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SIR RICHARD BLACKBURN LECTURE

“THE ATTORNEY-GENERAL – A HYBRID CHARACTER WHO NEEDS TO BE VERSATILE”

The Honourable Justice John F Gallop, AM, RFD
Federal Court of Australia
Supreme Court of the Australian Capital Territory
Supreme Court of the Northern Territory
Supreme Court of Christmas Island

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On this occasion of the Blackburn Lecture, it is appropriate that I make some reference to Sir Richard’s career as a great Australian and a much revered Judge.

We all cherish our own individual memories of such a great man. Outstanding scholar he was, not only merely in the academic sense. He was a scholar of history, the arts, music and humanity. He was always an outstanding achiever. He was always a brilliant student. Sir William Forster went to school with him at St Peter’s College, Adelaide over 50 years ago. He remembered him as the boy wonder who walked off the stage on speech day, arms groaning under the weight of the book prizes which he took off each year.

His first judicial appointment was as the resident judge of the Supreme Court of the Northern Territory following the death in office of Mr Justice Alan Bridge. Judges are supposed to be men of fortitude, able to thrive in a
hardy climate and take all the abuse an unruly mob can hand them. Sir Richard soon demonstrated his outstanding qualifications for judicial office. He was received in the Northern Territory at a welcome ceremony in the Supreme Court, Darwin, early in 1967. One of the addresses of welcome was from a colourful local practitioner named Mr John Lyons. Lyons’ not infrequent ferocity with judge and witness alike earned him the sobriquet of “Tiger”. His wiliness as an opponent and earthy charm with a jury served to achieve many dubious results in the courts of the Northern Territory. In his speech of welcome, Lyons set about to intimidate Sir Richard by regaling him with the prospect of virtually daily applications for prerogative writs and esoteric arguments on property and probate. It was not long before Sir Richard demonstrated to Lyons and the legal profession generally that he was more than equal to the resolution of any such matters that might be raised.

He complemented his erudition and academic background with a practical approach, enormous industry and above all, a sense of humanity. He exemplified the observation of Lord Kilmuir in his Volume “Judicial Qualities” that “... there is much to be said for the view that a kindly and patient man will make a far better judge than an ill-tempered genius”.

He was a Judge of the Supreme Court of the Northern Territory from 1966 to 1971. He was appointed as a Judge of the Supreme Court of the Australian Capital Territory and occupied that office from 1971 to 1977. He was appointed Chief Judge on 7 November 1977 and then Chief Justice on 7 May 1982 until his retirement on 31 March 1985. He died on 1 October 1987.

I well remember my first appearance before Sir Richard in the Supreme Court of the Northern Territory, Darwin, in 1967. It was not a case of any great moment and, as I had no opponent, winning the case was not to be regarded as one of my more illustrious performances. I well remember my first impressions. He treated me with profound courtesy, tolerance and patience. I subsequently appeared before him as counsel in the Federal Court of Australia and in this court and always received the same degrees of courtesy and patience.

After I had finished my appearance before Sir Richard in 1967 and later in the day, young Ryall, whom I had known during my earlier years as a Crown Prosecutor in the Northern Territory, suggested that we might repair
to Sir Richard’s chambers and attack his refrigerator contents. I somewhat reluctantly felt obliged to accept the invitation to partake of some judicially funded refreshments. My reluctance did not take long to dissipate. Upon my appointment to this court – you will note that I took my time about coming clean to Sir Richard – I told him about Ryall’s generosity. I remember how Sir Richard thought it was such a great joke and recalled his first associate with affection.

I know perhaps better than most that youth harbours brashness, inexperience causes mistakes. His Honour’s courtesy and patience were often stretched in the Supreme Court of the Northern Territory and in this court. In the Blackburn era as a Judge, Chief Judge and Chief Justice of this court, the profession grew and matured considerably. The courts in which his Honour presided were the gateway to practice for many young practitioners. Hence it fell upon Sir Richard over all those years to guide and mould a young profession in their practice of the law both in the Northern Territory and in the Australian Capital Territory. We remember him with great affection.

