THE MODEL OF A MODERN SOLICITOR GENERAL

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In Anthony Trollope's novel *Phineas Finn*, when the eponymous hero has reached the peak of his power and fame in Victorian London as the Under-Secretary of State for the Colonies, he reflects on the career he could have had in the law had he not gone into politics, and concludes that he never would have enjoyed such an exciting life as a lawyer, "even if he should have come to be Solicitor General". You may judge later whether Trollope overestimated the pleasures of this particular office.

J H Plunkett as NSW Solicitor General

First, however, I should say something about John Hubert Plunkett, effectively the fourth Solicitor General for New South Wales. He was born in County Roscommon in 1802 and, after studying at Trinity College in Dublin, he was called to the Irish Bar in 1826 and then to the English Bar.[1] He was a political associate of Daniel O'Connell and this led to his appointment as Solicitor General for New South Wales in 1831. In 1836 he added the post of Attorney General, although he continued to carry out the duties of Solicitor General despite the abolition of that office. His best known piece of litigation occurred in 1838 when he prosecuted the perpetrators of the Myall Creek massacre, which resulted in the death penalty for seven of the accused. In terms of legislation, he was heavily involved in the passage of the Church Act of 1836 that disestablished the Church of England in the colony.

In 1843, continuing as Attorney General, he became one of the 12 official nominees in the newly constituted and partially elected Legislative Council. When the office of Chief Justice became vacant in 1844 he was effectively an applicant but lost out to Justice Alfred Stephen who was a puisne judge of the court.

One of Plunkett's particular interests was education at all its levels. In 1848 he had been the first chairman of the body responsible for religious education in schools and in 1849 he was a member of the committee that led to the establishment of the University of Sydney, becoming a member of its first Senate. He was later Vice-Chancellor of the University over the period 1865 to 1867.

Plunkett had an extremely varied parliamentary and ministerial career after 1856, when the colony now had a fully elected Legislative Assembly and a fully appointed Legislative Council. This took the form of:

- member for the country seat of Argyle in the Legislative Assembly, 1856-1857;
- nominated to the Legislative Council and elected its President, 1857-1858;
- member for the electorate of Sydney in the Legislative Assembly, 1858-1860;
- nominated to the Legislative Council and Vice-Presidency of the Executive Council, 1863-1865; and
- Attorney General in the Ministry of Premier Cowper, 1865-1866

Plunkett died in 1869 after this long career of public service. Even this list of offices and accomplishments, however, does not do justice to the mark that he made on the infant colony. It was his contemporary, John Fairfax, who described him as "the greatest friend of civil and religious liberty in the colony".

History of the Office of Solicitor General

The Solicitor General is the Second Law Officer of the Crown, to use a somewhat ancient formula. The First Law Officer is, of course, the Attorney General. By the beginning of the sixteenth century at least, references can be found to the role of the King's Solicitor who was summoned to provide assistance on legal matters to the House of Lords.[2] At about this time the

King's Attorney had become more commonly known as the Attorney General of England. In 1515 the newly appointed King's Solicitor – John Fort – was accorded the title of Solicitor General. It might be noted that the King's Sergeants initially took precedence over both these other officers within the legal profession but by the middle of the sixteenth century this position had been reversed.

The first of the two Law Officers to sit in the House of Commons was in fact the Solicitor General – Richard Onslow in 1566. The House of Commons expressed less enthusiasm, however, for the presence of the Attorney General and had a rule of exclusion until 1670 (although some Attorneys General had sat as members of the House of Commons for the early part of the seventeenth century, notwithstanding this formal rule).

The capacity of the Solicitor General to carry out the functions of the Attorney General in the absence of the First Law Officer was raised in the prosecution of John Wilkes for seditious and obscene libel in 1770.[3] There was a vacancy at this time in the office of Attorney General and the information was laid by the Solicitor General – Sir Fletcher Norton. Lord Mansfield considered that in this situation – or in the case of absence or disability on the part of the Attorney General – "the business (which cannot stand still) must devolve upon another of the King's Counsel; and there is nothing so certain, as that the whole business and authority of the Attorney devolves upon the Solicitor General." It was not until 1944 that Lord Mansfield's proposition was embodied in legislation which provided for the Solicitor General carrying out the duties of the Attorney General – and vice versa – in the event of either office being vacant or the occupant being absent or under a disability.[4]

