Chapter 12

State Attorneys-General as First Law Officers and Constitutional Litigants

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Historical Background

The role and function of Attorneys-General[1] is a subject that could fill a book – indeed, it has filled several. With that in mind, I shall focus on the role of most interest to members of this Society – that is, their constitutional role in the context of our Federation and, in particular, the decision to intervene pursuant to section 78A of the *Judiciary Act 1903* (Cth) in High Court "proceedings that relate to a matter arising under the [Commonwealth] Constitution or involving its interpretation."[2]

Almost invariably, each State Attorney-General acts on the advice of the State Solicitor-General when deciding whether their State will intervene. Superficially, this suggests at least two perspectives. The first is an historical perspective – an outline of the evolution and transformation of the role and functions of the Attorney-General, as well as that of the Solicitor-General. Perhaps the most prominent issue that emerges is the question of the independence of the Attorney-General from Government and Cabinet in making decisions relating to the administration of justice and, in particular, civil, criminal and constitutional litigation.

The second perspective is the role of a State Attorney-General intervening, under a Commonwealth statutory right, to argue against the constitutional validity of Commonwealth executive actions and Commonwealth legislation in defence of State interests.

First, the historical aspect. As with much of our legal and governmental tradition, the office of Attorney-General has English origins. It seems that the office can be traced to the thirteenth century, when the King's Attorney and King's Sergeant were charged with responsibility for maintaining the Sovereign's interests before the royal courts. The title of Attorney-General ("*attornatus regis*") of England first appeared in 1461 and it was at about this time that the post of King's Solicitor also appears in early court records,[3] which in turn was translated into the office of Solicitor-General of England in 1515.[4]

Evolution in Australia

The roles and functions of both offices have evolved and changed over the centuries, although, in contrast to the Attorney-General, the Solicitor-General remains much more purely a law officer rather than having political functions and responsibilities. There have been occasions when a Solicitor-General has become an Attorney-General – two notable Australian examples are Sir Issac Issacs[5] and Robert James Ellicott, QC.[6]

As one might expect, the development of responsible government in the Australian colonies reflected aspects of the English tradition, including the office of Attorney-General, and attracted some of the salient features of the English office. In Western Australia, section 14 of the *Supreme*

Court Ordinance 1861 (WA) provided that "Her Majesty's Attorney General . . . shall have, exercise, and enjoy all the Powers, Authorities, and Privileges usually appertaining and belonging to the like Office in England". This is replicated in section 154(2) of the current *Supreme Court Act 1935* (WA).[7]

Prior to establishment of representative and responsible government, colonial Attorneys-General "were to act as legal advisers to their respective colonial Governors, prepare criminal indictments, conduct prosecutions and draft the colonial Governor's legal documents and legislation".[8] Indeed, at least in Western Australia from 1829 and South Australia from 1836, the title of these professional legal advisers was "Advocate-General". In due course that was replaced by the designation, "Attorney-General". For example, in 1832, William Henry Mackie became WA's first Advocate-General and George Frederick Stone, Advocate-General from 1859, became, in 1861, its first Attorney-General and served in that capacity until 1870.

After representative legislatures and responsible executives became entrenched in colonial and State constitutions, the title "Attorney-General" was retained but several changes occurred, and have continued:

- First, the office evolved from being a legal adviser to and appointed by the Governor, to that of a member of Parliament, appointed as a minister by the Governor and liable to retire from that position on what may be described as "political grounds" – loss of confidence and support from their parliamentary colleagues and First Minister, or with their government's loss of office.
- Second, considerations relevant to the appointment of an Attorney-General shifted in their degree of importance. That is, the need for legal knowledge and advocacy skills declined and political performance, authority and acumen became more significant.
- Third, the amount of legal work performed by Attorneys-General also declined relative to their parliamentary and ministerial activities. That necessitated not only an increase in the numbers of government lawyers, including specialists like parliamentary counsel, but also meant the reduction or cessation of private law work by Attorneys-General. In effect, Attorneys-General became responsible for State departments and ministries, with all the consequences flowing from that role.
- Fourth, although since 1928 the Attorney-General of the United Kingdom has not been a member of Cabinet, the trend in Australia has been otherwise. Australian Attorneys-General have generally been members of their jurisdiction's Cabinet, although at the Commonwealth level they have been from time to time members of the outer rather than the inner Cabinet.[9]

Cabinet Responsibility and Independence of the Attorney-General

Importantly, Cabinet status raises the possible conflict between two principles: collective responsibility to Cabinet, against the independence of an Attorney-General and duty to act in the public interest in matters concerning the administration of justice.

