



Publishing Government Legal Advice

Summary

In the UK, law officers of the crown are responsible for providing legal advice to the government. Successive governments have observed a long-standing convention that the advice they receive from law officers is not disclosed outside government. This House of Lords Library Briefing provides a brief overview of the role of the law officers and the convention on the publication of their advice. It also gives examples of how the Government has referred to the convention in response to calls for it to make public the full advice that it had received from law officers. The final section discusses demands for the Government to publish the legal advice that it has been given regarding Brexit.

Over recent weeks, there have been repeated calls—including from Labour, the Liberal Democrats, the Democratic Unionist Party (DUP) and a former Secretary of State for Exiting the European Union—for the Government to publish in full the legal advice it has received about its proposed Brexit deal. On 13 November 2018, a binding motion for a return was agreed without division in the House of Commons, calling for “any legal advice in full, including that provided by the Attorney General, on the proposed withdrawal agreement on the terms of the UK’s departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the United Kingdom and the European Union” to be laid before Parliament.

The Government published a “full reasoned position statement” setting out its legal position on the Brexit deal on 3 December 2018—the day before the Commons began its debate that will culminate in the ‘meaningful vote’ on the deal—and the Attorney General made a statement and took oral questions in the Commons. However, on 4 December 2018 the House of Commons narrowly voted in favour of finding the Government in contempt of Parliament for failing to comply with the 13 November motion, and ordered the Government to publish the Attorney General’s full legal advice immediately. The following day, the Government published the advice that the Attorney General had presented to Cabinet on 14 November 2018 on the legal effect of the withdrawal agreement. The Government argued that this should not set a precedent for any future release of law officers’ advice.

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1. Law Officers' Legal Advice to the Government

1.1 Law Officers

The law officers in England and Wales are the Attorney General and the Solicitor General.¹ They are government ministers, and the Attorney General is the chief legal advisor to the crown. The Attorney General is not a member of cabinet, though the post holder will attend when their advice is required or when matters within their responsibility come up for consideration.² The law officers have varied roles and functions, including: superintending prosecution authorities (such as the Crown Prosecution Service); bringing certain specified prosecutions; and referring unduly lenient sentences to the Court of Appeal.³ They are also responsible for providing legal advice to the government. In a speech on the role of law officers, Sir Oliver Heald, then Solicitor General, stated that the “core function” of the Attorney General was to “make sure that government, that ministers, act lawfully, in accordance with the rule of law”.⁴

1.2 Convention on Disclosing Law Officers' Advice

Successive governments have said that there is a long-standing convention that the advice given by law officers is not disclosed publicly. The Cabinet Office's ministerial code states that:

The fact that the law officers have advised or have not advised and the content of their advice must not be disclosed outside government without their authority.⁵

The 24th edition of Thomas Erskine May's *Parliamentary Practice*, a guide on parliamentary practice and procedure and British constitutional law, contains the following paragraph entitled 'Law officers' opinions':

By long-standing convention, observed by successive governments, the fact of, and substance of advice from, the law officers of the crown is not disclosed outside government. This convention is referred to in paragraph 2.13 of the ministerial code. The purpose of this convention is to enable the government to obtain frank and full legal advice in

¹ UK Government website, '[The Attorney General's Office: About Us](#)', accessed 6 November 2018.

² Attorney General's Office, '[Speech by Solicitor General Oliver Heald QC MP to Kent Law School](#)', 18 October 2012.

³ UK Government website, '[The Attorney General's Office: About Us](#)', accessed 6 November 2018.

⁴ Attorney General's Office, '[Speech by Solicitor General Oliver Heald QC MP to Kent Law School](#)', 18 October 2012.

⁵ Cabinet Office, [Ministerial Code](#), January 2018, p 6.

confidence. Therefore, the opinions of the law officers of the crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused; but if a minister deems it expedient that such opinions should be made known for the information of the House, the Speaker has ruled that the orders of the House are in no way involved in the proceeding.⁶

2. Iraq War and the Publication of Legal Advice

Prior to the invasion of Iraq in March 2003, there were calls for the then Labour Government to make public the advice that it had received about the legal basis for military action in Iraq. On 17 March 2003, responding to a written parliamentary question, the Attorney General, Lord Goldsmith, set out in the House of Lords his view of the legal basis for the use of force against Iraq.⁷ On 18 March 2003, a motion backing the Government's position was passed, and subsequently British troops were sent to Iraq.⁸

