DEFENDER OF THE FAITH? THE ROLE OF THE ATTORNEY-GENERAL IN DEFENDING THE HIGH COURT

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I may disapprove of what you say,
but I will defend to the death your right to say it.[1]

Voltaire (1694 - 1778)

The refusal of the Federal Liberal Attorney-General, Honourable Daryl Williams QC, to defend Justice Michael Kirby of the High Court of Australia in the face of a direct personal attack from a Senator under parliamentary privilege in March 2002, raised many important questions relating to the role of the Attorney-General in defending the High Court from attack. There has also been much debate in the legal profession in recent years over political attacks on the decisions of the High Court, especially in response to the Mabo (No2) and Wik decisions. In this article, the author surveys the development of the office of the Attorney-General in the British and Australian context, noting differences in the modern version of the office, and examines the extent of the doctrine of independence. The author then explores the debate over the role of the Attorney-General in defending the High Court, with particular reference to the views of the past three Chief Justices of the High Court and the present Attorney-General, the Honourable Daryl Williams QC prior to the attack on Justice Kirby. The article concludes that it is both appropriate and necessary for the Commonwealth Attorney-General to defend the judiciary from sustained political attack that may undermine the rule of law and damage the integrity of the courts. While the Attorney-General is primarily a politician and does not necessarily have to agree with the substantive decisions made by the High Court, as Chief Law Officer, the Attorney-General has a duty to prevent damaging conflict between the fundamental institutions of Australian constitutional government. The Attorney-General must act as both a bridge and a gatekeeper to uphold the proper functioning of the separation of powers.

The refusal of the Federal Liberal Attorney-General, Honourable Daryl Williams QC, to defend Justice Michael Kirby of the High Court of Australia in March 2002, in the face of a direct (and subsequently found to be false) attack made under parliamentary privilege by Senator Heffernan on the integrity of Justice

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1 *Bloomsbury's Treasury of Quotations*, (1994), 747.

Kirby, raised many questions on the role of the Attorney-General in defending the High Court from attack.

There has been much debate in the legal profession in recent years surrounding political attacks on decisions of the High Court, especially those with widespread political implications such as the *Mabo (No2)*[2] and *Wik*[3] decisions. Of particular significance has been the often public disagreements between members of the High Court and the Attorney-General on the appropriateness of the Attorney-General in defending the High Court from public political attack. Chief Justices Mason and Brennan have expressed the view that it is the role of the Attorney-General to defend the High Court from political attack.[4] The present Attorney-General, The Honourable Daryl Williams QC, has made his position very clear - that the alleged convention of the Attorney-General defending the judiciary from political attack is not an established convention and is, in fact, inconsistent with the primarily political nature of the office.[5] This disagreement amongst the upper echelons of the Australian legal structure has been further complicated by dispute over whether any legal basis exists in relation to such a duty. This article does not attempt to analyse the attack on Justice Kirby (a task no doubt others will endeavour to unpack for some time to come), nor does it examine the historical pattern of the Attorney-General in defending the High Court from public political attack in respect of other controversial decisions (a task worthy of a separate article altogether). Instead it aims to provide a comprehensive overview of the contemporary debate preceding this incident, and to explore the simmering tensions prior to the attack by Senator Heffernan.

This article is divided into three parts.

In Part I, I examine the development of the role of the Attorney-General in England and Australia and the differences between the two countries in the modern duties of an Attorney-General. In Part II, I explore the broader issue of the independence of the Attorney-General and the inherent tension between the Attorney-General's role as Chief Law Officer of the Commonwealth, and as a politician and member of Cabinet. In Part III, I examine the position of the current Attorney-General, The Honourable Daryl Williams QC, on the role of the Attorney-General in defending the High Court from political attack, as well as the position of members of the judiciary and the legal profession on the issue.

Embedded in this article are three important questions:

- *Must the Attorney-General defend the High Court?* This refers to the legal obligations of the Attorney-General to defend the High Court and whether it is

2 *Mabo v Queensland (No2)* (1992) 175 CLR 1.
3 *Wik Peoples v Queensland* (1996) 187 CLR 1.
4 Sir Gerard Brennan, 'The State of the Judicature', (the 30th Australian Legal Convention, Melbourne, 19 September 1997), reprinted in (1998) 72 *Australian Law Journal* 33; Sir Anthony Mason, "The judiciary, Community and the Media", (1997) 12(1) *Commonwealth Judicial Journal* 4; "Gleeson vows to stand up for judges", *The Australian*, 25 June 2001.
5 The Honourable Daryl Williams QC, "Judicial Independence", (1998) v36(3) *Law Society Journal* 50; The Honourable Daryl Williams QC, "The Role of an Australian Attorney-General: Antipodean Developments from British Foundations", Transcript of Speech to the *Anglo-Australasian Lawyers Society*, London, 9 May 2002.

entrenched in law, history, custom or convention; indeed, whether there is a legal basis at all.

- *Is the Attorney-General defending the High Court?* I examine the political attacks on the High Court in the aftermath of the controversial Wik decision, as well as the views of the current Attorney-General, The Honourable Daryl Williams QC, on his role in defending the court.
- *Should the Attorney-General defend the High Court?* This refers to the moral/normative obligations to defend the High Court. I examine this issue in the context of the modern role of the Attorney-General, the stability of the rule of law and the institutions of the doctrine of separation of powers.

I conclude that, despite the lack of a clear custom or convention, it is appropriate and necessary that the Commonwealth Attorney-General defends the judiciary from sustained political attack that has the potential to undermine the rule of law and damage the faith of the public in the integrity of the courts. While the Attorney-General is primarily a politician and does not necessarily have to agree with the substantive interpretations of the law as contained in the decisions of the High Court, as Chief Law Officer, the Attorney-General has a duty to prevent damaging conflict between the fundamental institutions of Australian constitutional government. The Attorney-General must act as both a bridge and a gatekeeper to uphold the proper functioning of the separation of powers.

I THE OFFICE OF THE ATTORNEY-GENERAL

A *The Development of the Office of Attorney-General*

The historical development of the office of the Attorney-General in the United Kingdom provides some clues as to its modern interpretation in Australia. Prior to the appointment of a specific Attorney for the Sovereign, it was the role of the King's Bench to safeguard the Sovereign's legal rights and interests and arrange the Sovereign's prosecutions.[6] However, it became increasingly difficult for the judges to remain impartial adjudicators of the rule of law with the added strain of supervising the conduct of the King's business.[7] Since the Middle Ages it has also been accepted doctrine that the Sovereign cannot appear in person to plead his own case due to the constitutional conflict of interest between the Executive and the judiciary.[8] The role of the judiciary thus moved to its more traditional role of protecting broader principles of constitutionalism and the rule of law, while the Sovereign utilised the services of a designated intermediary to supervise the conduct of specific legal interests.

The earliest recorded reference to the office of an 'Attorney-General' is in 1243 when a professional attorney, Lawrence del Brok, was noted as receiving

6 J. Edwards, *The Law Officers of the Crown*, 1964, 17 (hereafter referred to as 'Edwards').
7 Ibid, 16-17
8 Ibid, 14

payment 'for suing the King's affairs of his please before him.'[9] The role was formalised in 1315 and a number of private attorneys were engaged from time-to-time to assist the King's Attorney in prosecuting the King's business. An important development in these times was the exclusivity of the King's Attorney for the King's prosecutions - while other attorneys were engaged temporarily to assist with the workload, the person who held the official post of the King's Attorney was not allowed to act for private litigants.[10]

The political nature of the office was introduced gradually from 1461 when the King's Attorney was recognised as a key adviser to the Crown and was appointed to the council of advisers to the King, along with judges and political advisers, situated in the House of Lords.[11] During the sixteenth century the Attorney-General became an important figure in liaising with the House of Commons as adviser to the House of Lords.[12] However, the Attorney was not allowed to retain a permanent seat in the House of Commons, even if elected to a seat, because of the suspicion felt by the Commons at this turbulent time in British constitutional history towards a representative of the Crown.[13] In 1670, however, Sir Heneage Finch was permitted to retain his seat in the House of Commons after being appointed Attorney-General[14] and the office was increasingly able to assume political responsibilities within the House of Commons. During the eighteenth century, the presence of the Attorney-General and his input into the drafting of bills in the House of Commons became indispensable to its day-to-day operations.[15] However, the involvement of the Attorney-General was limited to preparation of bills and advice on legal matters. Only rarely did the Attorney-General speak in the Lower Chamber.[16] In the nineteenth and early twentieth century, the confluence of the legal and political roles took its toll. The increase in parliamentary duties, the role of advising the Crown and government departments on points of law, and the enormous volume of legislation drafting, all combined to change the character of the office from 'principal representative of the Crown in the Royal Courts to that of head of a government department.'[17]

As Edwards highlights in both of his scholarly works on the Law Officers of the Crown in Commonwealth countries,[18] the result of the increasing workload on the Attorney-General in the House of Commons was that the office began to exhibit a dualism in its role. On one hand, the Attorney-General acted as the chief senior counsel prosecuting matters and looking after the interests of the Crown. On the

9 Ibid 15-16. Sainty records the first official King's Attorney as William Langley in 1315; J Sainty, A *List of English Law Officers, King's Counsel and Holders of Patents of Precedence*, 1987, 41-42.
10 Ibid 24.
11 Ibid 27.
12 Ibid 34.
13 Ibid.
14 Ibid 37.
15 Ibid 45.
16 Ibid 46.
17 Ibid 51.
18 Edwards, above n 6; JL Edwards, *The Attorney-General, Politics and the Public Interest*, 1984 ('Edwards (1984)').

other hand, by the beginning of the twentieth century, the Attorney-General was increasingly providing advice to the House of Commons on the legal consequences of its proposed and actual legislation. As Edwards argues, the trend towards providing the House of Commons with legal advice on legislation, especially where such advice influenced the actions of the government of the day, placed the office squarely in a political context without the office necessarily being a political one.[19] Indeed, the Attorney-General was expected to address the Commons as an objective adviser on the legal implications of a bill. As Sir Stafford Cripps, Solicitor-General for the United Kingdom in the early 1930's put it in discussing the remuneration of the Attorney-General, the issue was that:

> Until a decision has been arrived at as to whether a Law Officer is really a Minister, and is to be paid and regarded as a Minister, or whether he is half Minister and half practising lawyer, no satisfactory conclusion will be arrived at as regards his salary.[20]

The political implications of legislation inevitably placed the Attorney-General in a position in which it became increasingly difficult to '...delineate those areas in which the questions of law involved do not impinge upon matters of government policy.'[21] Indeed, one could argue that the line delineating the boundaries of law and politics in Britain has been modified as often as the change in the Attorney-General.

