THE ATTORNEY-GENERAL, POLITICS

AND THE JUDICIARY

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The recent spate of controversy between the Attorney-General of the Commonwealth, Mr Darryl Williams QC, and eminent persons associated with the judiciary past and present, about the part which the Attorney-General should play of defending the courts and the judiciary from criticism, has focused attention upon the role of the Attorney-General as it has evolved in Australia. The purpose of this paper is to try to understand the contemporary role of the Attorney-General in the legal and political system and to examine some of the implications of that role for various functions performed by the Attorney-General.

The starting point must be a brief look at the history of the office. Its origins, like those of most of our legal institutions, are to be found in the pages of English history. The sovereign could not appear in person in his own courts to plead in any case which might affect his interests. It was necessary for him to appear by an attorney who would plead his case. In the middle of the 13th century there appears the first written record of the appointment as King's Attorney of one Lawrence del Brok who held office for 14 years and afterwards was made a judge. The functions of the King's Attorney gradually became wider and assumed a more public character. In 1461 he was called upon, together with the judges, to go to the House of Lords to advise upon legal matters and at that time he came to be described as Attorney-General.(1) The Attorney-General's role in the prosecution of crime derives from the royal prosecutorial function. In *R v Wilkes*(2) Chief Justice Wilmot of the Court of Common Pleas explained the constitutional basis for this role:

> "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society.... . As indictments and informations, granted by the King's bench, are the King's suits, and under his control, informations filed by the Attorney-General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure."

There was a steady expansion of the responsibilities of the Attorney-General involving the representation of the sovereign in his courts for the protection of his rights and interests wherever that was necessary and the discharge of the sovereign's responsibilities for the prosecution of crime. By far the most important aspect of this expansion of responsibilities was the increasing role of the Attorney-General in the work of the Parliament. He was called upon to an increasing extent to attend upon the House of Lords to give his advice and assistance. By a

process of historical development described by Dr JLJ Edwards in his book *"The Law Officers of the Crown"*[3], the Attorney-General became involved in the work of the House of Commons and in due course a member of that House. He thus came to assume the political responsibilities which are so important in the role of the modern Attorney-General. He came to be not only the instrument by which the sovereign discharged his legal functions and responsibilities, but also the Chief Prosecutor and also a Member of Parliament and a Minister of State with important political responsibilities. These functions, over time, tended to overlap and to influence each other, thereby giving rise to great difficulties for attorneys in discharging the various functions with integrity, and leading to controversies in which the reputations of attorneys suffered, often unjustly.

Because of the difficulty of reconciling the impartiality and even-handedness required for the proper discharge of the Attorney-General's legal and quasi judicial functions with the demands of partisan politics, there arose in England a notion described as "independent aloofness". The notion was that the Attorney-General should not be involved in questions of government policy or too closely in policy debates within government, should not engage in robust political debate except in relation to his own portfolio and should be generally reticent and non-confrontational with respect to party politics. This concept came into prominence following criticisms of the part played by the Attorney-General in the first British Labour Government in 1924 (Sir Patrick Hastings QC) in the withdrawal of a prosecution against a communist by the name of Campbell. The fullest and most articulate exposition of the concept has come from Sir Peter (later Lord) Rawlinson, who had been Attorney-General in the Macmillan and Heath governments, arising out of the role of the Attorney-General Mr Sam Silkin QC in the case of *Gouriet v Union of Post Office Workers*[4]. Mr Silkin, however, did not agree with the concept of independent aloofness and argued on the contrary for the intimate involvement of the Attorney-General "in the arguments and the stresses and the strains" which ultimately result in policy[5].

In considering the relationship of the Attorney-General of England to politics and policy in the United Kingdom, however, it is necessary to remember the nature of his role in government. It is restricted to legal advice to the government, representing the government in court, exercising ultimate control over major prosecutions and discharging such legal functions of the sovereign as granting fiats for relator actions and performing the duties of Queen's Proctor. He does not have ministerial responsibility for a government department. Ministerial responsibility for the administration of justice vests in the Lord Chancellor, and to some extent, the Home Secretary, both of whom are members of Cabinet.

In this context, the notion of independent aloofness has largely prevailed in the United Kingdom. The Attorney-General has not been a member of Cabinet since 1928.

The transposition of the office to the new world led to some changes in the concept of the office. At first the office in the American Colonies was clothed with the common law powers and duties of the English office. Later the great movement for public officials to be popularly elected in the mid Nineteenth Century, resulted in changes. In a number of states the Attorney-General was chosen by popular election and his role became almost exclusively that of chief prosecutor and legal representative of the government in the courts. Sometimes the Attorney-General was a member of a different political party from that of the Governor in whom the executive power resided, and there have been a number of instances in the United States of Attorneys-General contesting the governorship in opposition to the existing Governor.

The Attorney-General of the United States is, however, appointed by the President, is a member of Cabinet and therefore forms part of the executive government. This arrangement has resulted in a similar debate to that in Britain, as to the appropriate degree of involvement of the Attorney-General in political affairs and decision-making. The extent of the independence of the Attorney-

General has been a matter of special attention since Watergate. The responsibility of the Attorney-General for the appointment of special counsel to deal with allegations against the President obviously requires a considerable degree of detachment from, and independence of, executive government. Nevertheless, the Attorney-General of the United States is responsible for the Department of Justice, a huge department of executive government with a wide range of functions.

The doctrine of independent aloofness as had a wide and growing influence in many countries whose legal systems derive from Britain. The Attorney-General has been made a public official independent of politics in India, Kenya, Singapore, Sri Lanka, Malta, Cyprus, Botswana, the Bahamas and the Seychelles.

The history of the office in Australia has been different. 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. They were all politicians influential in framing government policy and were often engaged in robust political controversy. Independent aloofness played no part in their careers. The Attorneys-General of the states have commonly held other major portfolios. In my state of South Australia Don Dunstan twice held the Attorney-General's portfolio while he was Premier. I should mention my own experience. I was Attorney-General of South Australia from 1970 to 1975. During that period I was also Minister of Prices and Consumer Affairs and Minister for Community Welfare (including Aboriginal Affairs). I was deeply involved in the hot political issues of the day and was frequently a participant in vigorous political controversy.

