

²⁸ See further Chapter 3.4.3.

²⁹ Interview, Chris Kourakis; Interview, Robert McClelland; Interview, Pamela Tate; Interview, Dean Wells.

³⁰ *Administrative Arrangements Order (No 38) 1985 (Vic)*. See also Pamela Tate, ‘The Role of the Solicitor-General for Victoria’ (Speech Delivered at the University of Melbourne, 12 November 2003).

³¹ *Administrative Arrangements Order (No 114) 1992 (Vic)*.

legal issues that may arise in the development of policy because she believed this may compromise her independence in being the final determinant of the legal question.³²

As Tate explained, for some participants, one of the strongest symbols of the Solicitor-General's independence as a professional barrister was the maintenance of separate chambers. This physical separation symbolised the ethical separation between the barrister and the client.³³

Similarly, former Commonwealth Solicitor-General Stephen Gageler considered his physical separation from the Executive – not necessarily as part of the private Bar, but operating like a private barrister, separate from the client: 'I do not see myself as a member of the Executive. I see myself as occupying a separate, statutory, position ... symbolised in a sense by the location of my office in a court building.'³⁴

7.3.3 Beyond professional qualities: questions of politics

Many participants who were or had been Attorneys-General went further than simply looking at the professional qualities of candidates. They indicated that they were not seeking simply a Solicitor-General who was the best *technical* legal professional that they could find, but a legal professional who had the capacity to situate the law in a wider governance framework that broadly accorded with the viewpoint of their political party.

This was described in detail by former Queensland Attorney-General Rodney Welford, who appointed then Solicitor-General Patrick Keane to the Court of Appeal and Walter Sofronoff as Solicitor-General:

In selecting a Solicitor-General, and in the appointment of judges, it was important to me, and every Attorney-General might have their own view about what was important, but it was important to me, that you had one, high quality legal minds, but two, legal minds that had a willingness to be innovative with the law. That is, they were prepared to see the law as serving a public policy purpose, namely some higher concept of serving the public interest; and that they had an essential sense of the concept of social justice for example, and they saw the law operating as a vehicle for making a better society, rather than just operating in a vacuum.³⁵

³² See also discussion in Chapter 5.4.

³³ See also Interview, Geoffrey Davies; Interview, Barry Dunphy.

³⁴ The Commonwealth Solicitor-General's Sydney residences are in the Supreme Court building; his Canberra office is located in the Attorney-General's Department.

³⁵ See also Interview, Gareth Evans. When Evans was appointed Attorney-General, he inherited Maurice Byers as Solicitor-General, but Byers resigned soon after. Byers had been appointed by the Whitlam

Former Commonwealth Attorney-General Robert McClelland expressed a similar view, noting the importance first of the candidate's competency as an advocate, but in addition:

[Y]ou want someone ... who has got some view, in the case of a Labor government, a progressive view about how the Constitution should evolve. Now that is from a Labor government's point of view, and a conservative government may well have a different view depending on the person who holds the office.

Three points can be observed about those participants who held this belief. First, the two Attorneys-General who held this opinion were also those that sought the views of their Solicitors-General on the congruency between proposed government action and 'core government principles'.³⁶ Unsurprisingly then, the government's expectations of the Solicitor-General's role impacted on the types of internal capacities they sought in an appointee. In circumstances where the expectations were that the Solicitor-General continued to have an important role in advising the government on where the public interest lay, capacity to make fine distinctions and weigh potentially conflicting public law principles is pertinent.

Secondly, they were Attorneys-General who were or had been members of a Labor government. In contrast to the position of Labor Attorneys-General, the Attorney-General under the federal Howard Liberal-National Coalition government, Philip Ruddock, explained that he was particularly concerned that a Solicitor-General would not push a progressive agenda, and instead wanted to ensure that his Solicitor-General remained strictly in the confines of the law.³⁷

The divergence between views of Labor and Coalition Attorneys-General about Solicitor-General appointments is consistent with that in relation to judicial appointments. At its core it reflects a very different conception of the process of legal reasoning, contrasting progressive realist views that now embrace, in some cases, policy as a legitimate guide to judicial

Government. After Byers' first term expired, he was reappointed by the Fraser Government. However, he resigned after three years. Evans postulated that Byers was ready to retire after his first term, but took a second appointment and 'held on' to allow a Labor appointee to replace him. Evans said: 'although he was a good honest slave of the system... I think his instincts were on our side than the other side'.

³⁶ Chapter 5.3.3.3.

³⁷ In the US context, a similar comment was made by former Bush administration Attorney General Michael Mukasey, that government lawyers must ensure that they *only* 'do law': Michael Mukasey, 'The Role of Lawyers in the Global War on Terrorism' (2009) 32 *Boston College International and Comparative Law Review* 179, 181.

reasoning, with conservative views which continue to accept orthodox reasoning processes focussed on objective attainment of legal principle.³⁸

Finally, the trend identifiable among Labor Attorneys-General seems to be a relatively recent development, emerging in the second half of the twentieth century. Former Commonwealth Solicitor-General Anthony Mason believed that the relevance of political persuasion to appointment as Solicitor-General was a recent development, and could be traced to a belief in political circles that political persuasion may influence the legal advice received.³⁹

The idea that the political views of the Solicitor-General, or at least a shared sense of the purpose of the law and government with the Executive's political persuasion, were relevant in appointing a Solicitor-General, was rejected by many participants. Many thought political connections and views may be relevant but only in a limited way: they may act as a negative factor, in that affiliations with the opposite party may operate to disqualify a candidate;⁴⁰ or they may play a relatively innocuous part in appointment in that it might make a potential candidate better known to the government.⁴¹

Some Solicitors-General recounted that when, during their tenure, a new government of a different political persuasion was elected, they spoke to the incoming Attorney-General about continuing in the position or resigning, to ensure the incoming government had confidence in the Solicitor-General.⁴² Other participants thought the practice brought with it perceptions that undermined the distance that was expected between the Solicitor-General and the Executive.⁴³ To consider resignation at a change of government would be to encourage an incorrect perception of the office. The lengths of the terms set by the statutes indicate it was intended for officeholders to serve governments which often would be of different political

³⁸ In relation to the different approaches to judicial appointment between the major parties, see Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 192-211.

³⁹ See further discussion in Chapter 5.3.1.

⁴⁰ See Interview, David Bennett (SG); Interview, Daryl Dawson.

⁴¹ Interview, John Doyle; Interview, Patrick Keane; Interview, Chris Kourakis.

⁴² Interview, Geoffrey Davies; Interview, John Doyle; Interview, Patrick Keane; Interview, Keith Mason.

⁴³ Interview, John Doyle (although he recalled having a conversation with the incoming Attorney-General, he did not think a practice of resigning upon a change of government should be implemented); Interview, Walter Sofronoff.

persuasions. While the Solicitor-General was no longer a public servant it was intended it would be a ‘non-political officer ... serving different governments in succession.’⁴⁴

The delicacy of the situation was highlighted in South Australia in the late 1970s. Malcolm Gray’s appointment as Solicitor-General in the final months of the Dunstan/Corcoran Labor government was viewed with resentment by the incoming Tonkin Liberal government, and Gray found himself largely starved of work because of political distrust.⁴⁵

There have been few allegations of appointments made on purely political motives. But there are inevitably dangers inherent in the closed nature of the appointment process in most jurisdictions (excepting the Commonwealth and Victoria).⁴⁶ One example serves to highlight these. In 2007, it was alleged that the Tasmanian Police Commissioner had disclosed official secrets to the Premier. One of the secrets related to a police investigation that was to be launched into allegations about an agreement between a private barrister, Stephen Estcourt, and the Premier. The alleged agreement was that if Mr Estcourt acted pro bono for former Deputy-Premier Bryan Green in criminal proceedings, Mr Estcourt would be appointed Solicitor-General (a post that was vacant at that time).⁴⁷ Even though the allegations were found to be untrue,⁴⁸ the event illustrates the potential danger in a closed appointment system for political influence to undermine the propriety of the appointment process. Underlining the gravity of the danger is the perception by many that it is the scrupulous ethical practice of appointees that ultimately guarantees the independence of the office.

Northern Territory Solicitor-General Michael Grant argued that the closed appointment system has advantages. It ensures all eligible candidates are considered and not only those willing to go through the ‘cattle call’ associated with formal selection panels. It also facilitates informal consultations that may be more likely to reveal an individual’s character and ethical soundness than a formal and structuralised process might.

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Snedden).

⁴⁵ Interview, Catherine Branson. See further discussion of freezing out in Chapter 5.2.2.3.2.

⁴⁶ See further explanation of the appointment process and the introduction of a merits-based system in the Commonwealth and Victoria in Chapter 4.2.1.

⁴⁷ See *Tasmania v Johnston* (2009) 18 Tas R 195; Maria Rae, ‘Top Cop Arrested Over Official Secrets’, *The Mercury* (Hobart), 13 October 2008.

⁴⁸ *Tasmania v Johnston* (2009) 18 Tas R 195, [8] (Evans J).

In some jurisdictions, political persuasion seemed to play no role at all.⁴⁹ This was particularly the case in Victoria, with its more open, merits-based appointment system which included an interview process before a selection panel. The process was first used with Pamela Tate's appointment in 2003. Former Victorian Solicitor-General Daryl Dawson, who sat on Tate's selection panel, noted that the Attorney-General at the time 'may have wanted someone else'. However, when he was provided with the recommendation of the panel 'he had to accept that, and did, and I must say did'.

The emphasis placed by participants on the professional qualities, ethics and experience in protecting the Solicitor-General's independence demonstrates that for the majority of participants, the importance of 'independence' in practice lay in the individual's capacity for independent judgment and their professional competence and commitment to ethical behaviour. While, as will be shown below, the structural barriers against inappropriate external pressures were not necessarily discounted, for many participants they, alone, would be insufficient to ensure the Solicitor-General had the necessary independence to perform his or her functions.

7.4 Statutory mechanisms that protect independence

Less emphasised by participants was the importance of the statutory mechanisms, particularly the protection of tenure that bears 'some resemblance to Chapter III' of the Constitution and judicial independence.⁵⁰ So little weight was placed on these mechanisms by some that a few participants indicated that they believed the statute contained no formal mechanisms to protect the independence of the office.⁵¹ For others, however, the statute was important.

The structural guarantees of tenure, remuneration and pension were seen as keeping at bay unwanted external influences – most particularly from the pressures that may be brought to bear by the client. Former Commonwealth Solicitor-General Stephen Gageler, for example, believed that what protected his independence was 'partly structural' in the sense of his fixed term and statutory office.⁵² For Northern Territory Solicitor-General Michael Grant, the importance of the statutory tenure was instrumental in him accepting the appointment. When

⁴⁹ See Interview, Michael Grant; Interview, Thomas Pauling.

⁵⁰ Interview, James Faulkner. See further Chapter 4.2 and the table of statutory provisions in Appendix E that set out the appointment term and removal process.

⁵¹ Interview, David Bennett (SG); Interview, David Bennett (AGS); Interview, Michael Lavarch.

⁵² See also Interview, Catherine Branson; Interview, Michael Grant; Interview, Stephen McLeish; Interview, Michael Sexton.

Grant was offered the position, he said he would only be prepared to accept the appointment without term (under the Northern Territory legislation the Solicitor-General can be appointed with or without term):⁵³

because I don't want to be put in a position where I am appointed for five years, and reliant on the good will of government for any sort of reappointment. I think that is entirely unsatisfactory. I think you need to be appointed, in these sorts of jobs, and the DPP's job, you need to be appointed either until the statutory retirement age, so without term, or appointed for a fixed period with no possibility of reappointment, to stop any sort of subconscious desire to please government in your advising.

It was the appointment without term, together with the security of tenure (as he could not be removed except on similar grounds to a judge),⁵⁴ that meant Grant felt 'entirely unconstrained by any sort of political influence'. These mechanisms ensured that government understood the Solicitor-General was independent, 'and they know that if they heavy you, there is nothing stopping you from making an issue of it.' It was, for Grant, the statutory structure that meant 'it is almost impossible either theoretically or in practice for you to be suborned in this job.'

Former South Australian Solicitor-General Chris Kourakis emphasised the importance of the Solicitor-General's tenure by reference to the Crown Solicitor's lack of similar statutory protections. For Kourakis, the Crown Solicitor could seek protection under the Solicitor-General's statutory tenure guarantees. He explained:

So a terrific safeguard for them in terms of independence, when they've got a tricky problem, when they're not sure whether they should just say outright don't do it, or to say look it is balanced, you can go ahead, but these are the risks, is that they come to me. ... [A]n advice which the government seeks from the Crown Solicitor can be referred by the Crown Solicitor to the Solicitor-General. Then you've immediately got that independence in terms of tenure, and that helps protect them.

In Victoria, the statute provides for a discretionary removal mechanism, so that the Solicitor-General's security of tenure rests on convention, if it exists at all. Victorian Solicitor-General Stephen McLeish referred to the position as a 'weakness in the Victorian legislation'.⁵⁵

⁵³ *Law Officers Act 1978* (NT) s 13(1).

⁵⁴ *Ibid* s 15.

⁵⁵ See also discussion of this point in Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 187-9.

Former Commonwealth Solicitor-General Anthony Mason believed the statute not only guaranteed independence, but also assisted in the perception of independence: ‘I think it provides more independence. Certainly *outwardly* there is a greater appearance of independence. But I think in truth, it also provides independence.’ Mason’s point that the statute provides the ‘outward’ perception of independence was taken up by James Faulkner, head of the Constitutional Policy Unit in the Commonwealth Attorney-General’s Department. He explained that while the statutory protection was important, it was not what one thought of as guaranteeing the office’s independence at a practical level:

In the same way the issue is there for federal judges: the fact is, they have an even stronger form of protection than the Solicitor-General. But one doesn’t think when fronting up to the High Court, it is lucky those provisions are there or I don’t know what I would think about what they’re going to say.

For Faulkner, the importance of the statutory provisions was not in the practical protection of the office’s independence but that they provided an opportunity to ‘articulate a ... normative proposition’ that ‘sends the right messages’. In a similarly symbolic way, former Victorian Solicitor-General Pamela Tate said that the statute, by providing the office with the same entitlements as a Supreme Court Judge, played a significant role in terms of understanding the position within government: she believed the statute gave the role of Solicitor-General a status and independence analogous to a Supreme Court judge.⁵⁶

7.5 Other structural mechanisms

In addition to professional obligations and commitment to ethical standards, and the more tangible (although less important for some) statutory mechanisms, participants drew attention to a number of other mechanisms that protect the office’s independence.

7.5.1 Acting beyond counsel: the Solicitor-General in politically charged and controversial functions

Many participants were alive to the fact that the independence of the office may be undermined by the engagement of an officeholder in politically charged activities that would go beyond the statutory functions of adviser and advocate. Former Commonwealth Attorney-General Michael Lavarch said:

⁵⁶ See also Interview, Peter Garrisson; Interview, Stephen McLeish.

if you could not do it you would be better off. It is just a bit messy. And ... those things invariably still provoke[] all sorts of interests and things. In my view it is better off to keep your Solicitor-General away from it so he doesn't attract slings and arrows.

To a large extent this reflects the position that the involvement of the Judiciary in questions around policy undermines the courts' independence from these influences and therefore the public's perception of judges as impartial arbiters.⁵⁷ By engaging in politically associated activities, the Solicitor-General would overtly reintroduce the tensions that historically existed in the British model of the Law Officers. In Australia, removing the Solicitor-General from the political realm of the ministry was intended to remove this tension and the inevitable controversies that resulted from relying simply on the officeholder's personal integrity to separate the office's political duties from the legal functions that were expected to be exercised with professional independence.

A significant example of the Solicitor-General's engagement in politically charged functions was the office's earlier involvement in decisions around prosecutions. Prior to the statutory creation of a DPP in the different Australian jurisdictions, the Solicitor-General was also responsible for the Attorney-General's prosecutorial functions. These mainly involved making recommendations as to decisions on whether to bring a prosecution and whether to file a *nolle prosequi*. They have a strong public interest orientated focus. The function requires the weighing up of various factors, including political questions and direct evaluations of the public interest before decisions are made. The inclusion of these types of responsibilities led, on some occasions, to public political controversy over the office's independence.⁵⁸ Former New South Wales Solicitor-General Keith Mason explained that in

⁵⁷ See, eg, the discussion of the involvement of Justice Jane Mathews as a reporter under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 that required her to consider matters of policy. See also Duncan Webb, 'Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel' (2007) 5 *New Zealand Journal of Public and International Law* 243, 250-1; Geoffrey P Miller, 'Government Lawyers' Ethics in a System of Checks and Balances' (1987) 54 *University of Chicago Law Review* 1293.

⁵⁸ See, eg, the controversy around the exercise of these functions by Mary Gaudron and accusations of political bias and protecting political bosses in regard to recommendations for prosecutions: Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) chs 11-12. In relation to the prosecutorial role more generally, see the controversies around the exercise of this function by the British Law Officers that were considered in the recent reforms. The House of Commons Constitutional Affairs Select Committee said: 'The Attorney General's responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role.' Committee, House of Commons Constitutional Affairs, 'The Constitutional Role of the Attorney General: Fifth Report of Session 2006-07' (House of Commons, 2007) [56]; See also *The Governance of Britain: A Consultation on the Role of the Attorney*

New South Wales, with the transfer of these duties to the DPP went the political issues that were associated with them. The statutory removal of a very politically charged aspect of the office protected the independence of the office in its other functions.

Northern Territory Solicitor-General Michael Grant reflected on the remaining residual function in the New South Wales statute that provides that the Solicitor-General may act for the Attorney-General if that office is vacant or the officer is absent. He thought it was problematic because it placed the Solicitor-General into the political and administrative processes of government, undermining the independence of the office. This very issue was raised at the introduction of the Solicitor-General Bill of 1969 in the New South Wales Legislative Assembly. Jack Mannix, for example, argued that any delegations ought to be in the area of the Attorney-General's legal rather than political responsibility.⁵⁹ Attorney-General Kenneth McCaw explained that the wide delegation was needed because of difficulties in definitions, but that it was not intended the Solicitor-General would accept any policy-making responsibility.⁶⁰ Keith Mason believed this section must *only* relate to the Attorney-General's legal services and public interest functions and not the political functions of the office.

In many instances, the Solicitor-General will be asked to engage in non-legal activities precisely *because* of the independence of the office.⁶¹ A number of examples of this arose in the interviews. In the Northern Territory, under the *Legal Profession Act 2006* (NT), the Solicitor-General was appointed as the 'Statutory Supervisor'⁶² to oversee the regulation of the legal profession in the Territory. Solicitor-General Michael Grant explained that when the position was negotiated,⁶³ it had originally been proposed that the Statutory Supervisor would be a government officer, within the Department of Justice. However, the Bar Association had perceived that such an officer would not be sufficiently independent from government. The Solicitor-General was a satisfactory compromise.

General (The Stationary Office Limited, 2007) 13; House of Lords Select Committee on the Constitution, 'Reform of the Office of Attorney General: Report with Evidence' (2008), 14 [40] ff.

⁵⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 970.

⁶⁰ *Ibid* 971.

⁶¹ Interview, Michael Grant; Interview, Martin Hinton; Interview, Chris Kourakis; Interview, Greg Parker.

⁶² Section 678(2).

⁶³ Incidentally, he was involved in these negotiations prior to his appointment as Solicitor-General as the representative of the Bar Association.

Many Solicitors-General indicated they would have only have become involved in non-legal activities if they did not conflict with the primary functions of the role or undermine its independence and status.⁶⁴

Former Victorian Solicitor-General Pamela Tate acted as Special Counsel to the Human Rights Consultation Committee (an independent body established by the government to consult within the community on the question of whether Victoria should adopt a Charter of Rights).⁶⁵ She was asked to participate by the Attorney-General, but she was very careful to limit her involvement to technical advice on the legal features of the project, keeping her office removed from political considerations that may have undermined her independence. As the Charter of Rights was a major policy initiative of the State government of considerable legal complexity, she played a significant role in advising on the operation of the Charter throughout her tenure, both with respect to litigation, draft legislation, and executive action. She also appeared in Charter cases in a variety of courts within the Victorian hierarchy. This involved her in close and consistent contact with many government officers to facilitate the implementation of government policy within a legal framework.

For similar reasons related to the protection of the non-partisan perceptions of the office, participants generally accepted that the Solicitor-General should avoid the media where possible.⁶⁶ So, for example, former Queensland Attorney-General Dean Wells said:

Engaging with the media can lead to all sorts ... of trouble. The mere ... appearance in the public eye is sufficient to provoke a frenzy of character assassination. It is probably best to stay out of the public eye if you are trying to pursue a job that requires a degree of gravitas that the role of the Solicitor-General does.⁶⁷

The removal of the Solicitor-General from the political realm was a substantial and innovative step by the Australian jurisdictions. While only a few participants saw the statutory safeguards as vital in protecting the office's independence, there was a high degree of caution among participants about involving the Solicitor-General in activities that may undermine the perception of the Solicitor-General as being separated from politics. Involving the Solicitor-General in functions not traditionally associated with counsel would largely

⁶⁴ Interview, Geoffrey Davies; Interview, Martin Hinton; Interview, Anthony Mason; Interview, Greg Parker.

⁶⁵ Similarly, Michael Grant is Special Counsel to the Statehood Committee in the Northern Territory.

⁶⁶ Interview, Greg Parker.

⁶⁷ See also Interview, Chris Kourakis.

undermine the advantages sought to be gained by introducing a non-political, legal professional.

7.5.2 Relationship with the first Law Officer and traditional role of the Law Officers

The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers, so that none of them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day.⁶⁸

Many participants commented on the importance of the relationship between the two Law Officers as protecting the independence of the Solicitor-General.⁶⁹ For example, former Commonwealth Solicitor-General Gavan Griffith wrote in 1996: ‘The First [Law Officer] provides an insulation from the political process so that the Second is able to practice as counsel in an apolitical mode’.⁷⁰

Victorian Solicitor-General Stephen McLeish commented that he believed the respect within government of the finality of his advice as a Law Officer was also part of maintaining his independence.⁷¹

7.5.3 ‘So long and thanks for all the fish’: financial security

Queensland and Western Australia are currently the only jurisdictions that have re-introduced the right to private practice. For some participants, this was an important facet of the protection of their independence, as well as being a draw card for appropriately qualified barristers.⁷² This had been raised in the second reading debates in Queensland by Douglas Jennings, who indicated that the right to private practice in the Solicitor-General Bill 1985 (Qld) gave the Solicitor-General ‘independence that is not available in other States’.⁷³ Former

⁶⁸ *Waterford v Commonwealth* (1987) 163 CLR 54, 73 (Brennan J). See also *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 517 (Mason and Brennan JJ).

