

*The Hon John Doyle AC QC*

***THE ROLE OF THE SOLICITOR-GENERAL  
NEGOTIATING LAW, POLITICS AND THE  
PUBLIC INTEREST***

**BY GABRIELLE APPLEBY  
HART PUBLISHING, 2016  
XXVIII + 335 PP  
ISBN 978 1 84946 712 4**

**A**ssociate Professor Appleby writes:  
Little is known of the workings of the office of the Solicitor-General and the views of officeholders concerning the role. Many of those who have taken up the office have admitted to knowing little to nothing about it.<sup>1</sup>

The footnote to this passage identifies the ingenuous culprits.<sup>2</sup> I am one of them. If this excellent book had been available at the time I was appointed, a number of things that only gradually became clear to me would have been clear from the outset.

When I was appointed Solicitor-General in 1986 there was not much material available about the office of the Solicitor-General. As Appleby notes, such material as there was, provided ‘a generally uncritical description of the office ... rather than offering any robust analysis of it’.<sup>3</sup> The role of the Solicitor-General in Australia had gone ‘largely unstudied’.<sup>4</sup>

In this book Appleby remedies that situation. In part, she follows what might be called the traditional method. She covers the statute law, relevant case law, legal texts (such as they are), journals, speeches and other papers. In this respect the book is amply footnoted, and impressively thorough. There seems to be nothing relevant and useful that has been omitted.

But there is much more to this book than this. It is not just a thorough collection of material from traditional legal resources. Appleby interviewed some 45 people,

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<sup>1</sup> Gabrielle Appleby, *The Role of the Solicitor-General Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 148.

<sup>2</sup> Ibid 148 n 6.

<sup>3</sup> Ibid 8.

<sup>4</sup> Ibid 7–8.

most of whom were Attorneys-General and Solicitors-General, present and past, as well as some judges and Crown Solicitors. The interviewees were drawn from all Australian jurisdictions. The list of those interviewed in Appendix B shows that they cover a wide range of experience and background.<sup>5</sup> Based on my experience as the Solicitor-General for South Australia from 1986–95, it is apparent that Appleby has obtained the opinion and experience of ‘key players’.<sup>6</sup>

The interviews, and the use made of them by Appleby, enrich and enliven the text, and stimulate the reader’s interest. Not surprisingly, the book does not contain a transcript of the interviews. The material drawn from the interviews is found in the text and in the footnotes. Again, based on my own experience, I can vouch for the thoroughness of this aspect of her work. The material drawn from the interviews brings to life her analysis of the role and work of Solicitors-General.

Appleby has set out to do more than provide a real-life description of the work of Solicitors-General. She has also provided a history of the development of the office of the Solicitor-General in Australia.<sup>7</sup> But the significant additional feature is that, as she says: ‘The study of the Solicitor-General undertaken in this book is underpinned by a broad objective: to seek a better understanding of the “working”, or “complete”, form of constitutional systems’.<sup>8</sup>

As she points out, there is a tendency in the study of constitutional law to focus almost exclusively on the constitutional text, if there is one, or upon the workings of and relationship between the legislature, executive and judiciary.<sup>9</sup> She begins with what at first sight seems a bold proposition: ‘The central character of this book is one of the major actors in the contemporary Australian constitutional order: the Solicitor-General.’<sup>10</sup>

This proposition rests on the concept of the Solicitor-General as one of the ‘government lawyers’ whose advice ‘assists in keeping governments within the law, and also facilitates the adaptation of legal frameworks in a climate of evolving social needs and political ideas.’<sup>11</sup>

She adds: ‘Government lawyers are key components in achieving constitutionalism.’<sup>12</sup> And: ‘It is the rule of law and the striving for constitutionalism that serves

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<sup>5</sup> Ibid 313.

<sup>6</sup> For a list of those interviewed: *ibid*.

<sup>7</sup> Ibid ch 3.

<sup>8</sup> Ibid 3.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 6.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

to explain and provide the rationale for the constitutional role of government legal officers, including in Australia the primary legal officer, the Solicitor-General'.<sup>13</sup>

She argues then that the Solicitor-General is in a special position:

While the function of day-to-day legal adviser to the government is filled by a vast number of legal professionals both within and outside government, at the apex of these sits the Solicitor-General. Subject only to a future contrary judicial ruling, the office provides the final word on significant legal questions within the Executive.<sup>14</sup>

In her concluding remarks Appleby says:

What this book has demonstrated is that the non-political grounding of Australia's Solicitors-General has in many respects removed the office from the immediate tensions between the public interest, the law and politics that face a Solicitor-General holding a ministerial post. However, the office's continuing relationship with democratic government means that these tensions, appropriately, remain and must be negotiated by individual officeholders.<sup>15</sup>

That is a brief outline of her thesis: the Solicitor-General is at the apex of the lawyers who provide, to the executive government, legal advice that supports constitutionalism and the rule of law.<sup>16</sup> Thus, there is a constitutional and political aspect to the office, although it is an office independent of the executive government.

Appleby considers and analyses the role of the Solicitor-General as principal advocate for and principal adviser to the executive government.<sup>17</sup> It is in this aspect that the value of her research shines through. She has collected a valuable contemporary account of the work and perceptions of Solicitors-General and others. She relates this material to the role of the Solicitor-General in contemporary times.

