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# The Solicitor-General in context: A tri-jurisdictional study

## **Abstract**

The purposes of this article are fourfold and will proceed as follows. First, to succinctly trace the history and then observe the political disposition of the two law officers of the Crown; secondly, to contrast the Solicitors-General of Australia and Canada, and in doing so, focus particularly on the responsibilities of the Canadian Solicitor General both before and after its formal restructure; thirdly, to pose the question of whether a Solicitor-General can truly be independent of the executive; and finally, to assess the research currently obtainable on the Commonwealth Solicitor-General.

## **Keywords**

Commonwealth Solicitor-General, law officers, Canadian Solicitor-General

## THE SOLICITOR-GENERAL IN CONTEXT: A TRI-JURISDICTIONAL STUDY

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### I Introduction

Australia's constitutional system of government inherited from England necessitates the presence of two law officers. They are the Attorney-General and the Solicitor-General. The former is referred to as the first law officer of the Crown whilst the latter, somewhat predictably, is known as the second law officer of the Crown. This denotes the hierarchical nature of their relationship, with the Attorney-General being the more senior of the two law officers. Together they are the chief legal advisers to the Crown, representing and advising the Crown at both a federal and state level,<sup>1</sup> but individually they are quite disparate creatures. In contrast to the English model, the traditional role of the Solicitor-General in Australia<sup>2</sup> has evolved, to a point where the Solicitor-General is now largely considered to be genuinely apolitical.<sup>3</sup> Unlike the

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\* Sessional Academic; PhD Candidate, Faculty of Law, Bond University. I wish to acknowledge the support which I have received from Professor Patrick Keyzer in the preparation of this article, and also thank Rosa Riedl, whose sharp editorial eye identified some contextual adjustments to Parts I, II and III. For the help I received from Dr Oliver D'Alton and Michael Wallace, shortly before final submission, I also express my sincere appreciation.

<sup>1</sup> This article pertains exclusively to the role of a Solicitor-General at the federal level. However it is relevant, albeit briefly, to observe the distinction between the Commonwealth and the various state Solicitors-General. As Dr Gavan Griffith AO QC remarks, the Commonwealth Solicitor-General is the 'leading counsel and legal adviser for the Commonwealth, particularly in constitutional matters' whereas the offices of the state Solicitors-General, 'as well as being involved in constitutional law and public law issues...tend to have a more active role in criminal law issues': Gavan Griffith, 'Solicitors-General' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 631, 631.

<sup>2</sup> For the purposes of this article, the Solicitor-General of Australia will herein be referred to as the 'Commonwealth Solicitor-General'.

<sup>3</sup> This represents a departure from the English archetype, but is easily explained. Variation in jurisdictional approaches, particularly (in cases like Australia) where a country has federated from colonial rule, is 'attributable to the particular political and constitutional development and profile of the country in question': Neil Walker, 'The Antinomies of the

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Solicitor-General, the position of Attorney-General is politically partisan, with the Attorney-General having to be an elected member of the ruling political party in either the Senate or the House of Representatives.<sup>4</sup>

When reference is made to the 'Law Officers of the Crown', typically one office in particular springs to mind. Indeed, whilst concerted efforts have been made to delineate the role and responsibilities of Attorneys-General,<sup>5</sup> quality research conducted on the Solicitor-General is conspicuously absent, particularly in Australia.<sup>6</sup> This is lamentable and should be corrected. For instance, it is only tacitly assumed that a Solicitor-General is autonomous of the government in which he or she serves. The fact is that there is no sizeable body of Australian judicial or academic reasoning to support such a vital assumption.<sup>7</sup> This must be addressed especially given the long debate that has surrounded the independence of the United States Solicitor General. The Commonwealth Solicitor-General's link to both the executive and judicial branches of government demonstrates its consequential function. There are a multitude of factors worthy of consideration arising from the statutory office of Commonwealth Solicitor-General, including the written and oral advice prepared for the Attorney-General on questions of constitutional law, as well as the principal legal counsel for the Commonwealth in cases of constitutional significance before the High

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Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 135, 137.

<sup>4</sup> Elected political representatives are constitutionally prescribed in ss 7 and 24 of the *Commonwealth Constitution* (the 'Constitution').

<sup>5</sup> See, eg, Gerard Carney, 'Comment – The Role of the Attorney-General' (1997) 9(1) *Bond Law Review* 1.

<sup>6</sup> The exception to this being three conference papers presented very recently at a symposium canvassing the role of Australasian Solicitors-General: Keith Mason, 'Aspects of the History of the Solicitor-General in Australia: 1788 to 1970' (Paper presented at The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Bond University, 15 April 2011); Michael G Sexton, 'The Role of Solicitors General in Advising the Holders of Vice Regal Offices' (Paper presented at The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Bond University, 15 April 2011); and Martin Hinton, '*Secundarius Attornatus*: The Solicitor-General, the Executive and the Judiciary' (Paper presented at The Role of the Solicitor-General in the Australasian Legal and Political Landscape, Bond University, 15 April 2011). Importantly, however, these analyses are undertaken from the perspective of state Solicitors-General. This again emphasises the lack of eminent Australian research pertaining to the position of Commonwealth Solicitor-General.

<sup>7</sup> The only implicit indication of the Commonwealth Solicitor-General's independence from the executive is the *Law Officers Act 1964* (Cth) itself, which ensures relative protection of remuneration, tenure and pension. See especially *Law Officers Act 1964* (Cth) ss 6, 7, 10 and 16.

Court. More nuanced issues, however, remain. These are somewhat trickier questions about the Solicitor-General's role in law reform and the development of constitutional law, and most importantly, the Solicitor-General's accountability and independence of office.<sup>8</sup>

A secondary theme of this article is to engage in a comparative analysis of the office of Solicitor-General abroad. This will primarily involve contrasting the Commonwealth Solicitor-General to the now-defunct office of the Solicitor General of Canada, and where appropriate, to the United States Solicitor General.<sup>9</sup> With respect to the Canadian Solicitor General, this article presents an interesting account of a position that lost any semblance to the role that a *conventional* Solicitor-General would perform, long before its formal abolition in 2005. It traces the history of a department – a political office of the Canadian ministry – from its long-term departmental responsibility of managing policing and corrections; through its restructure and change of name from Solicitor General to Minister of Public Safety and Emergency Preparedness<sup>10</sup> in 2003, to its eventual eradication only two years later.

The purposes of this article are fourfold and will proceed as follows. First, to succinctly trace the history and then observe the political disposition of the two law officers of the Crown; secondly, to contrast the Solicitors-General of Australia and Canada, and in doing so, focus particularly on the responsibilities of the Canadian Solicitor General both before and after its formal restructure; thirdly, to pose the question of whether a Solicitor-General can truly be independent of the executive; and finally, to assess the research currently obtainable on the Commonwealth Solicitor-General.

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<sup>8</sup> The issue of whether the Solicitor-General is independent of the executive branch has not been the subject of academic analysis in Australia as it has in the United States. In Australia, the Solicitor-General's impartiality has simply been presumed. This important issue is the subject of discussion in Part V. Before this is commenced, however, it is worthwhile to examine the historical role of the Solicitor-General in England before its introduction to Australia. This provides the reader with an appreciation of the position's function before the offices of the Commonwealth and Canadian Solicitors-General are appraised. A study of the Canadian Solicitor General is included in this article because it usefully demonstrates how the role has transformed across jurisdictions.

<sup>9</sup> In Australia and the United Kingdom the title of the office requires a hyphen (that is, 'Solicitor-General'). In contrast, in Canada and the United States, the title contains no hyphen (that is, 'Solicitor General').

<sup>10</sup> The Minister for Public Safety and Emergency Preparedness has since undergone another change of title, and is now known as Minister for Public Safety, located within the Department of Public Safety Canada.

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## II The law officers of the Crown

A suitable starting point is the observation that, in many Commonwealth countries, the complexion of the Attorney-General and Solicitor-General remains shrouded in mystery. The two law officers, but particularly the Attorney-General, possess a mysterious ambience because no definitive agreement has been reached as to their true allegiance, whether it is conformist party politician or the legal guardian of the public interest. In Australia, however, this concern has been somewhat alleviated by the office of Commonwealth Solicitor-General being statutorily structured as a public service post insulated from direct political influence. Notwithstanding, the issue still poses a sagacious challenge for all Commonwealth countries with a constitutional system comprising law officers of the Crown. As Professor Neil Walker argues:

[E]very constitutional order faces an exacting challenge to articulate a role for the law officers which reconciles their attachment to a particular government and its political objectives with their commitment to a broader set of values associated with the integrity of the legal and political order.<sup>11</sup>

The genesis of the first Crown law officer can be traced back to 13<sup>th</sup> century England. The first recorded reference to the 'Attorney-General' was in 1243, when Lawrence del Brok received an annual retainer 'for suing the King's affairs of his pleas before him'.<sup>12</sup> The position was formally established in 1315 when a number of private attorneys were employed on a casual basis to assist the King's Attorney in prosecuting the King's business.<sup>13</sup> However, it was not until 1461 that the first recorded title of 'Attorney-General' emerged.<sup>14</sup> John Herbert was officially acknowledged as the 'Attorney-General of England', recognised along with judges and political advisers as key advisers to the Crown. Interestingly, court records of this time also identified for the first time the post of King's Solicitor,<sup>15</sup> which later became the office of the Solicitor-General for England in 1515.<sup>16</sup> Throughout the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries, the Solicitor-General represented the Crown but was also permitted to retain their private practice. As government expanded in the mid-19<sup>th</sup> century however, the Solicitor-General was called upon more regularly to tender

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<sup>11</sup> Walker, above n 3, 135.

<sup>12</sup> J LI J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 16.

<sup>13</sup> Ben Heraghty, 'Defender of the Faith? The Role of the Attorney-General in Defending the High Court' (2002) 28(2) *Monash University Law Review* 206, 209.

<sup>14</sup> See, eg, Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) *Murdoch University Electronic Journal of Law* 30, [6].

<sup>15</sup> Walker, above n 3, 136.

<sup>16</sup> *Ibid.*

advice to departments whenever important legal questions arose. According to Walker, in 1894 the 'law officers were debarred from taking on any private business to supplement their official salary', which effectively metamorphosed 'the law officers into full-time salaried ministers of the Crown'.<sup>17</sup> This reflected the growing politicisation of the two law officers.<sup>18</sup>

As this article is not overly concerned with the historical development of the office of Solicitor-General in England, historical devotees should consult Professor John Edwards' treatise, which remains the most authoritative text on the development of the second law officer of the Crown.<sup>19</sup> Nevertheless, for the purposes of this discussion, both the modern Attorney-General and Solicitor-General evolved in England as political offices, as 'they were held by Members of Parliament who were appointed as members of the government in office and who relinquished their positions as the government or their own political fortunes changed'.<sup>20</sup> According to Professor Edwards, the pre-eminent scholar on the law officers of the Crown, the Attorney-General and Solicitor-General 'share that rare combination of judicial or quasi-judicial functions together with political obligations in the government of which they are members'.<sup>21</sup> Despite this, Edwards acknowledges the long drawn-out struggle that the Solicitor-General has faced to achieve independence and oppose those who attempt to encroach upon their status and freedom. In England, where it is universally recognised that the Solicitor-General is a departmental Minister,<sup>22</sup> the ultimate strength of the office of the Solicitor-General, in all of its various activities, is its 'firm adherence to this long-fought-for principle of constitutional independence'.<sup>23</sup>

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<sup>17</sup> Ibid 138.

<sup>18</sup> Despite the assertion that there is an exigent link between 'full-time salaried ministers of the Crown' and the growing apprehension of political partisanship, it would be remiss not to at least acknowledge the intended neutrality of the two law officers. By way of analogy, a comparison may be made between a law officer on a full-time remuneration package and a 'speaker' of a Legislative Assembly or a House of Representatives. If a 'speaker' can be a neutral figure during parliamentary debates despite being an elected member of a political party then surely the same expectation would apply to the law officers. This outcome is quite plausible. Nevertheless, the important point here is that perceived neutrality should not be confused with actual neutrality. They are not analogous concepts.

<sup>19</sup> See Edwards, above n 12. For an extensive account of the history and development of the office of the Solicitor-General in England, see especially 119-31.

