

The evolution of a public sentinel: Australia's Solicitor General

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There is obviously no magic in institutions that were developed for an age which has long disappeared.¹

Introduction

In the state and federal jurisdictions of Australia the historic 'law officer' role of chief legal adviser and advocate for the Crown is now performed by the *second* law officer, the Solicitor General. In Australia, the Attorney General now performs an almost exclusively political function as one of the ministers of the Crown. The Attorney is concerned with day-to-day political pressures and has little or no time, often not the expertise, and increasingly lacks the necessary independence and detachment to fulfil the traditional legal functions of the role.² The progression in the first law officer's role has been marked by the devolution of many of the traditional legal functions of the law officers to the Solicitor General. It is now the Solicitor General who provides the final constitutional and legal foundation for government action and legislative policy. In many respects, the Solicitor General has become the first law officer in all but name.³

The British tradition of the law officers was forged over centuries, from the King's personal attorney and solicitor, to the more recognisable paradigms of Attorney and Solicitor

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1 Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government: vol 1 Principles and Values* (The Law Book Company 1995) 102.

2 See further analysis of the shift of the Attorney General towards the political in Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD Thesis, 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' (12th Annual Public Law Weekend, National Museum of Australia, Canberra, 9–10 November 2007); Gareth Griffith, 'The Office of Attorney General in New South Wales' (2007) 11 *Legal History* 79; Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) *Murdoch University Electronic Journal of Law*.

3 John LJ J Edwards commented that: 'In terms of legal expertise and judgment the burden rests on the shoulders of the Solicitor General, a non-political office.'; John LJ J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell 1984) 371.

General.⁴ Today in Britain these offices carry distinct legal and public interest obligations in addition to those they owe as political ministers of the Parliament. In Britain the tensions that result from combining these obligations and loyalties have never been adequately resolved. The law officers must find a delicate balance between the necessary loyalty they must exhibit as executive ministers and the independence from political interests that is fundamental to the provision of accurate and robust legal advice and for making decisions about where the public interest lies, for example, in prosecutorial matters.⁵ The tensions have variously attempted to be reconciled in Britain by the doctrines of ‘independent aloofness’, where the Attorney General does not engage too closely in government policy, political debates and party politicking,⁶ or that of ‘intimate but independent involvement’.⁷ At the turn of the twenty-first century, these tensions in Britain were again under scrutiny when the independence of the Attorney General’s advice to the government on the legality of the Iraq War was brought into question. The episode was a reminder of the ongoing weaknesses of the British model and the propensity for political pressure to be placed on the law officers, particularly in the carriage of their legal functions.⁸

In the nineteenth century, the British tradition was received in many of the Australian colonies. But it was not long until the law officers started to evolve with the new constitutional landscape, so that eventually a very different, non-political role has been forged for the Solicitor General to complement a now overtly political Attorney General. This has created a paradigm in which the legal functions of the law officers, at least, have been freed from many of the controversies that continue in Britain.⁹ The current framework in which the Solicitor General operates allows the independent discharge of the legal services function of the law officer free from political pressures. The placement of the

- 4 For a fuller account of the evolution of the British Law Officers, see John IJ 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); W S Holdsworth, ‘The Early History of the Attorney and Solicitor General’ (1918–1919) 13 *Illinois Law Review* 604; 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 & Haynes 1897).
- 5 Further discussion on the ‘tightrope’ of interests that the law officers must navigate in Britain can be found in 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; Edwards (n 4); Edwards (n 3).
- 6 For a strong account of the doctrine of independent aloofness, see Peter Rawlinson, ‘A Vital Link in the Machinery of Justice’ (1977) 74 *Guardian Gazette* 798, 799.
- 7 See S C Silkin, ‘The Functions and Position of the Attorney-General in the United Kingdom’ (1978) 59 *The Parliamentarian* 149. For further discussion of the two doctrines, see Edwards (n 3) 67–71.
- 8 This affair led to a series of government and parliamentary inquiries on the role of the Attorney General. See the initial government White Paper, *The Governance of Britain: A Consultation on the Role of the Attorney General* (Cm 7192, 2007), and the subsequent parliamentary reports: House of Commons Constitutional Affairs Committee, *The Constitutional Role of the Attorney General: Fifth Report of Session 2006–2007* (HC 2007, 306) and House of Lords Select Committee on the Constitution, *Reform of the Office of Attorney General: Report with Evidence* (HL 2008, 93). One recommendation that was made was the division of the Attorney General’s role between a Minister of Justice and a non-political legal officer to perform the legal services function. This model closely aligns with that which has evolved in the Australian jurisdictions. The recommendation was rejected by the government: United Kingdom Government, *The Government’s Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General* (Cm 7355, 2008).
- 9 For example, Electoral and Administrative Review Commission, *Report on Review of the Independence of the Attorney General* (EARC 1993) 2, 16–17, McCarthy (n 2) para 15. Although the continued exercise of some of the public interest and administration of justice functions by the Attorney General, such as the instigation of public interest litigation or the grant of a fiat in relator actions and the defence of the judiciary from criticism, have continued to attract controversy and robust critique in Australia: see, eg, Hanlon, *An Analysis* (n 2); Patrick Keyzer, *Open Constitutional Courts* (The Federation Press 2010), ch 4.

Solicitor General outside politics with statutorily guaranteed tenure, remuneration and pension created an office that provides both the actuality and appearance of independence in the discharge of the legal advisory role. 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.

The development of the Australian paradigm of the Solicitor General is largely untold.¹⁰ This article chronicles the story of the Solicitor General across three phases. The first phase commenced in the early nineteenth century. In this phase the law officers, as best they could in the colonial conditions, mirrored the British tradition. The introduction of self-government to the colonies in the 1850s brought familiar tensions in the offices between loyalties to executive interests and the parliament, although in the colonial parliament these were aggravated as the law officers were also members of the Executive Council. In the second phase the Solicitor General became a non-political, public service position. This commenced in Tasmania as early as the 1860s and was gradually adopted across the other jurisdictions. The third phase started in Victoria in 1951 with the introduction of a quasi-independent statutory counsel position. This was a uniquely Australian paradigm that would emerge as the preferred model across all of the jurisdictions in the second-half of the twentieth century. It would eventually become a specialist position in high-level constitutional and public law advice and litigation. This paradigm has remained stable in Australia since the 1970s.