In considering the role of the modern Attorney-General in relation to politics and the judiciary, it is important to keep in mind the highly political path which the office of Attorney-General has followed in the Australian environment. The modern Australian Attorney-General has the duties and responsibilities deriving from the executive prerogative power, and other duties and responsibilities conferred on the office by statute. The Attorney-General is also a Minister of State and a Member of Parliament with the duties and responsibilities attaching to those positions. This gives a somewhat hybrid character to the office of the modern Attorney-General. The incumbent may easily be placed in a situation of conflict between the demands of his political offices and the demands of the Office of Attorney-General as Chief Law Officer. Some of the difficulties arising out of this hybrid character require some further consideration.

The most important prerogative powers of the Attorney-General as Chief Law Officer are the power to initiate and terminate criminal prosecutions, to advise on the grant of pardons to grant immunities from prosecution, to issue a fiat in relator actions, to institute proceedings for contempt of court, to appear as a amicus curiae and to provide legal advice to Cabinet and Executive Council.[6] In addition there are powers conferred by statute such as the power conferred on the Attorney-General of the Commonwealth to intervene in proceedings involving the interpretation of the Commonwealth Constitution[7] and the power conferred by various state statutes on their Attorneys-General to intervene in cases involving interpretation of statutes.

There has been an established convention that the Attorney-General in exercising the prerogative discretions should not act merely as a minister influenced by government policy or party political considerations and compliant with Cabinet decisions, but should make the decisions in the exercise of an independent judgement. But the application of the convention to

concrete situations has had a chequered history and the proper relationship of the Attorney-General to Cabinet in relation to decisions as to the exercise of the prerogative discretions is by no means easy to define in a way which produces consistently satisfying outcomes.

The issue has generally arisen in relation to decisions to prosecute or not to prosecute. It has a long history in England. As long ago as 1792 the Attorney-General Sir John Scott (later Lord Eldon) asserted the complete independence of the Attorney-General in deciding whether or not to prosecute. His successor, Sir Charles Denman (later Lord Denman) however, expressly acknowledged the right of the government to give instructions to prosecute. Thus began a controversy which continued intermittently as the issue arose in particular cases. In 1873 Prime Minister Gladstone denied government responsibility for the Attorney-General's decision to institute proceedings for contempt of court and asserted that the office of Attorney-General "was entirely distinct from the action of the government." But conflicting views were expressed in a House of Lords debate in 1896 as to the Jameson Raid case and Lord Herschell asserted that the government could not entirely detach itself from a decision to demand a trial at bar "and say that the whole matter is for the determination absolutely of the Attorney-General."

Dr Edwards has identified and described numerous cases from that time until the famous Campbell case in 1924, in which the Attorney-General of the time, notably Sir FE Smith (later Lord Birkenhead) and Sir Gordon Hewart (later Lord Hewart) who were subsequently the most trenchant critics of Sir Patrick Hastings for doing the same thing in the Campbell case, instituted, and refrained from instituting, prosecutions on instructions from Cabinet[(9)].

The Campbell case, partly because of the highly charged political atmosphere surrounding the existence of the first Labour Government in Great Britain (it resulted in the downfall of the Government) and partly because of the extraordinary venom displayed towards Hastings, its Attorney-General, who seems to have been regarded by conservative figures at the bar as little short of a traitor for making his services available to the Labour Government, had a profound, perhaps disproportionate effect on subsequent thinking on the subject both in Britain and elsewhere. The senior Opposition figures in the debates such as Smith and Hewart adopted with passion the principle of the independence of the Attorney-General of Cabinet in his prosecutorial decisions. The Prime Minister in the Conservative Government which succeeded the defeated Labour Government, Stanley Baldwin, proclaimed that a Cabinet instruction to the Attorney-General to withdraw a prosecution was "unconstitutional, subversive of the administration of justice and derogatory to the Office of Attorney-General". Thus a doubtful and hitherto controversial principle was elevated to the level of binding constitutional convention. It was not thereafter questioned in Britain. The post-war Labour Government led by Clement Atlee, no doubt chastened by the fate of the first Labour Government, accepted the principle unreservedly and its Attorney-General, Sir Hartley Shawcross, went to great pains to expound it to the Parliament and the legal profession.

The Shawcross speech to the House of Commons in 1951 contains what Dr Edwards describes as "the modern exposition of the constitutional position of the Attorney-General".[(10).] It therefore deserves extensive quotation. Shawcross quoted the views expressed by Sir John Simon (later Lord Simon) in 1925:

> "... there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks that there is what the lawyers call 'a case'. It is not true and no-one who has held that office supposes that it is."

Shawcross continued that the Attorney-General should only direct a prosecution when it is in the public interest. In making the decision, he said:

> "There is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party is the government's political fortunes; that is a consideration which never enters into account."

Dealing particularly with prosecutions which may concern questions of public policy or national interest he said:

> "I think the true doctrine is that it is the duty of an Attorney-General in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist and must not consist, in telling him what the decision ought to be. The responsibility for the eventual decision rests upon the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision to the shoulders of his colleagues. If political considerations in the broad sense that I have indicated affect governments and the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations."

The communique of the Commonwealth Law Ministers who met in Winnipeg, Canada in 1978 seems to indicate that the law ministers adopted these principles. It reads:

> "In recent years both outside and within the Commonwealth public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdictions but the discretion in these matters should always be exercised in accordance with wide considerations of the public interest and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office, whatever the precise constitutional arrangements in the state concerned."

Thus what Dr Edwards describes as "the modern exposition of the constitutional position of the Attorney General" in Britain seems to have been accepted by the law ministers of other Commonwealth countries.

The then Attorney-General of Australia, Mr Ellicott QC certainly relied upon those principles in 1977 when he resigned from the Fraser government upon the ground that "there has been an attempt to direct or control" him in the exercise of a prosecutorial discretion. The question was whether the Attorney-General should exercise his power to take over and discontinue a private prosecution against the Prime Minister in the previous government, Mr EG Whitlam, and other ministers in that government. Cabinet had decided to refuse the Attorney-General access to Cabinet papers relating to the previous government's involvement in a controversial attempt to raise overseas loans and had conveyed to him the considered opinion of the entire Cabinet that the Attorney-General should take over the private prosecution and discontinue the proceedings. The importance of the incident from the standpoint of this paper, is that the Prime Minister, Mr Malcolm Fraser, although denying that what was done was tantamount to an "attempt to direct or control" the Attorney-General in the exercise of his discretion, accepted the Shawcross principles. He said:

> It is the traditional role of the Attorney-General, as first law officer, to institute and, where appropriate, to take over prosecutions for offences. The government recognises that this is his role. It is not questioned that the Attorney-General has a full discretion in relation to these matters. It is, nevertheless, proper for the Attorney-General in such matters to consult with and to have regard to the views of his colleagues, even though the responsibility for the eventual decision to prosecute or not rests with the Attorney-General, and with the Attorney-General alone. This practice of consultation is a long-standing practice."

