

1

The Solicitor-General and the Constitution

A constitution does not work itself; it has to be worked by men [and women].
Ivor Jennings (1959)¹

I. The Working Constitution

The study of the Solicitor-General undertaken in this book is underpinned by a broader objective: to seek a better understanding of the ‘working’,² or ‘complete’,³ form of constitutional systems. Arguably, the study of constitutional law has been excessively focused upon the constituting document (where one exists) and judicial interpretation of it.⁴ At times it appears that constitutional law is co-extensive with the constitutional text and judicial doctrine. But myopic focus upon these institutions is ‘hopelessly misdescriptive’⁵ and has led to the undervaluing, and therefore the understudying, of other key constitutional institutions. Because of Australia’s Westminster heritage, there is a wide acceptance that its constitution transcends the text and judicial pronouncements to include those political understandings and rules of practice known as constitutional conventions. Once conventions are accepted as fundamental facets of our constitutional system, it is clear that the focus on text and judicial interpretation is insufficient. The necessity arises for a broader definition of the Constitution.

¹ I Jennings, *The Law and the Constitution* (University of London Press, 5th edn, 1959) 82. That Jennings had referred only to men is telling. In Australia, only two female Solicitors-General have been appointed: Mary Gaudron as Solicitor-General of New South Wales in 1981 and Pamela Tate as Solicitor-General of Victoria in 2003.

² This is the terminology preferred by Karl Llewellyn: K Llewellyn, ‘The Constitution as Institution’ (1934) 34 *Columbia Law Review* 1, 6.

³ This is the terminology introduced by Matthew Palmer: see, eg, MSR Palmer, ‘Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution’ (2006) 54 *The American Journal of Comparative Law* 587.

⁴ Llewellyn referred to this as ‘orthodox constitutional theory’: Llewellyn, above n 2, 3–4. See also R Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) 18. In the Australian context, this focus has also been identified: see, eg, J McMillan, ‘Rethinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423; J McMillan, ‘The Ombudsman and the Rule of Law’ (2006) 44 *AIAL Forum* 1.

⁵ Llewellyn, above n 2, 4.

Martin Loughlin proposed that ‘public law’ must include those other mechanisms beyond the constitutional text that facilitate the governance of a community: ‘The assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing.’⁶ Loughlin’s definition introduces the possibility of a second definition of the Constitution, one that includes not simply rules but also their *usage*.⁷ Loughlin further argued that public law scholarship ought first to explore this usage before drawing conclusions about the nature of the law behind it.⁸

For Karl Llewellyn, a legal institution is ‘in first instance a set of ways of living and doing. It is not, in first instance, a matter of words or rules.’⁹ Drawing extensively on Llewellyn’s work, Matthew Palmer introduced the concept of ‘constitutional realism’: to understand the ‘complete’ constitution, Palmer suggested that we must understand ‘what factors affect the exercise of power and how’.¹⁰ Similarly, Mark Tushnet referred to ‘constitutional orders’ or ‘regimes’ rather than constitutions, meaning ‘a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions’.¹¹ Tushnet also postulated that a constitutional order will be constructed and transformed over time.¹² At any moment, a constitutional order contains residues of the past and hints of the future.

In Australia and elsewhere, there is a normative expectation that those in government will act legally, constrained by the limitations placed on them by the law. This is the fundamental tenet of the rule of law, and reflects an embedded norm of constitutionalism. It is this tenet that places on the Executive an obligation to first interpret, and then obey, the law. In a system that operates under the separation of powers, many see the task of interpreting the law as it limits government power as residing with the Judiciary.¹³ This is, in the last instance, undeniably correct: the existence of an independent judicial branch is one of the

⁶ M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 115. See also M Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 11.

⁷ See also MJ Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Law Book Co, 1985) 5; S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2007) 4.

⁸ Loughlin, *The Idea of Public Law*, above n 6, 44.

⁹ Llewellyn, above n 2, 17. See also KN Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 1930, 1960 reprint) 4, 7, 16, 79; KN Llewellyn, *The Theory of Rules* (University of Chicago Press, 2011) 63.

¹⁰ MSR Palmer, ‘What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders’ (2006) 17 *Public Law Review* 133, 134. See also Palmer, above n 3, 589.

¹¹ M Tushnet, *A New Constitutional Order* (Princeton University Press, 2003) 1.

¹² *ibid.*, 2.

¹³ The famous pronouncement of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, 177, that ‘[i]t is, emphatically, the province and duty of the judicial department to say what the law is’, while not expressly adopted by the Australian framers, has been embraced by the Court as ‘axiomatic’ (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J)). See also McMillan, ‘The Ombudsman and the Rule of Law’, above n 4, 1.

bulwarks on which governance under the rule of law rests. The perception of the ‘great powers’¹⁴ of the Judiciary has meant that there is much concern over, and therefore consideration of, this institution’s independence and impartiality.¹⁵ However, if interpretation were left only to the Judiciary, constitutional systems would have stalled at their inception. ‘After-the-fact’ judicial review alone does not explain how constitutionalism is achieved.¹⁶