<sup>20</sup> John McGrath, 'Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General' (1998) 18 *New Zealand Universities Law Review* 197, 197.

<sup>21</sup> Edwards, above n 12, 1.

<sup>22</sup> Ibid 5.

<sup>23</sup> Ibid 8.

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Even today the selection of a Solicitor-General remains politically made, with the Prime Minister of the United Kingdom choosing a suitable candidate from among the qualified members of his party in the House of Commons or House of Lords.<sup>24</sup> Notwithstanding this method of appointment, English convention has it that the Solicitor-General should ideally act in a capacity that is independent of political considerations.<sup>25</sup> Such aspirations of independence have been statutorily reinforced elsewhere. In Australia, the independence<sup>26</sup> of the Commonwealth Solicitor-General is manifested in s 6(1) the *Law Officers Act 1964* (Cth), which requires the Governor-General to appoint the Solicitor-General for a period not exceeding seven years. Although the text is ambiguous because it fails to specify a fixed term of appointment, modern convention dictates that Commonwealth Solicitors-General are generally appointed to fixed five year terms.<sup>27</sup> Section 10 of the *Law Officers Act 1964* (Cth) also provides relative security of tenure, in that the Governor-General can only remove the Solicitor-General from office in three prescribed situations.<sup>28</sup>

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<sup>24</sup> Andrew Le Sueur, *Solicitor-General*, The New Oxford Companion to Law <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e2046>>.

<sup>25</sup> McGrath, above n 20, 197.

<sup>26</sup> In Australia little academic attention has been paid to the independence of the Commonwealth Solicitor-General, and indeed, what has been discussed has centred upon its non-political function and desire to keep the position free of departmental responsibility: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Sneddon, Attorney-General). By contrast, copious amounts of scholarly research have focused on the role of the Solicitor General in the United States. In the United States, the Solicitor General is an appointee of the President and serves at his pleasure, possibly provoking claims that the United States Solicitor General is selected based as much on political ideology as legal expertise: see, eg, Todd Lochner, 'The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation' (1993) 79 *Virginia Law Review* 549, 566-7; and Ronald S Chamberlain, 'Mixing Politics and Justice: The Office of Solicitor General' (1987-1988) 4 *Journal of Law and Politics* 379.

<sup>27</sup> Dr David Bennett AO QC was appointed to two fixed five year terms (1998-2008), whilst the current Commonwealth Solicitor-General, Stephen Gageler SC, commenced a five year term on 1 September 2008: Attorney-General's Department, *New Solicitor-General of Australia Appointed* <[http://www.ag.gov.au/www/ministers/mccllelland.nsf/Page/MediaReleases\\_2008\\_SecondQuarter\\_30May2008-NewSolicitor-GeneralofAustraliaAppointed](http://www.ag.gov.au/www/ministers/mccllelland.nsf/Page/MediaReleases_2008_SecondQuarter_30May2008-NewSolicitor-GeneralofAustraliaAppointed)>.

<sup>28</sup> Section 10 of the *Law Officers Act 1964* (Cth) provides that 'the Governor-General shall remove the Solicitor-General from office if the Solicitor-General: (a) except by reason of temporary illness, becomes incapable of performing the duties of his or her office; (b) is guilty of misbehaviour; or (c) becomes bankrupt or insolvent, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit'.

Since the earliest days of the Australian colonies<sup>29</sup> the Attorney-General has exercised political province. Indeed, the Commonwealth Attorney-General has always played an important role in the executive and has been a key member of Cabinet.<sup>30</sup> Much less is known, however, about the evolution of the Commonwealth Solicitor-General. Until 1964 the office was combined with that of the Secretary of the Attorney-General's Department.<sup>31</sup> In 1916, upon the appointment of Sir Robert Garran GCMG KC, the Commonwealth office was given statutory recognition,<sup>32</sup> but as Mason articulates, it 'specified no eligibility criteria and merely described the functions as those "prescribed by or under any Act, or...delegated...by the Attorney-General"'.<sup>33</sup> It was not until the advent of the *Law Officers Act 1964* (Cth) that the office was ameliorated so that the Solicitor-General could be 'kept free of departmental responsibility and administration' to 'concentrate on his function as permanent counsel for the Crown'.<sup>34</sup>

Nowadays the two law officers can easily be distinguished. The Attorney-General is the principal legal adviser to the Commonwealth government and is responsible for the administration of the department, the administration of specific legislation and the development and implementation of policy;<sup>35</sup> whilst the Solicitor-General generally conducts any ensuing constitutional litigation for the Commonwealth,<sup>36</sup> and may also represent the Commonwealth in international cases and in areas of special government interest.<sup>37</sup> Deduced from this explanation is that the two offices lack parity. The powers of the Attorney-General clearly extend far beyond those of the Solicitor-General. For example, the Commonwealth Attorney-General has the right to intervene in litigation, and in the context of relator actions, the power to lend 'his or her assistance to any person to bring legal proceedings in the name of the

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<sup>29</sup> In Australia, the first Attorney-General and Solicitor-General were appointed in New South Wales in 1824: see Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252, 252.

<sup>30</sup> McCarthy, above n 14, [10].

<sup>31</sup> Griffith, above n 1, 631.

<sup>32</sup> *Solicitor-General Act 1916* (Cth) (repealed).

<sup>33</sup> Mason, above n 6, 14.

<sup>34</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Sneddon, Attorney-General).

<sup>35</sup> Williams, above n 29, 253.

<sup>36</sup> *Ibid.*

<sup>37</sup> Australian Government, Attorney-General's Department, *Guidelines on Briefing the Solicitor-General* <[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)-OLSC+General+Guidelines+on+Briefing+the+SolicitorGeneral+2008.doc/\\$file/OLSC+General+Guidelines+on+Briefing+the+Solicitor-General+2008.doc](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)-OLSC+General+Guidelines+on+Briefing+the+SolicitorGeneral+2008.doc/$file/OLSC+General+Guidelines+on+Briefing+the+Solicitor-General+2008.doc)>.

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Attorney-General by the grant of a fiat'.<sup>38</sup> These powers derive from both statute and the executive prerogative power at common law. Appropriately, Professor Gerard Carney has compiled a list outlining the Attorney-General's most significant prerogative powers. These powers are widespread and include

the power to initiate and terminate criminal prosecutions, advise on the grant of a pardon, grant immunities from prosecution, issue a fiat in relator actions, appear as *amicus curiae* or *contradictor*, institute proceedings for contempt of court, apply for judicial review, intervene in any proceedings involving the interpretation of the Commonwealth Constitution, represent the Crown in any legal proceedings, and provide legal advice to the Parliament Cabinet and the Executive Council.<sup>39</sup>

Given the ambit of these powers, it is unsurprising that the Attorney-General has been branded 'politically hamstrung'.<sup>40</sup> The ever-increasing politicisation of the Attorney-General's office is not in dispute. This has even been acknowledged by former Commonwealth Attorney-General Daryl Williams.<sup>41</sup> Traditionally, it was said that the Attorney-General should 'act as both a bridge and a gatekeeper to uphold the proper functioning of the separation of powers'.<sup>42</sup> Whether the Attorney-General still does so is a matter for debate. But this traditional view was advantageous for two reasons. First, the Attorney-General had both a responsibility to the executive (as chief legal adviser to the Crown) and to the judiciary (as first law officer of the Commonwealth).<sup>43</sup> Second, in the Attorney-General's role as gatekeeper, it was expected that he 'had absolute freedom to decide for which public rights it was worth seeking judicial protection'.<sup>44</sup> However, with the passage of time

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<sup>38</sup> Williams, above n 29, 253.

<sup>39</sup> Carney, above n 5, 2.

<sup>40</sup> Chief Justice Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 41. Chief Justice Brennan made this comment in response to Attorney-General Daryl Williams' apparent unwillingness to shield the courts and its judges from 'acute and often ill-informed criticisms' by political colleagues.

<sup>41</sup> Williams has expressed the view that 'the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous or at least eroded: Daryl Williams, 'Who Speaks for the Courts?' in *Courts in a Representative Democracy* (Australasian Institute of Judicial Administration, 1994) 191-2. But see Carney, above n 5, 3-4.

<sup>42</sup> Heraghty, above n 13, 208. See also Carney, above n 5, for a comprehensive discussion of both the Commonwealth and British Attorneys-General.

<sup>43</sup> For further information, see especially McGrath, above n 20, 202. Although McGrath particularises the functions of the Attorney-General from the perspective of New Zealand, his description of the position, for the purposes of this article, is similar to that of the Commonwealth Attorney-General.

<sup>44</sup> Walker, above n 3, 137.

and the evolution of contemporary party politics, this traditional view may now be considered somewhat misguided. Arguably, the modern Commonwealth Attorney-General is merely a politician (albeit one with legal expertise); a member of the legislature and likely member of Cabinet, largely devoid from and unconcerned with, exercising their traditional legal functions. In other words, the Attorney-General cannot be independently detached from government because he or she is intrinsically an agent of government no longer acting as an independent custodian of legal values.<sup>45</sup> This sentiment has been recently reiterated by Sir Anthony Mason AC KBE. Speaking in the context of relator actions and the Attorney-General's role as guardian of public law, Sir Anthony maintained that the 'Attorney-General is not independent of government and cannot be expected to act impartially in deciding whether proceedings should be brought against the government'.<sup>46</sup>

In direct contrast to the Attorney-General, the office of Solicitor-General has been depoliticised through statute, which represents a major departure from the British model. The office of the modern Commonwealth Solicitor-General was established under the *Law Officers Act 1964* (Cth). Despite this, it was recognised early at federation that the Commonwealth Solicitor-General should be a permanent non-political law officer:

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 recognized in some of the colonies by the appointment of a Solicitor-General as a non-political and permanent officer.<sup>47</sup>

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<sup>45</sup> See, eg, L J King, 'The Attorney-General, Politics and the Judiciary' (2000) 29(2) *University of Western Australia Law Review* 155, 158: 'From colonial times the Attorney-General has always been an important political as well as legal figure. He has been a member of the Cabinet and has frequently held other portfolios. Since Federation, the Attorneys-General of the Commonwealth have often been senior ministers combining the portfolio of Attorney-General with other senior and highly political portfolios. One need only mention famous Attorneys-General such as William Morris Hughes who was contemporaneously also Prime Minister, Robert Gordon Menzies who was also Deputy Prime Minister and Herbert Vere Evatt and Garfield Barwick who both combined the external affairs portfolio with that of Attorney-General'.

<sup>46</sup> Sir Anthony Mason, 'Access to Constitutional Justice: Opening Address' (2010) 22(3) *Bond Law Review* 1, 2.

<sup>47</sup> William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 180; accessed via <[http://www.archive.org/stream/constitutionofco00mooruoft/constitutionofco00mooruoft\\_djvu.txt](http://www.archive.org/stream/constitutionofco00mooruoft/constitutionofco00mooruoft_djvu.txt)>.

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Accordingly, although resourced and provided with administrative services by the Attorney-General's Department, the Solicitor-General is a holder of public office and is said to be independent of the Department.<sup>48</sup> This is consistent with the view that 'there is an unbroken tradition that Solicitors-General render dispassionate and non-political advice to their governments, including those of the contrary complexion to those under whom they took office'.<sup>49</sup> The purpose of the office includes, 'acting as counsel for the Commonwealth, giving opinions on questions of law to the Attorney-General, and carrying out such other functions, ordinarily performed by counsel, as the Attorney-General requests'.<sup>50</sup> The Solicitor-General appears as counsel in cases of constitutional significance, international cases and in areas of special government interest.<sup>51</sup>

### III Contrasting the Solicitors-General of Australia and Canada

The Canadian Solicitor General, like its Australian equivalent, evolved from the English archetype; but as time elapsed the two offices diverged considerably. The two offices shared a name and little else.<sup>52</sup> A reason for this was that the Canadians followed the English model and created the ministerial office of Solicitor General whilst Australia endeavoured to ensure that its Solicitor-General was neither a member of Parliament nor politically partisan. This is an important distinction.