In Australia, the development of the office of the Attorney-General reveals the same tension between First Law Officer of the Crown and the political implications of the office, but in the reverse order. The first Attorney-General in each of the State colonies was a member of the English Bar appointed by the Governor as an ex officio member of the Executive and Legislative Councils. From the beginning, the Attorneys-General in the colonies played an active part in the administration of local government and politics. As colonial government became more established, the need for judicial independence became more important and there was a gradual move of members of the judiciary and the Bar away from colonial politics.[22] Thus the Attorney-General was originally involved quite heavily in colonial politics but gradually withdrew from the political arena as the independence of the colonial judiciary became more pronounced.

As Edwards[23] writes in relation to the Australian colonies, the passage of time brought with it constitutional adjustments in keeping with the political inclinations of individual governments.[24] For example, the Attorney-General in Australia was a member of the Cabinet from the earliest days of the colony, a position determined in accordance with the political standing and seniority of the individuals rather than by convention.[25]

19 Edwards, above n 6, 51.
20 Edwards, above n 6, 117.
21 Ibid 52.
22 Edwards (1984), above n 18, 367.
23 Ibid 368.
24 Ibid 367.
25 Ibid 368.

B *The Modern Attorney-General*

What is clear from the history of the Attorney-General in both Britain and in Australia is that the office has always been hybrid in character - a fusion of political animal and Chief Legal Officer to the Crown. The difference between the two countries in the modern nature of the office is in the contrasting emphasis placed on each aspect. These emphases are the result of three influences upon the office in each country: the structure of the office, the functions of the office (particularly responsibility for criminal prosecutions) and the constitutional landscape.

In Britain, while the Attorney-General is certainly recognised as a politician, there still exists a hypothetical sense of independent detachment, heavily influenced by the legal aspect of legal adviser to the Crown.[26] A major reason for this difference in emphasis in the modern role of the Attorney-General in Britain can be found in the structure of the office. The British Attorney-General:

- is usually a leading counsel of established reputation whose advice is confined to important legal matters with respect to government;
- does not have responsibility for the administration of a government department as Ministerial responsibility for justice rests instead with the Lord Chancellor's Department;[27]
- is usually, though not always, a member of the House of Commons;
- is not included in Cabinet;[28]
- represents the Crown in the courts in all matters where public rights are concerned;
- is aided by a small professional staff;
- does not provide government departments with legal advice;[29]
- does grant fiats in relator actions and exercises ultimate control over major prosecutions, even though the majority of prosecutions are conducted by the Crown Prosecution Service (CPS).

In contrast, the Commonwealth Attorney-General:

- is primarily a politician;[30]
- is always a member of the legislature;
- may not necessarily be a lawyer;
- may be a member of Cabinet;
- does oversee a large government department (The Attorney-General's Department), which often advises other government departments as well as Ministers and the Cabinet;
- does not conduct prosecutions as this task is devolved almost entirely to the independent Commonwealth Director of Public Prosecutions (DPP);

26 Edwards, above n 6, especially 94-100
27 Gerard Carney, 'The Role of the Attorney-General', (1997) 9(1) *Bond Law Review* 1, 2-3 ('Carney').
28 HE Renfree, *The Executive Power of the Commonwealth of Australia*, Legal Books, Sydney, 1984, 205 ('Renfree').
29 Ibid.
30 Ibid.

- 'appears to be more of an administrative person and less of a legal professional one.'[31]

Certainly from the point of view of the government of the day, the Attorney-General is primarily a Member of Parliament who, through possessing political seniority and (usually) a law degree, is elevated to a portfolio in the Ministry that deals with the law - a portfolio no more or less significant in political terms than any other portfolio.

These variances are crucial to the differing interpretations of the office in each country. Whereas in Australia, the Attorney-General is a politician first (literally, in the requirement of election to the Legislature, constitutionally, as a member of Cabinet and the Executive Council, and culturally, in the generally accepted view of modern political parties to the office), in Britain, the Attorney-General is a leading counsel drafted into politics from the ranks of the English Bar without responsibility for a large government department. These are significant parameters to the interpretation of the office even before individuals have a chance to interpret the parameters of the office for themselves.

Secondly, the functions of the office in each country exert an important influence on the nature of the office, particularly in relation to the responsibility for criminal prosecutions. The duties of the Commonwealth Attorney-General derive from both common law and statute. The common law obligations derive from Executive prerogative powers and allow the Attorney-General to:[32]

- initiate and terminate criminal prosecutions;
- advise on grant of pardons;
- grant immunities from prosecution;
- issue fiats in relator actions;
- institute proceedings for contempt of court;
- appear as amicus curiae or contradictor in matters of public interest;
- apply for judicial review;
- represent the Crown in legal proceedings;
- provide legal advice to Parliament, Cabinet and the Executive.

The Attorney-General also has statutory power to intervene on issues of constitutional interpretation as conferred by s 78A of the *Judiciary Act 1903* (Cth).[33]

In Australia several of these prerogative powers have been delegated to other Law Officers under the *Law Officers Act 1964* (Cth), principally because of the administrative efficiencies of allowing a specialist department to deal with particular legal issues. For example, the Solicitor-General acts as legal Counsel and furnishes legal advice to the Commonwealth[34] and the Australian

31 Ibid.

32 Carney, above n 27, 2; Queensland, Queensland Electoral and Administrative Review Commission, report on the review of Independence of the Attorney-General (1993) 5-9.

33 Renfree, above n 28, 207

34 *Law Officers Act* 1964 (Cth) s 12. Moreover, apart from limited exceptions, the Attorney-General may delegate to the Solicitor-General *all or any* powers or functions of the Attorney-General: s 17.

Government Solicitor (AGS) is the principal solicitor engaged by the Commonwealth government and its departments.[35]

A major source of controversy and conflict between politics and legal duties in the past has centred on the role of the Attorney-General as Chief Prosecutor of the Crown. Previous Attorneys-General in both countries, and from both sides of politics, have been subjected to enormous pressure with respect to politically controversial decisions to prosecute. This issue, more than any other, has focussed attention on the role of the Attorney-General because the prosecutions have usually been of a political nature and thus high profile. The delegation of this power in Australia to the independent entity of the Director of Public Prosecutions has dissolved much of this tension by removing the decision to a public servant at arm's length from political pressure.[36] Of course, the DPP can still be subject to a significant amount of pressure from politicians through the media.[37] However, the act of delegation *per se* has removed the issue as a political pressure point. In Britain the Attorney-General has taken the same step and delegated prosecutions to the Director of Public Prosecutions, the administrative head of the Crown Prosecution Service (CPS). However, the British Attorney-General, assisted by the Solicitor-General, still has a statutory duty to 'superintend the discharge' of his or her duties by the DPP and thus still retains effective control over decisions to prosecute, as well as responsibility for those decisions in Parliament.[38]

Thirdly, the hybrid character of the office of Attorney-General is also a product of the position of the office within the Australian constitutional landscape. The Australian Attorney-General is situated at the 'cusp'[39] of the doctrine of separation of powers in Australian government. The Attorney-General is in a unique position because of the influence of the office in each of the three arms of the Australian constitutional structure; that is, in the Judicial arm of government as Chief Law

35 The AGS is the solicitor for the Commonwealth. It was established under the auspices of the *Judiciary Act 1903* (Cth) and operates in the areas of Litigation, Government Law and Revenue and Regulation. See <http://ags.gov.au/about/CorpIntent02.pdf> and more generally Website of the Australian Government Solicitor <http://ags.gov.au/index.html>.

36 See <http://www.cdpp.gov.au/cdpp/dppinfo.html> at 3 March 2002. According to the Commonwealth DPP website: 'The DPP was established under the *Director of Public Prosecutions Act 1983* (Cth) and began operations in 1984. The Office is headed by a Director who is appointed for a statutory term of up to seven years. The DPP is within the portfolio of the Commonwealth Attorney-General, but the Office effectively operates independently of the Attorney-General and of the political process. Under section 8 of the DPP Act the Attorney-General has power to issue guidelines and directions to the DPP. However, that can only be done after there has been consultation between the Attorney-General and the Director. In addition, any direction or guideline must be in writing and a copy must be published in the Gazette and laid before each House of Parliament within 15 sitting days. No guidelines or directions were issued during the last year.' Mr Williams has also commented that this is an important difference: see The Honourable Daryl Williams QC, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations', Transcript of Speech to the *Anglo-Australasian Lawyers Society*, London, 9 May 2002 at [24].

37 See, for example, the "gang rape" case of *R v AEM (jnr) & AEM (snr) & KEM*, District Court of NSW, Criminal Jurisdiction, 01/11/1996 per Justice Latham and the surrounding controversy, eg "Furious Carr rushes new laws to raise maximum penalty", *The Sun Herald*, 26 August 2001.

38 See Website of the *Crown Prosecution Service*, <http://www.cps.gov.uk/> (1/3/02).

39 Andrew Leigh, 'The successful Attorney-General: an oxymoron?', (1999) 73(2) *Australian Law Journal* 91 at 92 ('Leigh').

Officer with the responsibility to appoint federal judges; in the Executive arm of government as a Minister of State, and, in the Legislature as a Member of Parliament. Although the British Attorney-General is involved in all three areas of constitutional government, the influence is significantly less because the holder of the office may not necessarily be a member of the Legislature or of the Executive.