⁶⁹ Interview, Greg Cooper; Interview, Stephen Gageler; Interview, Michael Lavarch; Interview, Robert McClelland; Interview, Pamela Tate. In the US context, see Erwin N Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* (West Publishing Co, 1992), 271, 325-6.

⁷⁰ Gavan Griffith, ‘Report: Second Law Officer to the First Law Officer 1 July 1995-31 December 1996’ (Solicitor-General of Australia, 1996) [1.10].

⁷¹ See further discussion in Chapter 5.2.2.2.

⁷² As discussed in 7.3.1.

⁷³ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4384. Other justifications for the right were that it would attract leading members of the bar, and it would allow the Solicitor-General to retain a breadth of experience while in office: Interview, Greg Cooper; Interview, Geoffrey Davies; Interview, Dean Wells.

Queensland Solicitor-General Patrick Keane said that the right of private practice allowed him to leave the position if his independence was challenged. It:

made things a lot easier, at a practical level because you just say, so long, thanks for all the fish. You go your way, I'll go mine. It would not be the end of 'the career', whereas for public servants it is. So at a practical level, apart from the theoretical level, there is no doubt that the independence was very real.⁷⁴

However, while some viewed the Queensland office's right to private practice as protecting the Solicitor-General by ensuring financial pressures would be irrelevant (all participants that held this view were from Queensland), others were less sure. The most telling comments came from former High Court Justice, Ian Callinan, who had drafted the Queensland legislation and had been approached by the Bjelke-Petersen National government to take the first appointment under it. He said that after drafting the legislation, he gave the idea some more thought and decided that the right to private practice 'really wasn't right'. He explained that he feared that private parties briefing the Solicitor-General in private matters may expect government favour and that the courts would extend additional gravitas to the individual because of the appointment. There would be the possibility, and therefore the perception, of abuse of a public position.

Some participants from other jurisdictions viewed no impropriety in allowing private practice, but they thought it may cause conflicts regarding the allocation of time to government work.⁷⁵ Others saw immense dangers of legally compromising conflicts of interest arising.⁷⁶

The ability of the Attorney-General under the Commonwealth legislation to allow the Solicitor-General to engage in private practice sparked some controversy during then Solicitor-General Gavan Griffith's tenure in 1991. It was proposed that he would be granted a year's leave during which time he was given permission by the Attorney-General to engage in private practice pursuant to s 9 of the *Law Officers Act 1964* (Cth). A number of conditions

⁷⁴ See also Interview, Geoffrey Davies; Interview, Dean Wells.

⁷⁵ Interview, William Bale; Interview, Anthony Mason; note this possibility was raised in the Second Reading Debate: Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4376 (Wayne Goss, Labor, Leader of the Opposition).

⁷⁶ See also Interview, William Bale; Interview, John Doyle; Interview, Trevor Griffin; Interview, Michael Sexton; note this possibility was raised in the Second Reading Debate by: Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4378-9 (Paul Braddy, Labor).

were attached to the permission.⁷⁷ The matter became controversial when the Attorney-General refused to answer questions from the Parliament as to why the deal was put in place, referring only to the fact that the reasons behind the request from the Solicitor-General were ‘personal’.⁷⁸ Andrew Peacock for the Opposition said the use of the provision in the way proposed had the potential to undermine the Solicitor-General’s independence, because there would be at least a perception that the Solicitor-General had received a very generous favour from the government.⁷⁹

Former Commonwealth Solicitor-General Anthony Mason considered that fundamental to the protection of the office’s independence was the ability of the officeholder to resign with no, or little, financial ramifications. When asked about what protected the Solicitor-General’s independence, his answer was immediate:

Resignation. I say that seriously. If you felt that a position was being reached where you were being overborne, or attempts to overbear your independent, impartial judgment, then resignation was obviously the sanction. And in the case of a Solicitor-General, generally speaking ... I think universally up to the present point of time, people who have been appointed under the *Law Officers Act* have an established reputation which would enable them to resume practice at the Bar. It is not as if they are in the position of some people, whose whole career and livelihood is at risk if they don’t, as it were, toe the line. So resignation is a sanction that the Solicitor-General has.

Mason’s views were held in a jurisdiction where no right to private practice was retained, downplaying the importance of the right when the officeholder has the necessary status at the independent Bar prior to appointment. Former Victorian Solicitor-General Henry Winneke, when involved in the drafting of the 1951 Victorian statute, had expressed similar sentiments. ‘The right man’ he had said, needed no tenure, because ‘if he became dissatisfied, he could always return to the Bar.’⁸⁰

⁷⁷ See an explanation of the arrangements made between the Attorney-General and the Solicitor-General in Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 1991, 2842 (Michael Duffy, Attorney-General).

⁷⁸ Ibid.

⁷⁹ Ibid 2835.

⁸⁰ Coleman, above n 10, 160.

7.5.4 External institutions: the SCSG and the courts

Former Queensland Solicitor-General Patrick Keane added two mechanisms that he believed assisted in the protection of the Solicitor-General's independence: the SCSG and the courts.

Of the first, he said:

[W]e met regularly, to talk about matters of mutual interest and I think it was terrific for morale, that there was this little group of people who were in the same club, who had the same problems to a greater or lesser degree. So you had the opportunity for a sounding board, to just make sure that you were never on a limb all by yourself.⁸¹

He also explained why he believed the courts could assist in protecting the independence of the office:

[B]eing confident that there were some things that the court would accept and some things they wouldn't, if you can be confident about that it makes you more confident in your own position. ... I mean if the courts are blowing in the wind, then it gets really hard. ... Certainly in my time ... the courts were regular ... you know, innovation wasn't happening for innovation's sake. But I think it would be very destabilising for independence's sake, if you did have the courts blowing in the wind. Because then the pressure to just run anything because who can tell; 'run it up the flagpole and see if someone salutes it' would have been a very hard ... instruction to resist.

The notion that the predictability of the courts buttresses the independence of the Solicitor-General was illustrated in the reaction to the Solicitor-General's advice after the decision in the *Malaysia Solution Case*, the details of which have been explained in Chapter 5.2.1.2.⁸² A number of aspects of the episode demonstrate the destabilisation that can be done to the practical independence, the perceived independence and also the integrity of the office where the court comes to conclusions not predicted by a large part of the legal community. The media attacks on the integrity and competence of the Solicitor-General's original advice to the government on the Malaysia Solution (which was assumed to exist, but was never released) contained within them implicit attacks on the independence of the Solicitor-General from the government's policy imperatives in the immigration arena.

What is most telling is the reasoning in the Solicitor-General's publicly released advice on the High Court's decision (a joint opinion with Stephen Lloyd SC and Geoffrey Kennett SC), and the responses within parts of the legal community to it. The conclusion of the authors of

⁸¹ See also Interview, Peter Garrison; Interview, Stephen McLeish; Interview, Leigh Sealy.

⁸² (2011) 244 CLR 144.

the joint opinion was to the effect that they did not have reasonable confidence, on the material provided, that the *Migration Act 1968* (Cth) could be used to transfer asylum seekers from Australia to either Nauru (an option opposed by the government politically) or Papua New Guinea for processing.⁸³

The opinion is certainly couched in terms that demonstrate the Solicitor-General and the other authors were not at all confident as to which way the High Court may decide future cases. The authors expressly say as much; the identification of a number of significant issues left unresolved by the case heightens this sense that the future direction of the Court in this area remains less than certain.⁸⁴ Lawyers are often confronted with difficult situations where *they* may have a firm view of the correct legal position, but must advise their clients on whether a majority of the court would share that view. After the *Malaysia Solution Case*, there was great uncertainty because the Court had left a number of issues undecided in the decision itself. It is this unpredictability that opens the door for critiques that the advice was political.⁸⁵ Each criticism carries with it an undertone that the Solicitor-General's independence was being manipulated to achieve the (openly stated) political objectives of the Gillard government: to avoid using Nauru as an offshore processing country.

7.6 Independence in practice

To what degree is the independence of the Solicitor-General respected in practice? As a whole, the conclusion was that in the vast majority of cases the government and its emanations acted with the greatest respect for the independence of the office.⁸⁶ So, for example, former Commonwealth Attorney-General Michael Lavarch said:

[I]t is convention and custom that does tend to rule here. So in terms of the behaviours and the expectations of Ministers and the government not to ask or expect things which are improper. And we can be all terribly cynical about the government and government processes, but in my experience, ... people overwhelmingly acted properly in understanding the – almost instinctively to some extent – the boundaries of their role. The officeholders themselves obviously needed a bit of understanding as to what is proper and right, to not be moved from that.

⁸³ Opinion of Stephen Gageler, Stephen Lloyd and Geoffrey Kennett, *In the Matter of the Implications of Plaintiff M70/2011 v Minister for Immigration and Citizenship for Offshore Processing of Asylum Seekers under the Migration Act 1958 (Cth)*, 2 September 2011, 2 [3].

⁸⁴ *Ibid* [12]-[13].

⁸⁵ See further Chapter 5.2.1.2.

⁸⁶ See, eg, William Bale rejecting the idea that his advice had been subject to political interference in an interview on Lateline: Simon Cullen, 'Bill Bale', *Stateline Tasmania* (ABC Online), 18 July 2008 <<http://www.abc.net.au/stateline/tas/content/2006/s2307818.htm>>.

Former Commonwealth Attorney-General Robert McClelland indicated that, in practice, there will always be difficulties in ensuring the appropriate level of respect is provided to the independence of the Solicitor-General:

[N]ow there will be some members of Cabinet who want to get the advice they want to hear. And [the Solicitor-General] won't do that, and nor will I put pressure on him. And he is appointed for that period of time. And he is not the sort of person who would do that. But you will always find in any endeavour someone who wants to pressure the adviser to give the advice they want to hear. [The Solicitor-General] scrupulously resists that. But there is a need for a sense of maturity across Cabinet, to ensure that that doesn't happen, people putting pressure to get the advice they want to here. As best I can, supported by Cabinet colleagues, we emphasise that to other colleagues, but there is, and inevitably will be in the future, tensions about that.

As McClelland noted, there was evidence of instances where some pressure was brought to bear on the Solicitor-General. A Solicitor-General related one incident in which he was involved:

Have you ever had any improper pressure placed on you by the department, or perhaps a minister, that threatened that independence?

Yes, once. Yes.

Are you able to elaborate on that?

Probably not, but if the question is, 'Did I succumb to it'? The answer is absolutely not.

How did you deal with it?

I did what I was asked to do in the timeframe in which I was asked to do it and I did it in my own terms. I knew what was wanted but I did it in my own terms. When it was done, I spoke to the Attorney-General about it, and I made it clear that I didn't think it was acceptable.

The incident relays an important aspect of the Solicitor-General's independence. Particularly where most participants emphasised that the statutory mechanisms played no role, or were only partially relevant in protecting the office's independence, the individual's commitment to professional ethical standards will guide the extent to which pressure can be brought to bear on the office. As such, former Commonwealth Attorney-General Thomas Hughes described it as a 'duty of imperfect obligation', in the sense that 'it is not capable of being reduced to a duty punishable for non-observance'. It is a moral duty, 'to be performed in the light of the principles that should govern the execution of the office'.

7.7 Discussion

This discussion is conducted in two parts. First, I analyse the impact of my finding that, perhaps surprisingly, the officeholders largely view their independence as being protected by their professional and individual integrity and therefore their own vigilance, rather than the structural protections granted by the statutory provisions relating to tenure, remuneration and pension. I then turn to consider the two different approaches to independence that were identifiable among Solicitors-General: the ‘autonomous expert’ and the ‘team member’.

7.7.1 Protecting independence: comparing structural and individual protections

While the statutory basis for tenure was considered to provide the normative framework in which government and society more generally considers the Solicitor-General, my research reveals that far more important in protecting the independence of the officeholder in practice is ensuring quality candidates with appropriate integrity and professional experience continue to be attracted to the position.

A prevalent view in the US is that relying on the strength of individuals’ commitment to independence in offices such as the Solicitor-General is inadequate. Bruce Ackerman warned that relying on individuals’ ethical and professional conduct to ensure the integrity of a public office gives rise to the possibility of abuse by the less-scrupulous.⁸⁷ Often this is only possible because of a reputation fostered by previous, *ethical* officeholders.⁸⁸ Norman Spaulding considered the independence of government lawyers in the aftermath of the Torture Memos revelations.⁸⁹ His firm conclusion was that the individual’s commitment to independence was simply insufficient to ensure against abuse: ‘genuine independence requires structural support.’⁹⁰

In Australia we already have some structural support for the independence of the Solicitor-General; this is what the tenure and remuneration provisions of the statute were largely intended to achieve. Tenure and remuneration guarantees have been identified by the High

⁸⁷ Bruce Ackerman, ‘Abolish the White House Counsel: And the Office of Legal Counsel, too, while we’re at it’, *Slate*, 22 April 2009. See also Book Note, ‘Probing the Role of the Solicitor General’ (1992) 106 *Harvard Law Review* 504, 509; Cornelia T L Pillard, ‘The Unfulfilled Promise of the Constitution in Executive Hands’ (2005) 103 *Michigan Law Review* 676, 685.

⁸⁸ Ackerman, ‘Abolish the White House Counsel’ above n 87.

⁸⁹ Norman W Spaulding, ‘Professional Independence in the Office of the Attorney-General’ (2008) 60(6) *Stanford Law Review* 1931.

⁹⁰ *Ibid* 1977.

Court as key planks in protecting the decisional independence of the Judiciary.⁹¹ They are, at the least, important signals that articulate a normative proposition to the public about the government's commitment to protecting the independence of the Solicitor-General. However, a number of deficiencies exist even in these protections of the Solicitor-General's independence.⁹² The statute also fails to guarantee that the Solicitor-General will be briefed by the government in relation to particular matters, creating the possibility that a Solicitor-General who falls from government favour may be 'frozen out' of work.⁹³ Providing robust and independent advice may be one reason why an individual may be frozen out.

Even if the deficiencies in the tenure and remuneration guarantees could be sufficiently remedied across the jurisdictions to alleviate these concerns, there are real questions about whether structural guarantees can protect against inappropriate incursions into independent practice by officeholders bent on malfeasance; and also whether rigid frameworks may unnecessarily remove legitimate influences. Former Crown Solicitor Catherine Branson said 'we have to be realistic about the protection [statute] provides.' Ackerman agreed that structural support could never be sufficient. He argued therefore for the *abolition* of the post of lawyer for the Executive because conceptualised as the Executive's lawyers, these institutions breed one-sided advocacy. Ackerman argued for drastic institutional reform to replace such positions with court-like institutions operating within the Executive.⁹⁴

Spaulding advocated for less drastic structural reform. He acknowledged the difficulties in introducing structural guarantees of independence without creating overly rigid frameworks that compromise the benefits of political accountability and responsiveness.⁹⁵ In the Australian context, the Solicitor-General has no claim to an independent mandate to make binding decisions or take autonomous actions in a system where the responsible officer is the

⁹¹ See, eg, *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*'), 469-70 (Isaacs and Rich JJ); *Harris v Caladine* (1991) 172 CLR 84, 159 (McHugh J). The High Court has found that there is no single model of tenure that will guarantee independence, but that the question will be whether a particular framework ensures the independence and impartiality of the judiciary: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 (Gleeson CJ). See also Gerard Brennan, 'Independence of the Judiciary: Declaration of Principles on Judicial Independence, Announcement by the Chief Justice of Australia' (1997) 15 *Australian Bar Review* 175, which sets out the *Declaration of Principles on Judicial Independence issued by the Chief Justices of the Australian States and Territories* and the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. See particularly at 175, 177, 182-3.

⁹² See full discussion of these in Chapter 4.2.4.

⁹³ See full discussion in Chapter 5.2.2.3.2.

⁹⁴ Ackerman, 'Abolish the White House Counsel' above n 87; Bruce Ackerman, *The Decline and Fall of the American Republic* (Belknap Press of Harvard University Press, 2010) 143-5.

⁹⁵ Spaulding, above n 89, 1977.

Attorney-General. Therefore as an advocate, the Solicitor-General acts on the Attorney-General's instruction (even if in practice there is a large degree of autonomy of action);⁹⁶ and even as an adviser has an obligation to *assist* the government in pursuing its political objectives within a legal framework.⁹⁷ Participants emphasised that the Solicitor-General should not be an independent linesperson, performing a function akin to a court, but work constructively with the democratically elected government representatives.

Spaulding argued that flexible structural support could be achieved in a number of ways. These included making the guidelines drafted by former members of the OLC on the ethical framework in which advice must be drawn enforceable.⁹⁸ My research has revealed that relatively little is known about the Australian Solicitor-General's role and ethical obligations even within government.⁹⁹ In Australia, little has been written on the Solicitor-General that could be used as ethical guidelines for the office. I hope that my research, as the first portrait of the office, may provide a valuable tool for officeholders and government officials seeking to understand the role. By articulating an interpretation of the legal framework, the potential areas of tension in the role and the potential implications for the constitutional order that follow, I hope that this first comprehensive study of the office will go some way to providing an appropriately flexible ethical framework for officeholders.

Spaulding also suggested that greater transparency could be introduced to facilitate political accountability and a first step towards this would be making opinions public.¹⁰⁰ Public release of Solicitor-General opinions could promote more ethical practice and avoid the temptation to provide accommodating advice. As Jeremy Bentham said: 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.'¹⁰¹ It may also protect the Solicitor-General's independence from attacks, as were evident in 2011 when the government refused to release the Solicitor-General's advice on the legality of the Malaysia Solution.¹⁰²

⁹⁶ See further discussion in Chapter 6.3.

⁹⁷ See further discussion in Chapter 5.3.

⁹⁸ These are set out in more detail in Chapter 2.5.2.

⁹⁹ See, eg, general discussion of the understanding of the role in Part 2, and particularly in circumstances where the government may have been without a Solicitor-General for a long period, or operating under a Solicitor-General who took a view of the office that was largely disassociated from government: Chapters 5.2.2.2, 5.2.2.3.2, 5.2.2.3.3.3.

¹⁰⁰ Note this was something suggested in Interview, Stephen Gageler.

¹⁰¹ As quoted by Lord Shaw in *Scott v Scott* [1913] AC 417, 477.

¹⁰² See further discussion in Chapter 5.2.1.2.

But the proposal contradicts the justifications proposed for the existence of legal professional privilege and the Law Officers' Convention. Legal professional privilege exists to encourage clients to actively seek legal advice, and when they do so, to provide frank disclosure to obtain complete legal advice. These justifications apply with considerable weight in the government arena.¹⁰³ The convention that the Law Officer's advice is not released even to the Parliament continues to be strongly adhered to in Australia.¹⁰⁴ Further, Chapter 5.2.2.3 explained that in Australia, there is a very real possibility that the Solicitor-General's advice may not be sought by government (either because government fails to seek advice at all, or seeks advice from quarters perceived to be more accommodating) because of the lack of any guaranteed work. The convention, if it does encourage the government to seek the Solicitor-General's advice, is therefore an important part of the proper operating of our constitutional system and its removal should be viewed with caution.

In summary, the independence of the Solicitor-General in Australia is protected by statute, but officeholders and government officials are keenly aware of the importance of the individual's integrity in ensuring that independence is not undermined by inappropriate pressures. The current model provides normative protection while recognising the limits of statutory guarantees. Protection will be increased by developing a deeper understanding of the role that I hope this thesis will provide.

7.7.2 'Autonomous experts' and 'team members'

There were a number of participants who believed that part of maintaining their professional independence from the political Executive was through the maintenance of professional distance – that is, by mirroring the professional distance that exists between a private barrister engaged by a private client. This reflects the view of the role of the Solicitor-General as distinct from the government machine, to be briefed by government on matters of its choosing at points where significant legal issues have arisen. In Chapter 5, I called this the 'autonomous expert' approach to the role. This approach emphasises the status of the office as protecting its independence from improper pressures from the Executive.¹⁰⁵ Former Victorian Solicitor-General Pamela Tate emphasised that, for her, this professional distance took her away from the 'internal ethos' of the government, and was a barrier against any unintended, insidious, political influence. Just like with a private barrister, this meant that

¹⁰³ *Waterford v Commonwealth* (1987) 163 CLR 54, 62 (Mason and Deane JJ).

¹⁰⁴ Chapter 4.5.

¹⁰⁵ For further discussion of independence as 'status' in the context of lawyers, see Le Mire, above n 11, 34.

when the Solicitor-General was briefed, he or she was not influenced by any subliminal pressures that arose because of involvement in the development of a policy, with any resulting vested interests and pre-drawn conclusions. This permitted her to assist the government to achieve its policy objectives consistently with the rule of law. This model also combated any tendency by government lawyers to discuss advice with the Solicitor-General casually, and then to claim that the advice had the assent of the Solicitor-General, or had been confirmed by the Solicitor-General.¹⁰⁶

This first view of the position of the Solicitor-General can be contrasted against the view that the Solicitor-General ought to be more embedded within the government: to be involved during policy development to ensure the government addressed arising legal issues, and to tackle problems as they materialised in the most legally appropriate manner.¹⁰⁷ In Chapter 5 I called this the ‘team member’ approach. Different forms of this view existed. One of the more extreme examples of such a view was the position of former Victorian Solicitor-General Hartog Berkeley *within* the Premier’s Department; a less absolute form was taken by former New South Wales Solicitor-General Keith Mason who met regularly with a number of other statutory officeholders and the department head to ensure he was aware of the issues existing across the government.¹⁰⁸

In the Australian Capital Territory a policy directive requires all legal services to be provided through the Australian Capital Territory Government Solicitor (ACTGS) unless by agreement with the ACTGS and with the approval of the Solicitor-General.¹⁰⁹ This has meant the Solicitor-General (who is also the Chief Solicitor of the ACTGS) is aware of *all* of the legal issues arising across the government, and can decide whether to involve the office in particular matters.¹¹⁰ Australian Capital Territory Solicitor-General Peter Garrisson believed without this overarching, helicopter view of the legal position of government ‘there would be no value for [the Solicitor-General] role in government’.