At this stage there are four preliminary points of differentiation worth noting, the first of which is the nature of the office. The Canadian Solicitor General (like the Minister for Public Safety) was a Member of the ruling political party and a Minister who held a Cabinet portfolio; and since 1966 had exercised virtually no law officer responsibilities.<sup>53</sup> The Commonwealth Solicitor-General, by contrast, is non-political

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<sup>48</sup> Australian Government, Attorney-General's Department, *Annual Report 2009-2010* (2010) 307.

<sup>49</sup> Griffith, above n 1, 631.

<sup>50</sup> Australian Government, Attorney-General's Department, *Annual Report 2009-2010* (2010) 316.

<sup>51</sup> Australian Government, Attorney-General's Department, *Guidelines on Briefing the Solicitor-General* <[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)-OLSC+General+Guidelines+on+Briefing+the+SolicitorGeneral+2008.doc/\\$file/OLSC+General+Guidelines+on+Briefing+the+Solicitor-General+2008.doc](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)-OLSC+General+Guidelines+on+Briefing+the+SolicitorGeneral+2008.doc/$file/OLSC+General+Guidelines+on+Briefing+the+Solicitor-General+2008.doc)>.

<sup>52</sup> Sceptics may question why it is useful to compare incongruent jurisdictions and ultimately ask what can be learned by the comparison. Considering that both Solicitors-General evolved from the same English ancestry, it is interesting to discern how and why the Canadian Solicitor General's role digressed over time from that of a *conventional* Solicitor-General. So the point of contrasting various Solicitors-General is to examine how the position has adapted and been applied multi-jurisdictionally.

<sup>53</sup> In 1966 the existing responsibilities exercised by the Canadian Solicitor General were

'in the sense that it is not held by a Minister of the Crown or other Member of the House of Representatives'.<sup>54</sup> Thus the Commonwealth Solicitor-General is best viewed as an official of government rather than a politician with party loyalties. This is also reflected in the length of the Solicitor-General's tenure. Indeed, Commonwealth Solicitors-General have generally served longer terms than their Canadian counterparts (and US Solicitors General for that matter). There have been a total 41 Canadian Solicitors General over a 113 year period as opposed to only 10 Commonwealth Solicitors-General over a 96 year period.

**Table 1: List of Commonwealth Solicitors-General<sup>55</sup>**

<b>Name</b>	<b>Period of tenure</b>
<i>Robert Garran</i>	1916-1932
<i>George Knowles</i>	1932-1946
<i>Kenneth Bailey</i>	1946-1964
<i>Anthony Mason</i>	1964-1969
<i>Robert Ellicott</i>	1969-1973
<i>Maurice Byers</i>	1973-1983
<i>Gavan Griffith</i>	1984-1997
<i>Henry Burmester (acting)</i>	1997-1998
<i>David Bennett</i>	1998-2008
<i>Stephen Gageler</i>	2008-

The second point pertains to the Solicitor-General's appointment to office. In Canada the appointment of a Solicitor General was one made effectively under the royal prerogative, or simply, at the discretion of the Crown.<sup>56</sup> The Solicitor General held office 'during pleasure'<sup>57</sup> and there were no legislative provisions prescribing who had the power to appoint, the term of appointment, eligibility of re-appointment, and

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altered, which had the effect of removing the traditional function belonging to the law officers of the Crown. Instead, the Solicitor General became responsible for policing, corrections and parole. See also J L J Edwards, *Ministerial Responsibility for National Security: As it Relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1980).

<sup>54</sup> McGrath, above n 20, 198.

<sup>55</sup> This information has been partly sourced from Griffith, above n 1, 632.

<sup>56</sup> It appears that 'discretion of the Crown' can be equated with 'upon the advice of the Prime Minister'. Constitutional convention dictates that the Crown acts on the advice of the Prime Minister (or Cabinet).

<sup>57</sup> *Department of the Solicitor General Act*, RSC 1985, c S-13, s 2(2) (repealed).

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criteria to be satisfied before a candidate became eligible for appointment. In Australia, s 6 of the *Law Officers Act 1964* (Cth) abates this problem. Section 6(1) of the Act, for instance, states that '[a] person appointed as Solicitor-General shall be appointed by the Governor-General for such period, not exceeding 7 years, as the Governor-General determines, but is eligible for re-appointment'. The appointment process is altogether more transparent. The Governor-General, acting on the Attorney-General's recommendation, will confirm the incoming Solicitor-General's candidature.

To re-emphasise this point, in 2008 the Rudd government implemented a more open process for most statutory appointments. In the specific case of the Solicitor-General, after the retirement of Dr David Bennett AO QC, 'the position of Commonwealth Solicitor-General was advertised and selected candidates were interviewed by a panel which made recommendations to the Attorney-General'.<sup>58</sup> Consistent with s 6(1) of the *Law Officers Act 1964* (Cth), a suitable candidate was then selected and recommended to the Governor-General for formal approval.

Another related consideration is the necessary qualifications expected from a Solicitor-General. In Canada, although it was preferred that the Solicitor General had a legal background, it was not a statutory prerequisite.<sup>59</sup> In contrast, the Commonwealth Solicitor-General must be an experienced legal advocate, with at least five years standing as a barrister or solicitor of the High Court or of a State Supreme Court.<sup>60</sup> This not only reinforces that a Solicitor-General should give dispassionate and non-political advice to the executive, but to be a Solicitor-General the individual should be among the country's most distinguished lawyers. As Dr Gavan Griffith AO QC<sup>61</sup> has aptly noted, the 'Solicitors-General enhance the quality of practice in public law, and contribute to the depth and continuity of constitutional arguments presented for governments to the High Court'.<sup>62</sup> In Australia, due to the high standing of the office, a number of Solicitors-General have been subsequently appointed as Justices to the High Court of Australia.<sup>63</sup>

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<sup>58</sup> Australian Government, Attorney-General's Department, *Annual Report 2007-2008* (2008) 2.

<sup>59</sup> The *Department of the Solicitor General Act*, RSC 1985 (repealed) was silent as to whether a Solicitor General had to have prior legal professional experience as a prerequisite for office.

<sup>60</sup> *Law Officers Act 1964* (Cth) s 6(2).

<sup>61</sup> Seventh Commonwealth Solicitor-General, serving in office from 1984-97.

<sup>62</sup> Griffith, above n 1, 631.

<sup>63</sup> Sir Anthony Mason AC KBE (former Commonwealth Solicitor-General) was appointed on 21 September 1972 (and later as Chief Justice of Australia on 6 February 1987). Although he did not sit as High Court judge until 1948, Sir William Webb KBE (former Queensland Solicitor-General) achieved status as a Justice on 16 May 1946 upon his appointment as Australian President of the International Military Tribunal for the Far East. Sir Ronald

The third point involves the composition of the Solicitor-General's office. In Australia, following its separation from the Secretary to the Attorney-General's Department in 1964, the Solicitor-General's office has remained separate from that of the Attorney-General. It is understandable, therefore, that the Commonwealth Solicitor-General be considered independent of the Department. Although resourced by the Attorney-General's Department, the office of Commonwealth Solicitor-General is presumably provided with limited administrative assistance and finite budgetary availability.<sup>64</sup> By comparison, prior to its abolition, the department of the Canadian Solicitor General, along with its four agencies,<sup>65</sup> had an approximate annual operating budget of \$2.5 billion and employed over 34,000 workers.<sup>66</sup>

The final point to consider is the functions exercised by the two respective Solicitors-General. As second law officer, the Commonwealth Solicitor-General is entrusted to perform three functions: (1) to act as counsel for the Crown in right of the Commonwealth,<sup>67</sup> the Commonwealth, Ministers, or other authorised representatives of the Crown; (2) to furnish their opinion to the Attorney-General on questions of

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Wilson AC KBE CMG (at the time Solicitor-General of Western Australia) was appointed on 19 May 1979. Sir Daryl Dawson AC KBE CB (at the time Solicitor-General of Victoria) was appointed on 16 August 1982. Mary Gaudron AC QC (at the time Solicitor-General of New South Wales) was appointed on 6 February 1987.

<sup>64</sup> The operative word here being 'presumably', for such information is not currently made publically available. The last time information was published on the Solicitor-General's staffing numbers appears to be in 1997. Between 1992 and 1997 the Commonwealth Solicitor-General's office had (with the exception of 1993-94) two staff members: Australian Government, Attorney-General's Department, *Annual Report 1996-1997, Appendix 3: Human Resources* (1997) 182. In addition, the last time the Solicitor-General's outlays were reported upon was in 1999. During 1998-99, the Commonwealth Solicitor-General's total expenses were \$848,000: Australian Government, Attorney-General's Department, *Annual Report 1998-1999* (1999) 5. Today, the manner in which the Attorney-General's Department reports to the Parliament on its activities is far less transparent. The only information now in the public domain is that the Attorney-General's Department 'meets the costs of the Solicitor-General and Counsel Assisting the Solicitor-General (including salary)': Australian Government, Attorney-General's Department, *Annual Report 2009-2010* (2010) 327.

<sup>65</sup> That is, the Royal Canadian Mounted Police ('RCMP'), the Canadian Security Intelligence Service ('CSIS'), the Correctional Service of Canada ('CSC'), and the National Parole Board ('NPB').

<sup>66</sup> Colette E Derworiz, *Department of Solicitor General*, *The Canadian Encyclopedia* <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0007554>>.

<sup>67</sup> Put simply 'the separate legal personality consisting of the executive government of the Commonwealth of Australia': see Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2004) 108.

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law; and (3) to carry out other functions ordinarily performed by counsel.<sup>68</sup> Yet under the repealed *Department of the Solicitor General Act*, the functions of the Canadian Solicitor General extended to all matters over which the Parliament has jurisdiction relating to: (a) reformatories, prisons and penitentiaries; (b) parole, remissions, release and long-term supervision; (c) the Royal Canadian Mounted Police; and (d) the Canadian Security Intelligence Service.<sup>69</sup>

This point, along with the other three, illustrates the fundamental difference between the two Solicitors-General. For whilst one is a public servant with extensive experience and the highest ability as a legal adviser to the government, and legal advocate before the High Court of Australia and other superior courts; the other is a politician in charge of a cabinet portfolio conferring significant responsibilities for the administration of justice. It may also be the case that one requires a high standard of professional and personal integrity and a high level of judgment, whereas the other may not.

#### IV The Canadian Solicitor General

This article has identified a Solicitor-General as being the second law officer of the Crown; or in other words the second highest-ranking legal officer for the government after the Attorney-General, who officially remains the chief legal counsel for the executive branch. This is a description that, for the most part, suitably characterises the role of the Solicitor-General in most Commonwealth countries; but not Canada.<sup>70</sup> It was never the tradition, as it is in Australia (or the United States), for the Canadian Solicitor General to appear before the highest appellate courts as part of their regular

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<sup>68</sup> Section 12 of the *Law Officers Act 1964* (Cth) states that 'the functions of the Solicitor-General are (a) to act as counsel for: (i) the Crown in right of the Commonwealth; (ii) the Commonwealth; (iii) a person suing or being sued on behalf of the Commonwealth; (iv) a Minister; (v) an officer of the Commonwealth; (vi) a person holding office under an Act or law of a Territory; (vii) a body established by an Act or a law of a Territory; or (viii) any other person or body for whom the Attorney-General requests him or her to act; (b) to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General; and (c) to carry out such other functions ordinarily performed by counsel as the Attorney-General requests'.

<sup>69</sup> *Department of the Solicitor General Act*, RSC 1985, c S-13, s 4 (repealed).

<sup>70</sup> Part IV does not place heavy reliance on legal research because it was not the responsibility of the modern Canadian Solicitor General to be Canada's most senior government lawyer, representing the federal government in constitutional cases before the Supreme Court of Canada. Rather, as discussed below, the Canadian Solicitor General was responsible for public safety portfolios like policing, corrections and security intelligence.

duties;<sup>71</sup> though it was true that for a period the Solicitor General worked to ‘assist the Minister of Justice in the counsel work of the Department of Justice’ and was ‘charged with such other duties as are at any time assigned to him by the Governor in Council’.<sup>72</sup> Although the Solicitor General did, at this early stage, exercise functions compatible with that of a second law officer as the subordinate officer to the Minister of Justice (in effect the ‘Attorney-General’), it must be re-emphasised that this was a 19<sup>th</sup> century statute and thus not representative of any recent trend towards the use of its traditional functions.