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 some consideration of the separation of powers as provided in the Commonwealth Constitution. The founding fathers of the Australian Federation, taking instruction or guidance from the United States Constitution, adopted a similar separation of powers to those contained in the United States’ Constitution. The Legislative, Executive and Judicial powers are treated in the Australian Constitution as separate powers. Chapter One deals with the Legislative power, which is vested in the Parliament; Chapter Two deals with the Executive power, which is vested in the Federal Executive Council; Chapter Three deals with the Judicial power, which is vested in the Courts.

The separation of the personnel of the Legislative organ and the Executive organ of a government was not adopted from the American model, but on the contrary, the conventions of responsible government were accommodated by a requirement in section 64 that Ministers be members of either the House of Representatives or the Senate. Moreover, the difficulties
which arose in the United States with respect to the delegation of legislative power to the Executive so as to authorise the making of regulations were avoided by the High Court of Australia. From the beginning it upheld the power of the Commonwealth Parliament to authorise the making by Executive government of regulations and proclamations having legislative effect; *Baxter v Ah Way*¹, *Roche v Kronheimer*².

The relevance of the doctrine of separation of powers to this issue was discussed in the judgments in *Victorian Stevedoring and General Contracting Co Pty Ltd & Meakes v Dignan*³. The High Court’s view of the matter seems to have been founded pretty much on the practical consideration that the making of regulations is an essential aspect of the modern business of government.

The independence of the Federal Judiciary was protected by a Constitutional guarantee of security of tenure, originally for life, but subsequently until the attainment of the statutory retiring age, subject only to the power of removal on an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity and by a provision for the fixing of remuneration which could not be diminished during continuance in office.
The vesting of the judicial power of the Commonwealth in the High Court, and in such other Federal Courts as the Parliament creates, was held to prohibit the conferral of any part of the judicial power on any body other than a court consisting of Judges with the required tenure; *Huddart, Parker & Co Proprietary Ltd v Moorehead*[^4], *The State of New South Wales v The Commonwealth*[^5], *The Waterside Workers’ Federation of Australia v JW Alexander Limited*[^6]. The separation of the judicial power was made complete by the decision of the High Court in the *Boilermakers’ case*[^7] that Federal Courts were confined to the exercise of judicial powers and that attempts to confer non-judicial powers upon them would be invalid. The decision of the High Court was upheld by the Privy Council[^8]. Thus the Commonwealth Constitution not only provides for the separation of the Judicial power from the Legislative and Executive powers, but provides constitutional guarantees of essential conditions underpinning the independence of the Federal Judiciary.

The reason for the title to this Paper is that the Attorney-General, in the ordinary conduct of his office, straddles the three arms of government. He is required to exercise legislative powers as a member of the government, he is
required to administer his own department and he also has special responsibilities relating to the independence of the judiciary and the courts. In truth, the modern Attorney-General is a political triathlete.

**THE HISTORY OF THE OFFICE OF ATTORNEY-GENERAL**

The origins of the office, like those of most of our legal institutions, are to be found in 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 thirteenth century, there appears the first written record of the appointment as King’s Attorney of one Lawrence del Brok, who held office for fourteen 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.
The Attorney-General’s role in the prosecution of crime derives from the Royal Procurial Function. In *R v Wilkes*¹⁰, Chief Justice Wilmot of the Court of Common Pleas explained the constitutional basis for this role:

“The 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, 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.

