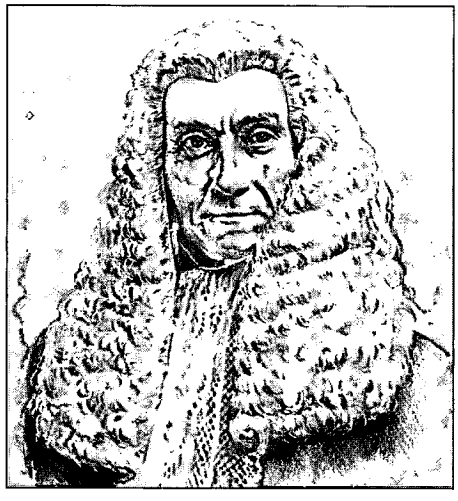
The Office of Solicitor General for New South Wales

Keith Mason QC, Solicitor General for New South Wales traces the development and depoliticisation of the office of Solicitor General in New South Wales.

When, late last year, I agreed with the editor to write something about my office for *Bar News* I assumed that most of my fellow members of the Bar who might read it would be as ignorant as I was a year ago about the role of the junior Law Officer in this State. This contribution will hopefully make each of us, if no wiser, then better informed.

The first Solicitor General for New South Wales was appointed in 1824. The office has been occupied for most of the period since that time, although it was abolished for 21 years in the late nineteenth century. A list of the holders of the office appears as a Schedule.

As with most things in the early colony, the appointment was initially seen as a replication of its English counterpart, the ancient office of Solicitor General which had existed in England under that name since the fifteenth century (see generally Edwards, *Law Officers of the Crown*and *Solicitor General v Wylde* (1945) 46 SR (NSW) 83 at 90-92). Inevitably the changing legal conditions of the colony and later the State meant that the incidents of the office were modified and it developed in its own way. Until the passing of the Solicitor General Act in 1969 the office rested upon administrative appointment made by Letters Patent by the Governor with the advice of the Executive Council. It has always been held at pleasure.



J.H. Plunkett
Solicitor-General (1831-1836)

In the very early days the idea of combinging the offices of Solicitor General and Crown Solicitor was toyed with. However the volume of work and the different function of solicitor and law officer meant that a clear differentiation between the two positions was accepted from the 1830s onwards.

The first incumbent, John Stephen, held office for only a year. This seems to have been a blessing given the quality of his later career as the first puisne judge of the Supreme Court. His appointment to the latter position was probably *ultra vires* and his performance in it was feckless and intemperate. "Mr Stephen . . . poor man", Governor Darling informed the Colonial Secretary in 1828, "is a tool in the hands of the Chief Justice, who works with him as best answers his immediate object". Stephen was frequently admonished by the Colonial Office for being indiscreet. His own nephew James prepared a despatch for Governor Darling in 1831 in which the latter recorded that "if I have anything to reproach myself with, it is the forbearance I have shown in not reporting his unfitness for his office".

The second appointee, James Holland who was a former Attorney General of Bermuda, never took up his position because the Chief Justice refused to swear him in as Solicitor General. Apparently Holland accidentally left behind in England the despatch of Lord Bathurst appointing him to the office. In a letter from the Colonial Secretary's Under Secretary to Holland the "inconvenience" was regretted, but it was pointed out that Holland had brought himself "into the unpleasant predicament" in which he was placed. Holland was consoled with the fact that his salary was unaffected by the slip because, like a number of early Solicitors General, he was also a Commissioner of the Courts of Request which were small debts courts. (Several other early incumbents also sat as magistrates or chairmen of courts of Quarter Sessions concurrently with their position as second law officer.)

Until 1922 the Solicitor General was, with occasional exceptions, a member of one of the Houses of Parliament in the State. The incumbent was a member of Cabinet and office was lost if a ministry fell or was reshuffled. In this sense and others the office was political until well into this century, although the Attorney General and Solicitor General were expected to perform their legal functions with a degree of non-partisan detachment, and they usually did so. Under the 1855 Constitution Act the office of Solicitor General was specifically mentioned as one of the "offices of profit under the Crown", which could be held consistently with membership of the Legislative Assembly. However from 1884 onwards the office ceased to be listed in the Schedule of those which could be held by members of the Legislative Assembly.