I have set out at length what I understand to be the hitherto accepted conventional position regarding the exercise of prosecutorial discretions. I now wish to make some comments of my own.

When I became Attorney-General of South Australia in 1970, I accepted the Shawcross principles as representing the true constitutional position. I explained them to Cabinet and I acted upon them throughout my term of office. Nevertheless, as my experience in the office increased, I began to question the soundness of the notion that Cabinet has no right to direct or control prosecutorial decisions. The Shawcross principles recognise that in exercising a prosecutorial discretion there is a question as to whether the public interest will be served by instituting or continuing the prosecution. They recognise moreover that it is proper, indeed wise in many cases, involving public policy or issues, for the Attorney-General to consult his colleagues in Cabinet as to where the public interest lies. What I gradually came to see was the artificiality of the distinction between Cabinet response to consultation, and direction by Cabinet. A typical example of a prosecutorial decision which affects public issues is one relating to an unlawful strike. If Cabinet judges that a prosecution would be against the public interest because it might convert an isolated and unimportant instance of industrial action into a general conflagration affecting the whole community, by what right would an Attorney-General se tup his own opinion against the wishes of Cabinet which must be responsible for the consequences of an ill-advised prosecution? The Ellicott affair provides a good example. Cabinet, it appears, took the view that it was contrary to the public interest for the Ministers of a defeated government to be prosecuted for alleged breaches of the law occurring in the course of their official duties. The alleged offences were breaches of the Financial Agreements Act and the Loan Council provisions. There was a question as to whether the public interest would be served by an incoming government appearing to persecute its predecessors for controversial actions, or whether rather damage might be done to the conventions surrounding the peaceful and civilised transfer of power in our democratic society if outgoing Ministers were to be subject to the hazards of prosecution for supposed offences committed in carrying out their duties. Can it reasonably be said that the view of an Attorney-General should prevail on such an issue over the views of the Cabinet? Must not the responsibility for such a decision be taken by Cabinet not only because the collective wisdom of Cabinet is more likely to be sound than the opinion of one of its members but because the government must bear the responsibility for the grave consequences which might follow a wrong decision.

It seems to me too that there is an important issue of democratic principle involved. The Attorney-General, or the Director of Public Prosecutions for whose acts the Attorney-General is responsible, prosecutes in the name of the Crown. The Attorney-General's authority to do so derives from his historic role as the Sovereign's Attorney. It is an exercise of the executive prerogative of the Crown. In modern constitutional practice the executive prerogative powers are exercised by the government. It follows, as it seems to me, that the Attorney-General prosecutes for the government and that Cabinet is the ultimate authority. It is important from the point of view of democratic principle and practice that Cabinet should be accountable to the Parliament and the people for prosecutorial decisions. Where a prosecution has public or political implications it is highly likely that the views of the Attorney-General's Cabinet colleagues will be decisive. There is but a fine line between a strongly expressed Cabinet view and a

binding decision. It is highly unsatisfactory that where Cabinet has made its view clear to the Attorney-General, it should nevertheless be able to escape accountability by resorting to a doctrine that the Attorney-General acts on his responsibility alone in deciding whether or not to prosecute. There is an interesting review of some Australian precedents in an article by Mr R Plehwe published after the Ellicott resignation(13).

An Attorney-General must of course act with integrity and if a Cabinet decision does not permit him to do so, resignation might be the only option. An Attorney-General should certainly take that course rather than comply with a Cabinet decision to prosecute where, in the Attorney-General's judgement, a sufficient case on the legal merits does not exist. Where, however, there is such a case and Cabinet's decision to prosecute or not to prosecute is based on public interest considerations, I see no reason why an Attorney-General should not be bound to implement the Cabinet decision and why Cabinet should not be required to take political responsibility for it. In my view, there is a strong case for reconsideration of the Shawcross principles in their application to an Attorney-General in the modern Australian political environment. The present Commonwealth Attorney-General has gone so far as to say:

> "... it ought to be concluded that the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous or at best eroded."(14)

Another aspect of the prerogative powers exercised by the Attorney-General which gives rise to similar problems is the fiat required for the pursuit of a relator action. It is the prerogative of the Attorney-General to institute and prosecute proceedings to vindicate public rights or to enforce the law. A private citizen who has no greater interest in the subject matter of proceedings than the public at large, but who wishes to proceed to vindicate a public right or enforce the law, must first obtain the fiat of the Attorney-General so that the case may proceed in the name of the Attorney-General on the relation of the citizen. The traditional view is that the decision to grant or refuse the fiat is entirely for the Attorney-General. In the case of *Gouriet v Union of Post Office Workers* supra the House of Lords adhered to the traditional view that there was no jurisdiction in the courts to review a decision by the Attorney-General to refuse the fiat. In *Barton v R* (1980) 32 ALR 449, the High Court took the same view with respect to the Attorney-General's decision to file an ex officio indictment.(12)) Likewise the accepted principle is that the Attorney-General is not subject to direction or control by Cabinet in making the decision. Accountability is to Parliament but the decision is for the Attorney-General alone.

Two cases which arose during my tenure of office as Attorney-General put a question in my mind as to the wisdom and practicality of this principle in modern government.

The first case was a challenge which an organisation called the Defence of Government Schools (DOGS) desired to mount to the constitutional validity of the use of Commonwealth funds for grants to non-government schools. The fiat was refused by the Attorney-General of the Commonwealth. DOGS then applied to the Attorneys-General for the States.