Thomas Hobbes observed that ‘[a]ll laws, written, and unwritten, have need of Interpretation’.¹⁷ Words consistently prove to be imperfect vehicles to convey unambiguous meaning, and this is particularly the case with those words that form part of a constitutional text, forged from political compromise.¹⁸ If the court has not considered (or in rare instances, cannot consider) a question of interpretation, the words of the Constitution and other laws must still be given meaning. Those with the mandate of administering and implementing the Constitution and the laws have been bestowed with a constant task of interpretation and adjudication.¹⁹ Often the Executive receives no guidance from the courts in this endeavour. Sanford Levinson explained:

Because courts can view only a very small percentage of official acts, it is crucial to the maintenance of a constitutional order that individuals believe themselves obligated to be conscientious adjudicators even in the absence of coercive constraints provided by courts.²⁰

Further, according to David Luban there is still ‘indeterminacy in legal doctrine’ with which administrators must grapple despite courts’ assistance in the interpretation of statutes.²¹ Sometimes judicial attempts to inject clarity into statutory language can result in further ambiguity. Similarly, indeterminacy will often plague common law doctrines. To understand how our Constitution and laws are practised, it is necessary to study and understand many more institutions in the system than simply the Judiciary.²²

¹⁴ Sir Ninian Stephen, ‘Southey Memorial Lecture 1981: Judicial Independence—A Fragile Bastion’ (1982) 13 *Melbourne University Law Review* 334, 338.

¹⁵ This has led to detailed analysis of the structural and other mechanisms that exist to protect these traits. Judicially, this concern was evident from the inception of the Commonwealth and has continued in its Chapter III jurisprudence.

¹⁶ DE Johnsen, ‘Faithfully Executing the Laws: Internal Legal Constraints on Executive Power’ (2007) 54 *UCLA Law Review* 1559, 1564.

¹⁷ T Hobbes, *Leviathan* (Penguin Books Ltd, 1651, 1968 reprint) pt II, ch 26, 322.

¹⁸ D Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 196; Llewellyn, *The Theory of Rules*, above n 9, 42.

¹⁹ See, eg, J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901, 1976 reprint) 791; CTL Pillard, ‘The Unfulfilled Promise of the Constitution in Executive Hands’ (2005) 103 *Michigan Law Review* 676, 687.

²⁰ S Levinson, *Constitutional Faith* (Princeton University Press, 1988) 50; see also P Brest, ‘The Conscientious Legislator’s Guide to Constitutional Interpretation’ (1975) 90 *Harvard Law Review* 585.

²¹ Luban, above n 18, 197.

²² Palmer, ‘What is New Zealand’s Constitution’, above n 10; See also M Tushnet, ‘Non-Judicial Review’ (2003) 40 *Harvard Journal on Legislation* 453, 492 and fn 228.

A. The Constitutional Role of Government Lawyers

The central character of this book is one of the major actors in the contemporary Australian constitutional order: the Solicitor-General.²³ Before providing an introduction to that specific office's role, the role of government lawyers requires some explanation. To apply constitutional rules (written and otherwise) the Executive needs assistance from those skilled in understanding the law to interpret them. It is the *understanding* of the constitutional text and judicial pronouncements held by public officials (elected and appointed) that guides their actions. Often, it is legal advice they receive that forms the basis of their understanding. Luban argued that 'the most significant actors are not judges, not ... officials more generally, but lawyers'.²⁴ It is through the lawyer-client interface that 'law in books becomes the law in action'.²⁵ AH Dennis claimed that the government lawyer constitutes 'a link between the law and the Executive'.²⁶ Similarly, Cornell Clayton observed:

Today, most government action takes place in a twilight zone that exists between what the clear commands of law authorize and what they prohibit. Within this zone, custom, convention, professional norms, and institutional cultures merge to authorize and constrain discretionary conduct. It is the work of government attorneys, ... to construct and define these informal understandings and to assist their political superiors in navigating through them.²⁷

Comprehension of a working constitution therefore requires considered study of those actors who guide the conduct of government officials by providing them with an understanding of the constitutional text, other laws and judicial pronouncements. It is the officials' understanding, combined with their conduct, that eventually becomes accepted as constitutional convention, particularly in light of the requirement for normative-based practice.²⁸ The advice of government lawyers assists in keeping governments within the law, and also facilitates the adaptation of legal frameworks in a climate of evolving social needs and political ideas.²⁹

Government lawyers are key components in achieving constitutionalism.³⁰ They can act as guards against tyranny and abuse within government. Indeed, in many

²³ In 1964, the seminal work on the English Law Officers said they comprised 'integral parts of our constitution': JLJ Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 11.

²⁴ Luban, above n 18, 131. See also *ibid*, 140.

²⁵ *ibid*.

²⁶ AH Dennis, 'The Official Lawyers' Place in the Constitution' (1925) 41 *Law Quarterly Review* 378, 379. See also *ibid*, 380.

²⁷ CW Clayton, 'Introduction: Politics and the Legal Bureaucracy' in CW Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 13.

²⁸ Jennings, above n 1, 135.

²⁹ See, in the context of conventions, *ibid*, 101.