¹⁰⁶ Interview, Stephen McLeish; Interview, Pamela Tate.

¹⁰⁷ This view largely reflected that of Sam Silkin’s ‘intimate but independent involvement’: S C Silkin, ‘The Functions and Position of the Attorney-General in the United Kingdom’ (1978) 59 *The Parliamentarian* 149. See Chapter 2.4.1.

¹⁰⁸ See also Interview, Daryl Dawson.

¹⁰⁹ *Law Officers (General) Legal Services Directions 2012* (ACT) sch, cl 1; Interview, Peter Garrisson.

¹¹⁰ Interview, Peter Garrisson.

John Edwards warned that more intimate involvement in government would erode the public's perception of the Law Officer's independence.¹¹¹ Any reduction in the independence of an officeholder who adopts a 'team member' approach is subtle. Client capture can occur: a 'team member' may become too closely identified with the government's policy, resulting in legal analysis being subconsciously framed through the client's lens.¹¹² A 'team member' may be influenced by the development of group norms and social pressures. The more cohesively embedded the Solicitor-General is within a group entrusted with policy implementation, the greater the potential danger that the office will no longer realistically and independently appraise alternative courses of action because of the motivation to achieve the goals of the group.¹¹³

A 'team member' Solicitor-General, at least in theory, risks losing professional distance from the Executive's policy desires: not necessarily consciously, but simply because of the ongoing exposure to policy development in a team atmosphere of shared goals. This propensity may seem particularly acute against the background of my findings that the Solicitor-General's independence is largely protected by the individual officeholder's personal commitment to independence. Even if these types of incursions into independence do not occur in practice, the closer relationship between the Solicitor-General and the Executive increases the likelihood of such a perception. In many ways, the 'autonomous expert' is actively protecting against any sort of group-cohesiveness that could thwart independence while also reinforcing the perception of the office's independence.

Neither approach was necessarily more associated with a government-agent perception of the Solicitor-General as opposed to a view that the Solicitor-General should be actively advising the government on the congruence between its actions and the public interest. However, the increased likelihood of a 'team member' losing independence because of being embedded more integrally within government processes perhaps meant that even if an individual had hoped to advise on the public interest in the development of government processes, he or she may lose the necessary distance to provide that type of advice.

An 'autonomous expert' may have adopted an approach that places his or her independence outside of subtle group-driven influences, but my research demonstrates such an officeholder

¹¹¹ Edwards, *The Attorney-General*, above n 5, 75. See further analysis Chapter 2.4.1.

¹¹² See analysis of the Torture Memos to this effect in Le Mire, above n 11, 27.

¹¹³ Irving Janis, *Victims of groupthink* (Houghton Mifflin, 1972); Irving Janis, 'Groupthink' (1971) 5 *Psychology Today* 43.

was not necessarily more likely to adopt a public interest driven approach to the role of Solicitor-General.¹¹⁴ A private barrister will also be physically removed from their client; analogous to the ‘autonomous expert’. However, often the independence of private barristers is considered to be precisely the reason why they can become ‘hired guns’ for their clients’ causes. *Morally* independent from the interests of their client, they do not directly further the public interest, but, rather, their clients’ interests, unencumbered by any personal judgment on its desirability. For example, David Marr wrote of former Commonwealth Solicitor-General David Bennett:

Perhaps after a hard day in court, David Bennett, QC, goes home and scrubs down with a strong carbolic soap. Lawyers have to do grim things for their clients at times, and Bennett’s client is the Commonwealth Government.¹¹⁵

An ‘autonomous expert’ Solicitor-General may fail to gain the trust of the government: government officers may treat a fiercely independent Solicitor-General with defensiveness and distrust. In the US context, Nancy Baker had observed that neutral, or fiercely independent, officeholders may be isolated from policy development by government because of erosion of trust in the office’s commitment to the government’s agenda.¹¹⁶ In the corporate context, a similar phenomenon has been observed. Suzanne Le Mire has argued that when a lawyer adopts independent status from the client, it may ‘lead to exclusion or marginalisation if managers see the lawyer as someone who is not motivated to achieve organisational goals.’¹¹⁷

As there is no statutory requirement to seek the advice of the Solicitor-General, the government may simply fail to consult a Solicitor-General because of a perceived distance between the goals of the government and those of the office. This means that the government may go without advice on actions where advice was needed; or obtain advice from quarters where there is a paucity of understanding of whole of government interests. There is also the possibility that the government may, intentionally or not, fragment its legal work, briefing the Solicitor-General on small parts of a larger legal picture. To guard against these potentialities, many participants emphasised the importance of a cultural fit when appointing a Solicitor-

¹¹⁴ See, eg, the views of David Bennett (SG) set out in Chapter 5.3.3.3, n 218.

¹¹⁵ David Marr, ‘Liberty is Left in Shaky Hands when the High Court no Longer Defends It’, *Sydney Morning Herald* (Sydney) 31 March 2005.

¹¹⁶ Nancy Baker, *Conflicting Loyalties: Law and Politics in the Attorney General’s Office, 1789-1990* (University Press of Kansas, 1992) 145-6. See further discussion at Chapter 2.5.2.

¹¹⁷ Le Mire, above n 11, 34.

General, and the delicate position that was created when a government of different political persuasion was elected to ensure this cultural fit continued.¹¹⁸ My research has revealed a number of instances of Solicitors-General being ‘frozen out’ of government legal work, demonstrating the frailties of the current arrangements with their lack of any formal guarantee of work for the Solicitor-General.¹¹⁹

An ‘autonomous expert’ is often consulted later in the continuum of decision-making than a ‘team member’. Indeed, former Victorian Solicitor-General Pamela Tate explained that she intentionally waited for legal issues to crystallise before becoming involved.¹²⁰ Robert Rosen has argued that the later a lawyer is involved, the more power must be wielded by the lawyer, as organisations are already committed to a particular course of action.¹²¹ So while an ‘autonomous expert’ may increase confidence in the office’s independence from the political, a ‘team member’ can be the most effective in ensuring the legality and integrity of the government’s actions.¹²² A ‘team member’ may also be more engaged in a larger number of issues, thus able to monitor compliance across government departments and agencies.

The approaches are not mutually exclusive. Tate strove throughout her tenure to reinforce the independence and integrity of office whilst maintaining an appropriate level of involvement with the development of government policy. She was appointed after a period where the office had limited involvement with government and she worked with senior officers in the Attorney-General’s Department to re-establish the authority of the position. However, she also understood the importance of the office’s involvement in the development of policies to ensure government objectives could be met within a legal framework. She observed:

[T]here are a number of strands to the role of Solicitor-General, some of which are in tension with each other. Part of the difficulty of the job is knowing how to straddle the various demands so that, when necessary, one must assert one’s independence, and, at other times, when the boundaries are very clear, one can be more of a ‘team member’. It is not a matter of being one extreme or the other.¹²³

¹¹⁸ See further analysis in Chapter 7.3.2.

¹¹⁹ See discussion of these instances in Chapter 5.2.2.3.2.

¹²⁰ See further explanation of Tate’s position in Chapter 5.2.2.3 and 7.3.2.

¹²¹ Robert Eli Rosen, ‘Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence’ (2001) 56 *University of Miami Law Review* 179, 205-6.

¹²² See similar arguments that have been made in relation to the advantages of in-house counsel over the engagement of external legal providers more generally: Le Mire, above n 11, 24-5; Deborah A De Mott, ‘The Discrete Roles of General Counsel’ (2005) 74 *Fordham Law Review* 955, 955.

¹²³ Letter from The Hon Justice Tate to Gabrielle Appleby, 12 August 2012, 1.

Similarly, incumbent Victorian Solicitor-General Stephen McLeish is attempting to find his own position that sits mid-way along the spectrum between the two approaches, and thereby receiving the benefits of a level of autonomy while maintaining involvement with government. He was appointed to the position after Tate, and initially chose to continue, by and large, the arrangements that she had put in place to keep the office somewhat distinct from government: he maintained private chambers, and continued to operate in accordance with the protocol implemented by Tate, with only minor adjustments. However, he has agreed with the Attorney-General to set up a second set of chambers within the government. McLeish saw a number of advantages in maintaining the two sets of chambers. Having private chambers meant he maintained a level of autonomy and involvement with the private Bar and was symbolically independent from government, but having chambers with government may combat the sense of isolation from government (felt by himself and those in government) and allow him to become better acquainted with those in government with whom he has regular dealings.

The final chapter of this thesis synthesises my findings about the perceptions and practice of the office. Despite historical intentions to achieve a model in which political influences are removed from the legal services functions of the Law Officers, and the statutory establishment and guarantees provided to the office, my findings demonstrate that the close relationship between the Solicitor-General and the complex and enduring entity of the Crown has meant many of the traditional tensions in the Law Officers' role remain omnipresent for the modern Australian Solicitor-General.

8 CONCLUSIONS

8.1 The Solicitor-General: an historical, legal and lived portrait

The Solicitor-General is next to the High Court and God.¹

My thesis introduces the Australian Solicitor-General as a major actor in our modern constitutional order. Informed by the overarching objective of obtaining a greater understanding of Australia's *working* constitution, I set out in this thesis to study both the theoretical framework in which the Solicitor-General operates and the reality of the office.

My research traversed the Solicitor-General's historical development to discover what it revealed about its theoretical and legal foundations, before turning to a close examination of the current legal framework. Finally, I analysed the perspectives and experiences of officeholders and others closely associated with the office to gain a deeper understanding of its position. The breadth of my research is illustrated by the number of interviews I conducted: I interviewed 40 participants from all Australian jurisdictions other than Western Australia.² The breadth of the study provides a rich picture of the office over different eras and jurisdictions, and across the political spectrum.

In common law systems, debate has regularly arisen around how Law Officers ought to fulfil their functions. Dominating this debate are competing ideas about whether the public interest, politics or the law are legitimate influences over the Law Officers' functions. It is a debate that continues in Australia today: in 2011, the independence of the Commonwealth Solicitor-General's legal advice from political objectives was very publicly called into question when the office became the fulcrum of a stand-off between the government and the Opposition over the offshore processing of asylum-seekers.³

As an historical narrative, the development of the Australian Solicitor-General demonstrates a desire on the part of Australian governments to respond creatively to many of the tensions associated with the traditional Law Officer role. Governments adopted an institutional design intended to remove the office from political pressures, while maintaining the office's accountability through the Attorney-General. The result is a unique statutory paradigm that places the Solicitor-General outside the political ministry and imports professional

¹ Interview, Linda Lavarch.

² This was for reasons of time and budget, see further explanation of the limits of my sampling in Appendix A.

³ See further discussion of this event in Chapters 5.2.1.2 and 7.5.4.

obligations of independence. In many respects, the design of the Australian Solicitor-General represents a regression to the early model of the British Law Officers as *professionals* on retainer for the Crown.

However, since the thirteenth century, the Crown has become a more complex legal entity. It is now comprised of three branches with distinct constitutional mandates. It is an enduring entity headed by a representative of the Monarch, but occupied at any given time by an elected government with a democratic mandate to implement its political agenda. Its legitimacy rests on grounds that have evolved from the idea of absolute power ordained by God, to restrained power, contingent upon the agreement of individuals within the community and built upon assumptions about the obligations of the Crown to both the individual and the community. In Australia, complicating this further is the idea that there are arguably several distinct Crowns that exist within the Commonwealth.

Given the complexity of the Crown, unique pressures are placed on the Solicitor-General's role as a legal professional. So, despite the office's withdrawal from the political arena, its close relationship with the Crown continues to pull the officeholder in different, and at times conflicting, directions. The Solicitor-General must strike a delicate balance between independence *from* the political agenda to ensure fidelity to the law and constructive engagement *with* that agenda to assist the Executive in pursuing its objectives.⁴ This raises immediate questions about the extent to which the Solicitor-General ought to be, and can be, insulated from political pressures. The legitimacy of the Crown is not drawn entirely from its democratic mandate, but rests also on enduring public policy values that emphasise government under the rule of law. It was the traditional role of the Law Officers to assist the Crown to adhere to these values, and the struggle to achieve them continues to influence the Solicitor-General's role today.

In this final chapter, I evaluate four of my major research findings. Each of them demonstrates my overarching thesis that, while the non-political grounding of Australia's Solicitor-General has in some respects removed the office from the immediate tensions between the public interest, the law and politics, the office's continuing relationship with the democratic government means that these tensions resurface in practice. *First*, I explain how the potential for conflicts to arise within a theoretically indivisible Crown impacts upon the

⁴ See also Alan C Hutchinson, 'In the Public Interest: The Responsibilities and Rights of Government Lawyers' (2008) 46 *Osgoode Hall Law Journal* 105, 117.

role of the Solicitor-General in practice. *Secondly*, I turn to the divergent perceptions about the continuing relevance of the Crown's obligations to the public interest in the Solicitor-General's advisory function. *Thirdly*, I consider the lack of any formal requirements for the government to brief the Solicitor-General and its implications for the integrity of Crown action and the Solicitor-General's independence. *Finally*, I turn to the finding that, despite the statutory attempts to guarantee the Solicitor-General's independence, the office's independence was perceived to rest largely upon the ethical commitment of the individual officeholder. I consider the two major approaches, the 'autonomous expert' and the 'team member', directed at balancing the objective of independence against the objective of ensuring appropriate consultation by, and engagement with, government. In this final section I also consider the different ethical frameworks that govern the functions of adviser and advocate and the implications of this in practice.

The following evaluation of these findings demonstrates that the tensions between the law, politics and the public interest continue to reside within the statutory model of the Solicitor-General's office, albeit they have emerged in different and often more subtle forms from those seen when the Solicitor-General was a ministerial Law Officer.

8.2 The Crown: a conflicted client

Across the Australian jurisdictions, the Solicitor-General acts as 'counsel for the Crown'. The Crown is, theoretically, indivisible. This theoretical position belies the complexity confronting a Solicitor-General attempting to determine the Crown's interests. I argued in Chapter 4.4 that the Crown in the statutes means the Executive, distinct from the other branches. Thus, the removal of the office from the Parliament has removed the potential for conflicts to arise between the interests of the Legislature and the Executive.⁵ Even within this narrower definition of the Crown there is the potential for conflicts to occur between the political Executive and other emanations of the Crown, particularly the Viceroy, independent statutory bodies, and quasi-independent government entities tasked with monitoring government action.⁶

The propensity for conflicting interests to arise within the Crown raises difficult questions for the Solicitor-General, who must determine the primary client and avoid acting for other

⁵ Chapter 5.2.1.3 explained that in practice the Solicitor-General will occasionally advise the Parliament, but this is either at the behest of the Executive, or with the Executive's knowledge and consent.

⁶ Chapters 4.4.2 and 5.2.2.1.

conflicting interests. It also raises a difficult conundrum for the operation of the constitutional system. As Chapter 1 explained, in striving towards constitutionalism under the rule of law, it is imperative that *all* of the Crown's emanations have access to high quality legal advisers who can resolve legal questions with finality and authority. This allows the Crown to act with confidence, and provides confidence to the citizenry. My findings demonstrate that it is in recognition of this ultimate objective that practices and protocols have been developed to facilitate access to the Solicitor-General by as many emanations of the Crown as possible, even in instances of possible conflict with the political Executive. For example, there is remarkable uniformity of practice among the jurisdictions about when and under what circumstances the Solicitor-General can advise the Viceroy.⁷ The practice may not yet have reached the level of constitutional convention, but the Solicitors-General have indicated the desirability of introducing uniformity in this area to lessen confusion,⁸ and ensure the rule of law is maintained in those very rare but important instances where the Viceroy is called upon to act independently from the government of the day.

The loyalties of Australian Solicitors-General are further complicated by the federal nature of the Australian Commonwealth. Arguably, Australia has seven Crowns; nine if the Crowns of the Northern Territory and the Australian Capital Territory are included.⁹ Each Crown has at its service a Solicitor-General. Australia may have seven Crowns, but it is also a federation. This implies that there is some larger 'common wealth' that transcends the governments of each jurisdictional entity and encompasses the people as a whole, the 'new political community created by the union of the people and of the colonies of Australia.'¹⁰ Solicitors-General have often been involved in nationwide policy initiatives through the collective group, the SCSG, where they must carefully balance the interests of their government and the interests of the federation.¹¹

While the Solicitors-General are dedicated 'counsel for the Crown' in right of their particular jurisdiction, that Crown is not a wholly sovereign entity, but forms part of the Commonwealth. I argued in Chapter 4.6.2.1 that the state of the federation is a relevant

⁷ Chapter 5.2.1.1.3.

⁸ See further Chapter 5.2.2.1.3, n 77.

⁹ Chapter 4.4 provided further analysis of the legal position in these jurisdictions.

¹⁰ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901, 1976 reprint) 312.

¹¹ See further explanation in Chapter 5.3.2.

consideration for the Solicitor-General in providing advice on the ‘core government principles’. I turn now to a detailed consideration of this conclusion.

8.3 The public interest and ‘core government principles’

In Chapter 4.6.2, I concluded that within the statutory framework there is a duty to warn and advise the government about what this thesis refers to as ‘core government principles’. The duty carries over from the Law Officer’s broader public interest obligations that developed in the British common law. These arose in conjunction with the idea that the Crown had obligations to act in the interests of the citizenry. Unlike the political Law Officers in Britain, I argue that in Australia the duty relates only to the Solicitor-General’s *advisory* function and the conduct of litigation in the form of ensuring the Crown adheres to the model litigant principles. This narrower duty recognises the legitimacy, and necessity, of the Solicitor-General acting as the legal agent of the Crown; but also recognises the existence of autonomous moral and political values that the Crown must strive to uphold. The Solicitor-General’s duty to warn and advise on the ‘core government principles’ assists the Crown to ascertain, and act in pursuit of, these values. In this way, it represents the reconciliation of the divergent legal and political philosophies that were identified by Neil Walker in the British context.¹²

Chapter 4.6 explained that historical convention underpins the duty to act in the public interest. This thesis is the first to analyse how the traditional Law Officers’ functions can continue in the Solicitor-General’s role under the contemporary statutes and explain the continuing relevance of the public interest to the advisory function.¹³ Therefore it was unsurprising to find that interview participants were divided over whether the Solicitor-General ought to provide advice of this nature.¹⁴ As a duty resting on tradition and

¹² Neil Walker, ‘The Antinomies of the Law Officers’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 145-6. See further Chapter 2.4.2.

¹³ Former South Australian Solicitor-General Bradley Selway had written on a similar obligation in the context of government lawyers under the responsibility of the Attorney-General more broadly: Bradley Selway, ‘The Duties of Lawyers Acting for Government’ (1999) 10 *Public Law Review* 114. Selway based his conclusions on an earlier Canadian piece: John Tait, ‘The Public Lawyer, Service to the Client and the Rule of Law’ (1997) *The Commonwealth Lawyer* 58. See more recent airing of Selway’s position by the current South Australian Solicitor-General Martin Hinton QC: Martin Hinton, ‘Secundarius Attornatus: The Solicitor-General, the Executive and the Judiciary’ (Paper presented at the conference on The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Gold Coast, 15 April 2011). Beyond this, there is sparse scholarship that explains the function. More recently, see Duncan Webb, ‘Keeping the Crown’s Conscience: A Theory of Lawyering for Public Sector Counsel’ (2007) 5 *New Zealand Journal of Public and International Law* 243.

¹⁴ See further Chapter 5.3.3.

convention, it is only through understanding and diligence on the part of individuals that it can continue.

8.4 Briefing the Solicitor-General

Governments *choose* to seek the Solicitor-General's advice if and when they like. Governments, like any client, may avoid seeking 'unwelcome' advice either by simply not asking for advice, or framing questions in a particular manner. This possibility raises serious questions about the legality and quality of government actions taken without appropriate legal scrutiny. I emphasised in Chapter 1 that a fundamental dimension of constitutionalism is that the Executive has a positive obligation to ascertain the law and comply with it in its actions and decisions. To do so, they require access to legal experts to guide them in this interpretative exercise.¹⁵

The ability of governments to avoid legal advice raises concerns beyond the legality of individual actions. It may also threaten the independent resolve of a Solicitor-General. If the government can avoid the Solicitor-General, an appropriate level of trust must develop between the two in order to prevent the relationship from breaking down. The ability of the government to sideline, or 'freeze out' the Solicitor-General, raises at least a possibility of the perception of bias on the grounds that an individual may adopt a course of action to remain within the government's trusted circle.¹⁶

The lack of guaranteed work for the Solicitor-General raises a further concern about the quality of advice received from other quarters if the Solicitor-General is not briefed. One alternative source of advice is that provided by in-house legal services. There are serious concerns that this advice may lack the necessary professional independence from the interests of the client, and may fail to understand the implications of a particular action on the broader legal interests of the whole of government. In some jurisdictions another alternative is that advice is sought from a private law firm. This source of advice has been similarly criticised because of its market-driven client focus and lack of institutional knowledge of government to ensure whole of government interests are considered when advising an individual department or agency.¹⁷ The competitive environment has even led to shifts towards client-

¹⁵ See also Interview, Leigh Sealy and discussion of the Crown's obligations in Chapter 4.6.1.3.

¹⁶ See findings in relation to 'freezing out' in Chapter 5.2.2.3.2 and analysis in Chapter 7.7.2.

¹⁷ See Chapter 5.2.2.3.3.

centred lawyering within government legal services providers, giving rise to similar criticisms of lawyers within the responsibility of the Attorney-General.

My research has revealed that the role of government lawyers and other legal service providers to government is a largely unstudied field in Australia. This thesis was limited to exploring the role of the Solicitor-General which required some study of its broader context. A more complete understanding of the provision of legal services of government would require more dedicated research in this area. Study of this nature is particularly pertinent at a time when the outsourcing reforms of the 1990s in several jurisdictions are under government review.¹⁸ My research, with its aim to shed further light on the role of the Solicitor-General, has thus demonstrated that more research into the larger field of government legal services delivery is required.

