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# The Role of the Attorney- General: an Australian Perspective

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**Speech given by Ross Ray QC, President,  
Law Council of Australia**

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## Overview of the Attorney-General's Role in Australia

The office of Attorney-General was transplanted to the Australian colonies with the reception of English law. The first Attorneys-General in the Australian colonies were drawn from the English Bar. They were appointed by the UK Government as ex-officio members of the Executive and the Legislative Councils and played a substantial role in colonial politics.

On federation, the Attorney-General was one of the seven original Ministers appointed by the Governor General pursuant to Section 64 of the Constitution.

The Attorney-General is described as the “Attorney-General for the Commonwealth of Australia” but is also the “First Law Officer of the Commonwealth”.

The Second Law Officer is the Solicitor-General.

The Attorney-General is a hybrid office of state, in which the different roles have not always been clearly distinguished. Generally, the Australian Attorney-General has three distinct but related functions:

- a policy function,
- a legal service function, and
- a public interest function.

### Policy Function

The Attorney-General is responsible within the Commonwealth Government for the administration of specific legislation, and the development and implementation of policy in specific areas. He is supported in the role by the Attorney-General's Department. Essentially this is a function which is similar to that of other Ministers.

It is a function which in England is exercised by the Lord Chancellor, who is responsible for the civil law and the courts, and in other countries by the Minister for Justice.

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## Legal Services Function

As First Law Officer of the Commonwealth, the Attorney-General has general responsibility for Commonwealth laws, the legal system, and the Commonwealth's role within that system.

The Attorney-General's Department (and thereby the Attorney-General) deals with, amongst other items, "Legal services to the Commonwealth".

The legal service function of the Attorney-General has its roots in the Westminster system, and has been adopted in other countries, such as the United States.

Upon the establishment of the Commonwealth of Australia, the Attorney-General took on the role of adviser to and counsel for the Government. This role is not mentioned in the Constitution. However the Constitution does provide that the executive power of the Commonwealth:

*"extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth."*

Within this Legal Services Function, the Australian Attorney-General has a number of specific roles, including:

### **Role as Adviser**

The Attorney-General is the principal legal adviser to the Cabinet and the Commonwealth Government. He provides legal advice to the Cabinet, either directly or by way of comment on or endorsement of the advice of others. At times, the A-G provides written advice, and expresses agreement with advice given by members of the legal profession.

The Attorney-General is accepted as the final arbiter of legal advice within the executive branch, though of course his advice is in no way binding on a judge examining the same question.

It is part of the Attorney's role to ensure that the Commonwealth takes a consistent view in relation to key legal issues.

It is also part of the Attorney-General's role to ensure that a whole of government approach is taken in legal advice.

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## Role in Legislation

The Attorney-General is responsible for the Office of Parliamentary Counsel, which drafts legislation. The Office of Parliamentary Counsel is responsible for advising the Government that a bill is drafted in accordance with Cabinet or other authority. When a Bill for an Act has been passed by both Houses of Parliament, it is presented to the Governor-General for the Queen's assent.

In accordance with a standing request, the Governor-General is advised by the Attorney-General in respect of each Bill, whether the Governor-General should recommend any amendments and whether the Bill should be reserved for the Queen's pleasure.

The Attorney-General is also responsible for subordinate legislation, which is generally prepared by the Office of Legislative Drafting in the Attorney-General's Legal Practice.

## Role in Litigation

The Attorney-General is responsible for litigation relevant to the Commonwealth. Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or any person appointed by him.

Cases involving constitutional issues are brought to the attention of the Attorney-General under the *Judiciary Act 1903*. This enables the Attorney-General to consider whether to intervene in the case or apply for its removal to the High Court.

Such issues regularly arise in courts across Australia. The Attorney-General has a right to intervene in proceedings in any court which “relate to a matter arising under the Constitution or involving its interpretation”.

The Attorney-General is regarded as having a role in relation to other major litigation involving the Commonwealth. It is difficult to describe precisely when that role arises, but in practice it does so where significant “whole of government” interests are affected.

The Attorney-General also has responsibility for developing and administering more general policy issues in relation to the conduct of Commonwealth litigation.

The Attorney-General is accountable for his functions. He answers questions in Parliament; he is accountable to parliamentary committees; and he answers letters from other parliamentarians and affected members of the public.