The British tradition in the colonies

The law officers were initially introduced in the colonies as far as practicable modelled on the British tradition. This is discernible in the colonies of New South Wales, Van Diemen's Land (later called Tasmania) and later Victoria.¹¹ This period in the law officers' development was characterised by questions over how to adjust the British traditions to colonial circumstances; the necessity of two law officers in light of concerns about finances and over-governance; the independence of the law officers, particularly as they became responsible ministers and took up seats in the Executive Council; and the broader responsibility of the law officers for the provision of legal services across the whole of government, a wider mandate than existed in Britain. It was these concerns and developments that would eventually form the impetus for lasting change in the office.

10 The exception being histories available in New South Wales: Keith Mason, 'The Office of Solicitor General for New South Wales' (1988) Autumn Bar News 22; and more recently in Queensland: Crown Law, *In My Opinion: The History of Crown Law Queensland 1859–2009* (Crown Law, Department of Justice and Attorney General 2009).

11 In Western Australia and, by and large, in South Australia and Queensland (there had been single, brief appointments of Solicitor General in the 1890s in these jurisdictions, but the office did not establish itself permanently), the position of Solicitor General did not emerge until the twentieth century. This has led one historian, and former Solicitor General, Keith Mason, to comment: 'a polity can get along just fine without a Solicitor General': Keith Mason, 'Aspects of the History of the Solicitor General in Australia, 1788 to 1970' (The Role of the Solicitor General in the Legal and Political Landscape conference, Bond University, 15 April 2011) 13. However, in these colonies other officers, while they lacked the appellation, carried out the functions of the Solicitor General. For example, in 1836 when the province of South Australia was established it had an Advocate General: Order-in-Council Establishing Government, 23 February 1836 (UK); Gordon D Combe, *Responsible Government in South Australia* (Wakefield Press 1957) 8; *Attorney General v Adams* [1965] SASR 129, 132 (per Napier CJ); *The Cyclopaedia of South Australia* (The Cyclopaedia Company 1907) 335.

COLONIAL BEGINNINGS: ADOPTING AND ADAPTING THE BRITISH TRADITION

The colony of New South Wales was given an Attorney General as early as 1823, and the appointment was quickly followed by the creation of a deputy for the office in the form of a Solicitor General. From this beginning, the evolution of the two offices would continue to be closely related. The first colonial Attorney General was appointed in New South Wales in 1823 by the Colonial Secretary from the English Bar.¹² The appointment was made pursuant to the recommendations of the influential Bigge Report.¹³ Prior to that, the colonial governor would refer important questions of law to the British law officers.¹⁴ Prosecutorial functions were performed by the Deputy Judge Advocate, who was also called upon for legal advice.¹⁵ The Bigge Report 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 governor.¹⁶ The Attorney General's other roles included providing legal advice to the government and acting as counsel in civil matters.¹⁷

The colony's first Solicitor General was appointed in 1824 under letters patent.¹⁸ 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.¹⁹

The colony of Van Diemen's Land was established separately from New South Wales in 1824 with a governor advised by a Crown Council. An Attorney General was appointed in 1824, and a Solicitor General in 1825 (who was also shortly thereafter appointed Crown Solicitor).²⁰

The creation of the colonial law officers was considered to have brought with it all the common law duties and powers of the offices applicable to the circumstances of the colony.²¹ 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

12 Edwards (n 3) 367; Norton-Kyshe (n 4) 49, fn 1.

13 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) 56–57.

14 For example, extract of opinions of the English law officers to the governor in J M Bennett and Alex C Castles, *A Source Book of Australian Legal History* (The Law Book Company 1979) 263–66. See also Herbert Vere Evatt, 'The Legal Foundations of New South Wales' (1938) 11 Australian Law Journal 409, at 416.

15 Evatt (n 14) 416; J M Bennett, 'The Status and Authority of the Deputy Judge Advocates of New South Wales' (1956–1958) 2 Sydney Law Review 501; Terry Kass, *A Brief History of the Attorney General's Department* (Attorney General's Department 1996) 5.

16 Bigge (n 13) 56–57, 59.

17 New South Wales Act 1823; Kass (n 15) 6.

18 *Historical Records of Australia* (HRA), Series I: *Governors' Dispatches to and from England*, vol XI, 199; vol XIV, 372; Mason (n 10) 22.

19 HRA, Series I, vol XI, 199.

20 HRA Series III, vol IV, 265, see also at 270 and vol V, 61; A Colonist, 'Correspondence: To His Honor Lieutenant Governor Arthur', *Hobart Town Gazette and Van Diemen's Land Advertiser*, 10 June 1825, 3 <<http://newspapers.nla.gov.au/ndp/del/article/1090808?searchTerm=%22solicitor+general%22>> accessed 11 October 2011.

21 HRA, Series I, vol XI, 883–84; Griffith (n 2) 95–96.

absence of representative or responsible institutions). The Solicitor General was the more junior law officer appointed to assist the Attorney General and a natural stepping stone to the senior position. The offices enjoyed the right to private practice until the 1890s.²² The appointment of law officers early in the colonies' history demonstrates that even in the context of a penal colony, the importance of government within the law was recognised and this required access to independent legal advisers.

The law officers in both colonies quickly came to be among the appointed advisers to the governor. When the Solicitor General was created in New South Wales, the officer joined the Attorney General as a member of the Executive Council advising the governor (although at this time the governor was not bound to follow such advice).²³ In Van Diemen's Land, the Attorney General was made an *ex officio* member of the Crown Council in 1830.²⁴ The focus of qualification for appointment to the offices in the early years was primarily political.²⁵ The practice of the law officers sitting in the Executive Council was a marked departure from that in Britain,²⁶ although, unlike the British Cabinet, the institution lacked actual political power at this early stage. It is likely, however, that the practice set a precedent that would continue when responsible government was introduced and power vested in the Executive Council (later the Cabinet). The ramifications of this are returned to later.