The Department of the Solicitor General for Canada was formally established in 1892, upon the implementation of the Act passed in 1887.<sup>73</sup> It is worth noting, however, that the concept of the Solicitor General was not new. Indeed, the office had existed provincially in Quebec and Nova Scotia prior to confederation in 1867,<sup>74</sup> at least since the 18<sup>th</sup> century.<sup>75</sup> Also of note is that from 1926<sup>76</sup> until its formal abolition in 2005, the Solicitor General was a permanent member of Cabinet. The politicisation of the position from an early stage again serves as a useful point of contrast between the Canadian and Commonwealth Solicitors-General.

The Canadian Solicitor General assisted the Minister of Justice until 1966<sup>77</sup> upon which time the modern Solicitor General was formed. During the 25<sup>th</sup> Ministry, the portfolio of Solicitor General of Canada was restructured into a new public security portfolio.<sup>78</sup> The new law<sup>79</sup> repealed the pre-existing Act and made the department ministerially responsible for the Royal Canadian Mounted Police (‘RCMP’), the Canadian Security Intelligence Service (‘CSIS’), the Correctional Service of Canada

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<sup>71</sup> The Hon Marc Rosenberg, ‘The Attorney-General in the 21<sup>st</sup> Century: A Tribute to Ian Scott’ (2009) 34 *Queen’s Law Journal* 813, 848.

<sup>72</sup> *Statute 50-51 Victoria*, s 1, assented to 23 June 1887 and proclaimed into force 3 December 1892. See especially Dale Gibson, ‘Development of Federal Legal and Judicial Institutions in Canada’ (1995) 23 *Manitoba Law Journal* 450, 458.

<sup>73</sup> *Statute 50-51 Victoria*, c 14.

<sup>74</sup> See *Statute 30-31 Victoria*, c 3 (UK). This statute was known as the *British North America Act 1867* until it was subsequently renamed the *Constitution Act 1867* in 1982.

<sup>75</sup> Gibson, above n 72, 458.

<sup>76</sup> *Ibid.*

<sup>77</sup> Between 1936 and 1945, however, the Solicitor General’s responsibilities were completely consumed by the Minister of Justice: see Colette E Derworiz, *Department of Solicitor General*, *The Canadian Encyclopedia* <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0007554>>.

<sup>78</sup> *History of Departments – 1867 to date*, Parliament of Canada, accessed via <<http://www2.parl.gc.ca/parlinfo/default.aspx?Menu=Home>>.

<sup>79</sup> *Statute 14-15 Elizabeth II*, c 25, assented to 16 June 1966 and proclaimed into force 1 October 1966.

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(‘CSC’), and the National Parole Board (‘NPB’);<sup>80</sup> along with four Ministry review bodies<sup>81</sup> aimed at accountability and respect for the rule of law. The Solicitor General effectively became guardian and policy maker for policing, law enforcement, national security intelligence, and corrections. Comparatively, a number of these responsibilities in Australia fall under state jurisdiction; with national security intelligence (as vested in the Australian Security Intelligence Organisation or ‘ASIO’) being part of the Commonwealth Attorney-General’s portfolio. Finally, the Department of Solicitor General of Canada was also given legislative authority to commission research into police policy, dangerous prisoners, and other criminal justice issues.<sup>82</sup>

The official purpose of the 1966 reorganisation was for the Solicitor General to assume responsibility for protecting Canadians and helping to maintain Canada as a peaceful and safe society.<sup>83</sup> Unofficially, the change ‘was a culmination of efforts

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<sup>80</sup> See *Who are We*, Public Safety Canada <<http://www.publicsafety.gc.ca/abt/www/index-eng.aspx>>. According to the Public Safety Canada website, the ‘RCMP enforces Canadian laws, prevents crime and maintains peace, order and security’; which includes ‘preventing, detecting and investigating offences against federal statutes; maintaining law and order’; ‘providing investigative and protective services to other federal departments and agencies; and providing Canadian and international law enforcement agencies with specialized police training and research, forensic laboratory services, identification services and informatics technology’. The CSIS ‘investigates and reports on activities that may pose a threat to the security of Canada’ and ‘provides security assessments, on request, to all federal departments and agencies’. The CSC ‘helps protect society by encouraging offenders to become law-abiding citizens while exercising reasonable, safe, secure and humane control’ and is also ‘responsible for managing offenders sentenced to two years or more in federal correctional institutions and under community supervision’. The NPB (now the Parole Board of Canada) ‘is an independent decision making body that grants, denies or revokes parole for inmates in federal prisons’.

<sup>81</sup> That is, the Inspector General of CSIS (‘IG’), the Security Intelligence Review Committee (‘SIRC’), the Commission for Public Complaints Against the RCMP (‘CPC’), and the Communications Security Establishment Commissioner (‘CSE’).

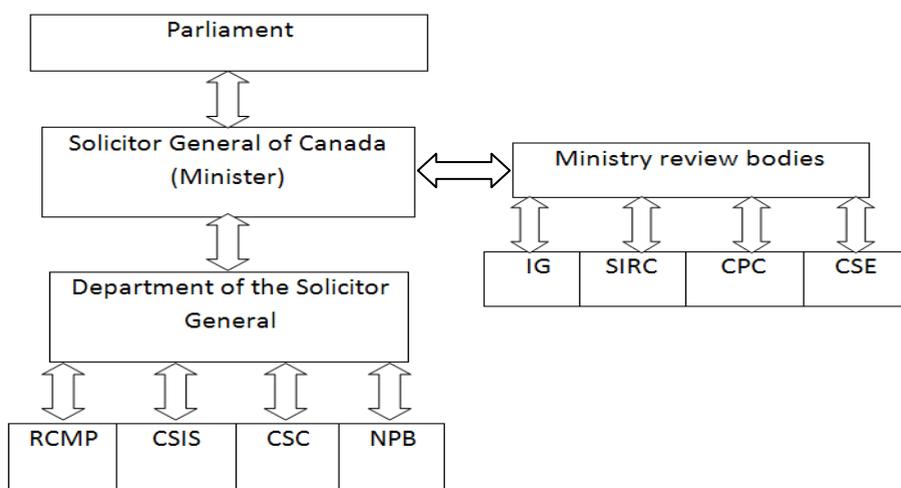
<sup>82</sup> See, eg, Christopher Murphy, ‘The Current and Future State of Police Research and Policy in Canada’ (1999) 41 *Canadian Journal of Criminology* 205. See also Andre Normandeau and Barry Leighton, ‘Police and Society in Canada’ (1991) 33 *Canadian Journal of Criminology* 251; James Bonta and Robert B Cormier, ‘Corrections Research in Canada: Impressive Progress and Promising Prospects’ (1999) 41 *Canadian Journal of Criminology* 235; and James Bonta, Ivan Zinger, Andrew Harris and Debbie Carriere, ‘The Dangerous Offender Provisions: Are they Targeting the Right Offenders?’ (1998) 40 *Canadian Journal of Criminology* 377.

<sup>83</sup> *The Canadian Security and Intelligence Community: Helping Keep Canada and Canadians Safe and Secure*, Government of Canada Privy Council Office <<http://www.pcobcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=csis-scrcs/index-eng.htm>>.

begun as long ago as 1878 to reduce the ever-increasing burden of the department of justice'.<sup>84</sup> In any case, the 1966 amendments did confer 'autonomous responsibilities on the Solicitor General in some important areas that had until then been assigned to the Minister of Justice',<sup>85</sup> such as correctional services and policing, but it unquestionably came at the expense of its existing law officer responsibilities, which were never recovered.

Figure 1 presents the structure of the Solicitor General's portfolio prior to its reorganisation in 2003.

**Figure 1: The Department of Solicitor General of Canada (1966-2003)<sup>86</sup>**



### **1. Minister of Public Safety (formerly the Minister of Public Safety and Emergency Preparedness)**

The position of Minister of Public Safety and Emergency Preparedness (also designated as Deputy Prime Minister) was announced at a press conference on 12 December 2003. Former Prime Minister Paul Martin, upon his formal induction as Prime Minister, announced an entirely new ministerial position and department. Absent was the Solicitor General. In fact no mention was made about where the supplanted Solicitor General had gone. Clearly the restructure was prompted by the devastating September 11 terror attacks on the United States in 2001. Acknowledging the need to 'continue to invest in stronger and smarter borders to protect both their

<sup>84</sup> Gibson, above n 72, 458.

<sup>85</sup> Ibid.

<sup>86</sup> All acronyms appearing in Figure 1 are elaborated upon fully in footnotes 65 and 81.

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security and economic interests; to ensure safe communities by supporting crime prevention, gun control and Canada's corrections and parole systems; and finally, to maintain anti-terrorism measures, policing and preparedness for all types of emergencies';<sup>87</sup> the most significant part of the restructure was to add the Canada Border Services Agency ('CBSA')<sup>88</sup> to the portfolio, consolidating into one portfolio all the departments that are responsible for ensuring public security in Canada.<sup>89</sup> As an aside, the CBSA's equivalent in Australia is the Australian Customs and Border Protection Service, an agency that is part of the Attorney-General's portfolio.

Notwithstanding the obvious benefits gained from reorganising like-departments into one portfolio, one cannot ignore that the executive's prerogative power to do this has its disadvantages. Alissa Malkin, for instance, argues that the reorganisation of government departments in Canada should have a statutory framework. Malkin contends that current federal government reorganisations, although infrequent, are opaque and devoid of legal certainty. The executive's ability to act under the royal prerogative means that a conferral of power to restructure government does not have to be accompanied by a statute authorising it. The major problem with such an approach is that this 'movement of powers occurs in a manner that may be difficult for anyone but a court to trace'.<sup>90</sup> Accordingly, Malkin argues that:

When this method is used, the legislative trail becomes a collection of Orders in Council – sometimes overwhelming in number – published in the Canada Gazette, Part II. Piecing together the numerous orders involved in a reorganization, such as that of December 12, 2003, in order to understand what was accomplished might seem a bewildering task – particularly as the

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<sup>87</sup> Canada, *Parliamentary Debates*, House of Commons, 16 May 2005, 6026 (Roy Cullen, Parliamentary Secretary to the Minister of Public Safety and Emergency Preparedness).

<sup>88</sup> See *Who are We*, Public Safety Canada, Public Safety Portfolio <<http://www.publicsafety.gc.ca/abt/wwwa/index-eng.aspx>>. According to the Public Safety Canada website, 'the Canada Border Services Agency (CBSA) manages the nation's borders by enforcing Canadian laws governing trade and travel, as well as international agreements and conventions. CBSA facilitates legitimate cross-border traffic and supports economic development while stopping people and goods that pose a potential threat to Canada'.

<sup>89</sup> Also modified were the review bodies. Remaining intact were the CPC and the Inspector General of CSIS, although the latter was reconstituted under the direct authority of the Deputy Minister. The other review bodies were responsible to the Minister directly. The SIRC and the CSE had been removed and replaced with the Office of the Correctional Investigator ('OCI') and the RCMP External Review Committee ('ERC'). These two new review bodies were not replacements for the SIRC and the CSE, but rather were original creations.

<sup>90</sup> Alissa Malkin, 'Government Reorganization and the Transfer of Powers: Does Certainty Matter' (2007) 39(3) *Ottawa Law Review* 537, 540.

technique employed and the import of each step is nowhere set out systematically or explained in a publicly available document.<sup>91</sup>

A prime example of this practice was integration of the CBSA into the public safety portfolio. An Order of Council was used to transfer a single division of an existing department and make it subject to the federal public administration regime.<sup>92</sup> Then Parliament used its power to authorise the Governor in Council to transfer ‘any powers, duties, or functions, or the control’ of ‘any portion of the federal public administration, between ministers or between portions of government’.<sup>93</sup> This permitted the Parliament to take Canada Customs<sup>94</sup> away from the now-vanquished Canada Customs and Revenue Agency and amalgamate it with personnel from the Canadian Food Inspection Agency and the Department of Citizenship and Immigration Canada, thus becoming the CBSA under the auspices of the Minister of Public Safety and Emergency Preparedness. Understandably, such a procedure makes it ‘difficult for people to ascertain which minister has the legal authority and responsibility for any given statutory power’.<sup>95</sup> Eventually the *Canada Border Services Agency Act*<sup>96</sup> was passed by the Canadian Parliament. This established the CBSA as a statutory body. The concern though is that it took two years from the date the Orders in Council were made before a proper statutory authority was realised.