The primary function of the Solicitor General in the nineteenth century was to assist the Attorney General and to deputise for him in the event of illness or absence. Out of court, this included advice to government, the laying of informations, and the preparation of civil and criminal litigation. In court, the work involved the conduct of criminal prosecutions and, increasingly, the conduct of important civil litigation for the State. In the legislature, the work included drafting bills and representing the government interest in legal matters in debate.

As with the English practice, the Solicitor General often succeeded to the Attorney Generalship when that office fell vacant. The junior role of the first law officer was also reflected in a salary which represented two-thirds of that of the Attorney General. The Solicitor General had a right of private practice which was occasionally exercised in the nineteenth century, but from 1895 onwards the Attorney General and Solicitor General ceased to engage in private practice. (This issue is distinct from any question of the right of the Solicitor General to be paid a brief fee for a civil Crown brief.)

As between the Attorney General and Solicitor General there was considerable overlap of function in the early nineteenth century. The Colonial Secretary pointed out to Governor Darling in 1829 that the two law officers:

"should be jointly employed in all the legal business of the Crown, and should be left to make such arrangements between themselves for the distribution of their common duties, as the Public interest and their own personal convenience may suggest. In the event of any disagreement between them on this subject, the Attorney General should have the right of dictating to his Colleague. If the Solicitor General should complain that an undue proportion of labour had been thrown upon him, you should depute to examine and adjust the dispute. I apprehend, however, that the necessity of making such an appeal would have a strong tendency to check any disputes of this nature in their commencement.

My motive for preferring this arrangement is that it will make both the Crown Lawyers responsible for the due discharge of the whole legal business of the Colony. This joint responsibility will operate as an important security against rivalry and dissension and as a constant check upon precipitate measures." (*Historical Records of Australia* ("HRA") vol XV p10)

This diplomatic language appears to reflect some tension between the incumbents of the respective offices at the time. In a letter from Attorney General Baxter to Governor Darling of 29 April 1829 the former pointed out that there was an "understanding" between himself and the Solicitor General as to the general nature of their duties. Somewhat wryly, he added that although the understanding "does not by any means produce an equal division of labour, yet it imposes a joint responsibility, requiring an equal proportion of vigilance". (*HRA* vol XV p99). Needless to say the Attorney General was at pains to stress "that the more onerous duties devolved upon himself". At this early stage it is clear that the Solicitor General's functions were tending towards the civil side of Crown legal work in court whereas the Attorney General primarily was involved in the criminal side. The reason given by Baxter for the excessive volume of criminal work was that "the general character of the population necessarily produces a frightful catalogue of crimes of the greatest magnitude" (*ibid*). (In the late twentieth century we blame slow judges, greedy barristers, inefficient administrators or inept ministers for these same ills.)

In 1836 the Attorney General was Dr J Kinchela and the Solicitor General was J H Plunkett. In a despatch from Governor Bourke to Lord Glenelg, the Colonial Secretary, the Governor notified Glenelg that he had appointed Plunkett to replace Kinchela as Attorney General because Kinchela's deafness rendered him incapable of properly performing his functions in the Legislative Council. Obviously this disability was not seen by Bourke to be an impediment to other forms of public office because, in the same despatch, the Governor recommended Kinchela's appointment as a judge of the Supreme Court (*HRA* vol XVIII p377). Without waiting for Glenelg's answer, Bourke appointed Kinchela an acting judge of the Supreme Court. It is said that Kinchela's increasing deafness "caused some delays when he was sitting alone" (*Australian Dictionary of Biography* ("ADB") vol 2 p52). Lord Glenelg replied guardedly to Bourke's despatch stating that Kinchela was entitled "to any public employment for which he may not be disqualified by his peculiar infirmity" (*HRA* vol XVIII p733). Shortly after, Governor Bourke appointed Kinchela to be Master in Equity, a position which in the past was apparently not seen to call for the full range of judicial attributes.