There were two conflicting philosophies of what was required of the modern Attorney-General in British political life. Sir Peter Rawlinson served as Attorney-General from 1971 to 1974 in the Conservative governments led by Mr Harold McMillan and Mr Edward Heath respectively. It was as a result of a case known as *Gouriet v Union of Post Office Workers*¹¹ that Lord Rawlinson, as he became, was prompted to describe the proper role of the Attorney-General in Britain. His view was that the Attorney-General,

“...ought to be aloof from his colleagues in the Ministry to a quite formidable extent. Even in ordinary matters of law affecting the government he should attend upon Cabinet, give his opinion and leave. With prosecutions, it should be even more formal.”
Needless to say the Attorney-General of the day did not agree with Lord Rawlinson. He 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.\textsuperscript{12}

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. It is, however, not necessary for the purposes of this paper to trace the history of the office in the United States and in the various nations of the Commonwealth. The history of the office in Australia, however, is important.

From colonial times the Attorney-General has always been an important political, as well as legal, figure. He has been a member of 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.
It has not been uncommon for the Attorneys-General of the States and Territories to hold other major portfolios. The modern Australian Attorney-General, whether in the Federal, State or Territory scene, has the duties and responsibilities deriving from the Executive prerogative power and other duties and responsibilities conferred on the office by statute. The Attorney is also a Minister of State and a Member of the Parliament with the duties and responsibilities attaching to those positions and must demand considerable versatility. This gives a somewhat hybrid character to the office of the modern Attorney-General. The present ACT Attorney-General is also the Deputy Chief Minister, Treasurer and Minister for Justice and Community Safety. It is not difficult to envisage that 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. It is this hybrid character of the office which warrants further consideration.

**EXERCISE OF THE PREROGATIVE DISCRETION**

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 *amicus curiae* and to provide legal advice to Cabinet and Executive Counsel. 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 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 judgment. 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”.

Since then there have been numerous cases from time to time involving the Attorney-General of the day and his critics for either instituting proceedings or refraining from doing so on instructions from Cabinet.
Eventually, however, both Conservative and Labour governments 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 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 and was not thereafter questioned in Britain.

The post-war 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 “the modern exposition of the Constitutional position of the Attorney-General”\(^{16}\). 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 all together excluded, and that is the repercussion of a given decision upon my personal position or my party in 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 the 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 communiqué of the Commonwealth Law Ministers who met in Winnipeg, Canada in 1978 seems to indicate that the Law Ministers adopted those 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 entirely upon the unimpeachable integrity of the holder of the office, whatever the precise constitution arrangements in the State concerned.”

Thus, the position of the independence of the Attorney-General in Britain seems to have been accepted by the Law Ministers of other Commonwealth countries.

**THE EL LICOTT RESIGNATION**

On 6 September 1977 the Commonwealth Attorney-General, Mr Ellicott QC, resigned as Attorney-General for the Commonwealth. The facts giving rise to his resignation and his reasons, which I shall now set out, are taken from his speech of resignation in the House of Representatives. Basically the reason for his resignation was what he conceived to be Cabinet’s interference with the exercise of his independent discretion in criminal
proceedings. These proceedings began with the laying of an information by a private citizen, a New South Wales lawyer, against Mr Gough Whitlam, Prime Minister of Australia from 1972 to 1975, Senator Lional Murphy, the former Attorney-General of the Commonwealth, and two other ministers of the Crown in the Whitlam Administration. The information charged the defendants with conspiring to effect an unlawful purpose, contrary to s 86 of the *Commonwealth Crimes Act*, the alleged unlawful purpose being that of deceiving the Hon J R Kerr, the Governor General, into approving a loan of $4,000 million “for temporary purposes,” when in fact the borrowing was for 20 years and was designed to meet the long term energy needs of the Government. If these assumptions were correct, the loan would arguably be in violation of the relevant constitutional instruments, *viz* the *Financial Agreement 1927*, the *Constitutional Alteration (State Debts) Act 1928* and the *Financial Agreement Act 1944*.