One possible alternative to the current arrangements is to amend the statutes establishing the Solicitor-General so that matters which raise particular issues *must* be briefed to the Solicitor-General (as exists for the work of the OSG in the US). In some jurisdictions, a protocol or set of guidelines have been created that set out the types of matters that must be briefed to the Solicitor-General.¹⁹ Events demonstrate however that even in these jurisdictions, such matters may still not be forwarded to the Solicitor-General. Further, the documents demonstrate the difficulty in attempting to identify and define the types of matters that require the advice of the Solicitor-General. Because of these difficulties, many Solicitors-General emphasised the desirability that the Crown Solicitor (or equivalent) act as a more sensitive and flexible ‘filter’ for requests to the Solicitor-General. However, simply relying on personal relationships can be dangerous: personal tensions may cause Solicitors-General to be deliberately ‘frozen out’ of work.

In summary, the lack of any requirement to ensure the Solicitor-General is engaged by government raises the immediate concern that government can avoid its highest legal adviser before pursuing important policy. I have argued that the involvement of the Solicitor-General provides an additional benefit: review of government action against a broader public policy framework informed by the Solicitor-General’s conceptions of the ‘core government principles’. More subtly, the ability of the government to avoid involving the Solicitor-General may have an impact upon the office’s independence and also aggravates a risk that,

¹⁸ See, further information on these reviews in Chapter 5.2.2.3.3.1.

¹⁹ See explanation of these in Chapter 5.2.2.3.

by choosing not to engage with a fiercely independent Solicitor-General, the government is obtaining legal services from less robust sources.

8.5 Independence

Underpinning the statutory office of Solicitor-General in Australia is an assumption that the design of the office will protect the officeholder's professional independence. The legislation's drafters hoped that incorporating similar statutory guarantees of tenure as are enjoyed by the Judiciary would place the legal work of government beyond reproach. However, the large majority of participants believed that the independence of the office rested, not on the statutory guarantees of tenure, but on an individual's professional competence and commitment to ethical behaviour. This focus on individual capacity is in contrast to judicial consideration of the characteristic, which has emphasised structural guarantees.²⁰ Despite the judicial position, my findings reveal the most important part of protecting independence is an individual's fortitude in the face of implied or express executive pressures. Without this internal fortitude, structural guarantees will not deliver independence. While they are important normative statements and they may create an environment in which internal capacity can be exercised, without the latter, they are easily undermined by subtle pressures and individual actions.²¹

8.5.1 The value of individual independence and structural guarantees

James Madison wrote in *Federalist No 10* that 'Enlightened Statesmen will not always be at the helm'.²² Neither will enlightened lawyers. Relying upon individuals' fortitude highlights an important facet of the Solicitor-General's position: the utmost importance of the appointment process. Without the appointment of candidates well-established within the legal profession who have exhibited a strong and ongoing sense of ethical purpose throughout their career, the role may be manipulated and its ability to fill the important function of maintaining the legal integrity of government action will be reduced.

Two issues were raised by this thesis about the current appointment processes and their ability to ensure the most appropriately qualified and experienced candidate is appointed. Chapter 4.2.1 explained that in most Australian jurisdictions, the appointment process is a

²⁰ Chapter 7.2, n 11.

²¹ The same conclusion is drawn in relation to in-house counsel in Suzanne Le Mire, 'Testing Times: In-House Counsel and Independence' (2011) 14(1) *Legal Ethics* 21, 38, see also 29, 35, 38.

²² James Madison, 'Federalist No 10' in Clinton Rossiter (ed), *The Federalism Papers* (Signet Classic, 1787, 2003 reprint) 71, 75.

closed one. This is similar to that traditionally associated with judicial appointment, and is the privilege of the incumbent government. This brings with it advantages, but its closed nature also carries a greater potential for abuse.²³ Secondly, Chapter 7.3.1 explained that governments have not always been able to attract their preferred candidate as Solicitor-General. In some cases, the government has struggled to appoint an officeholder at all; and in 2012, to attract an eminent candidate, Western Australia substantially changed the structure of its office by allowing private practice. Given the emphasis on the integrity of the individual in upholding the independence of the office, these trends are concerning.

In a system where structural protections of independence are not paramount, independence does not simply rest upon the officeholders' character, but the integrity of those in government. There was at least one participant who recalled an incident where inappropriate pressure was placed on them by government officials.²⁴ Others recalled inappropriate requests for advice being made. In many of those instances, the Solicitor-General perceived that such events were not consciously improper overtures, but motivated by misunderstandings of the Solicitor-General's role by those in government. Already, there is evidence of some formal and informal processes and mechanisms that have been instituted to combat these.²⁵ The deeper understanding of the role provided in my study will assist in this endeavour.

Chapter 7.7 discussed different views that have arisen in the US literature about the desirability of formal, structural guarantees of independence as against relying on the strength of an individuals' commitment to independence. Delivering on the ideal of an independent Solicitor-General is far from facile. The independence of the Australian Solicitor-General remains, somewhat fragily, protected by the probity of individuals despite attempts to strengthen independence through the statutory framework. This is not necessarily an entirely negative outcome. The Solicitor-General is accountable through the government and exists to assist the government in achieving its constitutional mandate. Political considerations are, in many cases, legitimately taken into account by the Solicitor-General. Reliance upon the individual's commitment to independence means that these influences can be balanced against the necessity of maintaining independence in legal reasoning, and, when relevant, in providing advice on the congruence between government action and the public interest.

²³ See further discussion of the advantages and disadvantages in Chapter 7.3.3.

²⁴ See further Chapter 7.6.

²⁵ See further Chapter 5.2.2.3.

8.5.2 ‘Autonomous experts’ and ‘team members’

The conclusion that the protection of the Solicitor-General’s independence rests predominantly upon the individual underscores the need for greater analysis of the approach of individuals in the role. My research revealed two dominant, contrasting, approaches. These are the ‘team member’ and the ‘autonomous expert’. The two approaches represent either ends of a spectrum, with emphasis on independence at one end, and engagement with government at the other. Each approach represents a different balance between the importance of distance to maintain independence and the desirability of incorporating the Solicitor-General more integrally within policy development. The ‘autonomous expert’ demonstrates a preference for rigid structures and objectively assessable independence; whereas the ‘team member’ demonstrates a preference for a flexible structure that prioritises government engagement, but it may be less independent from an objective viewpoint.

Participants were divided about the normative desirability of one approach over the other and which approach best achieved the office’s constitutional role of ensuring integrity. Participants suggested several reasons why individuals may prefer one approach over the other. A perceived need to reassert the independence of the Solicitor-General from politics after a period of intimate engagement between the Solicitor-General and the political Executive, drove one individual towards the ‘autonomous expert’ approach.²⁶ In another example, an individual was appointed after a period in which the Solicitor-General had not been engaged by government at all. To avoid over-engagement, or inappropriate engagement, caused by ignorance about the role, the individual adopted an ‘autonomous expert’ approach.²⁷ During periods of constitutional transition (such as after self-government in the Northern Territory) or the pursuit of wide-ranging legal reform agendas, Solicitors-General tended to adopt a ‘team member’ approach, closely engaged in innovative policy development.²⁸ In Queensland, the introduction of the Solicitor-General’s right to private practice has necessitated a more removed approach to the role.²⁹

²⁶ See, eg, Martin Hinton after Chris Kourakis.

²⁷ See, eg, Pamela Tate after Douglas Graham.

²⁸ For example, in the Northern Territory, see Interview, Thomas Pauling; in the Commonwealth during the Whitlam government (Maurice Byers’ tenure as Solicitor-General); and under the Rudd/Gillard Labor government, attempts by former Commonwealth Solicitor-General Stephen Gageler to reintegrate office and have it play a role in many of the ‘nation-building’ policies, such as the carbon tax and health reform.

²⁹ This model was introduced in Western Australia in 2012. It may be a similar approach is adopted in this jurisdiction as a result of this change.

The view of those in government, and particularly the Attorney-General, also influences the degree of engagement with the development of policy,³⁰ as does the strength of individual relationships with others in government.³¹

It would be unwise to advocate that one of the approaches is better designed, in all circumstances, to govern the Solicitor-General's behaviour within government. Knowledge of both models, their benefits and disadvantages,³² can however be a useful guide for individuals in the office. The models should not be used as definitive norms, but to inform difficult decisions about the appropriate conduct of the office.³³ It is likely that an individual Solicitor-General will move between the approaches at different periods and in different functions.³⁴

My identification of the two approaches, and the implications this may have for the intimacy of the Solicitor-General's involvement in development of policy, has wider relevance than simply this office, or even government lawyers more generally. Arnoud Boot and Jonathan Macey have already considered the roles of objectivity and proximity in relation to corporate governance monitors.³⁵ Many institutional mechanisms have been identified as fulfilling an 'integrity' function within government, including, for example, the Auditor-General and the Ombudsman.³⁶ The possibility of adopting a 'team member' or an 'autonomous expert' approach, as far as possible within the legal framework in which a particular institution operates, and the implications of each approach, is a pertinent consideration for these mechanisms.³⁷

³⁰ Chapter 5.4.

³¹ See, eg, the importance of the relationship with the Crown Solicitor, most extremely exemplified in South Australia during the period of Graham Prior's tenure as Crown Solicitor and Malcolm Gray's tenure as Solicitor-General (this is explained in full in Chapter 5.2.2.3.2).

³² These are discussed in greater detail in Chapter 7.7.

³³ For similar conclusions in relation to officers in the Department of Justice, see James R Harvey III, 'Loyalty of Government Litigation: Department of Justice Representation of Agency Claims' (1996) 37 *William and Mary Law Review* 1569, 1573, 1616.

³⁴ See further Chapter 7.7.

³⁵ Arnoud W A Boot and Jonathan R Macey, 'Monitoring Corporate Performance: The Role of Objectivity, Proximity, and Adaptability in Corporate Governance' (2004) 89 *Cornell Law Review* 356.

³⁶ See, eg, J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; John McMillan, 'Rethinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.

³⁷ Already in the scholarship on the Ombudsman, there is recognition that establishing and maintaining a 'good working relationship with executive agencies' is key to the office's effectiveness (see, John McMillan, 'The expanding Ombudsman role—what fits and what doesn't fit' (Paper presented at the 24th Australasian and Pacific Ombudsman Region Conference, Melbourne 2008), 6). Dedicated research into the operation of the two approaches, however, remains lacking.

8.5.3 Adviser and advocate

The Australian statutes require the Solicitor-General to act as counsel for the Crown, a role that combines advisory and advocacy functions familiar to practising barristers. My analysis of the professional duties of independence required by the statute concluded that the two functions import different levels of independence.³⁸ As an adviser, the Solicitor-General must provide a robust and independent assessment of the best interpretation of a legal rule or principle to ensure the integrity of government actions. In contrast, as an advocate the Solicitor-General may draw upon any legally available argument to protect government action that has already been taken. These distinct ethical frameworks illustrate a unique aspect of the Solicitor-General's role: the combination within the same office of two distinct functions, one that is internally focussed and designed to improve the legality and integrity of government action, and the other that defends the actions of the government against external attack. Other integrity mechanisms are singularly internally focussed, investigating and reporting upon the integrity of government action.³⁹

In accordance with my conclusions about the legal position in Chapter 4.3.1.3, my findings in Chapters 5 and 6 revealed the functions were, *prima facie*, perceived by participants to be fundamentally different, governed by different ethical frameworks that accept different levels of direction from the political executive. However in practice, my research revealed a greater complexity that was underpinned by the nature of the Crown itself. Some of the participants saw the duty to assist the government achieve its policies as a legitimate part of the office's advisory function.⁴⁰ In many respects, this is at odds with the regulatory, integrity-driven aspect of the role. Providing advice to the government on consistency of policies and actions with 'core government principles' adds further complexities if the adviser function is seen as a neutral expositor of legal principles. In the advocacy function, the Solicitor-General's large discretion in setting the position for the government or advising the government of the appropriate position for the Crown to adopt having regard to consistency of position and balancing of at times competing 'core government principles', particularly in constitutional litigation, encompassed a large degree of *de facto* independence not usually associated with

³⁸ Chapter 4.3.1.

³⁹ Spigelman points out that Auditor-General considers both probity and merits so has dual function: Spigelman, above n 36, 728, but my point here is that both of these functions are internal review roles.

⁴⁰ Chapter 5.3.

this aspect.⁴¹

The US literature raises the potential for the office's two functions to contaminate each other inappropriately, or cause confusion in government.⁴² In this way, the independence of the Solicitor-General's advice may be challenged. However, these potential negative implications flowing from the current Australian structure must be considered against the benefits of retaining the functions in the one individual, particularly in light of the significant overlap in the nature of the functions in practice. What the US literature reveals is that the Solicitor-General, and those within government interacting with the office, should be aware of the different nature of the functions and attempt to avoid any confusion and contamination, including the perception of it.

8.6 Concluding comments

The non-political grounding of Australia's Solicitors-General has in many respects removed the office from the immediate tensions between the public interest, the law and politics that face a Solicitor-General holding a ministerial post. However, the office's continuing relationship with democratic government means that these tensions remain. What may have been a sub-conscious effort to return to an earlier, simpler time when the Law Officers were the lawyers engaged by the Crown, has been complicated by the evolution of the nature of that entity.

This thesis provides a normative perspective on the legal role of the Solicitor-General, coupled with an analysis of that role in its 'glorious, messy reality'.⁴³ My findings are supported by a variety of methodologies, including historical and legal analyses, and a broad analysis of the office in practice drawing on several sources, including numerous interviews across Australia.⁴⁴ My conclusions highlight the features and tensions that inhere in an important actor in the constitutional system. As the first dedicated study of the Solicitor-General since the creation of the Australian framework, this thesis has underscored many aspects of the office not anticipated by the framers of the statutes. This has only been possible because of the use of interviews with officeholders and those working in close relation to the office to gain the necessary insight into the office's reality.

⁴¹ Chapter 6.3.

⁴² See full discussion in Chapter 6.5.

⁴³ Matthew S R Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *The American Journal of Comparative Law* 587, 589.

⁴⁴ With the exception of Western Australia, see Appendix A.

My conclusions provide substantive, and until now private, evidence for future comparative studies that has been largely overlooked in the past. The theory informing the Australian model and its practical manifestation holds many other insights for common law jurisdictions considering the most appropriate way to resolving some of the tensions in the Law Officer's function. For example, the 2007 review of the British Law Officers that considered the creation of a non-political office of Attorney-General was concerned about the lack of effectiveness of a non-Cabinet Law Officer.⁴⁵ Directly contradicting these concerns, my findings demonstrate that the advice of a non-political Law Officer retains its influence within Cabinet; but the model may lack effectiveness because of its reduced intimacy of involvement within government. H M Seervai more perceptively identified that the weakness of a non-ministerial Law Officer lies in his or her inability to oversee the legal position of government, instead waiting to be briefed, as one of many possible sources of legal advice to government.⁴⁶

My thesis has provided an original insight into the operations of an important constitutional actor in Australia. Most importantly, I hope my findings and conclusions will provide officeholders and other government officers with a more informed understanding of the role of the Solicitor-General, thus offering assistance to them as they confront the ongoing challenges of occupying and engaging with the office.

⁴⁵ See further Chapter 2.4.3.

⁴⁶ H M Seervai, 'The Legal Profession and the State: The Place of Law Officers and Ministers of Justice' (1977) 22 *Journal of the Law Society of Scotland* 265, 267. See full discussion of these findings in Chapters 5.2.2.2 and 5.2.2.3.

APPENDICES

APPENDIX A	Qualitative research design
APPENDIX B	Interview participants
APPENDIX C	List of officeholders
APPENDIX D	High Court appearances
APPENDIX E	Statutory provisions comparative table

APPENDIX A QUALITATIVE RESEARCH DESIGN

A.1 Introduction

Chapter 1 and Part 2 introduced the methodology employed in this thesis. The qualitative analysis in Chapters 5, 6 and 7 relies on a series of semi-structured interviews, supported by some documentary research.¹ The latter included the biographies and biographic dictionaries, memoirs, oral histories, personal manuscript collections, newspaper reports, government reports and other documents (such as Cabinet documents and legal opinions), the writings of officeholders and newspaper reports. Where it has been possible, the views of participants have been substantiated by examples from case law, written opinions and other data.² The purpose of this appendix is to provide a fuller explanation of the methodology employed to ensure adequate transparency and therefore the integrity of the research process.

Forty interviews were conducted from June 2010 to April 2012. A full list of my interview participants and the details of the interviews are provided in **Appendix B**. The interviewing process was preceded by obtaining the necessary ethical clearance from the University of Adelaide Human Research Ethics Committee, although the research was categorised as low risk.

A.2 Selection of interview participants

The primary research group for the interviews was current and former Solicitors-General. Also included were individuals from additional groups that operated closely with the office. These groups were current and former Attorneys-General, members of the Judiciary (some of whom had previously held office as either Solicitor- or Attorney-General) and members of the government solicitor's offices or Attorney-General's Departments. These additional groups were included on the basis that 'their views, experiences and so on would bring contrasting and complementary insights to the enquiry.'³ The groups were chosen because it

¹ Interviews and documentary analysis are very common qualitative techniques and have been identified as two of the three main methods of data collection for qualitative researching in law in a recent handbook on the topic: Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 928.

² In this way, much of the interview data findings have been triangulated (that is, supported by independent measures). Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 3rd ed, 1994) 266.

³ Jane Ritchie, Jane Lewis and Gilliam Elam, 'Designing and Selecting Samples' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage

is within these relationships – with the Executive, the Court and the public service – that the Solicitor-General operates and therefore these actors’ expectations and interactions with the office will offer insight into the role from different vantage points. I had, in my early formulation of my research, anticipated that I would also approach Vice Regal Representatives (Governors, Governors-General, Administrators) and important actors in the Parliament (Speakers, Presidents, Clerks) as I was interested in the relationship between these officeholders and the Solicitor-General. However, as I started my research I found I was able to gain sufficient information through interviews with the initial groups and independently verify this through publicly available documents.⁴ I was conscious to ensure my sampling was directed towards the ‘meatiest, most study-relevant sources’.⁵

The time period to which the research was confined varied across jurisdictions as I was concerned only with interview participants who had operated under the modern model of a statutory Solicitor-General.

Participants were not sampled through a representative selection. This was for two reasons. Practically, the pool of potential participants was simply too small for this to be achieved, and access to some members of it was necessarily limited (by age, ill-health or distance). Secondly, it was not intended that the sample would reflect with any great probability the conduct of the group as a whole.⁶ I was not measuring the frequency of any particular idea, but rather identifying that the idea existed, or did not, within the data.⁷ Thus the analysis rested on consideration and comparison of *individual’s* perceptions:

When the aim is to describe and understand a complex, shifting reality in some depth, when one is working with the sheer messiness of human reality, it has to be recognized that the apparently ‘unrepresentative’ individual is expressing something vital.⁸

Publications, 2003) 78, 86-7; Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage Publications, 1995) 69.

⁴ I did interview one Administrator of the Northern Territory, but this was on the basis that he was a former Solicitor-General as opposed to his current office.

⁵ Miles and Huberman, above n 2, 34.

⁶ Sharlene Nagy Hesse-Biber, ‘The Practice of Feminist In-Depth Interviewing’ in Sharlene Nagy Hesse-Biber and Patricia Lina Leavy (eds), *Feminist Research Practice: A Primer* (Sage Publications, 2007) 111, 119.

⁷ See the comparison between qualitative and quantitative research: J Kirk and M L Miller, *Reliability and Validity in Qualitative Research* (Sage Publications, 1986) 9.

⁸ Colin H Evans, *Language People: the experience of teaching and learning modern languages in British universities* (Open University Press, 1988) 5 extracted in Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing, 2004) 20. See also Webley, above n 1, 934.

While I was not aiming for a representative sample, the selection of participants was not random. ‘Strategic’,⁹ ‘purposive’ or ‘criterion based’,¹⁰ sampling was employed to allow for a comparison of persons of different backgrounds with different attributes to be considered, as well as focussing on the groups who I had identified as having a great deal of contact with the Solicitor-General, and thus be ‘data-rich’. A ‘pool’ of potential participants was compiled, composed of current and former Solicitors-General, Attorneys-General and those in government legal services with close and regular contact with the Solicitor-General, such as Crown Solicitors, or Crown Advocates. Within this pool, those whose contact details were not readily available were removed; also removed were those who it was known were not geographically accessible (I was geographically located in Adelaide and Queensland during my candidature, and I planned to travel to Sydney, Melbourne, Canberra, Darwin and Hobart).

My strategic sampling focussed on obtaining participants with a cross-section of attributes that I had identified. I did this on the basis that these attributes would allow me to draw strategic, cross-contextual comparisons amongst my data. Within the sample, as far as possible, a combination of male and female participants were approached, although the number of females holding offices that fell within those groups being interviewed were few (female participants n=3). Sampling was also done to ensure a combination of conservative and liberal appointees were interviewed (note, while Solicitors-General are not (usually) members of a political party, it is meant by this that the officeholder was appointed by a conservative or liberal government, although some officeholders had been appointed under both). Other attributes differed between participants that influenced sampling in an attempt to consider the viewpoints of those with different attributes. These included tenure experiences and backgrounds, for example a Solicitor-General who served governments of a single political persuasion only and those who served and were appointed under governments of different political persuasions; and Solicitors-General who were appointed from the Bar or from within the government.

As my interviews progressed, my sampling became more targeted. This was for three reasons. First, it became clear that particular individuals were involved in the relations between the Solicitor-General and the government and would offer a unique view. Secondly,

⁹ Jennifer Mason, *Qualitative Researching* (Sage Publications, 2002) 123-4.

¹⁰ Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Allyn & Bacon, 7th ed, 2009) 50; Ritchie, Lewis and Elam, above n 3, 78.

it was mentioned to me that a particular officeholder held a novel or outlying view regarding the office and my research would benefit from including them in it. Finally, a particular event became of interest to my research and to verify or expand on my data I needed to interview others involved in it. I also became interested in obtaining the perspectives from a number of different players in the same era; so I sought to include a number of sub-sets in my data of, for example, a Solicitor-General, Attorney-General and Crown Solicitor who all held office together. While time and cost meant I was not able to follow all leads that materialised in this way, they offered valuable direction in participant selection.

The sample included those operating in the federal jurisdiction and those operating in the State and Territory jurisdictions with the exception of Western Australia. The reason for excluding Western Australia was based on budgetary and time constraints. The interviews were collected and analysed across jurisdictions because to a large extent, as demonstrated in the history and legal chapters in the thesis, the jurisdictions are so similar that the constructs in one jurisdiction will inform the other. However, where the jurisdictions differ, these points of distinction could be used to better understand each jurisdiction and had to be borne in mind in the subsequent analysis.

