# TRADITIONAL NOTIONS OF THE ATTORNEY-GENERAL

## Time for some justice

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In 2008 the ministerial portfolio titles held by members of the federal Rudd cabinet include some that reflect core functions of government such as defence and health, and others that reflect current issues of importance in Australian politics and society such as Minister for Climate Change and Water and Minister for Social Inclusion. This balance between core issues and ministries, designed to ensure that the government acts on and can be held accountable for contemporary concerns, is also reflected in the current make up of many state and territory cabinets.

However, appearing amongst these core and contemporary portfolio titles in federal, state and territory cabinets in 2008 is one that predates responsible government in Australia and which adopts the title of an office established in England in 1461; the title 'Attorney-General'. In every Australian jurisdiction the office of Attorney-General is a ministerial appointment in the same manner as any other ministerial office from the ranks of the parliamentary party which controls the numbers in the lower house of Parliament.

Some may regard the continued use of 'Attorney-General' as a title for a ministerial office under a modern system of representative and responsible government in 21st century Australia as simply the benign and quaint retention of a traditional title from the 'old country'. Certainly, when in 1994[1] the then shadow Commonwealth Attorney-General Daryl Williams made the first of what would become his much quoted comments about the political nature of the Australian office of Attorney-General he was widely criticised for turning away from what was regarded as the 'traditional' nature of the office Attorney-General.

The vehemence with which Daryl Williams' comments were received had its basis in the view held by many that the Attorney-General was not simply a minister like any other but was also 'First Law Officer of the Crown' and, in that capacity, was in some manner distinct from other 'ordinary' ministers.

This distinction is significant because it often carries with it a belief, or at least an expectation, that Attorneys-General will act independently of their ministerial colleagues and of governmental and party political interests to protect such values as the proper administration of the justice system, respect for the rule of law and the integrity of judicial independence. Many also ascribe to the Attorney-General responsibility to act as a counsellor to his or her ministerial colleagues to promote the observance of fundamental legal principles in the formulation and implementation of government policy. No attempt is made to characterise any other ministerial office as being, to any degree, anything other than a political office.

Some of the 'traditional' notions of the independence of the Australian Attorney-General have their source in the office of Attorney-General in the United Kingdom. The holder of that English office historically acted as the principal legal adviser to the monarch, in other words, as the First Law Officer of the Crown. That office originated at a time when the legislature, executive and judiciary did not exist as distinct branches of government in the way they are now understood and references to 'the Crown' could still be equated with the person of the monarch of the day.

The ministerial office of Attorney-General in Australia has never been the true equivalent of the UK office. It has, instead, been a mixture of responsibilities that in the United Kingdom were historically divided between the Attorney-General, the Lord Chancellor and the Home Secretary. For this reason alone it is not appropriate to look to the United Kingdom Attorney-General as a model for the Australian ministerial office.

More significantly, the standing and role of the UK Attorney-General has undergone a re-consideration, in large part prompted by the manner and content of provision of legal advice by the former Attorney-General Lord Goldsmith on the issue of the legality of the United Kingdom entering the Iraq war. In the last 12 months that office has been the subject of review by the House of Commons Constitutional Affairs Committee and by the new Attorney-General and Solicitor-General. It is a model whose credibility is under scrutiny and not one that begs for adoption in the Australian context.

In addition, there have in recent years, been radical reforms to the historic role of the Lord Chancellor in the United Kingdom. The coming into office of the Brown government saw, for the first time in the UK, the creation of an office of Secretary of State for Justice and a Ministry for Justice. It can be expected that there will be further changes to the machinery of government arrangements for the administration of justice in the United Kingdom.

REFERENCES

1. Daryl Williams, 'Who Speaks for the Courts?' in *Courts in a Representative Democracy*, Collection of papers from the AIJA National Conference (1995), 192.

## The development of the office of Attorney-General in Australia

The history of the office of Attorney-General in Australia starts in 1823 when an office bearing that title was created in each of the colonies of New South Wales and Van Diemen's Land. No Attorney-General, or indeed legal adviser of any sort, accompanied the first fleet that brought the beginnings of white occupation to Australia in 1788.

The Attorney-General for New South Wales was also the Attorney-General for Victoria and Queensland in the years before the separation of each of those colonies from New South Wales. In each of colonial Western Australia and South Australia, the office that was created to advise the colonial governor in the 1830s carried the title 'Advocate-General'. It was only over time that the title 'Attorney-General' became uniform in all Australian jurisdictions.

These first Attorneys-General were legal advisers to the colonial governor and as such they were legal advisers to the executive government of the day. It was neither expected nor desired that they would act independently of the colonial governor they were appointed to serve.