Generally, it is assumed that, because of matters such as the increasing involvement of Attorneys-General in politics, the necessity for political party cohesion, and the lack of many counter-examples, it is collective responsibility, not independence, which prevails. That is not

necessarily so, as much can be achieved by persuasion and suitable compromise behind the scenes. But there are also public counter-examples.

One involving civil litigation occurred in Tasmania in August 1972. The Attorney-General, Mervyn Everett, resigned from Cabinet because Cabinet took a view opposite to his regarding whether a fiat should be granted to the "Save the Lake Pedder" Action Committee to commence Supreme Court proceedings.[10] In putting before Cabinet his view in favour of doing so, he expressed his duty as "not to decide whether Lake Pedder should be flooded or not, but whether there was a legitimate legal question in the situation which should be resolved in the courts".[11]

An instance involving criminal proceedings occurred in 1977. The Commonwealth Cabinet refused the Attorney-General, Robert Ellicott, QC, access to Cabinet papers of the former Whitlam Government that he considered he required in order to decide whether he should take over the conduct of the privately instituted criminal prosecution that eventually ended in the High Court as *Sankey v Whitlam*.[12]

From one perspective, the resignations of these Attorneys-General might be seen as an assertion of independence from Cabinet control and political pressure or influence. Indeed, Mr Ellicott's speeches in the House of Representatives on 4 March 1976 and 6 September 1977 clearly adopt this position, viz:

> If I received information that I feel is credible and that I feel may involve the committing of serious offences against the law of this Commonwealth, I shall, without fear or favour, take on the duty that is mine. My duty is to ensure that the law is upheld. My duty is not to be a toady to a Prime Minister . . . I will not be told by the Cabinet, the Prime Minister . . . or anybody else how I shall perform my function as law officer in prosecuting criminal offences.[13]

He later said:

> I do not believe that Cabinet should prevent the Law Officer from investigating any criminal matter. This is a criminal matter. There are politicians involved; in that sense one can say that it is political. . . . It is a criminal matter and I believe that a basic principle is involved. That basic principle is that where the Law Officer of the Commonwealth believes that there is a matter which ought to be investigated for the purpose of determining whether some breach of the criminal law has been committed he should not have the obstruction of Cabinet; he should have every assistance which Cabinet can give. And if Cabinet has confidence in its Law Officer it will not question him.[14]
>
> The discretion as to whether to prosecute is very much a matter for the Attorney-General.[15]

The opposing perspective is that these resignations indicate that the Attorneys-General submitted to their respective Cabinet's decision and, consequently, "gave precedence to the principle of Cabinet solidarity and the importance of [Cabinet] collective responsibility and denied the office of Attorney-General any independent power or authority".[16] Indeed, the

victory of the former principle over the latter can be illustrated by the positions taken by former Commonwealth Attorney-General Billy (later Sir Billy) Snedden, QC, who regarded himself as the legal representative of the executive government and claimed no independent role as First Law Officer.[17]

Creation of statutory offices of Director of Public Prosecutions for the Commonwealth and each State and Territory jurisdiction has now, in at least serious criminal matters, reduced the Attorney-General's potential for political interference in such cases. While relieving some of the pressure of conflicting imperatives, it respects the fundamental constitutional structure and hierarchy of responsibilities: section 8(1) of the *Director of Public Prosecutions Act 1983* (Cth) makes the Commonwealth Director subject to the Attorney-General's written directions and guidelines, while section 20(3) of the *Director of Public Prosecutions Act 1991* (WA) makes clear that "[t]he provisions of this Act do not derogate from any function of the Attorney General".[18]

