CELEBRATING 100 YEARS OF THE COMMONWEALTH SOLICITOR-GENERAL: CLOSING REMARKS

The Hon Justice Rachel Pepper*

Professor Appleby has suggested that "in many respects, the Solicitor-General has become the first law officer in all but name".[1] But that position, as is well known, belongs to the Attorney-General. However, unsurprisingly, the first and second law officers of the Commonwealth share an interconnected history which, having been received from Britain, had developed initially in response to the unique conditions and exigencies of colonial life, and later as a result of more modern political and constitutional realities.

Originally, in the initial years of the colony, there was considerable overlap between the functions of Attorney-General and Solicitor-General. Thus, in 1829, the Colonial Secretary noted to Governor Darling, that the first and second law officers:

> …should be jointly employed in all the legal business of the Crown, and should be left to make such arrangements between themselves for the distribution of the common duties…In the event of any disagreement between them the Attorney-General should have the right of dictating to his Colleague.[2]

Plus ca change…

The roles of first and second law officer, and the duties they entail, have transmogrified over time. In Australia, the role of the Attorney-General has shifted to encompass a greater political and administrative focus, with a particular recent emphasis on matters of national security and law reform.

By contrast, the role the Solicitor-General is uniquely that of a lawyer and is, strictly speaking at least, perceived to be apolitical. It is to provide legal advice to the

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* Closing remarks presented at 'Celebrating 100 Years of the Commonwealth Solicitor-General', Banco Court, Sydney, 24 October 2016. I wish to thank my tipstaff, Mr John Zorzetto, for his considerable assistance in compiling these remarks.

[1] Gabrielle Appleby, 'The evolution of a public sentinel: Australia's Solicitor General' (2012) 63(3) *Northern Ireland Legal Quarterly* 397.

[2] Keith Mason, 'The office of the Solicitor General for New South Wales' (1988) Autumn *Bar News* 22, 23.

executive branch of government on, amongst other things, significant Constitutional and public law matters.[3]

Central to the apolitical nature of the role of Solicitor-General is the fiercely guarded independence with which Solicitors-General across all Australian jurisdictions have treated their commission.

A striking illustration of this occurred early in the history of Australia, when, in 1893, the then Solicitor-General of Victoria, Sir Isaac Isaacs, proposed to institute fresh criminal proceedings against the executives of the collapsed Mercantile Bank for fraud. This was at a time when the Solicitor-General and the Attorney-General made prosecutorial decisions, a role which now rests with the various Directors of Public Prosecution. Sir Isaacs' decision to commence fresh prosecutions was contrary to the new Victorian government's decision to withdraw, and the Attorney-General directed Sir Isaacs to desist. Sir Isaacs refused citing his "individual responsibility for the due, honest and fearless performance of the functions entrusted to me".[4]

Ultimately the disagreement was resolved by the Victorian Premier requesting Sir Isaacs' resignation, which was duly proffered.

Despite this, Sir Isaacs went on to become the fourth Justice of the High Court of Australia. In light of very recent events, for some, this may be of considerable comfort.

The independence and impartiality of the Solicitor-General has now been institutionalised in Australia.

The first Solicitor-General was appointed in New South Wales in 1824.[5]

In 1825, Tasmania appointed its first Solicitor-General. Originally both the Tasmanian Solicitor-General and the Attorney-General were members of the Executive Council. However, in 1863, as a costs savings measure, the Tasmanian Government made the decision to remove the Solicitor-General from its ministry. This marked the start of legislated independence.

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[3] Gabrielle Appleby, *The role of the Solicitor-General* (Hart Publishing, 2016) 7.
[4] Appleby, above n 1, 404.
[5] For a detailed history of the role of the Solicitor-General see Appleby, above n 1; Appleby, above n 3, Ch 3; and Mason, above n 2.

Approximately 50 years later, the Hughes Government passed the *Solicitor-General Act 1916* (Cth), the centenary of which we celebrate tonight, creating the role of the Commonwealth Solicitor-General, modelled with more than a just passing nod to the reforms in Tasmania half a century earlier.

The first Solicitor-General was Robert Garran, who, prior to the Act's promulgation had been the Secretary of the Department of Attorney-General.

In 1922 New South Wales and Queensland moved to adopt the Commonwealth model of Solicitor-General. The last State to move the role of Solicitor-General from the province of the executive was Victoria, in 1951. However, Victoria went a step further by creating a quasi-independent statutory office that was not burdened by administrative duties. This set the gold standard for the office of Solicitor-General, and was emulated by the Commonwealth with the passing of the *Law Officers Act 1964* (Cth).