³⁰ American scholarship has recognised the idea that a significant part is played by non-judicial actors (including government legal officers) in the operation of the Constitution, and there has been

unstable fledgling democracies, government legal officers are quickly targeted by those leading revolutionary coups, or despotic leaders.³¹ It is the rule of law and the striving for constitutionalism that serves to explain and provide the rationale for the constitutional role of government legal officers, including in Australia the primary legal officer, the Solicitor-General.³²

II. The Australian Solicitor-General

Across the Australian jurisdictions, the Solicitor-General provides legal advice to the Executive on significant constitutional and public law matters, and otherwise legally or politically important issues. The Solicitor-General also defends the position of the government in the superior courts, including the High Court of Australia. The office is a relatively modern statutory one, with roots in the antiquity of the English Law Officers (the Attorney-General and the Solicitor-General). The contemporary Australian Solicitor-General is a constitutional specialist, although this has not always been the case.

Today, the role of Solicitor-General is *central* to the regulation of public power in every Australian jurisdiction. While the function of day-to-day legal adviser to the government is filled by a vast number of legal professionals both within and outside government, at the apex of these sits the Solicitor-General. Subject only to a future contrary judicial ruling, the office provides the final word on significant legal questions within the Executive. In a system of separation of powers between the federal Judiciary and the Executive, the office also provides an important conduit between these branches. It is the combination of these functions that makes the Solicitor-General unique among statutory officeholders in Australia. The office both ensures the integrity of the exercise of government power by actors within government, and defends the exercise of government power from external legal challenge. The Solicitor-General is, then, an important link in the chain between simply having rules and achieving effective constitutionalism. And yet the role of the Solicitor-General in Australia's constitutional system has gone largely

increasingly concerted study of these actors. See, eg, Tushnet, above n 22; M Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999); Pillard, above n 19; MJ Gerhardt, 'Non-Judicial Precedent' (2006) 61(3) *Vanderbilt Law Review* 713; MJ Gerhardt, *The Power of Precedent* (Oxford University Press, 2011) ch 4.

³¹ See, eg, the analysis of the coup in Fiji of December 2006 in P Larmour, *Guarding the Guardians: Accountability and Anticorruption in Fiji's Cleanup Campaign*, Pacific Island Policy 4 (Honolulu, East-West Centre, 2008) and of the government of Prime Minister Manasseh Sogavare in the Solomon Islands in C Moore, 'Unchartered Pacific Waters: The Solomon Islands Constitution and the Government of Prime Minister Manassah Sogavare' (2008) 6(2) *History Compass* 488, 498.

³² B Selway, *The Constitution of South Australia* (Federation Press, 1997) iii.

unstudied.³³ The role of lawyers in government has been discussed more generally in some Australian literature, although the scholarship is still relatively sparse.³⁴

There have been some, largely historical, pieces written on the Solicitor-General.³⁵ There are also some brief sketches of the position outlined in speeches delivered, or papers written, by officeholders.³⁶ These accounts provide a generally uncritical description of the office, often peppered with interesting anecdotes, rather than offering any robust analysis of it. This, of course, is understandable. Officeholders must be cognisant of the need to maintain the integrity and independence of the office. Detailed consideration in general constitutional texts is also lacking, often overlooked in the abundance of analysis of the constitutional documents and judicial interpretations. State constitutional texts, which have tended to focus more on the workings of government and the exercise of public power than their federal counterparts, give some consideration to the role.³⁷ In the 1980s two volumes of selected opinions from the (Commonwealth) Attorney-General, Solicitor-General and Attorney-General's Department were compiled,³⁸ providing

³³ A similar conclusion was reached in a survey of the Australian position conducted in C Goff-Gray, 'The Solicitor-General in Context: A Tri-Jurisdictional Study' (2011) 23 *Bond Law Review* 48, 82–83. Note the recent publication of G Appleby, P Keyzer and J Williams (eds), *Public Sentinels: A Comparative Analysis of Australian Solicitors-General* (Ashgate Publishing, 2014), and the contributions contained therein.

³⁴ Three works stand out: L Curtis and G Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights' (1975) 49 *Australian Law Journal* 335; M Sexton and LW Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (Angus & Robertson Publishers, 1982) ch 6; and B Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114.

³⁵ K Mason, 'The Office of Solicitor General for New South Wales' (Autumn 1988) *Bar News* 22; MG Sexton, 'The Role of the Solicitor General' in G Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 86; T Kass, *A Brief History of the Attorney-General's Department* (Attorney-General's Department, 1996). See also *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83, 91–92 (Jordan CJ); Crown Law, *In My Opinion: The History of Crown Law Queensland 1859–2009* (Department of Justice and Attorney-General, 2009). JLJ Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 367–88, also provided a brief and largely historical description of the Australian Law Officers. More recently see K Mason, 'Aspects of the History of the Solicitor-General in Australia' in Appleby, Keyzer and Williams (eds), above n 33, 23; and G Appleby, 'The Evolution of a Public Sentinel: Australia's Solicitor-General' (2012) 63(3) *Northern Ireland Legal Quarterly* 397, which contains much of the research that has informed ch 3 of this book.

³⁶ See, eg, P Tate, 'The Role of the Solicitor-General for Victoria' (Speech Delivered at the University of Melbourne, 12 November 2003); R Meadows, "'Perhaps the Most to Be Desired" The Role of the Solicitor-General in Western Australia' (Paper presented at the Western Australia Bar Association Conference, Perth, 2009); Sexton, 'The Role of the Solicitor General', above n 35; G Griffith, 'Solicitors-General' in M Coper, T Blackshield and G Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001, 2007 online edition); J Gleeson, *The Role of the Solicitor-General* (Speech to Seven Wentworth Chambers, 27 February 2014). There is also some discussion in memoirs, papers and interviews of former officeholders and tributes to them. See, eg, RR Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958); National Library of Australia, 'Papers of Sir Maurice Byers' (1975–99); D Connell, Interview with Maurice Byers (Law in Australian Society Oral History Project, 10 January 1997).