II THE INHERENT TENSION - AN INDEPENDENT ATTORNEY-GENERAL?

A *The Doctrine of 'Independent Aloofness' and the Shawcross Principle*

In order to deal with the tension between the political and legal obligations of the office, the doctrine known as 'independent aloofness' evolved in Britian. The doctrine provided that the Attorney-General should not be involved in questions of government policy, should not engage in excessive political debate outside his policy area, and should generally be non-confrontational with respect to party politics inside his or her portfolio.[40] The Attorney-General was thus free to make decisions based on the objective evidence before him or her, such as the decision to prosecute, but was not to be influenced by party political considerations.

This doctrine was most famously tested in the controversy of the Campbell case in 1924 in which the then Attorney-General, Sir Patrick Hastings, was allegedly directed by the Labor government, led by Prime Minister Ramsay MacDonald, to withdraw the criminal prosecution against John Russell Campbell as acting editor of the Communist newspaper 'Workers Weekly'.[41] In July 1924 the paper published an article in which members of the armed forces were urged not to turn their guns on their fellow workers in the event of an industrial dispute. The article also implored members of the fighting forces to form committees to overthrow capitalism and to organise to turn their weapons on their industrial oppressors.[42] After consultation with the Solicitor-General, Sir Archibald Bodkin, the Attorney-General took the decision to institute criminal proceedings under the *Incitement to Mutiny Act 1797*. However, the decision to prosecute did not sit well with a large block of the Labour backbench. These backbenchers lobbied for the prosecution to be withdrawn, especially since Campbell had been severely injured in the war, had been decorated for gallantry, was only acting editor while the chief editor was away, and many back benchers agreed with the fact that the army should not be used to quell industrial disputes.[43]

Attorney-General Hastings decided to withdraw the prosecution in light of these new facts. Even though Hastings had already decided to withdraw the

40 L.J. King, "The Attorney-General, Politics and the Judiciary", (2000) 29(2) *University of Western Australia Law Review* 155 at 157 ('King').
41 For a full account of the Campbell case and its aftermath see Edwards, above n 6, Chapter 11.
42 Edwards, above n 6, 199.
43 Ibid, 201.

prosecution, the Prime Minister and the Cabinet made a directive in a Cabinet meeting to the effect that the Cabinet should approve all prosecutions of a political nature.[44] When questioned in parliament, MacDonald claimed that he had not been consulted at all about the decision to institute or withdraw the prosecution.[45] However, several days later in Parliament he was forced to concede that he had been consulted on the decision. This admission led to a firm belief on the part of the Opposition that the Prime Minister had interfered with the decision to prosecute. The Opposition moved a successful motion of censure later that day which eventually forced the resignation of the entire government.[46]

As former South Australian Attorney-General King argues, the highly charged atmosphere surrounding the *Campbell* case was perhaps partly a reaction to the election of the first Labour government in Britain following World War I. King argues that the incident probably had a disproportionate effect on the conception of the Attorney-General, such that "a doubtful and hitherto controversial principle was elevated to the level of binding constitutional convention."[47] It was in this context that the post-World War II Labour government, led by Clement Atlee, accepted the principle unreservedly. The principle was expounded by the Attorney-General at the time, Sir Hartley Shawcross, in a famous speech to the House of Commons in 1951, which has played a significant part in defining the modern role of the Attorney-General. In considering whether to initiate a prosecution, especially one that contains issues of public importance, Shawcross said that:

> ... there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the governments political fortunes; that is a consideration which never enters into account.[48]

The classic Shawcross Statement is contained in the following passage:

> I think the true doctrine is that it is the duty of an Attorney-General in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful, would have upon public morale and order and international relations, and so on, and generally to make himself familiar with all the considerations of public policy which may enter into the matter. In order to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing himself of particular considerations which might affect his own decision, and does not consist and must not consist, in telling him what the decision ought to be. The

44 Edwards (1984), above n 18, 314-315.
45 Ibid 311.
46 Ibid.
47 King, above n 40, 160.
48 Edwards, above n 6, 222-223.

> responsibility for the eventual decision rests upon the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision to the shoulders of his colleagues. If political considerations, which in the broad sense that I have indicated affect government in the abstract, arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.[49]

Edwards has claimed that this is the 'modern exposition of the constitutional position of the Attorney-General.'[50] It does seem to have been the accepted doctrine of the role of the Attorney-General in Britain and Commonwealth countries, despite the differences in the roles in different countries. The general principle is that of independent aloofness in the decision to prosecute - the Attorney-General should not be directed by party political considerations in the decision to prosecute.

The acceptance of the Shawcross principle in Commonwealth countries was fortified at the Commonwealth Law Minister's Conference held in Winnipeg, Canada in August 1977. The Conference released a unanimous statement on the role of the modern Attorney-General in Commonwealth countries. The substance of that communique appeared to endorse the Shawcross principle despite the differences in specific constitutional arrangements of each country. It stated:

> In recent years, both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorse the principles already observed in their jurisdiction that the discretion in these matters should always be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned.[51]

It is clear that the Shawcross principle forms the basis for defining the modern role of the Attorney-General in Britain. However, it is distinctly unclear as to whether this is an accurate representation of the role of the modern Attorney-General in Australia. If it is the position in Australia, then it lends weight to the argument that the Attorney-General retains a degree of independence, albeit to a small degree, from party political considerations. One could argue that this small amount of independence is still a feature of the office of the Commonwealth Attorney-General. But does this sense of independence automatically translate into a positive duty to defend the High Court from public political attack when the rule of law and the integrity of the judiciary is in question, notwithstanding party political considerations? After all, the Shawcross principle arose in the context of British government, and specifically in relation to prosecutorial

[49] Ibid 223.
[50] Ibid.
[51] Edwards (1984), above n 18, 62.

discretion. On the other hand, if the principle of a degree of independence from political influence is not the accepted principle in Australia, then it supports the view of the present Attorney-General that the public does not expect the Attorney-General to defend the High Court because he or she is bound to the political views of the government.

B *The Australian Experience*

The tension is encapsulated well in an article by Andrew Leigh entitled, "The successful Attorney-General - an oxymoron?".[52] Leigh argues that because the Attorney-General sits at the cusp of the separation of powers, there is an inherent tension between success as a minister or as a member of a political party, and success as the Chief Legal Officer of the Crown. The requirement of putting the public interest above the interests of his or her political party is a difficult position to maintain; indeed, the Prime Minister may remove them if they dare to put what they consider to be the public interest first, thus there is no such thing as a successful Attorney-General.[53] Leigh draws on a useful distinction put forward by US academic Nancy Baker[54] of two Attorney-General archetypes: the 'advocate' and the 'neutral'. The 'advocate' is primarily interested in the political concerns of the administration and sees his or her role primarily as a politician.[55] Leigh cites, amongst others, Robert Kennedy, Lionel Murphy and Sir Patrick Hastings as examples of advocate Attorneys-General. A 'neutral' is relatively independent of party politics and fulfils the duties of the office with judicial discretion and independence, such as Edward Levi of the United States and Robert Ellicott in Australia.[56] Leigh argues that this distinction can be applied to most common law countries, such as the USA, the UK, Australia and Ireland, despite differences in constitutional structure and custom. Of course, it should be noted that this analysis is a useful one, but applies to the way in which an individual chooses to interpret the office of Attorney-General, rather than an objective assessment of the characteristics of the office.

Carney argues with respect to the Shawcross principles that, 'In Australia, the position is not so clear although there is sufficient recognition given to the principle for it to be considered at least a custom, if not a convention.'[57] Renfree argues that the office has undergone some change with its transfer to Australian conditions, namely that 'Australian Attorneys-General are politicians first',[58] implying that the Shawcross principles are of little significance in the Australian context.

The most famous Australian example that highlights the inherent tension between the Attorney-General as politician and the Attorney-General as Chief Law Officer

52 Leigh, above n 39.
53 Ibid 92.
54 *Conflicting Loyalties. Law and Politics in the Attorney-General's Office, 1789-1900*, University of Kansas Press, 1992.
55 Leigh, above n 39, 92.
56 Ibid 93.
57 Carney, above n 27, 3.
58 Renfree, above n 28, 205.

is that of the resignation of Attorney-General Robert Ellicott QC in 1977 over perceived interference from Cabinet in the exercise of prosecutorial discretion. In the aftermath of the dismissal of the Australian Prime Minister Gough Whitlam in 1975 and the subsequent election of the Conservative Coalition government the same year, a New South Wales lawyer by the name of Sankey initiated a private prosecution charging Gough Whitlam, Lionel Murphy and others with conspiring to effect an unlawful purpose contrary to s 86 of the Commonwealth Crimes Act. The alleged unlawful purpose was that the Governor General, Sir John Kerr, had been deceived into approving a temporary loan when in fact the loan was for 20 years.[59] The Attorney-General considered that this proceeding involved issues of public importance and attempted to obtain documents to inform himself of the merits of the prosecution. Cabinet had decided that it was contrary to the public interest to prosecute ministers of a previous government in the course of their official duties. The argument was advanced that it might not be in the public interest for the Attorney-General to continue these prosecutions because it could undermine the peaceful and orderly transfer of power from an outgoing to an incoming government. Thus the government refused the Attorney-General access to Cabinet documents on the matter and requested the Attorney-General to take over the private prosecution and terminate the proceedings. The Attorney-General resigned on 6 September 1977, specifically citing the Shawcross principle and the Winnipeg communique as the legal basis for his resignation, and stating that Cabinet had 'attempted to direct and control' his discretion in relation to prosecutorial matters. He stated in Parliament:

> ...that where the Law Officer of the Commonwealth believes that there is a matter which ought to be investigated for the purpose of determining whether some breach of the criminal law has been committed he should not have the obstruction of Cabinet; he should have every assistance which Cabinet can give. And if Cabinet has confidence in its Law Officer it will not question him.[60]

The Prime Minister at the time, Malcolm Fraser, agreed in theory with the Shawcross principle:

> It is the traditional role of the Attorney-General, as First Law Officer, to institute and, where appropriate, to take over prosecutions for offences. The Government recognises that this is his role. It is not questioned that the Attorney-General has a full discretion in relation to these matters. It is, nevertheless, proper for the Attorney-General in such matters to consult with and to have regard to the views of his colleagues, even though the responsibility for the eventual decision to prosecute or not rests with the Attorney-General, and with the Attorney-General alone. This practice of consultation is a long standing practice.[61]

59 Edwards (1984), above n 6, 380.

60 Quoted in Editorial, 'Resignation of Commonwealth Attorney-General, 6th September 1977 - The constitutional principles involved', (1977) 51 *Australian Law Journal* 675, 676.