The application seemed to me to raise two issues. First, did the argument possess sufficient legal merit to justify the case proceeding? Second, was it in the public interest that such a challenge should be pursued? As to the public interest issue, I consulted the Minister of Education. It was the South Australian Government's policy to grant financial assistance to non-government schools and the government supported the provision of such assistance by the Commonwealth. The Minister of Education took the view that if I was entitled to refuse the fiat, I should do so. To me, however, the public interest issue was not quite as simple as merely deciding whether Commonwealth aid to non-government schools was in the public interest. There was the further consideration whether, if there was any real doubt as to the constitutional

validity of the grants, it was not in the public interest to have the matter resolved. In the end I refused the fiat on the grounds of insufficient merit and did not have to resolve the public interest issue. Cabinet was not consulted. That view of the merits was vindicated when, the Attorneys-General of Victoria and Tasmania having granted the fiat, the High Court rejected the challenge by a six to one majority. But was it right to deprive Cabinet of the opportunity to resolve the issue of where the public interest lay?

The second case related to the stage review "Oh, Calcutta". This review was highly controversial because of its sexual content and there was considerable agitation for it to be banned. The producers submitted to me a copy of the script with a request that I indicate whether I would exercise my power under the Places of Public Entertainment Act of South Australia to prohibit the performance or whether I would authorise a prosecution. They indicated that persons under 18 years of age would be refused admission. I considered that it was not possible from a mere perusal of the script to determine whether the performance would involve illegal acts on stage or would offend public decency. It would depend on how the script was acted out at any particular performance. I declined either to ban it or to sanction its performance in anticipation. I was then approached by the leading member of a moral action committee which was campaigning against the revue for my fiat to enable him to institute proceedings seeking an injunction restraining the performance of the revue on the grounds that any performance would involve unlawful acts.

I thought that there was sufficient merit in the case, notwithstanding the view which I had formed, to justify the fiat. That was borne out by the ultimate decision of the court by a two to one majority to grant the injunction. The issue of public interest was more difficult. There was a question as to whether it was in the public interest to use the remedy of injunction to restrain apprehended unlawful acts of this kind rather than allow their lawfulness to be determined by the ordinary process of prosecution. There was also, and more importantly, an issue of censorship policy. It was the declared policy of the government that adults should be permitted to hear and see what they wished so long as there was no offence to others. I had consulted my Cabinet colleagues at a meeting of Cabinet as to whether any action to prevent performance should be taken. The Premier, who was a strong libertarian in these matters, and most of the Ministers were against any such action. I had no doubt that if the decision to grant the fiat was left to Cabinet, the decision would be to refuse it. I reached a clear conclusion, however, that the degree of disquiet in a large section of the public was such that it was in the public interests that the Court should be given the opportunity of deciding the issue. I granted the fiat. I did not consult Cabinet as to the grant of the fiat, although I knew that my decision would be unpalatable to the majority. I acted on the accepted principle that the decision was for the Attorney-General alone.

I have on reflection come to have serious doubts about the correctness of my course of action in not leaving the decision to Cabinet. I had taken it upon myself to decide an important issue of public interest, as required by the Shawcross principles, against the views of Cabinet. Why should my judgement prevail over that of Cabinet as a whole?

The Attorney-General is undoubtedly in a special position in relation to the exercise of the prerogative powers. The Attorney-General must be solely responsible for decisions as to the legal merits of a proposed relator action, as with the legal merits of a proposed prosecution. In making those decisions he performs a quasi-judicial role. Cabinet has no legitimate role in relation to the legal merits. If Cabinet were to attempt to mandate a prosecution or relator action lacking legal merit, the Attorney-General should refuse to comply and, if Cabinet insisted, should resign rather than comply. It seems to me now, however, that as a matter of democratic principle, Cabinet should be entitled to control the exercise of the discretion on public interest grounds and should therefore be accountable to Parliament and the people for the decision. The "Oh, Calcutta" decision was pre-eminently one which democratic principle dictated should have

been taken by Cabinet and for which the Government as a whole should have been responsible to Parliament and the people.

What should be emphasised is that if the Attorney-General is not subject to the control and direction of Cabinet in relation to the grant or refusal of the fiat, there is in practical terms, accountability to nobody. The theory is that the Attorney-General is accountable to Parliament. This is largely illusory, however, in present day Parliaments which, at least as regards the chamber where Governments are made and unmade, are managed by a strict party system. Accountability in these circumstances amounts to little more than an obligation to explain a decision in answer to questions. This consideration led in England, following Gouriet's case, to the view being propounded by two former Attorneys-General and many others that the Attorney-General's decision to refuse a fiat should be subject to judicial review. The enforcement of public rights by resort to the Courts, so it was argued, should not be left to the unsupervised discretion of the Attorney-General. The problem with this proposal is that the public interest factors which enter into the decision are often of a policy, even political, nature and may be concerned with the impact of the decision on the welfare of the public. Courts are ill-suited to make the sort of judgements that are often required. They are essentially matters for Government and fall squarely within the proper sphere of Cabinet responsibility.

One prerogative power of the Attorney-General which in my view does require the supervision of the Court is the entry of a nolle prosequi. This method of terminating criminal proceedings is now the subject of statutory provisions in most jurisdictions and in a number they enable it to be exercised by the Director of Public Prosecutions as well as the Attorney-General. The troublesome feature of this power is that the nolle prosequi does not clear the accused of guilt and the accused remains vulnerable to prosecution for the same crime. The nolle prosequi may be entered at any time even during a trial when the prosecution case has collapsed, thereby depriving the accused of the opportunity of obtaining an acquittal. The potential for injustice thus created has resulted in the development of conventions in the United Kingdom which severely restrict the circumstances in which the Attorney-General may enter a nolle prosequi. Until recently these conventions confined the entry of a nolle prosequi to cases of disposing of technically imperfect proceedings instituted by the Crown and of putting an end to oppressive private prosecutions. It is now thought not to be justifiable even to use the power to dispose of technically imperfect proceedings. The normal methods of terminating a prosecution in England are to tender no evidence or no further evidence, leading to a verdict of not guilty by direction or to seek the judge's consent to withdraw the prosecution. The latter course enables the prosecution to proceed afresh but the risk of oppression is minimised by the need for the judge's consent.(11)

The practice in Australia is probably not uniform. I can speak with assurance only of South Australia. There the ordinary method of terminating a prosecution for an indictable offence, whether before or during trial, is the entry of a nolle prosequi. That being so, the rule that the entry of a nolle prosequi is within the absolute discretion of the Attorney-General or the Director of Public Prosecutions and not subject to the control of the Court, has the potential for oppression and injustice. No doubt a nolle prosequi before or during trial may sometimes be justified either with or without the consent of the accused. If there is no objection by a represented accused, there is obviously no cause for complaint. If it is used, however, against the wishes of an accused and without proper cause, perhaps simply to salvage a failing case and to enable the prosecution to have another try, the interests of justice are not served. Once a trial has been embarked upon, I believe that the proceedings should be under the control of the court. If the prosecution wishes to discontinue, it should be required to satisfy the judge that it is in the interests of justice that it be allowed to do so. Otherwise it should be required to tender no further evidence and there should be a directed verdict of acquittal.