In two separate applications, first on behalf of the informant and later at the behest of three of the defendants, the Attorney-General’s consent was sought to his taking over the proceedings. In response to these applications, and earlier on his own initiative, Mr Ellicott had taken steps to obtain statements from relevant witnesses as to the subject matter of the private prosecution.
Statements were supplied by the Solicitor General, the Secretary of the Attorney-General’s Department and also certain officers of the Executive Council. Ellicott’s approach to the Secretary of the Treasury, however, was met with an outright rejection, the public official taking the position that the evidence sought from him related to events that took place during the period of the previous administration, when the Labor Party was in power, and consequently should not be produced even to the senior Law Officer of the Commonwealth. In due course, the difficulties experienced by Mr Ellicott in gaining access to all the documents that pertained to the overseas loan negotiations, which he deemed an essential precondition to deciding whether or not to take over the private prosecution, came before the Cabinet for resolution. It discussed the Attorney’s request on several occasions, eventually deciding that it should invoke Crown privilege with respect to the key papers that Mr Ellicott wished to examine.

In taking this stand in opposition to the Attorney-General the Cabinet rejected the philosophy adumbrated by Mr Ellicott that,

“... there is no place where the criminal law does not run, even in the Executive Council, nor can any convention that a government should not look into the affairs of a previous government prevent inquiry for the purposes of enforcing the criminal law.”
The confrontation in Canberra, it will be readily recognised, bears a striking resemblance to that which took place in Washington a few years earlier at the height of the Watergate affair when President Nixon sought to resist, also under the cloak of executive privilege, the no less determined efforts of the special prosecutor, Archibald Cox, to gain access to relevant evidence in the form of tapes of Richard Nixon’s discussions with ministers and senior officials. Even at this distance in time it is possible to feel the sense of frustration that each side in the Australian dispute must have experienced at the turn of events, to which was added the no less dogged determination to prevail, if not by the force of logic then by resort to what each conceived to be the source of final constitutional authority.

Before proceeding to outline the events that ensued from the basic disagreement between Mr Ellicott and his Cabinet colleagues it is worth noting that, subsequent to his resignation, the Attorney-General’s philosophy was resoundingly supported by the High Court of Australia in an unanimous ruling given in the case of *Sankey v Whitlam et al*\(^\text{17}\). The High Court was faced with an application by the private prosecutor to have much the same list of documents, pertaining to the controversial Middle East loan proposal, produced as evidence before the pending preliminary hearing. In ordering
that, with one exception, all the documents sought to be introduced should be placed at the disposal of the private prosecutor the Justices of the High Court swept away the last vestiges of the special privilege hitherto accorded that class of documents generally described as Cabinet papers, minutes, memoranda and other communications concerned with policy decisions at a high governmental level. The traditional view of English law had been that the disclosure of the contents of documents falling within this special class, no matter what they might individually contain, would inhibit the proper functioning of executive government and accordingly their non-disclosure was necessary for the proper operation of the public service. Gradual inroads into this expansive umbrella of protection were given a powerful stimulus by the voluntary restrictions announced in 1956 and 1962 by the Lord Chancellor, speaking on behalf of the executive branch of government. Later, substantial modifications of the original doctrine stemmed from the leading decision of the House of Lords in Conway v Rimmer\textsuperscript{18} authorising the trial judge to make up his own mind on the question whether production of the evidence, contained in the Cabinet documents, would or would not be harmful to the public interest despite official views to the contrary.
In the judgment of the High Court the fundamental principle should be that documents, including State papers at the highest level, may be withheld from disclosure only if, and to the extent that, the public interest renders it necessary. The real difficulty arises in determining on which side the balance of conflicting public interests should fall. The fact that members of the executive council are required to take a binding oath of secrecy, it was stated by the High Court, does not assist the argument that the production of State papers cannot be compelled. As Gibbs CJ aptly described the dilemma in the case before the court,

“If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead become a shield to protect wrongdoing by ministers in the execution of their office.”

Stephen J spoke in similar terms when he stated,

“... to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent power: by a decision to claim privilege dismissal of the charge will be well nigh ensured.”

