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## Preface: The evolving roles of Attorneys-General and Solicitors-General

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### **Abstract**

**Introduction:** This is a collection of papers that were prepared to coincide with a symposium of Australian Solicitors-General convened by the Centre for Law, Governance and Public Policy at Bond University in April 2011. A small group of public law scholars with an interest in this topic were invited to prepare short papers that traversed the history and evolution of the law officer role in jurisdictions of their choice. The result is this symposium edition of the Bond Law Review.

# PREFACE: THE EVOLVING ROLES OF ATTORNEYS-GENERAL AND SOLICITORS-GENERAL

IAIN FIELD\* AND PATRICK KEYZER^

## I Introduction

This is a collection of papers that were prepared to coincide with a symposium of Australian Solicitors-General convened by the Centre for Law, Governance and Public Policy at Bond University in April 2011. A small group of public law scholars with an interest in this topic were invited to prepare short papers that traversed the history and evolution of the law officer role in jurisdictions of their choice. The result is this symposium edition of the *Bond Law Review*.

## II History and evolution of the law officer role

All of the papers in the collection contain an historical account of the evolution of the law officer role in each of the several jurisdictions. A number of themes emerge: the impact of colonialism and the confluence of common law and civil law systems; the relationship between custom and received law; and the influence of fluctuating domestic and international relationships.

Professor Tony Angelo discusses the role of the Attorney-General in three former British colonies: Mauritius, Seychelles and Niue. As might be expected, the history of the law officer role in these countries has been heavily influenced by colonialism – primarily English but also French. In Mauritius, for example, the Attorney General's office evolved from the French office of *Procureur General* (and the *Civil Code* remains in French). Remnants of French colonialism remain in Seychelles, too, where the Attorney-General also performs the functions of the '*Ministère public*' (public prosecutor).

In a similar vein, Danielle Ireland-Piper demonstrates the confluence of colonial legal traditions in Sri Lanka. The institutions in existence in that country today retain features associated with the European powers that fought for control over Sri Lankan resources and for military ascendancy in that region. In the 1970s, colonial legal

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traditions converged again in Sri Lanka with the introduction of a French-style presidential system.

The impact of colonialism on the legal machinery of these countries (including the law officers) was not merely constitutional, however. In Sri Lanka, for example, ethnic factions were generated by the influx of non-indigenous workers, and Indian workers came to form the ruling Tamil elite, who, for a time, became the primary holders of legal and political office (although the balance of power was reversed in the 1920s with the onset of independence and the introduction of territorial representation).

The current role of the law officers in post-colonial societies is not merely the result of imperial decision-making. Religious and customary legal traditions have also had an impact. In Niue, for example, custom remains the dominant source of law in practice, and (in the absence of any practical need) the office of Attorney-General has not existed since separation from New Zealand in 1974.

Of course, the role and status of law officers in non-colonial jurisdictions has also been influenced by historical factors. In Scotland, as Iain Field demonstrates, the law officer role has expanded and contracted over the centuries in response to fluctuating relationships with England and the United Kingdom. That relationship has changed considerably in the past two decades, and may change again if independence is achieved. In either event, the effectiveness of the law officer role in Scotland will become increasingly important as the balance (or separation) of power between Scotland and the United Kingdom is determined.

In those jurisdictions that have a written Constitution (the US, Canada, Australia, Pakistan and Sri Lanka) the existence of law officers (assuming they exist at all) is invariably required by the Constitution itself. However, the extent to which the functions to be performed by the law officers are prescribed (constitutionally or otherwise) varies, and not all appear to contain provisions designed to ensure independence (such as those relating to tenure and appointment).

In contrast, as Tony Angelo explains, Niue has no written Constitution and therefore no constitutional mandate for the appointment of an Attorney-General. That country retains common law prerogative powers, and the office of Attorney-General has not existed since independence.

In Scotland, the role of the law officers evolved in the absence of a formal (or at least a single) written Constitution, and against a background of fluctuating relationships with the rest of the United Kingdom. However, as Iain Field observes, recent constitutional reforms (principally the process of devolution) have generated what is in effect a quasi-federal system in that country. As a result, the role and functions of

the Lord Advocate and Solicitor-General, while statutory (as opposed to constitutional), are now prescribed in a manner comparable with federal countries.

### **III Inherent tensions in the law officer role**

While the roles and functions exercised by law officers are diverse, certain core functions transcend jurisdiction. In all of the jurisdictions examined, the law officers are, first and foremost, legal advisors to their respective governments. This is hardly surprising given that this was, historically, the primary function of the English law officers – the model from which most of the other models examined have evolved.

But while all law officers would appear to perform some form of advisory role, no single vision emerges as to what, in broader terms, the ‘ideal’ role of law officers is, or should be. The additional functions exercised by law officers also vary considerably between jurisdictions, and a variety of tensions can be seen to arise within the law officer roles as a result. Are law officers guardians of the public interest, or of the Constitution, or of the interests of the government of the day? Should law officers be involved in public prosecutions, and if so, how can this role be performed when the government is also a party to proceedings?

### **IV ‘Independence’**

In many cases the tensions inherent in the law officer role manifest as questions of ‘independence’ – be it political, institutional, or personal. Chris Goff-Gray compares the US, Canadian and Australian (Commonwealth) Solicitors-General in these terms, and asks what basis there is for the ‘vital’ assumption that these officers do, in fact, operate independently from government. While this issue has been well canvassed in the United States, he finds little analysis on point in Australia. (In Canada the question is now moot, as the office has been abolished). As to the allegiance ultimately owed by Solicitors-General, Goff-Gray notes that, in both the US and Australia, the balance between the Solicitor-General’s role as an officer of the court and as an advocate for government is a tenuous one, and that the risk of politicisation is omnipresent.

Politicisation and independence are also central themes of Umair Ghori’s article. He is resolute in his view that the Pakistani office of Solicitor-General (who he describes as the ‘chief apologist for the ruling parties in Pakistan’) has become overtly politicised. He argues that, while notionally non-partisan, the appointment of the Attorney-General by military and civil regimes have often been self-serving, and concludes that legislation is needed to clarify that the Attorney-General is answerable to the Federation of Pakistan (the people) as opposed to the federal government.

## **V The exercise of advisory and prosecutorial roles**

The co-exercise of prosecutorial and advisory functions has also generated tensions in certain jurisdictions. As Iain Field explains, the co-exercise of these functions by the Scottish Law Officers, and the Lord Advocate in particular, has led to a raft of litigation in Scottish, UK and European jurisdiction in recent years. While this litigation might be seen as an unforeseen but remediable consequence of devolution – perhaps even a technicality – it might also be seen as a timely opportunity to reform the law officer role in Scotland in line with modern rule of law values.

In Sri Lanka, the inherent conflict between the exercise of advisory and prosecutorial functions is of far greater, and more immediate, concern. Danielle Ireland-Piper observes that the co-exercise of these functions by the Sri Lankan Solicitor-General has led to numerous accusations, by human rights groups and commentators, of bias in favour of the government in cases of alleged human rights abuses and ‘disappearances’. These concerns have been compounded by recent constitutional amendments, which have allowed the President to transfer the Attorney-General and Solicitor-General into the Ministry of Justice and, thereby, under his direct control.