However, there were further demands for the Government to publish the full legal advice it had received from Lord Goldsmith.⁹ On 9 March 2004, Elyn Llwyd (then Plaid Cymru MP for Meirionnydd Nant Conwy) tabled a motion for debate in the House of Commons that "this House believes that all advice prepared by the Attorney General on the legality of the war in Iraq should be published in full".¹⁰ Speaking in the debate, the Secretary of State for Foreign and Commonwealth Affairs, Jack Straw, stated that there were "strong substantive arguments in favour" of the convention that the advice of law officers given to the Government in confidence would not be disclosed publicly.¹¹ The motion was defeated in the House of Commons by 283 votes to 192.¹² However, there was continued political pressure and media scrutiny.¹³ As a result, on 28 April 2005 on 10 Downing Street's website, the Government published the Attorney General's final advice to the cabinet, issued on 7 March 2005, on the legality of the war with Iraq.¹⁴

⁶ Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 2011, 24th ed, p 447.

⁷ House of Lords, '[Written Question: Iraq: Legality of Armed Force](#)', 17 March 2003, HL2172.

⁸ [HC Hansard, 18 March 2003, cols 760–912](#).

⁹ House of Commons Constitutional Affairs Committee, [Constitutional Role of the Attorney General](#), 19 July 2007, HC 306 of session 2006–07, p 20.

¹⁰ [HC Hansard, 9 March 2004, col 1397](#).

¹¹ [ibid, col 1406](#).

¹² [ibid, cols 1459–60](#).

¹³ House of Commons Constitutional Affairs Committee, [Constitutional Role of the Attorney General](#), 19 July 2007, HC 306 of session 2006–07, p 20.

¹⁴ BBC News, '[Iraq War Legality](#)', 28 April 2005.

Other draft legal advice given to the Labour Government in 2002 and 2003 was declassified as part of the Iraq Inquiry.¹⁵ In a letter to the chairman of the inquiry, Sir John Chilcot, explaining the Cabinet Office's decision to make available the documents, the Secretary of the Cabinet and Head of the Home Civil Service, Sir Gus O'Donnell stated:

I have considered the matter carefully and believe that given the very exceptional nature of the Iraq Inquiry, this particular material can be declassified without prejudice to the general principles of legal professional privilege (LPP) and the convention in relation to the law officers' advice.¹⁶

Gus O'Donnell reiterated in his letter that the Government considered that this was an exceptional case and that its position remained that there was "a strong public interest in protecting both the convention that neither the advice of the law officers nor the fact that they have been consulted is disclosed outside government, and the principle of LPP".¹⁷

3. Legal Advice on Military Action Post-Iraq Conflict

Since the conflict in Iraq, governments have published on numerous occasions shortened versions of the advice given to it by law officers, particularly in regard to the legality of the deployment of British troops. However, in response to calls for the Government to publish the advice in full, it has often pointed to the long-standing convention that legal advice given by law officers to the Government is not disclosed publicly.

For instance, in November 2015, in response to a House of Commons Foreign Affairs Committee report on the possibility of extending into Syria participation by British aircraft in airstrikes against ISIS, the then Prime Minister, David Cameron, set out his justification for military action, including the legal basis.

There is a clear legal basis for military action against ISIL in Syria. The legality of UK strikes against ISIL in Syria is founded on the right of self-defence as it is recognised in article 51 of the UN Charter.

[...]

In light of these considerations and the scale of the threat posed by

¹⁵ The Iraq Inquiry was set up in June 2009 to consider the period from the summer of 2001 to the end of July 2009 to identify lessons that could be learned from the Iraq conflict. The final report was published on 6 July 2016.

¹⁶ Iraq Inquiry, '[Letter of the Secretary of the Cabinet and Head of the Home Civil Service, Sir Gus O'Donnell: Declassification of Draft Legal Advice](#)', 25 June 2010.

¹⁷ *ibid.*

ISIL, military action that is necessary and proportionate to bring an end to ISIL's attack on Iraq is justified in accordance with the right of collective self-defence that is preserved in article 51 of the UN Charter [...] The collective self-defence of Iraq provides a clear legal basis for the UK to increase its contribution to the Coalition's efforts against ISIL in Syria by taking direct military action itself, provided such activity meets the ongoing requirements of necessity and proportionality.¹⁸

On 26 November 2015, Mr Cameron made a statement in the House of Commons on the committee report and provided details on the content of his response.¹⁹ Addressing the issue of whether the Government would publish the formal legal advice that it had received, the Prime Minister stated that:

It is a long-standing constitutional convention that we do not publish our formal legal advice, but the document I have published today shows in some detail the clear legal basis for military action against ISIL in Syria.²⁰