With an increase in responsibility for the public often comes intense criticism, and the Minister for Public Safety and Emergency Preparedness has not been immune. Jointly together with the Minister of Citizenship and Immigration, the Minister has the power to issue security certificates,<sup>97</sup> which operate to immediately detain foreign

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<sup>91</sup> Ibid.

<sup>92</sup> This is achieved by an Order in Council under s 3 of the *Financial Administration Act*, RSC 1985, c F-11, ‘which authorizes the Governor in Council to add to Schedule 1.1 the name of any division or branch of the federal public administration, with a reference to its “appropriate minister”’: see *ibid* 541.

<sup>93</sup> See the *Public Service Rearrangement and Transfer of Duties Act*, RSC 1985, c P-34, s 2.

<sup>94</sup> Although a discussion of Canada Customs is not directly applicable to the Canadian Solicitor General, it does demonstrate the breadth of the executive’s prerogative power to confer additional jurisdiction to the Minister of Public Safety and Emergency Preparedness. The Minister of Public Safety and Emergency Preparedness did, of course, assume the Canadian Solicitor General’s pre-existing responsibilities in 2003.

<sup>95</sup> Malkin, above n 90, 540.

<sup>96</sup> *Canada Border Services Agency Act*, SC 2005, c 38.

<sup>97</sup> The ability to issue security certificates emphasises one of the Minister of Public Safety and Emergency Preparedness’ more pervasive powers: see especially ss 33-37 and ss 77-85 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For an extensive discussion of the nature and ramifications of security certificates, see Colleen Bell, ‘Subject to Exception: Security Certificates, National Security and Canada’s Role in the “War on

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nationals and permanent residents who are deemed to 'be a danger to society or to be unlikely to attend court hearings'.<sup>98</sup> The concern that many human rights advocates have had is threefold: (1) after the Ministers sign the security certificate, a judge of the Federal Court must 'determine whether the certificate is reasonable'<sup>99</sup> on the basis of 'the information and evidence available';<sup>100</sup> (2) the judge is merely permitted to provide a summary of the case to the accused with no requirement that any specific details of evidence be released;<sup>101</sup> and (3) the judge's decision is not subject to appeal.<sup>102</sup>

Such a restrictive practice, although justified in some circumstances, serves to unilaterally truncate civil freedoms. These three issues are undoubtedly problematic. The difficulty is not necessarily the detention itself (providing that the individual poses a danger to the public), but the length of time the individual is in detention before a periodic review is undertaken. If the Federal Court judge determines the security certificate is reasonable, then a permanent resident is not entitled to a subsequent review until at least six months later, even if in the meantime it is established that the person poses no danger to the public. For all non-citizens, mandatory detention ensues until either the certificate is ruled unreasonable or a detention review is due. A detention review is not required until 120 days have

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Terror'" (2006) 21 *Canadian Journal of Law and Society* 63; A Wayne MacKay, 'The Role of the Courts under the Charter' (2006) 21 *National Journal of Constitutional Law* 183; Michael Code and Kent Roach, 'The Role of the Independent Lawyer and Security Certificates' (2006-2007) 52 *Criminal Law Quarterly* 85; The Hon. Edmond P Blanchard, 'The Role of the Federal Court in National Security Issues: Balancing the Charter Against Anti-terrorism Measures' (2009-2010) 18 *Constitutional Forum* 37; Graham Hudson, 'A Delicate Balance: *Re Charkaoui* and the Constitutional Dimensions of Disclosure' (2009-2010) 18 *Constitutional Forum* 129; Thomas Poole, 'Recent Developments in the 'War on Terrorism' in Canada' (2007) 7(3) *Human Rights Law Review* 633; Jocelyne A Scutt, 'A Beacon Against the Passage and Implementation of Repressive Law' (2007) 19 *Denning Law Journal* 251; John Ip 'Comparative Perspectives on the Detention of Terrorist Suspects' (2006) 16 *Transnational Law & Comparative Problems* 802; and Stephen Townley, 'The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom' (2007) 32 *Yale Journal of International Law* 219.

<sup>98</sup> Bell, above n 97, 68.

<sup>99</sup> 'Reasonableness' is a very low standard of proof when compared to the civil standard of 'balance of probabilities', and more particularly, to the criminal standard of 'beyond a reasonable doubt'.

<sup>100</sup> See *Immigration and Refugee Protection Act*, SC 2001, c 27, s 80.

<sup>101</sup> Bell, above n 97, 71.

<sup>102</sup> See *Immigration and Refugee Protection Act*, SC 2001, c 27, s 80(3).

passed since the Federal Court judge's decision and the individual has not been removed from Canada.<sup>103</sup>

Following the decision in *Charkaoui v Canada (Citizenship and Immigration)*<sup>104</sup> however, it may now be surmised that the security certificate process has changed, and as a result, that these procedures have been relaxed. Charkaoui successfully argued that the scheme was unconstitutional on two grounds: (1) 'that the procedure for determining reasonableness of certification and for review of detention infringed s 7 of the *Canadian Charter of Rights and Freedoms* (the right to a fair hearing)'; and (2) 'that the detention of foreign nationals for 120 days without judicial review infringed the guarantee against arbitrary detention in s 9 of the *Charter*'.<sup>105</sup> In turn, Parliament amended the *IRPA* and added a right of appeal and a right to the assistance of special advocates,<sup>106</sup> the latter of which defends the 'interests of the person named in the security certificate'.<sup>107</sup> Whether these amendments strike an appropriate balance between human rights and national security concerns is a question that remains unresolved.

The Minister of Public Safety and Emergency Preparedness formally became the Minister for Public Safety on 6 February 2006. The effect was a change of name only and it is still representative of the current regime. The present structure of the Public Safety portfolio is contained, albeit a little convolutedly, in the following figure. It demonstrates the expansion of the portfolio since its removal from the Solicitor General in 2003.

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<sup>103</sup> Lorne Waldman, *Immigration Law and Practice* (LexisNexis Butterworths, 2004) 7.263.

<sup>104</sup> [2007] 1 SCR 350 ('*Charkaoui*').

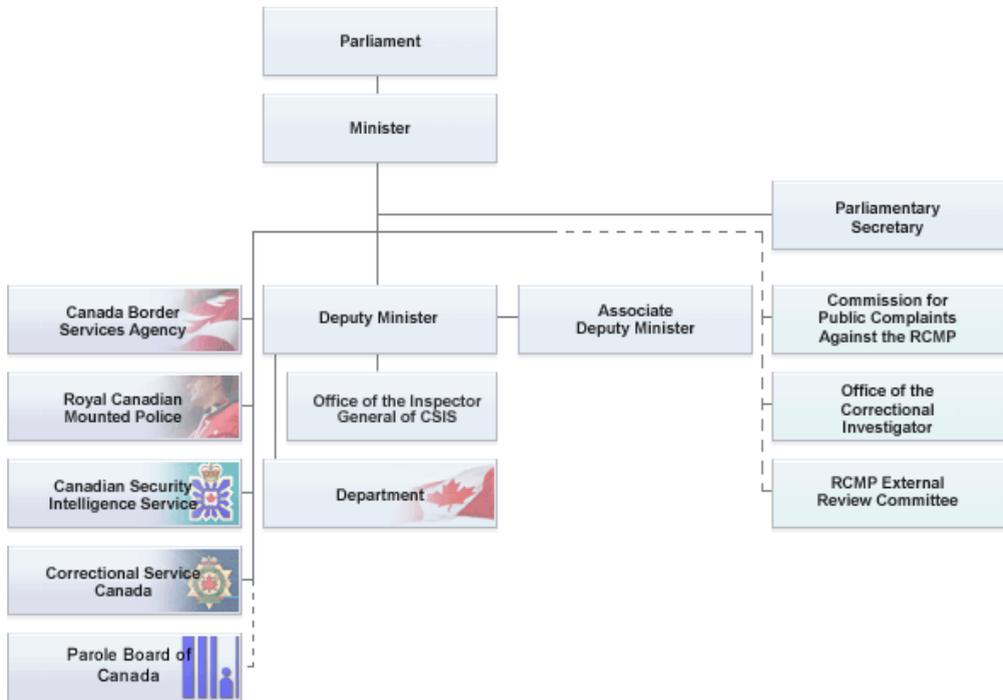
<sup>105</sup> Poole, above n 97, 639.

<sup>106</sup> One notable aspect of Supreme Court's judgment in *Charkaoui* was the Court's role in advancing a special advocate system, which enlivened Parliament to make the necessary legislative amendments. The Court made particular reference to the model employed by the Special Immigration Appeals Commission ('SIAC') in the United Kingdom. In order to preserve s 7 rights under the *Charter*, the Court proposed that Canada follow the United Kingdom in legislating to use 'special counsel to provide a measure of protection to the detained person's interests, while preserving the confidentiality of information that must be kept secret': *Charkaoui* [2007] 1 SCR 350, [69] (McLachlin CJ on behalf of the Court). The Court held that a special advocate system would not compromise security and would better protect a person's s 7 interests: at [86] (McLachlin CJ). *Charkaoui* clearly exemplifies the value of the Supreme Court of Canada, because although it was clear that 'more had to be done to meet the requirements of a free and democratic society', the Court steered clear of deliberate judicial activism; requiring that 'precisely what more should be done is a matter for Parliament to decide': at [87] (McLachlin CJ).

<sup>107</sup> Blanchard, above n 97, 42.

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Figure 2: *The Minister of Public Safety's portfolio (2003- )*<sup>108</sup>



The Minister remains responsible for the CBSA, RCMP, CSIS, CSC and the PBC (formally the NPB), and for providing policy leadership and delivering programs in a number of areas.<sup>109</sup> The department is entrusted to implement policies in areas of emergency management, crime prevention and law enforcement. The development of effective programs and initiatives are encouraged in areas of national security and corrections. It comes as no surprise, therefore, to learn that the resources made available to the Minister for Public Safety have increased since the 2003 government reorganisation. As already mentioned, the Department of Solicitor General of Canada had an annual operating budget of \$2.5 billion and 34,000 employees. This has swelled astonishingly to an annual budget of \$6 billion and more than 52,000

<sup>108</sup> This figure is available at the Public Safety Canada website. See *Who are We*, Public Safety Canada, Public Safety Portfolio <<http://www.publicsafety.gc.ca/abt/wwwa/index-eng.aspx>>. Figure 2 is a reproduced copy of an official work published by the Government of Canada. This reproduction has not been produced in affiliation with, or with the endorsement of, the Government of Canada.

<sup>109</sup> Chios Carmody, 'Enhancing the Canada-United States Gateways and Corridors: East, West and Within' (2008-2010) 34 *Canada-United States Law Journal* 267, 282.

employees.<sup>110</sup> This is further evidence of the portfolio's breadth since the 2003 reorganisation.

## 2. The formal abolition of the Canadian Solicitor General

Following the atrocious attacks on New York and Washington in September 2001, many countries made moves to bolster their national security and emergency management frameworks. The office of the Solicitor General of Canada was an indirect casualty of these increased measures. *An Act to establish the Department of Public Safety and Emergency Preparedness and to amend or repeal certain Acts* (also known as 'Bill C-6') was introduced and read for a first time in the House of Commons on 8 October 2004. It sought to repeal the existing *Department of the Solicitor General Act*<sup>111</sup> and introduce an Act mirroring the re-organisational change that had transpired on 12 December 2003.<sup>112</sup> The second reading occurred on 14-15 October 2004, where the principles of the Bill were debated. The Sponsor's Speech at Second Reading revealed the primary aim of Bill C-6 was based on national security and terrorism concerns, especially given that 'in the 21<sup>st</sup> century, threats come in many forms, whether from natural causes, accidents or malicious acts and...Canadians want assurance that the nation's critical infrastructures – water, cyber, electricity, telecommunications and transportation – are safe, reliable and robust' and that any security gaps are closed to 'criminals and potential terrorists'.<sup>113</sup>

The opposition parties generally supported the thrust of the Bill and it was passed by the House on 17 November 2004; however it met with more stubborn resistance once it reached the Senate. The fact that one senior Cabinet Minister could be responsible for 'security and intelligence, policing and enforcement, corrections and crime prevention, border services and border integrity, and immigration enforcement and emergency management'<sup>114</sup> concerned some Senators. According to one such

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<sup>110</sup> See *Who are We*, Public Safety Canada, Public Safety Portfolio <<http://www.publicsafety.gc.ca/abt/wwwa/index-eng.aspx>>.

