

BOOK REVIEW

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*The Role of the Solicitor-General:
Negotiating Law, Politics and the Public Interest*

Gabrielle Appleby

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In the field of constitutional law, most books focus on the *Constitution* and its application. This book is quite different, in that it focuses on the office of the Solicitor-General, who in Australia is a significant institutional player both in constitutional interpretation and in the way that governments interact with the *Constitution*, by applying it, enforcing it, stretching its boundaries or flouting it.

Little attention has previously been given to the office of Solicitor-General. To the extent that there has been more academic focus on the office in recent times, it has been largely due to Gabrielle Appleby, who since starting to write her doctoral thesis on the subject has initiated conferences and a book of collected essays on the subject. Her crowning achievement, however, is this splendid book which draws together both academic and practical views of the Solicitor-General's office. The first half of the book relies upon research and academic treatises to establish a principled view of the office, while the second half relies upon interviews with practitioners to illustrate how the office operates in practice and the conflicts faced by Solicitors-General. While both halves of the book are important, it is the second half, with the anecdotes and views of former Solicitors-General, Attorneys-General and government officers, which brings life to the book and lifts it above normal academic offerings.

The book is largely based upon Appleby's thesis. There is an art to transforming a thesis into a book. It is necessary to weed out the academic gobbledegook that has been included in the thesis to satisfy the conventions of the form. This is essential to make the book readable by a wider audience. For the most part, this is well achieved in this book, although there is the occasional lapse into 'thesis-speak', which the editor at Hart Publishing should have despatched with a red pen. The most egregious example of thesis-speak is as follows:

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Compiling a ‘thick description’ 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 the law, the environment in which it works and the ideas that people have about it’.¹

While academics could make some sense of that explanation of the work, I suspect that most ordinary readers would recoil in horror at such a description and snap the book closed. Fortunately, it is not representative of the rest of the book which is written in clear, simple and direct language without resort to academic obfuscation or terminological excesses.

The book commences by placing the Solicitor-General in historical context, from the impressively titled ‘*Solicitor Generalis domini Regis*’ of 1515² to the second law officer of the Crown who was also often a Member of Parliament and member of the executive. It then compares the position, both historically and currently, with that of the Solicitor-General in the United Kingdom, New Zealand and the United States. It is interesting to observe that the development of the office has diverged in each of these countries, even though the same concerns and interests have driven reforms. Each nation has dealt with the issues of responsibility, independence and conflicts of interest in different ways, placing slightly higher emphasis upon one aspect or another.

The book proceeds to a discussion of the Australian history of the Solicitor-General, from the early colonial times when Solicitors-General participated as members of the Legislative Council, through the period when they formed part of the public service, to the modern period where they are independent statutory officers. There are some delightful tales of the difficulty in managing the tripartite position of Solicitor-General, parliamentarian and minister. The hapless John Tuthill Bagot, for example, briefly held ministerial office in South Australia as Solicitor-General in 1857, but was unable to defend the constitutional validity of his own appointment, with a court striking it down as invalid.³ The same year, in Tasmania, T J Knight was appointed Solicitor-General. While he behaved correctly by resigning his seat so that he could be re-elected by the voters with their approval of his holding such an office of profit under the Crown, he found the voters to be less than amenable to the idea and lost his seat.⁴ Even the heroes of federation and the High Court struggled with the inherent conflicts involved in being a Crown law officer, a parliamentarian and a lawyer. Edmund Barton and Richard O’Connor were forced to resign in 1893 from their respective offices of Attorney-General and Minister for Justice, for having accepted private legal

1 Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 13.

2 Ibid 21.

3 Ibid 67.

4 Ibid 69.

briefs against a statutory government authority – an issue that has also haunted Solicitors-General.⁵

Chapter 4 rounds off the purely academic part of the book, addressing the nuts and bolts of the office. It covers the appointment and tenure of the Solicitor-General and the theoretical underpinnings of the office, such as its independence, accountability, relationship with the Attorney-General and responsibility to represent the Crown – all of which might conflict at times.