In the end, it is fair to say that "[t]he manner in which an individual Attorney-General will carry out the responsibilities associated with the office will depend on the skill, integrity, values, and personal and political beliefs of that individual and not on any fixed institutional character of the office itself."[19]

Attorney-General as Constitutional Litigant

There are several paths by which an Attorney-General can become involved in constitutional litigation. These include commencing proceedings; being a defendant; issuing his or her fiat so that relator actions can be commenced; being a friend of the court in an *amicus* role; and intervening in litigation. It is about the last which I want to make some observations.

Intervention can arise in three ways. First, at common law an Attorney-General has a right to intervene in court proceedings that may affect the Crown's prerogative.

Second, courts in their inherent jurisdiction have a discretion to grant an Attorney-General leave to intervene. Third, as noted, it can arise by way of a statutory right, including via section 78A of the *Judiciary Act 1903* (Cth).

Aside from Crown prerogative, in *Australian Railways Union v Victorian Railways Commissioners,* Sir Owen Dixon expressed a conservative general approach to interventions, saying:

> I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the *Constitution*. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the *Constitution* without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.[20]

From 1901 to 1976 the High Court frequently, but not always, granted Attorneys-General leave to intervene in constitutional law cases. Since 1976 there has been a Commonwealth

statutory right of intervention, via section 78A, although it is an interesting question as to whether – apart from some issues associated with its statutory construction and constitutional validity – section 78A has supplemented, or supplanted, the inherent jurisdiction of courts to grant leave to intervene. That is yet to be resolved.

Section 78A grants a right of intervention in "proceedings that relate to a matter arising under the Constitution or involving its interpretation."

An irony of section 78A is that it is a Commonwealth-granted statutory right. When State Attorneys-General use this provision to intervene in constitutional litigation they are often challenging the validity of Commonwealth legislative and executive actions. From a federalist perspective it is a nice – and, perhaps, all too rare – occasion of cooperative federalism working in favour of States and, when the High Court supports the States' arguments, to the detriment of Commonwealth constitutional powers.

From a practical perspective, the most important question for a State Attorney-General is, "when should he or she intervene in constitutional litigation?" Such litigation is not confined to the High Court, and Attorneys-General receive a significant number of section 78B notices each year from litigants who think that their case has constitutional implications.

Generally, it is only when litigation reaches the High Court that interventions are considered. It is not, at least to my mind and currently in Western Australia, merely a mechanical process where a Solicitor-General simply follows policies formulated by the Attorney-General, or where the Attorney-General simply accepts the views and advice of the Solicitor-General.

It is a more nuanced process, often informed by the particular circumstances of the immediate case, and one that, to my mind, makes the publication of public guidelines not only not feasible but inappropriate. So far as Western Australia is concerned:

1. Section 78B notices are sent, often by email, to the Attorney-General, and forwarded to the Solicitor-General.
2. In relation to High Court cases, the Solicitor-General prepares an advice setting out the history of the litigation, the relevant legal and constitutional issues, arguments, doctrines and precedents, as well as the ramifications for the State's constitutional position, and makes recommendations on whether to intervene and, if so, what arguments and positions should be advanced to the High Court.
3. On some occasions, the Solicitor-General will consult other Solicitors-General, either individually or collectively, in the Special Committee of Solicitors-General, without the Commonwealth Solicitor-General.
4. The Attorney-General then has several options, in addition to simply responding to the Solicitor-General's advice by scrawling "agreed".
5. Where necessary, there may be a conference between the Attorney-General and the Solicitor-General and, where it would be helpful, with others including with senior legal officers, departmental policy officers, and ministerial advisers.
6. The Attorney-General can then – especially if the constitutional issues affect ministerial responsibilities other than his own, or there are broader political or strategic considerations – consult other ministers, including the Premier.
7. Occasionally, the Attorney-General may consult other Attorneys-General either informally or at a ministerial meeting (such as the former Standing Committee of Attorneys-General,

or meetings of the State and Territories Attorneys-General).