In the 1820s and 1830s, despite difficulties in the colonial conditions, it was repeatedly confirmed that as far as possible the law officers' duties should follow the division in England.²⁷ In 1836 the New South Wales Solicitor General was abolished, in all likelihood because of the bickering between the law officers over the division of responsibilities.²⁸ By 1840 the governor requested the re-establishment of the office to allay concerns about delays in the law business of the Crown which now devolved on the Attorney General, and also to ensure there was a person to perform the Attorney's duties during his absence.²⁹ However, the Colonial Secretary refused the request because of concerns about the finances and over-governance of the colony.³⁰ Despite this, in 1841 the governor appointed an acting Solicitor General.³¹ The Colonial Secretary refused to confirm the appointment,³² and the position remained as an acting appointment until 1843 when the new Colonial Secretary decided to revive the office before the first elections for the newly created Legislative Council.³³

22 Kass (n 15) 6; Edwards (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', *The Mercury*, from N E Lewis, 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. The right to private practice was reintroduced in Queensland in the 1980s, the reasons for this are detailed below.

23 Edwards (n 3) 367; Alpheus Todd, *Parliamentary Government in the British Colonies* (2nd edn, Longmans Green 1894) 25–26.

24 <www.parliament.tas.gov.au/History/tasparl/mlcs1825to1855.htm> accessed 5 October 2010.

25 Edwards (n 3) 370.

26 Ibid 367–68, 369; Griffith (n 2) 85.

27 See the correspondence in relation to a number of disputes between the law officers in HRA, Series I, vol XIV, 371–73; HRA, Series I, vol XV, 10; HRA, Series I, vol XVII, 284–94.

28 HRA, Series I, vol XVII, 298; see also 585.

29 HRA, Series I, vol XX, 524.

30 HRA, Series I, vol XX, 716.

31 HRA, Series I, vol XXI, 291.

32 HRA, Series I, vol XXI, 299, 468. See also 524.

33 HRA, Series I, vol XXII, 592.

THE COLONIAL LAW OFFICERS TAKE THEIR SEATS IN PARLIAMENT

In 1842 the creation of a Legislative Council in New South Wales³⁴ highlighted the increasingly political nature of the law officers in the colonies. The new council was made up of elected members and appointed members. 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.³⁵

In 1850, Van Diemen's Land was also given a Legislative Council of appointed and elected members. 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.³⁶

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 Clerk.³⁷ After separation in 1851, Victoria established its own colonial law officers. Both officers were appointed members of the Victorian Legislative Council (composed of nominated and elected representatives),³⁸ 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.³⁹

RESPONSIBLE GOVERNMENT AND THE SOLICITOR GENERAL: FURTHER BREAKS WITH TRADITION

The New South Wales, Victorian and the Tasmanian Constitution Acts of 1855 finally brought responsible government to the colonies and made the law officers among the first responsible ministers of the Crown.⁴⁰ Under these constitutions, the governor was no longer solely responsible for the government of the colony. Rather, the governor had to act on advice of his elected ministers. The law officers were, as in Britain, now responsible ministers. However, in each colony they also 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 in the five permanent heads of departments who made up the Executive Council.⁴¹ The Solicitor General shared departmental responsibility with the Attorney General.⁴² While it may appear strange that

34 Which at that time included Victoria and Queensland.

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

36 <www.parliament.tas.gov.au/History/tasparl/mlcs1825to1855.htm> accessed 5 October 2010.

37 Hanlon, *An Analysis* (n 2) 42, referring to Colonial Secretary to C J La Trobe, 9 January 1840, extracted in P Jones, *Beginnings of Permanent Government*, Historical Records of Victoria Foundation Series (Victorian Government Printing Office 1981) 288.

38 Edward Sweetman, *Constitutional Development of Victoria 1851–1856* (Whitcombe & Tombs Ltd 1920) 28.

39 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#> accessed 5 October 2010.

40 Hilary Golder, Politics, *Patronage and Public Works: The Administration of New South Wales vol 1, 1842–1900* (University of New South Wales Press 2005) 108; John Michael Bennett, *A History of the New South Wales Bar* (Law Book Company 1969) 72.

41 Kass (n 15) 9.

42 Golder (n 40) 121.

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.⁴³ In Victoria, the Solicitor General also joined the Executive Council,⁴⁴ and was occasionally held with the Ministry of Justice, or they would occur in the alternative.⁴⁵

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). 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 the officers' independence.⁴⁶ A number of episodes in Victoria highlighted the tensions between the law officers' loyalty to the political executive as responsible ministers and membership of the Executive Council on the one hand, and their legal and public interest obligations on the other.

In 1864 and 1878 the independence of the advice of the Victorian law officers from the government was called into question. George Higinbotham, the Attorney General, and Archibald Michie, the Solicitor General, were both members of the Executive Council and held seats in the Legislative Assembly. In 1864, the Legislative Council was unpersuaded by the law officers' opinions that the tacking of a tariff reform Bill onto an appropriation Bill was lawful. Many in the Council particularly questioned the independence of the advice of the politically ambitious Higinbotham.⁴⁷ When the matter finally came to a head, the governor refused to receive advice from the British law officers, claiming he must accept the opinions of his local law officers.⁴⁸

In the second instance, in 1878, the governor actively 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.⁴⁹ The Colonial Secretary replied that the governor had an independent constitutional duty to assess the legality of any questionable action. In a statement that is clearly based on a British assumption that law officers operated with ostensible independence, the Colonial Secretary said that, in such cases, the governor should request the advice of the law officers in their capacity as 'the authorised exponents to the law' and not as political advisers.⁵⁰ In debate in the House of Lords, Lord Carnarvon asserted that in the circumstances he would have preferred for the appointment of 'one permanent and impartial legal adviser, who might be in a position to advise a colonial Governor as emergencies arose'.⁵¹ This suggestion was strongly refuted by Higinbotham, who noted the similarities between the colonial and British law officers, and said that the suggestion of a separate law officer to advise the governor in urgent matters was 'illegal' and 'absurd'.⁵²

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

44 Sweetman (n 38) 81, 83.

45 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.