The rule that the entry of a nolle prosequi is not subject to the control of the court, is entrenched

and the preferable way of dealing with the matter would be legislation conferring on the court power to decline to give effect to a proffered nolle prosequi. Absent legislation, I think that the courts should be prepared to assert control over the procedure in the interests of justice. The power to stay subsequent proceedings may go some way towards averting oppression, but it is unsatisfactory that an accused who has faced trial and against whom the case has proved to be insufficient, should be left without an acquittal and should have to rely on seeking a stay if required to face subsequent prosecution.

What we are seeing in the discussion of these issues is the essentially political character of the modern Australian office of Attorney-General. Conventions developed in England where the Attorney-General is a leading lawyer whose portfolio is primarily concerned with legal advice and prosecution and where the political functions discharged by our Attorneys-General are discharged largely by the Lord Chancellor, who is a member of Cabinet, and the Lord Chancellor's Department, have, as it seems to me, to be substantially modified to reflect democratic principles in the modern Australian scene. This is an important consideration when we are discussing the modern Attorney-General's role in relation to other issues.

One such issue is the administration of the courts. The political character of the modern office of Attorney-General emphasises the incongruity and danger of courts being administered by officers who are part of a government department of which the Attorney-General is political head. The Commonwealth and South Australian courts now have court-based administrations which are largely free of control by the Attorney-General. In other jurisdictions, however, the problem remains. Courts are entirely dependent for their operation on the court administration which provides staff and essential material equipment. Unless the courts have effective control over these essential conditions for their operation, they are dependent on other agencies for their ability to perform their constitutional function as the independent third arm of government. Where the court staff are officers of a department of executive government and the court administration is subject to the control and direction of the department, the independence of the courts is contingent upon the observance by the political and administrative chiefs of the department of a convention not to exercise their authority over the court staff to the detriment of the independence of the courts. This is no firm foundation for judicial independence. It is a fact of modern life that the Attorneys-General who are the political heads of the justice departments are politicians with a political agenda which is very likely in a crunch to take precedence over the needs of the courts to be totally independent of executive government influence.

It is the essentially political character of the office and portfolio of Attorney-General as it has developed in this country, which, paradoxically, makes it necessary to restate and re-emphasise the characteristics of the office which give rise to a distinction in kind between the role within government of the Attorney-General and the roles of other ministers. The distinction essentially is that the Attorney-General as law minister has, beyond the political responsibilities of a ministerial portfolio of the same nature as the responsibilities of other ministers, a special responsibility for the rule of law and the integrity of the legal system which transcends, and may at times be in conflict with, political exigencies. The Attorney-General has the unique role in government of being the political guardian of the administration of justice. It is the special role of the Attorney-General to be the voice within government and to the public which articulates, and insists upon observance of, the enduring principles of legal justice, and upon respect for the judicial and other legal institutions through which they are applied.

This special role has many manifestations. One is a responsibility for law reform. It is part of this special role of the Attorney-General to be active in the area of law reform and to secure government support for law reform initiatives. Law reform bodies labour to produce recommendations to keep the law abreast of changes in society and to enable it to serve contemporary needs. It is difficult, however, for proposals for long range reform to compete for a place in a government's legislative programme with legislation for the implementation of a

government social and economic policy or to deal with the day to day problems of government. The role of the Attorney-General is vital in this regard. It is the Attorney-General's task to induce and to sustain a constant awareness in, government, in parliament and in the public, of the pressing need for the law to keep abreast of changes in society, because it is only that awareness which can ensure that the recommendations of law reform bodies and other necessary measures of law reform are translated to the statute book.

Another important aspect of the special responsibility relates to the funding of courts. Court systems must be operated with public funds. Public funds can only be provided by the legislature. There must always be a minister who is responsible to the legislature for the expenditure of public money. That minister in the case of funds provided for the court system, is the Attorney-General. The Attorney-General must be the voice in government which insists on sufficient funds to provide adequate resources for the operation of the courts. Justice can only be administered effectively and without undue delay, if adequate resources are made available. In times of financial restraint there is pressure on the various departments to reduce their budgets. The Attorney-General is often faced with demands by ministerial colleagues that the court system share the pain. It is the Attorney-General's duty to resist those demands. The law minister must be prepared to explain firmly to Cabinet, to the parliament and to the public, that the court system must be adequately resourced irrespective of current economic conditions or budgetary strategies. The administration of justice is a core function of the state. It is not an optional extra which may be expanded or contracted according to economic circumstances. If, for lack of resources, justice cannot be delivered efficiently and expeditiously, the government is failing in one of the very purposes for which organised society exists. It will not do for an Attorney-General to say that there is a need for cost cutting and the judicial system must bear its share of the cuts. It is the law minister's function to demand of Cabinet that adequate resources be provided and to explain publicly why an adequately performing judicial system is so fundamental to society that financial pruning must never be allowed to impair its ability to deliver prompt and effective justice.

Moreover when resources are furnished to a court, it is essential to the independence of the judiciary that while those resources are in use in connection with the work of the court, they should be under the control of the court. The court staff must be responsible to the court and not to the executive government. It is essential that control of court buildings and facilities be vested exclusively in the judiciary. The court must have the right to exclusive possession of the building or part of the building in which it operates, and must have power to exercise control over ingress and egress, to and from the building or part thereof. The court must have power to determine the purposes to which various parts of the court building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings and facilities, its independence and its capacity to properly perform its function are impaired or threatened in a number of respects.

The citizen's right of access to the courts in a quest for justice includes the right for physical access to the court building. Moreover the courts must be able to ensure that their proceedings are known to the press and the public. This can only be ensured if the courts have such control over the court building and its precincts as enables them to prevent any interference with free access to the court. The judiciary must have the power to ensure that members of the public have advance notice of when and where cases are to be heard, that the building in which the court is situated is adequately identified, that the public are given free access to the building and to the court room, that the interior of the building is adequately sign-posted, that adequate seating is provided in the court and that once within the court members of the public can see and hear what is happening. They must also be able to ensure that there is no intimidation or fear of intimidation of persons seeking to exercise their right to attend the court by, for example, restrictions on the use of passageways, doors or lifts, or by being asked by anyone apparently in authority for evidence of identification or for information as to what their business in the building

might be.