In 1836 Governor Bourke abolished the position of Solicitor General and Plunkett performed the duties of both offices in his capacity as Attorney General. There was some speculation that Plunkett had been given a double load in the unfulfilled hope that he would resign. Plunkett was in fact assisted during this period by Roger Therry who not unnaturally bridled at the fact that he was performing the functions of Solicitor General without receiving the full emoluments or status of the office. In 1840 Governor Gipps pressed the Colonial Secretary to approve the appointment of Therry as Solicitor General. His despatch on the matter stated that there was:

". . . one circumstance, of which, when recommending Mr Therry for the appointment of Solicitor General I feel I ought not to withhold the knowledge from your Lordship; it is that Mr Therry is a Roman Catholic, as also (your Lordship is aware) is Mr Plunkett. I beg to assure your Lordship that, considering Mr Therry to be well qualified for the Office, and his position at the Bar to be such as to give him superior claims to those which any other person can advance, I do not myself think his religion ought to stand in the way of his promotion; but at the same time I cannot conceal from myself, and I ought not to conceal from your Lordship, that the accidental circumstance of both the Attorney and Solicitor General being Roman Catholics may be made by some parties in the Colony a matter of imputation on the Government." (*HRA* vol XX p525)

The Colonial Secretary declined to adopt the recommendation, but not apparently because of Therry's religion. The reason given was that the Colonial Secretary did "not feel justified in recommending to the Lords Commissioners of the Treasury any increased expense on this account, until the several Establishments of your Government shall have been reduced". (*HRA* vol XX p176). As an illustration that there is nothing new under the sun, the colonial authorities responded in a typical public service manner by making acting appointments and in 1841 Therry was appointed acting Attorney General and W a'Beckett was appointed acting Solicitor General.

Therry obviously harboured the view that his appointment as one of the law officers was deliberately delayed until the situation of two Catholics holding the offices could be avoided. "In truth", he protested to Governor Bourke, "the law officers have nothing to do with Church affairs" (see J M Bennett, introduction to R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria,* facsimile ed 1974 p20).

Literally, Therry's statement was untrue because several of the nineteenth century Solicitors General played prominent roles in the affairs of the Anglican and Catholic Churches in New South Wales. This involvement was generally welcomed, so long as the law officer used his skills and position to support, but not criticise, the clerical hierarchy.

The office was formally revived in 1849 when the then acting Solicitor General W M Manning was appointed Solicitor General. Manning's successor was Sir John Bayley Darvall, a barrister who in 1846 had illustrated the sturdy truculence of the Bar when he struck his opposing counsel, Richard Windeyer who had charged him with unfair conduct and had called him a liar. For this "contempt and outrage" Darvall had been committed to gaol for 14 days, while Windeyer received 20 days (*ADB* vol 4 p23). Darvall was elected to the first Legislative Assembly and took office as Solicitor General in the first ministry.

Alfred Lutwyche held the office for a very short time in 1856. He will be well known to modern barristers for his frequently cited *An Inquiry into the Principles of Pleading the General Issue* published in London in 1838. Lutwyche initially declined an offer to serve as Solicitor General and government leader in the Legislative Council until the Attorney General (James Martin, later Chief Justice) was admitted to the Bar. This principled stance was costly because the government fell only 21 days after Lutwyche's delayed appointment. Lutwyche served another short term in the office the following year before being appointed Attorney General. On his rumoured accession to that office the editor of the Sydney Morning Herald remarked that "no doubt Mr. Lutwyche is a very learned lawyer, although circumstances have not afforded him an opportunity to display that learning" (*SMH* 13.11.1858 p6). He was later appointed to the Supreme Court at Moreton Bay. When the separation of Queensland was imminent he claimed seat on the Sydney bench, to be told by the government that he could either become judge of the Supreme Court of Queensland or resign. He went on to serve on the Queensland bench for over 20 stormy years marked by constant bickering with the Queensland government in campaigns of letterwriting to newspapers and petitioning of the Colonial office about the invalidity of the Acts of the local legislature.

W.M. Manning
Solicitor-General (1849-1856)

John Hargrave who held the office during various short terms in the 1860s as governments rose and fell was first appointed Solicitor General in 1859, resigning his then office as foundation judge of the District Court of New South Wales. According to Sir Alfred Stephen, Hargrave's judgeship had been "disastrous for women suitors" because he habitually decided against them, although otherwise he had mastered his "disability". This misogynistic disability was apparently due to his inability to forgive his wife (who had returned to England) for having committed him to a lunatic asylum in the mid 1850s. Hargrave later went onto the Supreme Court, sitting as its first divorce judge. His swearing-in was boycotted by the Bar and his behaviour on the Full Court so aggravated Stephen CJ as to provoke the latter's early resignation.

