The Law Officers

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This Standard Note provides information about the role of the Law Officers in England and Wales (the Attorney General and Solicitor General). The Law Officers have varied roles and functions, including: superintending prosecution authorities (such as the CPS); bringing certain specified prosecutions; referring unduly lenient sentences to the Court of Appeal; and, providing legal advice to the Government. This note considers the Law Officers' duties and functions and some recent controversies which have arisen (particularly relating to the role of the Attorney General in bringing certain prosecutions). The paper also highlights recent Select Committee inquiries into the role of the Attorney General.

In March 2008, the then Labour Government published a White Paper entitled *The Governance of Britain: Constitutional Renewal* and a Draft Constitutional Renewal Bill (with an Explanatory Note). These papers suggested that the Government intended to change the role of the Attorney. In the event, these reforms were not taken forward in the Bill that became the *Constitutional Reform and Governance Act 2010*. Instead the Attorney General's Office agreed a new protocol with the prosecuting departments.

A separate note entitled *Law Officers' Advice* (SNHA/2942) is also available on the intranet.

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A. The Law Officers

1. Historical Background

The office of the Attorney General originated in 1315 when the Crown began to appoint an individual to prosecute its business in the Court of Common Pleas. This appointment was usually by letters patent under the great seal.

Initially, this individual was not given a specific title in the letters patent, but in 1327 he was designated 'King's Attorney'. In the patents granted during the reigns of Edward II and Edward III, the powers of the king's attorney were limited, either in respect of:

- The courts in which he was to practise;
- The area over which his authority extended;
- The business with which he was entrusted.

In 1452 the title of the office was changed to Attorney General and at the same time its holder was given power to appoint deputies. By the sixteenth century, it is said that he became the most important person in the legal department of the state and the chief representative of the Crown in the courts.

The office of the Solicitor General originated in 1461, when the Crown began to appoint a king's solicitor by letters patent under the great seal. In 1485, the holder was designated solicitor general in the letters patent of appointment, a precedent followed in 1521. The title 'king's solicitor' was used twice in the 1500s and the title solicitor general became standard from 1536.

The letters patent appointing the Attorney General and Solicitor General were in Latin until 1727 (except during periods of parliamentary rule or under the protectorate). They assumed their present form in 1885.[1]

Professor J Edwards has suggested that it was only in 1566 that the Commons determined that the official duties of the Solicitor General as an Assistant to the House of Lords did not disqualify him from sitting as a member of the Lower House.[2]

It was not until 1606 that the eligibility of the Attorney General to sit in the House of Commons was first debated. Professor Edwards went on to note that:

> The matter was allowed to lie fallow until 1614 when Francis Bacon's elevation from Solicitor General to Attorney General occasioned, not unexpectedly in his particular case, the same emotional disquiet among members of having amongst their ranks such a staunch and virulent protagonist for the Crown. After setting up once more a Committee of Privileges to search for precedents, a compromise decision was reached that

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1 The above information was taken from a historic version of Attorney General's website in August 2007

2 J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, pg 35, citing Commons' Journals, October 1, 1566

> "Mr Attorney General Bacon remain in the House for this Parliament, but never any Attorney General serve in the Lower House in the future".[3] This ruling was strictly adhered to in 1620, in 1625 and again in 1640 […] The rule of exclusion was finally abandoned in 1670. […] Thereafter, the practice of the Attorney General being a member of the Commons appears to have been generally recognised, though before 1700 at least two occupants of the office […] were not in the Lower House.[4]

The Attorney General's Office website states that the offices of the Attorney General and Solicitor General attained their modern 'shape' in the seventeenth century when they became legal advisers of the Crown. They appeared, either by themselves or their deputies, on behalf of the Crown in the courts. As the legal advisers and deputies of the Crown they gave legal advice to all the departments of state, and appeared for them if they wished to take action in the courts. Like judges, they received writs of attendance requiring them to come to Parliament to give their advice to the House of Lords. Unlike the judges, however, one or other was a member of the House of Commons. They were also regarded as leaders and representatives of the Bar. The Attorney General and Solicitor General are now known as the Law Officers of the Crown; the Solicitor General deputises for the Attorney General.[5]

In 1997, the *Law Officers Act* granted the Solicitor General new powers to exercise "any functions" exercised by the Attorney.

During the passage of the 1997 Act, the then Solicitor General, Lord Falconer QC, said:

> The Bill to which I ask your Lordships to give a Second Reading is not the stuff of political controversy. It seeks simply to remove a difficulty which exists in the running of the Law Officers' department, primarily in respect of the work of a non-political role which the Law Officers perform. In a nutshell, every time the Attorney-General wishes to delegate a particular piece of such work to the Solicitor-General he has formally to authorise the Solicitor to perform it. This means that the papers have to be presented to the Attorney for the delegation to be made.
>
> The Bill, if passed, would permit the Attorney and the Solicitor to agree a general division of labour between them and then the work can be distributed without the need for further formality […] The Law Officers Act 1944 […] permitted the Solicitor-General to perform the statutory functions of the Attorney-General when the office of the Attorney-General was vacant, when the Attorney-General was away or ill and where the Attorney-General had authorised the Solicitor-General to act in a particular case.
>
> That is where the law presently stands. It has significant practical and legal shortcomings. First, it requires the specific delegation in every case as I have described above. Secondly, it does not resolve whether, where the Attorney is available, he can nevertheless delegate his non-statutory functions to the Solicitor.

