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The Changing Role of the Attorney-General

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Abstract

The office of Attorney-General is an ancient one that remains central to the legal system. The Attorney-General exercises many functions and powers important to the legal system but is also a politician and member of cabinet. This article explains the key functions of the Attorney-General and also the political position of that officer. The focus of the article is upon federal law. It also examines three federal Attorneys-General of modern times and considers how their actions have influenced or reflected the changing conceptions of that office. The article does not suggest that changing conceptions of the office are either good or bad, but instead that they are a reality. The article suggests that these changes provide a reason to reconsider some of the traditional privileges of the Attorney-General, such as the power to grant a fiat in judicial review claims and the Attorney's privileged position in standing for judicial review of administrative action.

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I Introduction

Public law is replete with loose edges and inexact rules. We tend to associate most of that uncertainty with concepts and doctrines. Some of the cornerstones of public law remain elusive, such as the nature of judicial power, which is central to the allocation of power under the Australian Constitution. The High Court has acknowledged that the judicial power it exercises cannot be defined in a comprehensive manner.[1] The same is true of jurisdictional error, which has assumed a central role in modern Australian administrative law but may never be precisely defined.[2] There are also numerous loose edges around many of the offices vital to our public law framework. George Winterton noted that the key tenets of responsible government may be clear, but 'the edges are fuzzy and ill-defined'.[3] The place and role of cabinet in our governance is an example. Cabinet is arguably now the single most important political institution in Australia, whether at the federal, state or territory level

1. In *Saraceni v Jones* (2012) 246 CLR 251, 256 [2] Gummow, Hayne and Bell JJ conceded that 'it is not possible to frame a definition of "judicial power" which is at once exclusive and exhaustive'.
2. The High Court has conceded that the 'metes and bounds' of that concept have not been delineated and may never be: *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 573 [71].
3. George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 2.

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of government.[4] Cabinet is the apex predator of our polity. It is cabinet that determines government business of the day, such as what legislation will be tabled before parliament. Cabinet is also the arbiter, or at least the decisive forum for approval, of key decisions in government in a range of decisions, such as judicial and other public appointments, or decisions about Australia's entry into international treaties.[5] Legislative and other processes may underpin those decisions, but they will only be triggered after the imprimatur of cabinet is given. Yet, the Australian Constitution makes no mention of cabinet.[6] That constitutional omission has not obscured our understanding of cabinet because the basic rules governing cabinet conduct are widely known. Cabinet is not unlike a rough street gang. It demands solidarity and complete confidence, settles agreements in-house and ruthlessly casts out any member who breaks those rules.

This paper examines an office that sits within cabinet and is subject to expectations that may conflict with those governing cabinet. That office is the Attorney-General. The Attorney-General exerts a singular authority in our legal system and has long been described as the nation's first law officer.[7] The same description is also given to the Attorneys-General of the states and territories. As with cabinet, the Attorney-General is an institution we have inherited from English political practice, placed at the centre of many aspects of government, but one which we have done little to define.[8] Australian political practice has introduced one important distinction, which is that the Attorney-General is a member of cabinet. The political loyalty that follows from cabinet membership affects the Attorney-General but precisely how remains unclear. Many aspects of the role of the Attorney-General have been defined, and arguably changed, by those people who occupy it. This paper draws from two federal Attorneys-General of modern times, whose conception of their role has served to change it and also provoked considerable academic discussion. The paper uses those selected examples to consider the potential consequences for the role of the Attorney-General as the defender of the judiciary and the officer deemed to be able to represent the public interest in judicial review. The paper argues that the first role has changed and that the second role should. The paper also argues that, if the politicians who occupy the office of Attorney-General may change aspects of that role, it is equally legitimate for the courts to adjust those aspects of the office which are based in the common law. But it is useful to first sketch the role of the Attorney-General and some of the unique powers and privileges of that office.

4. The National Cabinet that sat regularly during the COVID emergency was a novel combination of all existing cabinets.
5. Approval of many such issues is a function formally vested in the Executive Council. That approval is a formality because convention requires that the vice-regal representative follows the advice embodied in cabinet's decision. The absolute nature was perhaps doubted when Gordon J noted that '*in general* the Governor or Governor-General defers to, or acts upon, the advice of his or her Ministers and not otherwise': *Comcare v Banerji* (2019) 267 CLR 373, 436 [147] (emphasis added).
6. An exception is the *Constitution of Queensland Act 2001* (Qld) s 42(1) which states that 'there must be Cabinet consisting of the Premier and a number of other Ministers appointed under section 43…'. Section 42(2) further provides that 'the Cabinet is collectively responsible to the Parliament'.
7. The High Court has often used this description for state and federal Attorneys-General. See, eg, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 517 (Mason and Brennan JJ); *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54, 73 (Brennan J); *CMB v Attorney-General for New South Wales* (2015) 256 CLR 346, 363 [47] (Kiefel, Bell and Keane JJ); *Taylor v Attorney-General (Commonwealth)* (2019) 268 CLR 224, 258 [93] (Nettle and Gordon JJ).
8. One reason for this uncertainty is that the powerbase within cabinet often changes, such as when an especially popular Prime Minister or Premier can dominate cabinet, or when a powerful cabinet committee or block of ministers becomes a de-facto inner cabinet: Patrick Weller, Dennis Grube and R Rhodes, *Comparing Cabinets: Dilemmas of Collective Government* (Oxford University Press, 2021) 3–12.

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II The Role and Powers of the Attorney-General

The office of Attorney-General is an ancient one which assumed the broad form we now recognise in the 17th century.[9] While the office was long seen as that of a leading lawyer, Attorneys-General in Australia now typically supervise a large department and hold other ministerial portfolios unrelated to the law.[10] The number and variety of these ministerial functions means that Attorneys do not have the time to assume the historical function of a senior lawyer for the government, who might regularly appear on behalf of the government, or provide detailed advice on complex legal issues. Accordingly, it is a fiction to suggest that an Attorney can or should be distinguished from other ministers as a practising lawyer.[11]

The federal Attorney-General instead exercises a great range of powers associated with the administration of the legal system, many of which affect the conduct of legal affairs across government.[12] An example is the power to issue Legal Services Directions under s55ZF of the *Judiciary Act 1903* (Cth). Those directions establish binding standards for the conduct of legal work by and on behalf of the Commonwealth, including model litigant rules governing those involved in that legal work.[13] Other powers and functions granted to the Attorney have a narrower scope but are vital to the legal system, such as approving requests for the extradition of people to and from Australia,[14] or the issue of certificates to certify that the disclosure of material to courts or other official processes would be contrary to the public interest.[15]

David Bennett noted that the functions of the federal Attorney-General extend beyond these individual ones contained in different statutes. One such function is to decide the position to be taken by the Commonwealth on legal questions that arise during litigation.[16] Bennett also noted that the federal Attorney takes a leading role in developing many aspects of legal policy, such as what issues are identified for law reform inquiries. Bennett observed that the subjects of law reform inquiries could vary from the 'politically charged…to the more technical', but all required the imprimatur of the Attorney-General before they could proceed.[17] A notable recent example is the announcement by the current federal government of its commitment to establishing a federal judicial

9. The office can be traced back several more centuries: House of Lords Select Committee on the Constitution, *Reform of the Office of Attorney General* (7th Report of Session 2007-08, HL Paper 93) para 3.
10. Over the 20th century, the portion of Attorneys who concurrently held portfolios not related to the law rose significantly, while the portion of Attorneys who held no other portfolios dropped considerably: Fiona Hanlon, 'The Modern First Law Officer in Australia' in Patrick Keyzer, Gabrielle Appleby and John Williams (eds), *Public Sentinels: A Comparative Study of Australia Solicitors-General* (Taylor & Francis, 2014) 119, 129.
11. Fiona Hanlon, 'Traditional Notions of the Attorney-General' (2008) 33 *Alternative Law Journal* 15, 17.
12. The *Administrative Arrangements Order*, made on 23 June 2022, allocates the Attorney-General responsibility for 155 federal statutes: <https://www.pmc.gov.au/resources/administrative-arrangements-order-23-june-2022>.
13. *Legal Services Direction 2017* (Cth).
14. *Extradition Act 1988* (Cth) ss15A, 15B, 16 and 22 (powers relating to the surrender of people by Australia for extradition), s40 (power for Australia to request extradition of a person by another country).
15. The Attorney performs this function under many statutes. See, eg, *Ombudsman Act 1976* (Cth) s9(3) (Attorney-General can furnish ombudsman with certificate stating that disclosure of material to ombudsman would be contrary to the public interest because it would prejudice national security, defence, international relations, disclose cabinet proceedings and other reasons); *Special Prosecutors Act 1982* (Cth) s6(1) (Attorney-General empowered to issue instrument stating functions to be given to special prosecutors).
16. David Bennett, 'The Roles and Functions of the Attorney-General of the Commonwealth' (2002) 23(1) *Australian Bar Review* 61, 73.
17. Ibid. The Attorney's power to refer issues to the Commission is confirmed in *Australian Law Reform Commission Act 1996* (Cth) s 20.

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commission. The government's decision to support that reform was surely influenced by the longstanding support of the current Attorney for a judicial complaints commission.[18]

The Attorney also assumes a special role in judicial appointments. While those appointments require cabinet approval, it is widely acknowledged that the Attorney leads and exerts considerable influence over all aspects of the selection process.[19] The singular influence of the current federal Attorney has been evident through his clear role in leading and shaping public discussion about reforms to processes for judicial, tribunal and other appointments to key positions in the legal system.[20] Those statements make clear that the Attorney-General is the driving force for influential legal appointments outside the courts, such as the role of President and individual Commissioners of the Australian Human Rights Commission, the President and individual Commissioners in the Australian Law Reform Commission and the Australian Information Commissioner.