So what stands out for me is the combination of historical record, legal details and the experience and perceptions of Solicitors-General, coupled with a careful consideration of the material drawn from the interviews.

The task that Appleby has undertaken is an ambitious one. It is not easy to integrate all of this material. But she has done so. She begins with a historical and comparative study of the office, examining in particular the role of the English law officers,<sup>18</sup> and

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<sup>13</sup> Ibid 7.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 294.

<sup>16</sup> Ibid 7.

<sup>17</sup> Ibid 98–100, 106–11, 147–211, 212–54.

<sup>18</sup> Ibid 18–43.

in less detail those of the US<sup>19</sup> and New Zealand.<sup>20</sup> This is followed by a history of the evolution of the Australian Solicitor-General.<sup>21</sup> She analyses both the technical details of the office, as well as the development of the Solicitor-General as a ‘constitutional specialist’.<sup>22</sup> She examines the nuts and bolts of the office — appointment, tenure, remuneration and removal.<sup>23</sup> She studies the role of the Solicitor-General both as advocate in court for the executive government<sup>24</sup> and as its principal adviser.<sup>25</sup> Her analysis is based firmly on her opening proposition — the role of the Solicitor-General is at the apex of the ranks of government legal advisers.<sup>26</sup>

In relation to the Solicitor-General as adviser,<sup>27</sup> she identifies three perspectives for analysis:

First, some participants believed the function existed to ‘check’ government from over-extending its powers ... Secondly, the function existed to assist the democratically elected government achieve its policy agenda with certainty and security. Thirdly, it facilitated the smooth operation of the separation of powers in times of conflict between institutions ...<sup>28</sup>

She identifies four assumptions necessary for the advisory function of the office of the Solicitor-General to be able to advance the rule of law.<sup>29</sup> First, that the Solicitor-General operates as an adviser to the executive; the executive being the client of the officeholder.<sup>30</sup> The second assumption is that the Solicitor-General’s advice is respected as the final word on a legal issue by government, and the government will follow the advice given.<sup>31</sup> The third assumption is that the government will seek the advice of the Solicitor-General when appropriate,<sup>32</sup> and the fourth is that the Solicitor-General provides independent advice, not the advice that is wanted.<sup>33</sup>

These perspectives and assumptions are carefully analysed in the material drawn from the interviews.

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<sup>19</sup> Ibid 48–51.

<sup>20</sup> Ibid 51–3.

<sup>21</sup> Ibid 57–92.

<sup>22</sup> Ibid 7.

<sup>23</sup> Ibid 92–5.

<sup>24</sup> Ibid 212–54.

<sup>25</sup> Ibid 147–212.

<sup>26</sup> Ibid 7.

<sup>27</sup> Ibid ch 5.

<sup>28</sup> Ibid 151.

<sup>29</sup> Ibid 164.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 171.

<sup>32</sup> Ibid 177.

<sup>33</sup> Ibid 192.

In chapter 6, Appleby analyses the role of the Solicitor-General as an advocate.<sup>34</sup> This part of the book is also enriched and enlivened by the interviews that Appleby conducted. As she notes, ‘subtle distinctions’ appeared in the views of the persons she interviewed,<sup>35</sup> demonstrating that the ‘true picture’ of the Solicitor-General’s function as advocate (if there is such a thing) is more complex than it might appear.<sup>36</sup> I make this qualification because it may be that there are differences of practice from one jurisdiction to another. This is an interesting and intriguing chapter of the book,<sup>37</sup> as one reflects on the differences of approach that emerge.

In chapter 7, she analyses the vital concept of independence, a concept that is central to all of her reasoning.<sup>38</sup> She says that ‘[i]t is independence that makes all legal advisers relevant; but in the context of the Solicitor-General, as the “final” legal adviser to government, the office’s independence is a dimension of added importance.’<sup>39</sup>

This concept also is examined in detail drawing on the interviews. Earlier, I referred to the value of the historical material found in this book. This material will provide a point of reference in the future for later analyses of the work of the Solicitor-General and reflections on the functions of that office. But, as I have already said, what struck me most forcefully was the value of her analysis of the application of the principles that she identifies, in the context of contemporary issues and events involving Solicitors-General. She explores a number of issues that can only be understood against the background of the principles and practices that she presents. So, for example, she explores the practical application of the concept of the Solicitor-General as the provider to the executive government of the ‘final word’ on legal issues.<sup>40</sup> She studies the assumptions that underline this role; that is, the assumption that the executive government will seek advice from the Solicitor-General when appropriate,<sup>41</sup> will not seek advice elsewhere, and will act on that advice.<sup>42</sup>

Reflecting on my time as Solicitor-General and my experience, this is a book of outstanding utility and quality. Appleby has combined research and analysis in a practical, illuminating and interesting manner. Her integration of the history and experience of the office of the Solicitor-General into the constitutional setting is illuminating, and gives rise to numerous practical and theoretical issues, with which she grapples. There is plenty of material to stimulate discussion about the office and functions of the Solicitor-General.

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<sup>34</sup> Ibid ch 6.

<sup>35</sup> Ibid 251.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid ch 6.

<sup>38</sup> Ibid ch 7.

<sup>39</sup> Ibid 254.

<sup>40</sup> Ibid 7.

<sup>41</sup> Ibid 177.

<sup>42</sup> Ibid 171.