46 Hanlon, *An Analysis* (n 2) 127.

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

48 Ibid 204.

49 Todd (n 23) 725–26.

50 Ibid 726–27; 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* (2nd edn, Frank Cass & Co Ltd 1967) 189–90.

51 Extracted in Evatt (n 50) 190.

52 Ibid.

The necessity for independence in the exercise of the law officer's prosecutorial function, an issue that has caused heated controversy in Britain, raised its head in Victoria in 1893. The Solicitor General, Isaac Isaacs, resigned from the Solicitor Generalship, ostensibly to protect his independence.⁵³ The incident involved the collapse of the Mercantile Bank and subsequent allegations of fraud by the bank's executives. Summonses were issued on the instructions of the Attorney General, but the charges were dropped after a change of government. Isaacs, almost immediately, announced he would institute new criminal proceedings against the men under what he saw as his independent (albeit concurrent) prosecuting authority.⁵⁴ The Attorney General was furious, asserting that the Solicitor General was subordinate to the senior law officer and ordered Isaacs to abstain.⁵⁵ Isaacs refused:

No amount of custom, red tape, officialdom, of personal consideration, or of etiquette, or relative status of law officers of the Crown, can in any way lessen my individual responsibility for the due, honest and fearless performance of the functions entrusted to me.⁵⁶

For Isaacs, the functions of the Solicitor General had to be exercised absolutely independently, of the Cabinet and even of the Attorney General. Of course, as a minister, Isaacs had his own elected mandate. The Cabinet resolved in favour of the Attorney General, but Isaacs refused to back down. Finally, the Premier requested his resignation, which Isaacs tendered.⁵⁷

DEBATE OVER THE LAW OFFICERS IN CABINET

The inclusion of the law officers in the Executive Council under a system of responsible government (essentially the Cabinet) was a major break with British tradition and likely contributed to the increased politicisation of the law officers. The move did not take place without debate in these early years.

In New South Wales, it was particularly controversial in relation to the prosecutorial function, which led to the drafting of legislation for an independent public prosecutor (although this was never passed).⁵⁸ At times during the 1850s and 1860s the New South Wales Attorney General was not included in the Executive Council over concerns that the office could not properly perform its public interest functions if it were seen to be too political.⁵⁹ In 1859 the New South Wales law officers were relieved of administrative duties in an attempt to remove the incompatibility of these roles with their position as legal advisers, although the strength of vested interests saw the Attorney General retained in the Executive Council 'for the present'.⁶⁰

Substantial reform was achieved, albeit fleetingly, in New South Wales in 1873 when the Attorney General became a non-Executive Council minister presiding over the newly created Department of Justice and Public Instruction and the Solicitor General was abolished for a period (this is returned to below).⁶¹ The change took place for a number of

53 Although there has been surmise that it was also caused by personal machinations between Isaacs and the Attorney General over priority between them as ministers: Hanlon, *An Analysis* (n 2) 93–94.

54 Crimes Act 1890 (Vic), s 338.

55 Extracted in Edwards (n 3) 374–75.

56 Ibid.

57 Ibid.

58 Golder (n 40) 121.

59 Kass (n 15) 10, referring to P 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.

60 Golder (n 40) 133; McMartin (n 43) 273.

61 Golder (n 40) 186.

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. 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 less overtly political and, in an effort to achieve the ideal of 'independent aloofness', did not sit as members of Cabinet.⁶² In the course of this debate an alternative proposal to have one of the law officers appointed outside the Parliament was rejected on the basis that the responsibility of the law officers to Parliament was a fundamental principle of the operation of British parliamentary government.⁶³ The 1873 reforms to the Attorney's role were short-lived; by 1878 the Attorney General had returned to the Executive Council.⁶⁴

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. The wish, as Cabinet Ministers, that a certain course should be pursued, would become 'father to the thought' that the law would permit it. The Attorney and Solicitor General were never Cabinet Ministers in the whole course of English constitutional government. That these officers have been made members of the Executive Councils of Colonies has only arisen from this, that constitutional government has not existed, and that law officers so situated had only the right to offer advice, without any power to compel that advice being adopted.⁶⁵

Boothby's warnings drew heavily upon the ideal of having law officers within government aloof from politics: someone who has 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 Australia 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.⁶⁶

62 'Legislative Assembly: Thursday 27 November 1873', *Sydney Morning Herald* (Sydney, 28 November 1873) 2, <<http://nla.gov.au/nla.news-article13327384>> accessed 11 October 2011.

63 Ibid.

64 Golder (n 40) 186.

65 Edwards (n 4) 167–68, quoting from (1862) H C Papers, vol 37.

66 Constitution Act 1856 (SA), ss 32, 34, 17. For one month in 1857 John Tuthill Bagot briefly held a ministerial office as Solicitor General. This appointment, however, was successfully challenged on the basis it was in breach of the prohibition of a Member of Parliament holding an office of profit under the Crown: '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>> accessed 11 October 2011; 'The Parliament: Legislative Council, July 2', *The Advertiser* (Adelaide, 3 July 1889) 6, <<http://newspapers.nla.gov.au/ndp/del/article/24479756>> accessed 11 October 2011; 'South Australian Parliament: Legislative Council, Tuesday, April 30', *South Australian Advertiser* (Adelaide, 1 May 1861) 2, <<http://newspapers.nla.gov.au/ndp/del/article/24479756>> accessed 11 October 2011; 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) 721.

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' department.⁶⁷ 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 overseeing the legal position across the whole of government, with relatively few exceptions. Selway asserted there were probably a number of reasons for this: 'governments were smaller 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'.⁶⁸

DEPOLITICISATION IN THE PUBLIC SERVICE

The depoliticisation of the Solicitor General was a major break with the British tradition of the law officers and would create the seeds of change that eventually led to the adoption of a statutory counsel position outside the public service. As is often the case with constitutional transitions, the change was predominantly made to meet the exigencies of a particular situation rather than resting on high constitutional principle. This trend started in Tasmania in the 1860s. It was adopted in Western Australia in 1902.⁶⁹ The Commonwealth introduced a similar office in 1916; New South Wales and Queensland in 1922. While the public service basis for the position was broadly consistent across these jurisdictions, some performed more administrative functions within the department than others.