On the same day, ahead of the Prime Minister's statement, the Attorney General, Jeremy Wright, responded to parliamentary questions on the issue of whether the Government would publish advice that it had received on the legality of the UK carrying out airstrikes in Syria in the absence of a UN Security Council resolution on that matter. Mr Wright set out the Government's reasons for not publishing the formal advice:

It is a long-standing convention that law officers' advice is not published [...] As for the legal advice that the law officers give, it can be argued that the convention is there for very good reason. There are essentially two reasons. The first is to enable legal advice to be given to government in a frank and open way, which is best done when advice is not published; and secondly, of course, the legal advice the law officers give is part of the collective responsibility of cabinet decision-making. Again, there are good reasons for not publishing it on those grounds [...] As I say, Members on both sides will have the chance to understand what the legal basis for the Government's proposals will be, but there is a distinction to be made between the Government's legal basis for action and the precise advice that law officers give. For the reasons I have explained, I do not think it sensible

¹⁸ House of Commons Foreign Affairs Committee, [Memorandum to the Foreign Affairs Select Committee: Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015–16: The Extension of Offensive British Military Operations to Syria](#), 26 November 2015, pp 15–16.

¹⁹ [HC Hansard, 26 November 2015, cols 1489–94.](#)

²⁰ [ibid. col 1490.](#)

in what is undoubtedly an open and transparent democracy to publish that advice.²¹

4. Brexit

4.1 Calls to Publish Attorney General's Advice on Brexit Negotiations

There have been repeated calls over recent weeks for the Government to publish in full the legal advice it has received about its proposed Brexit deal. In an article in the *Times* on 4 November 2018, David Davis, the former Secretary of State for Exiting the European Union, called for the Government to publish the legal advice it had received about the Chequers proposal—the Government's plan for a future relationship with the EU based on a common rulebook for goods and agri-food and a 'facilitated customs arrangement'.²² Mr Davis resigned from the Cabinet in July 2018 because he did not support the Chequers proposal.²³ In his *Times* article, Mr Davis referred to press reports that Geoffrey Cox, the Attorney General, had expressed doubts about the Chequers plan at a Cabinet meeting, raising concerns that a proposed UK-wide temporary customs arrangement to address the Northern Ireland border question would leave the UK in an indefinite limbo.²⁴ Press reports also suggested that members of the Cabinet indicated they would not sign off on any 'backstop' proposal to avoid a hard border between Ireland and Northern Ireland without legal advice from Mr Cox.²⁵

Mr Davis urged the Prime Minister to publish legal advice the Cabinet had received from Mr Cox, arguing that it was “not just politically the right thing to do, it's also morally and ethically the right thing to do” because “the public has a right to know”.²⁶ Mr Davis suggested that if the Prime Minister would not publish the legal advice, then “the Cabinet should exert its authority to compel her to do so”.

Sir Jeffrey Donaldson, the DUP chief whip at Westminster, also called on 7 November 2018 for the Government to publish legal advice it had

²¹ [HC Hansard, 26 November 2015, cols 1467–8.](#)

²² David Davis, '[Downing Street Must Publish the Dodgy Backstop Dossier or Be Damned Like Tony Blair](#)', *Times* (£), 4 November 2018. For more information about the Chequers proposal, see: House of Lords Library, [Brexit Preparations and Negotiations](#), 18 July 2018.

²³ Sky News, '[David Davis Resignation Letter and Theresa May's Response](#)', 9 July 2018.

²⁴ James Forsyth, '[From Dante's First Circle of Hell to Black Wednesday, This Week's Cabinet Meeting](#)', *Spectator* (£), 23 October 2018.

²⁵ Edward Malnick, '[Attorney General Joins Brexit War Cabinet After Ministers' Demands](#)', *Sunday Telegraph* (£), 4 November 2018.

²⁶ David Davis, '[Downing Street Must Publish the Dodgy Backstop Dossier or Be Damned Like Tony Blair](#)', *Times* (£), 4 November 2018.

received on a possible Brexit deal.²⁷ Sir Jeffrey said the Government had undertaken to share the full legal advice with the DUP, but he argued that wider publication was in the public interest.²⁸

He said:

It's because it affects the whole of the United Kingdom and therefore it shouldn't just be the Democratic Unionist Party that sees this advice, or the Government.

If the House of Commons is going to have a meaningful vote on a deal upon which this legal advice is very important, then I think people are entitled to know what the legal advice is.