Both the Attorney General and the Solicitor General maintained – and exercised – a right of private practice until 1894 when, at the instance of the Prime Minister, Mr Gladstone, this right was withdrawn. Readers of Trollope's *Barsetshire Chronicles*, set in the 1850s, will recall that the fictional Attorney General – Sir Abraham Haphazzard – was briefed to provide an opinion in relation to a dispute about church affairs in his private capacity. Many of those who started in the post of Solicitor General went on to high judicial office, including that of Lord Chancellor. Two of the best known who followed that path in the twentieth century were the flamboyant F E Smith, later Earl of Birkenhead, and the more clinical John Simon, later Viscount Simon, who in addition to the office of Lord Chancellor was at different times Home Secretary, Foreign Secretary and Chancellor of the Exchequer.

The current Attorney General for England and Wales is Richard Hermer KC who is not a member of the House of Commons but was appointed from the Bar with a life peerage to sit in the House of Lords. The current Solicitor General is Eleanor Reeves who is a member of the House of Commons.

History of the Office of Solicitor General in NSW

The first Solicitor General for New South Wales – John Stephen – was appointed in 1824.[5] The office was then maintained until the present time, with the exception of the periods 1836-1849 and 1873-1894 when it was abolished. Until 1922 the Solicitor General was, with the occasional exceptions, a member of one of the Houses of Parliament and also of the Cabinet. In 1922 the then Parliamentary Draftsman – Cecil Weigall – was appointed Solicitor General. He was not a member of either House of Parliament and could not, therefore, be appointed a Minister. He held the position of Solicitor General until 1953 and carried out many of the current functions, although he also performed some administrative duties within the Crown Law Department. His successor in 1953 was a practicing barrister – Harold Snelling QC and all subsequent occupants of the office have been appointed from the Bar.

The powers and duties of the Solicitor General were given statutory form in the Solicitor General Act 1969:[6]

> (1) The Solicitor General may—
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> (a) act as Counsel for Her Majesty and may perform such other duties and functions of Counsel as the Attorney General directs,
>
> (b) exercise and discharge the powers, authorities, duties and functions conferred or imposed on the Attorney General by or under any Act or incident by law to the office of the Attorney General if—
>
> (i) the office of Attorney General is vacant, or
>
> (ii) the Attorney General is absent from the State, or
>
> (iii) the Attorney General is on leave but still within the State, or
>
> (iv) the Attorney General is unable to exercise and discharge the powers, authorities, duties and functions because of illness.

(2) The provisions of subsection (1) shall have effect notwithstanding any delegation made under section 4 in respect of any power, authority, duty or function referred to in paragraph (b) of subsection (1) and any such delegation and any terms of such delegation shall have no operation or effect during any period the Solicitor General may exercise or discharge such power, authority, duty or function pursuant to the said paragraph (b).

It will be observed that, uniquely amongst the various jurisdictions in Australia, in the absence or unavailability of the Attorney General, his or her statutory and common law functions are to be exercised by the Solicitor General. During such periods another minister would normally act as Attorney General but only for the purpose of political functions as opposed to the statutory and common law roles of the Attorney General.[7]

Office of the Solicitor General in other Australian jurisdictions

In addition to New South Wales, each State has a Solicitor General, together with the Commonwealth and the two Territories. All are appointed in the same way – by the Executive Council after a Cabinet decision – and broadly exercise the same functions. In each case the officers are established by legislation which includes provisions for the period of office and grounds for removal. It might be noted that the New South Wales legislation appears to provide a right of unremunerated private practice to the Solicitor General[8] and there is provision in the Queensland, South Australian, Tasmanian, Western Australian, Australian Capital Territory, Northern Territory and Commonwealth legislation for remunerated private practice on the part of the Solicitor General to be approved by the Governor-in-Council or the Attorney General.[9]

Office of the Solicitor General in the United States

The office of Solicitor General was established in the United States – at the same time as the Department of Justice – in 1870 during the presidency of Ulysses Grant.[10] Amongst the occupants of the office since 1870 have been William Taft (who later became President over the period 1909-1913); John Davis (who was the Democratic candidate for the Presidency in 1924); future Supreme Court Justices Stanley Reed, Robert Jackson and Thurgood Marshall and current

Justice, Elena Kagan; and the prominent academic lawyers, Archibald Cox, Erwin Griswold and Robert Bork. In the 1950s the advisory and administrative functions of the office were transferred to the Attorney General's Office so that it now deals exclusively with cases before the US Supreme Court. In addition, 32 of the 50 States in the US have the office of Solicitor General, although there is some variation in the functions between the different jurisdictions. The current Solicitor General is Dean John Sauer who was previously the Solicitor General for the State of Missouri.