When responsible government was introduced in each Australian jurisdiction over the course of the second half of the 19th century, the office of Attorney-General became a ministerial office held by a person aligned with the political grouping or faction holding the majority of seats in the newly formed bi-cameral parliaments. These colonial ministries quickly developed a strong culture of collective responsibility that left little room for independence of action on the part of the Attorney-General.


In the period between the introduction of responsible government in each of the colonies and the federation of those colonies as the Commonwealth of Australia, there were attempts, particularly in New South Wales, to quarantine the Attorney-General from the day to day political pressures and policy compromises that come with being a member of the executive government. These attempts lasted only a few years. Premiers did not want their Attorneys-General to be independent of the executive government of which they were a part, preferring instead to be sure of both the active political loyalty as well as the legal support of their Attorney-General.

This period also saw the beginning of the practice of a high percentage of Attorneys-General also holding portfolios unrelated to the administration of justice, further undermining any notion of their being independent of the political interests of the executive government. This practice consolidated over time and continues today particularly at state and territory level.

At the time of federation of the Australian colonies, the office of Attorney-General was a political ministerial office in each Australian jurisdiction, the holder of which was a member of cabinet. This established model was adopted at the federal level. The first half of the 20th century saw an Australian Attorney-General as a member of cabinet, a minister holding other portfolios unrelated to the administration of justice and increasingly coming to the office with experience gained in such portfolios. Attorneys-General were spending more time in the Parliament before being appointed to ministerial office, and less time in private legal practice.

Over the course of the second half of the 20th century, the political aspects of the role so dominated the legal professional aspects that statutory offices, principally the Solicitor-General and the Director of Public Prosecutions, were established, not only to perform professional tasks for which Attorneys-General were not qualified or had no time but to distance those tasks from the political office that the Attorney-General had become.

In 1956 Prime Minister Menzies introduced the practice of dividing the federal ministry into an inner cabinet and an outer ministry. This model was rejected by the Whitlam government but has been adopted by all other federal coalition and labor governments. The practical result of this model is that a federal Attorney-General's membership of cabinet is related to their political standing rather than to any particular legal qualification. The presence of the Attorney-General amongst membership of cabinet confirms the holder of the office as a senior member of the ministry who can be trusted to abide by the collective nature of the cabinet process.

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By necessity, this outline of the history of the office of Attorney-General in Australia is a generalisation but it reflects the trends in the nature of the office and the political institution that is the office of Attorney-General which have taken place in each Australian jurisdiction over the last 100 years.

## The characteristics of the Australian Office of Attorney-General in 2008

In 2008 an Australian Attorney-General is a Member of Parliament elected in the same way as other members of Parliament and a minister appointed in the same manner as other ministers. He or she will be included in the cabinet unless he or she lacks sufficient political standing to justify membership. It is rare for the office of Attorney-General to be held as a standalone portfolio. Most Attorneys-General also hold the portfolio of Minister of Justice and most hold concurrently with the office of Attorney-General one or more ministerial portfolios unrelated to the administration of justice.

The office of Attorney-General in Australia in this first decade of the 21st century is likely to be held by a lawyer but one who has engaged predominately in a political career and not one who has been engaged in the active practice of the law, at least not at any time recent to their appointment as Attorney-General. An Attorney-General does not personally perform such legal professional functions as continue to be associated with the office. These are carried out by a combination of the DPP, Solicitor-General, a government solicitor, public service legal officers and private sector lawyers. The extent to which the Attorney-General has oversight of that work varies between jurisdictions.

This distancing of the Attorney-General from personal performance of the professional legal functions associated with the office has been due to a combination of factors. One factor was that the ministerial work load of the office made it impossible to maintain a schedule that allowed an Attorney-General to personally carryout legal work or to make regular court appearances. Another factor was the growth in the size and scope of legal work associated with government departments and agencies to a level where it was impossible for an individual Attorney-General to be across all the issues involved.

Yet another factor was simply the absence of any uniform model for an Australian Attorney-General across the jurisdictions in terms of their holding legal qualifications. There are numerous examples at State level of the office having been held by persons with no legal qualifications or experience. For instance, in Queensland from the early 1930s to the mid 1980s no Attorney-General held any legal qualifications; this despite the fact of there being, for at least part of the time, lawyers amongst the ranks of the parliamentary party in power.

These factors have combined to produce a situation where it can not be said with any seriousness that any of the Attorneys-General holding office in any jurisdiction in Australia that they are a practising lawyer preparing and being personally responsible for the content and professional delivery of legal advice and services. It follows that Attorneys-General cannot be distinguished from their ministerial colleagues on the basis of having professional and ethical obligations of a practising lawyer that do not apply to those ministerial colleagues.