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## Public Interest Function

In some areas, the Attorney-General has traditionally been seen as having a special independent public interest responsibility within government – that is, as distinct from a responsibility to protect the Government's interests.

The principal areas where this responsibility arises are in the litigation and prosecution processes.

The protection of public rights is the province of the Crown, and the Attorney-General has standing to obtain an injunction or declaration to enforce a Commonwealth law.

Further, a private person may bring proceedings to enforce a public right by a relator suit – that is, a suit brought by a private citizen in the name, and by the consent, of the Attorney-General.

In these proceedings, as with prosecutions, the Attorney-General is regarded as representing the public interest and the community at large.

At its highest, the Attorney-General's public interest role seeks to promote the rule of law in a representative democracy. It is a recognition that government is founded on the will of the people, and that government should therefore strive to act lawfully, and with respect when enforcing or defending a claim.

## Differences between the Modern Office of Attorney-General in the United Kingdom and Australia

Although a ministerial position in both countries, the position of Attorney-General in Australia differs in a number of respects from that in the United Kingdom.

Foremost, in Australia the Attorney-General is primarily a politician, heads a government department and is vested with numerous statutory powers.

He or she is usually a lawyer but does not need to be and recently, in some Australian jurisdictions, has not been.

In the United Kingdom, on the other hand, the Attorney is usually a Leading Counsel whose advice is confined to the most important legal matters and who is spared any administrative/departmental responsibility by a deliberate policy of separating the Attorney from daily politics.

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## Current Issues

There are two issues I will now comment on which impact on the role of the Attorney-General in all of the Australian jurisdictions.

### **Defender of the judiciary**

An aspect of the traditional role of the Attorney-General is as the “public defender of the judiciary”. The Attorney-General traditionally assumed the role of defender of the judiciary by instituting contempt of court proceedings.

Further, in Australia, the Attorney-General, by convention, defends the judiciary from unjustified political attacks. This role stems from the importance of the independence of the judiciary and the need to maintain public confidence in the rule of law.

In the mid-1990s, the then Attorney-General, the Honourable Daryl Williams QC, argued that given the separation of powers and the maintenance of an independent judiciary under the Constitution, it is no longer appropriate for the Attorney-General, as a member of the Executive, to defend the judiciary from political criticism. In his view, the role of defending the judiciary must be performed by the judiciary itself.

A former Chief Justice of Australia has a different view and he expressed it in his 1997 State of the Judicature Address when he said:

*“The Court does not need an Attorney-General 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 ground irrelevant to the rule of law”.*

Central to the Chief Justice’s position is that if the attack is from a political source, the response must be from a political identity. This must be so in order for the judiciary to remain aloof from the political arena.

Despite the intervening years, this issue has not yet been resolved in the Australian context. It is very much a “work in progress”.

### **Judicial Appointments**

One of the most important functions of Attorneys-General in all Australian jurisdictions is to make recommendations for judicial appointments. The Commonwealth Attorney-General is required by law (pursuant to the High Court of Australia Act) to consult with his counterparts in all states, concerning appointments to the High Court.

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What form that consultation takes and, more importantly, how effective this consultation has been, is the source of much debate.

While all governments, at both Commonwealth and State level, will say that the most essential criteria for appointments to the judiciary is merit, there seems to be many paths to determining this question.

In some jurisdictions it includes advertising for expressions of interest for at least some judicial offices, and in others what might be called “extensive consultation”. Recently there has been a public debate about the best methods of determining merit. In some common law countries we have seen the emergence of a “judicial appointments commission”. No Australian jurisdiction has yet gone down this path.

The current Australian Attorney-General has adopted a new judicial appointments process which has four essential elements:

- Public advertising for expressions of interest,
- Extensive consultation with individuals and professional bodies,
- Establishing a panel to assess all candidates against published criteria, and
- Recommendations being made to the Attorney-General by the panel on a number of highly suitable candidates.

Importantly, this procedure does not apply to High Court appointments.

This process is still in its infancy and problems will undoubtedly emerge in its practical operation. Whether it is suitable or appropriate for all levels of Federal Courts is also under discussion.

The Law Council of Australia has recently determined its own policy on judicial appointments and it largely follows the above-mentioned process.

The processes adopted in all Australian jurisdictions vary enormously and, yet again, this whole area is very much a “work in progress”.

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