Role of the Solicitor General in constitutional cases

The Solicitor General normally appears in all cases before the High Court involving questions of constitutional law. Constitutional questions may also arise in the Court of Appeal; before single Judges of the Supreme Court; in the District Court; in the Federal Court; and even, on occasions, in the Local Court.

The Solicitor General will appear in constitutional cases where the State (or one of its agencies or instrumentalities) is a party, but may also appear on behalf of the Attorney General of the State as an intervenor where constitutional issues are raised by the Commonwealth, another State, or by private parties. The Attorneys General have a right to be heard in any proceedings relating to a matter arising under the Constitution.[11]

There was a time when large-scale constitutional confrontations regularly took place in the High Court between the Commonwealth and the States over the allocation of powers between these polities under the Constitution. But it is now relatively rare to find these polities on different sides. There was such a case in 2023 when a private litigant challenged – on the basis of s 90 of the Constitution – Victoria's tax on the mileage of electric vehicles and the Commonwealth supported that challenge which was resisted – unsuccessfully – by all the States.[12]

Many of the constitutional cases in the High Court in recent years have been challenges to federal or State legislation on the basis that it contravenes the implied freedom of political communication under the Constitution or contravenes the principle in Kable v Director of Public Prosecutions[13] which invalidates any legislation that imposes functions on federal or State courts in a way that adversely affects their institutional integrity. Because both these doctrines are a

limitation on legislative power, it would usually be the case that the Solicitors General for the Commonwealth and the States would all be present at the Bar table to defend the legislation in question, whether it be a federal or a State statute. In a typical case concerning the implied freedom in 2022, there was a challenge to a provision of the Surveillance Devices Act 2007 (NSW) that effectively prohibited the provision to the media of film footage of the treatment of animals on agricultural properties where those filming had entered the property in question by way of trespass. NSW was supported by the Commonwealth and three of the other States and the legislation survived the challenge by the narrow margin of a four to three decision of the Court.[14]

One example of the problems caused by Kable for law enforcement bodies was in relation to so-called motorcycle clubs that are in reality organisations specifically established to engage in widespread criminal conduct. Because the criminal law has generally been designed to deal with individuals engaging in particular instances of illegal conduct, these kinds of organisations pose a difficult problem. In the decade after 2010 legislation was enacted in various States and Territories that differed in various respects but essentially allowed the police to apply to the Supreme Court for a declaration that an organisation represented a risk to public safety and order because its members associated for the purpose of engaging in serious criminal activity. If this kind of declaration was made, the police could then apply to the Court for a control order in relation to the members of the organisation that would effectively prevent them from associating with one another.

Over the next decade I was involved in four cases in the High Court where legislation of this type was challenged and three further cases involving these kinds of criminal organisations.[15] The basis for the challenge in the four cases was that the legislation undermined the independent status of the court by giving the appearance that it was merely putting into effect the decisions of the executive government. Three of the seven cases concerned legislation by the NSW Parliament and the challenges to these statutes essentially failed as did challenges to Queensland, Western Australian and South Australian legislation, although one South Australian statute was invalidated. The whole saga demonstrates, however, the ability of well-financed and determined criminal organisations to engage in litigation at the highest level over a long period of time.

On a somewhat similar subject there has been considerable legislation in all the Australian jurisdictions in relation to terrorist offences in the wake of the events of September 2001 and I have been involved in challenges to some of this legislation in the High Court and the NSW Court of Appeal.[16] A common aspect of this kind of legislation is the provision for continuing detention orders where a person has been convicted of a terrorist offence but has come to the end of his or her sentenced period of imprisonment in circumstances where he or she is still considered by the relevant authorities to pose a danger to the community. Another common aspect of such legislation is the availability of control orders, that is, supervision and monitoring, for persons who remain in the community but are considered to be at risk of committing a terrorist offence. It is the fact that the legislation gives the power to make continuing detention orders or control orders to the courts that has given rise to challenges under the Kable doctrine, although the challenges were unsuccessful in the cases in which I took part.