<sup>111</sup> *Department of the Solicitor General Act*, RSC 1985, c S-13 (repealed).

<sup>112</sup> The purpose of Bill C-6 was to establish legislative authority for what the government had already been doing since 12 December 2003; namely to be ministerially responsible for the RCMP, CSIS, CSC, PBC and CBSA.

<sup>113</sup> Canada, *Parliamentary Debates*, House of Commons, 14 October 2004, 402 (Roy Cullen, Parliamentary Secretary to the Minister of Public Safety and Emergency Preparedness).

<sup>114</sup> Canada, *Parliamentary Debates*, House of Commons, 16 November 2004, 1392 (David McGuinty).

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Senator,<sup>115</sup> Bill C-6 created a powerful and centralised Minister by 'disfiguring the ancient law officer of the Crown, the Solicitor General, by abolishing the position while, simultaneously, transforming and morphing it into the new mega minister with characteristics that are not those of the Solicitor General'.<sup>116</sup> Although the opposition Senator made a valid point, given the perfunctious haste with which the Solicitor General was discarded, she failed to acknowledge that the Canadian Solicitor General had not exercised any of these traditional 'characteristics' since 1966. Her remark, therefore, that Bill C-6 represents a 'bizarre form of constitutional cannibalism' is somewhat misleading and should be viewed with a degree of scepticism.

Regardless of the Senator's concerns, Bill C-6 was passed by the Senate on 22 March 2005 and received Royal Assent on 23 March 2005. The *Department of Public Safety and Emergency Preparedness Act*<sup>117</sup> came into force on 4 April 2005, upon which time the office of the Solicitor General was formally abolished. Any power, duty or function that had been vested in the department of the Solicitor General immediately prior to the coming into force of the Act was automatically transferred to the Minister of Public Safety and Emergency Preparedness.<sup>118</sup> Section 6(1) of the Act outlines the Minister's functions, which are to be read together with s 5 ('entities for which the Minister is responsible').<sup>119</sup>

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<sup>115</sup> Senator Anne C Cools deserves special mention because she was the only member of either the House of Commons or the Senate to lament the demise of the Canadian Solicitor General.

<sup>116</sup> Canada, *Parliamentary Debates, Senate*, 7 December 2004, 422 (Anne C Cools).

<sup>117</sup> *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10.

<sup>118</sup> *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10, s 8(1).

<sup>119</sup> Section 6(1) of the *Department of Public Safety and Emergency Preparedness Act* SC 2005, c 10, states that 'the Minister may: (a) initiate, recommend, coordinate, implement or promote policies, programs or projects relating to public safety and emergency preparedness; (b) cooperate with any province, foreign state, international organization or any other entity; (c) make grants or contributions; and (d) facilitate the sharing of information, where authorized, to promote public safety objectives' ...[s 5] 'for which the Minister is responsible, including the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Canada Border Services Agency, the Canadian Firearms Centre, the Correctional Service of Canada and the National Parole Board'. For clarity purposes, it should be emphasised that the Canadian Firearms Centre is constituted as part of the Royal Canadian Mounted Police.

## V The independence of Solicitors-General: Perspectives from Australia and the United States

Whether the office of the Solicitor-General is independent of the executive is an issue that has not yet received sustained scholarly or judicial attention in Australia. The issue has, however, been discussed abundantly by legal scholars in the United States. It has presumably received more attention in the United States than in Australia because the Solicitor General has been reviled as being a political appointee of the President.<sup>120</sup> Similarly to Daryl Williams' sentiments about the appropriate role of the Commonwealth Attorney-General, former United States ('US') Solicitor General Erwin Griswold once defined his

role as an advocate for the interests of the government and its agencies rather than as a 'statesman'... [w]hile Solicitors General have, I think, sought with remarkable consistency to take statesman-like positions on legal matters within their sphere, it seems unwise to lose sight of the reality that a Solicitor General is not an ombudsman with a roving commission to do justice as he sees it. He is a lawyer, though with special responsibilities, who must render conscientious representation to his client's interests.<sup>121</sup>

Accordingly, Wilkins concludes that any 'assertion that the Solicitor General should be free of political persuasion ignores the reality that he is an official within the executive branch who serves at the pleasure of the President who appointed him'.<sup>122</sup>

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<sup>120</sup> See, eg, Rebecca Mae Salokar, *Solicitor General* (2002) The Oxford Companion to American Law <<http://www.oxfordreference.com/views/ENTRY?subview=Main&entry=t122.e0858>>. See also James L Cooper, 'The Solicitor General and the Evolution of Activism' (1990) 65 *Indiana Law Journal* 675; Lochner, above n 26, 550; and Chamberlain, above n 26, 380: 'It is clear that the solicitor general is political; the solicitor general is "appointed by, and may be removed by, the President, [and is] subject at all times to the mandates of the executive"' (see references cited therein).

<sup>121</sup> Erwin Griswold, 'The Office of the Solicitor General - Representing the Interests of the United States Before the Supreme Court' (1969) 34 *Missouri Law Review* 527, 527.

<sup>122</sup> Richard G Wilkins, 'An Officer and an Advocate: The Role of the Solicitor General' (1987-1988) 21 *Loyola of Los Angeles Law Review* 1167, 1172. Although discussed in the text below, this is an appropriate time to acknowledge Robert H Bork, who served as President Nixon's Solicitor General from June 1973 until President Nixon's resignation in August 1974. On 20 October 1973, which by all accounts was a dramatic day in modern American history, Bork fired Archibald Cox, the Watergate Special Prosecutor, following Cox's sustained efforts to subpoena a number of tapes 'for use in the criminal trials of several high-ranking White House officials charged with crimes arising out of Watergate': Charles M Lamb and Lisa K Parshall, 'United States v. Nixon Revisited: A Case Study in Supreme Court Decision-Making' (1996-1997) 58 *University of Pittsburgh Law Review* 71, 73. Bork controversially fired Cox, himself a former Solicitor General under President Kennedy, at

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This power is proclaimed through statute. Pursuant to §505 of Title 28: *Judiciary and Judicial Procedure*, the 'President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties'. These duties primarily involve (1) deciding when 'the government ought to seek review by the Supreme Court after it has lost a case in any appellate court; (2) to present or oversee the government's arguments when it is a party before the Supreme Court; and (3) to present or oversee the government's views as *amicus curiae* in those cases of interest where the government is not a party'.<sup>123</sup> This raises a number of significant points.

First and foremost, the US Solicitor General, like in Australia (but unlike Canada), must be learned in the law,<sup>124</sup> suggesting extensive experience and demonstrated aptitude as both a legal adviser at the highest levels of government, and advocate in only the highest courts.<sup>125</sup> Secondly, it is implied that the Solicitor General will be skilful in constitutional law. Thirdly, that the Solicitor General assists 'the Attorney General in the performance of his duties' is similar to the role that a Commonwealth Solicitor-General plays as second law officer. A major point of difference is that while the Commonwealth Solicitor-General is appointed by the Governor-General, Her Majesty's representative in the Commonwealth, the US Solicitor General is selected solely by the President; although it should be acknowledged that checks and balances do exist because the Senate must consent to the appointment before it is finalised.<sup>126</sup>

Notwithstanding, it still remains the case that the US Solicitor General is directly appointed by the President. Because the President is the head of the executive branch of government, the concern is that the US Solicitor General (to a much greater extent than the Commonwealth Solicitor-General) must walk much more of a 'delicate line between representing the interests of the president and maintaining legal and

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President Nixon's behest after both Attorney General Elliot Richardson and Deputy Attorney General William French Smith refused to do so and resigned. This left Bork as the highest-ranking member of the Department of Justice, and he duly carried out the presidential directive, despite President Nixon being in breach of a court order compelling the release of the tapes. This incident later became known as the 'Saturday Night Massacre'.

<sup>123</sup> Cooper, above n 120, 679.

<sup>124</sup> According to s 6(2) of the *Law Officers Act 1964* (Cth), the Commonwealth Solicitor-General must be an experienced legal advocate, with at least five years standing as a barrister or solicitor of the High Court or of a State Supreme Court.

<sup>125</sup> That is, the US Solicitor General represents the executive branch in the Supreme Court of the United States.

<sup>126</sup> Together with the House of Representatives (the lower House), the Senate is the upper House of the legislature that comprises the United States Congress.

political credibility with the nine justices'.<sup>127</sup> This is accentuated by the knowledge that the Solicitor General (a) serves at the President's pleasure and (b) is a high ranking member of the Department of Justice.<sup>128</sup> Both of these factors were in full view during the 1970s Watergate scandal. Fred H Altshuler, who served as counsel on the House of Representatives' Impeachment Inquiry Staff in 1974, notes that:

The incidents that triggered the Watergate investigations was the arrest on June 17, 1972, of burglars working on behalf of President Nixon's reelection campaign who had broken into the offices of the Democratic National Committee at the Watergate office complex. On May 21, 1973, Attorney General Elliot Richardson appointed Archibald Cox as Special Prosecutor in charge of the pending Watergate criminal investigation.<sup>129</sup>

As part of his duties, Cox subpoenaed a number of Oval Office tape recordings (involving President Nixon) and other documents. After President Nixon initially refused to comply with the subpoena, the President reached a compromise with the Senate Committee, whereby the White House would release the tapes to Senator John C Stennis, who would summarise the contents for Cox. Cox then refused a presidential directive not to make further efforts to obtain the tapes and documents, by vowing 'to pursue the tape recordings at a televised news conference'<sup>130</sup> on 19 October 1973. This set in motion the chain of events on 20 October 1973 that culminated in Cox's dismissal by Solicitor General Robert H Bork (a power exercised as acting Attorney General), following the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, both of whom refused to fire Cox. For this, Bork earned the epithet 'The Executioner'.<sup>131</sup> Such a title epitomises Bork's role in the Watergate scandal. Stephen Gillers, in particular, alleges that Bork's actions effectively helped President Nixon obstruct justice. Firstly, despite executing the presidential order as acting Attorney General and not Solicitor General, Bork still possessed an ethical obligation as the Solicitor General to disapprove of the directive (much like Richardson and Ruckelshaus did). Secondly, on 21 October 1973 'Bork abolished the Special Prosecutor's office and did not re-establish it and appoint Jaworski until November 2, a week after President Nixon, reacting to public pressure,

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<sup>127</sup> Rebecca E Deen, Joseph Ignagni and James Meernik, 'Individual Justices and the Solicitor General: The Amicus Curiae Cases 1953-2000' (2005) 89(2) *Judicature* 68, 68.

<sup>128</sup> Lochner, above n 26, 549.

<sup>129</sup> Fred H Altshuler, 'Perspectives on Watergate Panel: Comparing the Nixon and Clinton Impeachments' (2000) 51 *Hastings Law Journal* 745, 746 at footnote 6.

<sup>130</sup> Carroll Kilpatrick, 'Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit', *The Washington Post* (Washington), 21 October 1973, A01.

<sup>131</sup> See, eg, Peter Phillips, 'A Study of Robert Bork' (1987) 19 *Arizona State Law Journal* 425, 425.