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[3] *ibid p36*-37,citing Commons' Journals, Vol 1 pp 459-460, April 11, 1614

[4] J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, pp36-38 and see HL Debates, Vol 206, col 380

[5] Information taken from historic version of Attorney General's website in August 2007

> The position in the Law Officers' department is, therefore, unlike any other Ministry where work of the appropriate level can be assigned to the junior minister without the need for the intervention of the Secretary of State or leading minister, and without the fear, save in the exceptional case, that it could be said the junior minister did not have the authority to undertake the function.[6]

Professor Edwards records that a Law Officers' Department was established in 1893, with a small secretarial staff and that another 40 years were to pass before the "nucleolus of a small professional staff was authorised."[7] That office now has a more significant staff and budget.[8] The Attorney also "superintends" several other offices (including the Crown Prosecution Service) with total combined staff numbers of 9,743 and outturn of £778m in 2006/7.[9]

2. Duties and Functions

The Attorney General's Office published a list of his functions, following a request to attend the Constitutional Affairs Committee in February 2007 to discuss his role.[10] The Committee's inquiry is discussed further below.

The list separated the functions into those which are wholly or partly statutory (such as the superintendence of the prosecution agencies (CPS, Serious Fraud Office and Revenue and Customs Prosecutions Office)), the consent to bring certain prosecutions, refer points of law in criminal cases to the Court of Appeal[11], refer unduly lenient sentences to the Court of Appeal[12] and the appointment of special advocates in England and Wales[13]) from those which result from a convention or other authority.

Many of the Attorney's functions seem to stem from practice or convention. For example, Professor Edwards traces his recognition as the titular head of the English Bar to 1814[14] and also makes reference to the practice of the Attorney General to attend, but not be a member of the Cabinet.[15]

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[6] HL Deb, 16 June 1997, cc1074-1078

[7] J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p5

[8] In 2006/7 the office had 57 staff and a budget of £5m (figures from *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192, Annex C)

[9] I*bid.* Up to date accounts are available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311595/2013-14_DRA.pdf (last accessed 30 July 2014)

[10] Information taken from historic version of Attorney General's website in August 2007

[11] Under Section 36 of the *Criminal Justice Act 1972*, where a person tried on indictment has been acquitted, the Attorney General may seek the opinion of the Court of Appeal on a point of law which has arisen in the case. It is usual, but not essential, that the point of law should have been crucial to the outcome of the case. The ruling by the Court of Appeal does not affect the acquittal and the procedure is not used as an appeal

[12] Under s 36 of the *Criminal Justice Act 1988*, if it appears to the Attorney General that the sentence imposed by the Crown Court is unduly lenient, and is an offence to which s36 applies, the Attorney may, with leave of the Court, refer the case to the Court of Appeal, which is empowered to quash any sentence passed and impose any sentence it thinks appropriate

[13] By virtue of s 6 of the *Special Immigration Appeals Commission Act 1997*, however in Scotland this power is granted to the Lord Advocate

[14] J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p 3 and p276-277

[15] *ibid*, pg 174-175, which in particular records the observation of AB Keith that "there are advantages in excluding from the Cabinet officers charged with the impartial and non-political administration of the law" – a view apparently echoed in an early edition of Wade and Phillips' *Constitutional Law* (5th Edition)

Traditionally, the Law Officers have also had responsibilities in relation to Parliament, covering the constitution and conduct of proceedings in Parliament; including questions of parliamentary privilege; the conduct and discipline of Members; and the meaning and effect of proposed legislation. The Attorney General is also entitled to intervene in court proceedings to assert the privileges of either House, either of his or her own motion, or more usually at the request of the House authorities or the trial judge. A prominent example of this type of intervention occurred in the case of *Pepper v Hart.*[16]

A more detailed discussion of the role of the Attorney can be found between paragraphs 1.10 and 1.37 of the Consultation Paper *The Governance of Britain: A Consultation on the Role of the Attorney General* which is discussed further below.[17]

3. The Role of the Attorney General in bringing certain prosecutions

The Attorney has published some guidance about his role in bringing certain prosecutions, indicating that:

> Law Officer consent is required to prosecute certain offences. At the last count, there were over five hundred such offences. In practice, consents work tends to be limited to applications to prosecute under: the Explosive Substances Act 1883; the Terrorism Act 2000; Part III of the Public Order Act 1986 (Inciting Racial Hatred); the Law Reform (Year and a Day Rule) Act 1996 and corruption offences. Law Officers may also receive applications for consent to prosecute under the Official Secrets Act. The Law Officers Act 1997 empowers both Law Officers to grant consent to prosecute.
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> The criteria for the grant of consent are the twin tests contained in the Code for Crown Prosecutors. First, there must be a realistic prospect of conviction. Second, a prosecution must be in the public interest.[18]

The issue was given detailed consideration by the Law Commission in its Consultation Paper *Criminal Law: Consents to Prosecution*.[19] Published in 1997, the Law Commission said that:

> Although the use of consent provisions is not a recent development, their proliferation is […] It was not until the Second World War that consent provisions became widely used. We believe that the consents regime is a pressing and important subject for review.[20]

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[16] [1993] AC 593. For more on the role of the Law Officers in respect of Parliament, see: A Kennon, "Legal Advice to Parliament" in A. Horne, G. Drewry and D. Oliver (eds), *Parliament and the Law* (Oxford: Hart, 2013), pp126-7 and also pp 48, 70 and 91

[17] The Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192

[18] Information taken from historic version of Attorney General's website in August 2007

[19] Law Commission Consultation Paper No 149, 1997, available at: http://lawcommission.justice.gov.uk/docs/cp149_Consents_to_Prosecution_consultation.pdf (last viewed 30 July 2014)

[20] *ibid*, para 1.2

The Commission was critical of the current arrangements, citing the views of former Attorney-General, Sir Reginald Manningham-Buller (later Viscount Dilhorne LC), Lord Simon of Glaisdale, a former Solicitor-General and a Law Lord academic commentators such as Professor Edwards, author of *The Law Officers of the Crown* and *The Attorney General, Politics and the Public Interest.*

The Law Commission published its final report, *Consents to Prosecution* (HC 1085) in October 1998. Appendix A to that report contains a helpful list of offences requiring the consent of the Attorney General. Appendix B to that report provides other extracts from relevant legislation relating to the Attorney.

Further information on prosecutorial independence is contained in section 10 of this note.

4. Legislation referring directly to the role of the Attorney General

The Butterworths *Legislation Direct* service provides some information about legislation relating to the Attorney General. As of 2008, it listed 823 legislative provisions (contained in Statutes and Secondary Legislation) which made specific reference to the Attorney General.

5. Membership of and attendance at the Cabinet

In *The Law Officers of the Crown*, Professor Edwards records that whilst historically, some Attorneys have gained membership of the Cabinet[21], this practice was initially discontinued in 1922. When Sir Douglas Hogg was appointed Attorney in 1924, and accorded Cabinet rank, this move was subject to criticism in legal journals and the House of Commons.[22] Edwards states that "the outcry appears to have had some effect, for the next Attorney General, Sir Thomas Inskip, appointed in March 1928, was not included in the list of Cabinet Ministers, and this policy has been followed without exception ever since."[23]

In the *Attorney General, Politics and the Public Interest*, Edwards surmised that the policy had "served to reinforce the tradition that the subject of criminal prosecutions is outside the purview of the Cabinet's decision-making functions."[24]

During the course of its recent inquiry into the role of the Attorney, the Constitutional Affairs Committee took evidence from Lord Mayhew of Twysden QC and Lord Morris of Aberavon QC on the modern practice of the former Attorney General, Lord Goldsmith, to regularly attend Cabinet. Lord Mayhew told the Committee that:

> I am afraid I think it is a bad mistake for the policy to change. In my time it was the established convention that you were of Cabinet rank, but not a member of the

[21] Citing the example of FE Smith and Sir Gordon Hewart, who was made a member on his appointment in 1919, J Edwards; *The Law Officers of the Crown*, Sweet and Maxwell, 1964, p173

[22] *ibid*

[23] *ibid* , p174

[24] J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984, p322-333

> Cabinet, and you went by invitation to deal with the specific items of business and then you left.[25]

He explained that this was important since Cabinet members had to take advice from the Attorney and it might be more difficult if he had been present taking part in a contested debate. Lord Morris added that "if you sit in Cabinet, then there is a lot of preparatory work, which is an additional burden which I would not wish, as Attorney, to do."[26] The Committee concluded that the Attorney should only attend Cabinet by invitation and then "only for the consideration of specific relevant agenda items".[27]

6. Recent controversies

The role of the Attorney General was described by Sir Francis Bacon as "the painfullest task in the realm" and many holders of the office have suffered from controversy. Examples include Rt Hon Sam Silkin for declining to prosecute the Clay Cross Councillors and the Post Office Union (for its unlawful boycott of mail to South Africa during apartheid), Sir Michael Havers (who consented to the prosecution of a civil servant following disclosure of information relating to the sinking of the Belgrano) and Sir Nicholas Lyell who was Attorney during the collapse of the Matrix Churchill trial.[28]