The further important point was made, by Stephen and Mason JJ, that the High Court’s ruling in favour of disclosure stemmed from a combination of factors, viz that the course of justice should not be impeded and also the
unusual character of the criminal proceedings, involving charges against a former Prime Minister and senior members of his ministry related to their conduct in office.

These views by the High Court of Australia were not known a year earlier when Mr Ellicott was waging a solitary campaign against the Prime Minister, Mr Malcolm Fraser, and the other members of the Cabinet. In repeatedly refusing to agree that the Attorney-General should have unrestricted access to documents in the possession of the government’s servants the Cabinet made its position even more plain by urging the Attorney-General to take over the proceedings and terminate the prosecution. Mr Ellicott’s reaction to this advice, conveyed in the course of a meeting of the Cabinet on 26 July 1977, set the course for his ultimate decision to resign. This decision, moreover, was preceded by earlier intimations to the Prime Minister by Mr Ellicott that he was prepared to resign because of the “collision course” which he regarded as inevitable so long as he was thwarted in the execution of his responsibilities.

It is interesting to note also that Senator Durack, as the new Attorney-General, had to decide the same question as his predecessor. After taking
counsel’s advice he decided against taking over the committal proceedings. In his speech of resignation, Mr Ellicott had used strong words. The crux of Mr Ellicott’s complaint against his Cabinet colleagues is contained in his letter to Prime Minister Fraser which explained that he was resigning,

“... because decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney-General of my discretion in relation to the criminal proceedings in Sankey v Whitlam and others. In the circumstances I feel that I have no other course but to resign my office. I regard it as vital to our system of government that the Attorney-General’s discretion in criminal matters remains completely independent.”

The importance of the incident 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.”

The New South Wales Bar Association passed a resolution extolling the stand taken by Mr Ellicott as in keeping with the highest traditions of the office which he had left. A similar commendation was forthcoming from the
back-bench members of the administration’s own Law and Government Committee in the House of Representatives. These conclusions were not adopted in the assessment of the constitutional dispute contained in the influential *Australian Law Journal*. Since the nature of the criminal proceedings was inseparably connected with politics, the *Journal* concluded that the Cabinet, not the Attorney-General, was the better judge of the relevant public interest. Had the prosecution been taken over and continued in the name of the Attorney-General, even through independent counsel, the appearance of one government prosecuting its predecessor, it was claimed, would constitute an undesirable constitutional precedent. In the same philosophic strain the *Australian Law Journal* doubted whether the Shawcross and Winnipeg principles were ever designed to extend to criminal proceedings of the kind portrayed in *Sankey v Whitlam et al*.

Since the Ellicott resignation there has developed strong support for the principle affirmed by the Prime Minister in the above passage. 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 that the Attorney-General prosecutes for the Government and that Cabinet is the ultimate authority. Some see it as 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. Some think it 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.

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 judgment, 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, there seems to be 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. It seems, therefore, that 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.”

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 *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 The Queen* 20, the High Court took the same view with respect to the Attorney-General’s decision to file an *ex officio* indictment 21. 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.

One prerogative power of the Attorney-General which 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, including the Australian Capital Territory, they enable the power to be exercised by the Director of Public Prosecutions as well as the Attorney-General. In the Commonwealth area, the Director is empowered to decline to proceed further in the prosecution of a person under commitment or where the prosecution for the offence was
instituted, has been taken over or is carried on by the Director of Public Prosecutions. No doubt the Director is accountable to the Attorney-General and the Attorney-General is accountable to the Parliament for such decisions.

However, I confine my remarks to the Australian Capital Territory where, when a person is under commitment or has been indicted for an indictable offence, the Attorney-General or the Director of Public Prosecutions may decline to proceed further in the prosecution of the offence and may cause the prosecution to be brought to an end, (Director of Public Prosecutions Act 1990, s 7(6)). 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 or the Director 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 consent22.