Part III of the book draws on interviews to supplement the theoretical analysis of the office with the hard edge of reality. When it comes to constitutional matters, there is a very notable gulf between the theory of what is supposed to happen and the reality of what happens in practice behind closed doors. This is particularly so at the governmental level, including in relation to the role and actions of vice-regal officers. Academic works rarely, if ever, come close to bridging this gulf. Government secrecy, including the obligations of confidentiality of government officers and the long delays in gaining access to primary documents, mean that it is extremely difficult for outsiders even to recognise the extent of this gulf, let alone to seek to expose it and analyse what actually happens in this parallel constitutional universe.

Appleby was fortunate in that she started as an insider, working for Patrick Keane when he was Solicitor-General for Queensland, allowing her to observe the operation of the office and recognise that there was more to the reality than told in existing books. Hence, her thesis not only entailed an academic study of the theory of the office, but extensive interviews with Solicitors-General, Attorneys-General and other legal or judicial officers. The line-up of interviewees is impressive. At the Commonwealth level, for example, she interviewed Sir Anthony Mason, Bob Ellicott, Gavan Griffith, David Bennett, Stephen Gageler and Justin Gleeson – all former or current Solicitors-General – along with Tom Hughes, Gareth Evans, Duncan Kerr, Michael Lavarch, Philip Ruddock, Robert McClelland and Mark Dreyfus, all of whom have held the office of Attorney-General.

One would have imagined that the result would have been a brutal, warts-and-all, exposure of the reality of the office of the Solicitor-General. However, it did not really turn out this way. What is interesting is how the interviews seem to track and largely support the principled theory in the first part of the book. While this has the virtue of reinforcing how things should be, I doubt that it is a completely accurate representation of how things actually are. Certainly, it does not represent my own experience as a government legal officer dealing with the office of Solicitor-General during a period in New South Wales in the late 1990s. One possibility is that this period was a complete aberration and not representative of what has happened in other places in Australia or at other times. The other, in my view more likely, possibility is that those interviewed had a particular interest in pressing a particular point of view. Those who were former or current Solicitors-General no doubt wished to stress the independence of the office, the binding nature of its advice and its exclusivity when it comes to

5 Ibid 61. See also at 272–3.

constitutional matters. Former Attorneys-General most likely wished to represent themselves as behaving in a principled and honourable manner, independent of the political pressures imposed by government self-interest. Hence, the material sourced from interviews appears to be more high-minded than representative of the truly messy, corner-cutting and pragmatic reality of government.

As a former public servant, I too feel reluctant, due to lingering obligations of confidentiality, to spill too many beans about what really happened in government when dealing with constitutional matters. But one example of the dissonance between theory and reality is the assertion throughout Appleby's book that the Attorney-General is the sole or primary representative of the Crown and the ultimate instructor of the Solicitor-General.⁶ This was not the case in New South Wales in the 1990s and I understand it is still not the case today.

Appleby, for example, argues that if the New South Wales Solicitor-General gave advice to the Governor, this

must still be subject to the constitutional position of the Attorney-General as the appropriate officer to give instructions on behalf of the Crown. That is, the Attorney-General would have to give instructions for the Solicitor-General to provide advice to the Governor.⁷

Yet, in practice this has not been the case, and the New South Wales Solicitor-General has long been regarded as entitled to advise the Governor without any ministerial instruction or supervision. Further, at the day-to-day level in New South Wales it is the Premier who takes the primary role in relation to constitutional matters (other than litigation), due to their 'whole of government' significance. Under the formal orders for the administration of Acts,⁸ the Premier, rather than the Attorney-General, is responsible for the *Constitution Act 1902* (NSW), as well as other constitutional legislation, such as the *Succession to the Crown (Request) Act 2013* (NSW) and the *Australia Acts (Request) Act 1985* (NSW). The Premier can request advice from the Solicitor-General at any time, without any need for the Attorney-General's knowledge or permission, although in practice instructions are given through the medium of the Crown Solicitor's Office. The notion, as now seems to apply at the Commonwealth level,⁹ that written permission of the Attorney-General must be provided before the Prime Minister or Premier could obtain the advice of the Solicitor-General would be regarded in New South Wales as absurd and supremely impractical.