There were certain limitations within my sample caused predominantly by fiscal and time constraints. As already mentioned, the absence of participants from Western Australia is one of these. The other is the lack of breadth in the participants interviewed in some jurisdictions. This was predominantly because of time constraints as I only visited some jurisdictions briefly. However, rather than seeing these sampling limitations as detracting from the study, they offer the opportunity to further test the conclusions drawn in future research.

Despite these acknowledged limitations in the sample size, I did have a large amount of confidence in the sufficiency of the sample in drawing my conclusions. Once I had conducted approximately 10 interviews and started to transcribe and code the data, it became clear to me that a number of recurrent themes, relationships and patterns were emerging. These were starting to repeat themselves in the succeeding interviews. I was reasonably confident by the end of my interviews that I had reached a satisfactory level of saturation with my data; that is, I was not gaining any significant new or novel insights in the interviews. That is not to say the subsequent interviews were not extremely important for the research: many of my preliminary conclusions were being reinforced through further views, and additional examples arose as the interviews continued. As is explained further below, I was able to

verify and confirm my conclusions with this additional data giving greater depth to their integrity.

A.3 Recruitment of interview participants

The recruitment of participants was done using publicly available information (including government directories, Who's Who, university directories (as many former officeholders are now adjunct professors) and the internet). They were approached by telephone, email or mail. The response of participants to be involved in the study was very encouraging: only two participants approached did not respond positively to the request;¹¹ and seven interviews failed to materialise because of an inability to coordinate a mutually suitable time. One interview asked whether the interview could be conducted with a colleague of his as they worked closely in the area and believed my research would be more complete with the two of them.¹²

Overall, I had little trouble gaining access to my participants and my response rate was very high. There are a number of reasons that likely underlie this. Many participants indicated that they were highly interested in the topic, and noted that little research had been done in the area. This general interest helped them to understand the purpose and importance of the interviews. The nature of the topic also meant that for many participants it was an opportunity to talk about their professional careers and reflect on them. The professional nature of the research meant that there was little reluctance on the basis of privacy or sensitivity. Many participants also knew me, or one or other of my supervisors. I am sure that this generated a level of trustworthiness in the research that ensured my high participation rate.¹³

This level of trust in the research was largely reflected in participants' approaches to confidentiality and anonymity (this is explained below) and the level of candour that all participants displayed. At the end of the interviews, a number of participants expressed how much they had enjoyed the interview: an opportunity to reflect on their experiences, and some of the larger concepts that touch on their role with an interested third party. Many indicated that if I required anything further that I simply needed to get in touch. A number

¹¹ And in both of these instances no response was received, rather than a negative response.

¹² A joint interview was conducted with James Faulkner (Constitutional Policy Unit, Commonwealth Attorney-General's Department) and David Bennett (Deputy Government Solicitor, Australian Government Solicitor).

¹³ David Buchanan, David Boddy and James McCalman, 'Getting in, getting on, getting out and getting back' in Alan Brymer (ed), *Doing Research in Organisations* (Routledge, 1988) 53, 59.

also provided me with additional documentary sources during, or after, the interview to assist me with my research.

This high response rate is critical to understanding the veracity of the data: the high participation rate meant participants were less likely to be self-selecting and therefore conclusions were not influenced by the suggestion that the participants had a particular interest or agenda in relation to the study's subject matter.

Participants were initially provided with an overview of the project and its goals, together with a copy of my CV to allow them to see my previous work as a researcher. Once I received a response from them expressing an interest to be involved in my research, I forwarded the additional material for the interview and arranged the time and place for the interview. Most interviews lasted approximately an hour. Interviews were conducted at the place most convenient to the participant: this was largely in participants' workplaces, although a small number were conducted elsewhere.

The additional material forwarded to participants included:

(a) A three-page sheet of Explanatory Notes that explained in more depth the purpose and scope of the research, the intent of the interviews in the larger project and the conditions that would surround the interview (particularly in relation to consent and confidentiality). This also provided participants with a list of subjects around which the interview would be conducted. These were:

- The appointment of the Solicitor-General;
- The constitutional importance of the office;
- The Solicitor-General's client;
- The independence of the Solicitor-General;
- The processes of the office;
- The broader bureaucratic setting in which the office operates;
- The accountability of the Solicitor-General;
- The different functions of the Solicitor-General;

- The relationship between Solicitors-General;
 - The relationship between the Solicitor-General and the Court;
 - The role of the Solicitor-General in interventions before the High Court.
- (b) A consent form, that included an optional box regarding (i) confidentiality and anonymity and (ii) tape recording; and
- (c) Information on the University of Adelaide’s independent complaints procedure.

The Explanatory Notes for Interview Participants, consent form and complaints procedure information sheet that were used in this study are set out at the back of this Appendix.

A.4 Development of interview topics

The interview topics were, initially, developed during the comparative research into the British, US and New Zealand offices,¹⁴ the history of the Australian office and the analysis of the legal position. The focus of the interviews was the perceptions and experiences of the office regarding the key characteristics that divided the literature as to how the Law Officers ought to resolve the political and legal tensions inherent in their constitutional roles. Thus the attitudes towards the questions of client, function, independence and accountability were key themes explored in each interview. Also relevant in analysing the position was the view on the relationship between the office and the three arms of government: the Executive, the Parliament and the Judiciary, and any perceptions about public interest obligations the office continued to fulfil.

The interviews also sought to understand better the processes of the office, and so questions regarding the appointment, everyday processes (including relationship with the Attorney-General, Ministers and other government legal officers), the broader bureaucratic setting in which the office operates, and the relationship between Solicitors-General as a collective (particularly involving the Special Committee of Solicitors-General) were explored.

The initial five interviews (which included current and former Solicitors-General, two judges and a former Attorney-General) were used as a pilot study to test the interview schedule and to gain an insight into issues of concern to participants. The interview schedule was modified accordingly.

¹⁴ Chapter 2.

A.5 Conduct of interviews

The interviews took between 25 minutes and two and a half hours. They were conducted in a semi-structured manner around those topics that had been provided to the participants in the Explanatory Notes. Solicitors-General (current and former) were asked about their perspectives on the role, any difficulties they had faced that demonstrated a perceived tension in the role, and whether they had been confronted by particular issues that highlighted such tensions. Those in the other groups – Attorneys-General, Judges, members of the government legal service – were asked about their perspective of the role in the broader government context, particularly as it influenced their role, together with their observations of, relationship, and interactions with the office. For each individual interview, research was conducted regarding their current and former professional positions, political affiliations, events of significance during their time in office, previous writings (particularly on the topic of the Solicitor-General), and previous interviews or oral histories they may have given. This allowed individual interviews to be tailored to individual experiences and opinions.

For my first five interviews, I arranged an informal meeting with the participant to discuss my project, the purpose of the interview and the general content of the interview. This allowed me to develop rapport with the participant, and ensure that the subsequent interview was tailored to the individual and I could use the time allocated for the interview as effectively as possible. I was able to do this with these participants as I was living in the city in which they were conducted and thus access to them was not a problem. As I grew more comfortable with my interview technique and preparation I found this initial, informal meeting was unnecessary (and in many of my subsequent interviews, it was impractical to arrange two meetings with the participant). One of these initial interviews was with one of my PhD supervisors who is a former Solicitor-General. This was an important interview as after the interview he provided me with feedback that allowed me to further improve my technique, the flow of questions, and the content of questions.

Three interviews were conducted over the telephone. This was not ideal, as it did not allow for the same level of rapport to be built between myself and the interview participant as an in-person interview does. However, I did not feel these interviews were prejudiced because of this method for two reasons. First, the nature of the roles of participants (each participant that I interviewed over the telephone was an incumbent Solicitor-General) is such that they would often be required to conduct lengthy teleconferences. Further, I had met two of the

participants on a number of occasions prior to the interview which enabled rapport to develop.

The choice of a semi-structured interview for my methodology was necessary for a number of reasons. It allowed the interview to explore a topic in more depth if it was one on which the participant had extensive views on, or with which the participant had had controversial experiences, while ensuring that there was sufficient similarity across subject areas that data could be collated and compared across relevant variables. Where time did not permit, it allowed the interview to focus on those areas that were of particular interest because of the character or characteristics of the participant. The semi-structured format also allowed participants to be asked about specific events and views that they had expressed publicly that related to the interview topics. Finally, the order of the interview was able to be changed depending on how a participant responded to the questions, and the topics that naturally progressed during the course of the interview.

Throughout the interview, funnel questioning was used to ensure the participant's views on a topic were explored first, before I made suggestions about issues in the questions. This allowed the data as far as possible to be collected from the participant uninfluenced by particular propositions I wanted to put to the participant. As I conducted more interviews, the propositions that I put to the participants changed and expanded as I engaged in my preliminary data analysis and tested the conclusions that I had drawn from the data.

In the course of the interview, I also pressed participants for illustrative examples of any broad generalisations, or principles that they provided. This ensured the data I was received was grounded in practical experience rather than idealised theory. It also enabled me to check accounts against other factual records to verify validity of the data.

While each interview developed as its own conversation, naturally focussing upon different topics in more depth than others, at a high level of abstraction the general format the interviews took can be described. Below is a description of the format of an interview with a Solicitor-General (current and former) (interviews with Attorneys-General, the Judiciary and members of the government legal service were modified according to their position).

I commenced each interview with an explanation of the project, and that the participant had a number of choices regarding confidentiality and anonymity: they could request complete anonymity; they could request confidentiality or anonymity regarding some matters as they

arose in the course of the interview; or finally they could ask for anonymity or confidentiality (whether complete or partial) when I provided the participant with the final draft of the thesis for their review. Generally, most participants opted to allow me to use the interviews subject to any requests as to confidentiality or anonymity made during the interview itself. Some participants also indicated that they would review their position of confidentiality/anonymity when they saw the draft thesis. At this point I also asked the participants whether they had any questions about the project (on a number of occasions, at this point participants raised queries about the broader project and these discussions were always enlightening as they provided a fresh perspective on the wider analytical framework I was adopting).

Each interview proper would typically start with an examination of the officeholder's appointment as Solicitor-General. This would include understanding the procedure that resulted in appointment, the perception of the role that a candidate had, and their thoughts on the significance of the appointment for their career. Then the interview turned to questions that would throw more light on the impact of the appointment process on the role and independence of the Solicitor-General, such as what the participant perceived were desirable characteristics in a Solicitor-General, and the impact of any previous relationship with the government or political persuasion on the appointment process. To assist in candour, questions around the desirable characters of a candidate were framed in the abstract rather than the specific.

Participants were asked about the processes of the office – and particularly questions that would shed light on the role of the office within the government structure and the degree to which the office was involved in the legal services of government. I explored topics such as from where they received their instructions, the level of involvement with the Attorney-General, other Ministers, and government legal advisors. The types of matters in which they were involved was also canvassed at this point. I also explored the role of the Solicitor-General in competing for the legal work of government in a situation where they have no guaranteed legal work.

Participants were then asked to comment on what they viewed as the importance of the office of the Solicitor-General within the government. After they provided a general answer, participants were asked more specific questions about the need for a permanent officeholder in the system, and the advantages such an office offered over, for example, engaging private counsel on an *ad hoc* basis.

At this point, many participants had already indicated who they believed the Solicitor-General's client to be in passing. I made a point of directly asking participants this question. Many answered simply by reference to the 'Crown' or the 'State'. Issues about what they would do in the event of a conflict between the long term interests of the government polity and the short-term interests of an incumbent government were explored at this point. Whether they thought the office had any overarching obligations to the public interest – and if so, how these manifested – were also explored. Participants were asked directly whether they had been involved in advising the Governor and the Parliament (either in the form of the Speaker of the lower house, President of the upper house, clerks, or committees) and how this had occurred. Participants were asked about their perspective on a case study from 1975 where there was a question as to whether the Solicitor-General had an overriding obligation to the Parliament.

Participants were asked about the type of independence that they perceived the Solicitor-General enjoyed, and the mechanisms that they thought existed to protect that independence. Examples of when independence had not been respected and the response to that were sought. Perceived differences between the professional and ethical obligations of a private practitioner and the Solicitor-General were explored. Closely tied to the above two topics, participants were asked to whom they considered themselves accountable.

To explore the different functions of the office, and also to get a better perspective on what types of matters were considered to be appropriate for the Solicitor-General to engage in, participants were asked about any non-legal functions the Solicitor-General engaged in, whether they engaged with the media, and whether they considered the Solicitor-General could engage in private practice in their jurisdiction (with the exception of Queensland where private practice is engaged in, in which case participants were asked about any difficulties this posed, and the propriety of it). All participants were asked for the reasons behind their responses.

The relationship between the Solicitor-General and the Judiciary was explored by questions about whether they thought judges had any additional expectations from the Solicitor-General as opposed to a private practitioner appearing for a private client; consideration of appointment to the bench; and the degree to which the Solicitor-General was directed by the Executive in taking positions, intervening in constitutional cases, and formulating argument before the courts.

The relationship between the Solicitors-General was finally explored by questions about the relationship more generally, and the operations of the Special Committee of Solicitors-General and its relationship to the Standing Committee of Attorneys-General. This was always an enjoyable point to end the interview on as the recollections of relationships between the officeholders were often warm and entertaining.

As the interview was finishing (and when time permitted) I concluded with an open-ended question about any issues the participant thought I may have missed. Each interview concluded then with an explanation of the process from that point, that I would provide the participant with a copy of the relevant sections of the draft thesis before it was submitted, that they would be able, at that point, to ensure the accuracy of any material I used in the thesis, and that they could also request anonymity or confidentiality in regard to any of the material used, even where they had not indicated the material was confidential during the interview.

A.6 Situating myself in the interview process

To some degree, the use of semi-structured interviewing that flowed as a conversation around pre-set topics placed me *within* my methodology.¹⁵ Therefore some explanation of my perspective and background is necessarily to provide a greater level of transparency, allowing for the discovery and understanding of any unintended influences and pre-suppositions.

I am somewhat of an ‘insider’, as a PhD student in law, a legal academic and having previously practised in the public law field in Queensland (as an articulated clerk to the Queensland Crown Solicitor and then as an associate to a judge of the Supreme Court) and Victoria (as a Senior Lawyer at the Victorian Government Solicitor’s Office). As such, I or my writings were likely to have been known to a number of my participants (the likelihood of this dramatically increased in those jurisdictions where I had worked – indeed I interviewed previous colleagues and bosses – and because I provided participants with a copy of my CV when I invited them to be part of the project).

The advantage of bringing a legal perspective to the interview was that it gave me a shared language and knowledge with the participants.¹⁶ At one level, this shared culture enabled me

¹⁵ S Roseneil, ‘Greenham Revisited: researching myself and my sisters’ in D Hobbs and T May (eds), *Interpreting the Field* (Oxford University Press, 1993) 180 referred to in Cownie, above n 8, 21.

¹⁶ Rubin and Rubin, above n , 22; Sharlene Nagy Hesse-Biber and Patricia Leavy, *The Practice of Qualitative Research* (Sage Publications, 2006) 136.

to decode answers more accurately.¹⁷ However, I had to be additionally vigilant that I did not make assumptions based on preconceived conclusions as to meaning that affected me in the gathering and subsequent analysis of the data.¹⁸

A.7 Data analysis

Interpreting data is ‘an art it is not formulaic or mechanical’.¹⁹ Nonetheless, I approached my data interrogation and interpretation on the basis it must be systematic, rigorous and reliable without being too rigid. In my analysis of the data I relied extensively on the framework outlined in *An Expanded Sourcebook: Qualitative Data Analysis* by Matthew B Miles and A Michael Huberman. It is a seminal and heavily relied upon work in the social sciences. Their ontological orientation was also closely aligned with that I have used in the thesis (this is described further in Chapter 1).²⁰ The approach of Miles and Huberman can be outlined as consisting of three concurrent ‘flows of activity’: data reduction (coding, writing summaries and memos etc); data display (organising, comparing data to further understanding and facilitate analysis); and conclusion drawing and verification (noting regularities, patterns, explanations, possible configurations, causal flows, and propositions).²¹

A.7.1 Data reduction: transcription, coding and memoing

A.7.1.1 Transcription

All but three of my interviews were tape-recorded with the permission of the participant (including those conducted by telephone).²² Where participants requested that certain information be kept confidential, this was generally flagged while the tape was still recording. The tape recorder was small and inconspicuous, and I do not believe it compromised the rapport or frankness of the interviews in any way.

The use of a recording device enabled the data to retain its richness through direct quotes. Where possible in the presentation of the analysis, these quotes have been used. All interviews were transcribed by me with the assistance of contemporaneous notes that I had

¹⁷ William Foddy, *Constructing Questions for Interviews and Questionnaires: Theory and Practice in Social Research* (Cambridge University Press, 1993) 17.

¹⁸ J Riemer, ‘Varieties of Opportunistic Research’ (1977) 5(4) *Urban Life* 467.

¹⁹ Norman K Denzin, ‘The Art and Politics of Interpretation’ in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage, 2000) 317.

²⁰ Miles and Huberman, above n 2, 4.

²¹ For an overview of these three flows, see *ibid* 10-12.

²² Of those that were not tape recorded, two were on the request of the participant and one because the surroundings were too noisy to allow for a tape recorder to be used.

made.²³ I made these notes as general ‘post-interview memos’ that noted any number of things that occurred to me during the interview or in my immediate reflection; these included ideas on the main themes in the thesis; relationships with previous interviews, or thoughts that I had had; any queries relating to demeanour, candour and frankness; ideas where I may find further information on particular examples provided by the participant; and further avenues of research.²⁴

Transcription was an invaluable part of my data reduction and analysis and during it I not only became more immersed in the data but I developed codes and started to think and note down relationships and patterns that struck me at this early stage of the process.

A.7.1.2 Coding and memoing

The data were then reduced through an exercise in coding and memoing. I commenced coding my interviews when I had approximately 10 interviews completed. I had developed a series of codes based on my literature review and historical and legal analysis; but was also very open to allowing codes to develop from within the data, thus drawing to some extent on the ideas of grounded theory.²⁵ I was very conscious that, as I had conducted my historical and legal analysis in the main prior to conducting my interviews and analysis, I brought to the exercise a number of ideas about how, in theory, the office should operate. This prior research had also alerted me to areas in which the theory was imperfect, lacked specificity and confirmed my view that this area of the office was little understood: in these areas the importance of my empirical research was particularly acute. In this sense, I was not rigidly testing preconceived hypotheses, but neither was I conducting entirely open-minded grounded research.²⁶ In coding, I was identifying excerpts in the text that were either themselves perspectives on the code, practical explanation of the code, or illustrations of the code (or perspectives on it). When I came back to each code, the relationships between these different combinations would provide a rich cross-section of data for analysis.

²³ Notes during the interview itself were avoided as far as possible to ensure that the participant followed the answers, and was able to develop probing questions to better understand them, and to ensure open and receptive body language was maintained.

²⁴ I used the example ‘Contact Summary Form’ in Miles and Huberman, above n 2, 53.

²⁵ In this respect, I found the short memos I wrote after conducting each interview particularly helpful in the creation of new codes as, in these memos, I often wrote anything that had struck me as fresh in the interview.

²⁶ Miles and Huberman, above n 2, 17.

As I developed new codes, I reviewed the earlier interview data. I also found that some of my codes collapsed, that is, I found two or more codes were capturing the same material. I was also able to start grouping my codes into thematic groups and hierarchies that I could use later to assist in the data display and analysis. These groupings, as they were refined, would also form my headings and subheadings when it came to set out my interview findings in the final thesis.

During this coding process, I commenced a series of memos on those codes that I perceived from the outset to be fundamental (particularly client, independence, public interest) and also those which I was surprised to see rising in prominence (particularly the office's position within the larger bureaucracy). These memos noted 'typical' or 'representative' answers that were emerging from the data (that is, recurrent themes in relation to perspectives on the code and relationships and patterns that I could start to see emerging from the data); 'negative' or 'disconfirming' instances in relation to these answers; and 'exceptional' and 'discrepant' instances (that is, particular novel ways of looking at the idea).²⁷

For my initial 10 interviews, I also wrote summaries for each interview after I had completed my coding (I called these my 'interview memos'). These summaries helped me identify patterns and themes and develop the subsequent memos. As I progressed through the interviews, the need for these summaries lessened as my codes stabilised and I developed a greater sense of the themes and relationships for which I was looking. After the first 10 interviews, it was no longer necessary to conduct such a rigorous analysis for each individual interview.

At approximately half-way through my data collection, I made the decision to change from manual coding and memoing to NVIVO software. This decision was made predominantly on the basis that I needed to organise the growing data; but later I was very pleased with the manner by which the software allowed me to retrieve, search and display my coded data. I entered my codes (to date), and imported my interview transcripts. Within the software I was able to group my codes, and add the key 'attributes' of each participant (these were largely the attributes on which I had sampled my participants): position, jurisdiction, gender, years in office, subsequent position and political persuasion. This allowed for highly particularised searching and comparison of the data later on.

²⁷ Ibid 34.

When I imported my interview data into NVIVO, I decided to recode all of my interviews without reference to my original, manual coding. This allowed me to ‘test’ the accuracy of my original coding and increase its consistency across the data set. Once I completed coding my interviews, I also added into my data set a number of documentary sources and coded these. These were therefore able to be part of the data displays I would generate around the codes.

I conducted four of my interviews after I had largely completed the coding and analysis process. Rather than importing this data NVIVO and coding the transcripts, I manually coded the transcripts and entered any additional material into my analysis. I was able to do this predominantly because the interviews did not provide any new findings, but provided support and illustrations for findings I had already drawn and written up.

A.7.2 Data display: reconceptualising the data

This part of my analysis was pivotal. Its purpose was to allow me to reconceptualise the data and thus understand relationships and themes that may not have been immediately apparent in the data’s raw form (that is, in the interview transcripts themselves). The displays would facilitate comparisons and contrast that would hold the key to all of my conclusions.

I commenced my analysis by displaying the coded data (that is, excerpts from the interviews that had been coded – the huge advantage of this was it allowed me to look at the actual interview data, not simply summaries of it) using matrix tables collating different variables to allow for the systematic comparison of responses across the whole data set, but also within jurisdictions, time periods, and across groups of participants sharing the same attributes. In this way, relationships across the data and conclusions were developed. This analysis commenced before all of the interviews had been completed.