61 Edwards (1984), above n 18, 385.

Thus the Prime Minister and Cabinet accepted the Shawcross principle in relation to prosecutorial discretion but differed from the Attorney-General in the application of those principles to the particular circumstances of the Whitlam prosecution. Of course, this particular incident is of less relevance to the modern role of an independent Attorney-General following the transfer of the function of prosecution practice to the Commonwealth DPP through the *Director of Public Prosecutions Act 1983* (Cth).

The case does highlight, however, the inherent tensions between the three roles that the Attorney-General is required to perform in Australia. As Edwards recognises:

> At the theoretical level the Prime Minister and the Attorney-General were of one mind in defining the nature of the Attorney-General's role. The serious rift that emerged in the Whitlam case arose in the application of the theoretical principles and in determining the significance that should attach to the advice tendered by the Cabinet to the decision maker.[62]

There is no doubt that the office of Attorney-General is primarily a political role. The delegation of legal duties has eroded the legal aspect of the office, resulting in the practical dominance of the political role of the Attorney-General through Legislative and Executive functions. However, disagreement still exists over the extent to which the political advocate role should dominate the Attorney-General's neutral role as Chief Legal Officer. The spectrum of belief on the proper extent to which the political advocate should smother the traditional legal duties of the neutral extends from Robert Ellicott, a strong believer in the primacy of the Shawcross principle, to the present Attorney-General, The Honourable Daryl Williams, who believes that, 'the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous, or at best, eroded' and thus that the political nature of the office is paramount to its interpretation and operation.[63]

Examples of this erosion of the independence of the Attorney-General are not hard to come by, and there are very few, if any, commentaries in recent times that argue for a totally independent Attorney-General. As the Honourable Daryl Williams QC, said in 1996:

> The public no longer perceives the Attorney-General as independent of political imperatives. The Attorney-General, these days, is not simply a legal adviser to the government but is clearly also a politician answerable to Parliament and to the electorate.[64]

62 Ibid 386.

63 'It ought to be concluded that the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous, or at best, eroded.'; The Honourable Daryl Williams 'Who Speaks for the Courts?' speaking in 1994 to the National Conference on *Courts in a Representative Democracy*, quoted in Dr Michael White QC, 'Judicial Appointments: including the role of the Attorney-General', (2000) 20(2) *Australian Bar Review* 115 at 121 ('White').

64 The Honourable Daryl Williams QC, 'The Judiciary, Parliament and the Executive. Who Speaks for the Judges?', Transcript of Speech to the *Australian Judicial Conference*, Canberra, 3 November 1996, page 4 of transcript, [27].

More recently, former Federal Court Judge, Justice Gallop, also expressed his view that:

> ...many of the functions which were thought to be responsibilities of the Attorney-General to be exercised independently of politics must now be understood to be subject to government control and direction and the Attorney-General must be understood to be primarily a politician with political responsibilities to government and own political party.[65]

LJ King, the South Australian Attorney-General from 1970 to 1975 in the Dunstan Government, and former Chief Justice of the Supreme Court of South Australia, wrote that during his term as Attorney-General he increasingly came to recognise the 'artificiality of the distinction between Cabinet response to consultation, and direction by Cabinet.'[66] Similarly, Edwards has demonstrated that despite the Shawcross statement and the condemnation of the practice by politicians, Cabinet direction of the Attorney-General has been a common feature in both Australia[67] and the United Kingdom.[68] The question is then, to what extent should the Attorney-General be subject to direction by Cabinet and, at a broader level, be constrained in fulfilling his legal duties because of party political considerations?

The answer seems to be that the nature of the office is left open to wide interpretation and is therefore interpreted by the particular office holders themselves.[69] The convention of independence from party politics is imported from a different constitutional context, it has evolved in a different constitutional and political climate, and is therefore not firmly established. Moreover, the political reality is that the Prime Minister appoints the Attorney-General for political reasons, not legal excellence. It is therefore much more convenient for an Attorney-General to act as a political advocate to ensure his or her survival in the position. In the reality of modern politics, one could easily foresee that an Australian Attorney-General who foreshadowed that he or she intended to abide by the Shawcross principle of independent aloofness in a political controversy, would probably not last long enough in the position to articulate that principle. The Shawcross principle is irrelevant if an Attorney-General is dismissed before exercising the principle when it matters. Thus Edwards' exhortation to modern politicians that '...it behoves [the Attorney-General's] ministerial colleagues to gain a better grasp of the unique nature of the functions associated with the Law Officers and to respect, in reality as well as theory, the reasons behind the independent judgment required of the Attorney-General as the ultimate guardian of the public interest...'[70] may have been applicable in the time of the Ellicott affair, but nowadays wears very thin. Indeed, members of either party political persuasion might take issue with the argument that the Attorney-General is, as

65 Quoted in White, above n 63, 121.
66 King, above n 40, 163.
67 Edwards (1984), above n 18, 386-387.
68 Edwards, above n 6, 213-216.
69 A view shared by Edwards (1984), above n 18, 393-394.
70 Ibid, 388 (original emphasis).

Edwards argues, the guardian of the public interest, rather than a democratically elected government.

Thus the title of Chief Legal Officer bestowed on the Attorney-General has much to do with the (now defunct) tradition of the Attorney-General as a legal counsellor to the Crown, but very little to do with the reality of the functions, structure and impact of the office. It appears inconsistent therefore, that the Attorney-General still retains the privileges of the traditional role as Chief Law Officer (for example, as head of the Bar and precedence in all Commonwealth courts).[71] Strictly speaking, it is the Solicitor-General who has primary carriage of legal advice and representation on behalf of the Commonwealth, even though the Attorney-General is not bound to accept that advice. The Commonwealth Attorney-General appears to be primarily a political administrator of matters legal.

III DEFENDER OF THE JUDICIARY?

As discussed above, the independence of the Attorney-General has never had any statutory form and has only ever reached as high as a convention.[72] What is clear is that the office has become far more politicised. Does this mean that the Attorney-General must be or should be reluctant to defend the High Court from political attack, especially when this puts him or her in conflict with his or her own party?

It should be noted that the principle of defending the judiciary does not rest solely on the shoulders of the Attorney-General. Protection of the integrity of the courts is maintained by contempt of court offences such as 'scandalising the court'. There are also special contempt rules in Parliament preventing the use of offensive words against a judge, and preventing assertions in relation to the personal character or conduct of a judge except as contained in a substantive motion.[73]

The issue of the role of the Attorney-General in defending the High Court from political attack is a similar but distinct issue to the independence of the Attorney-General. Both issues focus on the Attorney-General as the guardian of the public interest. However, the issue of defending the courts moves beyond the specific case of Cabinet pressure on the Attorney-General (where the overriding principle is to resist the political influence of Cabinet colleagues), and concerns the general protection of the legal system and maintenance of the doctrine of separation of powers (where the overriding principle is to *utilise* political influence). The legal

71 Renfree, above n 28, 205.
72 Queensland Report, above n 32, [3.7].
73 Carney, above n 27, 7.

basis for this latter principle as defender of the judiciary is still an open question[74] and the debate outlined and analysed below is testament to that confusion.

As the Commonwealth *Report of the Review of the Attorney-General's Legal Practice* ('Logan Report') in March 1997 indicated, the Attorney-General still retains a central role with respect to issues of public interest:

> At its highest, the Attorney-General's public interest role seeks to promote the rule of law in a representative democracy. It is a recognition that government is founded on the will of the people, and that government should therefore strive to act lawfully, and with respect when enforcing or defending a claim.[75]

Thus at its highest, it can be argued that the Attorney-General, as Chief Law Officer of the Crown, has a special responsibility to protect the rule of law and the integrity of the courts as fundamental features of a stable system of representative democracy under the Australian Constitution.[76] Indeed, the Attorney-General has consistently admitted as much:

> Real difficulties arise when a court becomes the subject of debate or attack in the political arena. This is an arena in which the judiciary and the courts are unable to defend themselves. This aloofness from the dust of political debate has been seen as necessary to retain judicial separation from the proper roles of parliamentarians and the Executive....The political arena, however, is one where circumstances will dictate that a defence of the judiciary must, on occasion, be mounted. Sustained political attacks capable of undermining public confidence in the judiciary may call for the defence of the Attorney-General.[77]

However, even with this declaration, the present Attorney-General's interpretation of when criticism begins 'undermining public confidence in the judiciary' has been a point of some contention, especially in respect of members of the Attorney-General's own party.

[74] I could find no specific legal basis for this obligation, apart from the inference to be drawn from the independence of the Attorney-General, the role of the Attorney-General as the Chief Law Officer and thus the traditional role of protecting the King's interests, which includes, defending the courts. The only reference I could find to a legal convention was in a speech by Sir Anthony Mason in 1993 entitled "The role of the Courts at the Turn of the Century", (1993) 3 *Journal of Judicial Administration* 156, 158 where Sir Anthony made mention of a reciprocal obligation between the judiciary and the Attorney-General whereby the judiciary does not make political comments and the Attorney-General, in turn, defends the High Court from political attack. See also Carney, above n 27, 7.

[75] *Report of the Review of the Attorney-General's Legal Practice*, Australian Government Printing Service, March 1997, [3.27] ('Logan Report').

[76] See the reasoning in *Lange v ABC* (1997) 189 CLR 520 as an example of this argument where a process of reasoning relying on the proper functioning of representative democracy was employed by the High Court to entrench the freedom of political communication.