The Attorney also has an important role in dealing with the Solicitor-General, who serves as lead counsel for the government in important litigation and also as the government's top legal advisor. The Solicitor-General is formally designated at the 'second' law officer of the Commonwealth,[21] which impliedly reinforces the role of the Attorney as the first law officer but leaves much about the relationship between the two offices unclear. The political dimension of this relationship became apparent in an episode that led to the resignation of Justin Gleeson SC as Solicitor-General. That incident arose after the Attorney-General Brandis amended the *Legal Services Directions*, to include rules that essentially made him the gatekeeper for advice from the Solicitor-General by providing that the Solicitor could only receive or respond to requests for advice if approved by the Attorney.[22] The Directions were withdrawn hours before they faced certain disallowance by the Senate[23] but still attracted considerable media and political attention over the Attorney's claims that he had discharged the legal requirement to consult the Solicitor before issuing the direction.[24] The conduct of the Attorney was fiercely criticised,[25] but the

18. The Attorney acknowledged his longstanding support for the concept when announcing the government's support for it: Hon Mark Dreyfus, 'Government Response to the Australian Law Reform Commission Report on Judicial Impartiality and the Law on Bias' (Media Release, 29 September 2022) <https://ministers.ag.gov.au/media-centre/government-response-australian-law-reform-commission-report-judicial-impartiality-and-law-bias-29-09-2022>.
19. See, eg, Law Council of Australia, *Policy on the Process of Judicial Appointments* (26 June 2021) 3 which suggests that '[J]udicial appointment should be a function of Executive Government performed by (or upon the advice of) the Federal Attorney-General…'.
20. See, eg, Hon Mark Dreyfus, *Appointment As Attorney-General of Australia* (Media Release, 1 June 2022) which emphasised plans to improve appointment practices to the AAT and Australian Human Rights Commission <fcfcoa.gov.au/news-and-media-centre/media-releases/ag/mr010622> and *ABC National Law Report* (28 June 2022) <https://ministers.ag.gov.au/media-centre/transcripts/abc-radio-national-law-report-28-06-2022>.
21. *Law Officers Act 1964* (Cth) s 5.
22. *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (Cth). The substance of this change was not included in the subsequent *Legal Services Directions 2017* (Cth).
23. Michaela Whitburn, 'Brandis Backs Down on Solicitor-General Order' *Sydney Morning Herald* (11 November 2016) 10.
24. The Attorney's interpretation of the legislative requirement to consult with the Solicitor-General was widely ridiculed, but one commentator noted the legislation was expressed so vaguely that the Attorney's perfunctory attempt may have been legally sufficient: Andrew Edgar, 'The Brandis-Gleeson Affair – What Does "Consultation" Mean?' AUSPUBLAW (6 December 2016) <https://auspublaw.org/blog/2016/11/the-brandis-gleeson-affair-consultation>.
25. See, eg, Editorial, 'Brandis Playing Politics with Good Government' *Sydney Morning Herald* (18 October 2016) 14; George Williams, 'A Worrying Pattern of Dysfunctional Relationships has Left Brandis Floundering' *Sydney Morning Herald* (26 October 2016) 16.

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Solicitor resigned when it became clear that his professional relationship with the Attorney was broken beyond repair.[26]

On one view, the proposed Directions introduced procedures that built upon legislation that makes clear that the Solicitor-General acts at the instruction of the Attorney.[27] The formalised statement to this effect in the proposed Directions was widely perceived as hampering the independence of the Solicitor-General to provide advice in circumstances where the involvement of the Attorney might not be appropriate.[28] Appleby rightly noted that the divergent views this incident revealed about the legislation governing the Solicitor-General represents 'a deeper, simmering dispute over the appropriate level of control exercised by the Attorney-General over the Solicitor-General'.[29] But the circumstances surrounding the resignation of Justin Gleeson also suggest that the relationship between the Attorney and Solicitor-General includes a hierarchical element which, in times of dispute or crisis, places the former over the latter.[30]

The Attorney-General also performs important functions in relation to criminal prosecutions. The historical responsibility of the Attorney for the institution and discontinuance of criminal proceedings has always attracted considerable controversy when prosecutions somehow affected the political fortunes of the government of the day. Lord Shawcross made an influential statement on why this function must be exercised independently and free from political influence,[31] but the transfer of the prosecutorial functions, including the discretion to prosecute, to an independent Director of Public Prosecutions has largely consigned what became known as the Shawcross rules to history.[32] The Attorney may issue directions or guidelines to the DPP, but the current policy governing prosecutions explains that directions 'occur very rarely and have not been provided in relation to a particular case'.[33] There are, however, occasions where the federal Attorney has issued

26. The resignation letter was recounted widely in the media. See, eg, Michaela Whitbourn, 'Solicitor-General Quits Over Brandis: Legal Standoff – "Irretrievably Broken" Relationship Comes to a Head' *Sydney Morning Herald* (25 October 2016) 5. Appleby has noted that, while the Solicitor-General is not a political office and is removed from the daily conflict of political life, the officer's close working relationship with the government of the day means tensions between law and politics require regular and delicate management by the Solicitor: Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 286 ('*Gabrielle Appleby*'). Gleeson's resignation suggests that when the relationship between the Attorney and Solicitor-General becomes a 'political problem', there can be only one outcome.
27. *Law Officers Act 1964* (Cth) s 12(b) [Solicitor-General is to furnish opinions 'to the Attorney-General on question of law referred to him or her by the Attorney-General'] (c) [Solicitor-General 'to carry out such other functions… as the Attorney-General requests']. This provision is carefully examined in Gabrielle Appleby (n 26) 99.
28. The Solicitor-General of the day explained that he had previously advised a Governor-General and Prime Minister in circumstances where their very request for advice, as well as the content of advice given, was confidential: Justin Gleeson SC, Submission to the Committee Secretary, Senate Legal and Constitutional Affairs References Committee, Inquiry into the Nature and Scope of the Consultations Prior to the Making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (3 October 2016) 4.
29. Gabrielle Appleby, 'The Law Officers of the Commonwealth' (2017) 28 *Public Law Review* 97, 102.
30. That assessment seems to accord with a guidance note issued in 2018, which provides Office of Legal Services Coordination, *Guidance Note 11 – Briefing the Solicitor-General* cl 13 (requests for advice from the Solicitor-General require consent of the Attorney).
31. Lord Shawcross' statement is reproduced in JL Edwards, *The Law Officers of the Crown* (Sweet & Maxwell, 1964) 222–3.
32. That transfer occurred with enactment of the *Director of Public Prosecutions Act 1983* (Cth).
33. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth – Guidelines for the Making of Decisions in the Prosecution Process* (19 July 2021) 1.2. The policy indicates that no bill applications which request an Attorney to cease a prosecution are normally decided by the DPP: 6.29. <https://www.cdpp.gov.au/system/files/ProsecutionPolicyoftheCommonwealthasupdated19July2021.pdf>.

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directions, such as how a class or category of cases should be approached.[34] The functions that remain vested in the Attorney are typically ones involving sensitive matters of national security or public interest, such as authorising special security operations conducted under intelligence operations,[35] the prosecution of people who have disclosed the identity of an employee of ASIO[36] or prosecutions for any breach of the legal protections governing sensitive military sites.[37] The Attorney also retains responsibility for the prerogative of mercy, that can operate to grant pardons to those convicted of criminal offences, or to reduce or extinguish sentences for criminal offences.[38]

The Attorney may also retain a little known and highly discretionary power that extends beyond criminal prosecutions to the enforcement of the law more generally. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[39] McHugh J reasoned that there could be good reasons why a law should not be enforced. Some might become outdated, supported now only by 'a vocal and powerful minority'.[40] The enforcement of these and other laws might, in rare cases, undermine governments, courts and society itself.[41] McHugh J thought that in these extreme cases, any decision upon 'when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires' which 'is arguably best made by the Attorney-General who must answer to the people'.[42] His Honour adhered to that position in *McBain*,[43] with the apparent agreement of Gleeson CJ who accepted that:

> …there may be limits, including limits dictated by political considerations, upon the lengths to which law enforcement authorities are prepared to go to enforce legislation in the courts.[44]

The lack of any reference to the Attorney-General in this passage is striking. The acknowledgement by Gleeson CJ that political factors may influence the extent 'authorities' are willing to enforce legislation inevitably points to cabinet.[45] If so, a decision to not enforce the law is not one for the Attorney-General but cabinet, which is surely right for such a contentious decision.[46]

The Attorney-General also occupies a singular position in applications for judicial review of administrative action. The Attorney is 'deemed to be able to speak on behalf of the wider public'.[47] The Attorney can also provide that automatic standing to another party, by the grant of a fiat. These

34. *Magaming v The Queen* (2013) 252 CLR 381, 390 [21]–[22].
35. These are approved by the Attorney-General under the *Australian Security and Intelligence Organisation Act 1979* (Cth) s 35C.
36. *Australian Security and Intelligence Organisation Act 1979* (Cth) s 92.
37. *Defence (Special Undertakings) Act 1952* (Cth) s 28.
38. This power arises from the executive power in s 61 of the *Australian Constitution*. The Governor-General exercises this power on the advice of the Attorney-General, who receives and considers applications: Attorney-General's Department, *Royal Prerogative of Mercy* (Web Page) <https://www.ag.gov.au/crime/federal-offenders/appeals#apply>.
39. (1998) 194 CLR 247 ('*Bateman's Bay*').
40. Ibid 277 [84].
41. Ibid 277 [83].
42. Ibid 278 [86]. See also 276[82].
43. *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 449–50 [113] ('*McBain*').
44. Ibid 390 [7]. Callinan J pointedly left open the question of whether the executive 'may deliberately and selectively abstain from enforcing an enactment': 475–6 [295].
45. Though it is very likely that a decision not to enforce minor regulatory offences could be taken at the departmental level. In such circumstances, the responsible minister might be informed but not cabinet.
46. Prime Ministers would inevitably exercise significant influence on cabinet deliberations, but the extent to which they might do so from a legally informed perspective would vary considerably.
47. Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2022) 850.

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privileges presume a level of political neutrality of the Attorney which is demonstrably at odds with the reality of modern politics. While the courts have acknowledged the increasingly political role occupied by Attorneys-General,[48] they have not explained what those changes might mean. It is useful to outline the increasingly political role of Attorney before the issues of standing and the fiat can be examined.