Where security measures are necessary they must be firmly under the control of the judges using a particular court. The determination of whether any particular threat to security is such as to justify the presence of armed police or other security officers in and around the courts, or the screening, identification or searching of visitors to the courts, should be the responsibility of the judges. Such a determination involves a delicate balancing of competing interests which the judges alone can perform properly. Moreover such measures have such a potential for interference with the independence of the judicial process that the judges must have the responsibility of determining whether the implementation of such measures is justified, together with the right to control their nature and extent. The judges must, of course, rely upon the executive government for the security and protection which is necessary for the free and effective discharge of their functions, but control of security measures in and around the courtroom and buildings should be firmly under the control of the judges.

It is part of the Attorney-General's unique ministerial role as Law Minister to make all this clear to ministerial colleagues and the public service.

The role of the Attorney-General in relation to misplaced criticism of the judiciary has been the subject of some public discussion. It is a very important topic. A traditional safeguard of judicial independence has been a certain reticence in criticism of the courts. The decisions of courts and the conduct of judges, have of course always been open to discussion and criticism. The convention has been that discussion and criticism should be kept within reasonable bounds so as not to bring the administration of justice itself into disrepute. All parliaments in the Westminster tradition have standing orders which prohibit reflections on the judiciary except in the course of a debate on a substantive motion relating to the judiciary. The media, and citizens generally, generally observed restraint. The reason for this of course has not been any feeling of tenderness towards the judges. It has been a recognition of society's vital interest in the independence of the judiciary and the danger to that independence of unbridled and vituperative criticism. Judges are not politicians and few of them have been exposed to the harsh criticism which people in public life are called upon to endure. They decide their cases calmly and objectively and after hearing argument on either side in the controlled and dispassionate atmosphere of the courtroom. The fear has rightly been that if judges are exposed to trenchant criticism and vituperation and if they should lack the strength of character to remain uninfluenced by criticism, they may, at least subconsciously, tend to make decisions which will avoid public criticism, and decisions so motivated may be contrary to the justice of the case. Unfortunately much has changed. It is pretty difficult at the present time to discern any sign of reticence or restraint in the media's treatment of the judiciary. Judges of the High Court have had to endure the most scathing criticism, sometimes descending to the personal, for expounding their understanding of the common law as to native title as it applies to Australian Aborigines and Torres Strait Islanders. Judges exercising criminal jurisdiction have become accustomed to gross misrepresentations and to the featuring by the media of outbursts by people whose involvement in the matter deprives them of the capacity for objectivity. Racial bias and gender bias are attributed to judges usually without the slightest reasonable justification. The methodology is to extract passages from judgements or summings up directed to the issues in a particular case, take them out of context, omit significant sentences and present them to the world as examples of bias. This is taken up by some groups which see some mileage for their particular ideological point of view. The opportunity to gain some cheap applause is taken by some people in public positions who ought to know better and so the process continues to the detriment of the public's perception of the judiciary and the system of justice. It is an extraordinary and unscrupulous process but its dangers for judicial independence are real. Judges require great strength of character to withstand those sort of pressures applied not only to them personally but to their families. I have every confidence in the judges of our courts who continue to do impartial justice notwithstanding these pressures, but any society which valued

the independence of its judiciary would not subject them to that dangerous sort of pressure.

The recent discussions of the role of the Attorney-General in relation to criticisms of the judiciary arose principally from a series of strong, even vitriolic, attacks on the High Court and its judges in connection with the Wik decision. Those attacks went far beyond criticism of the judicial reasoning and amounted to an attack on the integrity of the High Court as an institution and the integrity of the judges, thereby damaging public confidence in the court. The Attorney-General's role in that situation was referred to by the Commonwealth Attorney-General in a lecture at Monash University on 1st May 1997. Sir Anthony Mason took up the issue in an address in October 1997(15). Referring to a reported comment by Mr Williams that he had difficulty in speaking out earlier because ignorant and uninformed comments were coming from his own political ranks, Sir Anthony commented:

> "Granted the existence of the difficulty, it is none the less the responsibility of the first law officer, a responsibility of the first importance, to uphold the rule of law. It is a responsibility that should not be subordinated to party political considerations when the integrity of judicial institutions is under challenge."

Sir Anthony went on:

> "No-one expects an attorney to respond to every criticism of the judges. Indeed, he may have justification for voicing criticism himself. But an attorney has a responsibility to uphold the rule of law as administered by an independent judiciary. That means that there will be occasions when he should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary .... my belief is that nothing short of a defence by the attorney will attract prominent media attention and counter-balance the adverse publicity."

The then Chief Justice, Sir Gerard Brennan, discussed the topic in a speech to the 30th Australian Legal Convention on 19 September 1997(16). Referring to a statement by Mr Williams at the Conference on "Courts in a Representative Democracy" in November 1994 that "the judiciary should accept the position that it no longer expects the Attorney-General to defend its reputation and make that position known publicly", Sir Gerard commented:

> "The courts do not need an Attorney-General to attempt to justify their reasons for decisions. That is not the function of an Attorney-General but why should an attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application to the rule of law? Can an attorney not explain publicly that courts must apply the law whatever the consequences, that the facts of each case and not some unbending policy must govern the exercise of judicial discretions including sentencing discretions, that the courts have no political agenda, that the only valid ground of criticism is an error of facts that the court has found or in a step in the legal reasoning or in the exercise of a judicial discretion?"

A similar position has been taken by Justice Kirby.

The present Commonwealth Attorney-General disagrees with these views. Referring to Sir Anthony Mason's view "that in Australia it is the Attorney-General, as first law officer of the Crown, who should defend the judiciary from attack", he has written:

> "I disagree and consider such a view ignores the contemporary role of an Attorney-General and ignores the real risk of a conflict between the interests of the judiciary

> and the executive interests of the government of which the Attorney-General is a member. Attorneys-General, as members of governments, are politicians. An Attorney-General cannot simply abandon this role and expect to stand as an entirely independent defender of the judiciary. In fact it has never been clearly articulated or accepted that Australian Attorneys-General do have such a duty. Arguments that an Attorney-General should defend the judiciary and has an obligation to do so is an outmoded notion which derives from a different British tradition .... As I have consistently stated, it would seem to me more in keeping with the independence of the judiciary from the executive arm of government that the judiciary should not ordinarily rely on an Attorney-General to represent or defend it in public debate."