TASMANIA BREAKS WITH BRITISH TRADITION

In the 1860s the Tasmanian office was the first in Australia to become non-political on a permanent basis.⁷⁰ After 1855 there had been occasions where there was no Solicitor General in the ministry,⁷¹ although it was not until 1863 that the 'firm decision' was made to remove the Solicitor General from a ministerial and political post.⁷² The development was advanced at the time simply as a cost-cutting measure.⁷³

The Attorney General continued the duties of the first law officer, assisted now by a public service Solicitor General. After this time the Solicitor General's evolution was characterised by a decline in the legal duties of the Attorney General (who became the political and administrative head of the department only) and a concomitant rise in the legal duties of the Solicitor General.⁷⁴ The centralisation of legal services in the one department, explained above, meant the Solicitor General became 'the core of legal administration' in

67 For an overview of the British position, see Edwards (n 3) ch 7.

68 Bradley Selway, 'The Different Role of an Australian Attorney General' (2002) 13 Public Law Review 263, 266–67.

69 J S Battye, *The Cyclopaedia of Western Australia: An Historical and Commercial Review: Descriptive and Biographical Facts, Figures and Illustrations: An Epitome of Progress* (The Cyclopaedia Co 1912) 479; see also <<http://newspapers.nla.gov.au/ndp/del/article/25712845>> accessed 11 October 2010.

70 R L Wettenhall, *A Guide to Tasmanian Government Administration* (Platypus Publications 1968) 94; *Cyclopaedia of Tasmania* (n 22) 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.

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

72 Wettenhall (n 70) 2.

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

74 Letter to Editor, *The Mercury*, from N E Lewis, 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* (John Vale, Government Printer of Tasmania 1908) 39.

the colony.⁷⁵ The office conducted all civil and criminal litigation for the Crown,⁷⁶ including from 1887 the role of Crown Prosecutor.⁷⁷ The advantages of the new model for the Solicitor General were described as bringing continuity of practice and knowledge of government to the role.⁷⁸ Depoliticisation also meant that no longer was the Solicitor General a stepping stone to the Attorney Generalship.

A COMMONWEALTH OFFICE: THE SOLICITOR GENERAL ACT 1916 (CTH)

At the time of federation, then, two models for the Solicitor General had emerged in the colonies: a ministerial office assisting the Attorney General or a public servant conducting the predominance of legal business to assist an increasingly politicised 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 at which the constitution was drafted. The framers were aware of the need to have authoritative legal advice on hand to the different polities to ensure the smooth operation of the federal system: the role of the Attorney General in providing legal advice on constitutional questions was referred to on several occasions,⁷⁹ and the increased importance federation would bring to the role of the Attorney General, advising on the interpretation of the Commonwealth Constitution, was noted.⁸⁰

Why, then, was there no discussion of the role of the Solicitor General of the Commonwealth? The likely explanation is twofold. It was anticipated by many that the Commonwealth was going to be relatively small, only as large as was necessary to discharge the powers selectively bestowed upon it.⁸¹ As such, it was probably anticipated that the legal work of the government would not be so large as to require the assistance of the second law officer. Secondly, was the pervasiveness of the idea that the Attorney General would continue to operate as an impartial and properly qualified legal adviser. While this did not reflect the growing trend in the colonies towards an increasingly political Attorney General, it continued to follow the British tradition of the first law officer, 'independently aloof' from politics.

Once the federation was established, both of these assumptions proved untrue. The first Attorney General, Alfred Deakin, appointed Robert Garran as secretary of his department.⁸² Included in the department's responsibilities was drafting legislation,⁸³ advising the government on legal and constitutional issues and conducting litigation on behalf of the government.⁸⁴ Garran described his functions 'as those of the Chief

75 Wettenhall (n 70).

76 *Cyclopedia of Tasmania* (n 22) 129.

77 Ibid.

78 Royal Commission (n 74) 7, per Lewis.

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

80 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 7 April 1891, 858 (per John Cuthbert).

81 See, eg, the first resolution adopted by the National Australasian Convention in Sydney, 1891: 'That the powers and privileges and territorial rights of the several existing Colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.'; extracted in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press 2005) 45.

82 Sir Robert R Garran, *Prosper the Commonwealth* (Angus & Robertson 1958) 143.

83 Ibid 143–45.

84 Ibid 151.

Permanent Law Officer of the Commonwealth'.⁸⁵ Even at this early stage the position Garran was filling was akin to that of the Tasmanian public service-style Solicitor General. As the Commonwealth grew, so did the work of the Attorney General's department, which largely devolved onto Garran. In 1910, Sir 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.⁸⁶

The gap left by the lack of Solicitor General at the federal level became particularly acute with the commencement of the First World War. In 1916, Billy Hughes, the Prime Minister and also Attorney General, introduced the Solicitor General Bill which contained skeletal provision for a public service office.⁸⁷ Its purpose was to provide him with additional support and assistance.⁸⁸ Garran was the first appointment to the position, while continuing in his role 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 why the new title was required at all.⁸⁹ The major change, according to Hughes, was the ability for the Attorney General to delegate powers under a wide range of legislation.⁹⁰

The Solicitor General Bill 1916 engaged the Parliament in debate over the accountability of a non-political Solicitor General; a debate that would continue across the jurisdictions until the 1980s. 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 . . .⁹¹

Garran said that upon creation of the office, he was vested with 'practically all the powers of the Attorney General'.⁹² He went on to explain how he believed such power remained limited and accountable under the new Australian model because of the operation of responsible government: behind the Solicitor General was the Attorney General, behind him was the Parliament, and behind it stood the people.⁹³

85 Papers of Sir Robert Garran, Manuscripts, NLA, Letter, 5 March 1915, Robert Garran to C W Harriott, Secretary of the New South Wales Council of the Bar.

86 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn (1st edn 1910), Legal Books 1997) 179–80.

87 National Archives of Australia: Series A-2863, Item 1916/28.

88 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Hughes); see also 8998 (per Littleton Groom); and the debate in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Robert Guthrie, James Stewart)).

89 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Earle Page).

90 Ibid (per Hughes); Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Albert Gardiner); Solicitor General Bill 1916, cl 3.

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Littleton Groom); and the debate in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Robert Guthrie, James Stewart).

92 Garran (n 82) 221.

93 Ibid 221–22.

OTHER JURISDICTIONS: MOVE TO THE PUBLIC SERVICE

In New South Wales, the move to a public service model was incremental. As already explained, the Solicitor General was abolished in 1873 when the Attorney General was removed from the Executive Council.⁹⁴ In 1891 a 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.⁹⁵ The commission recommended its re-introduction, although noting this could be as a traditional ministerial office, or a 'permanent officer with the duties of a Solicitor General'.⁹⁶ 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,⁹⁷ rather than as a response to the inquiry. The office reappeared permanently in 1900.