III Politics and the Attorney-General

The Australian version of the Attorney-General now differs in many ways from its British origins. The most important distinction is the political status of the Attorney-General in each jurisdiction. The English Attorney has only recently become a standing member of cabinet and had previously only attended cabinet meetings by invitation, typically when there is an issue that the Attorney has been involved with or can speak on with particular authority.[49] The UK version of the office has changed considerably, especially since enactment of the *Constitutional Reform Act 2005* (UK), which confirmed that many functions traditionally associated with the Attorney-General in Australia were the province of the Lord Chancellor.[50] A recent UK parliamentary review of the functions of the Attorney-General and Lord Chancellor made clear that many functions of those two offices often overlap,[51] which greatly limits the relevance of current UK practice.[52] Subject to that caveat, since the middle of the 19th century, the Australian adaptation of the office has taken a different path and conceived the Attorney as more a politician than expert or leading lawyer.[53] Australian Attorneys-General have long been members of cabinet, which is widely agreed to give the office a 'somewhat hybrid character' that may often place an occupant 'in a situation of conflict between the demands of…political offices and the demands of the office of Attorney-General as Chief Law Officer'.[54]

48. See, eg, *Bateman's Bay* (n 39) [38] (Gaudron, Gummow and Kirby JJ); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, [68] (Gageler and Gleeson JJ) ('*Hobart International Airport*'); *Unions NSW v New South Wales* (2023) 296 ALJR 150, [50] (Edelman J) ('*Unions NSW*').
49. House of Lords Select Committee on the Constitution, *The Roles of the Lord Chancellor and the Law Officers* (House of Lords paper 118, 9th Report of Session 2022-3) para 28 ('House of Lords Select Committee on the Constitution'). An earlier parliamentary inquiry found 'no consensus' about the Attorney's ministerial role, but 'unanimous agreement' that he or she 'should not regularly attend' cabinet: Constitutional Select Committee, *Constitutional Role of the Attorney General* (House of Commons Paper 306, 5th Report of Session 2006-07) para 84.
50. *Constitutional Reform Act 2005* (UK) s 3(6) (providing that Lord Chancellors exercise their functions with regard to the need to defend judicial independence, the need for judges to have the support necessary to enable them to exercise their functions and the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters).
51. House of Lords Select Committee on the Constitution (n 49) paras 90–133.
52. In this area, the United Kingdom has neither a single office nor practice. In addition to the English offices, there is a Lord Advocate and Solicitor General in Scotland, a General Counsel for Wales, an Attorney-General for Northern Ireland and the UK Attorney-General, which occupies the additional office of Advocate General for Northern Ireland: House of Lords Select Committee on the Constitution (n 49) para 4. The names, constitutional position and practices of these offices varies: Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom* (Hart Publishing, 2022) 2–9; James Hand, 'The Attorney-General, Politics and Logistics – A Fork in the Road?' (2022) 42(3) *Legal Studies* 425, 429. The UK Attorney-General is the Attorney for England and Wales, rather than all parts of the United Kingdom, so this article refers mainly to the 'English Attorney-General' to denote those functions exercised by the Attorney-General over England.
53. JL Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 367–8. The historical trend that has seen Attorneys-General move from being leading members of the legal profession to parliamentarians with high political profiles is carefully mapped in Hanlon (n 11) 119, 121–7.
54. Len King, 'The Attorney-General, Politics and the Judiciary' (2000) 74(7) *Australian Law Journal* 444, 446.

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The different political position of the English Attorney arguably appears greater from an outside perspective. Australian commentators have emphasised the relative political neutrality of the English Attorney, as being 'in effect, divorced from the political process or…at least more divorced than his Australian counterpart'.[55] English commentators, by contrast, argue that the formalities of politics and cabinet attendance cannot obscure the proximity of the Attorney to the government of the day and its agenda.[56] The overlapping political and legal functions of the Attorney have long been said to create the potential for conflicts of interest, most notably in matters of political importance to the government of the day.[57] The possibility for political influence upon the Attorney came into acute focus by reason of the questionable advice provided by the Attorney about the legality of any British involvement in the invasion of Iraq,[58] but there were other instances around this time that created a perception that the Attorney had invoked the public interest to take actions that clearly advanced the interests of his government. Such examples have led many UK commentators to conclude that the 'inherent tension' between the Attorney's dual political and legal functions is now real rather than simply perceived and 'inevitably lends itself to charges of political bias in legal decisions'.[59]

That tension is more immediately obvious in Australia because our Attorneys-General are members of cabinet. The unyielding demands of cabinet solidarity and political party discipline may not sit easily with the duties and powers related to the courts and legal system that are held by an Attorney-General. This mingling of law and politics is neither surprising nor necessarily at odds with constitutional principles.[60] It is also important to note that the Attorney-General is by no means the only minister whose statutory functions can overlap with political ones. In *Minister for Immigration and Multicultural Affairs v Jia* ('*Jia*'),[61] for example, the High Court accepted that ministers could and should engage in public discussion about their statutory powers. That political realism led the court to hold that very strident statements the minister (who later became Attorney-General) made about a power to cancel visas in a radio interview for people convicted of criminal offences did not create an apprehension of bias.[62] While that

55. Ruth McColl, 'Reflections on the Role of the Attorney-General' (2003) 14 *Public Law Review* 20, 21.
56. Alec Samuels, 'Abolish the Office of Attorney-General' [2014] (October) *Public Law* 609, 609 (arguing that the competing functions of the Attorney make the role 'irredeemably anomalous'); Conor Casey and John Larkin, 'The Attorney General and Renewed Controversy Over the Law/Politics Divide' (2022) 26(2) *Edinburgh Law Review* 228 (arguing that the various UK Attorneys can stridently advocate the government's political agenda without comprising other aspects of their role).
57. An issue identified in the classic British account by Edwards (n 53) 61.
58. The Attorney provided advice on the legality of any British involvement in the invasion of Iraq but then changed key aspects of his advice. An enormous political scandal occurred when that change became known. A subsequent inquiry identified many flaws in how the advice was received by cabinet: Sir John Chilcot, *Report of the Iraq Inquiry* (2016) vol 5.
59. Jeffrey Jowell, 'Politics and the Law: Constitutional Balance or Institutional Confusion?' (JUSTICE Tom Sargant Memorial Annual Lecture 2006, The Law Society London, 17 October 2006) 12 <https://files.justice.org.uk/wp-content/uploads/2015/02/06172428/Politics-and-the-Law.pdf>. A recent parliamentary review took a contrary view, concluding that the political role of the Attorney-General and other law officers enabled them to understand the 'political context in which their legal roles take place and bolsters their clout with [other] ministers': House of Lords Select Committee on the Constitution (n 49) 5.
60. Much of Australia's constitutional framework is 'deliberately non-prescriptive and intended to allow for flexibility in governmental arrangements': Benjamin Saunders, 'Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance' (2022) 45(2) *Melbourne University Law Review* 693, 727.
61. (2001) 205 CLR 507 ('*Jia*').
62. Ibid [102] (Gleeson CJ and Gummow J, Hayne J agreeing), [245] (Callinan J).

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finding was attributed to the context-dependent nature of the bias rule,[63] the High Court also implicitly accepted that the minister understood and could manage possible tension between his political and legal functions.

The extent to which that reasoning can apply to the Attorney-General is often doubted by lawyers, who perceive the functions and duties of the Attorney as exceptional. McColl advocated that approach when she argued it was 'inevitable' that Attorneys-General would have to act 'independently' of their political colleagues because:

> …even though he wears two hats, no one expects him to sacrifice his duty of independence in favour of party political interests. That would be inconsistent with his duty as a lawyer and…his colleagues', as well as the community's, expectations.[64]

That suggestion diverges significantly from *Jia*, where the High Court carefully avoided any prescriptive or rigid rules governing cases where ministerial and political roles could come into tension. Most political observers would surely find McColl's claim to the Attorney's political independence puzzling. Politicians sacrifice much of their independence when they join a political party, even more when they join cabinet. Most members of the Australian public would know enough of our cabinet style of government to accept that reality, even if begrudgingly. McColl was arguably the one out of step. At the time of writing, she was a senior barrister and was appointed to the New South Wales Court of Appeal shortly after. A member of the independent bar whose formidable career clearly foreshadowed judicial office was perhaps ill equipped to understand the singular strictures of political rather than judicial office.

Tickner v Bropho[65] provided rare insight into the stifling nature of cabinet oversight. The case involved the extension of a protection order over land of cultural significance to local indigenous people and had generated enormous controversy.[66] One of the many people to lobby the minister was an independent politician, who asked why the Minister had not simply granted an order when there was a clear basis to do so. When the Minister explained that he could not exercise his powers without Cabinet approval, the incredulous politician reminded the Minister that the statute vested the power to act in him and him alone. The minister replied: 'You get 100% for law and zero for politics'.[67]

There is no reason to suppose that discretionary powers vested in an Attorney-General are no less subject to cabinet oversight, which is always unyielding when an issue causes political or public controversy. That possibility is consistent with the significant recent study of cabinet governance by Weller, Grube and Rhodes, who noted that very often a strong leader of government, sometimes aided by a small troika of favoured ministers, could rule in a form of 'court government'.[68] Those authors did not suggest either that the functions of the Attorney-General inevitably made that officer a member of any inner political sanctum or immune to dictation by such a body. Put another way, the Attorney-General is just as likely to be politically steamrolled as any other minister. This dominance of cabinet may not be a bad thing. Len King who had served as

63. Ibid [63].
64. McColl (n 55) 22.
65. (1993) 40 FCR 183 ('*Tickner*').
66. The affair led to special legislation (the *Hindmarsh Island Bridge Act 1997* (Cth)), which survived constitutional challenge in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
67. *Tickner* (n 65) 204.
68. Weller, Grube and Rhodes (n 8) 17–19.