Following Lord Goldsmith's appointment in 2001, a number of issues arose, including his advice on the legality of the war in Iraq, the question of possible charges over allegations of "cash for peerages" and the discontinuance by the Serious Fraud Office of an investigation into allegations of corruption against BAe systems on "public interest grounds".[29]

7. The Attorney General and Select Committees

As long ago as 1984, Professor Edwards highlighted the "special problems" of the Attorney General appearing before Select Committees. He noted the "deliberate exclusion of the Law Officer's Department" from the functions of the Select Committee on Home Affairs[30] claiming that the Attorney "retreated in the face of repeated and vociferous demands that the committee be allowed to examine the Director of Public Prosecutions and the policies that govern the exercise of prosecutorial discretion".[31]

By 2006, a Select Committee was undertaking this role.[32] In December 2006, the Constitutional Affairs Committee issued a press notice announcing an inquiry into the constitutional role of the Attorney General. The Committee twice took evidence from the then Attorney, Lord Goldsmith QC. While the original intention of the Committee may have been

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[25] Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, para 85

[26] *ibid,* Ev 17

[27] *ibid,* paras 85-86

[28] For further examples, see the evidence of Lord Goldsmith QC to the Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, Ev 61

[29] See: e.g. A.J. Roberts*, Prosecution: Director of SFO - lawfulness of decision to discontinue prosecution* [2009] Criminal Law Review 46

[30] See HC Deb 25 June 1979, c38-39 and also 52, 120-122

[31] J Edwards, *The Attorney General, Politics and the Public Interest*, Sweet and Maxwell, 1984, p227-235

[32] Although the Attorney General first gave evidence to the Constitutional Affairs Committee in March 2005, in respect of an inquiry into the Special Immigration Appeals Commission

to inquire into his constitutional position following the *Constitutional Reform Act 2005* and the difficulties caused by the "cash for peerages" affair, the Committee subsequently considered the issue of the Saudi/BAe case and "public confidence in the role of the Attorney General".[33]

The Committee acknowledged that its report had not provided a "detailed blueprint for reform".[34] It said:

> On balance we have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government. The Attorney General's ministerial functions should be exercised by a minister in the Ministry of Justice. Where Ministers instruct the independent head of the prosecution service on public interest grounds, whether national security or other grounds, the Secretary of State for Justice would be accountable to Parliament for the instruction.[35]

Jeffrey Jowell QC has argued that the simple solution would appear to be the Indian, South African or Israeli model, where the Attorney is not a serving politician. He stated that in Israel, the government is obliged to follow the Attorney's advice – and that an Attorney can refuse to defend a Government which fails to do so. However, he acknowledged that the "issue is more complex because even in those countries the Attorney-General is appointed by the Government (normally the Justice Minister) and is therefore still often perceived as being inclined to support those who appointed him."[36] He also noted that if the Attorney is "depoliticised", following the changes to the role of Lord Chancellor, there may no longer be any lawyers serving as Government ministers.

Lord Goldmith's replacement as Attorney General, Baroness Scotland QC, wrote to the Committee (now renamed the Justice Committee) in response to its report in December 2007.[37] Referencing a public consultation that had been undertaken by the Government, she stated that "overall, most respondents counselled against major structural change, taking the view that 'mistaken perception is a weak foundation on which to base reform' and that 'most of the institutional reforms [proposed] are neither necessary nor desirable, and would not significantly improve the political independence and political accountability of prosecutorial decision-making'. Hence most respondents thought the Attorney General should remain a Government Minister whilst retaining the role of the Government's chief legal adviser and Ministerial responsibility for the prosecuting authorities."[38]

In April 2008, the Lords Constitution Committee published a report on the role of the Attorney[39]. The report was designed to "set out the main arguments for and against reforming each of the different parts of the Attorney's role", the Committee having taken

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[33] Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, p22-24

[34] *ibid*, p41

[35] *ibid*, p 42

[36] *The Times*, "Should the office of Attorney-General be reformed?" 3 April 2007

[37] Justice Committee, Constitutional Role of the Attorney General: Government's Response to the Committee's 5th Report of 2006-07, HC 242

[38] *Ibid*, para

[39] House of Lords Constitution Committee, *Reform of the Office of Attorney General*, Session 2007-8, HL 93, http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf (last viewed 30 July 2014)

evidence from Professors Anthony Bradley and Jeffrey Jowell QC, as well as Baroness Scotland. The report stated: "We trust that this report will prove useful as a 'handbook' to guide members of the House through the continuing debate on the role of the Attorney."[40]

8. A Consultation on the Role of the Attorney General

The Governance of Britain Green Paper, published by the Ministry of Justice, clearly indicated that changes would be made to the role of the Attorney General. The paper stated that the Government would "review the role of the Attorney General to ensure that the office retains the public's confidence."[41] It went on to add that:

> 53. […] The complexity of the role has attracted much public comment in recent years around several issues, most notably:
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> • the position of a Government Minister as chief legal adviser; and
> • the position, often statutory, of the Attorney in the role of guardian of the public interest.
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> 54. The Government is fully committed to enhancing public confidence and trust in the office of Attorney General and is keen to encourage public debate on how best to ensure this and will listen to the views of all those with an interest. We will therefore publish a consultation document before the summer recess which considers possible ways of alleviating these conflicts (or the appearance of them) and invites comments. The Government looks forward in particular to the report of the Constitutional Affairs Select Committee of the House of Commons, and will study the Committee's report carefully [...]