However, even if such a distinction could be made, in 2008 no comfort can be found in notions of an Attorney-General as First Law Officer of the Crown by those looking for a basis for independence of action on the part of an Attorney-General. The application of modern constitutional and administrative law concepts can only result in any entity that might be characterised as 'the Crown' in this context being equated with the executive government of which the Attorney-General is a part.[2] Accordingly, even if the Attorney-General as First Law Officer of the Crown could be regarded as a practising lawyer, the client in whose interests he or she would have to act would be the executive government, being the cabinet of which he or she is a member and the broader ministry.

## Distinguishing the political ministerial office of Attorney-General

Some who have held the office have suggested that the 'independence' of the Attorney-General is and has always been dependent on the skill and capacity, strength and inclination of the individual holding the office at any given time.[3] Individual Attorneys-General may set aside party political interests and seek to exercise a positive influence over their ministerial colleagues in defence of judicial independence and the rule of law.

However, the critical issue is that under neither Australia's constitutional and political system nor in the legislation of the various jurisdictions, is there anything to ensure that all those who hold the political

2. *Sue v Hill* [1999] 199 CLR 462, 497, 499 for the High Court's discussion of the various meanings that might be ascribed to the expression 'the Crown' in constitutional theory.

3. See Electoral and Administrative Review Commission, *Report on Review of Independence of the Attorney-General* (1993) para 3.21

ministerial office that bears the title 'Attorney-General' will act in a consistent and predictable manner when confronted by an issue of principle associated with the defence of these important values.

The manner in which an individual Attorney-General carries out the responsibilities associated with the office depends on the skill, integrity, values, personal and political beliefs of individual holding the office at any given time. The extent to which an individual Attorney-General can be effective will also depend on the culture of the executive government in power at any given time and the respect that culture gives to the observance of the rule of law, the integrity of the administration of justice and respect for judicial independence.

If an executive government does not have a culture of transparency and accountability that respects these important issues it is unrealistic to expect that a lone individual, simply by reason of holding a ministerial office with the title of Attorney-General, can work within the executive government of which he or she is a member to overcome the negative impacts of such a political culture.

In some Australian jurisdictions — the ACT, Victoria and, more recently Western Australia — the Attorney-General has been a leader in championing the need to ensure tangible protections for human rights and to increase the role of the Parliament in this regard. However, in other jurisdictions, most notably, the federal jurisdiction during the term of the Howard government, the presence of a minister holding an office bearing the title of Attorney-General within the cabinet did not act to prevent actions of the executive government that impacted adversely on the protection of human rights and the accepted understandings of the principle of the rule of law.

## Should the Attorney-General's 'independence' be reasserted?

The aspects of the office of Attorney-General in 2008 which work against an independent Attorney-General are centred on membership of the Parliamentary party in power, membership of cabinet, responsibility for the administration of departments of the executive government and the distancing of the Attorney-General from personal performance of tasks that involve the exercise of the professional skill and judgment of a practising lawyer.

To alter all or any of these aspects of the office would be contrary to the manner in which the office of Attorney-General has evolved in Australia. It would also be contrary to the importance placed by Australia's constitutional and political culture on the collective responsibility of a ministry selected from and responsible to Parliament. Suggestions that at least some ministers be chosen specifically for their expertise and appointed from outside the ranks of members of Parliament have repeatedly been rejected in this country.[4]

If the office is to remain a ministerial political office appointed in the same manner as others, then continuing to maintain 'traditional' notions of an independent Attorney-General will only work to confuse and reduce the accountability of both the Attorney-General and the executive government. By focussing on the Attorney-General as decision-maker, the executive government of which the Attorney-General is a member and in whose political interests he or she may be acting can escape scrutiny. Further, given the dominance of collective over individual ministerial responsibility in Australia's political culture, it is likely that an Attorney-General will be protected from scrutiny by reason of the executive government's control of the numbers in the Parliament and, thereby, also escape accountability.

## Out with Attorney-General in with Minister of Justice?

The need to eliminate confusion and avoidance of responsibility that comes with notions of an independent ministerial Attorney-General is at its most critical in the context of the re-focussing of the Attorney-General's office towards issues of internal and national security that has taken place since 2001. While done in the name of the Attorney-General is Australia, the administration of counter-terrorism legislation is a ministerial responsibility which in the United Kingdom belongs to the Home Secretary. There is no tradition of political independence on the part of the Home Secretary.

There is a genuine debate to be had about how to balance the competing interests of security and human rights. It is not a debate that should tolerate any confusion that such balancing is being done by an Attorney-General acting independently of the executive government. The administration of counter-terrorism legislation is a matter for which the executive government should be held collectively accountable. The entrusting of such responsibilities to a ministerial Attorney-General cannot substitute for an effective human rights instrument.