[77] The Honourable Daryl Williams QC, 'Judicial Independence and the High Court', (1998) 27 *University of Western Australia Law Review* 140, 151. See also, for example, Williams, 'Judicial Independence', *The Canberra Times*, 13 January 1997 and Williams, Attorney-General and Minister for Justice, 'The Judiciary, Parliament and the Executive. Who Speaks for the Judges?', (*Speech delivered at the Australian Judicial Conference*, 3 November 1996).

A *Attorney-General Williams*

The present Attorney-General, Honourable Daryl Williams QC, has made his position on the role of the Attorney-General in defending the High Court very clear. In 1994 when he was Shadow Attorney-General, Mr Williams delivered a paper at the National Conference on *Courts in a Representative Democracy*[78] entitled "Who Speaks for the Courts?"[79]. Mr Williams stated that the dubious independence of the Attorney-General meant that it was impossible for the Attorney-General to divorce himself from political considerations:

> Commonwealth, State and Territory Attorneys-General generally continue to be responsible for the administration of justice and the recommendation to cabinet of judicial and magisterial appointments. But there is now little or no expectation on the part of the public that the Attorney will act independently of his or her Cabinet colleagues in relation to such matters. Legal advice which the Attorney-General provides to Cabinet or government is now rarely the personal advice of the attorney. Almost always it is the advice of the Solicitor-General or a senior departmental legal adviser which the attorney brings. In the light of these circumstances, *it ought to be concluded that the perception that the Attorney-General exercises important functions independently of politics is either erroneous or at least eroded.* This is confirmed by the fact that there is little or no surprise when an Attorney-General fails to rush to defend the judiciary against assailants in the media.[80]

The Attorney-General also put forward the argument that it would be more appropriate for the Australian Judicial Conference, guided by the Council of Chief Justices, to act as the main body in representing judicial views to the public and to the media.[81]

The Attorney-General has been consistent in his argument that the politicisation of the role of the Attorney-General means that he cannot 'take the side of the judges'. In a paper prepared in June 1996 just three months after becoming Attorney-General, Mr Williams recognised that the Attorney-General must defend the judiciary when the 'criticism might significantly impair public confidence in the system'.[82] However, he went on to argue that generally it is inappropriate for a politician with a political interest in an issue to defend the Court from attack:

> I do not believe that the public perceives that the Attorney-General acts independently of political imperatives. Accordingly, the conventions that the Attorney-General should defend the judiciary and that politicians exercise

78 The Conference was hosted by the Australian Institute of Judicial Administration Inc, the Law Council of Australia and the Constitutional Centenary Foundation Inc at the Hyatt Hotel, Canberra, 11-13 November 1994.

79 Ibid.

80 Ibid 14-15, 1994 (footnotes omitted, emphasis added); quoted in White, above n 63, 121.

81 Ibid 17-19.

82 Daryl Williams MP, Attorney-General and Minister for Justice, Transcript of Speech, 'Criticism of Judges and Judicial Performance: The Judicial Response', 14 June 1996, 14.

> restraint in criticising the judiciary, are of decreasing relevance. An Attorney-General cannot be a wholly independent wise counsel who rushes to the defence of the judiciary when under attack.[83]

Again in November 1996, the Attorney-General put forward similar views in a speech to the Australian Judicial Conference in Canberra entitled "Who Speaks for the Judges?".[84] In that speech the Attorney-General went further and argued:

> I do not consider that the Attorney-General should be regarded as the appropriate official responsible for defending judges from public criticism in all cases. There will be situations in which the defence by the Attorney-General will be appropriate, but I believe the category of such cases is narrowing in line with changes in our society....The public no longer perceives the Attorney-General as independent of political imperatives. The Attorney-General, these days, is not simply a legal adviser to the Government but is clearly also a politician answerable to Parliament and to the electorate.[85]

Interestingly, the Attorney-General in that speech appeared to confirm the confusion between criticism of the substance of the judgments of the court, and defending the integrity of the court system itself:

> There is also an increasing risk of a conflict between differing interests of the judiciary, on the one hand, in making a *substantive reply on an issue* and, on the other hand, the political interest of the Attorney-General or the government in relation to that issue.[86]

Here we see the Attorney-General arguing that it is inappropriate for the Attorney-General to defend the substantive decisions of the judiciary where there is potential for conflict with government policy. It is argued that it is impossible for an Attorney-General to defend the reasoning of a court where that reasoning leads to an outcome that is at odds with government policy on the subject matter of the reasoning. Thus there is a distinction made by the Attorney-General between criticisms of the High Court that may be in conflict with party policy, and the acknowledgment of the role of the Attorney-General in protecting the integrity of the judiciary. The difference appears to be where the Attorney-General draws the line between criticism of the substance of High Court judgments based on disagreements as to the interpretation of the law, and criticism that might undermine public confidence in the legal system.

In the aftermath of the High Court's *Wik* judgment,[87] the level of criticism of the High Court appeared to many to cross the line of criticism defined as acceptable

83 Ibid 15.
84 The Honourable Daryl Williams MP, Attorney-General and Minister for Justice, 'The Judiciary, Parliament and the Executive. Who Speaks for the Judges?', (*Speech delivered at the Australian Judicial Conference*, 3 November 1996). Also quoted in White, above n 63, 121.
85 Ibid 3-4.
86 Ibid 4 (emphasis added).
87 Above n 3.

by the Attorney-General.[88] The *Wik* judgment of the High Court held that the granting of a pastoral lease, whether or not the lease had expired or been terminated, did not necessarily extinguish all native title rights and interests that might exist concurrently with the pastoral lease.[89] The decision caused widespread confusion and public outcry, especially from pastoralists, who feared that the decision would place undue emphasis on native title to the detriment of commercial pastoral interests.[90] The Deputy Prime Minister, Honourable Tim Fischer MP and several other Conservative State and Federal Members of Parliament launched scathing criticisms of the High Court.[91] National Party Premier of Queensland at the time, Rob Borbidge, is reported to have labelled the High Court in a speech 'a pack of historical dills'.[92] These critics argued in the strongest possible terms that the Court was engaging in judicial activism to the extent of appropriating the role of the legislature.

In response to furious public debate, the Attorney-General maintained his position that it was not the role of the Attorney-General to defend the High Court from political attack, despite comments that seemed to strike at the heart of the independence and integrity of the Court. In an article in *The Canberra Times* on 13 January 1997 at the height of the public debate on the *Wik* judgment, the Attorney-General acknowledged that:

> ...where sustained political attacks occur that are capable of undermining public confidence in the judiciary it would be proper and may be, depending on the circumstances, incumbent upon an Attorney-General to intervene.[93]

However, the Attorney-General contended that the "recent debate" on the *Wik* judgment, including the attacks by the Deputy Prime Minister and the Premier of Queensland on the High Court, had '...fallen well short of undermining the public's confidence in the ability of the judiciary to deal with cases impartially, on their merits, and according to law.'[94]

The failure of the Attorney-General to come to the defence of the High Court in the aftermath of the *Wik* judgment provoked strong disapproval at the time from Sir Anthony Mason,[95] Chief Justice Brennan,[96] Justice Kirby,[97] several Presidents

88 A view shared by King: 'Those attacks [after *Wik*] went far beyond criticism of the judicial reasoning and amounted to an attack on the integrity of the High Court as an institution and the integrity of the judges, thereby damaging public confidence in the Court.', 172.
89 G. Hiley, (Ed.), *The Wik Case: Issues and Implications*, (1997,) 1.
90 Ibid 7.
91 Alan Ramsay, 'High Court gets short shrift', *Sydney Morning Herald*, 8 March 1997, and see 'Fischer lashes High Court on Wik', *Sydney Morning Herald*, 11 January 1997; The Honourable Daryl Williams QC, 'Judicial Independence', *Canberra Times*, 13 January 1997; 'Chief Justice tells Fischer: stop attacks', *Sydney Morning Herald*, 28 February 1997; 'Borbidge steps up attack on High Court', *Sydney Morning Herald*, 1 March 1997.
92 Alan Ramsay, 'High Court gets short shrift', *Sydney Morning Herald*, 8 March 1997.
93 'Judicial Independence', *The Canberra Times*, 13 January 1997.
94 Ibid.
95 Sir Anthony Mason, 'The Judiciary, Community and the Media', (1997) 12(1) *Commonwealth Judicial Journal*, 4.
96 'Chief Justice tells Fischer: stop attacks', *Sydney Morning Herald*, 28 February 1997.
97 'Judges tell MPs to stop meddling', *The Australian*, 14 April 1997.

of State Bar Associations,[98] the Law Society[99] and academics.[100] The Attorney-General later defended his position in an article in the *Law Society Journal* of New South Wales in April 1998, and refuted claims by Sir Anthony Mason that the Attorney-General had neglected to defend the Court in this 'crucial test' of public confusion and political criticism.[101]

In June 2001,[102] Mr Williams argued that the Court should defend itself in response to comments by Justice Kirby claiming that it was the role of the Attorney-General to defend the High Court, especially since the Attorney-General had refused funding at the time for a public information officer.[103]

Finally, in May 2002 in the aftermath of the comments by Senator Heffernan attacking Justice Michael Kirby of the High Court, Mr Williams addressed directly the issue of the role of the Attorney-General in defending the High Court from attack.[104] Mr Williams compared and contrasted the offices of the British and Australian Attorneys-General and summarised several of the fundamental features of Australian constitutional separation of powers. The Commonwealth Attorney-General also repeated his earlier calls for the judiciary to defend itself through bodies such as the Australian Judicial Conference,[105] his argument that judges should not engage in political comment,[106] and his consistent belief that an Attorney-General should not defend the courts because he or she is first and foremost a politician, with superior loyalties to political party and Cabinet.[107] Interestingly, Mr Williams made a direct reference to the Heffernan incident, and justified his silence in the matter with the following comments:

> "[the incident]... put my views under the spotlight. [82] In that instance, responses to these allegations were made by the judge himself and the Judicial Conference of Australia, representing the judiciary generally. In my view, it was appropriate that a response came from these bodies rather than from the Attorney-General. [83] Calls for me to intervene were based on the misapprehension that there is a tradition that Australian attorneys-general always defend the judiciary."[108]

98 See 'Law groups back Brennan', *Sydney Morning Herald*, 20 September 1997.
99 Patrick Fair, "The Attorney-General must defend the courts", (1997) v35(9) *Law Society Journal* (NSW), 2; and see 'Law groups back Brennan', *Sydney Morning Herald*, 20 September 1997.
100 H.P. Lee, 'Why we must protect the protector ', *Sydney Morning Herald*, 13 March 1997.
101 Daryl Willimas MP, 'Judicial independence', (1998) 3 *Law Society Journal* 50. The article was substantially the same as that printed in *The Canberra Times* in January 1997.
102 Daryl Williams, 'Judges must speak for themselves', *The Canberra Times*, 28 June 2001.
103 Michael Kirby, 'Our Courts in need of a voice', *The Canberra Times*, 25 June 2001; Michael Kirby, 'Mr Williams, our courts need their own voice', *The Age*, Saturday 23 June 2001. The latter was an edited text of His Honour's speech to the Australian Institute of Judicial Administration given on 22 June 2001.
104 Daryl Williams QC, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations', Transcript of Speech to the *Anglo-Australasian Lawyers Society*, London, 9 May 2002.
105 Ibid [67]-[74].
106 Ibid [75]-[76].
107 Ibid [77], [85]-[86].
108 Ibid [82]-[83].