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both Chief Justice and Attorney-General of South Australia reflected upon an instance where he granted a fiat in a public law case, conceding that he did so without consulting cabinet because he feared his colleagues would inevitably have disagreed and overruled him. King noted that 'accepted principle' deemed the decision as one for the Attorney alone, but he later confessed to 'serious doubts' about taking such a decision against the likely views of cabinet.[69] King thought that his unilateral approach effectively removed any real accountability, so it was preferable that:

> …as a matter of democratic principle, Cabinet should be entitled to control the exercise of the discretion on public interest grounds and should therefore be accountable to Parliament and the people for the decision.[70]

This appeal to parliamentary accountability could be criticised as replacing the illusion of an independent Attorney-General with the equally illusory but more unlikely one of an accountable executive government.[71] Lawyers might be uncomfortable if an Attorney openly surrenders the practical exercise of significant powers to the collective judgment of cabinet, but a judgment is nonetheless made. This melding of law and politics might provide a coherent legal and political path to better understanding the function of the Attorney-General. Justice Gordon appeared sympathetic to that possibility in a speech where her Honour noted that the English Attorney-General had described her function as '[m]aking law and politics work together…'.[72] Justice Gordon thought that approach was 'equally applicable and important' to Australia's system of responsible and representative government where '[p]olitics and law are considered part of the same enterprise of governing in our systems'.[73] It is one thing to say law and politics should or must work together, but quite another to explain how it might be done. Justice Selway hinted at one solution when he explained that the many specific functions conferred upon an Attorney did not convey the full import of his or her influence within cabinet and government more generally. Selway thought an important duty of the Attorney was 'to "remind" other aspects of the Executive of the core values or ethics of government'.[74] The extent to which an Attorney can, or even wishes to, adopt that function of soft diplomacy or soft power within cabinet and government will be heavily influenced by whether Attorneys perceive themselves primarily as a politician.

IV Standing in a Unique Position

The privileged position of the Attorney in relation to standing in judicial review claims that was noted above contains many discrete elements. That privileged position is intended to enable protection of the public interest, yet pursuit of that function can require Attorneys to challenge the

69. King (n 54) 451. There are other instances where cabinet overruled such decisions by an Attorney. See, eg, Hanlon (n 11) 130 (noting that the Tasmanian Attorney-General resigned in August 1972 after cabinet overruled his decision to issue a fiat to challenge a development that would flood Lake Pedder).
70. King (n 54) 451.
71. On executive accountability see Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) 149–54.
72. Michelle Gordon, 'The Integrity of Courts: Political Culture and a Culture of Politics' (2021) 44(3) *Melbourne University Law Review* 863, 884–5. This phrase has been used by several English Attorneys-General and remains on the opening page of the Attorney's official Twitter account: @attorneygeneral (Twitter) <https://twitter.com/attorneygeneral?lang=en>.
73. Gordon (n 72) 885.
74. Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114, 121 quoting Tait, 'Public Lawyer, Service to the Client and the Rule of Law' (1997) 8 *Commonwealth Lawyer* 58, 65.

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decision of a cabinet colleague. Sir Anthony Mason has conceded that the obvious conflict of interest in such circumstances admits only one answer because an Attorney 'cannot be expected to act impartially in deciding whether proceedings should be brought against the government'.[75] Similar problems attach to Attorney's power to grant a fiat to another party to commence judicial review proceedings.[76] The fiat essentially extends the Attorney's right of standing in public law proceedings to another party, who will conduct the claim and be responsible for its costs,[77] though the Attorney ultimately retains complete charge of the litigation at all times.[78] The grant of a fiat is a discretionary decision that is not justiciable,[79] or subject to other significant legal constraints.[80]

Bateman's Bay made clear that Australian political practices affecting the Attorney were relevant to privileges the Attorney held at common law. The High Court rejected the English position which held that *only* the Attorney-General could assert public rights.[81] Gaudron, Gummow and Kirby JJ identified 'particular difficulties' in transposing that principle to Australian law.[82] One was that it left no room for the special interest test that enabled individuals and groups to claim standing.[83] The more significant problem of this rule was its faith in the Attorney-General as an apolitical defender of the public interest. Gaudron, Gummow and Kirby JJ explained:

> In Australia, both at federal and State levels, the Attorney-General is a minister in charge of a department administering numerous statutes, is likely to be a member of Cabinet and, at least at State level, may not be a lawyer. At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.[84]

While the denial of the fiat in *Bateman's Bay* received surprisingly little attention,[85] the fiat was central in the later case of *McBain*. The federal Attorney-General granted a fiat in that case to the Conference of Catholic Bishops, to challenge a Federal Court decision that essentially enabled single and gay women in Victoria to access IVF services.[86] The Attorney later sought to intervene in the High Court proceedings commenced by the Bishops and make submissions which, in some aspects, were at odds with those of his relator acting under the fiat. A majority of the High Court

75. Sir Anthony Mason, 'Access to Constitutional Justice: Opening Address' (2010) 22(3) *Bond Law Review* 1, 2.
76. The Attorney-General may commence proceedings directly (*ex officio*) or through another by grant of a fiat (*ex rationale*). Edelman J examined the application of *ex rationale* to criminal cases in *Taylor v Attorney-General (Commonwealth)* (2019) 268 CLR 224, [106], [120]–[121] ('*Taylor*').
77. *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518, 527. This case left open the question of when the Attorney might be liable for costs incurred by the party given a fiat.
78. *McBain* (n 43)[287] (Hayne J); *Taylor* (n 76) [120]–[121] (Edelman J).
79. An exception is the codification of the grant of a fiat in the *Attorney-General Act 1999* (Qld) s10, which may render decisions about fiats in that jurisdiction to supervisory review: *Sharples v O'Shea* [2002] QSC 94, [8].
80. *Little v State of Victoria* [1999] VSCA 113 held that the Attorney did not have a wide-ranging duty of care in the conduct of litigation, which was suggested to include decisions to grant a fiat or intervene in proceedings: [18]–[23].
81. *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 (Lord Wilberforce).
82. *Bateman's Bay* (n 39) [37].
83. Ibid. The special interest test was affirmed in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.
84. *Bateman's Bay* (n 39) [38]. The quoted remarks were by Gibbs J in *Victoria v Commonwealth* (1975) 134 CLR 338, 383, who thought 'it somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible'.
85. *Bateman's Bay* (n 39) 248.
86. *McBain v Victoria* (2000) 99 FCR 116. The Bishops received leave to appear as amicus curiae in this proceeding. An amicus is not a party and has no right of appeal, hence the need for a fiat.

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dismissed the claim as lacking the constitutional requirement of a 'matter',[87] but the Attorney's decision to intervene and make arguments partly at odds with the party acting under his fiat was fiercely criticised.

Christopher Maxwell, who later became President of the Victorian Court of Appeal, argued that the grant of this fiat 'was unmistakably a political decision' because the Attorney clearly wished to facilitate a challenge to a decision that many in his government disliked.[88] Maxwell thought the grant of a fiat was also further evidence that the Attorney had 'once again undermined, rather than supported, the authority of a federal judge' when he should have been 'defending the integrity of the federal judicial system'.[89] The contentious attitude that Daryl Williams QC took as Attorney General in relation to criticisms of the courts and their decisions is examined in the next section of this article. For the moment, it is sufficient to note that the suggestion that Williams' grant of a fiat was yet another instance of him supposedly attacking the courts was not an isolated claim. Gageler and Gleeson JJ made no mention of that historical context when their Honours conceded that:

> …it would defy our experience of government to expect an Attorney-General to act as an apolitical 'guardian of the public interest' in all cases of granting to, or withholding from, some other person a 'fiat'…[90]

Although fiats are rarely sought, and even more rarely granted, the principles surrounding them shed light on the role of the Attorney, as well as the wider principles governing standing in public law.[91] The repeated acceptance by the High Court that decisions by an Attorney about the grant of fiats are more likely to be influenced by political considerations rather than questions of public interest provides a compelling basis for change to the common law. That could take the form of accepting that decisions to grant or refuse a fiat should be justiciable. Another more radical option would be to abolish the Attorney's power to grant fiats in public law cases. After all, if the Attorney cannot be expected to act as the guardian of the public interest, the conceptual foundation upon which the discretionary power of the Attorney rests is questionable. *Bateman's Bay* acknowledged that the presumptions attending the position of the British Attorney-General could not be transposed without adaptation to Australian legal and political practice but said little about what changes might be made. The ones just suggested are logical.

Edelman J grappled with related issues in *Unions NSW v New South Wales* when he conceded that the 'increasingly political nature' of the Attorney's role was one reason that standing rules had relaxed in Australia.[92] His Honour reasoned that the 'doubly elastic' concept of the special interest test in standing had gone some way to facilitate standing by those who might otherwise struggle but thought that some form of standing requirement should remain.[93] The obvious solution would be for

87. *McBain* (n 43) [26] (Gleeson CJ), [29], [62] (Gummow and Gaudron JJ), [249] (Hayne J).
88. Christopher Maxwell, 'In the Line of Fire: Re McBain and the Role of the Attorney-General as a Party' (2002) 13 *Public Law Review* 283, 290. This argument does not take account of those possible cases where any collective cabinet decision to approve the grant of a fiat occurs despite disagreement within cabinet and is granted reluctantly by an Attorney.
89. Ibid.
90. *Hobart International Airport* (n 49) 254 [68].
91. Cheryl Saunders and Paul Rabbat, 'Relator Actions: Practice in Australia and New Zealand' (2002) 13 *Public Law Review* 292, 292.
92. *Unions NSW* (n 49) 163 [50] (Edelman J).
93. Ibid [50]–[51].

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an even more relaxed approach to standing, so that the special interest test provided no real obstacle to people and groups with a legitimate interest in commencing a public law claim.[94]

The standing cases have not considered the apparent limits that the courts have imposed on attempts by Attorneys to intervene in cases about questions of statutory interpretation. Attorneys-General have many rights to intervene in proceedings by reason of the subject matter of the case, such as ones arising under the Constitution or involving its interpretation,[95] or claims commenced under the Commonwealth's judicial review statute.[96] Outside of these clear rights of intervention, the limited nature of an Attorney-General to intervene in proceedings was recognised almost 50 years ago by the New South Wales Court of Appeal in *Corporate Affairs Commission v Bradley* ('*Bradley*').[97] That case concerned the registration of a business name of the 'Rhodesia Information Centre' in a time when the independence of Rhodesia from Britain was contested. The federal Attorney-General sought to intervene on behalf of the Commonwealth, essentially to argue that British rule over Rhodesia remained in force and that independent political authority claimed by Rhodesia was not recognised in Australia. Hutley JA distinguished the case from those involving the prerogative or statutory powers of the Crown in relation to foreign powers, where an Attorney-General could appear as of right, but also reasoned that the practices that evolved in constitutional litigation were equally unhelpful in cases that involved no 'legislative trespass' upon the citizens of a state or federal government.[98] Hutley JA held that recognition of a right of Attorneys-General to intervene in cases containing *only* issues of public policy, rather than constitutional questions, would be 'subversive of the independence of the judiciary'.[99] His Honour noted that enabling an Attorney-General to intervene in such cases would inevitably invite further interventions 'at the behest of a different executive with a different public policy'.[100] The court was not only concerned that its processes might become a vessel to implement the political imperatives of the executive but also that those imperatives might change between and within governments.