The other staple of constitutional litigation in recent times has been a constant series of challenges to federal and State legislation on the basis that the statutes in question contravened the implied freedom of communication under the Constitution. The implied freedom had its origins in Australian Capital Television Pty Ltd v Commonwealth,[17] where legislation was struck down that prohibited paid television and radio advertising by political parties and substituted free time to be provided by broadcasters, thereby removing the parties' predominant reason for soliciting funds from donors. Over the last decade the High Court has developed a complex test for the contravention of the implied freedom, based upon a doctrine of structured proportionality, although some members of the Court have never accepted that aspect of the test and successive majorities of the Court have said this year that it may be a useful tool of analysis in some instances but need not be invoked automatically.[18] It is true that most of the challenges in the High Court to legislation based on the implied freedom have failed but NSW legislation prohibiting political donations from corporations and limiting third party expenditure in election campaigns was invalidated.[19] It might be thought that both were designed to reduce the impact of money in the political landscape.

In the courts of New South Wales there have been a number of challenges in recent times to laws regarding protests and intrusions on infrastructure, such as bridges and tunnels.[20] There was also a challenge to legislation criminalising the public display of Nazi symbols without reasonable excuse. [21]

Professor Sawer once described the High Court's view of s 92, as it was in the 1950s and 1960s, as a "fantasy", by which he meant a judicial construct that had no basis in the Constitution. I would be inclined to make the same comment about the implied freedom and the tests for its contravention. Professor Thomas Poole of LSE Law School has noted that:

> Proportionality is plastic and can in principle be applied mostly infinitely forcefully or infinitely cautiously, producing an area of discretionary judgment that can be massively broad or incredibly narrow – and anything else in between.

As already noted, many of the challenges based on the implied freedom have been unsuccessful and the same is true for most of the challenges based on the Kable doctrine. But both doctrines have had a significant influence on the drafting of legislation at both the federal and State level so that they have been and remain a substantial limitation on legislative power.

Cases under the criminal law

I had not originally associated the Office of Solicitor General with the criminal law but this field has occupied a lot of my time in this role. Sometimes this is because there is a constitutional challenge to legislation in this area. This occurred on several occasions in relation to the legislation designed to ensure the continuing imprisonment of those convicted of three killings, those victims being Virginia Morse, Janine Balding and Anita Cobby. Those convicted comprised a small group who had been the subject of a recommendation by the trial judge that they should never be released from prison. This legislative regime was challenged three times in the High Court but on each occasion the challenge was rejected by the Court.[22]

I have appeared in a range of other criminal or quasi-criminal cases in the High Court in which there was no constitutional issue, including questions as to[23]:

- validity of search warrants;
- questions that might be asked of witnesses before the NSW Crime Commission;
- malicious prosecution;
- failure by an accused person to give evidence; and

- examination by law enforcement bodies of persons who have been charged or may be charged with a criminal offence.

One of the most torturous criminal sagas in which I was involved began with the disappearance of Kerry Whelan on 6 May 1997. She had arranged to meet her husband at his office in Western Sydney and then fly with him to Adelaide. When she did not arrive at his office, he drove to a hotel in Parramatta where he knew that she always parked her car. He found the car with the keys in the ignition but no sign of his wife. Neither he nor her children ever saw her again.

The last sighting of Kerry Whelan was made by security in the hotel carpark. She was shown walking up the exit ramp towards the street. She reaches the top of the ramp and appears to turn right. Then she moves outside the range of the camera. The following day her husband received a letter demanding a ransom of $1.25 million for the return of his wife but there was no further demand for a ransom and no return of Kerry Whelan.

Almost two years later in April 1999 Bruce Burrell, at one time an employee of Kerry Whelan's husband, was charged with her kidnapping and murder. Burrell's lawyers asked the Supreme Court to stay the trial, largely on the basis of the unfavourable publicity that he had received during the course of an inquest into the death of Kerry Whelan. This application was refused and Burrell appealed to the Court of Criminal Appeal where I appeared for the Crown. The appeal was dismissed in June 2004 and in March 2005 the High Court rejected an application for special leave to appeal against that decision.[24]

So the trial proceeded. In the absence of a body or any witnesses to what had happened, the prosecution case was entirely circumstantial. But the Crown used security camera footage from the hotel to argue that a vehicle closely resembling Burrell's four-wheel drive had arrived and departed from the front of the hotel at the same time as Kerry Whelan disappeared. The prosecution also relied extensively on two sets of handwritten notes found at Burrell's property – one which it said was a plan of the kidnapping and another which it said was a draft of the ransom note. Burrell did not go into the witness box to say what these notes meant. The trial lasted for three months and, after deliberating for ten days, the jury were unable to reach a verdict.