As my data grew, my matrices became larger and unwieldy. My change from manual coding to NVIVO allowed these matrices to be more easily created, viewed, and I was able to retrieve and search the data in a highly particularised manner (including using codes, grouped codes, and attributes of participants).

A.7.3 Conclusion drawing and verification

The data displays and memoing that I had conducted to this point were the tools which I then used to draw conclusions. I also returned to some of the pivotal interview transcripts and reread them to ensure I was not taking data out of its context.

The matrix displays were pivotal for my interpretation as they allowed me to find patterns and relationships that formed the core of my conclusions and then verify these through providing substantiating examples and repetition.²⁸ My conclusion drawing and verification was an interactive and iterative process: the data spoke to additional issues requiring further research in the interviews, and conclusions could be verified and modified as required in the course of additional data being added. In this way, the coding and analysis paradigm that I used was neither truly ‘inductive’ nor ‘deductive’, but a combination of both.

It was at this point in my data analysis that I started to corroborate the validity of some of the data where it related to historical events. I was able to compare data within the interviews and other documents regarding the same incident to check veracity; and I also conducted research to externally verify statements and assertions. This included, for example, using case law, court transcripts, written opinions and Cabinet documents to verify, and at times further exemplify, claims made.

By the end of my analysis I was confident that, while there were limitations in my study (see below), the conclusions I had drawn were reliable and sound. There was sufficient repetition and examples that substantiated my conclusions to demonstrate that they were valid representations of the individual interviews conducted and provided valuable insights into the operation of the office more generally. While I was, at a number of points, tempted to try to draw ‘representative’ conclusions about the Solicitor-General, I had to remind myself that I was not looking for ‘representative’ conclusions, but rather conclusions that represented valuable insights and broad ranges of experiences of individuals in regard to the office of Solicitor-General.²⁹ In accordance with my methodology, therefore, I had to guard against overly broad generalisations in drawing conclusions.

A.8 Participant review

In accordance with my ethics approval, once I had a complete and almost final draft of my thesis, I provided any extracts from interviews or information attributed to a participant (either expressly or anonymously) to each participant for their comment. I decided to provide my participants with the full chapters in which these extracts or information appeared. This way participants would gain an understanding of the context in which they were quoted. This

²⁸ I used many of the ‘tactics’ for generating meaning outlined in *ibid* ch 10, throughout this process.

²⁹ Colin H Evans, *English People: the experience of teaching and learning English in British universities* (Open University Press, 1993) x, extracted in Cownie, above n 8, 17; Webley, above n 1, 934.

gave rise to some difficulty – because I was providing all participants with the full chapter at the same time, I had to de-identify all references. I provided each participant with an anonymous number, only informing each individual what number they had been allocated and drawing their attention to references to their interview (through electronic highlighting). At this stage, I also brought their attention to any parts of other interviews where comments had been made about their office, themselves, or their jurisdiction, and thus providing them with a further opportunity to comment.

This was a very rewarding exercise. Participants responded with interest to my research, and many provided additional comments and insights that developed the accuracy, depth and breadth of my research. There were only a small number of occasions where participants requested incidents they had referred to be removed or anonymised. In most instances, I was able to agree with the participant on alternative wording that sufficiently anonymised them or the incident, thus still relying on their views and experience in my analysis. On a number of occasions in their responses participants provided me with further data that I was able to, with their permission, incorporate into the thesis.

A.9 Limitations of study

The sample size for the interviews was not small for a qualitative study of this kind. However, as has already been noted, limited funding and time meant that within some jurisdictions participants possessing different attributes were not represented in the data. This is particularly the case in Tasmania, Northern Territory, Western Australia and the Australian Capital Territory. It is therefore difficult to make larger generalisations from the data regarding these jurisdictions without analysing a broader cross-section of data that represents it. Although it should be added that such a limitation does not mean that commonalities that have been identified across the data will not still hold relevance in these jurisdictions.

Qualitative research that relies upon interviews always raises the possibility of a degree of (even sub-conscious) self-regulation by participants. Participants are informed that they will be involved in a study about how the office operates in practice, and there is a human tendency to paint the most ‘proper’ picture – whether that be in accordance with professional ethical standards, their own idealised self-image, or attempts to ‘please’ the researcher, who may be giving sub-conscious clues themselves as to the answers they are seeking.³⁰ As has

³⁰ Nigel Fielding and Hilary Thomas, ‘Qualitative Interviewing’ in N Gilbert (ed), *Researching Social Life* (Sage Publications, 2001) 126.

already been noted, the large response rate to the interview requests in this study tends to somewhat mitigate against this concern: while participants might have consciously or subconsciously self-regulated, as a general rule they have not self-selected. The cross-section therefore is not limited to those with strong views, or who have considered the office, in the past.

There were a number of telling factors in the interviews that demonstrated the information being obtained was very frank. All of the participants were very senior, established professionals with great confidence in their professional and ethical opinions. As such, the likelihood that they were tailoring answers to accord with any conception of the answer that they thought I was looking for was remote. It was also known to the participants (as I explained to them at the start of the interview), that I would be interviewing a number of their contemporaries, this provided them with a subconscious reminder that any information they provided to me would be referenced against the recollections and views of others who may have been involved in any particular event. Finally, a large number of participants disclosed instances where there was less than ideal behaviour: as any good evidence lawyer understands, self-incriminating testimony is taken as being particularly reliable.³¹

A further limitation of all qualitative research conducted with interviews is the recognition that people's views are 'constructed and reconstructed'.³² The validity of the data obtained in all the interviews must be assessed therefore against a recognised fallibility in construction and recollection. There were a number of instances in the interviews, for example, where the detail of recollection was mistaken. Rather than completely undermining the validity of the data, however, it should be acknowledged that the intention of the interviews was to develop an understanding of the views of officeholders (and others); and that therefore precise recollection of historical events did not necessarily undermine the data. In the presentation of the data, any errors of fact made by participants have been noted.

In the interviews, I often encountered reluctance from participants to comment directly on other individuals; particularly when they worked, or had worked, closely with them. At times participants declined to make comments about individuals but were happy to make general statements. These comments lacked some strength because I was not able to obtain details of the actual events or individuals that evidenced them.

³¹ On this basis confessions form an exception to the rule against hearsay.

³² Mason, above n 9, 64.

One constraint of all interviews was the operation of legal professional privilege. This limited, to some extent, the degree to which participants could provide examples in practice of their views. However, most participants were happy to provide general references within the confines of professional obligations. Legal professional privilege was one of the underlying reasons as to why interviewing was such an appropriate methodology for the thesis. Most of the legal opinions and other written work of the Solicitor-General are not publicly available, and therefore interviews provide a way of accessing attitudes about the roles without infringing on privilege.

**THE UNIVERSITY OF ADELAIDE
HUMAN RESEARCH ETHICS COMMITTEE**



EXPLANATORY NOTES FOR INTERVIEW PARTICIPANTS:

The Role of the Solicitor-General in Australia

PhD Candidate:

Gabrielle Appleby
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Supervisors:

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Chief Justice Patrick Keane
Federal Court of Australia
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Ph: (07) 3248 1192

Thank you for agreeing to participate in the above PhD Research Project. These Explanatory Notes will give you some background about the larger PhD Research Project as well as explain the purpose and format of the interviews. You have also been provided with a Consent Form and an information sheet on the Independent Complaints Procedure which provide further information about the protocols surrounding the interview.

Aim of PhD Research Project: The Solicitor-General of Australia is one of the most frequent advocates before the High Court of Australia. Yet, the office's constitutional role and influence in Australia has to this point gone unstudied. The office is of such a nature that it has the potential to influence not only the constitutional direction but also the political direction of Australia, and to contribute to the attainment of fundamental constitutional principles on which the Australian governing system is based.

To a large degree the question about the proper role of the Solicitor-General reflects the tensions experienced by any legal practitioner between the professional duties to the law and the court, the client and the desire to further one's own reputation and professional career. However, where the 'client' is the Government these tensions take on a greater significance. The Government has, compared to other clients, enormous power and influence over individuals' rights. Actions taken by the Government often have a wider effect on the community than the individual concerned in any particular decision. The Government is elected by and accountable to the people. It has a duty to protect the constitution and the rights of individuals contained in that document. The Government is a repeat litigant in important constitutional cases before the High Court and Government decisions are in some cases given a degree of deference by the Court. Often the Government will take action that affects individuals the legality of which the Court will never consider. For all of these reasons an informed debate about the proper role of the Government's most senior lawyer is an important part of facilitating the understanding of a system of democratic government operating under the auspices of the rule of law.

In this context, this research will attempt to determine the role of the Solicitor-General at the federal level in Australia.

Outline of the PhD Research Project: The larger PhD Research Project will investigate the role and function of the Solicitor-General in Australia through the lenses of a number of archetypes developed to describe similar offices in the United States.

The research will be conducted in three main parts. Because of the lack of literature on the Australian office, the initial part will extract a number of archetypes of the role of the office from the large volume of literature in the United States. Each archetype takes a different view of the appropriate function and level of independence that the office ought to enjoy. Often the different types are conceived of by reference to the identity of the client. Where the client is the Executive Government alone, the office is considered first and foremost a 'Government Advocate'. Where the obligations to the Court and the law as an institution are paramount the role reflects that of 'The Tenth Justice' (in the US context) or 'Handmaiden to the Court'. If the client is conceived at a higher level of abstraction, as some broader ideal of justice or public interest, the office may fulfil the role of 'Public Interest Advocate'. Where the client is considered to be the Government as a whole, and the office has an obligation to each branch, the office may perform the role of 'Peacemaker' in a system of separation of powers. Another view is that the actions of the office are not governed by any particular view of its proper function within the Government, but by bureaucratic pressures, to preserve the reputation and influence of the office, which may explain why one model is preferred over another in particular circumstances. A 'Bureaucrat' therefore chooses the model most suited to preserving the office's role and influence in the bureaucracy. By their nature as absolutes these archetypes will set outermost parameters of the plane on which the actual role of the Solicitor-General will be situated. They highlight the questions and issues to be considered in the analysis of the Australian position and then provide a matrix through which to evaluate the Australian experience.

The second part of the PhD Project will be an analysis of the historical, constitutional, statutory and common law position of the Solicitor-General. The final part of the PhD Project then will consider the actual operation of the office and the perceptions of the role of the Solicitor-General of current and former Solicitors-General, Attorneys-General, members of the judiciary and public servants who have worked closely with the Solicitor-General. The data for this part will come primarily from the interviews conducted.

While the larger thesis project is focussing on the role of the Solicitor-General at a federal level, the interviews will be conducted with officeholders in a number of jurisdictions. There are many differences between jurisdictions, however many of the fundamental characteristics remain the same and therefore the perspectives of people operating in these jurisdictions will provide an insight into the federal office. Further, where there are significant points of divergence, this will offer insights by way of comparison and contrast.

The Interviews – Structure and Content: The interviews will be semi-structured, conducted around a number of broad aspects of the role of the Solicitor-General. Each interview will roughly cover the same topics so as to make the data collected comparable in the final analysis. In the course of the interview, in addition to a general discussion of the role of the office, your opinion on particular historical events which have involved the office will be sought. Each interview will be broadly based around the following issues:

- The appointment of the Solicitor-General;
- The constitutional importance of the office;
- The Solicitor-General's client;
- The independence of the Solicitor-General;
- The processes of the office;
- The broader bureaucratic setting in which the office operates;
- The accountability of the Solicitor-General;
- The different functions of the Solicitor-General;
- The relationship between Solicitors-General;
- The relationship between the Solicitor-General and the Court;
- The role of the Solicitor-General in interventions before the High Court.

The interview is likely to take between one and two hours, although of course this will depend on the time that you are able to make available. It may also be desirable to conduct the interviews in two parts to allow you to provide your opinions and responses to events and issues that may be raised in later interviews. If I think it may be necessary for a second interview to be conducted, I will be in contact with you.

Consent, Confidentiality and Complaints Procedure: The interviews will only be conducted with your full consent as a participant. Please read through the Consent Form regarding the protocols that will be applied in relation to consent, use of data, anonymity and also the information sheet on the Independent Complaints Procedure.

Document for people who are participants in a research project

**CONTACTS FOR INFORMATION ON PROJECT AND INDEPENDENT COMPLAINTS
PROCEDURE**

The Human Research Ethics Committee is obliged to monitor approved research projects. In conjunction with other forms of monitoring it is necessary to provide an independent and confidential reporting mechanism to assure quality assurance of the institutional ethics committee system. This is done by providing research participants with an additional avenue for raising concerns regarding the conduct of any research in which they are involved.

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

Project title: The Role of the Solicitor-General in Australia

1. If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

Name: Professor John Williams

Telephone: (08) 8303 4018

2. If you wish to discuss with an independent person matters related to
 - making a complaint, or
 - raising concerns on the conduct of the project, or
 - the University policy on research involving human participants, or
 - your rights as a participant

contact the Human Research Ethics Committee's Secretary on phone (08) 8303 6028

CONSENT FORM: *The Role of the Solicitor-General in Australia*

PhD Candidate: Gabrielle Appleby (University of Adelaide)
Supervisors: Professor John Williams (Law, University of Adelaide)
Professor Clem Macintyre (Politics, University of Adelaide)
Chief Justice Patrick Keane (Federal Court of Australia)

1. I, _____ consent to take part
in the research project entitled:

The Role of the Solicitor-General in Australia

2. I acknowledge that I have read the Information Sheet entitled:

Explanatory Notes for Interview Participants: The Role of the Solicitor-General in Australia

3. I have had the project named above (including the details of the project and the purpose of the interviews), so far as it affects me, fully explained to my satisfaction by the Information Sheet and Ms Appleby.

4. My consent is given freely.

5. I understand that:

- (a) I am free to withdraw from the project at any time up without any reasons given for my withdrawal until the completion of the research project and withdraw any unpublished data previously supplied by contacting Ms Appleby.
- (b) The information I provide will be used for the purpose of the research project named above and the information I provide cannot be used for any other research project or by other researchers without my consent.
- (c) If I request (below), the anonymity and/or confidentiality of the information I provide in this interview will be safeguarded subject to any relevant legal requirements.

I request that *all* of the information I provide in this interview be kept anonymous:
Yes/No (please circle).

I request that the answers to particular questions be kept anonymous and/or confidential if I indicate this in the course of the interview: **Yes/No (please circle).**

- (d) Despite the guarantee of anonymity made above, it is nonetheless possible that, due to the small number of people being interviewed, someone may still be able to identify me as the source of information provided to Ms Appleby.
- (e) I will be sent a draft copy of any extract of interview or information attributed to me (either expressly or anonymously) for my comment before the research project is complete.
- (f) The information I provide in this interview will be accessed in the course of the research project only by Ms Appleby and her supervisors.

- (g) I understand that I may be asked to be involved in a second interview with Ms Appleby, on a date and time to be arranged. I am free to accept or decline such an invitation if it is made.
6. I consent to my interview being audio-taped for the purpose of ensuring accuracy of the transcript: **Yes/No (please circle)**
7. I am aware that I should retain a copy of this Consent Form, when completed, the attached Information Sheet, and the information on the Independent Complaints Procedure.

<p>PARTICIPANT</p> <p>.....</p> <p style="text-align: center;"><i>(signature)</i> <i>(date)</i></p>

<p>PhD Candidate</p> <p>I have described to _____ the nature of the research to be carried out. In my opinion he/she understood the explanation.</p> <p>Name: Gabrielle Appleby</p> <p>.....</p> <p style="text-align: center;"><i>(signature)</i> <i>(date)</i></p>
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APPENDIX B INTERVIEW PARTICIPANTS

Forty interviews were conducted in total. Below is a list of interview participants grouped by jurisdiction and position. The date and place of interview is also included. Where participants held a number of relevant offices (for example, if they were Solicitor-General but subsequently appointed to the bench), this has been indicated in a footnote. Incumbent officeholders (as at September 2012) are marked with an asterisk (*).

B.1 Commonwealth

Solicitors-General	Attorneys-General
Sir Anthony Mason AC KBE QC ¹ Sydney 16 February 2011	The Hon Thomas Hughes AO QC Sydney 16 February 2011
The Hon Robert Ellicott QC ² Sydney 23 June 2011	The Hon Gareth Evans AO QC Melbourne 27 June 2011
Dr Gavan Griffith AO QC Gold Coast 14 April 2011	The Hon Duncan Kerr SC ³ Hobart 21 December 2010
Dr David Bennett AC QC Sydney 27 June 2011	The Hon Professor Michael Lavarch AO Brisbane 13 August 2010
Justice Stephen Gageler ⁴ Sydney 17 February 2011	The Hon Philip Ruddock MP Sydney 17 February 2011
	The Hon Robert McClelland MP Sydney 15 February 2011
Judiciary	Other
Sir Gerard Brennan AC KBE QC Sydney 23 June 2011	James Faulkner SC PSM (Constitutional Policy Unit, Attorney-General's Department)* Canberra 7 September 2011
The Hon Ian Callinan AC QC Brisbane 1 November 2010	David Bennett QC (Deputy Government Solicitor, Australian Government Solicitor)* Canberra 7 September 2011

¹ Anthony Mason was subsequently appointed as a Justice of the New South Wales Court of Appeal, then Puisne Judge of the High Court of Australia and later Chief Justice of that Court.

² Robert Ellicott was elected to the House of Representatives and served as Attorney-General and subsequently as a Judge of the Federal Court of Australia before returning to the private bar.

³ Duncan Kerr was appointed a Federal Court Judge in 2012, after my interview with him.

⁴ Stephen Gageler was appointed a High Court Justice in 2012, after my interview with him.

B.2 New South Wales

Solicitors-General	Attorneys-General
The Hon Keith Mason AC QC ⁵ Sydney 16 February 2011	The Hon Terence Sheahan AO ⁶ Sydney 14 February 2011
Michael Sexton SC* Sydney 15 February 2011	

B.3 Queensland

Solicitors-General	Attorneys-General
The Hon Geoffrey Davies AO QC ⁷ Brisbane 3 August 2010	The Hon Rodney Welford Brisbane 2 February 2012
Chief Justice Patrick Keane ⁸ Brisbane 6 September 2010	The Hon Linda Lavarch Brisbane 24 September 2010
Walter Sofronoff QC* Brisbane 26 August 2010	The Hon Dean Wells Brisbane 23 September 2010

Other

Barry Dunphy (Queensland Crown Solicitor)
Brisbane
15 October 2010

Greg Cooper (Queensland Crown Solicitor)*
Brisbane
12 October 2010

⁵ Keith Mason was subsequently appointed as President of the New South Wales Court of Appeal.

⁶ Terence Sheahan was subsequently appointed as a Judge of the New South Wales Land and Environment Court.

⁷ Geoffrey Davies was subsequently appointed as a Justice of the Queensland Court of Appeal.

⁸ Patrick Keane was subsequently appointed as a Justice of the Queensland Court of Appeal before being appointed Chief Justice of the Federal Court of Australia.

B.4 South Australia

Solicitors-General

The Hon John Doyle AC⁹
Adelaide
20 September 2010

Chief Justice Chris Kourakis¹⁰
Adelaide
16 September 2010

Martin Hinton QC*
Adelaide
24 June 2010

Attorneys-General

The Hon Trevor Griffin
Adelaide
11 July 2010

Other

The Hon Catherine Branson QC¹¹ (South
Australian Crown Solicitor)
Adelaide
2 April 2012

Greg Parker* (South Australian Crown Solicitor)
Adelaide
30 June 2010

B.5 Tasmania

Solicitors-General

William Bale QC
Hobart
21 December 2010

Leigh Sealy SC*
Hobart/Adelaide (phone interview)
13 March 2012

⁹ John Doyle was subsequently appointed as Chief Justice of the Supreme Court of South Australia.

¹⁰ Chris Kourakis was subsequently appointed to the Supreme Court of South Australia, and then Chief Justice of the Supreme Court of South Australia.

¹¹ Catherine Branson was subsequently appointed to the Federal Court of Australia and then as President of the Human Rights Commission.

B.6 Victoria

Solicitors-General

Sir Daryl Dawson AC KBE CB QC¹²

Melbourne

28 June 2011

Justice Pamela Tate¹³

Melbourne

30 June 2011

Stephen McLeish SC*

Melbourne/Adelaide (phone interview)

27 February 2012

B.7 Australian Capital Territory

Solicitors-General

Peter Garrisson*

Canberra/Adelaide (phone interview)

5 March 2012

B.8 Northern Territory

Solicitors-General

The Hon Thomas Pauling AO QC¹⁴

Darwin

10 June 2011

Michael Grant QC*

Darwin

10 June 2011

¹² Daryl Dawson was subsequently appointed to the High Court of Australia.

¹³ Pamela Tate was subsequently appointed as a Justice of the Victorian Court of Appeal.

¹⁴ Thomas Pauling was subsequently appointed as Administrator for the Northern Territory.

APPENDIX C LIST OF OFFICEHOLDERS

Chapter 3 chronicled the historical development of the Solicitor-General across the Australian jurisdictions by reference to three substantive periods. Appendix C provides a list of the officeholders in those jurisdictions across the different periods.