The likely political motives of executive intervention also weighed on the Victorian Court of Appeal in *Priest v West*.[101] That case raised questions on whether the coroner could compel a notorious prisoner to give evidence at a coronial inquiry, to examine one of many deaths he was suspected to be involved in. The Victorian Attorney-General sought leave to intervene and make submissions about the interpretation of the *Coroners Act 2008* (Vic), arguing that his 'particularly informed perspective' on the Coroner's Court meant he was 'uniquely positioned' to assist the court in its interpretation of the Act.[102] The Court of Appeal found there was no need for an *amicus curiae* to appear because the claim had a proper contradictor and the extrinsic materials the Attorney intended to base his submissions were publicly available, which could be marshalled by the parties if they wished.[103]

The Court of Appeal also addressed the wider principle that underpinned the Attorney's application, which it thought 'was, essentially, a claim of specialist expertise' based upon his role of

94. This might be satisfied by the formula of a 'material interest' suggested by Gageler and Gleeson JJ in *Hobart International Airport* (n 49) 254 [68].
95. *Judiciary Act 1903* (Cth) s78A(1) grants that right to the Attorneys of the Commonwealth, the States and Territories.
96. *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 18.
97. [1974] 1 NSWLR 391, 403 (Hutley JA, Reynolds and Glass JJA agreeing) ('*Bradley*').
98. Ibid 399.
99. Ibid 403.
100. Ibid.
101. (2011) 35 VR 225.
102. Ibid 234–5 [38].
103. Ibid 235–6 [43]–[46].

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minister responsible for the administration of the statue.[104] The court held that the work of ministers did not give to any such expertise, even when a statute designated particular functions to a minister. The Court of Appeal noted that any ministerial claim to some sort of legislative expertise 'would be of almost unlimited application'.[105] The court reasoned that judicial recognition of the expertise or special interest of ministers in the interpretation of a statute could 'divert' courts from their interpretive function.[106] The Court of Appeal cautioned:

> …the submission which any intervening minister might make about how an Act should be interpreted might well be thought to be – and might in fact be – influenced by the policy position of the government of the day, which has no place in the interpretive task which an independent judiciary must perform.[107]

The concerns expressed in *Bradley* and *Priest v West* about the influence that the political imperatives of the executive might bring to the courts are not convincing. Many public law cases contain issues of government policy or the politics of the day, but the courts issue regular reminders that such issues are distinct from, and do not influence, their constitutional function.[108] If that is true, the danger that courts *might* be diverted by submissions that *might* include *some* recourse to political considerations by an intervening minister is a remote one. Limiting intervention by Attorneys-General would also not affect the other ways the executive can affect the determination of questions of policy or politically charged issues by the courts, such as by deciding whether to oppose or concede a questionable claim of standing by a public interest body,[109] or whether to appeal an unfavourable decision that appears doctrinally weak. Such decisions are surely influenced by the political goals of the executive government of the day, even if those goals are rarely expressed publicly.[110] If the executive is normally reluctant to express its political motives in the conduct of public law proceedings, *Bradley* and *Priest v West* could be understood as illustrating an equal reluctance on the part of the courts to sanction a procedural means for the executive to pursue those rare cases where it is not shy about such motives. *Bradley* and *Priest v West* arguably also confirm the reluctance of the courts to confirm new privileges at common law for the Attorney-General.

An examination of the political aspects or influences of the role of the Attorney-General requires a cautionary note. Legal scholars may be sceptical about the legitimacy of political influences, but

104. Ibid 235 [39].
105. Ibid 235 [40].
106. Ibid 235 [41].
107. Ibid 235 [42].
108. See, eg, the delicate articulation of these issues by French CJ in a migration case that attracted enormous attention by the media and politicians: *Plaintiff M70/2010 v Commonwealth* (2011) 244 CLR 144, 157–8 [2]–[3].
109. An example is the many recent Victorian cases in which conservation bodies have contested decisions to enable logging in native forests. The vigorous defence mounted to those claims by VicForests was described as an 'all or nothing' approach: *East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, 155 [380] (Richards J). The last annual report of VicForests noted it had spent more than $10 million defending such cases in the previous year: VicForests, *Annual Report – 2021-22* (2022) 4. Costs of this scale, as well as the wider strategy in which they arose, would not be incurred without approval from the responsible minister and cabinet.
110. See, eg, *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337 which held a ministerial decision restricting the export of cattle was invalid and that substantial compensation should be paid to cattle farmers for the consequences of the decision. The case was vigorously criticised: Andrew Edgar, 'Structured Proportionality, Unreasonableness and Managing the Line between Executive and Judicial Functions' (2021) 32 *Public Law Review* 204. Despite the apparent doctrinal flaws of the decision and its significant financial consequences for the government, the Commonwealth did not appeal the decision. It is not unrealistic to suggest that the reluctance of the conservative government of the day to appeal the decision would have been influenced by the strongly negative reaction that would have come from the farming interests that traditionally support conservative governments.

open discussion of them in this context may help a better understanding of the legitimacy of the actions and motives of Attorneys.[111] Judges regularly acknowledge that connection in their acceptance that judicial legitimacy depends in large part upon public confidence in the courts.[112] Decision-making processes outside the courts can involve different considerations, some of which are in tension. A relevant one for this article is that 'officials sometimes have to consider their legitimacy in relation to more than one audience' who each 'might have significantly different priorities'.[113] The priorities and expectations that fellow politicians and lawyers and judges may hold of an Attorney would surely be different, perhaps radically so, but a better understanding of these expectations can lead to a greater understanding of the official who must balance them.[114]

V The Political Attorney-General as 'Non-Defender' of the Judiciary

Daryl Williams AC KC was Commonwealth Attorney-General from 1996 to 2003 and was arguably responsible for a significant change to the role, though he argued this had occurred much earlier. Williams might be fairly described as a realist on many issues affecting the legal system. Sir Anthony Mason noted that Williams had 'categorically refuted' the 'archaic notion that judges do not make law' when speaking at the swearing in of Justice Hayne as a member of the High Court of Australia.[115] Mason's apparent approval of those remarks might have reflected an undercurrent of relief, that someone in government had finally acknowledged what judges and academics had been saying for decades.[116] But Mason was highly critical of Williams' 'refusal' to defend the High Court from political attacks, which he described as 'another disturbing example of the degradation of the apolitical role of the Attorney-General'.[117] Williams had clearly refused to provide any real defence of the various attacks, which included a notorious one upon one member of the High Court,[118] and

111. The influential analysis of Tyler argues that people support the rule of law in large part because of a range of personal values, including the perceived legitimacy of the law, its processes and institutions. See, eg, Tom Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale University Press, 1990).
112. See, eg, Stephen Gageler, 'Judicial Legitimacy' (2023) 97 *Australian Law Journal* 28, 28; Gordon (n 76) 866.
113. Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) *Journal of Criminal Law and Criminology* 119, 122–3; JR Sparks and AE Bottoms, 'Legitimacy and Order in Prisons' (1995) 46(1) *British Journal of Sociology* 45, 58–9. Those articles argue that the expectations of prisoners and the general public of the legitimacy of decisions by prison officials are often impossible to reconcile, but the reasonable expectations of each can blunt the more unreasonable expectations of the other.
114. One scholar has described this approach as 'micro-legitimacy', in which it can be necessary to analyse 'the roles, standing, and conduct of those who speak for, act for, are accountable to, and represent the state': Nicole Roughan, 'The Legitimacy of Whom?' in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press, 2019) 82, 82.
115. Sir Anthony Mason, 'Should the High Court Consider Policy Implication When Making Judicial Decisions?' (1998) 57(1) *Australian Journal of Public Administration* 77, 77.
116. Decades earlier, Lord Reid famously stated that the notion judges do not law and instead only declared should be consigned to history because 'we do not believe in fairy tales anymore': Lord Reid, 'The Judge as Lawmaker' (1972) 12(1) *Journal of Society of Public Teachers of Law* 22, 22.
117. Mason, 'Access to Constitutional Justice: Opening Address' (n 5) 3.
118. Justice Kirby was subject to baseless personal attacks, made under parliamentary privilege by a senator in Williams' government: Enid Campbell and Matthew Groves, 'Attacks on Judges Under Parliamentary Privilege: A Sorry Australian Episode' [2002] (Winter) *Public Law* 626.

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some landmark decisions around this time such as *Wik Peoples v Queensland*.[119] What Mason considered disturbing could arguably be characterised as another example of Williams' realism, which was to recognise that a convention Mason mourned had in fact passed long ago.

That convention was that the Attorney-General was the appropriate officer to respond to any public or political critics of courts and judges. This convention operated in tandem with a complimentary one that judges should not speak on a range of matters, such as controversial issues or to defend their decisions.[120] This convention was strongly doubted, and arguably transformed, by Williams during the 1990s. While he was Shadow Attorney-General, Williams argued that any practice which obliged the Attorney to defend the judiciary was a loose practice at best and certainly not one that commanded the universal acceptance one might expect of a convention.[121] Williams also drew support from the separation of powers, arguing that the need for courts to remain independent of government and be 'perceived to be so' did not sit easily with a presumption that the Attorney-General was required to defend them.[122] The somewhat counterintuitive implication was that the institutional integrity of courts could be undermined if the Attorney sought to counter attacks which might question that very integrity. A discrete aspect of this claim saw Williams reject arguments that the Attorney-General was required to exercise some functions independently of the executive government. Williams thought that view, that many might also have characterised as a convention, was 'erroneous or at least eroded'.[123]

Williams was mindful of the political status of Attorneys-General, which made them 'answerable to their party colleagues, Parliament and the electorate' and meant Attorneys 'are not, and cannot be, independent of political imperatives'.[124] Williams' ultimate focus was not upon the status of Attorneys-General as elected members of parliament but rather the political demands that flowed from their membership of cabinet. Cabinet is a collective body whose operation depends on the political fealty of its members.[125] That loyalty would often conflict with a convention that required Attorneys to defend judges and courts, particularly in response to criticisms made by a cabinet or party colleague. Williams may have been mindful that the political character of Attorneys-General dictates that, in any media criticisms made of courts and judges, they may be inclined to be more

119. *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*'). Haig Pantapin, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 165–8 documents the furious attacks on the decision and the High Court. Williams had indicated he was prepared to speak out against criticisms that had the potential to undermine public confidence in the judiciary but thought those made in the wake of *Wik* fell 'well short' of that point: Daryl Williams, 'Judicial Independence' (1998) 36(3) *Law Society Journal* 50, 51 ('*Judicial Independence*').