However, Mr Williams yet again placed a qualification on this view, by arguing that:

> I do believe that there are circumstances when it is appropriate for an attorney-general to comment on or explain judicial actions or developments. This may be appropriate where criticism could significantly impair confidence in the judicial system. For example, sustained political attacks capable of undermining public confidence in the judiciary may justify a defence by an attorney-general.[109]

In summary, there are two basic elements to the Attorney-General's position. Firstly, Mr Williams questions whether there is an accepted custom or convention obligating the Attorney-General to defend the High Court from political attack. As demonstrated in the various comments quoted above, the argument runs that the Attorney-General is primarily a politician and a representative of the Executive such that the Attorney-General is bound by Cabinet solidarity. As a politician and member of the Executive government of the day, the Attorney-General is primarily responsible to the people and to the political concerns of Cabinet. The public therefore do not expect the Attorney-General to be independent of political concerns. This is an accepted transformation of the office of the Attorney-General in the Australian context, further reinforced by the declining nature of the Attorney-General as the Chief Legal Officer and the delegation of the majority of legal advice to the Solicitor-General and the DPP. The British version of the Attorney-General as an independent legal adviser has therefore never really been accepted in Australia, including any clear acceptance of the Shawcross principles. The practical role of the Attorney-General is as a politician who cannot jump to the defence of the High Court because there may be a conflict of views on a particular issue. The convention of an independent and impartial Attorney-General willing to defend the High Court at every opportunity is therefore inconsistent with the practical and modern role of a Commonwealth Attorney-General.

The second limb of the argument is that in the absence of the traditional defence by the Attorney-General, and in the face of increasing judicial accountability to the public, it is up to the judiciary to defend itself. The Attorney-General argues that the judiciary is a separate arm of government under the doctrine of separation of powers and it is therefore inappropriate for a member of the Executive and/or a member of the Legislature to come to the defence of the judiciary. The Attorney-General even goes so far as to say that 'relying on a politician as the first line of defence for the court risks eroding the distinction between the Executive and the judiciary'.[110] Moreover, Mr Williams argues that an 'unquestioning defence' of the judiciary would require an Attorney-General to inquire into all matters before the court and come to a conclusion as to whether there was merit in defending the judiciary.[111] This, Mr Williams asserts, would put the Attorney-

[109] Ibid [84].
[110] The Honourable Daryl Williams QC, 'Judges must speak for themselves', *The Canberra Times*, 28 June 2001.
[111] Ibid.

General in the position of 'judging the judges'.[112] The best person to defend the High Court, Mr Williams suggests, would therefore be someone like the Chairperson of the Australian Judicial Conference.[113]

B *The Judges*

The judicial response to the position taken by Mr Williams on the role of the Attorney-General in defending the courts, specifically the High Court, has been sporadic, perhaps, ironically, reflecting the inability of the High Court to respond to political debates. Chief Justice Mason (as he then was) made the point in 1993 that the Attorney-General in Australia by convention defends the High Court from unjustified political attack.[114] However, Mason CJ also made the point in his "State of the Judicature" Address[115] that the upsurge in public interest in the work of the High Court, especially after the *Mabo (No.2)* decision, was 'no bad thing'.[116] The increased criticism and interest was natural in an era of increased democratic accountability and Mason CJ encouraged judges to contribute to a better popular understanding of the courts. To this end, Mason CJ announced in his speech the formation of the Australian Judicial Conference to better explain the role of the courts. Interestingly, Mason CJ also said that:

> Judges can no longer expect that their decisions will be accepted without criticism or that, when criticised, they and their decisions will be defended automatically by their Attorney-General.[117]

However, Mason CJ made a clear distinction between criticism of substantive decisions of the Court, and criticism of the courts and judges:

> [Criticism of decisions] is an entirely legitimate exercise in a democracy. It is for legislatures, within the powers conferred on them by their constitutions, to determine whether they will alter the law as declared by the courts. But it is quite another thing to subject judges to personal abuse, and that is to be deplored.[118]

Sir Anthony entered the public domain again in 1997 in response to the vitriolic attacks on the High Court after the *Wik* decision. In a revised version of a lecture delivered to the Commonwealth Magistrates' and Judges' Association in Cambridge in June 1997,[119] Sir Anthony commented directly on the role of the

112 Ibid.

113 'Who Speaks for the Judges?', 3 November 1996, Transcript at 6-8. Specifically: 'I also believe it would be useful for the Australian Judicial Conference to develop a role as a representative voice for the judiciary on broader questions that arise in relation to the judiciary as an institution, such as matters bearing directly on the status and independence of the third arm of government...' at 7.

114 Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century', (1993) 3 *Journal of Judicial Administration* 156 at 158, ('Mason (1993)'); Carney, above n 27, 7.

115 Sir Anthony Mason, 'The State of the Judicature', (1994) 68 *Australian Law Journal* 125 ('Mason (1994)').

116 Ibid 134.

117 Ibid 133.

118 Ibid.

119 Sir Anthony Mason, 'The Judiciary, the Community and the Media', (1997) 12(1) *Commonwealth Judicial Journal* 4 ('Mason (1997)').

Attorney-General in defending the High Court, specifically in the aftermath of the *Mabo* and *Wik* decisions:

> The old tradition was that the Attorney-General spoke for the judges when they came under attack, certainly when they came under unjustified attacks. In the last two decades we have witnessed an erosion in this tradition. True it is that an Attorney-General cannot be expected to defend the judiciary officers in all circumstances. He may not agree with what a judicial officer has said or done. But an Attorney-General should defend the courts and the judicial officers against irresponsible criticism and he should be prepared to do so when irresponsible criticism is made by politicians.[120]

Sir Anthony viewed 'with considerable concern' the attitude of Mr Williams on the issue,[121] and argued that it is impracticable for judges to evolve a means of defending themselves, for example through the Australian Judicial Conference:

> There is the likelihood that "the spokesjudge", like the Bar Association or the Law Society, will be seen as simply supporting "club" members...the Attorney-General can make a much more effective response than a judge. A defence by the Attorney-General will achieve much more prominence and more mileage than a defence by judges or a professional body.[122]

Sir Anthony went on in the address to outline the attacks on the High Court by politicians and the refusal of the Prime Minister and Attorney-General to come to the defence of the court in the face of these scathing attacks. He even went so far as to say that the attacks undermined respect for judicial independence in Australia.[123] Sir Anthony made the point, drawing on his well known belief that the High Court should engage with the public, that the judiciary should not be immune from criticism. Sir Anthony did, however, express concern over criticism that was 'illegitimate and irresponsible'.[124]

Indeed, in a similar article in the *Law Society Journal*, Sir Anthony stated that the political attacks in the aftermath of the Wik decision were based on political interest groups attempting to impose legislative change by undermining the decision of the High Court. As Sir Anthony stated:

> The difficulty of persuading others that the Court's majority approach was unjust and erroneous induced those seeking legislative change to launch an attack on the Court's integrity...The attack was taken to the point where it went beyond criticism of the majority reasoning in *Wik* and was damaging to public confidence in the High Court.[125]

[120] Ibid 11.
[121] Ibid. Although interestingly, Sir Anthony commented that 'I have great respect for the Attorney-General. On an earlier occasion, when in Opposition, he defended the High Court's decision on *Mabo* aboriginal land rights when it took some political courage to do so at a public meeting organised by mining interests hostile to the decision.' at 11.
[122] Ibid.
[123] Ibid 12.
[124] Ibid.
[125] Sir Anthony Mason, 'No place in a modern democratic society for a supine judiciary', December 1997, 35(11) *Law Society Journal* 51 at 52-53 ('Mason (LSJ)')

On the role of the Attorney-General and his refusal to defend the High Court following *Wik*, Sir Anthony said:

> ..it is nonetheless the responsibility of the First Law Officer, a responsibility of the first importance, to uphold the rule of law. It is a responsibility that should not be subordinated to party political considerations when the integrity of judicial institutions is under challenge.[126]

Sir Anthony thus made the point that, in his view, the line between justified attacks on the substantive decisions of the court, and attacks undermining the integrity of the court, had been crossed in the aftermath of the *Wik* judgment. As such, it was the responsibility of the Attorney-General to defend the High Court from attacks originating from within his own Coalition.