The second trial commenced in March 2006. In May Burrell was convicted of the kidnap and murder of Kerry Whelan. He was sentenced to life imprisonment. He appealed to the Court of Criminal Appeal and this case was heard in November 2006, when I appeared for the Crown. The Court of Criminal Appeal rejected Burrell's arguments but in doing so the judges referred to some evidence that had not been before the jury at the trial.[25] When this was pointed out by the Crown, the Court delivered a second judgment, saying that the mistake had no influence on its ultimate decision.[26]

A little more than a year later we were all in the High Court again, where Burrell's lawyers argued that the Court of Criminal Appeal had no power to bring down a second decision when the first one had already been finalised. The High Court agreed and said that Burrell's appeal would have to be heard again by the Court of Criminal Appeal.[27] So in December 2008 – almost ten years after Burrell had first been charged – the appeal was reargued and again rejected in June 2009.[28] There was no appeal to the High Court this time. I have set out this legal epic in some detail to give an idea of how cases can take on a life of their own and, as in this instance, last for almost a decade.

Advisory functions of the Solicitor General

The other major function of the Solicitor General, in addition to submissions to and appearances before the courts, is the provision of advice to the Attorney General and to government departments and agencies. In almost all these matters the requests for advice come to the Solicitor General through the Crown Solicitor. Many of these requests involve the ambit of the functions of the relevant government body under a particular NSW statute, although common law questions of contract and tort often occur. It will frequently be necessary to look at Commonwealth legislation where the issue is one of possible inconsistency between the State statute in question and the federal legislation.

It may be that, on occasion, a government agency disagrees with the advice that it has already received from the Crown Solicitor and seeks in effect a second opinion from the Solicitor General. It is also possible that two government agencies may take different views of a legal question and ask the Solicitor General to arbitrate between them. Such disputes should never, in my view, lead to litigation between government bodies and, if the matter cannot be otherwise

resolved, this should occur, in my view, by means of discussions between the two relevant Ministers.

It may be that, in the course of litigation or providing advice, the Solicitor General becomes aware of a problem with the existing law and then takes this up with the relevant policy officers in the Department of Communities and Justice or with the Parliamentary Counsel. Conversely those policy officers or the Parliamentary Counsel may seek the comments of the Solicitor General on proposed changes to a particular area of the law.

Delegated functions of the Solicitor Geneal

Under the Solicitor General Act, the Attorney General may delegate his or her powers and functions to the Solicitor General.[29] The delegations are, of course, revocable at any time. The current list of 28 delegated functions includes:

i) intervention in constitutional cases;

ii) intervention in cases generally, including in instances where leave is required;

iii) questions arising out of charitable trusts;

iv) whether contempt prosecutions referred to the Attorney General are to proceed;

v) whether claims of public interest immunity should be made by government departments or agencies;

vi) whether Senior Counsel should be briefed in a particular case and the level of fees that is appropriate, this normally being the rate fixed by the Attorney General;

vii) whether proceedings should be commenced against persons for disrespectful conduct in the courts, that is, conduct that falls short of contempt but is considered to fall within the statutory provisions protecting proceedings in courts; and

viii) grants of indemnity from prosecution and undertakings that disclosures will not be used in evidence in specified proceedings.[30]

Special Committee of Solicitors General

Three times a year the Solicitors General of the Commonwealth, States and Territories meet formally – as the Special Committee of Solicitors General – to consider current constitutional litigation in the courts of all Australian jurisdictions and to exchange views on what approach might best be taken to particular cases in those categories. Occasionally, as already noted, the Commonwealth and the States may be on opposite sides of a particular piece of litigation but this is a rare occurrence and would normally result in the Commonwealth leaving the States to discuss that case amongst themselves.