120. These are the so-called 'Kilmuir rules', explained in AWB Bradley, 'Judges and the Media: The Kilmuir Rules' [1986] (Autumn) *Public Law* 383. Some argued that the Kilmuir rules operated in conjunction with a convention that discouraged direct criticism by the media of courts and judges: Louis Blom Cooper, 'The Judiciary in an Era of Law Reform' (1966) 37(4) *Political Quarterly* 378.

121. Daryl Williams: 'Who Speaks for the Courts?' in *Courts in a Representative Democracy* (AIJA, 1995) 183 ('*Who Speaks for the Courts*'). Williams repeated these arguments after he became Attorney-General: 'The Role of the Attorney-General' (2002) 13(4) *Public Law Review* 252 ('*The Role of the Attorney-General*'); 'Judicial Independence and the High Court' (1998) 27(2) *University of Western Australia Law Review* 140, 150–2 ('*Judicial Independence and the High Court*').

122. Judicial Independence and the High Court (n 122) 151.

123. Who Speaks for the Courts? (n 122) 192.

124. The Role of the Attorney-General (n 122) 261 and Judicial Independence (n 119).

125. The Cabinet Handbook leaves no doubt about the binding nature of cabinet solidarity: Department of Prime Minister and Cabinet, *Cabinet Handbook* (15th ed, 2022) [12]–[16], [27]–[29]. The current Attorney-General is Cabinet Secretary. It is not clear if that role places additional obligations upon the Attorney-General in observance of the requirements of solidarity and collective responsibility, but it would surely oblige the Attorney to lead by example.

loyal to the media. Australian politicians do not simply focus heavily on media coverage; they rely upon, foster and manipulate it.[126] One senior judge recently lamented that Australia politicians 'seem beholden' to media organisations.[127]

The various difficulties politicians face in making a timely and informed response to media criticisms of courts may distract attention from the political benefit an Attorney-General can gain from allowing criticisms of courts and judges to remain unanswered by any senior government official. When those criticisms somehow foster the political strategies of a government, the absence of any official correction essentially allows one side of a debate to be aired without real challenge. In such cases, the silence of an Attorney-General may be a calculated part of a wider political strategy.[128]

While some commentators flatly rejected Williams' arguments,[129] many acknowledged the declining force of any convention that Attorneys-General must defend courts and judges.[130] A measured assessment made during this time by the retired Chief Justice of South Australia recognised the evolving role of the Attorney-General but argued that the unique stature of Attorneys to speak on questions governing the courts meant their role in defending courts and judges against attacks was 'as important as it ever was'.[131] King explained that 'an aspect' of this function was 'to defend the integrity of the system of justice against attacks which threaten public confidence in it, even if necessary, against political colleagues'.[132] This argument suggests that the singular position of an Attorney-General requires its occupant to sometimes place the needs of the legal system before political imperatives but fails to confront a central element of Williams' argument — the position of Attorney-General may be singular in the legal system, but it is not in politics. King's suggestion that Attorneys can take issue with and, where necessary, publicly rebuke their colleagues is an elegant invitation to unemployment.

King argued that the differences between Williams and his critics was ultimately 'one of emphasis rather than principle' because even Williams accepted that an Attorney should speak in defence of the courts and judges when public criticism of them was extreme or somehow especially damaging.[133] That assessment has a superficial attraction but does not take account of the transformative nature of Williams' arguments. Williams was no mere commentator. For many years,

126. Justice Kirby long ago cautioned that the private offices of ministers were adept at manipulating media coverage: Justice Michael Kirby, 'Judiciary, Media and Government' (1993) 3(2) *Journal of Judicial Administration* 63, 71.
127. Justice Peter Applegarth, 'Coverage and Criticism of Courts' (2022) 24 *Media and Arts Law Review* 149, 159. This problem is universal one in modern democracies.
128. An example is the trenchant criticisms that many conservative politicians made of the High Court's decision of *Wik* (n 119).
129. McColl (n 55) argued that the tradition Williams thought was less than clear was in fact very apparent and should be preserved. McColl's argument does not sit easily with earlier papers in which judges acknowledged they should take a greater role in explaining their work and decisions. See, eg, Sir Anthony Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 133–4.
130. In 1992, the Judicial Conference of Australia gathered to address the need for judges to establish a body to 'defend the judiciary as an institution and, where appropriate, to defend individual judges who were the target of unfair and unwarranted criticisms': Chief Justice Robert French, 'Seeing Visions and Dreaming Dreams' (Speech, Judicial Conference of Australia Colloquium, 7 October 2016) 1.
131. King (n 54) 457.
132. Ibid.
133. Ibid.

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he held a central role in the maintenance of the convention yet rejected its very existence. Political and legal conventions arise from, and are continued by, practice.[134] The statement and conduct of Williams profoundly changed conventions governing the duty of the Attorney-General to make a public defence of courts and judges. This change may apply outside the public view. If Williams thought it was not his function to defend the courts, judges and their decisions against much of the criticism they received, the extent to which he was willing to undertake the 'soft diplomacy' role advocated by Selway and others would surely also be very limited.

VII The Political Attorney-General as Selective Critic of Litigants and Their Cases

The next federal Attorney to be considered is George Brandis QC, who was federal Attorney-General from 2013 to 2017. Brandis AG did not ever doubt or seek to reverse Williams' claim that the Attorney should no longer be seen as the main defender of the judiciary and the courts[135] but arguably extended that practice by regularly attacking those who launched legal action against government decisions. Brandis moved from the silence of Williams to joining the fray and questioning, sometimes apparently attacking, people who took his own government to court. This occurred with his adoption of the rhetoric of 'lawfare' to describe the opponents of some of his government's policies.

The notion of lawfare was first used to describe the various legal tactics used against American forces in Iraq and Afghanistan, when prisoners or war or civilians injured in battle sought redress in the courts. The use of well-settled principles, such as an application for *habeas corpus* for release from allegedly unlawful detention, was described as 'a method of warfare where law is used as a means of realizing a military objective'.[136] The concept quickly gained traction with military and government officials, who claimed that legitimate military operations, and the armed forces more generally, were being hampered by lawfare.[137] The essential claim of lawfare is that 'enemy forces' are using the legal system for improper purposes. Although the concept contained many obvious contradictions,[138] it has gained traction in official circles. The relevant aspect of lawfare for present purposes is that its early usage implied that the legal system was being used by the wrong people for the wrong reasons.[139] It was hardly surprising that a concept which arose in times of war and invasion used highly pejorative language against those claimed to be abusing the legal system, but

134. This is the gist of Dicey's conception of political conventions: Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 23–4. Dicey's view accords with contemporary assessments. See, eg, Gabrielle Appleby, 'Unwritten Rules' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 210.

135. On the many instances when members of his government attacked the courts or their decisions, Brandis AG remained silent. A notorious recent instance occurred when three members of federal cabinet narrowly escaped contempt charges for an outrageous attack on the Victorian judiciary: *Director of Public Prosecutions (DPP) (Cth) v Besim; Same v MHK (No 2)* [2017] VSCA 165.

136. Charles J Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (29 November 2001) 4 <https://people.duke.edu/~pfeaver/dunlap.pdf>.

137. See, eg, Christopher PM Waters, 'Is the Military Legally Encircled?' (2008) 8(1) *Defence Studies* 26; David Hughes, 'What Does Lawfare Mean?' (2016) 40(1) *Fordham International Law Journal* 1.

138. For example, many of the early cases confirming the extraterritorial operation of domestic human rights remedies involved defence personnel. See, eg, *R (Gentle) v Prime Minister* [2008] 1 AC 1356.

139. The original proponent of the term conceded lawfare could be marshalled for legitimate and illegitimate goals: Charles J Dunlap Jr, 'Does Lawfare Need an Apologia?' (2010) 43(1) *Case Western Reserve Journal of International Law* 121.

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the extension of the rhetoric of lawfare into domestic Australian politics signalled a worrying turn in Australian law.

A notable turning point in the use of the overheated language of lawfare occurred during the tumultuous government of Queensland Premier Campbell Newman. The Attorney-General in that government introduced many apparently draconian laws affecting criminal justice.[140] That same Attorney complained that lawyers who acted for some suspects were 'part of the criminal gang machine'.[141] This was the rhetoric of lawfare in everything but name. Not long after, federal politicians from Queensland began to use similar rhetoric. One minister complained that lawyers who acted pro bono for asylum applicants were 'un-Australian' in the pursuit of their 'social justice agenda'.[142] Brandis AG later delivered a speech that affirmed the important role of lawyers in 'defending the vulnerable, the marginalised or the despised',[143] though he neither named nor directly criticised his ministerial colleague. If that was taken as an illustration of the soft diplomacy that Selway and others thought an Attorney should conduct with cabinet colleagues, it was soft to the point of limp.