During its period in abeyance, the office was substantially depoliticised.⁹⁸ In 1884 it was removed from the responsible ministry.⁹⁹ One of the disadvantages of having a political appointee was seen in the constant reshuffling of the ministries, leading to disruption in the administration of the justice portfolios.¹⁰⁰ 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.

In 1922 New South Wales permanently adopted a public service model and the holder of this appointment performed both administrative and legal functions within the Crown Law Department. In 1953 the government appointed a practising silk and the office evolved into a non-political and non-departmental position.¹⁰¹

In Queensland, the Solicitor General appeared in 1922 as a non-political public servant within the Crown Law Department.¹⁰² South Australia created a public service office of Solicitor General only in 1969 by simply changing the name of the 'Crown Solicitor' to 'Solicitor General'.¹⁰³ In 1970, with a new appointment, this was changed to take the Solicitor General outside of Crown Law, but the office was still a public servant within the Attorney General's department.

COMMON LAW POWERS AND PRIVILEGES IN THE PUBLIC SERVICE

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 common law office. The

94 Kass (n 15) 13.

95 *Report on the Attorney General's Department* (Public Service Inquiry Commission 1891) 2–3.

96 *Ibid* 3.

97 Eg, Richard O'Connor (MLC) was appointed Solicitor General for a short duration between July and September 1893 to deputise for Attorney General Edmund Barton while he was overseas in Canada: 'The Solicitor General', *Sydney Morning Herald* (Sydney 19 July 1893) 4, <<http://nla.gov.au/nla.news-article13918822>> accessed 11 October 2011; 'Ministerial Movements', *Sydney Morning Herald* (Sydney, 13 September 1893) 6, <<http://nla.gov.au/nla.news-article13928783>> accessed 11 October 2011. During his premiership, George Reid also held the office for brief periods from time to time throughout the 1890s, presumably for the same reason.

98 Bennett (n 40) 72, fn 168.

99 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, 88.

100 Bennett (n 40) 73.

101 Mason (n 10) 25.

102 Crown Law (n 10) 2, 89.

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

Supreme Court of New South Wales confirmed on two occasions that it did. In 1900, in New South Wales, the Solicitor General was appointed from the private Bar and held a non-political appointment.¹⁰⁴ 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 he 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'.¹⁰⁵ 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.¹⁰⁶

In 1945, the matter was considered again in *Solicitor General v Wylde*.¹⁰⁷ The case concerned an information laid by the Solicitor General against the Bishop of Bathurst alleging 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 English counterpart, because the position was only a civil servant, and not the agent of the King in the same sense as in the UK.¹⁰⁸ 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.¹⁰⁹ To support this position, he relied upon *Attorney General v Belson*: 'The mere appointment to an office by name in a colony, generally carries with it the right and duty of doing all acts done by usage by an officer of the same name in the mother country';¹¹⁰ and a New Zealand authority, *Solicitor General v Dunedin*:

The fact that at present these offices are non-political does not affect the question. The Crown has power to appoint these officers, and there is nothing in the nature of the duties they have to perform that makes it necessary that they should be members of the Ministry for the time being.¹¹¹

This was rejected by Nicholas CJ (in equity) in a strong dissent that echoed the concerns raised at the introduction of the 1916 Commonwealth legislation.¹¹² He relied heavily upon the ability in the United Kingdom to bring the office to account for its decisions and actions before Parliament: 'it is because he is in Parliament that there is a safeguard against the abuse of his power'.¹¹³

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

105 Resolution of the Council of the Bar, extracted in Bennett (n 40) 147.

106 Decision extracted in Bennett (n 40) 147; this was confirmed in *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83.

107 *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83.

108 Ibid 85–6.

109 Ibid 93.

110 (1867) 4 WW & a'B (E) 57, 62 (Molesworth J); [1867] VR 57, 62–63.

111 (1875) 1 NZ Jur R N S 1, 15.

112 *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83, 108.

113 Ibid.

A new paradigm: statutory counsel

The last state to remove its Solicitor General from the ministry was Victoria in 1951.¹¹⁴ The 1951 legislation created a new office with two roles: 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.¹¹⁵ 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.

In the years before the move, the Victorian office had often been simultaneously held with the Attorney General.¹¹⁶ Since 1900 both the law officers no longer engaged in the day-to-day provision of legal advice and representation, relying instead on their officers in the Law Department.¹¹⁷ To a large extent this reflected the fact that well-respected barristers had ceased to be actively engaged in politics.¹¹⁸ The framework that Victoria adopted 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 KC.¹¹⁹ Winneke had a large influence on the features of this original post, including the necessity of appointing from King's Counsel at the Bar and the need to appropriately remunerate the appointee to compensate him (it was not envisaged at that time it would be a female) 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.¹²⁰

The basic position established in 1951 continues in Victoria to this day.¹²¹ 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 between the 1960s and 1980s.¹²² So while Victoria had lagged behind in removing the Solicitor General from the rough and tumble of party politics in Parliament, 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. It 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 responsibility between the office and the responsible minister, the Attorney General, it did go some way towards guaranteeing independence from arbitrary interference from the government of the day.

114 Solicitor General Act 1951 (Vic).

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

116 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 (per John Cain, Premier).

117 Dean (n 116) 269.

118 Ibid 268; Robert Coleman, *Above Renown: Biography of Sir Henry Winneke* (Macmillan Company 1988) 159.

119 Coleman (n 118) 160–62.

120 Ibid 160.

121 The position in Victoria was updated with the Solicitor General Act 1958 (Vic). This was further updated in Attorney General and Solicitor General Act 1972 (Vic).