The Attorney, however, did go on:

> "I acknowledge that where sustained political attacks occur that are capable of undermining public confidence in the judiciary it would be proper and may be incumbent upon an Attorney-General to intervene. The recent debate has fallen well short of undermining public confidence in the ability of the judiciary to deal with cases impartially, on their merits and according to law"[(17)].

It seems to me that upon close analysis, the difference between Sir Anthony and Mr Williams is one of emphasis rather than principle, and to some extent one of different interpretation of the concrete situation which arose following the Wik decision. Mr Williams saw the disagreement as "whether the public and the judiciary should routinely look to the Attorney-General to be the official responsible for defending judges from criticism." But I do not understand Sir Anthony as taking the position that the Attorney-General should do so "routinely". He explicitly recognises that the Attorney-General is not to be expected "to respond to every criticism of the judges." He simply contends that "there will be occasions when he should respond to irresponsible criticisms which threaten to undermine public confidence in the judiciary." The Attorney agrees that where confidence in the judiciary, is threatened, it may be incumbent upon the Attorney-General to intervene. They disagree as to whether the situation which arose following Wik threatened public confidence in the High Court and therefore called for the intervention of the Attorney-General.

Nevertheless there can be no doubt that the thrust of Mr William's argument is to minimise the role of the Attorney-General in defending the courts and the judiciary. To some extent this is the product of his conception of the office of Attorney-General. He emphasises the essentially political nature of the office and the primacy of the Attorney-General's responsibilities as a member of the government. In this he is, in my opinion, undoubtedly correct. If, however, his statement that "the perception that the Attorney-General exercises important functions independently of politicians and in the public interest is either erroneous or at least eroded" is intended to deny the unique ministerial role of the Attorney-General as the political guardian of the administration of justice in his relations with Cabinet, his party colleagues, the parliament and the public, I think that he goes too far. This role is as important as it ever was. An aspect of it is to defend the integrity of the system of justice against attacks which threaten public confidence in it, even, if necessary, against political colleagues. No doubt this responsibility has to be discharged with discretion and with due regard to the political imperatives of loyalty to colleagues and government and party interests to which the Attorney-General also has a duty. Nevertheless I believe that the judiciary and the public are still entitled to look to the Attorney-General to explain publicly, no doubt with appropriate discretion and regard to his political responsibilities, the matters referred to by Sir Gerard Brennan in the passage quoted above, and the more so when those matters have been misrepresented or misunderstood by other members of the government. Judges can do much and should do more, as the Attorney suggests, to explain these matters themselves but the damaging effect of attacks by senior ministers can only be effectively neutralised by appropriate responses made in the political

arena by the law minister.

The further aspect of the unique position of the Attorney-General to which I allude relates to judicial appointments. Throughout Australia responsibility for making recommendations to Cabinet for appointments to the judiciary at all levels rests with the Attorney-General. Appointments, of course, are made by Executive Council and the final decision and responsibility therefore rests with Cabinet. Notwithstanding that, the Attorney-General's responsibility for the integrity of the administration of justice requires advice and indeed positive insistence, to Cabinet colleagues that no extraneous consideration be allowed to deflect the government from its duty to appoint the most appropriate available candidates. Appointment on merit must be insisted upon. Merit, of course, does not equate simply to legal knowledge and skill. Professional proficiency is indeed of great importance. Other important qualifications are character, capacity to stand aside from personal beliefs and convictions so as to judge impartially, fairmindedness, and an understanding of human nature and its faults and failings. It is natural that an Attorney-General and Cabinet may be influenced in assessing these characteristics by a perception that a candidate's values and outlook on life and society are compatible with the social philosophy of the government. That is inevitable. Appointment is the one stage at which the judiciary may be touched by the democratic process. Once appointed, the democratic process can have no influence on a judge's decisions. But in the process of appointment, the community through the elected government has a legitimate voice in the choice of the sort of person who is to sit in judgement on the citizens. In that process, the role of the Attorney-General is crucial. It is part of the unique responsibility of the Attorney-General for the integrity of the system, to see to it that the assessment of a candidate's qualities is not made the excuse for the appointment of candidates who lack the degree of merit appropriate to the office, for extraneous reasons such as reward for party services or other reasons of patronage, or to give effect to some social theory which may have strong appeal to some members of Cabinet and to sections of the public but which is incompatible with appointment on merit.

The notion of a judiciary chosen to be representative of the various component groups of the society is one such theory. It is incompatible not only with the principle of appointment on merit but also with the fundamental principle of the delivery of justice without fear or favour by impartial judges. Appointments, it is said, should be made, not on mere merit, but specifically to provide greater balance of the sexes and greater representation to people with certain ethnic backgrounds. I think that this is a very dangerous theory and its implications are worth considering. Every judge takes an oath of office to do justice to all manner of persons without fear or favour, affection or ill-will. That is an oath to deal impartially with people irrespective of sex or race or religion or any other extraneous discrimen. The theory of a representative judiciary seems to assume that a male judge is less likely to do justice to a female litigant and presumably a female judge is less likely to do justice to a male litigant. It seems to assume that justice will be variable according to the ethnic background of the judge. The theory, in my opinion, is totally subversive of the principles of detachment and impartiality upon which the judicial system is built. It is not explained how making the judiciary more representative is to overcome this assumed partiality of judges. If a female litigant receives a raw deal from a male judge, as the theory seems to assume she might, how would that injustice be rectified by having a female judge give a raw deal to a male litigant in some other case. It would be small satisfaction to a person of a particular ethnic background who suffered an injustice at the hands of a judge of a different ethnic background to know that in some subsequent case a judge of his ethnic background would do likewise to someone else. It is all appalling nonsense. Impartial decision-making by independent judges must be the goal and that goal is best achieved by appointment of the most suitable people to hold judicial office irrespective of sex, religion, ethnic background or any other extraneous factor. It is incumbent upon an Attorney-General, in my opinion, to uphold these principles and to insist on the observance of them by the government.

The faithful discharge by the Attorney-General of the unique role of the office is the essential

safeguard of the integrity of the judicial system against erosion by improper or unsuitable judicial appointments.