Labour and the Liberal Democrats also joined calls for the legal advice to be published. Sir Keir Starmer, Shadow Secretary of State for Exiting the European Union, said it was “essential MPs are given the opportunity to scrutinise the Attorney General’s legal advice before voting on the final deal”.²⁹ In his view, the public had “the right to know precisely what the Cabinet has signed up to and what the implications are for the future”. Tom Brake, the Liberal Democrat spokesman for Exiting the European Union, said that “the people deserve access to this information” and that “choosing to withhold this information from the public raises serious questions about what Tory ministers are trying to hide”.³⁰

4.2 Motion for a Return

On 13 November 2018, Labour moved a motion for a return, calling for “any legal advice in full, including that provided by the Attorney General, on the proposed withdrawal agreement on the terms of the UK’s departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the United Kingdom and the European Union” to be laid before Parliament.³¹ A motion for a return is the same procedural move previously used to get the Government to publish its Brexit impact assessments.³²

During the debate on the motion for a return, Keir Starmer said that there had been press reports about legal advice being provided to the

²⁷ Peter Walker, [‘Cross-Party Calls Grow for Brexit Legal Advice to be Published in Full’](#), *Guardian* 7 November 2018.

²⁸ *ibid.*

²⁹ Peter Walker, [‘Cross-Party Calls Grow for Brexit Legal Advice to be Published in Full’](#), *Guardian* 7 November 2018.

³⁰ Andrew Sparrow, [‘Cabinet Ministers Invited in to Read Near-Complete Text of EU Withdrawal Agreement’](#), *Guardian*, 7 November 2018 (see entry at 11:39).

³¹ [HC Hansard, 13 November 2018, col 190.](#)

³² House of Commons Library, [Exiting the EU: Sectoral Assessments](#), 9 March 2018.

Government at various points over recent weeks, but what he was asking for was “the final advice provided by the Attorney General to the Cabinet concerning the terms of any withdrawal agreement” to be “made available to all MPs [...] in good time to allow proper consideration before MPs are asked to vote on the deal”.³³

David Lidington, Minister for the Cabinet Office, said that if the wording of the motion were taken literally (“any legal advice in full”) it could amount to the publication of over 5,000 documents going back over two years.³⁴ He agreed that MPs should have access to “detailed legal analysis of the meaning and implications of the agreement”, and accepted that it was “a perfectly fair request to be made of Government that we set out the legal implications, as we see it, of the agreement”. Mr Lidington gave a commitment that the Government would “make available to all Members of the House, following the conclusion of negotiations and ahead of the meaningful vote, a full reasoned position statement laying out the Government’s political and legal position on the proposed withdrawal agreement, including any protocols that might be attached to it”.³⁵ He also said that the Attorney General was willing to make an oral statement to the House and take questions. However, he argued that if the convention against publishing law officers’ advice in full were set aside “there would be an adverse impact on the quality of discussions within government and of the government’s collective decision-making, which would not be in the interests of any government of any political party”.³⁶

The Government told Conservative MPs to abstain on the motion; this was reportedly in preference to losing a vote, as the DUP were planning to vote with Labour.³⁷ The motion for a return was therefore carried unanimously with no vote taken.³⁸ The Speaker said that “the motion is effective—it is not just an expression of opinion; it is an expression of will—and the Government should regard the motion as effective and respond swiftly to it”.³⁹

Downing Street said on 27 November 2018 that the Government would publish a “position statement” on the legality of the deal, rather than the “full and final advice” given to ministers.⁴⁰ The following day Stephen Barclay, Secretary of State for Exiting the European Union, announced he had

³³ [HC Hansard, 13 November 2018, col 192.](#)

³⁴ *ibid*, col 199.

³⁵ *ibid*, col 202.

³⁶ *ibid*, col 205.

³⁷ Jessica Elgot, ‘[Government to Publish Brexit Legal Advice After Commons Defeat](#)’, *Guardian*, 13 November 2018.

³⁸ [HC Hansard, 13 November 2018, col 235.](#)

³⁹ *ibid*, col 236.

⁴⁰ Jack Maidment, ‘[Theresa May Accused of ‘Dangerous’ Brexit Cover-Up As She Blocks Full Publication of Legal Advice on Her Deal](#)’, *Telegraph* (£), 27 November 2018.

published a long-term economic analysis of EU exit under different scenarios, fulfilling a commitment the Government had made in January 2018 to publish an economic analysis of the Brexit deal before the ‘meaningful vote’ took place in the House of Commons.⁴¹ Mr Barclay said the Government planned to publish a further document setting out the Government’s legal position on the proposed withdrawal agreement on 3 December 2018, and the Attorney General would make a statement to the House of Commons the same day. The House of Commons is due to begin debating the withdrawal agreement and political declaration on the future framework for UK-EU relations on 4 December 2018, with the ‘meaningful vote’ scheduled to take place on 11 December 2018. Speaking in the Commons on 28 November 2018, the Prime Minister, Theresa May, acknowledged the “legitimate desire in Parliament to understand the legal implications of the deal”, but maintained that “the advice that a client receives from their lawyer is privileged”.⁴²