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agreed to accept a new Special Prosecutor'.<sup>132</sup> This action was clearly unwise given that it was not in the interests of justice to abolish the office and turn the Watergate investigation over to the Justice Department.<sup>133</sup>

Despite this aberration, the role of US Solicitor General has historically been performed in a relatively anonymous and inconspicuous fashion. This reputation has, since 1870, been built upon a tradition of independence.<sup>134</sup> In an oft-quoted statement, former Solicitor General Francis Biddle once remarked that the 'Solicitor General has no master to serve except his country'.<sup>135</sup> Although this statement pays romantic homage to the ideals the position represents, Biddle's observation (especially given the later actions of Bork and Fried) is frankly hyperbolic. Moreover, it does not really assist in defining what the Solicitor General's proper role should be. According to former Solicitor General Wade H McCree, Jr however, 'it is the duty of the Solicitor General to serve as a first-line gatekeeper for the Supreme Court and to say 'no' to many government officials who present plausible claims of legal errors in the lower courts'.<sup>136</sup> In this 'gatekeeper' capacity,

the Solicitor General's job is to weed out those adverse decisions worthy of further review from those that are not. Where decisions unfavourable to the Government lack precedential significance...or turn on factual determinations by trial judges that are unlikely to be reversed on appeal, or have deficient records, the Solicitor General will normally deny authorization to appeal.<sup>137</sup>

This statement is more helpful than Biddle's because it implies a certain degree of autonomy; that the US Solicitor General should be independent of the President and the executive. As Richard L Pacelle, Jr contends, this fosters 'a tradition of mutual

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<sup>132</sup> Stephen Gillers, 'The Compelling Case Against Robert H. Bork' (1987) 9 *Cardozo Law Review* 33, 60.

<sup>133</sup> Cf Jason S Harrow, *Saturday Night with Elliot Richardson and Robert Bork: A Case Study in Exemplary Executive Branch Lawyering* (2011) <[http://works.bepress.com/jason\\_harrow/1](http://works.bepress.com/jason_harrow/1)>. Harrow claims that, as the last line of succession, Bork was right to comply with President Nixon's directive to fire Cox. Relying on Richardson and Ruckelshaus transcripts, Harrow argues that if Bork had of resigned it would have left the Department of Justice without an 'adequately qualified leader', which would have 'put at risk the continued vitality of the Watergate investigation itself': *ibid* [10].

<sup>134</sup> Drew S Days III, 'The Solicitor General and the American Legal Ideal' (1995-1996) 49 *SMU Law Review* 73, 76.

<sup>135</sup> Francis Biddle, *In Brief Authority* 98 (Doubleday, 1<sup>st</sup> ed, 1962).

<sup>136</sup> Wade H McCree, Jr, 'The Solicitor General and His Client' (1981-1982) 59 *Washington University Law Quarterly* 337, 341.

<sup>137</sup> Drew S Days III, 'No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts' (1995) 11 *Georgia State University Law Review* 645, 648.

trust and respect'<sup>138</sup> between the office of the Solicitor General and the Supreme Court. It also signals the success that the Solicitor General has enjoyed as a litigator before the Supreme Court.<sup>139</sup>

Indeed, much like the Commonwealth Solicitor-General, it appears as though US Solicitors General are appointed based on merit, and not political ideology. Appointees have enjoyed distinguished legal careers, either in practice or in an academic capacity, before being promoted to Solicitor General. Appointing individuals of proven legal ability should ensure relative independence, and perhaps it does, but for some this view altered when the Reagan Administration appointed Rex E Lee and Charles Fried to office in 1981 and 1985 respectively. In particular, 'until the tenure of Charles Fried the Office had not been the subject of intense scholarly scrutiny'.<sup>140</sup> In a series of purported 'agenda cases',<sup>141</sup> Solicitor General Fried filed discretionary amicus briefs<sup>142</sup> that sought to promote President Reagan's

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<sup>138</sup> Richard L Pacelle, Jr, 'Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici' (2006) 89(6) *Judicature* 317, 317. See also Note, 'The Solicitor General and Intragovernmental Conflict' (1977-1978) 76(2) *Michigan Law Review* 324, 325.

<sup>139</sup> See Margaret Meriwether Cordray and Richard Cordray, 'The Solicitor General's Changing Role in Supreme Court Litigation' (2010) 51 *Boston College Law Review* 1323, 1333-5: 'At the petition stage, the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% that the Court grants at the request of other litigants'... 'At the merits stage [as a direct party], the Solicitor General's winning percentage is also extraordinarily high' at '60-70% (as opposed to the 50% win rate for all litigants'... 'When participating as amicus on the merits, the Solicitor General is even more successful than as a party. Overall, when the Solicitor General steps in as amicus, the office wins 70-80% of the cases, regardless of which side it supports'.

<sup>140</sup> *Lochner*, above n 26, 550.

<sup>141</sup> According to Nicholson and Collins, an 'agenda case' is a term used to represent those cases that are 'salient for promoting the president's policy priorities': Chris Nicholson and Paul M Collins, Jr, 'The Solicitor General's Amicus Curiae Strategies in the Supreme Court' (2008) 36(3) *American Politics Research* 382, 390. The authors highlight the importance of agenda cases, tracing these amicus briefs back to Stanley Reed and Robert Jackson, who served as Solicitors General under President Franklin D Roosevelt. These agenda cases pertained to the 'New Deal', a series of economic programs passed by Congress between 1933 and 1936, which were reform measures proposed by President Roosevelt in response to the Great Depression.

<sup>142</sup> See Pacelle, above n 138, 319-20. Like Nicholson and Collins, Pacelle argues that discretionary briefs can be used as vehicles for the President: discretionary 'amicus briefs should be divided into two categories. The first protects the enforcement powers of the government; the second furthers the particular administration's views'. The second category is 'part of the current administration's policy priorities. These truly discretionary amicus briefs [or 'agenda cases'] provide the best opportunity to further executive designs.

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policy priorities. In one such instance,<sup>143</sup> Fried was instructed to file amicus briefs arguing that *Roe v Wade*<sup>144</sup> should be overturned. *Roe* was a landmark abortion case in which the Supreme Court ruled that the 'right to privacy' appertained to the Fourteenth Amendment's due process clause – prohibiting states from depriving persons of life, liberty, or property without due process of law – which, in turn, extended to a woman's decision to have an abortion. Not attracting the judicial numbers he needed, Fried was ultimately unsuccessful in his endeavours to have *Roe* overturned and it thus remained settled law.

It is in this context – the filing of discretionary amicus briefs – that the US Solicitor General's office has been accused of lacking independence and endorsing political activity.<sup>145</sup> When advancing the policies of the President, the argument can be made that the Solicitor General has diverted from its primary responsibility to the Supreme Court: to screen petitions scrupulously to keep many off the Court's crowded docket and to prepare briefs of the highest quality.<sup>146</sup> A failure to maintain these standards could easily convey the impression that the office has become politicised.<sup>147</sup> However others would dispute the integrity of such claims. As Strauss argues, the Solicitor General is not just an official of the executive but rather an officer who has special professional ethics to the Supreme Court. In effect, the Solicitor General becomes a 'tenth justice';<sup>148</sup> meaning that the Solicitor General should only take the position that 'reflects his best judgment of what the law is, just as he would if he were literally a Justice'.<sup>149</sup> This view is further reinforced by the knowledge that a Solicitor General

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When filing these briefs, the SG more closely resembles the "Attorney General as Policy Advocate": at 320.

<sup>143</sup> Brief for the United States as Amicus Curiae in Support of the Appellants, *Thornburgh v American College of Obstetricians*, 476 US 747 (1986).

<sup>144</sup> 410 US 113 (1973). President Reagan did not support the decision in *Roe* and campaigned to scale back pro-abortion freedoms.

<sup>145</sup> See Cooper, above n 120, 685, for a brief discussion of the relationship between amicus filings and perceptions of political activism in the Solicitor General's office.

<sup>146</sup> See Pacelle, above n 138, 317.

<sup>147</sup> Ronald S Chamberlain presents an interesting view on the issue of the Solicitor General's independence. Rather than proposing that the Solicitor General should be independent or at least partly independent, Chamberlain argues that the Solicitor General's office can never become too political. Because the Solicitor General is not statutorily obligated to maintain a position of neutrality, his sole focus should be on assisting the Attorney General and serving at the pleasure of the President: Chamberlain, above n 26, 380.

<sup>148</sup> The 'tenth justice' is a phrase coined by Lincoln Caplan in his book *The Tenth Justice: The Solicitor General and the Rule of Law* (Vintage Books, 1988).

<sup>149</sup> David A Strauss, 'The Solicitor General and the Interests of the United States' (1998) 61(1) *Law and Contemporary Problems* 165, 168. See also Biddle, above n 135, 97: '[The Solicitor General] is responsible neither to the man who appointed him nor to his immediate

will not be forced to 'defend a statute when he determines that the law is patently unconstitutional'.<sup>150</sup>

For Strauss, there was nothing wrong with Fried arguing that *Roe* should be overturned, providing that he *personally* took the legal view that the case had been unconstitutionally decided. The Solicitor General should therefore appraise his or herself of all relevant considerations before deciding whether or not to file an amicus brief. Such a cognizant-based approach would be consistent with the principle that the Solicitor General is independent from the executive branch; but the conundrum still remains (a conundrum that may well also apply to the Commonwealth Solicitor-General): how would we ever *really know* what the Solicitor General's personal position is?

With respect to amicus curiae<sup>151</sup> in the United States, Rule 37(4) of the *Rules of the Supreme Court of the United States* stipulates that 'No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General'. Clearly the US Solicitor General has wide latitude in deciding whether or not to become an amici. Even where the Solicitor General is not involved as a party, however, the amici participates in large and increasing numbers. Indeed, US amici have litigated in a diverse range of constitutional matters and have 'been used with great effect to advance minority rights arguments'.<sup>152</sup>

In Australia, on the other hand, the general position with respect to the role of the amicus is more tenuous and narrow,<sup>153</sup> a position which has been the subject of significant academic criticism.<sup>154</sup> The widely-held perception is that the High Court of

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superior in the hierarchy of administration...his guide is only to the ethic of his profession framed in the ambience of his experience and judgment'.

<sup>150</sup> Days III, above n 134, 80.

<sup>151</sup> The Latin expression for 'friend of the Court'. According to Professor Patrick Keyzer, an 'amicus curiae' in its classical sense 'was a person who, as a volunteer or as a court appointee, could advise, inform, assist or otherwise benefit a court in its deliberations': *Open Constitutional Courts* (Federation Press, 2010) 98.

<sup>152</sup> Ibid 119 (see references cited therein).

<sup>153</sup> See ibid 106-18 for an in-depth discussion as to why amicus curiae is seldom used as a device in the High Court of Australia.

<sup>154</sup> See, eg, Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126; and George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365. See also Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2010) 22(3) *Bond Law Review* 111; and Elisa Arcioni, 'Some Comments on Amici Curiae and 'The People' of the Australian Constitution' (2010) 22(3) *Bond Law Review* 148.

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Australia's conservative approach to amicus applications impedes greater amici involvement, and in turn, jeopardises access to constitutional justice. It does not help that there exist no rules in the *High Court Rules* which provide criteria as to when an application for amicus will be accepted.<sup>155</sup> These concerns have led Ernst Willheim to conclude that procedural deficiencies exist in the High Court's procedures that 'place formidable obstacles in the way of amicus applications' which 'seriously disadvantage the substantive parties'.<sup>156</sup>

Despite these unresolved problems, there is no formal impediment to the Commonwealth Solicitor-General appearing *at any time* as amicus curiae in the High Court in a constitutional case, providing that he seeks leave from the Court to do so.<sup>157</sup> Although it is clearly open to the Commonwealth Solicitor-General to appear as amicus (as Sir Maurice Byers did in *R v Cooke; Ex parte Twigg*);<sup>158</sup> depending on the circumstances, it may make more sense for the Solicitor-General to appear as an intervener. Consider the main point of distinction between the two. As an intervener, the participant becomes a full party to the proceedings and enjoys the benefits and burdens that entails,<sup>159</sup> whereas the amicus curiae is limited to making submissions as a 'friend of the court'. For Willheim, an 'intervener usually seeks to intervene in the interest of one of the principal parties'.<sup>160</sup> Although this exposes the intervener to adverse costs orders, it at least permits them to make submissions in support of a particular party.