8. And, in some cases, it may be necessary for the Attorney-General to take the decision whether or not to intervene to Cabinet for noting, or even to take a recommendation to Cabinet whether or not to intervene, for Cabinet's consideration.

What comes into play in this process are not only the formal legal and constitutional issues but issues of practical federalism (such as the impact of the litigation on Commonwealth-State relations), and policy and financial issues (including the possible consequences of any High Court decision on parliamentary sovereignty). Overtly, political issues do not predominate. The reason is obvious: constitutional law is more enduring than day-to-day politics. What might be perceived as an adverse, short-term, political consequence may turn out to have longer term, and federal structural, benefits.

For example, the question of whether to intervene in a challenge to the constitutionality of a particular Commonwealth initiative may be justified in that it would argue for the limitation of Commonwealth powers.

On the other hand, given the circumstances of the case, it might be thought that a successful challenge may have undesirable consequences. For example, the argument raised by the challenger may be based on the assertion of a broader interpretation of a constitutional provision that, if accepted, may form the basis for an argument for a "bill of rights" interpretation of that provision. Also, from a shorter-term political viewpoint, an intervention may be perceived as the Government attempting to frustrate a Commonwealth initiative that benefits that State. In such circumstances, a particular State may choose to intervene, or not intervene, for reasons other than merely because it is able to do so.

The most recent and prominent public manifestation of intervention has been the *Williams* cases,[21] although there are many others, such as the interventions in the *Kable*-type cases[22] of *Pollentine v. Bleije*[23] and *Attorney-General [NT] v Emmerson*[24]that are also very important in maintaining State sovereignty.

In both of the *Williams* cases, the Commonwealth Solicitor-General "conceded the question of Mr Williams' standing 'in light of the position taken by the [State Attorneys-General as] interveners' to support Mr Williams' submissions that the impugned [Commonwealth] payments [to the National Chaplaincy Program] were not validly made."[25]

If Mr Williams, either as a tax-payer or a private person, was found not to have had the requisite legal interest to provide him with standing, the intervention by State Attorneys-General, pursuant to section 78A, to challenge the constitutional validity of the Commonwealth expenditure and legislative provisions, would have been crucial.

In both *Williams* cases, State Attorneys-General intervened to argue that the Commonwealth executive's expenditure of money appropriated by the Commonwealth Parliament was unconstitutional. The constitutional law issues related to Commonwealth executive and legislative powers, and the consequences involved the potential for constitutional limitations and constraints to be imposed so as to narrow those powers.

One "federalism" consequence, highlighted by the High Court in the 2012 *Williams* case, was the possibility that the Commonwealth would have to involve the States, via section 96, in the expenditure of that money. This would improve the policy, political and legal position of the

States. Despite the 2014 *Williams* case, this has not yet occurred, although the current Commonwealth Government is reviewing the previous administration's myriad direct spending programs.

In the longer term, however, these cases have the potential to alter Commonwealth–State arrangements regarding the raising and spending of money. Given the problems that some people perceive with the current financial arrangements, this may be a beneficial outcome. Indeed, these, perhaps longer term, considerations informed Western Australia's decision to intervene, together with the possibility that the High Court, given its somewhat more federalist approach to certain cases of late, would narrow Commonwealth power.

Conclusion

Obviously, the office, the role and the responsibilities of the Attorney-General will continue to evolve. That is inevitable in a world of change. It is also inevitable and appropriate that there are no clear and precise rules, conventions and parameters surrounding these matters.

This is best illustrated by the two principal aspects I have touched upon. The first is the balance which each Attorney-General, in a variety of particular situations, needs to strike between doctrines of collective Cabinet responsibility – as well as ministerial responsibility to Parliament – and the position that an Attorney-General should be independent and unfettered in the exercise of his or her powers in the public interest.