Following these comments and Mr Barclay’s statement, Keir Starmer raised a point of order in the House of Commons, declaring he was “deeply concerned” that in publishing only a position paper summarising the Attorney General’s advice, the Government did not intend to comply with the motion for a return.⁴³ The Speaker advised that if Sir Keir wrote to him to state his belief that the Commons “has seen, or is about to be subject to, a contempt”, he would take a timely decision as to “whether there is an arguable case that a contempt has been committed”.⁴⁴

Keir Starmer raised the matter again in an urgent question in the House of Commons on 29 November 2018.⁴⁵ Robert Buckland, the Solicitor General, reiterated that the Government would publish a “full reasoned statement to set out their position on the legal effect of the withdrawal agreement” on 3 December 2018, and the Attorney General would make a statement to the Commons and answer questions “in the fullest possible way”.⁴⁶ Sir Keir said that this was “not good enough”, as the “binding motion that was passed was for nothing less than for the full and final legal advice provided by the Attorney General”. He declared it was “unacceptable, and frankly shows contempt for this House” for the Government to “pretend that the House was asking only for partial or qualified legal advice”. Tom Brake, the Liberal Democrat spokesman for Exiting the European Union, said that he had already written to the Speaker asking whether this was a matter of contempt.⁴⁷

⁴¹ House of Commons, [‘Written Statement: Exiting the European Union: Publications’](#), 28 November 2018.

⁴² [HC Hansard, 28 November 2018, col 242.](#)

⁴³ [HC Hansard, 28 November 2018, col 274.](#)

⁴⁴ *ibid.*, cols 274–5.

⁴⁵ [HC Hansard, 29 November 2018, col 411.](#)

⁴⁶ *ibid.*

⁴⁷ *ibid.*, col 413.

Mr Buckland argued that it was “premature” for the House to judge whether the Government had discharged its obligations under the motion for a return before the Attorney General had made his statement in the Commons.⁴⁸ He maintained that the Attorney General would “meet the spirit and intention of the motion passed, but preserve the important constitutional convention relating to law officers’ advice”.⁴⁹ It was in recognition of the “exceptionally important, unusual and unprecedented times” that the Attorney General was taking the “rare” step of coming to the House to make a statement.

4.3 Publication of Government Legal Position and Oral Statement by Attorney General

On 3 December 2018, the Government published a command paper entitled *EU Exit—Legal Position on the Withdrawal Agreement*.⁵⁰ The Attorney General said in a written statement that the document “sets out the Government’s legal position on the proposed withdrawal agreement and provides a legal commentary, covering each part of the withdrawal agreement and the three protocols”.⁵¹ Appearing later that day before the Commons, Mr Cox explained the context of this publication:

It is important to understand how the law officers habitually give their advice, which may be a mixture of oral and written communications given at different times during fast-developing events. Ministers are advised by their own departmental lawyers, and the points that arise for consideration of the law officers are invariably limited to the relatively few of political importance to the policy decision of the Government. Therefore, my statement today is complimented by a detailed legal commentary, provided for the purpose of the debate and published this morning, that analyses the effect of the [withdrawal] agreement as a whole. That legal commentary has been produced with my oversight and approval. I comment it to the House as both an accurate examination of the provisions of the agreement and a helpful exposition of some of the salient issues that arise from them.⁵²

Indicating his willingness to answer questions from MPs, Mr Cox said that he considered it his “solemn and constitutional duty to this House to advise it on these legal questions objectively and impartially, and to place such legal

⁴⁸ [HC Hansard, 29 November 2018, col 412.](#)

⁴⁹ *ibid*, col 413.

⁵⁰ HM Government, [EU Exit—Legal Position on the Withdrawal Agreement](#), 3 December 2018, Cm 9747.

⁵¹ House of Commons, [‘Written Statement: Exiting the European Union: Publications’](#), 3 December 2018, HCWS1131.

⁵² [HC Hansard, 3 December 2018, col 546.](#)

expertise as I have at its disposal”.⁵³ He argued that the “historical precedents strongly support this view”.