Chief Justice Brennan (as he then was) addressed the topic directly in his "State of the Judicature" address in 1997 in the aftermath of the attacks following the *Wik* judgment.[127] Sir Gerard commented that:

> Mr Williams rightly seeks the best way of keeping the courts out of the political arena. I venture to suggest that an Attorney's silence is not the way. The courts do not need an Attorney-General to attempt to justify their reasons for decision. That is not the function of the Attorney-General. But why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law?[128]

Sir Gerard went on to argue that the idea of a representative of the Australian Judicial Conference representing the views of judges was implausible because an individual judge could not presume to defend another judge's or another court's decision.[129] Instead, 'if the attack is from a political source,' Sir Gerard asserted, 'the response must be from a political identity'.[130] Sir Gerard also contended that the trend for politicians to perceive the judiciary as 'players in the political game' was inappropriate and a threat to the independence of the judicial arm of government.[131] Cooperation amongst the arms of constitutional government was essential, and criticisms of the court should be restricted to flaws in legal reasoning and judgments, rather than unjustified and ill informed criticism of a judgment that undermines public confidence in the courts.[132]

Again in the response by a former Chief Justice, we see a distinction made between attacks upon the substance of a decision as a natural part of a healthy and accountable democracy, and attacks that go beyond legal criticism to undermine confidence in the integrity of the court itself. The implication of these criticisms

126 Ibid 52.
127 Sir Gerard Brennan, 'The State of the Judicature', (1998) 72 *Australian Law Journal* 33 ('Brennan (1998)').
128 Ibid 41.
129 Ibid 41-42.
130 Ibid 42.
131 Ibid.
132 Ibid.

is that the court is engaging in judicial activism to the extent of appropriating the role of the legislature.

In recent times, Justice Kirby has been at the forefront of calls for the Attorney-General to defend the High Court from political attack.[133] As described above, Justice Kirby recently argued that it is the role of the Attorney-General to defend the High Court, especially since the Attorney-General had consistently refused funding for a public information officer.[134] Kirby J has also commented on the widespread nature of attacks on the judiciary in other countries in a paper presented to the American Bar Association.[135] In that article Kirby J lists 14 colourful insults hurled at the High Court in the aftermath of the *Wik* judgment.[136]

At about the same time in June 2001, the matter seemed to have come to a resolution when Chief Justice Gleeson, while stating that he didn't 'necessarily agree with every aspect' of the decision by the Attorney-General not to defend the High Court,[137] stated that he would attempt to fill the gap left by the Attorney-General and respond to criticism of judges and judgments from time-to-time.[138] Gleeson CJ's approach to the issue seems to be that, like Mason CJ, he accepts that High Court judges will be subject to some level of criticism. However, judges are at least entitled to expect those critics to make informed criticisms based on a reading of the judgment.[139]

The decision by the Chief Justice to take on some of the responsibility of defending the High Court has, at the time of writing, defused to a certain extent the increasingly public debate over the role of the Attorney-General in defending the High Court. As Dr Austin (now Austin J of the Supreme Court of NSW) stated in an address to University of Sydney graduates, the old defensive strategy of relying on the Attorney-General to defend the High Court was simply not working because the Attorney-General did not acknowledge the existence of such a convention.[140] However, Dr Austin argued that for judges to engage in public debate and defend themselves is an even less desirable option.[141] Austin J argued, firstly, that responses in the media will reduce judges to the level of their attackers, secondly, that the nature of public responses will encourage the public to accuse judges of making partisan judgments, and thirdly, that judges are less than effective in the arena of public debate because they are not trained for that purpose.[142]

133 The Hon Justice Michael Kirby, 'Our Courts in need of a voice', *The Canberra Times*, 25 June 2001.
134 Ibid; and see Michael Kirby, 'Mr Williams, our courts need their own voice', *The Age*, Saturday 23 June 2001.
135 The Hon Michael Kirby, 'Attacks on Judges - A Universal Phenomenon', (1998) 72 *The Australian Law Journal* 599 ('Kirby (1998)').
136 Ibid, 601. They make very entertaining reading.
137 Henderson, 'Gleeson vows to stand up for judges', *The Australian*, 25 June 2001.
138 Ibid.
139 Ibid.
140 R.P. Austin, 'Commentary: The High Court and the Community', (1998) 4 *The Judicial Review* 17, 25.
141 Ibid 22-24.
142 Ibid 23.

To these arguments can be added the constitutional convention that judges should not engage in political debate because that would impinge upon the Legislative and the Executive spheres. Indeed, it is ironic that Mr Williams should use the very same argument to justify judges defending themselves:

> The doctrine of separation of powers must work both ways. Put simply, politicians should refrain from attacking the courts and the judiciary should not interfere in matters that are the responsibility of government.[143]

Of course, Kirby J has not always erred on the side of caution when crossing the two way street of the public separation of powers. In April 2001 in a keynote address for a graduation ceremony in the School of Education, University of South Australia, Kirby J voiced his concerns over the apparent shift of federal government funding towards private schools at the expense of the public system.[144] Both the Prime Minister and the Attorney-General took this as the foray of a judge into the political sphere, and attacked Kirby J for breaching the separation of powers. The Attorney-General also argued that this example of comment supported his argument that the judiciary could look after itself.[145]

C *Analysis*

The above debate demonstrates some fundamental disagreements on the proper separation of government and judiciary, and specifically, the role of the Commonwealth Attorney-General in defending the High Court from political attack. There appear to be seven key issues informing the debate.

1 *The role of the public*

The Attorney-General has relied on the rationale that the public expects an Attorney-General to be a politician first and foremost. On this reasoning, a politician will act on the will of the majority, expressed through the elected government of the day. However, the fact that the public expects the Attorney-General to act as a politician does not automatically mean that a politician should shy away from protecting the judiciary from political attack. One could easily argue that, as a politician, the public expects the Attorney-General to act in the public interest. The public interest undoubtedly includes the maintenance of a stable system of constitutional government. One could also argue that the maintenance of a stable system of constitutional government, in the minds of the public at least, includes defending the fundamental institutions of constitutional government, over and above party political interests. Thus one might conclude that the public interest is best served by defending the courts from political attack because the public has a strong sense that the integrity of the judiciary should be protected. Merely because the public expects the Attorney-General to act as a politician with loyalties to his or her party, does not mean that the deeper expectation of defending the system of constitutional government falls by the wayside. Thus, defending the integrity of the courts is in fact consistent with what

143 Daryl Williams QC, 'Judges must speak for themselves', *The Age*, 28 June 2001.
144 'Kirby sounds alarm on schools funding', *The Australian*, 28 April 2001.
145 'PM's attack on Kirby a first', *The Australian*, 2 May 2001.

the public expects of a politician.

2 *Substantive Versus Political Attack*

The Attorney-General argues that government policies may conflict with the substantive findings of the High Court in a healthy democracy. This is not a new argument and has been propounded as a natural characteristic of a healthy democracy by Sir Anthony Mason.[146] The public expects the government to disagree, sometimes strenuously, with the decisions of the High Court. However, as the quotation from Voltaire at the beginning of this article highlights, there is a difference between disagreement with the substance of an argument and defence of the right to argue, notwithstanding a view of the substance of the debate. It is submitted that, in the aftermath of the *Wik* judgment, it was open for Mr Williams to disagree with the substantive decision of the Court as an exercise of judicial discretion. However, it was also open to Mr Williams to follow his own declared demarcation between substantive criticism and public attack on the very legitimacy of the Court. It is further submitted that Mr Williams failed to uphold his own acknowledged standards[147] establishing when it is appropriate to defend the High Court from unjustified and ill-informed political attack instigated by members of the government - attacks that probably undermined the integrity of the courts in the minds of the public.

3 *Judicial Activism as Legitimate Criticism*

One might argue that Mr Williams was justified in not immediately jumping to the defence of the High Court because there was some merit in the criticism that the High Court was engaging in a large measure of judicial activism in *Wik*. One might argue that in 'discovering' native title, the High Court was usurping the role of the legislature and actively engaging in breaching the separation of powers. Thus, the government, and the Attorney-General, were entitled to question whether the decision was extending the role of the High Court beyond its rightful place in the separation of powers.

The debate over whether the *Wik* decision was an exercise in judicial activism beyond the boundaries of the proper role of the judiciary has been conducted elsewhere.[148] For present purposes, even if the Court engaged in a measure of judicial activism in extending the law, this is hardly a breach of the separation of powers. Moreover, the attacks on the integrity of the High Court went beyond legitimate questioning of the legal basis of judicial review and reasoning. The criticisms went to the core of whether the Court was operating legitimately within the scope of the doctrine of separation of powers. That is a criticism that goes to the fundamental integrity and legitimacy of the judicial system. This is what Sir

[146] Mason 1994, above n 115.
[147] See above n 82, 85, 93 and 109.
[148] Kristen Howden, 'The common law doctrine of extinguishment: more than a pragmatic compromise', (2001) 8(3) *Australian Property Law Journal* 206; Philip Hunter, 'Judicial activism? The High Court and the *Wik* decision', (1997) 4(2) *Indigenous Law Bulletin* 6; Sir Anthony Mason, "Should the High Court consider policy implications when making judicial decisions?" (1998) 57(1) *Australian Journal of Public Administration* 77; Pamela O'Connor, 'The Wik decision: judicial activism or conventional ruling?', (1997) 4(2) *Agenda* 217.

Anthony Mason meant when he stated that the difficulty of persuading others that the Court's approach was erroneous induced those seeking legislative change to launch an attack on the Court's integrity: 'The attack was taken to the point where it went beyond criticism of the majority reasoning in *Wik* and was damaging to public confidence in the High Court.'[149]

It is common for politicians in liberal democratic countries to argue that judges have exceeded their authority through judicial activism at the expense of the will of the people, especially in the face of a decision that might not accord with a view of legal rights held by politicians within the government.[150] However, if that is a claim to be pursued by a politician, the proper avenue for redress is not an attack on the role of the court in society. It is rather the passing of appropriate legislation designed to address those political concerns. Moreover, governments appoint judges, and thus there will naturally be judges tending towards a more conservative approach to the law, and judges tending towards a more progressive interpretation of the law. To attempt to undermine the integrity of the judiciary simply because one does not agree with the application of the law in either a conservative or progressive manner, sets a dangerous precedent of attacking the foundations of the judiciary each time one disagrees with a particular judgment.