The sentiments of that speech did not sit easily with one Brandis AG gave a few months earlier, where he assailed those who used the legal process to the frustration of the policies of his government.[144] That analysis was littered with contradictions and weaknesses. For example, Brandis criticised a careful academic study that showed public interest environmental litigation had a marginal cost because it lacked quantification, yet his own suggestion that such litigation had a 'human cost' lacked any detail.[145] Another striking flaw in Brandis' argument was that he failed to admit he was railing against environmental laws introduced by a previous conservative government. Brandis decried the supposed use of lawfare because it 'can bring the courts into disrepute' and see them 'become vehicles for an ideological agenda' and 'makes the courts a hapless vehicle for the extraneous ends of others – not an umpire to be approached so much as a weapon to be deployed…'.[146]

This speech was not an isolated instance. The Attorney had previously complained about public interest litigation by 'radical green activists',[147] as had his cabinet colleagues.[148] Their government

140. The criminal justice policies of that government are examined in Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1.
141. Kate Kyriacou and Josh Robertson, 'You're Just One of the Gang' *Courier Mail* (7 February 2014) 8. Several lawyers sued the Queensland Attorney-General for those remarks and received substantial damages: Terry Sweetman, 'Defame and a Small Fortune' *Courier Mail* (20 May 2016) 30.
142. Phillip Coorey, 'Refugee Lawyers are "un-Australian": Peter Dutton' *Australian Financial Review* (Canberra, 28 August 2017) 5.
143. James Massola, 'George Brandis Slaps Down Peter Dutton Over "un-Australian" Lawyers Attack' *Sydney Morning Herald* (Sydney, 9 October 2017) 4 (*'Brandis'*).
144. Published as George Brandis, '"Green Lawfare" and Standing: The View from Within Government' (2018) 90 *AIAL Forum* 11.
145. *Brandis* (n 143) 16.
146. *Ibid* 18.
147. Anne Davies, 'Green "Vigilante" Rob Purves is the Wealthy New Face of Activism' *Sydney Morning Herald* (Sydney, 18 September 2015) 4 (quoting the Attorney as complaining about 'radical green activists' and the Attorney and Prime Minister promising to end lawfare).
148. See, eg, Sid Maher, 'Murray Wilcox Attacks Tony Abbott Over Mine Statement' *The Australian* (14 August 2015) 22 (quoting the Minister for Trade as attacking a consent order in a Federal Court proceeding that set aside approval for a mine as lawfare).

had attempted to amend federal environmental laws to remove standing laws that were thought to encourage public interest litigation.[149] Attorney-General Brandis never appeared to acknowledge his obvious conflict of interest in questioning those who sought to challenge the decisions of his ministerial colleagues. There was a much deeper contradiction in these statements of Brandis. He appeared to simultaneously assume the stature of his office enabled him to speak about the legal system with particular authority, while remaining unaware that he simply sounded like every other politician rather than the first law officer.

The sentiments of Brandis' paper decrying lawfare have a loose parallel with a speech delivered by then British Attorney-General Suella Braverman to a conference convened by the Public Law Project. Braverman criticised recent decisions of the Supreme Court and argued the case for proposals to curtail judicial review and the legitimacy of parliament reversing individual decisions if a government thought that appropriate. Braverman acknowledged the longstanding debate about the 'proper role' of the courts in public law matters but argued that recent decisions of the UK Supreme Court marked a 'radical departure from orthodox constitutional norms' that had 'tested our shared understanding [of those norms]…in unprecedented ways'.[150] The *Economist* thought it 'bizarre' that a law officer 'normally expected to defend the judiciary'[151] instead 'has joined the attack'.[152] One leading commentator argued that it was difficult to accept the Attorney could 'act independently in the public interest while remaining the government's chief legal adviser' while she was so intent on 'trumpeting a political message'.[153] But other commentators suggested that these criticisms were 'overblown' because British Attorneys-General have 'never been considered an apolitical actor in the richer sense'.[154] Conor and Larkin explained:

> Attorneys General must, of course, avoid political partisanship in their public interest determinations, and the kind of public remarks that would bring the judiciary and the Rule of Law into contempt. But

149. Claims that the standing provisions of the *Environmental Protection Conservation and Biodiversity Conservation Act 1997* (Cth) foster spurious claims have been debunked: Annika Reynolds, Andrew Ray and Shelby O'Connor, 'Green Lawfare: Does the Evidence Match the Allegations? – An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019' (2020) 37 *Environmental and Planning Law Journal* 497.
150. Suella Braverman QC MP, 'Judicial Review Trends and Forecasts: Accountability and the Constitution' (speech to the 2021 Public Law Project Conference, 19 October 2021) <https://www.gov.uk/government/speeches/judicial-review-trends-and-forecasts-2021-accountability-and-the-constitution>. Braverman made stronger criticisms of European courts, such as when she strongly criticised a ruling of the European Court of Human Rights, which briefly halted British government plans to remove asylum seeks to Rwanda: Mason Boycott-Owen, 'Suella Braverman calls for UK to leave "political" ECHR in wake of Rwanda ruling: The Attorney General said that it is necessary to get on with delivering Brexit' The Telegraph (10 July 2022) <https://www.telegraph.co.uk/politics/2022/07/10/suella-braverman-calls-uk-leave-political-echr-wake-rwanda-ruling/>. The many academic criticisms of these and other decisions were expressed in far more moderate terms. See, eg, Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?' (2020) 24 *Edinburgh Law Review* 88.
151. 'Government v Judges' *The Economist* 441(9270) (6 November 2021) 28.
152. 'Are Rules For Losers?' *The Economist* 441(9270) (6 November 2021) 13, 14.
153. Joshua Rozenberg, 'Back In Your Box, Attorney Tells Judges: Suella Braverman Pushes the Constitutional Boundaries' *A Lawyer Writes* (21 October 2021) <https://rozenberg.substack.com/p/back-in-your-box-attorney-tells-judges>. Rozenberg's singular stature is denoted by him being the only journalist to ever have been made a King's Counsel *honoris*. A leading academic commentator thought the Attorney's criticisms of the courts tore at the very constitutional fabric she expressed nostalgia for: Mark Elliott, 'Response to the Attorney-General's Public Law Project Keynote Speech' Public Law For Everyone (20 October 2021) <https://publiclawforeveryone.com/2021/10/20/response-to-the-attorney-generals-public-law-project-keynote-speech/>.
154. Conor Casey and John Larkin, 'The Attorney-General and Renewed Controversy Over the Law/Politics Divide' (2022) 26 *Edinburgh Law Review* 228, 235.

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> these are entirely distinct from advancing a good-faith constitutional rationale for policy reform mooted by the Government…[155]

To recognise the Attorney-General is primarily a politician affects both whether it is thought acceptable for that officer to criticise the courts and their decisions, as well as the extent to which that is acceptable. But acceptance that the Attorney is *primarily* a politician impliedly accepts that, to some uncertain extent, the office retains a special status within and obligations towards the courts, judges and the legal profession. Even if that function of an Attorney is now a secondary one, it seems clear that both Braverman and Brandis failed in the events just discussed. Braverman's claims were made against a background of years of intemperate and inaccurate criticisms of courts and their decisions. One recent parliamentary study suggested that relentless criticism of UK courts, which was accompanied by a range of more subtle attacks such as private briefings to the media and regular threats to remove or limit judicial discretion, had clearly affected public perceptions of the courts. Court suggested that sustained criticism of higher courts by British politicians over the last 25 years has clearly affected the willingness of the Supreme Court to rule in favour of the executive government.[156] If Braverman's remarks are seen as one more part of that continued attack, they are less able to be characterised as good faith arguments about policy reform. Braverman did not simply continue the earlier attacks of her colleagues; she also abdicated the function of soft power that Selway identified as so valuable. The same is true of Brandis, though the context of his comments were arguably more concerning.

At first glance, Brandis' concern about environmental litigation was unsurprising. His government had tried and failed to amend the legislation he claimed was fuelling 'green lawfare'.[157] Brandis could hardly claim the cloak of a good faith advocacy of policy reform given above to Braverman because Brandis had already failed on that front. He was instead criticising people who used a law that his government could neither reform nor repeal. Those suggestions can be criticised on two counts. Firstly, the right of access to the courts is precious.[158] Whatever view one takes of the role of the Attorney-General and the extent to which occupants of the office can be motivated by political considerations, it cannot be right for an Attorney to criticise any use of the right of access to the courts because it might frustrate the policy agenda of the government of the day. Secondly, they are at odds with the suggestions of McHugh J that Attorneys could, in exceptional circumstances and after consultation with cabinet colleagues, be trusted to identify those rare occasions when it might be appropriate not to enforce a law.[159] McHugh J was mindful that Attorneys could draw from political experience to make judgements about *their* rights and responsibilities. The same political experience and imperatives limits, perhaps even extinguishes, the capacity of an Attorney-General to criticise the decisions of other people in the exercise of their own rights and responsibilities.

155. Ibid.
156. All Parliamentary Group on Democracy the Constitution, *An Independent Judiciary – Challenges Since 2016* (Report, 28 March 2022). The group contains parliamentarians from all parties but is not an official parliamentary committee.
157. One such proposal was examined in: Senate Environment and Communications Legislation Committee, *Report on the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (November 2015). The government members to that report did not mention lawfare but its use was acknowledged and criticised by opposition members (at pp 30, 42–3).
158. The High Court has affirmed the constitutional significance of that right when considering legislation that has sought to narrow or remove access to the courts. See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 *('Graham')*.
159. *Bateman's Bay* (n 39); *McBain* (n 43).

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VIII The Attorney-General Moves from Defender of, to Defended by, the Rule of Law

Christian Porter was Commonwealth Attorney-General from 2017 until 2021, when he was moved to another ministry in a cabinet reshuffle. That reshuffle occurred largely because allegations that Mr Porter had sexually assaulted a woman several decades earlier were broadcast on the ABC Four Corners program. Mr Porter strenuously denied the allegations[160] and quickly launched defamation proceedings against the ABC. During the ensuing media and political frenzy, many suggested that the Prime Minister should launch an administrative inquiry to determine whether Mr Porter was a suitable person to remain Attorney-General.[161] The Prime Minister and Mr Porter both suggested that such an inquiry was not compatible with the rule of law. The key reasons for this claim were that the any administrative inquiry had the potential to interfere with the pending defamation proceedings, as well as any investigation that New South Wales police might conduct into the claims made against Mr Porter.[162]

One key reason raised by advocates for an administrative inquiry was the singular position occupied by the Attorney-General. That point was expressed in various ways, but the essential reason was that the federal Attorney-General was the nation's first law officer and lingering questions about the suitability of any occupant of that position should be investigated.[163] The editor of the *Australian Law Journal* took issue with suggestions that any such inquiry might be contrary to, or somehow damage, the rule of law. Justice Francois Kunc argued that any inquiry could take account of the pending defamation proceedings, operate in accordance with the rules of fairness and 'would not only be in accordance with the rule of law but would enhance it'.[164] A former Commonwealth Solicitor-General similarly suggested that his successor could advise the Prime Minister on how these delicate issues could be managed in accordance with fairness and other legal principles.[165]

The rule of law was invoked in arguments made both for and against holding an administrative inquiry into the allegations, for the purpose of determining whether Mr Porter should remain

160. Mr Porter made lengthy statements to this effect during a press conference. See 'Read the Full Press Conference: Christian Porter Denies Historical Rape Allegation', *ABC News* (Online, 3 March 2021) <https://www.abc.net.au/news/2021-03-03/christian-porter-press-conference-transcript/13212054>.The story remains on the ABC website but that organisation issued a clarification explaining the story 'did not intend to suggest that Mr Porter had committed the criminal offences alleged': 'Christian Porter' *ABC News* (Online, 31 May 2021) <https://www.abc.net.au/news/corrections/2021-05-31/christian-porter/13367350>.