One of the most difficult discussions in the book is about the 'independence' of the Solicitor-General's role. On the one hand, it is clearly the case that the Solicitor-General should be free, and indeed obliged, to give honest and accurate legal advice, rather than advice that is misleading, incorrect or distorted to achieve a political aim. But that is not the end of the issue. The Solicitor-General, as an advocate, is also required to act upon instructions. While the Solicitor-

6 Ibid 115–20.

7 Ibid 123.

8 See, eg, *Administrative Arrangements (Administration of Acts – General) Order 2015* (NSW) sch 1.

9 *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (Cth). Note that at the time of writing it was subject to a notice of motion for disallowance and its making was the subject of an inquiry by the Senate Legal and Constitutional References Committee.

General may provide advice upon whether or not to intervene in a constitutional matter and what interests need protecting and may in some cases exercise delegated powers in relation to intervention, in highly contentious matters it is ultimately the government which decides upon which side the state or the Commonwealth will intervene. This may give rise to disputes within the government about whether long-term whole of government interests should override short-term political interests. In New South Wales, this led to occasional conflicts between the Premier and the Attorney-General about intervention in constitutional cases.

Conflicting interests within the government and consequential compromises sometimes also led to rather challenging instructions being given to the Solicitor-General. For example, for political reasons, the government might feel obliged to be seen to be supporting one side, and therefore formally intervene in support of party X, but on the other hand, from a whole of government point of view, taking into account the potential consequences of some of X's arguments, the government might wish to oppose those arguments. Hence, it has not been unheard of for a Solicitor-General to be instructed to intervene in favour of X, to find the most narrow and innocuous reason to support X and then focus all fire power in seeking to defeat X's main arguments. The Solicitor-General, in this regard, is a hired gun. He or she is obliged to muster the best legal arguments that he or she can to give effect to these instructions (while obviously still subject to obligations to the court to be truthful, not to mislead and to be a model litigant). Independence does not mean that the Solicitor-General gets to choose the position that is taken in constitutional litigation according to his or her own views of what is the preferable constitutional argument, although the Solicitor-General may seek to persuade the government to alter its instructions.

It is in the area of advice that independence is more relevant. It is generally not helpful to anyone to receive inaccurate legal advice. However, advice can be both accurate and helpful. When asked a question of whether it would be constitutionally valid for the government to do X, one Solicitor-General might give the legally correct answer of 'No'. Another, however, might give the more helpful answer of 'No, you cannot do X, but if your policy aim is to achieve Y, then you can achieve that aim (in full or in part) in a constitutionally valid fashion by doing Z'. In my experience, the approach of the second Solicitor-General, in this example, is far more valuable to government. The advice is legally correct (and no one would wish to compromise its accuracy), but it still recognises that it is democratically legitimate for elected governments to seek to implement their policies and that the advice of law officers should support the implementation of those policies by clarifying how it can be done in a legally valid manner. The dichotomy ought not to be one between accurate advice and the distortion of advice in favour of the government's political aims. Instead, the real question is the extent to which the Solicitor-General will employ correct legal advice to aid the implementation of the policy of the government of the day. While some might regard the consideration of policy aims as undermining independence, it is part of the essential context in which the advice must be situated in order for it to be effective.

Constitutional convention and principle is largely established simply by asserting its existence. If enough new players, relying on books rather than personal experience, believe that something is so, then it becomes so. Appleby's book will now become the authoritative source about the office of Solicitor-General. It will rightly be read by incoming Solicitors-General, seeking to come to grips with their new role, and by those who brief and interact with the Solicitor-General. While Appleby's book might not necessarily represent in full the more pragmatic way that the office of Solicitor-General has been treated in practice, it has the virtue of asserting a more principled and high-minded approach to the office that is likely to form the basis of the future understanding of the office. By saying that it is so, it will become so, and that is no bad thing.