The practice in Australia is probably not uniform. In this Territory, 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, (in my short experience I have never known that to happen in the Australian Capital Territory) perhaps simply to salvage a failing case and to enable the prosecution to have another try (inconceivable in the Australian Capital Territory) 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. 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*.

In the absence of 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.

The next important area which is the concern of the Attorney-General 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 the political head.

The Commonwealth and South Australian courts now have court-based administrations which are largely free of the control by the Attorney-General. They have what is known as the “autonomous” model. Other jurisdictions, however, including the Australian Capital Territory, have the “traditional” model. Court services are provided by a generalist executive department known as the Attorney-General’s Department or the Department of Law or some such appropriate name. These organisations are responsible for the administration of a range of different justice and justice related services. Essentially, court employees are public servants employed by the Executive government to whom they are ultimately accountable through a
Chief Executive Officer. The courts’ divisions of these organisations work in consultation with the Judiciary in matters of court administration.

Under the “autonomous” model, courts are entirely dependent for their operation on the court administration which provides staff and essential material equipment. The theory is that 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 the 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. Some say that this is no firm foundation for judicial independence. Some say 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 the 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 the 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 program with the legislation for the implementation of a governmental 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.

Fundamental to the administration of justice with which the Attorney-General is charged, is the funding of the 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. Obviously, it is the Attorney-General’s duty to resist these demands.

A couple of anecdotes are worth relating. A letter was received by the Chief Executive of a particular court from State Treasury inviting the Chief Executive to instruct the judiciary to increase their fines by a certain percentage in order to assist with achieving revenue targets for the government. Of course this was not complied with. In the second incident, the Chief Executive was appearing before a Parliamentary Capital Works Committee seeking approval and provision of funding for the construction of a particular courthouse. One of the Committee, a member of the legislature, asked whether the judiciary appreciated the extent of the cost to the public purse of constructing, maintaining and running a new court complex and
secondly, whether they took this into account when fixing the quantum of fines imposed on convicted persons. These events are merely illustrations of the problem. If ignorance is the cause of the problem, then this is a matter for serious concern.

Public confidence in the judiciary will be adversely affected if courts are not adequately funded and housed. Public confidence in the judiciary is fundamental to the way courts operate.

It is time to relate a story from one of Gillespie-Jones’ books called “The Lawyer Who Laughed”. Many years ago Kevin Dobson, a senior magistrate in Canberra, had a man before him charged with vagrancy, that is, he allegedly had no visible means of support. Not wanting to deal too harshly with the man, Mr Dobson asked him if he had any prospect of getting a job. The man replied, “Yes, I can start a new job potato picking at Young”. Mr Dobson asked “What pay will you get?”, to which the defendant replied “$40.00 per day”. The Magistrate exclaimed “But that’s more than I get”. “Yes” replied the defendant, “but I have to work for it”.
The Attorney-General must be prepared to explain firmly to his political colleagues 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 his political colleagues 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.

The financial dependence of the courts on the Executive Government is a reality. Justice McGarvie has said:

“Governments never have enough money to fund all deserving public causes. If a government in a democracy has to choose between spending money on a project which will help win the next election and one which will not, the former is usually selected. Spending money on the judicial system seldom helps win election.”23
It is a renowned fact that there are no votes in providing new court houses. Some years ago I spoke to a former Attorney-General for New South Wales who was by then a Judge. He related the story how Cabinet had cynically decided to build three new court houses in New South Wales in the electorates in which they were either in danger of losing the seat or had good prospects of gaining the seat. Having done so, they were not successful in any of the three electorates.

Having provided the resources it is essential that the resources in use in connection with the work of the court 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 in which it operates and must have power to exercise control over ingress and egress, to and from the building. 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 vested with such rights of control over its buildings and facilities, its independence and its capacity to
perform properly 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 to physical access to the court building. Moreover the courts must be able to ensure that their proceedings are known to the press and to 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. It is part of the Attorney-General’s unique ministerial role as Law Minister to make all this clear to ministerial colleagues, the public service and the public.