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

In the states, the new office included responsibilities for the prosecution of the criminal law until the creation of the Director of Public Prosecutions (DPP) in the 1980s and the 1990s. When the Commonwealth adopted the Victorian paradigm in 1964, the intention was to develop an officer who would bring coherency and expertise in the areas of *constitutional and public law*. It was towards this model that the states would also move. For example, 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'.¹²³ Thus, it was within the new statutory paradigm that the focus of the office moved from the predominantly criminal to developing an almost monopoly on constitutional advice and litigation work. While in the first decades of the High Court the Solicitor General played no great part in the constitutional jurisprudence that would define the Australian system, Solicitors General started to emerge as leaders of the constitutional Bar in the 1960s, developing in the 1970s and 1980s the stranglehold on this work that now defines the contemporary office.¹²⁴

The move towards greater independence for the Solicitor General did not come without consternation from the parliaments across the jurisdictions, primarily for the same reasons that questions had been raised in 1916 at the Commonwealth level: it was perceived that this move was accompanied by less responsibility. The Victorian government was keen to emphasise that the Solicitor General had no continuing political role, becoming subject to

123 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 April 1979, 4010 (per Frank Walker, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 April 1979, 4528–29 (per Walker). In this move, New South Wales followed similar models already in place in Victoria and Tasmania.

124 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 occasions, the Attorney General. It was only very occasionally that appearances were noted for the Solicitor General. For example, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, the Western Australian defendants, and the Victorian, South Australian, Tasmanian and Commonwealth interveners were all represented by private counsel. In *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, the Commonwealth and Victoria, intervening, were represented by private counsel, and South Australia and Western Australia, intervening, were represented by the South Australian Crown Solicitor, A J Hannan KC (in South Australia, the profession was fused, meaning that Crown Solicitors would often perform the advocacy role in the High Court; this also occurred in Western Australia). In *Bank of New South Wales v Commonwealth (State Banking Case)* (1948) 76 CLR 1, H V Evatt KC, the Commonwealth Attorney General, represented the Commonwealth, assisted in a rare appearance by the Commonwealth Solicitor General, K H Bailey and a number of other junior counsel. Victoria was represented by private counsel and South Australia and Western Australia by the South Australian Crown Solicitor. With the creation of the Victorian Solicitor General in 1951, Sir Henry Winneke KC started to make appearances as counsel for Victoria in constitutional matters. One of his first appearances as such was in *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1. In the following decades, as the jurisdictions adopted non-political Solicitors General tasked to act as 'counsel', these officers appeared for the governments in constitutional litigation. (This general statement is with two notable exceptions. In New South Wales, throughout the 1970s, private counsel were retained in constitutional matters. This can be explained by the large criminal load the Solicitor General's office was carrying until the creation of the Crown Advocate and the DPP. In Tasmania, since the mid-1980s, the state has been represented by private counsel in most High Court litigation. This is because of the unique position that has developed in that state where the office performs almost all of the state's advisory work). In 1969, in *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, each of the plaintiffs, Western Australia and Victoria, and New South Wales, South Australia and Tasmania (intervening) and the Commonwealth (seeking leave to intervene) were represented by the Solicitor General of the jurisdiction. Queensland was represented by private counsel. The picture would be completed in 1989 with the appointment of a Solicitor General for Queensland. See, eg, *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, where the respondent was represented by the New South Wales Solicitor General, and the Attorneys General of the Commonwealth, Western Australia, Victoria, South Australia and Queensland (intervening) were all represented by their respective Solicitors General.

direction by the Attorney General, who remained responsible for all actions taken and decisions made by the Solicitor General.¹²⁵ In New South Wales, much was made of ensuring the Solicitor General was not a minister of the Crown,¹²⁶ so as to make him 'aloof from matters of policy of a political kind'.¹²⁷ The Attorney General would remain responsible for all decisions of the Solicitor General,¹²⁸ and the decisions of the Solicitor General would be regarded as those of the Attorney.¹²⁹ The Attorney General emphasised that the Solicitor General would remain 'always under ministerial control'.¹³⁰

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 1964 federal Bill, 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, which would also be guaranteed by statutory tenure.¹³¹ Much was made of 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 to re-establish themselves at the private Bar. These provisions, it was thought, would ensure the best legally qualified candidate could be induced to take the position.¹³² When the provisions were originally proposed by Winneke their objective was to prevent a narrower sort of perceived conflict of interest: to offset the disadvantage he might suffer when approached (as he surely would be) to suggest names for judicial appointments, and he could 'scarcely' suggest his own.¹³³

In the Tasmanian Bill of 1983, 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.¹³⁴ 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'.¹³⁵ 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 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 departmental administration.¹³⁶

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

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

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

128 Ibid 1480 (per McCaw).

129 Ibid 1481 (per McCaw).

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

131 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964 (per Billy Sneddon, Attorney General). Although, note that when the position of 'Senior Counsel to the Attorney General' was originally proposed to Winneke, he rejected that security of tenure would be necessary. He was said to have asserted: 'The right man would need none, if he became dissatisfied, he could always return to the Bar.' See Coleman (n 118) 160.

132 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (per McCaw); Commonwealth, *Parliamentary Debates*, Senate, 30 October 1964, 1493 (per Samuel Cohen); see also Coleman (n 118) 160.

133 Coleman (n 118) 165.

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

135 Ibid.

136 Ibid.

Under the original Victoria model, the office was in the exclusive employ of the Crown.¹³⁷ In other state jurisdictions, the position was introduced with an ability to engage in private practice with the permission of the governor, or Attorney General. In Western 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.¹³⁸ In Queensland, however, it was intended to allow the Solicitor General to engage extensively 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'.¹³⁹ This provision was opposed by the opposition, arguing that the post should be filled on a full-time basis,¹⁴⁰ and that 'the demands of modern Government bring with them a need for constitutional advice, commercial advice and, nowadays, advice arising out of the tens of thousands of pages of legislation that is passed at an increasing rate'.¹⁴¹ A further concern was raised, that it might compromise the independence of an officeholder not wishing to lose the favour of the government because this might result in the loss of this right.¹⁴² However, one member asserted that the provision in fact supported the independence of the office because of the increased ease of returning to full-time private practice.¹⁴³

Reasons for change

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. First, the changing constitutional position of the politics in the federation and government more generally dictated the need for a full-time legal officer (unhampered by day-to-day administration of the department) who could provide continuity across changing administrations.¹⁴⁴ The increased constitutional complexities arising from the federal compact had given rise to increases in constitutional litigation. This was coupled with the rise of the interventionist state and the increase in legal work associated with it.¹⁴⁵ The Victorian Attorney General said the Bill would provide 'a pilot to guide the ship of State through troublous waters'.¹⁴⁶ A full-time legal expert in the form of the Solicitor General could provide the government with high-

137 Solicitor General Act 1951 (Vic), s 3(b).

138 Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 1969, 3611 (per A F Griffith, Minister for Justice); South Australia, *Parliamentary Debates*, Legislative Council, 14 March 1972, 3796 (per Sir Arthur Rymill); South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3963 (per A J Shard, Chief Secretary). Similar concerns were raised in other jurisdictions, see Northern Territory, *Parliamentary Debates*, House of Assembly, 20 March 1986, 2324–26 (per Brian Ede); Northern Territory, *Parliamentary Debates*, House of Assembly, 22 March 1986, 2422–28 (per Terry Smith) and (per Dan Leo).