According to his biographer in Australian Dictionary of Biography, Solicitor General Robert Isaacs, who served in 1866-1868 was a "verbose and plodding orator (who) probably fulfilled his potential and his ambitions in the honourable but unspectacular position as second law officer of the Crown".

Joshua Josephson distinguished himself when, as a judge of the District Court he was subject to a complaint that he, when Solicitor General, had wrongfully induced Judge Cary to retire from the bench of that court (to make way for himself, it seems) by promises and a monetary payment. The question, which was also agitated in recent years involving the late Murphy J, of whether a judge could be removed for misconduct before appointment remained unresolved, because Josephson was cleared of any intentional moral wrong but was reprimanded for his great imprudence and indiscretion.

The office was abolished in 1873 at a time when a Department of Justice and Public Instruction was established and it was decided that the Attorney General should cease to be a member of the Executive Council. This move was largely instigated by Sir Henry Parkes. Unsuccessful attempts were subsequently made to revive the office in order to relieve the Attorney General from some of the crippling burden of his criminal work as law officer. The weight of such burden was seen to undermine the Attorney's capacity to promote law reform measures. It was argued that the position of Solicitor General need not be political and that if an independent appointment of a Solicitor General were made then the criminal duties of the Attorney General would be more appropriately assigned by law to the Solicitor General (of the discussion culminating in the appointment of a Director of Public Prosecutions in 1987). In 1891 a Public Service Inquiry Commission reported that the Attorney General's department had been affected seriously by the abolition of the Solicitor-Generalship.

The office was revived in the 1890s when Sir George Reid added it for five short terms to the several other ministries, including Premiership, held by him. (It may be this was done so that he could depute for his absent Attorney General during those periods.) From 1894 until 1922 the Solicitor Generalship was, with few exceptions, a political office held by a minister of the government, usually a member of the Upper House. During this period the position was frequently held concurrently with the office of Minister of Justice, a portfolio separate from that of Attorney General. A joint opinion given to the

Crown Solicitor in 1920 by C E Flannery QC and H V Evatt stated that the office of Solicitor General was prima facie an executive office held by a Minister of the Crown. The opinion noted that this need not be the case and instanced the non-political appointment of Hugh Pollock in 1901. However the lastmentioned appointment was obviously perceived as exceptional, although one can perhaps see some evidence of a move towards a non-partisan role in the fact that, since 1884, the office ceased to be listed in the Schedule of offices of profit under the Crown which could be held by members of the Legislative Assembly.

The trend towards a non-political focus of the office was not without its critics. The debates in the House of Representatives on the passing of the Solicitor-General Act 1916 (Cth) reveal a strong body of opinion that it was only through personal accountability to Parliament that proper control could be exercised over the incumbent.

Two MLAs, Sir George Reid and W A Holman, did hold the office for brief periods in the 1890s and 1915 respectively. A motion to declare Reid's seat vacant because he had thereby accepted an office of profit under the Crown was defeated (*NSW Parliamentary Debates* vol 75 (1895) pp3911-3914) on the ground, it appears, that no remuneration attached to the additional ministry. Reid was Premier at the time.

In 1922 the Government was apparently blocked in its desire to appoint T J Ley Solicitor General because it was advised by the Crown Solicitor that Ley would thereby vacate his office in the Assembly. (To record simply that Ley is described, correctly, in the *Australian Dictionary of Biography* as "politician and murderer" might convey the suggestion that the office had a peculiar attraction for those destined to get themselves into trouble. The writer is happy to record that most of his predecessors performed their duties with distinction and rectitude, and the several went on to serve in higher positions in public life.)

H. Snelling, QC Solicitor-General (1953-1974)

The de-politicisation of the office effectively commenced in 1920 when a public servant, Robert Sproule, was appointed. (He was given life membership of the Legislative Council and membership of the Executive Council, apparently *virtute officii.*) But he was the last Solicitor General to be appointed a Minister, whether in name or substance.

Sproule's successor in 1922 was Cecil Weigall who, when appointed, was the Parliamentary Draftsman. Weigall held office until 1953 during which time he performed the more traditional functions of the office, deputising for the Attorney General in his legal functions and representing the Crown in criminal matters in court. From time to time he performed administrative functions within the Crown Law Department in addition to those inherent in the position of second law officer.