³⁷ See, eg, A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 714–15; B Selway, *The Constitution of South Australia* (Federation Press, 1997) 81, 156–57; G Taylor, *The Constitution of Victoria* (Federation Press, 2006) 187–89.

³⁸ P Brazil, *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 1 (1901–1914)* (Australian

a valuable insight into the breadth of the advisory function of the federal office in the early twentieth century.³⁹ A third volume was published in 2013,⁴⁰ and in 2015 there was a further digital release,⁴¹ extending the published range of opinions from 1901 to 1950. Later opinions lie in archival storage, contemporaneous public release by governments being the exception rather than the norm.⁴²

Many reasons exist for the lack of analytical, or generalised,⁴³ study of the Australian Solicitor-General. Consistent with the narrow focus of orthodox constitutional study upon the role, independence and doctrinal reasoning of the courts,⁴⁴ the opinions of government legal advisers have been largely overlooked. There is greater difficulty in accessing Solicitor-General opinions compared with publicly accessible judicial decisions, although they are gradually released under archival requirements, and some are voluntarily released by the government contemporaneously. Nonetheless, for the most part, they stand unscrutinised,⁴⁵ either for their legal reasoning or as part of a broader analysis of the office's involvement in the government system.⁴⁶

Government Publishing Service, 1981); P Brazil, *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 2 (1914–23)* (Australian Government Publishing Service, 1988).

³⁹ John Farquharson, Interview with Pat Brazil (Law in Australian Society Oral History Project, 12 and 26 September, 26 October 1995 and 27 February and 20 March 1997) 12–14.

⁴⁰ *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 3 (1923–1945)* (Australian Government Solicitors, 2013).

⁴¹ *Opinions of Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department: Volume 3 (1946–1950)* (2015), available online at <<http://legalopinions.ags.gov.au>>.

⁴² For example, the release of the Solicitor-General's advice after the dismissal of Prime Minister Whitlam in 1975: Opinion from Kep Enderby and Maurice Byers, 4 November 1975; the tabling of advice to Parliament during the controversy over whether the actions of Justice Murphy were sufficient to justify removal: E Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 102–03; and more recent releases, eg, Letter of advice from Stephen Gageler SC, *In the Matter of the Office of the Speaker of the House of Representatives*, 22 September 2010.

⁴³ In the sense of going beyond the individual recollections or descriptions by officeholders.

⁴⁴ See also JL Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 15; R Gray, *The Constitutional Jurisprudence of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 4; C Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 7; J Williams, 'The Australian Constitution and the Challenge of Theory' in C Sampford and T Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (Federation Press, 2001) 119, 119.

⁴⁵ Although Solicitor-General advices released more recently (2009–13) have been subjected to some scrutiny. See, eg, critiques in Memorandum of Advice from Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill, *On the Justiciability of Social and Economic Rights under a Commonwealth Human Rights Act*, 8 December 2009; Australian Capital Territory Economic, Social and Cultural Rights Research Project, 'Final Report' (Australian National University, September 2010), 132–33; J Allan, 'Stephen Gageler too risk-averse in his advice on Nauru option', *The Australian* (Sydney) (16 September 2011), available at <<http://www.theaustralian.com.au/business/legal-affairs/stephen-gageler-too-risk-averse-in-his-advice-on-nauru-option/story-e6frg97x-1226138211343>>; A Twomey, 'Advice to the Governor-General on the Appointment of Kevin Rudd as Prime Minister' (2014) 24 *Public Law Review* 289.

⁴⁶ Similar observations have been made in the British context, see KA Kyriakides, 'The Advisory Functions of the Attorney-General' (2003) 1 *Hertfordshire Law Journal* 73.

There is also a difficulty because the study of the role of Solicitor-General straddles the disciplines of both law and political science.⁴⁷ In America, much of the literature on government lawyers has come from political scientists. In Australia, however, political scientists have generally left the study of the law and the courts to the lawyers.⁴⁸ Political scientists have even observed that general study of the working of the executive system of government in Australia is slim, lacking in original fieldwork and devoid of theory.⁴⁹

In Britain and America, much of the scholarship on the Law Officers was generated after public outcry over overt political interference with officeholders. In contrast, in Australia there have been no significant public scandals raising allegations that Solicitors-General have failed to fulfil the appropriate or desirable functions of the office.⁵⁰ There has therefore been little sustained impetus for the dedicated study of the office in Australia. Even the Solicitor-General's role in the highly controversial dismissal of Prime Minister Gough Whitlam by the Governor-General in 1975 was given only passing attention,⁵¹ overshadowed by the events themselves and other difficult constitutional questions they raised. On occasion there have been concerns voiced in Parliament about the independence, accountability and integrity of the office, but in the absence of significant media or public interest, Solicitors-General have been left to perform the office's fundamental tasks within the government structure subject to little public understanding, scrutiny or consternation.