139 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1985, 4098 (per N J Harper, Attorney General and Minister for Justice).

140 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4374–75 (per Wayne Goss). Although note that, as Premier, Wayne Goss made Patrick Keane QC's appointment under the Act and with the right to private practice, having reconciled himself with this scheme at some stage.

141 Ibid 4389 (per Agnes Innes).

142 Ibid 4380 (per Paul Braddy).

143 Ibid 4384 (per Douglas Jennings).

144 Coleman (n 118) 159.

145 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5682–83 (per Mitchell); see similar reasoning given later in Queensland: Crown Law (n 10) 227, referring to *Hansard*, 27 November 1984, 4097; see also Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4388 (per Mr Innes).

146 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5683 (per Mitchell); see also Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3524 (per Griffith).

level legal advice with continuity and deep understanding of government policy objectives because of the ongoing retainer and the close relationship with the Attorney General.¹⁴⁷

When Western Australia introduced its legislation, the Attorney General noted the advantage of an enduring, politically astute but non-political legal counsel for the state. He referred to a piece of correspondence from the Commonwealth Attorney General:

One of the special merits of our system (that of the Solicitor General appearing as counsel) is that the High Court in particular may explore in a case peripheral or related matters which it is difficult to foresee and on which it is difficult to brief outside counsel adequately.¹⁴⁸

This highlights one of the features of the statutory counsel position that had not necessarily been exhibited in the public service model: under the new paradigm the states and Commonwealth would come to be represented by the same counsel consistently before the High Court. This was no doubt seen as particularly important with the increase in volume and complexity of constitutional litigation.

The second reason for introducing a statutory counsel position was that, in this environment of greater need for legal services by government, the Attorney General was not able to personally fill the traditional legal role. The position of the Attorney General had developed in Australia to such a degree that it was almost wholly political, with sometimes little, or even no, legal qualifications and experience.¹⁴⁹ In many jurisdictions it was often held with other important portfolios leaving the officeholder little time to devote to legal duties. As such, the government needed an alternative and non-political (and therefore independent in the sense of being free from political party affiliation) officer to take over this heavy responsibility. In contrast to the Attorney General, the Victorian legislation required the Solicitor General to be taken from the ranks of His Majesty's counsel.¹⁵⁰

The third reason behind the Victorian shift, and the immediate impetus for the change in many other jurisdictions, was an effort to retain the services of Winneke, who had until then been the non-statutory 'senior Counsel to the Attorney General', while the Attorney General held both law officer posts.¹⁵¹ It was thought the office of 'Solicitor General' would provide the requisite increase in status and remuneration.¹⁵²

Conclusion

The developments of the second-half of the twentieth century are a clear embodiment of the growing importance of the Solicitor General across the Australian jurisdictions. It is now the government's highest-level legal officer in matters of constitutional and public law. Since its enshrinement in statute, the role has been a stable and important part of government. It complements (together with the DPP in relation to the criminal law) the

147 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684–85 (per Mitchell). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 232 (per Mitchell).

148 Extracted in Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 April 1969, 3436 (per Charles Court).

149 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 222–23 (per John Cain, Premier); Hanlon, *An Analysis* (n 2).

150 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684 (per Mitchell).

151 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 224 (per Cain). This was also behind the move in Western Australia, which wanted to keep the employ of Ronald Wilson QC, then Crown Counsel; and in South Australia seeking to keep Brian Cox QC: South Australia, *Parliamentary Debates*, House of Assembly, 7 March 1972, 3651 (per King).

152 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 568 (per Mitchell). And also ensure he stayed with the Crown for the duration of his appointment: Coleman (n 118) 167.

position of the Attorney General, who has all but shed the title of first law officer. This is in recognition not simply of the reality that the Attorney General very rarely possesses the legal aptitude and experience required for these legal roles, but it operates to create distance between the exercise of the law officers' legal services functions and the day-to-day politics and administration in which an Australian Attorney General is immersed.

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 England, where 'a conscious policy . . . to divorce the Attorney General from day-to-day political issues' has been pursued.¹⁵³ The Australian position, many argue, brings advantages. The Attorney General gains intimate awareness of the 'battles and the arguments and the stresses and strains that eventually result in policy', better equipping the officer to find (if possible) a lawful and proper way to achieve the policy objective.¹⁵⁴ It has also been argued that the Attorney General in the Cabinet gives greater weight to the office's authority among Cabinet colleagues, ensuring compliance and adherence to legal advice.¹⁵⁵ The Australian system secures these benefits but, as this article has shown, acknowledges the increased danger of political and administrative pressures in this environment through the development of independent statutory officers to assist the Attorney General.

The current paradigm of the Solicitor General has addressed this danger through a number of developments. Tensions between political allegiances and the independent discharge of the Solicitor General's functions have been removed by the creation of an office outside of politics that has statutory guarantees of tenure, remuneration and pension. Further, the focus on the legal nature of the position has meant the office's independence is largely protected by the professional training and obligations of appointees. Finally, no longer is the office plagued with the politically charged prosecutorial discretion, this having been hived off to the statutorily independent office of the DPP.¹⁵⁶

153 Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report 27) (1985) <www.alrc.gov.au/report-27> 90 [160], accessed 11 October 2011.

154 Sam Silkin QC, former English Attorney General, cited in Edwards (n 3) 71.

155 Geoffrey Palmer, 'New Zealand Office of the Attorney General' (1987) 13 Commonwealth Law Bulletin 248, 249, 252.

156 Prior to the removal of this jurisdiction, see, eg, the political controversy that surrounded the discharge of the criminal law functions of Mary Gaudron, New South Wales Solicitor General in the 1970s and 1980s during 'The Ages Tapes' scandal: Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (University of Western Australia Publishing 2010), chs 11 and 12.