Mr Cox drew a distinction between the present situation and the circumstances in which Lord Goldsmith’s advice on military action in Iraq had been made public:

[...] the advice of Lord Goldsmith was published two years after the event. What the House is now asking is that the advice, if any, given by the Attorney General be published in the middle of the negotiations, where we may still need to deploy many of the arguments connected with the withdrawal agreement in the future. Secondly, the advice of Lord Goldsmith was on a question of the lawfulness of the Government’s action. This is not a question of whether the Government acted lawfully; this is simply a question of whether the Government are acting wisely, on which Members of the House can disagree. There is a fundamental distinction between the position when the advice of Lord Goldsmith was given in 2003 and the advice today.⁵⁴

Mr Cox outlined his conviction that “to disclose any advice that might have been given would be fundamentally contrary to the interests of this country”.⁵⁵ He argued that because negotiations on the UK’s future relationship with the EU were ongoing, breaching the constitutional convention about releasing legal advice “would be contrary to the national interest in the course of a negotiation that might involve discussions about strength, weaknesses and future strategies”.⁵⁶ In his view, “although the House says that I should disclose, I believe that the public interest compels me not to”. Mr Cox also questioned whether the power of the Commons to require the publication of documents was unlimited:

Where do the limits of this power end? Does it extend to Cabinet minutes? Does it extend to the papers of the Secret Intelligence Service? Is the House, by means of this motion, to command any paper of any kind, central to the interests of this nation, without even being able to check that, by its release it is causing, or might cause, severe damage to the public interest? [...] If one looks at previous versions of *Erskine May*, one sees that the motion to return is confined to documents of public and official character.⁵⁷

He urged the Commons to take into account his point about balancing the public interest when deciding whether the Government had adequately

⁵³ [HC Hansard, 3 December 2018, col 546.](#)

⁵⁴ *ibid*, col 565.

⁵⁵ *ibid*, col 563.

⁵⁶ *ibid*, col 564.

⁵⁷ *ibid*, col 563.

fulfilled the terms of the 13 November motion:

Ultimately, what the House will have to decide is whether an Attorney General and a Government who are seeking to protect the public interest are in contempt of its motion when they have sought to comply with the spirit of it to the maximum possible degree, and when they have put their legal adviser at the disposal of the House and instructed him to give full, frank, complete answers to any questions asked on the matters of law that any legal advice would have been likely to cover.⁵⁸

Nick Thomas-Symonds, the Shadow Solicitor General, argued that there was “no point whatever in trying to hide behind the law officers’ convention” as the ministerial code and *Erskine May* were “very clear” that ministers had the discretion to make advice available under “exceptional circumstances”.⁵⁹ He questioned “what circumstances could be more exceptional than these?”, arguing that the “economic, political and constitutional integrity of our country is at stake”. Joanna Cherry, Scottish National Party (SNP) Justice spokesperson, argued that by not dividing the Commons on 13 November, the Government had “effectively conceded that these were exceptional circumstances and that the normal, very important convention would not apply”.⁶⁰

4.4 Contempt Motion

While questions on the Attorney General’s oral statement were ongoing in the Commons Chamber, a cross-party group of MPs wrote to the Speaker to request that he consider giving precedence to a motion being placed before the House of Commons that the Government had held Parliament in contempt.⁶¹ The letter was signed by Keir Starmer (Shadow Secretary of State for Exiting the European Union), Stephen Gethins (SNP Foreign Affairs and Europe spokesperson), Tom Brake (Liberal Democrat spokesperson on Exiting the European Union), Nigel Dodds (Deputy Leader of the DUP), Hywel Williams (Plaid Cymru spokesperson on Brexit) and Caroline Lucas (leader of the Green Party in Parliament). In it, they argued that:

Neither a ‘reasoned position statement’ nor a document ‘setting out the Government’s legal position’ constitute the final and full advice provided by the Attorney General to the Cabinet. It does not comply with a motion of the House that you have ruled to be effective. It was the concession offered by the Government offered during the debate

⁵⁸ [HC Hansard, 3 December 2018, col 567.](#)

⁵⁹ *ibid*, col 550.

⁶⁰ *ibid*, col 553.

⁶¹ Labour Party, ‘[Labour Leads Cross-Party Alliance Calling on the Speaker to Launch Contempt Proceedings Against the Government](#)’, 3 December 2018.

[on 13 November 2018], but it was rejected—and ministers made no attempt to amend or oppose the motion for debate.

It is apparent to us—and we believe the overwhelming majority of the House—that the information released today does not constitute the final and full advice provided by the Attorney General to the Cabinet. It does not comply with a motion of the House that you have ruled to be effective.