Historically, the Australian Attorney-General has received much greater attention than the Solicitor-General. The Attorney-General's role was firmly

⁴⁷ CW Clayton, 'Introduction: Politics and the Legal Bureaucracy' in CW Clayton (ed), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (University Press of Kansas, 1995) 1, 21. See also similar comments in relation to the somewhat similar position in England of the Lord Chancellor: G Gee, 'What are Lord Chancellors For?' [2014] *Public Law* 11.

⁴⁸ Pierce, above n 44, 15; B Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 3.

⁴⁹ P Weller, 'Investigating Power at the Centre of Government Surveying Research on the Australian Executive' (2005) 64 *Australian Journal of Public Administration* 35; RAW Rhodes and J Wanna, 'The Core Executive' in RAW Rhodes (ed), *The Australian Study of Politics* (Palgrave Macmillan, 2009) 119. Note, however, recent empirical contributions on the role of ministerial advisers: RAW Rhodes and A Tiernan, *Lessons in Governing: A Profile of Prime Ministers' Chiefs of Staff* (Melbourne University Press, 2014); RAW Rhodes and A Tiernan, *The Gatekeepers: Lessons From Prime Ministers' Chief of Staff* (Melbourne University Press, 2014).

⁵⁰ There have been small-scale scandals that have generated localised interest. Many of these are canvassed in the remainder of the book. Attention has materialised mostly in parliamentary debate, with only limited media coverage. This has been negligible compared to the public outcry following the release of the 'Torture Memos' in the United States, or the revelations of the pressure placed on the English Attorney-General in relation to the Iraq War advice.

⁵¹ See, eg, Interview of Robert Ellicott by Kel Richards, *AM Broadcast*, 17 November 1975. At the State level there has been some discussion of the Solicitor-General's role in these circumstances: Twomey, above n 37, 635; A Twomey, 'The Governor-General's Role in the Formation of Government in a Hung Parliament' (2011) 22 *Public Law Review* 52, 60; M Sexton, 'The Role of Solicitors-General in Advising the Holders of Vice Regal Officers' in Appleby, Keyzer and Williams (eds), above n 33, 91; A Twomey, 'Advice to Vice-Regal Officers by Crown Law Officers and Others' (2015) 26 *Public Law Review* 193.

thrust into the public spotlight in the 1990s,⁵² and it was in this period that the predominance of scholarly debate over the role emerged. Comments of the then Shadow Attorney-General, Daryl Williams, that any convention that the office acted independently of the political Executive in Australia was ‘erroneous or at least eroded’, sparked the debate.⁵³ He highlighted the departure of Australia from the British traditions.⁵⁴ Additional comments made by Williams doubting the Attorney-General’s constitutional duty to defend the courts from political attacks⁵⁵ caused outcry among the Judiciary and its supporters.⁵⁶

Scholars clambered aboard the brewing controversy, and interest developed regarding the balance that is, or ought to be, struck in the Australian legal paradigm between the office’s obligations to politics, law and the public interest.⁵⁷ Divisions were most evident over whether Australia had accepted, or ought to

⁵² Although note commentary on it in Queensland earlier: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, ‘Report of a Commission of Inquiry Pursuant to Orders in Council (“Fitzgerald Report”)’ (1989) 138. See also Electoral and Administrative Review Commission, ‘Report on Review of the Independence of the Attorney-General’ (1993).

⁵³ D Williams, ‘Who Speaks for the Courts?’ (1994) *AJJA* 183, 192.

⁵⁴ *ibid.*, 191–92.

⁵⁵ *ibid.*; D Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252. Australia has never had an office of Lord Chancellor, and it was generally considered that the role of defending the Judiciary’s independence in the Australian constitutional arrangements fell on the Attorney-General.

⁵⁶ See G Brennan, ‘The State of the Judicature Address’ (Paper presented at the 30th Australian Legal Convention, Melbourne, 19 September 1997) 30; A Mason, ‘No Place in a Modern Democratic Society for a Supine Judiciary’ (1997) 35(11) *Law Society Journal* 51.