161. Laura Tingle and James Elton, 'Lawyers call for Attorney-General Christian Porter to be subjected to the same standard of accountability as others in the legal profession' *ABC News* (Online, 11 March 2021) <https://www.abc.net.au/news/2021-03-11/lawyers-christian-porter-subjected-to-codes-of-conduct/13235176>.

162. This was one explanation provided by the Prime Minister: Hon Scott Morrison, 'Press Conference given at Tomago NSW – Transcript' 4 March 2021 <https://www.pm.gov.au/media/press-conference-tomago-nsw>. It is notable that the police had previously considered the issue and decided charges should not be brought.

163. One commentator framed arguments for an inquiry in more general terms, seemingly to suggest this course should be taken for serious allegations made against any minister. See Rosalind Dixon, 'Christian Porter, Public Confidence and Procedural Fairness' *ABC News* (Online, 12 March 2021) <https://www.abc.net.au/religion/christian-porter-public-confidence-and-procedural-fairness/13244152>. If applied with any rigour to claims of ministerial misconduct, that suggestion could have far reaching consequences. Precisely what might constitute 'serious allegations' for this purpose would be very contested.

164. Justice Francois Kunc, 'The Rule of Law' (2021) 95 *Australian Law Journal* 311, 313.

165. Justin Gleeson SC, 'It is not Too Late, Prime Minister, to Seek Advice of the Solicitor-General' *The Guardian Australia*, (Online, 11 March 2021) <https://www.theguardian.com/commentisfree/2021/mar/11/it-is-not-too-late-prime-minister-to-seek-the-advice-of-the-solicitor-general>.

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Attorney-General.[166] Reliance on the rule of law for both sides of the same argument is ironic, but it also reflects the longstanding differences of opinion which have arisen about such a protean and subjective concept.[167] Sir Owen Dixon signalled the problem in his famous statement that 'the rule of law forms an assumption' upon which the Australian Constitution is based.[168] As with most assumptions, the detail can be filled with accounts that reflect one's view of the function of the concept in question. This provides the concept with a malleable quality, in which different accounts of the concept can easily differ and each can be reasonable.[169]

Two aspects of rule of law are relevant to Mr Porter's case. One is Martin Krygier's useful point that the rule of law is 'too important' to be left to the lawyers and judges.[170] The concept serves and belongs to wider society, so it must be supported by those outside the law.[171] But recourse to the public, particularly public opinion as determined through polling or ad hoc methods of gauging public sentiment, as part of the rule of law is not without difficulty. The first Australian attempt to gauge empirical support for the rule of law revealed strong public support for the doctrine,[172] which may be even higher than the strong support that has long been found in studies of the American public. That study also revealed that support for the rule of law was not defined by reference to the courts or judges but was instead the result of a 'bundle of factors'. One of the associations revealed by the study was between the rule of law and confidence in public institutions.[173] That association points to a difficult question in the controversy surrounding Mr Porter. If public support for the rule of law depends, in part, on the confidence people have in public institutions, which surely includes the federal government and its cabinet, how can the rule of law be invoked as a reason *not* to have an inquiry into a scandal surrounding a senior minister?[174] The role of public opinion here is subject to the same caution Krygier has identified for lawyers. The rule of law is surely also too important to be decided by public opinion alone.[175] But we should also be cautious of any reliance upon supposed public perceptions about the rule of law as the reason why there should not be an inquiry that attempts to clarify an important issue that is in the public domain and remains unsettled.

166. On the possibility that many who invoked the rule of law in this debate were unaware of the subtle aspects of the concepts and the disagreements about its content, see Paul Burgess, 'The Rule of Law: From Unconscious Awareness to Conscious Awareness (and Beyond?)' (2021) 46(4) *Alternative Law Journal* 288.
167. Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) *Law and Philosophy* 137, 148–53. See also *Graham* (n 158) [82], where Edelman J noted that the rule of law is 'a concept the precise content of which is hotly disputed'.
168. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.
169. There is longstanding debate on the precise content of the rules of law, particularly distinctions between thick and thin conceptions of the doctrine. In its recent discussion of the concept as it relates to law officers, the House of Lords Selection Committee on the Constitution essentially adopted the thick conception of the doctrine and stated that minister should be 'mindful of the concept, understand its key principles…and consider the rule of law to have primacy over political expediency': House of Lords, Select Committee on the Constitution, *The Roles of the Lord Chancellor and the Law Officers* (HL Paper 118, 2023) 15–18.
170. Martin Krygier, 'Why the Rule of Law is Too Important to be Left to Lawyers' (2012) 2(2) *Prawo I Wiez* 30.
171. Lisa Burton Crawford, 'The Rule of Law' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 77, 78 who argues that the rule of law 'can never be reached by legal means alone'.
172. Matthew Groves, Ingrid Neilsen and Russell Smyth, 'Public Support for the Rule of Law' (2022) 51(1) *Australian Bar Review* 80.
173. Ibid 103.
174. Excluding, of course, claims that are patently spurious.
175. A point emphasised by a former Attorney-General of New Zealand, who noted that public opinion can be manipulated more easily in the digital age: Geoffrey Palmer, 'Rethinking Public Law in a Time of Democratic Decline' (2021) 52 *Victoria University of Wellington Law Review* 413.

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The second aspect of the rule of law of relevance to the case of Mr Porter became apparent in a spirited defence of the Prime Minister's refusal to convene some sort of inquiry. That defence came from Arthur Moses SC, whose arguments included a caution against 'cynical and ugly attempts to paint one's political opponents as criminals', which Moses noted was central to former President's Trump's recent failed campaign for re-election.[176] Moses rightly noted that there was a clear distinction between the issues a Prime Minister might consider when making ministerial appointments, as opposed to those relevant to deciding whether the executive government should establish a coercive inquiry to 'judge the individual'.[177]

The fatal deficiency in Moses' argument was his astonishing failure to acknowledge that the Trumpian tactics of mounting outrageous attacks against one's enemies was a regular feature of the government that Mr Porter was part of. This is the rhetoric of lawfare, examined in the previous section. An especially troubling aspect of the lawfare rhetoric is that successive federal Attorneys-General had stubbornly refused to offer any correction when cabinet and other government colleagues trenchantly criticise those involved in environmental litigation as explained above. The problem here is not political criticism of one's opponents, nor is it political criticism of those who commence litigation that sometimes does not succeed. The problem is the use of inflamed rhetoric against citizens who commence legal actions, many of which have a clear evidentiary basis, many of which succeed, yet those litigants are routinely branded essentially as enemies of the state. Moses simultaneously decried the use of lawfare in America yet failed to acknowledge either its rise in Australia or its frequent use by Mr Porter's own colleagues. It is for this reason that circumstances surrounding Mr Porter provide a useful minor sequel to the more detailed study of Attorneys-General Williams and Brandis. The extent to which the special status of the office of Attorney-General could provide a coherent basis to resist calls for an inquiry into the allegations against Mr Porter by reason of him holding the Attorney's office were significantly undermined, in my view fatally, by the arguments and actions of some of his own predecessors.

IX Concluding Observations

Scepticism should not be confused with prophecies of doom. The strong doubt expressed in this paper about the contemporary role of the Attorney-General is not intended to suggest that Australian Attorneys-General face any existential political or constitutional crisis. The office will continue at the federal, state and territory levels of government. Perhaps the issues examined in this paper simply confirm that the office of Attorney-General is evolving, as is the norm for most legal and political institutions in the common law world. This paper has traced some of that evolution, such as the refusal of many Attorneys to defend the judiciary against public criticism and suggested that they are not necessarily retrograde steps for the law and may even been positive steps for the Attorney-General. Can we really complain that Attorneys-General are increasingly happy to acknowledge more openly that their greater loyalty lies with cabinet and other political colleagues, rather than the judiciary?

176. Arthur Moses SC, 'The Fit and Proper Person Test and the Rule of Law – One Size Does Not Fit All' (2021) 95(6) *Australian Law Journal* 401, 403. The tactic predates the 2020 election campaign.

177. Moses did not indicate what issues he thought could or should be considered, perhaps because the likely relevant factor would be difficult to predict in advance of their occurrence.

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Honesty is such a rare trait in politics that we should hesitate to criticise those politicians who, usually on rare occasions and in sparing amounts, exhibit genuine honesty.[178] But honesty always has a cost. Political honesty more so. If Attorneys-General are happy to admit they are firstly a politician, and secondly a first law officer, the assumptions upon which the traditionally special position of the Attorney-General are based necessarily weaken. How can the courts accept that the Attorney-General represents the public interest, when occupants of that office no longer maintain the fiction? These questions are all the more difficult for the courts because it is impossible to deny the judicial power that exists over the special position of the Attorney-General. The courts have created and perpetuated the Attorney's fiat, as well as its wider associations. That common law power to create inevitably includes an equivalent power to reform or remove. The same applies to the restrictions that remain on standing for other parties, which rely in part on the assumption that the Attorney can represent the public interest. To acknowledge the power of the courts to shape these doctrines is to invite the most difficult question of all: If Attorneys-General no longer pretend to represent the public interest, why should our courts continue to pretend otherwise?

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178. David Feldman, 'Comparison, Realism and Theory in Public Law' in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing, 2016) 367, 370 notes that lawyers and politicians typically make recourse to values for quite different reasons. The extent to which lawyers can fully grasp the motives of, and values articulated by, politicians is therefore necessarily limited.

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