C.1 Commonwealth Solicitors-General

Year	Solicitor-General
‘Public Service Period’	
1916 – 1932	Sir Robert Garran
1932 – 1946	Sir George Knowles
1946 – 1964	Sir Kenneth Bailey QC
‘Modern Period’	
1964 – 1969	Sir Anthony Mason AC KBE QC
1969 – 1973	Robert Ellicott QC
1973 – 1983	Sir Maurice Byers Kt CBE QC
1984 – 1997	Dr Gavan Griffith AO QC
1998 – 2008	Dr David Bennett AC QC
2008 – 2012	Stephen Gageler SC

C.2 New South Wales Solicitors-General

Year	Solicitor-General
'British Colonial Period'	
1824 – 1825	John Stephen
1826 (appointed but never sworn in)	James Holland
1827	William Foster
1828	John Sampson
1830 (appointed but lost position for failing to take up duties)	Edward MacDowell
1831 – 1836	John Hubert Plunkett QC
1836 – 1841	VACANT
1841 – 1844	William a'Beckett (acting)
1844 – 1848	Sir William Montagu Manning QC
1848 – 1849	William John Forster MLC (acting)
1849 – 1856	Sir William Montagu Manning QC
1856	Sir John Bayley Darvall QC
1856	Alfred James Peter Lutwyche
1856 – 1857	Sir John Bayley Darvall QC
1857	Edward Wise MLC
1857 – 1858	Alfred James Peter Lutwyche
1858 – 1859	William Bede Dalley
1859 – 1860	John Fletcher Hargrave QC
1863	John Fletcher Hargrave QC
1863 – 1865	Peter Faucett MLC
1865	John Fletcher Hargrave QC
1866 – 1868	Robert Macintosh Isaacs
1868 – 1869	Joshua Frey Josephson
1869 – 1870	Sir Julian Emanuel Salomons QC
1870 – 1872	Sir William Charles Windeyer
1872 – 1873	Sir Joseph George Long Innes
1873 – 1901	VACANT*
1901 – 1904	Hugh Pollock
1909 – 1910	John Garland KC
1911 – 1912	Walter Bevan

* During this period, Richard Edward O'Connor MLC and George Houston Reid QC MLA held the office for short periods. As is explained in Chapter 3.3.3, this was simply to allow these individuals to deputise for the Attorney-General during his absence, rather than a permanent appointment and reinstatement of the office of Solicitor-General.

1912 – 1915	David Robert Hall
1915	William Arthur Holman
1916 – 1919	John Garland KC
1919 – 1920	John Daniel Fitzgerald
1920 – 1922	Robert Sproule

‘Public Service Period’

1922 – 1953	Cecil Edward Weigall QC
1953 – 1969	Harold Alfred Rush Snelling QC

‘Modern Period’

1969 – 1974	Harold Alfred Rush Snelling QC
1974 – 1978	Reginald Joseph Marr QC
1979 – 1981	Gregory Thomas Aloysius Sullivan QC
1981 – 1987	Mary Genevieve Gaudron QC
1987 – 1997	Keith Mason AC QC
1997 – 1998	Leslie Katz SC (acting)
1998 –	Michael Sexton SC

C.3 Queensland Solicitors-General

Year	Solicitor-General
'British Colonial Period'	
1890 – 1893	Thomas Joseph Byrnes
'Public Service Period'	
1922 – 1925	Sir William Flood Webb
1925 – 1937	VACANT
1937 – 1945	Hubert James Henchman KC
1946 – 1954	William Graham Hamilton QC
1955 – 1970	William Edmond Ryan
1971 – 1980	Thomas Parslow QC
1980 – 1984	Denis Vincent Galligan QC
1985 – 1989	Kenneth George Mackenzie QC
'Modern Period'	
1989 – 1991	Geoffrey Lance Davies QC
1992 – 2005	Patrick Keane QC
2005 –	Walter Sofronoff QC

C.4 South Australian Solicitors-General

Year	Solicitor-General
'British Colonial Period'	
1857	John Tuthill Bagot
'Public Service Period'	
1969 – 1970	Andrew Wells QC
1970 – 1972	Brian Cox QC
'Modern Period'	
1972 – 1978	Brian Cox QC
1978 – 1986	Malcolm Gray QC
1986 – 1995	John Doyle AC QC
1995 – 2005	Bradley Selway QC
2005 – 2008	Chris Kourakis QC
2008 –	Martin Hinton QC

C.5 Tasmanian Solicitors-General

Year	Solicitor-General
‘British Colonial Period’	
1825 – 1832	Alfred Stephen
1832 – 1833	Hugh Cokeley Ross (acting)
1833 – 1837	Edward MacDowell
1838 – 1841	Herbert C Jones
1841 – 1844	Thomas William Horne
1844 – 1848	Sir Valentine Fleming KC
1848 – 1851**	Alban Charles Stonor
1851 – 1854	Sir Francis Villeneuve Smith
1854 – 1855	Edward McDowell (acting)
1855 – 1857	John Warrington Rogers
1857 – 1860	T J Knight
1860	Sir William Lambert Dobson
1861	VACANT
1862	Robert Byron Miller MHA
‘Public Service Period’	
1864 – 1867	John Compton Gregson
1867 – 1887	Robert Patten Adams
1887	Edward David Dobbie KC
1887 – 1901	Alfred Dobson KC
1902 – 1913	Edward David Dobbie KC
1914 – 1930	Sir Lloyd Eldon Chambers KC
1930 – 1938	Philip Lewis Griffiths KC
1939 – 1944	Rudyard Noel Kipling Beedham KC
1944 – 1946	Marcus George Gibson KC (acting)
1946 – 1951	Marcus George Gibson KC
1951 – 1952	Sir Malcolm Peter Crisp KC
1952 – 1956	Stanley Charles Burbury QC
1956 – 1968	David Montagu Chambers QC
1968 – 1984	Roger Christie Jennings QC
‘Modern Period’	
1984 – 1986	Christopher Reginald Wright QC
1986 – 2007	William Christopher Robin Bale QC

** Resigned in 1854, but had taken sick leave from 1851.

2007 – 2008

Francis Counsel Neasey (acting)

2008 –

Geoffrey Leigh Sealy SC

C.6 Victorian Solicitors-General

Year	Solicitor-General
'British Colonial Period'	
1851 – 1852	Sir Redmond Barry
1852	Sir Edward Eyre Williams
1852	James Croke
1854 – 1855	Sir Robert Molesworth (acting)
November 1855 – 1856	Sir Robert Molesworth
1856 – 1857	Thomas Howard Fellows
1857	Robert Sacheverell Wilmot Sitwell
1857	John Dennistoun Wood
1857 – 1858	Thomas Howard Fellows
1858 – 1859	Richard Davies Ireland
1859 – 1860	Travers Adamson
1860	James F Martley
1860 – 1861	VACANT
1861 (Minister for Justice)	John Dennistoun Wood
1863 (Minister for Justice)	Sir Archibald Michie
1866 (Minister for Justice)	Sameul Henry Bindon
1869	James Joseph Casey
1870	Butler Cole Aspinall
1870 – 1871	Sir Henry John Wrixon
1871 – 1872	Howard Spensley
1872 – 1874	George Briscoe Kerferd
1875	James Macpherson Grant
1875	Dr John Madden
1877	James Macpherson Grant
1880	Dr John Madden
1881 – 1883	Frank Stanley Dobson
1883 (Minister for Justice)	Robert Stirling Hore Anderson
1883	Alfred Deakin
1892 – 1893	Sir George Turner
1893	Sir Isaac Isaacs
1893 – 1894	Agar Wynne
1894 – 1899	Sir Henry Cuthbert
1899 – 1900	Sir John Mark Davies

1900 – 1902	Agar Wynne
1902 – 1903	Sir John Mark Davies
1903	Sir William Hill Irvine
1904 – 1908	Sir John Mark Davies
1908	Sir John Emanuel Mackey
1908 – 1909	Sir John Mark Davies
1909 – 1913	James Drysdale Brown
1913	W J Evans
1913 – 1915	Donald Mackinnon
1915 – 1917	Sir Harry Sutherland Wightman Lawson
1917 – 1918	Agar Wynne
1918 – 1920	Sir Arthur Robinson
1920	Sir Harry Sutherland Wightman Lawson
1920	Sir Arthur Robinson
1924 – 1924	Isaac Henry Cohen
1924	William Slater
1924 – 1927	Sir Frederic William Eggleston
1927	John Allan
1927 – 1928	William Slater
1928 – 1929	Ian Macfarlan
1929 – 1932	William Slater
1932 – 1934	Robert Gordon Menzies
1934 – 1935	Ian Macfarlan
1935	Harold Edward Cohen
1935 – 1938	Sir Albert Louis Bussau
1938 – 1943	Sir Albert Dunstan
1943	William Slater
1943 – 1945	Ian Macfarlan
1945 – 1947	William Slater
1947 – 1950	Trevor Donald Oldham
1950 – 1951	Thomas Walter Mitchell

‘Modern Period’

1951 – 1964	Sir Henry Winneke KC
1964 – 1974	Tony Murray QC
1974 – 1982	Sir Daryl Dawson QC
1982 – 1992	Hartog Berkeley QC
1992	Raymond Finkelstein QC (acting)

1992 – 2002

Douglas Graham QC

2003 – 2010

Pamela Tate SC

2011 –

Stephen McLeish SC

C.7 Western Australian Solicitors-General

Year	Solicitor-General
'Public Service Period'	
1902 – 1930	William Frederick Sayer KC
1930 – 1935	VACANT
1935 – 1946	James L Walker KC
1946 – 1969	Sydney H Good QC
'Modern Period'	
1969 – 1979	Sir Ronald Wilson QC
1979 – 1994	Kevin H Parker AC QC
1994 – 2011	Robert Meadows QC
2011 – 2012	Rob Mitchell SC (acting)
2012 –	Grant Donaldson SC

C.8 Australian Capital Territory Solicitors-General

Year	Solicitor-General
'Modern Period'	
2011 –	Peter Garrisson

C.9 Northern Territory Solicitors-General

Year	Solicitor-General
'Public Service Period'	
1978 – 1980	Ian McClelland Barker QC
1981 – 1987	Brian Frank Martin QC
'Modern Period'	
1988 – 2007	Thomas Ian Pauling QC
2007 –	Michael Patrick Grant QC

APPENDIX D HIGH COURT APPEARANCES

Chapter 3 chronicled the historical development of the Solicitor-General, and explained that it is only during the ‘Modern Period’ that the office has developed the stranglehold on constitutional work that is now one of its defining characteristics. Appendix D contains two tables that demonstrate this trend by reference to the trends in court appearances of the Solicitor-General. The first (**Table 1**) considers the constitutional cases where the government polity (or another government party) was represented. It provides the percentage of these cases where representation was provided by the Solicitor-General. The second (**Table 2**) considers all of the cases where the Solicitor-General represented the government. It provides the percentage of these cases that were constitutional cases. These figures have been compiled by the author according to appearances recorded in the Commonwealth Law Reports (before the High Court and Privy Council). Determinations were made about whether the case raised a constitutional issue by reference to the catchwords and head notes. In the table, ‘constitutional cases’ are cases that raise constitutional issues, even though they may also involve other issues (eg, immigration, tax, family law or industrial relations). Where the Solicitor-General has appeared in a matter to address the court on a constitutional issue, but has not because the issue was ultimately not raised at the hearing of the matter, these cases have still been included on the basis the Solicitor-General has appeared to defend the constitutional interests of the polity. The tables include cases reported to the end of volume 242 (2010) of the Reports.

TABLE 1: Representation of government by Solicitor-General in constitutional cases

Jurisdiction	Representation of the polity in constitutional cases by the Solicitor-General (number of constitutional cases in which Solicitor-General appeared over total constitutional cases in which government was represented)		
	Pre-'Modern Period'		'Modern Period'
	Traditional public service position	Public service position where counsel appointed	
Commonwealth	1916-1964 3 per cent (8 of 229)	NA	Since 1964 82 per cent (292 of 358)
New South Wales	1922-1954 0 per cent (0 of 73)	1954¹-1969 33 per cent (11 of 33)	Since 1969 67 per cent (138 of 205)
Tasmania	1903-1968 17 per cent (4 of 23)	1968²-1983 60 per cent (12 of 20)	Since 1983 62 per cent (24 of 39)
Victoria	NA	NA	Since 1951 84 per cent (151 of 179)
Western Australia	1903-1969 0 per cent (0 of 28)	NA	Since 1969 78 per cent (119 of 152)
South Australia	NA	1969-1972 100 per cent (9 of 9)	Since 1972 85 per cent (137 of 160)
Queensland	1922-1989 <1 per cent (1 of 119)	NA	Since 1989³ 82 per cent (46 of 56)
Northern Territory	1979-1985 0 per cent (0 of 3)	NA	Since 1985 58 per cent (18 of 31)
ACT	NA	NA	NA

¹ While the Solicitor-General was still appointed as a public service position, Harold Snelling was a Queen's Counsel appointed from the private bar and, unlike his predecessors, undertook substantial counsel work.

² While the Solicitor-General was still appointed as a public service position, Roger Jennings was a Queen's Counsel and, unlike his predecessors, undertook substantial counsel work.

³ Geoffrey Davies was appointed in 1989 under letters patent independently of the statute. However, his conditions of appointment were largely mirrored in the statute and he operated as an independent counsel. The characteristics of his appointment reflect appointments during the 'Modern Period' and it has therefore been included in this period.

TABLE 2: Percentage of cases in which Solicitor-General appeared that were constitutional cases

Jurisdiction	Percentage of cases in which Solicitor-General appeared that were constitutional (number of appearances in constitutional cases over total appearances of Solicitor-General in the High Court)		
	Pre- 'Modern Period'		'Modern Period'
	Traditional public service position	Public service position where counsel appointed	
Commonwealth	1916-1964 93 per cent (13 of 14)	NA	Since 1964 76 per cent (292 of 383)
New South Wales	1903-1954 0 per cent (0 of 8)	1954-1969 39 per cent (11 of 28)	Since 1969 74 per cent (138 of 186)
Tasmania	1903-1968 25 per cent (4 of 16)	1968-1983 70 per cent (12 of 17)	Since 1983 75 per cent (24 of 32)
Victoria	NA	NA	Since 1951 74 per cent (151 of 204)
Western Australia	1903-1969 0 per cent (0 of 1)	NA	Since 1969 78 per cent (119 of 152)
South Australia	NA	1969-1972 82 per cent (9 of 11)	Since 1972 71 per cent (137 of 192)
Queensland	1922-1989 20 per cent (1 of 5)	NA	Since 1989 73 per cent (46 of 63)
Northern Territory	1979-1985 0 per cent (0 of 3)	NA	Since 1985 58 per cent (18 of 31)
ACT	NA	NA	NA

D.1 Explanatory notes to Tables 1 and 2

D.1.1 Commonwealth

Since the statutory position came into effect with Anthony Mason's appointment in 1964, the Commonwealth's interests in constitutional matters have been, by and large, represented by the Solicitor-General. For example, since that date to 2010, the Solicitor-General has appeared in approximately 82 per cent of constitutional cases in recorded High Court and Privy Council matters (292 of 358¹) in which the Commonwealth's interests have been represented. Of the remaining, in one case the Attorney-General represented the Commonwealth's interests, and in 28 cases other Commonwealth officers (namely Chief General Counsel) appeared. This left only 10 per cent of constitutional cases (37 of 358) in which the interests of the Commonwealth were represented by private counsel. In addition to constitutional work during this period, the Commonwealth Solicitor-General has appeared in 91 other matters, including criminal, native title/aboriginal lands, tax, administrative law, industrial relations, defence and family law matters. This represents approximately 24 per cent of the Commonwealth Solicitor-General's appearances in the High Court; meaning that in over 75 per cent of cases in which the Solicitor-General appeared, constitutional issues were raised.

D.1.2 The States and Territories

Since the creation of the statutory office and the devolution of criminal work onto the DPP, the position in the States has been very similar. Before the statutory positions were created, in many States the Solicitor-General conducted the predominance of the criminal work,² and

¹ This figure includes those cases in which an 'Acting Solicitor-General' appeared. These were appointed from the ranks of Commonwealth Officers (Chief General Counsel).

² During the period of public service appointments, Solicitors-General for Tasmania and New South Wales regularly appeared in criminal matters before the High Court. See, eg, Tasmania: *Enever v The King* (1906) 3 CLR 969; *Hedberg v Woodhall* (1912) 15 CLR 531. New South Wales: *Eade v The King* (1924) 34 CLR 154; *R v Ellis* (1925) 37 CLR 147; *Delaney v Gant* (1927) 40 CLR 174; *Dawson v King* (1927) 40 CLR 206; *Russell v Bates* (1927) 40 CLR 209; *Russell v Gale* (1928) 40 CLR 587; *Whittaker v The King* (1928) 41 CLR 230; *R v Weaver* (1931) 45 CLR 321; *Basto v The Queen* (1954) 91 CLR 628; *Beavan v The Queen* (1954) 92 CLR 660; *Harlor v The Queen* (1956) 95 CLR 170; *Mruz v The Queen (No 2)* (1956) 96 CLR 62; *Parsons v The Queen* (1957) 97 CLR 455; *Smyth v The Queen* (1957) 98 CLR 163; *Commissioner of Police v Tanos* (1958) 98 CLR 383. When Winneke was appointed Solicitor-General for Victoria, he also appeared in many criminal cases, see, eg, *Shaw v The Queen* (1952) 85 CLR 365; *Hall v Braybrook* (1956) 95 CLR 620; *O'Meally v The Queen* (1958) 98 CLR 13; *Papadimitrpoulos v The Queen* (1957) 98 CLR 249; *Raspor v The Queen* (1958) 99 CLR 346; *Attwood v The Queen* (1960) 102 CLR 353. In South Australia and Western Australia, the Crown Solicitor would often appear in these matters, as in these jurisdictions there was a single, fused profession.

civil litigation,³ for the Crown.⁴ It was not until the statutory office was created that the Solicitors-General became pre-eminent in the constitutional sphere, although this has been less so in New South Wales and Tasmania than the other jurisdictions, for reasons discussed below.⁵

D.1.2.1 Queensland

In Queensland, since the appointment of Geoffrey Davies in 1989, the Solicitor-General has appeared in 82 per cent of the constitutional cases in which the State's interests have been represented (46 of 56). In those cases where the Solicitor-General didn't appear, in 3 the State's interests were represented by an officer from Crown Law, and in another 3, the interests were represented by a Solicitor-General of another State. That left only 7 per cent of constitutional cases in which Queensland's interests were represented by private counsel. In Queensland, the office of Solicitor-General was created *after* the establishment of the DPP. Since the Solicitor-General was created, the office has only appeared in 2 criminal appeals before the High Court. Since 1989, the Solicitor-General has appeared in 17 non-constitutional cases (including crime, administrative law and native title matters among others). Constitutional matters made up 73 per cent of the Solicitor-General's appearances (46 of 63).

D.1.2.2 South Australia

In South Australia, while the first⁶ Solicitor-General, Andrew Wells, was appointed in 1969 as a public service appointment (his appointment changed to a statutory one in 1972), from that date the Solicitor-General appeared as counsel for the State. In South Australia, the profession has always been fused, and for example it was not unusual that the Crown Solicitor would appear as counsel for South Australia before the appointment of a Solicitor-General. Since the appointment of Wells, the Solicitor-General has appeared in approximately 86 per cent of constitutional cases for the State's interests (146 of 169).⁷ In those where the Solicitor-General did not appear, in 10 the State's interests were represented

³ These included matters such as charities, wills, taxation, workers compensation, liability of the Crown, property law and obscene publications.

⁴ See Table 2 on percentage of constitutional work conducted pre- and post- the 'Modern Period'.

⁵ Chapter D.1.2.6.

⁶ With the exception of John Bagot in the nineteenth century for a mere 11 days (see Chapter 3.2.4).

⁷ Between 1969-72, 100 per cent (9 of 9); after 1972, 85 per cent (137 of 160).

by Crown Law Officers,⁸ in 9 they were represented by Solicitors-General of other State jurisdictions, and therefore in only 2 per cent of cases (4 of 169), were private counsel briefed. Unlike in other jurisdictions, with the creation of the DPP in 1991, the Solicitor-General still continued to appear with some regularity in criminal matters. Prior to 1991, the Solicitor-General appeared in 13 criminal appeals in the High Court, and appeared in 7 after the creation of the DPP. Since 1969, the Solicitor-General has appeared in 57 non-constitutional cases (including crime, administrative law and tax matters among others). Thus, constitutional matters made up 72 per cent of the Solicitor-General's appearances (146 of 203).⁹

D.1.2.3 Victoria

Since 1951, with the appointment of Henry Winneke as Solicitor-General of Victoria, the Victorian Solicitor-General has appeared in 84 per cent of constitutional cases in which the State's interests have been represented (151 of 179). In 1 of the cases in which the Victorian Solicitor-General did not appear, the Attorney-General did; and in 4 others, another Solicitor-General was briefed to appear for Victorian interests as well as those of their own jurisdiction. This leaves only 13 per cent of constitutional cases in which the interests of Victoria were represented by private counsel (23 of 179).¹⁰ Since the creation of the DPP in Victoria in 1982, there has been a concomitant decrease in the criminal work performed by the Solicitor-General: the Solicitor-General has appeared in only 1 criminal appeal before the High Court;¹¹ whereas prior to then, Solicitors-General Winneke, Tony Murray and Daryl Dawson had appeared in 25 criminal matters. Since 1951, the Solicitor-General has appeared in 53 non-constitutional cases (including crime and administrative law among others). Thus, constitutional matters made up 74 per cent of the Solicitor-General's appearances (151 of 204).

⁸ Between 1978-84, the Crown Solicitor, Graham Prior, appeared in a larger than usual number of cases, excluding the Solicitor-General from this work. See further the phenomenon of 'freezing out' Solicitors-General discussed in Chapter 5.2.2.3.2.

⁹ Between 1969-72, 82 per cent (9 of 11); after 1972, 71 per cent (137 of 192).

¹⁰ There was a significant gap between retirement of Douglas Graham and the appointment of Pamela Tate; the same thing occurred between retirement of Tate and the appointment of Stephen McLeish. Many appearances by private counsel or other Solicitors-General occurred in these periods between 2002-3 and 2010-11.

¹¹ Not included criminal cases in which the Solicitor-General appeared as an intervener.

D.1.2.4 Western Australia

In Western Australia, with Wilson's appointment under the new statute in 1969, the Solicitor-General has appeared in 78 per cent of constitutional cases in which the State's interests have been represented (119 of 152).¹² In 9 of the cases where the Solicitor-General did not appear, the State's interests were represented by other Crown Law officers, and in 19 of them, a Solicitor-General (or Crown Solicitor) from another State jurisdiction appeared for Western Australia; leaving only 3 per cent of cases in which the interests of Western Australia were represented by private counsel (5 of 152).¹³ Since the creation of the DPP in 1991, again a decrease in the Solicitor-General's appearances in criminal appears has occurred. Prior to this date, the Solicitor-General appeared in 8 criminal appeals; and only a single appeal afterwards. Since 1969, the Solicitor-General has appeared in 33 non-constitutional cases (including crime, administrative law and tax matters among others). Thus, constitutional matters made up 78 per cent of the Solicitor-General's appearances (119 of 152).