⁵⁷ See, eg, G Carney, ‘Comment—The Role of the Attorney-General’ (1997) 9 *Bond Law Review* 1; a conference was held in Melbourne on the Attorney-General’s role, and many of the papers were subsequently published: B Selway, ‘The Different Role of an Australian Attorney-General’ (2002) 13 *Public Law Review* 263; R McColl, ‘Reflections on the Role of the Attorney-General’ (2003) 14 *Public Law Review* 20; T Abbott, ‘Reflections on the Role of the Attorney-General’ (2002) 13 *Public Law Review* 273. See also B Heraghty, ‘Defender of the Faith? The Role of the Attorney-General in Defending the High Court’ (2002) 28(2) *Monash Law Review* 209; D Bennett, ‘The Roles and Functions of the Attorney-General of the Commonwealth’ (2002) 23 *Australian Bar Review* 61; A McCarthy, ‘The Evolution of the Role of the Attorney-General’ (2004) 11(4) *Murdoch University Electronic Journal of Law* 30; C Mantziaris, ‘The Federal Division of Public Interest Suits by an Attorney-General’ (2004) 25 *Adelaide Law Review* 211; G Griffith, ‘The Office of Attorney General in New South Wales’ (2007) 11 *Legal History* 79; F Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD, University of Melbourne, 2007); F Hanlon, ‘Death of the Rule of Law? The Attorney General—First Law Officer of the Crown, Political Guardian of the Rule of Law, or just Another Politician?—An Historical Assessment of the Office in Australia and Directions for the Future’ (Paper presented at the Twelfth Annual Public Law Weekend, National Museum of Australia, Canberra, 9–10 November 2007); P Keyzer, *Open Constitutional Courts* (Federation Press, 2010) ch 4. The scholarly literature has been supplemented by the views of officeholders: see, eg, LJ King, ‘The Attorney-General, Politics and the Judiciary’ (2000) 74 *Australian Law Journal* 444; B Debus, ‘Maintaining the Rule of Law: The Role of the Attorney General’ (Winter 2006) *Bar News* 5; J Hatzistergos, ‘The evolving office of the New South Wales Attorney General’ (2012) 86 *Australian Law Journal* 197. And also a number of government-commissioned reports during the 1990s that investigated the provision of legal services to government in the context of the inter-governmental commitment to the National Competition Policy: see, eg, B Logan, D Wicks and S Skehill, *Report of the Review of the Attorney-General’s Legal Practice* (March 1997); M Byers and M Gill, ‘Review of Legal Services to Government’ (New South Wales Attorney General’s Department, 1993). The reports have been drawn on in academic works, but the material they contain is generally informative about, rather than critical of, the Attorney-General’s role.

accept, a doctrine of independent judgement (that is, whether the Attorney-General's legal and public interest functions ought to be carried out independently from the Cabinet).⁵⁸ Bradley Selway confronted two fundamental differences between the English Attorney-General and the office that has developed in Australia, noting, first, the Australian office's intimate involvement with Cabinet and, secondly, the office's responsibility for and control of the provision of legal services to the *whole of government*. While sacrificing some independence from politics, Selway argued that the Australian office's advantage lies in a more engaged and influential Attorney-General, capable of monitoring and ensuring compliance with the rule of law.⁵⁹ A number of academics noted the vague definition of the role in Australia. Ben Heraghty observed that the nature of the office in Australia is 'left open to wide interpretation and is therefore interpreted by the particular officeholders themselves'.⁶⁰

Australian academic scholarship on the role of the Attorney-General can be broadly described as reactive and focused upon the influence of the senior Law Officer's *political* position on the office's other functions, particularly the exercise of prosecutorial discretion, the conduct of public interest litigation and the defence of the Judiciary. Scholars have engaged in analysis of the extent to which British traditions are of continuing relevance in Australia.

In this context, scholars have at times also raised the question of the proper role of the Solicitor-General,⁶¹ but this has not developed into comprehensive or systematic study of the office. While much of the scholarship's focus has little direct relevance to the Australian Solicitor-General, it raises pertinent questions about how this office can negotiate the tensions between politics, the law and the public interest in an environment where the Attorney-General has evolved toward the political. The creation of the modern Solicitor-General in Australia was intended to defuse many of the debates surrounding the 'independence' of the senior Law Officer by creating an independent, non-political office to assist the Attorney-General in the fulfilment of the legal services functions. The time is ripe for a full analysis of the Solicitor-General to consider the office's effectiveness in doing so.

This book undertakes an investigation of both the history and law underpinning the role of the Solicitor-General, and the operation of the role in its richness, depth, nuance, context and complexity. It includes an analysis of the historical, legal, political and cultural position of the office to determine its normative and behavioural characteristics. The design of the project tends towards the

⁵⁸ For example, King, above n 57, 449, 451; Hanlon, *An Analysis of the Office of Attorney General*, above n 57; contra McColl, above n 57; G Griffith, above n 57, 98–104.

⁵⁹ Selway, 'The Different Role of an Australian Attorney-General', above n 57, 271. See also Selway, 'The Duties of Lawyers Acting for Government', above n 34.

⁶⁰ Heraghty, above n 57, 220.

⁶¹ See, eg, Hanlon, *An Analysis of the Office of Attorney General*, above n 57, 249–50; Electoral and Administrative Review Commission, above n 52, 14, 16–17; Byers and Gill, above n 57, ch 4; Logan, Wicks and Skehill, above n 57, 59.

transdisciplinary, although the initial analyses are delineated into historical and legal. The last part, however, brings these dimensions of the investigation together in a focused, holistic study of the Solicitor-General, drawing on several different sources to provide a description of its culture.⁶² 'Culture' is a notoriously difficult and ambiguous concept. In this book, I draw from Clifford Geertz's explanation of the interpretative nature of culture:

Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law, but an interpretative one in search of meaning.⁶³

My analysis of the Solicitor-General's 'cultural' position therefore researches the practices, relationships, norms and customs that surround the office. By not only drawing on traditional historical and legal methodology but also undertaking a qualitative analysis of the views of officeholders, the book provides a portrait of the office in practice, rather than simply theorising the role in its abstract form.