Following his appearance in the Chamber, the Attorney General also wrote to the Speaker. He argued that “the effect of a motion calling for the publication of information which is subject to public interest duties is far from clear”.⁶² He also outlined practical difficulties associated with fulfilling the motion for a return, arguing that the terms of the request Sir Keir Starmer expressed during the 13 November debate for “publication of the full and final advice provided by the Attorney General to the Cabinet concerning the terms of any withdrawal agreement” were “vague” and it was “not clear what is meant by them”. Specifically, he questioned whether “advice” should be interpreted to mean oral advice as well as written advice, and noted that “full” and “final” advice might refer to advice given at different moments. He argued that

Unless there is clarity on these questions it is simply not possible for the Government to know how to comply with the motion. It is particularly important that if anyone is to face sanctions for contempt he or she should fairly know how to comply with it.⁶³

He also maintained that there was “real doubt over the ambit of a motion to return”. He raised a concern that “if it is to be used to cover confidential documents [...] without amendment of the procedures of the House, there is no means by which a document can be reviewed to ensure that its disclosure does not harm the national interest”.

In response to the letters, the Speaker stated that he had “considered the matter carefully” and was “satisfied that there is an arguable case that a contempt has been committed”.⁶⁴ He said he would therefore give precedence in the order of business the following day to a motion to allow the House to take a decision on the matter.

⁶² Attorney General’s Office, [Letter to Speaker](#), dated 3 December 2018, published 4 December 2018.

⁶³ *ibid.*

⁶⁴ [HC Hansard, 3 December 2018, col 624](#).

The *Erskine May* guide to parliamentary practice notes that there is no definitive definition of what constitutes a contempt of parliament:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.⁶⁵

On 4 December 2018 the House of Commons debated a motion tabled by the authors of the letter to the Speaker that “this House finds Ministers in contempt for their failure to comply with the requirements of the motion for return passed on 13 November 2018, to publish the final and full legal advice provided by the Attorney General to the Cabinet concerning the EU Withdrawal Agreement and the framework for the future relationship, and orders its immediate publication”.⁶⁶ Andrea Leadsom, Leader of the House of Commons, tabled an amendment to the motion to instead refer to the House of Commons Privileges Committee “the question of whether the Government’s response fulfils the motion passed on 13 November 2018 and [request] the committee to consider the constitutional and historic context and the proper use, ambit and scope of the motion for return procedure”.

The Government’s amendment was defeated by 311 votes to 307, a majority of four.⁶⁷ The Commons voted in favour of the motion tabled by Keir Starmer and others by 311 votes to 293, a majority of 18.⁶⁸ Andrea Leadsom said that the Government would comply with the will of the House and publish the “final and full advice” provided by the Attorney General to the Cabinet, but in recognition of the “serious constitutional issues that this raises”, she had also referred the matter to the Commons Privileges Committee so it could consider the implications of the motion for a return.⁶⁹

Speaking the following day in an interview, Mrs Leadsom argued that in future government ministers would be “very careful about what they ask law officers to give advice on”, and the law officers themselves would be “very reluctant to give any advice to government that they might then see

⁶⁵ *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 2011, 24th ed, p 251.

⁶⁶ House of Commons, [Order Paper](#), 4 December 2018, p 8.

⁶⁷ [HC Hansard, 4 December 2018, cols 723–7.](#)

⁶⁸ *ibid*, cols 728–31.

⁶⁹ *ibid*, col 732.

published on the front pages of the newspapers”.⁷⁰

4.5 Publication of Attorney General’s Legal Advice

The following day, the Government published a six-page letter from the Attorney General addressed to the Prime Minister, dated 13 November 2018.⁷¹ This set out the Attorney General’s response to the question: “What is the legal effect of the UK agreeing to the Protocol to the Withdrawal Agreement on Ireland and Northern Ireland in particular its effect in conjunction with Articles 5 and 184 of the main Withdrawal Agreement?”. In a written statement accompanying the document’s publication, the Attorney General confirmed that it was “a copy, in full, of the final advice that I provided to Cabinet on 14 November on the legal effect of the Withdrawal Agreement”.⁷²

In the written statement, Mr Cox explained that the Government had taken the step of publishing this document because of the exceptional circumstances surrounding the Commons vote, but argued that this should not be seen to set a precedent:

The release of this advice does not set a precedent for any future release of Law Officers’ advice. It remains a fundamental constitutional convention that neither the fact, nor the content, of Law Officers’ advice is disclosed outside Government without the Law Officers’ consent. That convention provides the fullest guarantee that the business of governments is conducted at all times in the light of thorough and candid legal advice, which may also enter into matters of acute sensitivity to the public interest. The Leader of the House of Commons has asked the Committee of Privileges to inquire into the serious constitutional implications of Humble Address motions in such circumstances and I very much hope that it move to do so as swiftly as possible.