D.1.2.5 Northern Territory

In the Northern Territory, since the creation of the statutory position of Solicitor-General as counsel in 1985, the Solicitor-General has appeared in 58 per cent of the constitutional cases in which the State's interests have been represented (18 of 31). In those cases where the Solicitor-General didn't appear, in 10 cases, the interests of the Territories were represented by a Solicitor-General of another State jurisdiction.¹⁴ That left less than 1 per cent of constitutional cases in which the Territory's interests were represented by private counsel (3 of 31). Since 1985, the Solicitor-General has appeared in 13 non-constitutional cases (including crime, and native title matters among others). Thus, constitutional matters made up 58 per cent of the Solicitor-General's appearances (18 of 31).

D.1.2.6 New South Wales and Tasmania

Exceptionally, in both New South Wales and Tasmania, the Solicitor-General has *not* had such a large monopoly in constitutional litigation.

¹² Wilson's appointment as Solicitor-General succeeded a period where, as Crown Counsel, he was doing most of the constitutional work in any event. Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31(2) *Melbourne University Law Review* 20, E.

¹³ Also note there seems to be a period in 1995/6 where no Solicitor-General appeared because of the transition between the retirement of Parker and the appointment of Meadows. This accounts for 3 of the 5 non-Solicitor-General appearances.

¹⁴ This is a large percentage: in over 30 per cent of cases, the interests of the Northern Territory are represented by another jurisdiction's Solicitor-General.

D.1.2.7 New South Wales

In New South Wales, the Solicitor-General started to take on the constitutional work of the State in the 1960s, prior to the establishment of the statutory position in 1969. After Solicitor-General Harold Snelling's first recorded appearance in the High Court in March of 1954,¹⁵ the Solicitor-General appeared in approximately 63 per cent of constitutional cases for the interests of New South Wales (149 of 238). Of the cases in which the Solicitor-General did not appear, the Attorney-General appeared in 3, the DPP in 1 and other Solicitors-General represented the interests of the State in 3. This left 34 percent in which private counsel appeared in the interests of the State (82 of 238). Since 1954, the Solicitor-General has appeared in 65 non-constitutional cases (including crime, administrative law and tax matters among others). Thus, constitutional matters made up 69 per cent of the Solicitor-General's appearances (149 of 214).

A better understanding of when the Solicitor-General became a constitutional specialist in New South Wales is gained by considering the role during a number of time periods. In the period after Snelling's first appointment, and prior to the codification of the position in 1969, the Solicitor-General only appeared in 33 per cent of constitutional cases (11 of 33).¹⁶ After the statutory office was created, Snelling's appearances in constitutional matters increased. However, after his retirement in 1974, his successors, Reginald Marr and Gregory Sullivan, again ceased to appear in the constitutional cases (although they continued to appear regularly in criminal work).¹⁷ So in the period from the commencement of the statutory position in December 1969 and the appointment of Mary Gaudron (Sullivan's successor) in February 1979, the Solicitor-General appeared in just under 16 per cent of constitutional cases for the State (8 of 51), with private counsel appearing in the remainder (43 of 51, or 84 per cent). There was recognition in New South Wales that the Solicitor-General was not performing the role of constitutional specialist that was occurring in many of the other jurisdictions. In 1979 New South Wales introduced the position of the Crown Advocate, as a precursor to the creation of the DPP, to relieve the Solicitor-General of much of the criminal work and thereby make 'a far greater contribution to constitutional and legal problems'.¹⁸

¹⁵ *Grannall v C Geo Kellaway and Sons Pty Ltd* (1955) 93 CLR 36, 29 March 1954.

¹⁶ Although in this period Snelling was performing much of the criminal work.

¹⁷ Eight recorded criminal High Court cases were presented by the Solicitor-General in this period, compared to only 8 of 51 constitutional cases.

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 April 1979, 4010 (Frank Walker, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 April 1979,

After the creation of the Crown Advocate, and the appointment of a new Solicitor-General (Gaudron), the New South Wales Solicitor-General took over much of the High Court constitutional work. From 1979, the Solicitor-General appeared in 84 per cent of constitutional cases for New South Wales (130 of 154). Of the cases the Solicitor-General did not appear, in 2 the interests were represented by other Solicitors-General, and in 1, the DPP appeared. That left just under 14 per cent in which private counsel represented the State (21 of 154).¹⁹ In this period, since 1979, the Solicitor-General has appeared in 36 non-constitutional cases. Thus, constitutional matters made up 78 per cent of the Solicitor-General's appearances (130 of 166).

D.1.2.8 Tasmania

In Tasmania, while the statutory position was not introduced until 1983, Roger Jennings, when he was Solicitor-General between 1968 and 1983 was appearing in constitutional litigation for the State. Since 1968, the Solicitor-General has appeared in only 61 per cent of constitutional cases for Tasmania (36 of 59). Of the cases in which the Solicitor-General did not appear, the Attorney-General appeared in 1, other Solicitors-General appeared in 5, and private counsel in 2. These figures are relatively stable in the period pre- and post- the 'Modern Period'.²⁰ Since 1968, the Solicitor-General has appeared in 13 non-constitutional cases. Thus, constitutional matters made up 73 per cent of the Solicitor-General's appearances (36 of 49).²¹

The Tasmanian Solicitor-General has thus never appeared in the same volume of constitutional cases for the State (and indeed, the figures demonstrate that compared to the other States, there have been substantially less interventions by the Tasmanian Solicitor-General in constitutional cases and therefore appearances in the High Court).²² This can largely be explained because of the wider duties the Tasmanian Solicitor-General performs, including all government requests for advice involving the scope and operation of the rights

4528-9 (Walker). In this move, New South Wales followed similar models already in place in Victoria and Tasmania.

¹⁹ During 1997 when there was a transition between the retirement of Mason and the appointment of Katz (acting), NSW relied heavily on private counsel.

²⁰ Between 1968-83 60 per cent (12 of 20) and post 1983 62 per cent (24 of 39).

²¹ This differs little between the periods 1968-83 (70 per cent; 12 of 17); and post 1983 (75 per cent; 24 of 32).

²² Queensland has a similarly low appearance rate in constitutional matters (56 cases); but this is from a shorter period – only from 1989 rather than from 1968. Northern Territory also has a low appearance rate.

and duties of the Crown.²³ The impact this has had on the Solicitor-General's constitutional functions in Tasmania is discussed further in Chapter 5.2.2.3.

²³ Although there are changes afoot to push this work back onto the Crown Solicitor.

APPENDIX E STATUTORY PROVISIONS COMPARATIVE TABLE

Chapter 4 provided a detailed examination of the legal position of the Solicitor-General across the jurisdictions. Appendix E contains a comparative table of many of the salient statutory provisions that are referred to in the Chapter.

E.1 Commonwealth

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegations	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Law Officers Act 1964</i> (Cth)	<p>Process: Governor-General appointment on 'such terms and conditions as Governor-General determines' (s 6(1) and (3)).</p> <p>Term: Period not exceeding 7 years, but eligible for reappointment (s 6(1)).</p>	Disqualified from sitting in Parliament as holds an 'office of profit under the Crown': <i>Constitution</i> s 44(iv).	<p>Functions: To (a) act as counsel for Crown, Commonwealth, person suing or being sued on behalf of Commonwealth, Minister, officer of the Commonwealth, officer of Territory, body established under Territory law, any other person at request of Attorney-General; (b) furnish opinions to the Attorney-General on questions of law; (c) carry out other functions of counsel as Attorney-General requests (s 12).</p> <p>Additional functions: Application for declaration re: vexatious litigant in Industrial Relations Court: <i>Industrial Relations Court Rules Order 21, Division 3, Rule 1</i>; and in the High Court (as Law Officer): <i>High Court Rules 2004</i> (Cth) r 6.06.</p>	<p>Remuneration: Determined by Remuneration Tribunal (s 7(1)).</p> <p>Allowances determined by Remuneration Tribunal (s 7(2)); See also <i>Judicial and Statutory Officers (Remuneration and Allowances) Act 1984</i> (Cth) s 7.</p> <p>Eligible for Long Service Leave (s 7A).</p>	Requires consent of Attorney-General, reasons for any consent to be laid before Parliament within 15 sitting days (s 9).	Yes (s 11).	None.
	<p>Qualification: Barrister or Solicitor of High Court or Supreme Court of not fewer than 5 years standing (s 6(2)).</p> <p>Removal: Governor-General shall remove on the grounds of incapacity, misbehaviour, bankrupt or insolvency (s 10); Resignation (s 8).</p>						

E.2 New South Wales

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Solicitor General Act 1969</i> (NSW)	<p>Process: Governor on terms and conditions as Governor determines (s 2(1) and (4)); Guidelines for selection process may be set by the Attorney-General but not binding (s 2(10)).</p> <p>Term: Not exceeding 10 years; not beyond the age of 72 years; eligible for reappointment (s 2(2)).</p>	<p>No: s 2(6). Also note <i>Constitution Act 1902</i> s 13B (Solicitor-General holds an office of profit under the Crown)</p>	<p>Functions: To (a) act as Counsel for Her Majesty and perform other duties and functions of Counsel as Attorney-General directs; (b) when office of Attorney-General is vacant, powers, authorities, duties and functions of Attorney-General (s 3). Additional functions: Signing indictments under <i>Criminal Procedures Act 1986</i> (NSW) s 126; to issue proceedings for contempt under <i>Criminal Procedures Act 1986</i> (NSW) Sch 1, cl 1 and under the <i>Real Property Act 1900</i> (NSW) s 143 and <i>Vexatious Proceedings Act 2008</i> (NSW) s 4(b); to sanction proceedings under <i>Conveyancing Act 1919</i> (NSW) s 183(3); sit on Council of Law Reporting <i>Council of Law Reporting Act 1969</i> (NSW) s 3(2)).</p>	<p>Remuneration: <i>Statutory and Other Offices Remuneration Act 1975</i> (NSW) and other allowances (s 2(3)).</p>	<p>No (s 2(5)(f)). Although note this is a prohibition on remunerated private practice only.</p>	<p>Deputy Solicitor-General (s 2(1)).</p>	<p>None.</p>
	<p>Qualification: Australian lawyer of at least 7 years standing (s 2(1)).</p> <p>Removal: Office shall be vacant if: for 'any cause which appears to the Governor sufficient the Solicitor-General is removed from office by the Governor'; bankruptcy; mentally ill; resignation; at the age of 72; engages in paid employment (s 2(5)).</p>						

E.3 Queensland

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Solicitor-General Act 1985</i> (Qld)	<p>Process: Letters patent issued by or on behalf of the Queen, on recommendation of Executive Council (s 5(1)).</p> <p>Term: Not exceeding 5 years; eligible for reappointment (s 5(2)).</p>	<p>Not a Responsible Minister: s 6 (not a Minister liable to retire on political grounds under <i>Constitution Act 1967</i> (Qld) s 14). Must waive any paid State appointment if elected: <i>Parliament of Queensland Act 2001</i> (Qld) s 66.</p>	<p>Functions: To (a) act, upon the request of the Attorney-General, as counsel for the Crown in right of the State, the State, a person suing or being sued on behalf of the State, a body established by or under an Act, and any other person or body where it is to the benefit of the State that the Solicitor-General should so act; (b) to carry out for the benefit of the Government of the State such other functions ordinarily performed by counsel as the Attorney-General requests (s 8). Additional functions: Writs of inquisition in cases of <i>bona vacantia</i> – <i>Property Law Act 1974</i> (Qld) Schedule 1, cl 2.</p>	<p>Remuneration: 80 per cent of Puisne Judge of the Supreme Court (s 11). Recreation and sick leave entitlements same as public servant (s 12(1)). <i>Judges (Pensions and Long Leave) Act 1957</i> (Qld) leave of absence (s 12(2)).</p>	<p>Requires consent of the Governor in Council to practice as a barrister. Must at all times give priority to discharging functions as Solicitor-General; May not appear for the defence in a prosecution brought by the Crown, act in any case where Crown is a party; permit or suffer conflicts of interest (s 16).</p>	<p>Yes (s 7).</p>	<p>None.</p>
	<p>Qualification: Barrister entitled to practice in the Supreme Court of not less than 10 years standing (s 5(3)).</p> <p>Removal: Resignation (s 17(2)); Governor in Council may remove for misbehavior or physical or mental incapacity (s 17(3)); Governor in Council shall remove for bankruptcy or absence from duty (s 17(4)(b)); contravention of conditions on right to private practice (s 17(4)(c)).</p>						

E.4 South Australia

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Solicitor-General Act 1972</i> (SA)	<p>Process: Governor on terms and conditions as Governor determines: ss 4(1) and 5.</p> <p>Term: Not specified, set as Governor determines (s 5).</p>	<p>No: <i>Constitution Act 1934</i> ss 45 and 46.</p>	<p>Functions: At the request of the Attorney-General, to act as her Majesty's counsel and perform such other duties as are ordinarily performed by counsel (s 6(a)).</p> <p>Additional functions: To appear for DPP; <i>Director of Public Prosecutions Act 1991</i> (SA) s 7(7).</p> <p>Delegation: None.</p>	<p>Remuneration: Salary and allowances as Governor from time to time determines: s 5(2).</p> <p>Pension: Judge of the Supreme Court (s 10).</p>	<p>Not to engage in other remunerative employment without consent of Attorney-General (s 6(b)).</p>	<p>No provision made.</p>	<p>None.</p>
	<p>Qualification: Legal practitioner of not less than 7 years standing (s 4(1)).</p>						
	<p>Removal: Governor may remove by writing for incapacity (s 7(a)); misconduct (s 7(b)); resignation (s 8(1)); attain age of 65 (s 8(2)).</p>						

E.5 Tasmania

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Solicitor-General Act 1983</i> (Tas)	Process: By Governor (s 4(2)).	No – must vacate office if elected to Parliament: <i>Constitution (State Employees) Act 1944</i> s 2	<p>Functions: To (a) act as counsel for the Crown in right of Tasmania or any other person for whom the Attorney-General directs or requests to act; (b) other duties ordinarily performed by counsel as the Attorney-General requests or directs; (c) such duties (if any) as imposed by another Act (s 7).</p> <p>Additional Functions: Certification of legality of directions: <i>Forestry Act 1920</i> (Tas) (s 12C(3)).</p> <p>Functions of DPP in event of absence (s 12(3)).</p> <p>Law Officer given functions under <i>Criminal Code Act 1924</i> (Tas) s 1 (definitions) eg the proper authority to report homicide to: s 162A.</p> <p>Delegation: Attorney-General may delegate functions and powers to the Solicitor-General and may revoke such delegation(s 8(1)); Terms of delegation (s 8(2) and (3)); Attorney-General may continue to perform function or exercise power (s 8(4)).</p>	<p>Remuneration: Salary of a puisne judge of the Supreme Court of Tasmania and travelling and other allowances (ss 5(1)(ab) and (b)).</p> <p>Long Service Leave under <i>Long Service Leave (State Employees) Act 1994</i> (s 5(2)).</p> <p>Pension: <i>Public Sector Superannuation Reform Act 1999</i> (Tas) applies to Solicitor-General (s 9A).</p>	May hold an office or engage in employment only if expressly authorised by the Attorney-General (s 10(2)(b)).	Yes (s 4(5)).	Yes: to Attorney-General to be laid before each house of Parliament (s 11).
	<p>Term: Not specified, set as Governor determines (s 5(3)).</p> <p>Qualification: Australian lawyer of not less than 7 years' standing as a practitioner (s 4(3)).</p> <p>Removal: Resignation (s 6(2)); Removal by Governor on resolution of both Houses of Parliament (s 6(3)); or removal requires first suspension by Governor on the basis of disability or infirmity, bankruptcy, convicted of crime punishable by 12 months or more; misconduct in the performance of functions (s 6(4)); then resolution of both Houses of Parliament (s 6(5)).</p>						

E.6 Victoria

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Attorney-General and Solicitor-General Act 1972</i> (Vic)	Process: Governor in Council (s 4(1)). Term: Not specified (s 4).	No: s 4(2). See also <i>Constitution Act 1975</i> s 49.	Functions: To (a) act as counsel for Her Majesty and perform other duties of counsel as the Attorney-General directs; (b) any powers and functions conferred on the Solicitor-General by any Act (s 5). Additional functions: Ex officio member of Council of Law Reporting (s 5(1)(b) <i>Council of Law Reporting in Victoria Act 1967</i> (Vic)) Delegation: None.	Remuneration: Salary and allowances of a Judge of Supreme Court (s 4(3)). Pension: Same as Judge of Supreme Court (s 6).	No (s 4(3)(b)).	No provision made.	None.
	Qualification: Queen's Counsel or Senior Counsel (s 4(1)). Removal: Governor in Council (s 4(1)).						

E.7 Western Australia

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Solicitor-General Act 1969</i> (WA)	<p>Process: By Governor (s 3(1)) on terms and conditions determined by Governor (s 4A).</p> <p>Term: Not exceeding 7 years and eligible for reappointment (s 3(1a)).</p>	<p>No – Disqualified from holding seat in Legislature: <i>Constitution Acts Amendment Act 1899</i> s 34 Sch V, Part 1.</p>	<p>Functions: To (a) act as counsel for the Crown in right of WA and for any other body or person for whom the Attorney-General requests him to act, and may perform such other duties of counsel as the Attorney-General directs; (b) any powers and functions conferred by any Act of State or Cth. (s 9).</p> <p>Additional Functions: Commencing prosecutions: <i>Criminal Procedure Act 2004</i> s 83; Discontinuing prosecutions: s 87.</p> <p>NOTE: At 31 July 2012, amendments made to <i>Criminal Appeals Act 2004</i> by <i>Criminal Appeals Amendment (Double Jeopardy) Bill 2011</i>, giving the Solicitor-General (and other officers) power to apply for a new trial had not come into force.</p>	<p>Remuneration: Determined by Salaries and Allowances Tribunal (s 4).</p> <p>Leave and other terms and conditions determined by Governor (s 4A).</p>	<p>No, except with approval of the Governor (s 6).</p>	<p>Yes (s 8).</p>	<p>None.</p>
	<p>Qualification: Legal practitioner or a barrister or solicitor of a Supreme Court of another State/Territory of not less than 8 years standing and practice (s 3(2)).</p> <p>Removal: Resignation (s 5(1)); Governor may remove for incapacity, misbehavior or bankruptcy or insolvency (s 7).</p>						

E.8 Australian Capital Territory

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Law Officers Act 2011</i> (ACT)	<p>Process: Executive under the <i>Legislation Act</i> (s 16(1)), on terms agreed between Executive and Solicitor-General (s 16(4)).</p> <p>Term: Not longer than 7 years (s 16(3)).</p>		<p>Functions: To act, at the request of the Attorney-General as counsel for (i) the Crown in right of the Territory, (ii) the Territory, (iii) or any other entity; (b) to exercise other functions of counsel as the AG directs; (c) to exercise the chief solicitor's functions if the Attorney-General directs; (d) to exercise any other function given to the Solicitor-General under this Act, another Territory law or law of the Cth (s 17(1)(a)).</p> <p>Delegation: No. (Solicitor-General may delegate: s 25).</p>	<p>Remuneration: Conditions agreed between the Executive and the Solicitor-General stated in the appointment, subject to any determination under the <i>Remuneration Tribunal Act 1995</i> (s 16(4)).</p> <p>Pension: Conditions agreed between the Executive and the Solicitor-General stated in the appointment, subject to any determination under the <i>Remuneration Tribunal Act 1995</i> (s 16(4)).</p>	<p>The Solicitor-General must not, without the Attorney-General's consent, practice as a legal practitioner or have paid employment (s 19).</p>	<p>Yes, <i>Legislation Act 2001</i> (ACT) pt 19.3 (s 16, note 1, of the <i>Law Officers Act 2011</i>)</p>	<p>The Solicitor-General must give written notice to the Attorney-General of all direct or indirect financial interests that the Solicitor-General has or acquires in a business, or in a corporation carrying on a business (s 20).</p>
	<p>Qualification: Legal Practitioner for not less than 5 years (s 16(2)).</p> <p>Removal: The Executive may end appointment if: misbehavior; substantial physical or mental incapacity; failing to comply with s 19 (Solicitor-General must not do other work) (s 21(1)); The Executive must end appointment if bankrupt, personally insolvent, absent without leave for specified period, or fails to comply with disclosure obligations under s 20 (s 21(2)).</p>						

E.9 Northern Territory

Jurisdiction & Legislation	Appointment (Process, Term, Qualification, Removal)	Can the SG sit in Parliament?	Functions/Delegation	Remuneration & Pension	Right to Private Practice	Acting appointments	Reporting Requirements
<i>Law Officers Act 1978 (NT)</i>	<p>Process: Administrator by instrument w (s 13(1)).</p> <p>Term: For the period specified in the instrument, or without limit. (s 13(1)).</p>	<p>1986 amendments to elaborate office originally included that candidate could not be a Minister. No longer included.</p>	<p>Functions: To act as counsel for the Crown in right of the Northern Territory and for any other person. Attorney-General requests Solicitor-General to act (s 14(a)); other duties of counsel Attorney-General directs (s 14(b)); other powers and functions conferred by law (s 14(d)).</p> <p>Additional functions: Application regarding vexatious litigant proceedings: <i>Vexatious Proceedings Act</i> s 7(6). Certification of state insurance policies: <i>Territory Insurance Office Act</i> s 30(1). Advise on inquiries of Admissions Board regarding overseas applicants: <i>Legal Profession Admission Rules</i> r 15(2). Granting fiats in cases where crown title is questioned: <i>Law of Property Act</i> Sch 1 Statutory Supervisor under the <i>Legal Profession Act</i> unless other appointment made: s 678(1) (includes complaints, investigation, supervision of processes under the legislation).</p>	<p>Remuneration: On such terms and conditions as Administrator determines (s 13(1)).</p>	<p>Not to engage in other practice as a legal practitioner, or in other paid employment consent of Attorney-General (s 14(c)).</p>	<p>Yes (s 13(4)).</p>	<p>None.</p>
	<p>Qualification: Has not attained age of 65 (s 13(1)(a)). Legal practitioner for not less than 5 years (s 13(1)(b)).</p> <p>Removal: Administrator shall remove if, and only if: incapacity (s 15(a)); misbehavior (s 15(b)); bankrupt or insolvent (s 15(c)). Resignation (s 13(8)), Reaches age of 65(s 13(9)).</p>	<p>Delegation: None.</p>					

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