Proceeding with this argument, the next step is to ask under what grounds can the Commonwealth Solicitor-General become an intervener. The answer is that the Solicitor-General cannot, at least not directly anyway. The right to intervene is governed by s 78A of the *Judiciary Act 1903* (Cth). Section 78A(1) confers an automatic right of intervention on the Attorneys-General of the Commonwealth and the States only. They may intervene in any 'proceedings that relate to a matter arising under the Constitution or involving its interpretation' before the High Court. No mention is made of the Solicitor-General. Section 17(1) of the *Law Officers Act 1964* (Cth), however, provides for a power of delegation by the Attorney-General. Accordingly,

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<sup>155</sup> Keyzer, above n 151, 110-11.

<sup>156</sup> Willheim, above n 154, 137.

<sup>157</sup> *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 495 (Griffith CJ). See also *R v Cooke; Ex parte Twigg* (1980) 147 CLR 15 (where former Commonwealth Solicitor-General Maurice Byers appeared as amicus curiae); and Keyzer, above n 151, 103.

<sup>158</sup> (1980) 147 CLR 15.

<sup>159</sup> Willheim, above n 154, 135. According to Willheim, this includes the 'right to file pleadings, adduce evidence, call and cross-examine witnesses, and to appeal'.

<sup>160</sup> *Ibid.*

the Attorney-General may 'delegate to the Solicitor-General all or any of his or her powers and functions under all or any of the laws of the Commonwealth or of a Territory'.<sup>161</sup> So the Solicitor-General may act as an intervener providing he or she has been authorised to do so.<sup>162</sup>

Returning for a final time to the issue of the Solicitor-General's independence, it may be boldly said that a Solicitor-General walks a fine line between representing the interests of the executive and advancing strong, technical constitutional arguments for the Court's consideration. Is the Solicitor-General independent of the executive? Many have argued that the Solicitor-General must either be independent or subordinate; but as Strauss argues, 'no simple formula can capture the complex nature of the Solicitor General's responsibilities'.<sup>163</sup> From a personal perspective, it is suggested that the view of Richard Wilkins is preferable – that the Solicitor-General is both an advocate and an officer of the court. In the truest sense, it is the job of a Solicitor-General to strike an appropriate balance between the two. This is the Solicitor-General's role. Thus:

The Solicitor General should support the administration's views on sensitive legal issues. However, in the course of that advocacy, the Solicitor General must never sacrifice his credibility and reliability as a trusted officer of the Court. Maintaining a balance between the sometimes conflicting duties of advocate and officer of the Court is a difficult and often thankless task...Achieving and maintaining that balance, however, is the fundamental mission of the Solicitor General.<sup>164</sup>

Given this dual responsibility, it may therefore be stated that the Solicitor-General is sui generis. Sceptics would dismiss this and flatly maintain that the Solicitor-General is subservient to the executive. But this is a thin argument that does not do justice to their nuanced role. To maintain such a view ignores the Solicitor-General's important institutional responsibilities to the Court, as scholar and interpreter of the Constitution, and in developing the law. Indeed, it was the intention of the *Law Officers Act 1964* (Cth) that 'the Solicitor-General will hold a non-political office, and he will be kept free of departmental responsibility and administration so that he can

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<sup>161</sup> Except under the *Telecommunications (Interception and Access) Act 1979* (Cth): s 17(6) of the *Law Officers Act 1964* (Cth).

<sup>162</sup> See *Attorney-General v Foster* [1999] FCA 81, [43] (Von Doussa, O'Loughlin and Mansfield JJ).

<sup>163</sup> Strauss, above n 149, 176.

<sup>164</sup> Wilkins, above n 122, 1169.

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concentrate on his function as permanent counsel for the Crown'.<sup>165</sup> This is what Sir William Harrison Moore had in mind in 1910.<sup>166</sup> Accordingly:

...a Solicitor-General should be free to appear in court whenever an important case required it, because Crown counsel permanently associated with government legal work can bring special qualifications to the conduct of a case or the furnishing of an opinion at the highest level.<sup>167</sup>

This statement is indicative of the fact that 'special qualifications' are required of Solicitors-General: an exceptional understanding of constitutional law and the *High Court Rules*, adroitness as legal counsel and litigator in Court, as well as expertise outside of Court in performing other duties. Adding to this, the Solicitor-General must be appointed 'among counsel practicing at the Bar'<sup>168</sup> – a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years standing<sup>169</sup> – and shall be appointed for a fixed term not exceeding seven years.<sup>170</sup> The Commonwealth Solicitor-General must be an officer of the court, obviously skilled, experienced and of good repute. Take, for example, the current Solicitor-General Stephen Gageler SC. He is a graduate of the Australian National University and Harvard, was associate to Sir Anthony Mason AC KBE from 1983 to 1985, later an assistant to former Solicitor-General Gavan Griffith AO QC, member of the NSW Bar and Barrister of the High Court, having appeared in several seminal constitutional law cases before the High Court over the past 20 years.<sup>171</sup>

Any negative perceptions about the Solicitor-General's independence is dispelled by the knowledge that ss 6, 7, 10 and 16 of the *Law Officers Act 1964* (Cth) assures some security of tenure.<sup>172</sup> Although accusations may be levelled at the US Solicitor General because he serves at the President's pleasure, and the President 'can remove solicitors who do not live up to expectations';<sup>173</sup> there are clearly more adequate safeguards built into the *Law Officers Act 1964* (Cth) guaranteeing the Commonwealth Solicitor-General's relative independence.

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<sup>165</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Sneddon, Attorney-General).

<sup>166</sup> See Moore, above n 47.

<sup>167</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2220 (Billy Sneddon, Attorney-General).

<sup>168</sup> *Ibid.*

<sup>169</sup> Section 6(2) of the *Law Officers Act 1964* (Cth).

<sup>170</sup> Section 6(1) of the *Law Officers Act 1964* (Cth).

<sup>171</sup> See 'Stephen Gageler SC' (Winter 2008) *Bar News: Journal of the NSW Bar Association* 85.

<sup>172</sup> See also above footnotes 27, 28 and 124.

<sup>173</sup> Jeffrey A Segal, 'Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts' (1988) 41 *Western Political Quarterly* 136.

## VI A better understanding of the Commonwealth Solicitor-General is required

As alluded to at the beginning of this article, quality research on the Commonwealth Solicitor-General is conspicuously absent. The lack of scholarly attention paid to the Solicitor-General is not only confined to Australia; there is an absence of knowledge of the second law officer elsewhere too. Indeed, apart from Professor John Edwards' book, *The Law Officers of the Crown*,<sup>174</sup> little effort has been made to cultivate a better and fuller understanding of a Commonwealth-originating Solicitor-General. With respect to Australia, an additional disadvantage is that Edwards chooses not to discuss the Australian position at all; although it really is a moot point because the *Law Officers Act 1964* (Cth) had not been enacted prior to the book's publication.

The point is that very little exists in academic books, law journals and, dare it be said, the internet, that focuses on the role and functions of the Commonwealth Solicitor-General. For instance, apart from the *Law Officers Act 1964* (Cth), basic research conducted on the terms 'Commonwealth Solicitor-General', 'Solicitor-General of Australia' and 'Australian Solicitor-General' revealed: a half-page description of the *Law Officers Act 1964* (Cth) in an article by Justice Gummow;<sup>175</sup> brief mentions of Sir Maurice Byers' 1975 advice to then Prime Minister Gough Whitlam with respect to whether the Governor-General had the power to dismiss an elected Prime Minister and government; the more recent 2010 opinion prepared by Stephen Gageler SC on the constitutionality of the Pairing Arrangement of the Speaker of the House of Representatives; newspaper articles on the appointment of Stephen Gageler SC to the office of Solicitor-General; two publically available 2008 documents specifying the selection criteria for potential applicants to satisfy before applying for the position of Solicitor-General; a short contribution by former Commonwealth Solicitor-General Gavan Griffith in the *Oxford Companion to the High Court of Australia*;<sup>176</sup> and, located on the Attorney-General's Department website, (1) previous annual reports prepared by the Secretary to the Attorney-General and Minister for Home Affairs which briefly lists the functions and categories of documents the Solicitor-General maintains,<sup>177</sup> and (2) the Attorney-General's guidelines on briefing the Solicitor-General.<sup>178</sup> It should

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<sup>174</sup> See Edwards, above n 12.

<sup>175</sup> Justice W M C Gummow, 'The Permanent Legacy' (2000) 28(2) *Federal Law Review* 177, 177.

<sup>176</sup> See Griffith, above n 1.

<sup>177</sup> See, eg, Australian Government, Attorney-General's Department, *Annual Report 2009-2010* (2010) 316.

<sup>178</sup> Australian Government, Attorney-General's Department, *Current Guidance Notices – Briefing the Solicitor-General* <[http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalServices toGovernment\\_LegalServicesDirections 2005?open&query=%22Briefing the Solicitor-General%22](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalServices%20toGovernment_LegalServicesDirections%202005?open&query=%22Briefing%20the%20Solicitor-General%22)>.

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also be noted that the office of the Commonwealth Solicitor-General does not have its own website, although most would argue that this is unnecessary.

Clearly the degree of information currently available about the Commonwealth Solicitor-General is inadequate and does not go far enough to promote a better understanding of the position. There is scarce detail about the Commonwealth Solicitor-General's responsibilities and other abstruse characteristics. What is needed is a full appreciation, from an Australian perspective, of the Commonwealth Solicitor-General's historical, theoretical and practical role as both government lawyer and officer of the court. Whether this runs the risk of adverse academic criticism (as is the case in the United States) is a gamble that is worth taking. There must be greater transparency and accountability in all areas of government, and as the chief legal adviser to the executive on constitutional matters and advocate for government enterprises in the High Court, the Commonwealth Solicitor-General is no exception.

### **VII Concluding remarks**

To summarise, there were four primary purposes to this article. One was to provide a concise historical overview of the development of the two law officers of the Crown. Another was to contrast the Solicitors-General of Australia and Canada. An additional objective was to assess the current level of research available on the Commonwealth Solicitor-General. These three avenues have been adequately addressed and do not warrant any further consideration. The fourth point, however, could do with some elaboration. The question was posed of whether a Solicitor-General could truly be independent of the executive. In Australia, the Solicitor-General's independence has never really been questioned. There appears to be a blanket acceptance, in effect a presumption, that the Commonwealth Solicitor-General is independent of the executive. But axioms are always dangerous. Unproven propositions are not universal truths, and should not be treated as such, until properly verified. To assume otherwise would be counterintuitive.

Given the Solicitor-General's function as second law officer, in which his or her primary duty is to appear as legal counsel for the Commonwealth in matters of constitutional significance, it may follow that to effectively perform this task the Solicitor-General must take a partisan position. His or her client, after all, is the executive branch of government. This is where the Solicitor-General's boundaries become nebulous. The Solicitor-General is the executive's lawyer in constitutional matters, yet theoretically retains a 'special relationship' with the highest appellate court, whether it is the High Court in Australia or the Supreme Court in the United States. Can a Solicitor-General be a 'neutral advocate' or is this merely a contradiction in terms? As Fisher notes, 'the adversary system depends on opposing attorneys who

present as vigorously as they can their conflicting positions in court'.<sup>179</sup> For many, this argument goes some way towards debunking Caplan's 'tenth justice' theory.

From a personal perspective, the Commonwealth Solicitor-General is satisfactorily independent of the executive, and this intention is manifested, to some significant extent, in the *Law Officers Act 1964* (Cth). But it also remains the case that not enough is known about the intricacies of the office of Commonwealth Solicitor-General.<sup>180</sup> A good example is the Solicitor-General's role as an intervener or *amicus curiae* in cases before the High Court. This article is not intending to question the impartiality of the Commonwealth Solicitor-General; rather, it is questioning why we are so willingly predisposed towards instinctively accepting its independence without extensive jurisprudential evidence to support the premise. Given the profusion of American academic thought afforded to the US Solicitor General, this only further accentuates the stark gap in the Australian literature concerning the veritable functions of the Commonwealth Solicitor-General. This is an oversight that should be rectified going forward.

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<sup>179</sup> Louis Fisher, 'Is the Solicitor General an Executive or a Judicial Agent? Caplan's Tenth Justice' (1990) 15(2) *Law and Social Inquiry* 305, 308.

<sup>180</sup> A number of important questions were raised in Part V of this article, which should be the subject of further academic research and inquiry. Such an undertaking would make a positive contribution to legal knowledge in the area.