In a relator capacity the office was thrust into a deep controversy within the Church of England in the "Red Book Case" in which various members of that Church (mainly from Sydney) effectively challenged the right of the Bishop of Bathurst to authorise a liturgical change in the Bathurst Diocese. Of more general relevance is the report of the argument before and decision of the Full Court discussing the history of the office and the precise circumstances in which, at common law, the Solicitor General might exercise powers vested in the Attorney General: see *Solicitor General v Wylde* (1945) 46 SR (NSW) 83.

The appointment of the late Harold Snelling QC as Solicitor General in 1953 marked the swing of the pendulum firmly back in favour of the office being seen essentially as both non-political and non-departmental. Snelling was a practising silk at the time of his appointment. The Solicitor General Act 1969 now requires the appointee to be a QC (s2(1)) and stipulates that the office shall not be held by a Minister of the Crown (s2(6)).

The primary function of the Solicitor General, according to the Act, is to act "as Counsel" for the Crown (s3(1)(a)); and when the office of Attorney General is vacant, or the Attorney General is absent from the State or is by reason of illness unable to exercise and discharge his powers, to exercise and discharge any powers conferred or imposed on the Attorney General "by or under any Act or incident by law to the office of the Attorney General" (s3(1)(b)).

The Attorney General may delegate any other of his powers by instrument in writing (s4(1)) and the breadth of this statutory authority was the subject of some critical comment during the second reading speeches on the passing of the Act. The Opposition members expressed concern that the power of delegation might be used in circumstances that could blur what was perceived to be a clear line between legal and political functions. I am however happy to say that I have never been asked to open a bridge in Burrinjuck, make a political speech in St Marys or campaign in Lane Cove.

The functions presently delegated include matters involving:-

(a) charities and charitable trusts;

(b) venues of trials;

(c) the Listening Devices Act 1984.

None of these, and others not mentioned, appear unduly controversial in the sense that their exercise could be the subject of partisan debate, although experience tells one that anything can become controversial in connexion with the governmental discharge of legal functions in this State.

The commencement of the Director of Public

Prosecutions Act 1986 has had a significant impact. Before 13 July 1987 much of the work of the office involved the criminal process with the Solicitor General providing advice on decisions whether to "no bill", appeal against sentence etc and making these decisions in lieu of the Attorney General when he was absent from the State. The volume of that work meant that latterly the Solicitor General tended to be involved personally in this area only when a Crown Prosecutor and the Crown Advocate disagreed in the advice tendered to the Attorney, or when the Attorney was absent. Since 13 July 1987 the Director of Public Prosecutions has exercised these functions and the Attorney General's (and thus the Solicitor General's) roles, though preserved (s30), is confined in practice to areas where a possible personal conflict of interest precludes the Director of Public Prosecutions from acting.

Nonetheless there remain certain important criminal law matters not directly involving the decision to prosecute such as extradition, the granting of indemnities, change of venue and directing that an inquiry as to fitness to plead which remain vested in the Attorney General. Some of these may be exercised by the Solicitor General as the Attorney's delegate; for others (eg the granting of indemnities) the Solicitor General or Crown Advocate may be involved in tendering advice to the Attorney General. The Solicitor General may also (with the Crown Advocate) be involved in tendering advice to the Attorney General on other matters relating to the latter's roles as first law officer. These include the institution of contempt proceedings, applications involving vexatious litigants, consent to perjury prosecutions, responding to allegations of professional misconduct by practitioners etc.

The bulk of the work of the office is now that of counsel for the Crown in significant civil matters. Naturally much of this work involves constitutional law. Decisions as to intervention following receipt of s78B notices (running at about eight per month) have to be taken or advised to the Attorney. Beyond that there is the usual barrister's lot of advices and court appearances on instruction from the Crown Solicitor. It is little different from the position of a barrister at the "private" bar except perhaps that the brief is returned unaccompanied by a memorandum of fees. As can happen to barristers generally, one sometimes has an unprompted inkling from the nature of the matter as to what advice the client would *like* to receive. As with the barrister who has several clients, it would be unethical and foolish to let that inkling influence one's judgment. Again, just as can happen to counsel who appears regularly for the one client, judges or fellow practitioners may take the opportunity of your presence in a specific case as the occasion for some direct or indirect remonstrance against your client generally. I hope, nevertheless, that it is generally perceived that the Solicitor General appears in court as counsel making submissions for the Crown, and not as an agent making speeches or admissions on behalf of the government of the day. Furthermore, the adversary system and the friendly critical jibes of one's fellow barristers are hopefully the best antidote against the risks of developing an excessively genign attitude towards ministers and bureaucrats.