The second may be more appealing to Attorneys-General who are interested in the legal and political dimensions of State and Commonwealth constitutional law – the chance to be involved in decisions about commencing actions, providing a fiat, or of intervening in constitutional litigation offers some relief from what I suspect most ministers appreciate to be the daily, but necessary, grind of politics.

For that, if for no other reason, the experience of being the First Law Officer in Western Australia is a rewarding one.

Endnotes

I am indebted to Dr Jim Thomson, SC, Legal Advisor to the Office of the Attorney General for Western Australia, for his work on the initial draft of this paper.

1. As all Australian jurisdictions, except New South Wales and Western Australia, hyphenate "Attorney" and "General", for convenience and consistency with majority usage I have also done so except when referring to those two jurisdictions. Curiously, "Solicitor-General" in Western Australia is hyphenated (see *Solicitor-General Act 1969* (WA)), whereas in every other jurisdiction, except NSW, it is not.

2. *Judiciary Act 1903* (Cth), section 78A – Intervention by Attorneys-General
   (1) The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation.

(2) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, the court may, in the proceedings, make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.
(3) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings, the Attorney-General of the Commonwealth or the State, as the case may be, shall be taken to be a party to the proceedings.
(4) Where the Attorney-General of the Commonwealth or of a State institutes an appeal from a judgment given in proceedings in which the Attorney-General of the Commonwealth or the State, as the case may be, has intervened under this section, a court hearing the appeal may make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

3. J. Ll. J. Edwards, *The Law Officers of the Crown*, Sweet & Maxwell, 1964, 27.

4. *Ibid*, 29.

5. *Inter alia* Solicitor-General of Victoria (a political office), Attorney-General of Victoria, Commonwealth Attorney-General, Justice and Chief Justice of the High Court of Australia, Governor-General of Australia.

6. *Inter alia* Commonwealth Solicitor-General, Commonwealth Attorney-General, Judge of the Federal Court of Australia.

7. *Supreme Court Act 1935* (WA), section 154 – Attorney General
(1) The Attorney General shall be a lawyer, to be appointed from time to time by the Governor, and to hold office during the Governor's pleasure.
(2) The Attorney General shall be the legal representative of the Crown in the Supreme Court, and shall have, exercise, and enjoy all the powers, authorities, and privileges usually appertaining and belonging to the like office in England.

8. Fiona Hanlon, "The Modern First Law Officer in Australia", in Gabrielle Appleby et al (eds), *Public Sentinels – A Comparative Study of Australian Solicitors-General*, Ashgate, 2014, 120.

9. Hanlon, *ibid*, provides a comprehensive and engaging survey of the evolution in Australia of the offices of Attorney-General and Solicitor-General as First and Second Law Officer respectively.

10. Hanlon, *op. cit.*, 130.

11. Quoted in *Australian Dictionary of Biography*, Vol. 17, MUP, 2007.

12. Hanlon, *op. cit.*, 130-131; (1978) 142 CLR 1.

13. *CPD*, House of Representatives, 4 March 1976, 544.

14. *CPD*, House of Representatives, 6 September 1977, 724.

15. *CPD*, House of Representatives, 6 September 1977, 726.

16. Hanlon, *op. cit.*, 130.

17. Hanlon, *op. cit.*, 135-6.

18. Not that this has deterred public or media dissatisfaction with particular decisions of a DPP being directed against the Attorney-General of the day, with associated demands on the Attorney-General to interfere in the case directly to "fix" it, or to instruct the Director to take specific action to do so himself.

19. Hanlon, *op. cit.*, 136-7.

20. [1930] HCA 52; (1930) 44 CLR 319, at 331.

21. *Williams v Commonwealth of Australia* [2012] HCA 23; *Williams v Commonwealth of Australia* [2014] HCA 23.

22. Arising from the reasoning and result in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

23. *Pollentine v Bleijie* [2014] HCA 30.

24. *Attorney-General [NT] v Emmerson* [2014] HCA 13.

25. *Williams v Commonwealth of Australia* [2014] HCA 23, at [29].