When the announcement was made, the Prime Minister stated on 3 July 2007 that "while we consult on reform, the Attorney General has herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual criminal cases."[42]

It is not clear what practical effect this will have, since as noted above, the consent of the Law Officers is required to prosecute certain offences. At the last count, there were several hundred of these. Furthermore, the former Attorney (Lord Goldsmith QC) cited national security as the reason for the Serious Fraud Office discontinuing the investigation into the BAe "Al Yamamah" deal, writing in a letter to Sir Menzies Campbell MP that "the judgment was that UK co-operation with Saudi Arabia in the counter-terrorism field is of crucial importance."[43]

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[40] *Ibid*, para 2
[41] Ministry of Justice, *The Governance of Britain*, July 2007, Cm 7170, p 7
[42] HC Deb, 3 July 2007, c817
[43] Information taken from historic version of Attorney General's website in August 2007

In late July 2007, the Government published its *Consultation on the Role of the Attorney General*, allowing respondents until 30 November 2007 to answer a series of questions about possible reforms.[44] These included:

- Whether the role of chief legal adviser to the Government should be separated from that of a political Government Minister, and if so, who should exercise the role?
- If the Attorney should continue to attend Cabinet meetings and be involved in Cabinet Committees in the current way, or whether these practices should be reviewed?
- Whether the Attorney should be made subject to an express statutory duty to uphold the rule of law?
- If a commitment should be given that the Attorney should exercise his public interest functions in a way which is clearly institutionally separate from the Government?
- Whether legal advice to the Government should be published (and if so, in what circumstances?
- If the legal basis for key Government decisions should be made publicly available?
- Whether any changes are necessary to the Attorney General's public interest functions other than those relating to individual criminal prosecutions?

The consultation paper included a list of international comparisons in an Annex. Different (and more detailed) information on the role of Attorneys in other jurisdictions (including India and Israel, mentioned above) had previously been made available to the Constitutional Affairs Committee, which reproduced the information in its report.[45] The Committee was also provided with written evidence from the Scottish Lord Advocate and the Director of Public Prosecutions in Ireland on their respective systems.

9. Proposals for reform

On 25 March 2008, the then Lord Chancellor and Secretary of State for Justice, Jack Straw, made a statement on constitutional renewal. He announced the publication of a White Paper, entitled *The Governance of Britain: Constitutional Renewal*[46] and a draft Bill[47]. He indicated that:

> Part 2 of the [Draft] Bill deals with the Attorney General. It sets out major reforms to the role of the Attorney General and to the management of prosecutions, to make the arrangements more transparent and to enhance public confidence. The proposals involve recasting the relationship between the Attorney General and the prosecuting authorities. In particular, the Attorney General will cease to have any power to give directions to prosecutors in individual cases, save in certain exceptional cases which give rise to issues of national security. The Attorney General will have to report to Parliament on any exercise of that power. Under clause 3, a protocol will set out how the Attorney General and the prosecuting authorities are able to exercise their functions in relation to each other. This will be laid before Parliament, as will an

[44] The Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney* General, July 2007, CM 7192

[45] Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC, Ev 62-68

[46] Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, 25 March 2008, Cm 7342-I

[47] Draft Constitutional Renewal Bill, Cm 7342-II

annual report. We do not propose changing the Attorney General's role as chief legal adviser to the Government, or his or her attendance at Cabinet.[48]

The White Paper contained a short summary of responses to the Government's earlier consultation (discussed above). It stated, *inter alia*, that:

> 36. The Government's analysis of the consultation responses is set out in full in The Governance of Britain – Analysis of Consultations (CM 7342-3). Key messages arising from the consultation are set out below.
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> 37. In relation to the Attorney General's role as legal adviser, the majority of respondents (27 out of 38 who expressed a clear view on this point) favoured the Attorney General remaining as the chief legal adviser to the Government and continuing to be a Minister. A significant number of these respondents thought that other changes should be made to the role of the Attorney General.
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> 38. There was strong support for the changes proposed in the consultation document to clarify the basis on which the Attorney General's functions are exercised and to provide greater transparency. In particular there was broad support for the proposal to reform the Attorney General's oath of office.
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> 39. A significant majority of respondents (21 out of 25 who responded on this point) considered that the Attorney General should attend Cabinet only where attendance is necessary to provide legal advice or where there was otherwise a specific reason for the Attorney General to attend.
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> 40. The majority of respondents favoured retaining a general presumption against the disclosure of legal advice provided by the Attorney General (19 out of 31 who commented on this issue).There was some interest in creating limited exceptions to that presumption or in establishing other means of ensuring good governance by, for example, ensuring that Parliament was given a proper explanation of the legal basis for key government actions.
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> 41. Among those who wished to see greater disclosure of legal advice, there was no consensus as to the cases in which disclosure would be appropriate or what form disclosure should take. Suggestions of classes of advice which it might be appropriate to disclose on a regular basis included advice which is expressly relied upon by the Government, advice in relation to the use of armed force and advice on the interpretation of existing legislation.
> […]
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> 43. Amongst comments received on the Attorney General's functions in relation to the prosecuting authorities, criminal proceedings and criminal justice policy, there was strong support (26 out of 31 respondents who expressed a clear view on this point) for the Attorney General retaining the function of superintending the main prosecution authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office).There was also support for clarifying that role. A large number of respondents also wished to see the role modified although a minority favoured maintaining the status quo.

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[48] HC Deb, 25 March 2008, c 21

> 44. Respondents expressed general support for the proposition that it was legitimate for the Attorney General to have a role in setting the high level policy and objectives of the prosecuting authorities. However, the majority favoured reducing or ending the role that the Attorney General plays in relation to the formulation of criminal justice policy.
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> 45. There was strong support for removing or curtailing the Attorney General's role in relation to individual prosecutions. Accordingly there was support for abolishing or limiting the power of the Attorney General to consent to a prosecution and ending the power to stop a prosecution by way of a *nolle prosequi* (to stop a trial on indictment).
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> 46. Most respondents took the view that it was legitimate for the Attorney General (or other Minister) to have a role where a prosecution has implications for national security or, possibly, international relations (14 out of 16 respondents who expressed a view on this supported the Attorney General or other Minister having a role in such cases).There was no consensus as to what that role should be with some respondents taking the view that the Attorney General should merely give advice in such cases and other respondents expressing the view that the Attorney General should have the final say as to whether such prosecutions should proceed.[49]

The Government indicated in the White Paper that, in its view, "the Attorney General should remain the Government's chief legal advisor and that the Attorney General should remain a Minister and a member of one of the Houses of Parliament". The Government argued that "Ministers are more likely to have confidence in, and to follow, advice from one of their peers." It has also suggested that there is a certain "artificiality of seeking to divide law from policy".[50] It concluded that it would "not be appropriate for the advice of the Attorney General to be published on a routine basis".[51]

a. The draft Bill

The Government did not proceed with the clauses contained in the draft Bill (see section 10 below). For historical interest, a short discussion about the clauses is included below.

Part 2 of the Draft Bill related to the proposed reform of the office of the Attorney General. The relevant provisions were found between clauses 2-18. In particular:

Clause 2 indicated that the Attorney's general superintendence of the directors of the prosecuting authorities would not give her the power to give directions in an individual case, (subject to a national security exemption contained in clause 12). Clause 3 contained details for a protocol to be prepared about the running of the prosecution services, whilst clauses 4-6 set out certain provisions about the tenure and qualifications for the various directors of the prosecuting authorities.

Clause 7 would have given effect to Schedule 1 of the Draft Bill and would have amended a number of statutes under which the Attorney currently has to give consent for a prosecution to occur. Clauses 8-10 made provision for further prosecution consent functions to be

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[49] Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, 25 March 2008, Cm 7342-I

[50] Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, 25 March 2008, Cm 7342-I, para 51

[51] *Ibid,* para 66

transferred from the Attorney to the Director of Public Prosecutions (or other relevant person).

In a press notice published on 25 March 2008, the Attorney General's Office indicated that:

> **Consents**
>
> Proposed reform: In line with the proposal that the Attorney General give up the power of direction in relation to individual cases in almost all cases, the Attorney General will give up the power of consenting to prosecutions in almost all cases. Where the requirement to obtain consent to a prosecution is unnecessary, the requirement for consent will be abolished. (Examples are consents under the Agricultural Credits Act 1928 and the Water Industry Act 1991.)
>
> In most other cases, the function of consenting to a prosecution will be transferred to the DPP or, in relation to offences which fall within their remit, the Director of the Serious Fraud Office, or the Director of the Revenue and Customs Prosecutions Office. (Examples include offences in relation to corruption, offences involving explosive substances and incitement to racial or religious hatred.) In relation to a small number of offences where a prosecution is particularly likely to give rise to difficult matters which relate to public policy or public interest, the Attorney will retain the function of consenting (examples include most offences under the Official Secrets Acts and war crimes.)
>
> The draft Bill contains a list of amendments to the Attorney General's consent functions. However this aspect of the draft Bill is provisional. Further work is needed to determine which offences belong in which category. (There are over 100 offences for which the consent of the Attorney is required for a prosecution.)[52]

Clause 11 would have abolished the Attorney's right to enter a *nolle prosequi*[53] in relation to proceedings in England and Wales. The White Paper noted that:

> The Government does not propose to transfer the power to enter a *nolle prosequi*, to the prosecuting authorities. But consideration will be given as to whether other measures are needed as a consequence of abolishing the power of the Attorney to enter a *nolle prosequi*. Such measures might include expanding the current powers of the prosecuting authorities to discontinue a prosecution.[54]

Clause 12 would have introduced a power for the Attorney to "intervene to protect national security". The provision would have allowed the Attorney to give directions to the Director of the Serious Fraud Office that no investigation into specified matters take place in England and Wales; and to direct prosecutors in England and Wales not to institute proceedings, or where such proceedings have been instituted, not to continue with the proceedings, where she is satisfied that this is necessary for the purpose of national security. The White Paper explained that "in considering whether to exercise this power, the Attorney General would be

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52 Attorney General's Office, *Press Notice*, 25 March 2008

53 The Oxford Dictionary of Law notes that a *nolle prosequi* is a Latin term which describes a procedure "by which the Attorney General may terminate criminal proceedings". It is sometimes used when the Attorney considers that a prosecution is not in the public interest

54 Ministry of Justice, The Governance of Britain: Constitutional Renewal, 25 March 2008, Cm 7342-I, para 98

able to consult Ministerial colleagues about the public interest implications in appropriate cases though a 'Shawcross exercise'"[55]

If the Attorney exercised her powers under that section, clause 14 provided that she would then be obliged to lay a report before Parliament. Clause 14(3) stated that the report would not have to contain information if the Attorney was satisfied that the provision of such information would be prejudicial to national security; international relations; the investigation of a suspected offence; or, if it would be covered by legal professional privilege.

Clause 15 supplemented clause 12 by enabling the Attorney General to obtain information which could assist her in determining whether to give or to withdraw a direction under that clause or in preparing a report to Parliament under clause 14. Information could have only been obtained from the person to whom the direction is, or could be, given. Clause 15(4) would have made it an offence to fail, without reasonable excuse, to provide such information.

The Government recognised that:

> The exercise of the power under clause 15 power to obtain information may engage Article 8 [of the European Convention on Human Rights]. The disclosure of private personal information without the consent of the individual may give rise to an interference with the right to private life. It is considered that any interference with the right to respect for private life occasioned by these new powers would be in accordance with the law (because of the provision the draft Bill makes). Further, any interference would be justified by reference to a legitimate aim – that of safeguarding national security. The question of whether any interference is proportionate will always depend on the circumstances of each case.[56]

Clause 16 would have required the Attorney to lay a report before Parliament "on the exercise of the functions of the Attorney General during the year". Such a report would again not have to contain material where such material would prejudice national security; international relations; or, the investigation of a suspected offence; or, where such material would be legally privileged.

b. The rule of law

In addition to the proposals listed above, the Attorney's office also indicated that:

> The Attorney General's oath of office will be amended to require her to "respect the rule of law". No change is proposed to the role of the Attorney as the Government's chief legal adviser. But the change to the oath will re-emphasise the basis on which the Attorney gives legal advice and exercises her functions in the public interest, rather than on the basis of political convenience or party loyalty. As the oath of the Attorney is currently not a statutory one, this change can be made without legislation.[57]

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55 Ministry of Justice, The Governance of Britain: Constitutional Renewal, 25 March 2008, Cm 7342-I, para 87

56 Explanatory Notes to the Draft Bill.

57 Attorney General's Office, *Press Notice* 25 March 2008. For more on the Attorney and the rule of law, see: e.g. Law Society Gazette, *Attorney General comes off the bench*, 7 July 2006

c. Commentary on the proposals

The Guardian's Clare Dyer argued that there are two separate issues in respect of the Attorney's role vis-à-vis prosecutions. The first is that while some prosecutions cannot now be brought without the Attorney's consent, the draft Bill would result in the power to consent being transferred to the Director of Public Prosecutions, with some limited exceptions such as the Official Secrets Act. The second issue is that the Attorney will have a power to halt prosecutions where there are "national security grounds".

She said:

> The current attorney, Lady Scotland, has emerged with her role strengthened after a battle with the justice secretary, Jack Straw, who wanted her powers curbed. Under current law, experts are divided on whether the attorney has power to direct prosecutions to be halted, rather than just a power to be consulted. There is nothing in statute and the power to direct - if it exists - has not been exercised by any attorney general in recent times. Lord Goldsmith, the former attorney general, had to persuade Robert Wardle, head of the SFO, to drop the investigation into BAE Systems over alleged arms deal bribery. Goldsmith said it was Wardle who had taken the decision, but in future the attorney will be able to halt a case in its tracks.[58]

She also stated that:

> Gordon Brown promised reform after tensions between the attorney's conflicting roles as the government's legal adviser, minister superintending prosecutions and guardian of the public interest were highlighted during Goldsmith's tenure. Apparent conflicts of interest arose over Goldsmith's advice on the legality of the Iraq war, his part in the BAE case, and his insistence that he would play a role if the CPS decided there should be a prosecution in the loans for honours affair. But in all three areas the draft bill leaves the attorney's role either as strong as before or stronger.[59]

It was also recognised that the draft Bill did not address all the criticisms raised by the then Constitutional Affairs Committee. Roger Smith, the then Director of JUSTICE, observed that "the Attorney General retains her power to stop proceedings on the grounds of national security despite this being precisely the cause of the row about the conduct of Lord Goldsmith over the BAE contract with Saudi Arabia".[60]

Peter Riddell in the Times has also argued that the proposals did "not go far enough for the opposition parties."[61]

On 30 April 2008, the Justice Committee issued a press release. Its Chairman, Alan Beith, announced that the Government had issued a response to the Constitutional Affairs Committee's earlier report. He stated:

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58 *Guardian Online*, "Conflicting roles, Explainer: Attorney General", 26 March 2008, available at: http://www.guardian.co.uk/politics/2008/mar/26/constitution.law (last viewed 30 July 2014)

59 *Ibid*

60 *New Law Journal* "Crime, punishment and lacklustre constitutional refirm", 4 April 2008

61 *The Times*, "Important changes under way, but who cares?"; 26 March 2008

> We are glad that the Government recognises the Committee's legitimate concerns. However, we are disappointed that their proposals fall short of the independence for the Attorney General which the Committee recommended. In our Report, we particularly emphasised the need to depoliticise the prosecution role as one of the central purposes of reform, not least in order to restore public confidence in the office of Attorney General.
>
> We shall shortly be taking evidence on the Government's proposals in the draft Constitutional Renewal Bill and we will focus in particular on the Government' s plans for the relationship between the Attorney General and the Directors in charge of prosecutions. We will be particularly interested in the proposals which would allow the Attorney General on national security grounds either to halt prosecutions or, unlike in any other area of the criminal law, fraud investigations by giving an instruction to the head of the Serious Fraud Office.[62]

10. The Constitutional Reform and Governance Bill and other developments

The Government brought forward the *Constitutional Reform and Governance Bill* in 2009.[63] In the event, it did not contain any measures to reform the office of the Attorney General. When presenting the Bill in the then Lord Chancellor, Jack Straw, indicated that:

> In the event, the significant, necessary reforms to the role of Attorney-General are being achieved without the need for legislation. For example, the Attorney has reached a new settlement with the Directors of Public Prosecutions, the Serious Fraud Office and Revenue and Customs Prosecutions to improve relationships, guarantee prosecutorial independence while ensuring an appropriate degree of accountability and to improve transparency about the relationship, as reflected in the new protocol setting out the respective responsibilities of the Attorney and the directors. This builds on the Prime Minister's Statement in July 2007, that the Attorney-General has herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual criminal cases. Furthermore, the new protocol makes it clear that the Attorney-General will not be consulted in any case which concerns an MP or Peer or where there is a personal or professional conflict of interest, other than where her decision is required by law. This protocol will be published by the Attorney very shortly. Furthermore, the Attorney-General now only attends Cabinet when matters affecting her responsibilities are on the agenda.
>
> Given that it has been possible to make these reforms to the office of Attorney-General without legislation, the Government have concluded that it is not necessary to include legislative changes in respect of the Attorney-General.[64]

The protocol between the Attorney General and prosecuting departments was published in July 2009. The protocol sets out how the Attorney General and the directors of the prosecuting departments (the Crown Prosecution Service (CPS); the Serious Fraud Office

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[62] Justice Committee, Press Notice *The Role of the Attorney General*, 30 April 2008

[63] Which became the *Constitutional Reform and Governance Act 2010*

[64] HC Deb 20 July 2009 c106WS

(SFO) and the Revenue and Customs Prosecutions Office (RCPO))[65], work with each other. It covers:

- general responsibilities
- strategy
- planning and performance
- responsibility for prosecution decisions
- development of policy
- dealing with the media
- dealing with complaints.

B. Holders of the office of Attorney General from 1979

- Sir Michael Havers QC (subsequently Baron Havers): 5 May 1979 - June 1987
- Sir Patrick Mayhew QC (now Lord Mayhew of Twysden): 13 June 1987 - 11 April 1992
- Sir Nicholas Lyell QC (subsequently Baron Lyell of Markyate): 11 April 1992 - 2 May 1997
- John Morris QC (now Baron Morris of Aberavon): 06 May 1997 – 28 Jul 99
- Baron Williams of Mostyn QC: Jul 1999 – Jun 01
- Lord Goldsmith QC: 12 Jun 2001 – 28 Jun 07
- Baroness Scotland of Asthal QC: 28 Jun 2007- 06 May 10
- Dominic Grieve QC: May 2010 – Jul 2014
- Jeremy Wright: July 2014 – current

[65] Since merged with the CPS