The position does provide opportunities for the tendering of advice on policy matters. The Solicitor General may be consulted on proposals for law reform and there may be opportunities flowing from constant involvement in litigation on the Crown side to suggest changes in practice or the law.

The Solicitors General of the various States, the Northern Territory and the Commonwealth meet regularly as the Special Committee of Solicitors General to discuss constitutional cases in the pipeline. (The Commonwealth Solicitor General is always invited half an hour late.) In addition the Committee may be asked to act as an adviser to SCAG (the Standing Committee of Attorneys General) to prepare a proper legal solution to give effect to a policy decision already taken in principle by SCAG. By this means, for example, the drafting of the cross-vesting scheme devolved upon the Solicitors General. This hopefully should be some help if the constitutional validity of the scheme is challenged. □

HOLDERS OF THE OFFICE OF SOLICITOR GENERAL FOR NEW SOUTH WALES

Name	Term of Office
John Stephen	1824-1825
James Holland	Appointed on 2.4.1826 but never sworn in.
William Foster	1827
John Sampson	Appointed in 1828
Edward MacDowell	Appointed in 1830 but lost the position when he failed to take up his duties promptly
John Hubert Plunkett QC MLC	1831-1836
William a'Beckett	20.3.1841-30.8.1844 (acting)
William Montagu Manning (Sir) QC MLC	31.8.1844-11.1.1848 (acting) 20.11.1849-5.6.1856
William John Foster MLC	12.1.1848-19.11.1849
John Bayley Darvall (Sir) QC MLA	6.6.1856-25.7.1856 3.10.1856-25.5.1857

Alfred James Peter Lutwyche MLC	12.9.1856-2.10.1856 7.9.1857-14.11.1858
Edward Wise MLC	23.5.1857-7.9.1857
William Bede Dalley MLA	15.111858-11.2.1859
John Fletcher Hargrave QC MLC	21.2.1859-26.10.1859 3.11.1859-31.3.1860 1.8.1863-15.10.1863 3.2.1865-21.6.1865
Peter Faucett MLA	16.10.1863-2.2.1865
Robert Macintosh Isaacs MLA	22.1.1866-26.10.1868
Joshua Frey Josephson MLA	27.10.1868-9.9.1869
Julian Emanuel Salomons (Sir) QC MLC	18.12.1869-15.12.1870
William Charles Windeyer (Sir) MLA	16.12.1870-13.5.1872
Joseph George Long Innes (Sir) MLA	14.5.1872-19.11.1873
Position not filled	1873-1894
George Houston Reid (Sir) QC MLA	21.12.1894-5.3.1895 19.12.1895-20.4.1896 22.12.1896-9.2.1897 27.4.1898-7.10.1898 3.1.1899-1.5.1899
Hugh Pollock	31.7.1901-6.10.1904
John Garland KC MLC	21.12.1909-20.10.1910 * 15.11.1916-23.7.1919 *
Walter Bevan	15.7.1911-1912
David Robert Hall MLC	4.4.1912-1915 *
William Arthur Holman MLA	19.1.1915-6.2.1915
John Daniel Fitzgerald MLC	23.7.1919-12.4.1920 *
Robert Sproule MLC	15.4.1920-13.4.1922
Cecil Edward Weigall QC	18.12.1922-30.4.1953
Harold Alfred Rush Snelling QC	25.8.1953-12.9.1974
Reginald Joseph Marr QC	13.9.1974-10.3.1978
Gregory Thomas Aloysius Sullivan QC	5.2.1979-18.2.1981
Mary Genevieve Gaudron QC	19.2.1981-5.2.1987
Keith Mason QC	6.2.1987-

* Concurrently with office of Minister of Justice.

NOTE: In some cases the appointment as senior counsel or to membership of one of the Houses of Parliament occurred during or after the term of office of the person named.