It should hardly be necessary to state that the most fundamental aspect of the unique role of the attorney general is to safeguard the independence of the judiciary. The foundation stone of judicial independence is security of tenure.

Judges are appointed to a fixed retiring age and are removable only on a resolution of both Houses of Parliament. A judge should only be removed for incapacity or misbehaviour. This has the effect of insulating judges from the possibility of pressure or influence by government. It is a fundamental safeguard of judicial independence. It has always been thought to be unimaginable that any government or parliament would attempt to interfere with that security of tenure which is written into all the statutes which govern the appointment of judges. The unimaginable must now be imagined. In 1992 there was a change of government in Victoria following a general election. The new government disapproved of a court which had been established by an Act of Parliament during the period of office of the previous government. The court was known as the Accident Compensation Tribunal. The Act of Parliament which established it designated it a court. The judges appointed to it were designated judges and given equal status with County Court judges. They had the same security of tenure as other judges. The new government passed through the parliament an Act to abolish the Accident Compensation Tribunal. There is no problem about that; that was the government's policy and it was entitled to enact it into law. In those circumstances the proper procedure is clear. The international documents on judicial independence, being then the International Bar Association's standards of judicial independence in the development of which I played some part some years ago, and the Charter of the International Commission of Jurists, state that where a court is abolished the judges of that court must be appointed to another judicial office of comparable status. This requirement has since been reiterated in clause 29 of the principles of the independence of the judiciary adopted at the 6th Conference of Chief Justices of the Asia Pacific Region held in Beijing in August 1997 and subsequently approved by the Chief Justices of Australia. In that way the security of tenure which underpins judicial independence is preserved. The Victorian legislation did not do that. On the contrary it simply revoked the commissions of the judges of the abolished court. They were sacked, not for any impropriety but simply because the government decided that it did not want them. This was a direct and flagrant defiance of the most important safeguard of judicial independence. The action drew protests from many sections of the Australian judiciary and the professional associations and there was some comment in the media. But it was all quickly forgotten. The government easily rode out the criticism. Indeed the process was repeated with the abolition of the Employee Relations Commission of Victoria in December 1996. There was scarcely a ripple on the surface of public opinion. Others were being sacked. Why not judges? What was not sufficiently appreciated is that the security of tenure of the judiciary exists not for the protection of judges but for the protection of the people. The incident is a salutary lesson in the fragility of the foundations of judicial independence in this country. The concern is that unless those foundations are secured by adequate constitutional change, judges of the future may be tempted to be influenced by indications of government displeasure at decisions of their courts. Federal judges are protected by a provision in the Constitution of the Commonwealth which can be amended only with the approval of the people at a referendum. Something has been done in New South Wales. A similar provision to the Commonwealth constitutional provision, in the Constitutions of the states is urgently necessary if the potential for mischief of the Victorian precedent is to be removed, or at least contained. Pending that one can only rely on the obligation of an Attorney-General to make clear to Cabinet that any erosion of judicial security of tenure is unacceptable.

Suggestions that judges should be appointed for limited terms or should serve a probationary period, are alarming. Judges without security of tenure will always be open to the suspicion that their decisions may be influenced, consciously or sub-consciously, by ambition for permanent

appointment. For that reason acting judgeships should be used sparingly and only in situations of real necessity. The idea that prospective judges should have a probationary period has much appeal to some people who have not thought through the consequences. Appeal has been made to the United Kingdom experience with Recorders and other part-time judges. I believe that the United Kingdom practise is fundamentally flawed and has at times caused deep concerns. It has probably escaped causing serious damage to judicial independence by reason of the Office of Lord Chancellor. The Lord Chancellor is not only the Cabinet minister responsible for most judicial appointments but is also head of the judiciary. This has inspired confidence that the system of judges with limited tenure, often on probation for permanent appointment, will not be used in a way which could influence their decisions. Whether that confidence will remain unimpaired in the face of the increasingly party political role of the Lord Chancellor and the minimisation of the judicial role, remains to be seen. It is, however, a practice fraught with danger for judicial independence and one which should not be imported into this country. It is an important aspect of the role of Attorney-General as guardian of the integrity of the administration of justice, to warn against and repel innovations of this kind which are inimical to judicial independence.

What emerges from a consideration of the issues canvassed in this paper is that the office of the modern Attorney-General in Australia is an essentially political office, the role of which is far removed from the traditional role of the Attorney-General of England. In consequence, many of the functions which were thought to be responsibilities of the Attorney-General to be exercised independently of politics, must now be understood to be subject to Cabinet control and direction and the Attorney-General must be understood to be primarily a politician with political responsibilities to a government and political party. Nevertheless there remains unimpaired the Attorney-General's function as political guardian of the integrity of the administration of justice, which gives rise to the unique role and responsibility of the Law Minister. The importance of this role in our constitutional system, although not as pervasive as it once was, remains undiminished in importance. The faithful discharge by Attorneys-General of this role is an indispensable ingredient of the political and constitutional foundations of our system of independent and impartial justice.

NOTES

(1) The office of Attorney-General - Shawcross "Parliamentary Affairs" Vol VII No. 4 Autumn 1954.

(2) (1768) 4 Burr 2527; 97 ER 123.

(3) The Law Officers of the Crown (1964) Chapter 3.

(4) 1978A 435.

(5) The Law Offices of the Crown - Edwards pp62-71.

(6) The Role of the Attorney-General - Carney 9 Law Review 1-9.

(7) Judiciary Act 1903 (Cth) s78A.

(8) Address by Sir Anthony Mason (Ldec 1997) 35 Law Society Journal 51.

(9) The Law Offices of the Crown page 179 et seq.

(10) Ibid page 223.

(11) The Attorney-General Politics and the Public Interest - Edwards 444-8.

(12) Judicial Review and the Attorney-General - GM Illingworth June 1985 NZ Law Journal page 176.

(13) The Attorney-General and Cabinet: Some Australian Precedents - R Plehwe (March 1980) 11(1) Federal Law Review page 1.

(14) Who Speaks for the Judges - Paper delivered by The Hon Daryl R Williams AMQC MP at a National Conference on "Courts in a Representative Democracy" 11-13 November 1994.

(15) 35 Law Society Journal page 51.

(16) The State of the Judicature - Sir Gerard Brennan (1998) 72 ALJ 33.

(17) Article Judicial Independence - The Hon Daryl Williams (April 1998) 36(3) Law Society Journal 50-51.