As is well known, the *Law Officers Act 1964* (Cth) provides a seven year commission with the opportunity for reappointment and fixed remuneration.[6] Importantly, these terms provide for not just the appearance, but the actuality, of independence.[7] The stability that has ensued is no doubt the reason why is the Commonwealth will have had 12 Solicitors-General over the last 100 years,[8] whereas, before the position was abolished in 2005, Canada had 41 Solicitors-General in 113 years.[9]

The United Kingdom and Canada provide an interesting comparison to the position of Solicitor-General in Australia.

The United Kingdom has maintained the traditional roles of both the Attorney-General and Solicitor-General – or, 'the Law Officers', as they are jointly known - as elected Members of Parliament. But notwithstanding their positions as politicians, they are principally lawyers, whose role it is to provide legal advice to the government, represent the government in court, and conduct major prosecutions.[10]

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[6] See *Law Officers Act 1964* (Cth) ss 6(1) and 7.
[7] Appleby, above n 1, 399.
[8] This includes the Acting Solicitor-General between 1997-1998.
[9] Christopher Goff-Gray, 'The Solicitor-General in context: a tri-jurisdictional study' (2011) 23(2) *Bond Law Review* 48, 58.
[10] Alana McCarthy, 'The evolution of the role of the Attorney-General' (2004) 11(4) *Murdoch University Electronic Journal of Law* [14].

Central to the functioning of the Law Officers is the "doctrine of independent aloofness" which provides that both the Attorney-General and the Solicitor-General should not be involved in government policy, should refrain from engaging in political debate, except insofar as it relates to their respective portfolios, and should be non-confrontational in relation to party politics.[11]

Canada is different again. Originally, the Solicitor-General assisted the Minister for Justice, the Canadian equivalent to the Attorney-General, and there was provision for the Solicitor-General to act as Canada's second law officer.

However, Canada has not had a tradition of the Solicitor-General acting as an advocate for the Crown. Rather, in Canada, the Solicitor-General has primarily been a Ministerial position, responsible for the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Correctional Service of Canada and the National Parole Board.[12]

After the 9/11 terrorist attacks, a portfolio restructure resulted in the position of Solicitor-General being replaced with the new Minister of Public Safety.[13]

In Australia, this responsibility is the dominion of the Attorney-General, aided by the federal Minister for Justice.

The statutory independence enjoyed by Commonwealth and State Solicitors-General in Australia is therefore not a universal phenomenon in common law countries.

But even with this independence, the Solicitor-General is not simply a "constitutional-gun for hire" who can argue cases as he or she pleases. The government legitimately pursues its policy objectives in a broader constitutional context and the Solicitor-General has a function in guiding those interests. The extent to which a Solicitor-General can eshew those interests, and depart from instructions, is therefore circumscribed. The inherent and necessary balancing act is both nuanced and complex.

[11] McCarthy, above n 10, [16] and see John Edwards, *The Attorney-General Politics and the Public Interest* (Sweet & Maxwell, London, 1984) 189-190.
[12] Goff-Gray, above n 9, 59 and 62-63.
[13] Goff-Gray, above n 9, 64-65.

Take, for example, *Northern Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 51,[14] a challenge to the appointment of the Chief Magistrate of the Northern Territory on non-standard terms which gave rise to the issue of whether the *Kable* doctrine applied to courts of the territories. Earlier case law indicated that territory courts did not fall under the rubric of Ch III of the Commonwealth Constitution and any concomitant restrictions imposed on State courts by dint of Ch III did not apply.

Senior Counsel from the private bar briefed to appear with the Solicitor-General of the Northern Territory enthusiastically endorsed this view (based on *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248). The Solicitor-General, Mr Thomas Pauling, responded by saying that:

> 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…But in this case…this legislation doesn't offend any of the principles espoused in *Kable*.[15]

Finally, it remains to observe that the role of the Commonwealth Solicitor-General is an auspicious position. Nine justices of the High Court have previously held the position as Solicitors-General, either to the Commonwealth or to one of the States, including two of the current High Court Justices, and numerous others have accepted judicial commissions in other Federal and State courts.

In this regard, and given remarkable events of the past fortnight, it is hoped that this tradition continues.

It remains to thank once again:

- Sir Anthony Mason for his illuminating opening remarks
- our distinguished panellists (The Hon Bob Ellicott QC, Dr Gavan Griffith AO QC, Dr David Bennett AC QC and the Hon Justice Stephen Gageler), for their invaluable insights and observations;
- the chair, Professor Gabrielle Appleby, who timing has been nothing short of exquisite; and

[14] This example may be found in Appleby, above n 3, 223-225.
[15] Appleby, above n 3, 225.

- yourselves, for attending here tonight to celebrate the centenary of the position of the Commonwealth of the Solicitor-General.

Thank you.