I turn to another subject which is controversial namely, the role of the Attorney-General in relation to misplaced or uninformed criticism of the judiciary. It is an important topic and has been the subject of some public discussion. 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. 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.

It is pretty difficult at the present time to discern any sign of reticence or restraint in the media’s treatment of the judiciary in some places, not the Australian Capital Territory. 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 Aborigines and Torres Strait Islanders. Similarly, Judges of the High Court were criticised in patently offensive terms by a political candidate in the Federal sphere because the High Court held that he was not qualified to put himself up for election. 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 method used is to extract passages from judgments 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. The now infamous passage of a summing up, “rougher than usual handling” is a notorious example. Such phrases are taken up by some groups who 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.

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 creating the risk of 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 1 May 1997. Sir Anthony Mason took up the issue in an address in October 1997. 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. 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.
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.
The Attorney-General occupies a unique ministerial role as the political guardian of the administration of justice in his relations with his party colleagues, the parliament and the public. Part of that role is to defend the integrity of the system of justice against attacks which threaten public confidence in it, even, if necessary, against political colleagues. I believe that the judiciary and the public are entitled to look to the Attorney-General to explain publicly, no doubt with appropriate discretion and regard to his political responsibilities, matters which may have been misrepresented or misunderstood by other members of the government. Judges can do much and should do more 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.

A further aspect of the unique position of the Attorney-General relates to judicial appointments. Responsibility for making recommendations to government for appointments to the judiciary at all levels rests with the Attorney-General. The Attorney-General’s responsibility for the integrity of the administration of justice requires advice and indeed positive insistence to government 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 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.

In the process of appointment of judges, the community, through the elected government, has a legitimate voice in the choice of the sort of person who is to sit in judgment on its citizens. In that process, the role of the Attorney-General is, of course, 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.

The notion of a judiciary chosen to be representative of the various component groups of society is a theory which 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.
Those who say that appointments 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, are mistaken. That is a dangerous theory and cannot be allowed to prevail. The theory of a representative judiciary is appalling nonsense. Impartial decision-making by independent judges must be the goal and that goal is best achieved by the appointment of the most suitable people to hold judicial office irrespective of sex, religion, ethnic background or any other extraneous factor. It is, in my opinion, incumbent upon an Attorney-General to uphold these principles and to insist on the observance of them by 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.

What emerges from a consideration of the issues canvassed 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 government control and direction and the Attorney-General must be understood to be primarily a politician with political responsibilities to government and his own 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 is our constitutional system, although not as pervasive as it once was, remains undiminished in importance. The faithful discharge by the Attorney-General of this role of political guardian of the integrity of the administration of justice is an indispensable ingredient of the political and constitutional foundation of our system of independent and impartial justice.

1 (1909) 8 CLR 626
2 (1921) 29 CLR 329
3 (1931) 46 CLR 73
4 (1909) 8 CLR 330
5 (1915) 20 CLR 54
6 (1918) 25 CLR 434
7 R v Kirby; ex parte Boilermakers’ Society of Australia (1955-56) 94 CLR 254
8 (1956) 95 CLR 529
9 The office of Attorney-General – Shawcross “Parliamentary Affairs” Vol VII No. 4 Autumn 1954
10 (1768) 4 Burr 2527; 97 ER 123
11 (1777) 3 All ER 71
13 The Role of the Attorney-General – Carney 9 Law Review 1-9
14 Judiciary Act 1903 (Cth) s 78A
15 The Law Officers of the Crown – p 179 et seq
16 Ibid p 223
17 (1979) 21 Aust LJ 505; [1980] CLR 1
18 [1968] AC 910
Who Speaks for the Judges – Paper delivered by The Hon Daryl R Williams, AM, QC, MP at a National Conference on “Courts in a Representative Democracy” 11-13 November 1994

(1980) 32 ALR 449


The Attorney-General Politics and the Public Interest – Edwards pp 444-8


35 Law Society Journal, p 51