The constitutional tensions created between the expression of the will of the House of Commons by these means on the one hand, and the public interest in the Law Officers’ convention on the other, are not themselves conducive to the proper conduct of public affairs. It is necessary that the public has confidence in the ability of Government and Parliament to work together at a time of national decision-making of the most profound significance. The standing of the House of

⁷⁰ Joe Curtis, ‘[No-deal Brexit is ‘Default Option’ if May’s Withdrawal Agreement Voted Down, Says Leadsom](#)’, *City AM*, 5 December 2018.

⁷¹ Department for Exiting the European Union, ‘[Exiting the EU: Publication of Legal Advice](#)’, 5 December 2018.

⁷² House of Commons, ‘[Written Statement: Exiting the EU: Publication of Legal Advice](#)’, 5 December 2018, HCWS1142.

Commons is also of prime importance. For these reasons, having tested the will of the House twice, the Government will respect its decision and, in these exceptional circumstances and to resolve for the present those constitutional tensions, it has decided, with my consent, to publish this advice.⁷³

4.6 Legal Advice on other Aspects of Brexit

Throughout the Brexit process, there have been calls for the Government to confirm whether it has received legal advice on certain points, and to publish any such advice. The Government has maintained the position that, in line with convention, it will not comment on such matters. For example, in answer to a recent parliamentary question about whether the Department for Exiting the European Union (DExEU) had sought legal advice on holding a second referendum on EU membership or on the possibility of revoking the UK's article 50 notification, the Government responded:

The Government are maintaining the general practice of successive governments not to comment on legal advice that may or may not have been sought or received.

As a matter of firm policy we will not revoke article 50 or hold a second referendum. A clear majority of the electorate voted to leave the EU and we must respect both the will of the British people, and the democratic process which delivered this result.

The British people gave a clear instruction to leave, and we are delivering on that instruction.⁷⁴

Freedom of information requests have also been made seeking disclosure of whether the Government has received legal advice on the possibility of withdrawing the article 50 notification, and the publication of any such advice.⁷⁵ DExEU has maintained that this information is exempt from disclosure under section 27 of the Freedom of Information Act 2000, which creates an exception where disclosing information would prejudice the UK's relations with other countries or international organisations or the UK's interests abroad.⁷⁶

⁷³ House of Commons, '[Written Statement: Exiting the EU: Publication of Legal Advice](#)', 5 December 2018, HCWS1142.

⁷⁴ House of Commons, '[Written Question: Brexit](#)', 13 September 2018, 172459.

⁷⁵ See for example: Jessica Simor, '[Why It's Not Too Late to Step Back from the Brexit Brink](#)', *Guardian*, 7 October 2017.

⁷⁶ Department for Exiting the European Union, '[Freedom of Information Request Ref: DEX000799—Internal Review](#)', 30 April 2018 (published on WhatDoTheyKnow website).

DExEU stated that:

Confirmation or denial that any such information is held would undermine our relationship with the [European] Commission, and EU member states, as it could be interpreted as giving an indication that the UK has not committed to leaving the EU. Confirmation or denial would have a detrimental impact upon relations between the UK and the EU, and impact negatively on the UK's negotiations.

Furthermore, we have considered the likelihood of prejudice. [...] confirmation or denial would result in a real risk of prejudice to the UK's national interests.⁷⁷

On 26 November 2018, the Government published a summary of its legal case in its application to the Supreme Court to appeal the decision of the Inner House to make a reference to the Court of Justice of the European Union (CJEU) on the question of whether the UK could unilaterally revoke its article 50 notification.⁷⁸

⁷⁷ Department for Exiting the European Union, [Freedom of Information Request Ref: DEX000799—Internal Review](#), 30 April 2018 (published on WhatDoTheyKnow website).

⁷⁸ Department for Exiting the European Union, '[Wightman and Others v Secretary of State for the Exiting the European Union—Application for Permission to Appeal to the Supreme Court](#)', 26 November 2018. The Supreme Court found that it could not hear an appeal because proceedings have not been concluded in the Scottish courts—the Scottish Court of Session has referred the question to the CJEU for a preliminary ruling, and once that ruling has been issued, the matter will return to the Court of Session for a final judgment in the proceedings (Supreme Court, '[Permission to Appeal Determination](#)', 20 November 2018). An Advocate General issued an advisory opinion on 4 December 2018, but this is not binding on the CJEU; judgment will be given at a later date (Court of Justice of the European Union, '[Advocate General Campos Sanchez-Bordona Proposes that the Court of Justice Should Declare that Article 50 TEU Allows the Unilateral Revocation of the Notification of the Intention to Withdraw from the EU](#)', 4 December 2018).