In the course of these meetings one jurisdiction may raise a question of statutory construction or law reform that turns out to be common to some or all of the other jurisdictions and the subsequent discussion may provide useful material towards the solution of the problem in all jurisdictions.

Advice by Solicitors General to vice-regal officers

One somewhat unresolved question is the role of Solicitors General in providing advice to the Governor – or at the federal level to the Governor General.[31] At one time it was common for such advice to be provided to vice-regal officers by the Chief Justice of the particular jurisdiction but, in the wake of Chief Justice Barwick's involvement in the events of November 1975, it is unlikely now that a Chief Justice would wish to provide such advice.

In the case of a legal question not involving the reserve powers, such as the validity of proposed legislation, there may be a threshold issue as to whether a Solicitor General is technically entitled to provide advice to a vice-regal officer without the consent of the Premier – or Prime Minister in the case of the Governor General – and/or the Attorney General. In any event, however, there is certainly a political issue as to whether this should occur. My own inquiries of my colleagues

over a period of time suggest that the practice varies in this respect as between the jurisdictions. Bradley Selway QC, then the South Australian Solicitor General, expressed the following opinion:[32]

> It is likely that the consent of the Attorney-General will need to be obtained before the Solicitor-General could so advise but the practice in some jurisdictions is now so longstanding that such consent would seem to be implied.

Professor Twomey has written that in NSW there is in effect a convention that "the Governor is given access … to the Solicitor General to give independent legal advice to the Governor if this is requested."[33]

In the case of questions arising out of a possible exercise of the reserve powers, greater difficulties may arise. The most likely case involving these difficulties is where an election has produced no clear majority in the lower House of Parliament for one party or one coalition of parties so that there is an issue as to who should be called on to form a government. In these circumstances the vice-regal officer may be conscious of the fact that the existing Prime Minister – or Premier – and Attorney General have an interest in the decision to be made and so in what advice might be allowed to be given to the vice-regal officer.

At the Tasmanian election of 13 May 1989 no party secured a majority in the House of Assembly.[34] In these circumstances the Governor took extensive advice from the then Solicitor General but also obtained opinions from two other constitutional lawyers and was supplied with five further opinions by the existing government and another opinion from one of the political parties.[35] It is interesting, however, that the Secretary of the Tasmanian Department of Justice considered that the Solicitor General was entitled to read and comment on any external legal opinions provided to the government:

> There is a strong tradition of the Government taking the Solicitor-General's advice on constitutional issues, and where outside advice is sought, that advice is ordinarily sought with the full knowledge of the Solicitor-General, and the Solicitor-General being able to comment on that advice to you. [36]

Initially the Attorney General complained that he had not approved the provision of advice to the Governor by the Solicitor General. [37] The Governor then returned the Solicitor General's opinions to the Attorney General but the Attorney General sent them back to the Governor, conceding that there may be a convention that the Solicitor General can advise the Governor directly on constitutional matters.

At the Tasmanian election of 20 March 2010 no party again secured a majority in the House of Assembly.[38] Ultimately the Governor commissioned the existing Premier to form a government after the Solicitor General had provided advice to the Governor in relation to the alternatives available to him in the wake of the election result.

At the recent election of July 2024, where once more no party secured a majority in the House of Assembly, the Governor commissioned the person who had been Premier prior to the election, although there is no public record of any advice that was taken into account in coming to this decision

Summing up

It will be obvious from all this material that a Solicitor General – and certainly the NSW Solicitor General – is engaged in the practice of law at a high level. But, in my view, he or she is also engaged in the role of public administration, acting as a source of guidance and warnings to the executive government in its function of providing essential services to the general community. This is no doubt the basis for Mary Gaudron's dictum that it is the best job going in the law.

23 October 2025

[1] These details of Plunkett's life are taken from John N Molony *An Architect of Freedom*: *John Hubert Plunket in New South Wales 1832 – 1869* (Australian National University Press, 1973). See also Volume 2 of the Australian Dictionary of Biography (Melbourne University Press, 1967).

[2] A detailed account of the history of the offices of the Attorney General and the Solicitor General can be found in J Ll J Edwards *The Law Officers of the Crown* (Sweet & Maxwell, 1964), especially Chaps 2 and 7.

[3] *R v John Wilkes* (1768) 4 Burr. 2527; 98 ER 327 (KB); *R v Wilkes* (1768) 4 Burr 2527; 97 ER 123 (HL).