This book explores how individuals perform the role of Solicitor-General, and the extent to which that is influenced by the role perceptions of those individuals and others who interact with the office. The book thus contains a description of the office's status, the 'collection of rights and duties', and also a more complex exploration of the *role*, 'the dynamic aspect of a status'.⁶⁴ To understand the dynamic aspect of the Solicitor-General requires an examination of the 'norms, attitudes, contextual demands, negotiation, and the evolving definition of the situation' as understood by officeholders and those interacting with them.⁶⁵ It requires an examination of the 'actual workings of the office and the traditions and conventions' around it.⁶⁶ Compiling a 'thick description'⁶⁷ of the lived experience of the Solicitor-General in this way is driven by the objective of lifting the veil on the true nature of an office that, through its advising and advocacy, has enormous potential to influence the normative framework of government. This orientation for the research in the book is congruent with the principles on which constitutional realism has been founded, with its emphasis on 'multi-causal, non-linear, reciprocating, recursive interactions between law, the environment in which it works and the ideas that people have about it'.⁶⁸

⁶² J Klein, 'A Taxonomy of Interdisciplinarity' in R Frodeman (ed) *The Oxford Handbook of Interdisciplinarity* (Oxford University Press, 2010).

⁶³ C Geertz, 'Thick Description: Toward an Interpretative Theory of Culture' in C Geertz (ed), *The Interpretation of Cultures* (Basic Books, 1973) 5.

⁶⁴ R Linton, *The Study of Man: An Introduction* (Appleton-Century, 1936) 113–14.

⁶⁵ BJ Biddle, 'Recent Development in Role Theory' (1986) 12 *Annual Review of Sociology* 67, 72.

⁶⁶ HM Seervai, 'The Legal Profession and the State: The Place of Law Officers and Ministers of Justice' (1977) 22 *Journal of the Law Society of Scotland* 265, 266.

⁶⁷ Geertz, above n 63.

⁶⁸ Palmer, above n 3, 593. See also the growth of the idea of 'New Legal Realism': *New Legal Realism: Empirical Law and Society*, available at < www.newlegalrealism.org>.

III. The Rest of this Book

Part I of the book commences with this chapter, introducing the office of Solicitor-General and its role within the Australian constitutional system. Chapter two provides an historical and comparative base, tracing the history and literature from which the remaining analysis of the Australian Solicitor-General is conducted. Chapter two considers the generally comparable offices⁶⁹ in Britain (the Attorney-General and the Solicitor-General of England and Wales, which in this book will be referred to as the English Law Officers; Scotland has its own Advocate-General), the United States (the Attorney-General, the Office of Solicitor-General (OSG) and the Office of Legal Counsel (OLC)) and New Zealand (the Solicitor-General).⁷⁰ It provides an extended historical introduction to the Law Officers as they developed in England, from which the Law Officers in Australia, the United States and New Zealand all evolved.

In John Edwards' influential work on the English Law Officers, he raised the importance of comparative endeavour to understanding the different aspects of, influences on and tensions within the Law Officers' roles.⁷¹ Exploration of the operation of offices in Britain, the US and New Zealand provides an opportunity to reflect on how to understand, and perhaps improve, the framework and functioning of the offices not only in Australia, but also in these other jurisdictions. As with any comparative endeavour, it is fundamental to remember that the constitutional system in which the Solicitor-General operates is necessarily underpinned by the philosophical basis, history, traditions, values and other traits (political, social, legal and economic) of the particular community.⁷² Nonetheless, a comparative endeavour is worthwhile where, as is the case for the Law Officers, different jurisdictions have experimented with different governmental structures to address many of the enduring tensions in the role.

Part II of the book turns to Australia. Chapter three develops an understanding of the origins of the contemporary Australian Solicitor-General and the reasons and theories that governed its creation. This chapter chronicles the evolution of the colonial position that led to the development of the modern Solicitor-General in the States, Territories and the Commonwealth. In chapter four, an analysis of

⁶⁹ A rough 'functionality' test of comparability was applied in identifying these offices: K Zweigert and H Kötz, *Introduction to Comparative Law* 2, T Weir trans (Oxford University Press, 3rd edn, 1998); M Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1238.

⁷⁰ The hyphenation of Attorney-General and Solicitor-General varies between jurisdictions. In Australia and New Zealand, it is more commonly hyphenated, while in England and the US it is not. For consistency, this book will adopt the hyphenation.

⁷¹ Edwards, *The Attorney General*, above n 35, 61–62.

⁷² C Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 *National Taiwan University Law Review* 1, 9–11; O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 7.

the legal position builds from the historical chapter, considering whether ‘insights of history’ persist, or whether the position has moved so far from its origins as to be a completely new office.⁷³ With the creation of the modern statutory position, much of the framework that governs the office is now legislative. But to understand the legal position of the office requires the stark legislative provisions to be supplemented with professional ethical obligations and residual common law duties of the Law Officers to the public interest.