Since the latter part of the 20th century it has become increasingly common for the office of Attorney-General at state level to be held jointly with the office of Minister of Justice. The title 'Minister of Justice' carries no reference to any other office. It is straightforwardly a ministerial portfolio title like other ministerial portfolio titles. The use of 'Minister of Justice' denotes a political office and, therefore, better reflects the true nature of the office that has traditionally assumed the title of Attorney-General in Australia.

The time has come to let go of 'Attorney-General' and the traditional notions that accompany it. Instead the office should be recognised as an importance ministerial office and given a title more akin to other ministerial titles in acknowledgement of the political nature of the office.

## Consequences of acknowledging the political nature of the office

The importance of replacing the title Attorney-General with an unambiguously political title such as

4. See for example David Hamer, *Can Responsible Government Survive in Australia?*, Centre for Research in Public Sector Management (1994), 73; Robert Hawke, *The Resolution of Conflict*, Boyer Lectures, Australian Broadcasting Commission (1979), 23–4; Max Spry, 'Executive and High Court Appointments' in Geoffrey Lindell and Robert Bennett (eds), *Parliament: The Vision in Hindsight* (2001) 419, 419; Sir Samuel Griffith, Convention Debates, Sydney, 4 March 1891, 36; Bernhard Wise Convention Debates, Melbourne, 10 March 1898, 2198–9; Alfred Deakin, Convention Debates, Adelaide, 30 March 1897, 288; Thomas Playford, Convention Debates, Sydney, 5 March 1891, 60 and Isaac Isaacs Convention Debates, Adelaide, 26 March 1897, 169. See generally Spry, 423–424

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Minister of Justice lies not just in the act of updating the title. It is important because it will force serious consideration of issues that have been allowed to remain unresolved. It has been easier over the last 10 to 15 years in Australia to chide individual Attorneys-General for not fulfilling 'traditional' expectations such as defending the judiciary, than it has been to engage with the serious structural and constitutional issues involved. An acknowledgement of the 'political' nature of the office of Attorney-General in Australia presents an opportunity to enhance rather than erode matters of importance such as the rule of law, judicial independence, and, more generally, the accountability of the executive government for the manner in which it exercises the significant powers given to it.

Instead of considering the relationship between the judiciary and the executive attention should also be turned to the relationship between the judiciary and the legislature and ways to give the judiciary a greater degree of structural, administrative and constitutional independence. Courts governance and judicial administration need to be put back on the agenda in jurisdictions where court administration remains with officers of the public service responsible to an Attorney-General.

Acknowledging that the ministerial portfolio with responsibilities for the administration of justice is a political office should revive consideration of the most appropriate methods for selecting candidates for judicial office. The ability of the judiciary to speak in their own defence and the appropriate role for Chief Justices and other heads of jurisdiction need also to be discussed and debated.

Another issue that should be under active policy consideration is the Attorney-General's common law power to institute or to permit litigation to enforce public rights though the grant of a fiat. A number of options present themselves. The first possibility is the creation of an independent office accountable, in the manner of an Ombudsman or an Auditor-General, to the Parliament. This office might have a title such as Public Interest Commissioner but other suggestions have been made including the creation of a specialist Ombudsman.[5] Consideration could also be given to the creation of an office of Advocate General who would have standing to make submissions to the High Court on constitutional questions after receipt of representations from any member of the public or interest group.[6] Yet another option is reform to the laws of standing to broaden the range of persons and groups who may bring an issue involving the enforcement of public rights before a court without the prior approval of a gatekeeper.

But it is not enough to focus on these institutional issues. If we are to ensure the vigour and health of our constitutional and justice system, focus should also be turned to the role of the legal profession and the extent to which it should bear some responsibility for bringing to public attention any action of the executive government that could be regarded as a threat to the integrity of the legal and judicial system. Recent events in Pakistan have demonstrated how fragile these values can be in the face of a hostile political culture and how sometimes it is only a vital and engaged legal profession that can act to raise awareness the importance of these values.

In 21st century Australia it is not appropriate that notions of an independent Attorney-General continue to cloud accountability for important issues involving the administration of justice. In considering the office of Attorney-General in Australia we should not try to reinstate some notion of political independence for the holder of the office. We should, instead, look to establishing and enhancing a range of measures to increase the accountability of the executive government as a whole. These matters are too important to be left to quaint notions of the traditional role of an office first created in England some 500 years ago in very different times.

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5. Keith Hancock, *The Battle of Black Mountain. An Episode of Canberra's Environmental History* (1974), 54

6. Daryl Williams, 'The Australian Parliament and High Court: Determination of Constitutional Questions' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 203, at 216–217