[4] Law Officers Act 1944 (UK).

[5] A detailed history of the Office of the Solicitor General in New South Wales is contained in the article by the then Solicitor General, Keith Mason QC, in *Bar News* (Autumn 1998) at 22-27.

[6] Solicitor General Act 1969, s 3.

[7] See ss 36-38 of the Constitution Act 1902.

[8] Solicitor General Act 1969, s 2(5)(f)

[9] Law Officers Act 1964 (Cth), s 9; Solicitor General Act 1985 (Qld), s 16(1); Solicitor-General Act 1969 (WA), s 6; Solicitor-General Act 1972 (SA), s 6(b); Solicitor-General Act 1983 (Tas), 10(2)(b); Law Officers Act 2011 (ACT), s 19; Law Officers Act 1978 (NT), s 14(c).

[10] Act of June 22, 1870, ch. 150, 16 Stat. 162.

[11] See s 78A of the Judiciary Act 1993 (Cth).

[12] *Vanderstock v Victoria* (2023) 279 CLR 333 .

[13] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[14] *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 .

[15] *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Kuczborski v Queensland* (2014) 254 CLR 51; *Tajjour v NSW* (2014) 254 CLR 508; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219.

[16] *Thomas v Mowbray* (2007) 234 CLR 307; *Lawrence v New South Wales* (2020) 103 NSWLR 401.

[17] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[18] *McCloy v New South Wales* (2015) 257 CLR 178; *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1; *Babet v Commonwealth* (2025) 99 ALJR 883.

[19] *Unions NSW v State of New South Wales* (2013) 252 CLR 530; *Unions NSW v State of New South Wales* (2019) 264 CLR 595.

[20] See *Kvelde v State of New South Wales* [2023] NSWSC 1560; *Lees v State of New South Wales* [2025] NSWSC 1209.

[21] *R v Abdul-Wahab (No 3)* (unreported, Local Court of NSW, Donnelly LCM, 2024/372546, 29 October 2025).

[22] *Baker v The Queen* (2004) 223 CLR 513; *Elliott v The Queen* (2007) 234 CLR 38; *Crump v New South Wales* (2012) 247 CLR 1.

[23] *RPS v The Queen* (2000) 199 CLR 620; *A v NSW* (2007) 230 CLR 500; *NSW v Corbett* (2007) 230 CLR 606; Z v *NSW Crime Commission* (2007) 231 CLR 75; and *Lee v NSW Crime Commission* (2013) 251 CLR 196.

[24] *R v Burrell* [2004] NSWCCA 185; *Burrell v The Queen* [2005] HCA Trans 103.

[25] *Burrell v The Queen* [2007] NSWCCA 65.

[26] *R v Burrell* [2007] NSWCCA 79.

[27] *Burrell v The Queen* (2008) 238 CLR 218.

[28] *Burrell v The Queen* [2009] NSWCCA 163.

[29] Solicitor General Act 1969, s 4.

[30] See ss 32 and 33 of the Criminal Procedure Act 1986.

[31] See M Sexton, "The Role of Solicitors-General in advising the Holders of Vice Regal Officers" in G Appleby, P Keyzer and J M Williams (eds) *Public Sentinels: A comparative study of Australian Solicitors General* (Ashgate, 2014) at 91-103.

[32] B Selway, "The Duties of Lawyers Acting for Government" (1999) 10 *Public Law Review* 114 at 127.

[33] A Twomey, *The Constitution of New South Wales* (Federation Press, 2004), at 635.

[34] For a detailed account of the aftermath of the election see "Documents Concerning the Constitutional Events which Surrounded the Tasmanian General Election in 1989" (1991) 2 *Public Law Review* 4.

[35] A Twomey, "Advice to vice-regal officers by crown law officers and others" (2015) 26 *Public Law Review* 193 at 213.

[36] Report of Royal Commission into an Attempt to Bribe a Member of the House of Assembly and other matters (1991): Annexure JAR4).

[37] A Twomey "The Governor-General's Role in the Formation of Government in a Hung Parliament" (2011) 22 *Public Law Review* 52 at 66.

[38] See generally M Stokes, "The Role of the Governor where there is a Hung Parliament: The 2010 Tasmanian Experience" (2010) 21 *Public Law Review* 223.