The description of the legal boundaries of the office provides a necessary but thin introduction to the office itself. The legal structures are certainly ‘central to understanding of the present state of affairs, the exercise of power and in visions of possible futures.’⁷⁴ However, they are necessarily limited. The South Australian Solicitor-General, Martin Hinton, recounted the story that after his appointment, and reading the legislation governing his new role, he was dismayed. He was left with no great guidance as to what was expected of him.⁷⁵ The current federal Solicitor-General, Justin Gleeson, explained:

The statute tells you what you may do and what you may not do. What you actually end up doing, within the confines of the legally possible, depends very much on what you wish to make of the role and how you choose to relate to those with whom you have to deal.⁷⁶

The last part of the book moves to a ‘thick description’ of the role of the Solicitor-General and tells the stories of how the office is practised.⁷⁷ These narratives are constructed by investigating individuals’ perceptions of, and experiences in, the role. The practical manifestation of the Solicitor-General’s role is greatly influenced by the views, understandings, interpretations and perspectives of that role held by the Solicitor-General and others closely associated with the office.⁷⁸

In this last part, I am not attempting to provide a universal description of the role but rather a contextual study of its ‘social practice’, a study of the history, theory and social factors that influence the realisation of the office.⁷⁹ This study provides no single ideal model or set of criteria for ‘what is to be done’ by an

⁷³ MM Siems, ‘Legal Originality’ (2008) 28(1) *Oxford Journal of Legal Studies* 147, 150.

⁷⁴ B Murphy and J McGee, ‘Phronetic Legal Inquiry: An Effective Design for Law and Society Research?’ (2015) 24 *Griffith Law Review* 288, 307.

⁷⁵ M Hinton, ‘The Courts, the Executive and the Solicitor-General’ in Appleby, Keyzer and Williams (eds), above n 33, 67.

⁷⁶ J Gleeson, *The Role of the Solicitor-General* (Speech to Seven Wentworth Chambers, 27 February 2014) 13.

⁷⁷ Geertz, above n 63.

⁷⁸ This is an assumption ‘endemic’ in most versions of role theory (BJ Biddle, ‘Recent Development in Role Theory’ (1986) 12 *Annual Review of Sociology* 67) and underpins much qualitative research relying upon the interview method: J Mason, *Qualitative Researching* (Sage Publications, 2002) 63. See also MB Miles and AM Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 3rd edn1994) 4.

⁷⁹ B Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How it can Succeed Again* (Cambridge University Press, 2001) 2. See also Murphy and McGee, above n 74.

officeholder when particular circumstances arise. Indeed, the description of the practice of the role provided in the final part of the book provides a context-dependent description, intentionally free from value judgement (although not analysis).⁸⁰ It reveals, within the same statutory context, the different ways in which the office has been practised and its tensions negotiated, by different people, in different social and political circumstances. It is offered so that future actors may deliberate on their own role, taking from the narratives offered what wisdom they can, testing them against their own experiences, practices and perceptions.⁸¹

Part III draws on extensive interviews with current and former Solicitors-General and those closely associated with the office (including Attorneys-General, judges and other government legal professionals: n=47), and on analysis of memoirs, oral histories, government reports and Cabinet papers, manuscript collections, legal opinions (where available) and biographies. Further details of the methodology are provided in the introduction to Part III, and the research design, including the sampling and recruitment of interview participants, development and conduct of interviews, and analysis, is set out in detail in Appendix A to the book.

Chapter five illustrates that the *advisory* function of the Solicitor-General was viewed by participants as the function most significant to the broader constitutional system. However, the effectiveness of the Solicitor-General's advisory function rests on a number of assumptions, including that the Executive will seek the Solicitor-General's advice and treat it as determinative of the legal issue; and that the Solicitor-General will provide objective advice 'independently' of the desires of the government. The chapter also explores the extent to which the Solicitor-General does, and whether participants thought it ought to, provide advice to the Executive beyond strictly legal issues.

Chapter six examines the Solicitor-General's other significant function: advocacy for the Executive in the courts. The analysis in this chapter explores the extent to which the Solicitor-General exercises *de facto* independence as government advocate. The chapter also explores the relationship between the Solicitor-General and the court, particularly when the officeholder acts as an interface between the Judiciary and the Executive.

Chapter seven returns then to the central idea of 'independence', and canvasses the views of the participants on the extent and protection of the Solicitor-General's independence in the different jurisdictions. What this research reveals is that, even with Australia's specific legislative arrangements designed to provide structural safeguards for independence, the office's independence still rests upon the professional integrity and ethics of the officeholder. The chapter traces two approaches to how participants saw independence in the context of the Solicitor-General's overall role. Some participants perceived the independence of the office as so vital for government that it must be protected from all political interference,

⁸⁰ Flyvbjerg, above n 79, 59.

⁸¹ *ibid.*, at 139, referring to RN Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (Harper & Row, 1985) 307.

removing the Solicitor-General somewhat from the Executive, even at the expense of engagement in all matters in which the Solicitor-General's advice ought to be sought. This I refer to as the 'autonomous expert' approach. Others regarded the independence of the Solicitor-General as existing for an overarching constitutional purpose, and that it must be balanced against the objective of ensuring that during the development of policy the government is provided with high quality legal advice. This may, at times, undermine the autonomy of the Solicitor-General as the officeholder becomes closer to government and the subtle pressures associated with that, but it comes with the benefit of ensuring greater integrity across the broader spectrum of government action. This I refer to as the 'team member' approach.

The conclusion in chapter eight draws together the findings about the historical moment of the Solicitor-General's development, the legal framework in which individuals must operate and the actual manifestations of the role. The framers of the modern statutes might have sought to compartmentalise the legal responsibilities of the Solicitor-General from politics and insulate the office from political influences. However, the continuing close relationship between the Solicitor-General and the Crown has meant politics and ideals relating to the public interest continue to influence, inform and antagonise the office.