4 *Politicisation Through Association*

The argument that 'politicisation of the judiciary' will result from the Attorney-General protecting the judiciary is clearly untrue. In fact, it is the absence of a defence that is more likely to influence the decisions of the High Court. As Kirby J points out, "Words will be spoken by others and taken as truth because they are unanswered."[151] The aggregate effect of constant criticism in the media is to undermine the integrity of the courts, especially in the minds of the public when no defence of the actions of the judiciary is forthcoming through the normal media channels. A sustained political attack from the government may also influence the Court to be less forthright and tailor its decisions to the contemporary political climate so as to avoid further criticism.

Further, if an Attorney-General delays defence of the judiciary on an issue, by the time the Attorney-General comes to the defence of the judiciary, a political attack will have gathered momentum in the media, thus simplifying and polarising the debate. Accusations from politicians that a court or judge is acting in a certain way automatically 'politicises' the judiciary in the media and in the eyes of the public because the judge or court is characterised as the political antithesis of the politician mounting the attack. The 'politicisation of the judiciary' is thus brought about in the first place by the political attack itself, rather than the Attorney-

[149] Mason (LSJ), above n 125, 52-53.

[150] See, for example, Greg Craven, 'Judicial Activism in the High Court', (1999) 28(2) *University of Western Australia Law Review* 214; John Toohey, 'Without Fear or Favour, Affection or Ill-Will: The role of courts in the community', (1999) 28(1) *University of Western Australia Law Review* 1; Bryan Horrigan, 'Is the High Court Crossing the Rubicon? A Framework for Balanced Debate', (1995) 6 *Public Law Review* 284.

[151] The Hon Justice Michael Kirby, 'Our Courts in need of a voice', *The Canberra Times*, 25 June 2001, 9 ('Kirby (2001)').

General entering into the fray on behalf of the judiciary. If anything, the appearance of the Attorney-General to defend the High Court from a partisan attack by a member of the Attorney-General's own party, will neutralise the politicisation of the judiciary.

5 *Judging the Judges*

It is also untrue to argue, as Mr Williams does, that the Attorney-General would have to engage in 'judging the judges'. This argument assumes again that the Attorney-General will come to the defence of the judiciary on matters of substance and will therefore have to make a decision on the merits of each particular case. The implication is that this will bring his own views into conflict with those of the court and would therefore put him in an impossible position to defend the Court if he happened to disagree on an issue. This would then allow the Attorney-General to pass judgment on the correctness of decisions. However, again, the Attorney-General has confused defence of substantive decisions of the High Court and the defence of the integrity of the institution itself. Protecting the High Court from political attack does not detract from the disagreement that the Attorney-General and his party may have with the High Court. It also does not necessitate delving into all the substantial issues. The only issue that the Attorney-General would have to delve into would be a self evident one - that protection of the High Court is also a defence of the constitutional system of representative and democratic government in Australia, which allows the smooth operation of all levels and institutions of government.

6 *The Defence of Self-defence*

It is inappropriate for the Chief Justice of each court and/or the Australian Judicial Conference to shoulder the responsibility of defending the courts in the public domain, as Mr Williams argues. Chief Justices are legally trained; they are not politically trained to counter criticism of their Courts in the media.[152] As Justice Kirby contends:

> Most have little or no skill in dealing with the media... They cannot "mix it" with politicians, pundits, or committed interest groups whose lives revolve around media exposure and, to an extent, media massage and manipulation...There is a fear that those who go down to the media bear pit may end up with fleas.[153]

The Australian Judicial Conference is also an inappropriate body to counter political attacks played out in the media because the Conference meets only once a year. Attacks upon the integrity of a particular court are usually worn out in the media within a week of the original attack. Organisations such as the Australian Judicial Conference are simply not set up to defend the judiciary in either form or substance. They fulfil the role of coordination bodies, not advocates. The Conference is therefore an inappropriate, inflexible and unwieldy instrument to counter attacks upon the integrity of the Court. The Federal Court and the NSW

[152] Ibid.
[153] Ibid. See also Austin J's comments above n 142.

Supreme Court both have a Media and Public Relations Officer.[154] Funding for an equivalent position in the High Court appears to have been confirmed.[155] However, until it receives a media officer, the High Court is hamstrung in its ability to respond to attacks in the media, and even with a media officer, the court will be restricted in its comments so as not to breach the political sphere.

7 *The Rule of Law and the Separation of Powers*

Finally, it is incumbent upon the Attorney-General to defend the institutions that underpin the rule of law. As King argues:

> ...the Attorney-General must be understood to be primarily a politician with political responsibilities to a government and a political party. Nevertheless, there remains unimpaired the Attorney-General's function as political guardian of the integrity of the administration of justice, which gives rise to the unique role and responsibility of the Law Minister.[156]

It is submitted that it is the attitude of Mr Williams towards the role of the Attorney-General that has had more of an impact on 'eroding the distinction between the Executive and the judiciary' than the actions of the High Court itself. The view accepted by the vast majority of judges and a strong convention in the doctrine of separation of powers is that the High Court is not equipped to wrestle in the political sphere of government and that it should not attempt to enter into political argument.[157] When an Attorney-General steps in to defend the High Court from political attack, what he or she is effectively doing is preventing the erosion of the boundaries between the judiciary and the Executive by making sure the judiciary does not have to defend itself in the political sphere. An Attorney-General actively steps in to demarcate the lines between the judiciary and the other arms of government, thus providing a bridge of communication between constitutional powers.

The role of the judiciary is fundamentally different to that of Parliament, even though the ramifications of judicial reasoning means that judgments will often influence and impinge upon current political and social issues. As Carney argues, the Attorney-General '...who straddles both the worlds of politics and law is in a *unique* position to arrest any undermining of public confidence.'[158]

Notwithstanding robust and constructive debate between the courts, the community and the government on the impact of judgments of the High Court, the refusal of the Attorney-General to defend the High Court and force judicial

[154] The Federal Court Officer is based in Melbourne.

[155] Kirby (2001), above n 151; According to Justice Kirby a request was made in October 1998 for funds for a media officer and again in October 2000. No funds had then been forthcoming, apparently due to a dispute between the Commonwealth and the States as to funding. The position was confirmed by the Attorney General; Daryl Williams QC, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations', Transcript of Speech to the *Anglo-Australasian Lawyers Society*, London, 9 May 2002 at [51].

[156] King, above n 40, 179.

[157] See, for example, George Winterton, *Parliament, The Executive and the Governor General. A Constitutional Analysis*, (1983,) 61.

[158] Ibid (original emphasis).

officers to defend themselves does tremendous harm to the maintenance of separation of powers by forcing each institution to go 'head-to-head' in battle. In this type of political battle, the judiciary will always finish second to the seasoned ministerial and political media advisers. The prevailing view should be that the politicians stick to their turf and the judiciary sticks to theirs, with the Attorney-General acting as an important gatekeeper between the two fields. As Mr Williams acknowledges: 'The public's confidence in the impartiality of the courts depends on individual judges being seen as above the rough and tumble of political debate.'[159] Unfortunately, Mr Williams appears not to share this view of his role as gatekeeper in practice[160] - a decision that has allowed poisonous attacks to seep into the cracks between the government and the judiciary.

IV CONCLUSION

It appears that the contemporary debate over the role of the Attorney-General in defending the High Court from attack is being fought along outdated and inappropriate battle grounds. The issue is not whether the Attorney-General is under a duty to defend the High Court based on the tradition of the independence of the Chief Law Officer of the Crown, nor is it a matter of what the public expects of its politicians in contemporary Australian politics. The central issue is, given the unique position of the Attorney-General at the juncture of the separation of powers in contemporary Australian constitutional jurisprudence, and the vulnerability of the High Court to political attack without recourse to a political response, whether the decision by the Attorney-General *not* to defend the High Court from political attack is damaging to the integrity of the judiciary and thus to the efficient operation of the doctrine of separation of powers. It is suggested that in the interests of maintaining the stability of the constitutional system of government in Australia and minimising the unnecessary conflicts between the judiciary and the other arms of government, the proper convention is and should be that the Attorney-General errs on the side of caution and defends the High Court whenever there is even the slightest possibility that a public political attack will bring the court system into disrepute. The objective defence of the judiciary from political attack can legitimately rest alongside the healthy political and social disagreements between the judiciary and government on the substance of High Court decisions.

The politicisation of the role of the Attorney-General and the transformation of the office in the context of Australian government has been a constant trend in the development of the role of the Attorney-General. The application of the Shawcross principles to the Australian context remains, at best, minimal. However, the role of the Attorney-General in defending the High Court touches on the broader constitutional issue of defence of the rule of law and the integrity of the courts in the face of political attack.

[159] Daryl Williams QC, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations', Transcript of Speech to the *Anglo-Australasian Lawyers Society*, London, 9 May 2002 at [76].

[160] cf n 147 above

The Attorney-General is in the perfect position, at the cusp of the separation of powers, to ensure the integrity of the court system, while still maintaining a political position on substantive decisions of the High Court. It is essential that the independence of the judiciary be maintained by leaving the judgments to the judges and the politics to the politicians, with the Attorney-General standing guard between the judicial and political spheres of constitutional government, while at the same time acting as a bridge to assist the judiciary when under attack. Forcing judges to defend themselves from political attack would undermine the impartiality of the Bench and blur the distinction between politics and the judiciary. The Attorney-General must act as both a bridge and a gatekeeper to uphold the proper functioning of the separation of powers.

It is submitted that the view of Sir Anthony Mason and Sir Gerard Brennan on the role of the Attorney-General in defending the High Court is the approach that should be taken. Both Sir Anthony and Sir Gerard make the important distinction between disagreements with the substance of the decisions, and attacks that undermine the integrity of the court itself. Political attacks should be met with a political response from a political figure such as the Attorney-General. The recent personal attacks by Senator Heffernan in March 2002, as well as the attacks on the High Court in the aftermath of the *Wik* judgment, provide poignant examples of the grave importance of such a defence.