



House of Commons  
Constitutional Affairs  
Committee

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# **Constitutional Role of the Attorney General**

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**Fifth Report of Session 2006-07**





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**Fifth Report of Session 2006-07**

*Report, together with formal minutes, oral and  
written evidence*

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## Summary

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The office of Attorney General is an ancient one. It combines legal administration and the provision of independent legal advice with the political duties of being a member of the Government. He or she is also superintendent of the prosecution services in England and Wales.

Recent events have called into question the sustainability of this divided set of responsibilities. First, the Constitutional Reform Act 2005 changed the status of the Lord Chancellor from being one of a judge, who took the judicial oath of office, to that of a Secretary of State who had a legal duty to protect the independence of the courts. This has left the Attorney General as the only member of the Government who was required to be legally qualified. The creation of the Ministry of Justice in May this year has also raised questions about the Office of the Attorney General, its functions, and the position of the office in the trilateral framework for the formulation and delivery of criminal justice policy in England and Wales.

Second, the office's role in three particular controversial matters have highlighted further concerns: advice on the legality of invading Iraq; potential prosecutions in the "cash for honours" case; and the decision to halt investigations by the Serious Fraud Office into BAE Systems. The evidence which we took relating to the BAE case was particularly instructive in showing the inherent tensions in the dual role of the Attorney General and in particular the sometimes opaque relationships with the prosecution services.

Our Report identifies inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office. Real and perceived political independence has to be combined with a role of an intrinsically party political nature in one office holder. This is at the heart of the problem. There is a lack of transparency in how each of these functions is carried out. We acknowledge the need for accountability to Parliament and the public for all of the duties carried out by the Attorney General, but believe that reform of the office is necessary, both in order to ensure clear lines of responsibility for particular decisions and to remove any credible allegation of political pressure. These issues were brought into sharp focus by the decision to stop the investigation in the BAE Systems case. We therefore recommend that the current duties of the Attorney General be split in two: the purely legal functions should be carried out by an official who is outside party political life; the ministerial duties should be carried out by a minister in the Ministry of Justice.





# 1 Introduction

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1. The office of the Attorney General is an ancient one, which has traditionally been at the junction between law and politics in England and Wales. The office has not remained static but has developed in order to accommodate the wide range of tasks and functions of the modern Attorney General. Traditionally, the Attorney General and the Solicitor General have been senior barristers and Members of Parliament, with considerable experience in the fields of both law and politics. All Attorneys General were, with the exception of only the most recent two past Attorneys General<sup>1</sup> and the current Attorney General, also Members of Parliament who sat in the House of Commons. In oral evidence to the Committee, Lord Goldsmith was not even certain that he could be described as a "politician".<sup>2</sup> This change has had a significant impact for the role of the Attorney General as the traditional interface between law and politics, and for the accountability of that Office.

2. Described by Francis Bacon as "the painfulest task in the realm" the Attorney General has "multifarious" roles. In a recent lecture, Professor Jeffrey Jowell QC summarised the role as follows: "he is of course legal adviser to the Government. Yet he is also a politician who takes the party whip and a Minister who nowadays attends all Cabinet meetings. He superintends various offices, such as the Crown Prosecution Service and a number of judicial and quasi-judicial proceedings where he must decide in the public interest. He may decide himself to bring civil actions and prosecutions or refuse to prosecute and whether or not to bring relator actions. He is also Leader of the English Bar".<sup>3</sup>

3. Professor Jowell stated that: "one set of relationships in our democracy that has been subject to the most dramatic alteration in recent years is between politics and the law; the appropriate balance between those decisions which are in the province of politicians and those which belong to the law is one of the most fundamental question in all constitutional theory and has great practical importance".<sup>4</sup>

4. Part of the framework where law and politics meet is in the historic office of the Lord Chancellor, who has had a duty to uphold the Rule of Law within Government. Recent changes in the role and responsibilities of the Lord Chancellor under the Constitutional Reform Act 2005 transformed the role of the Lord Chancellor, and in doing so have brought the tensions which are inherent in the multiplicity of the roles performed by the Attorney General into sharp focus, and have raised several questions about his constitutional role. The Lord Goldsmith has himself commented on this in several speeches, specifically in relation to his role in upholding the Rule of Law.<sup>5</sup>

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1 Rt Hon Lord Williams QC and Rt Hon Lord Goldsmith QC

2 Q 319

3 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p.11

4 For example see *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law, 29 November 2006, and *Government and the Rule of Law in the Modern Age*, 22 February 2006.

5 Ibid

5. At the same time, the Attorney General's position has also come under scrutiny in connection with his position as head of the prosecution authorities, as the Government's Chief Legal Adviser and as a member of the Government. Particular difficulties were identified in relation to the police investigation into allegations about Cash for Honours and whether the Attorney General should play any role in determining (if necessary) whether the Crown Prosecution Service (CPS) should proceed with prosecutions. We have already published a Special Report containing the correspondence between the Chairman of the Committee, the then Attorney General and the then Lord Chancellor on this matter.<sup>6</sup> In addition, the Attorney General's independence has been questioned as a result of a decision not to prosecute in the BAE Systems case, and in relation to the advice he gave on the legality of taking military action in Iraq.

6. Furthermore, recent changes to the machinery of government, the division of the Home Office and the creation of a new Ministry of Justice have also raised questions about the office of the Attorney General, his or her functions, and the position of the Office in the trilateral framework for the formulation and delivery of criminal justice policy in England and Wales. These factors combined have resulted in intense scrutiny of the role and functions of the Attorney General, and subsequent calls for the reform of that Office and role.

7. In the light of the considerable recent changes to the constitutional arrangements for the maintenance of the Rule of Law and the continuing commitment of the Government to modernise the constitution, we decided to inquire into the constitutional role of the Attorney General. We concentrated on three specific areas:

- how the office works;
- the impact on the office of recent controversies; and
- what options there are for reform.

8. We took oral evidence from Rt Hon Lord Goldsmith QC, the then Attorney General;<sup>7</sup> Rt Hon Lord Falconer of Thoroton QC, the then Lord Chancellor and Secretary of State for Constitutional Affairs, and two former Attorneys General: Rt Hon Lord Morris of Aberavon KG QC and Rt Hon Lord Mayhew of Twysden QC. We also took evidence from Robert Wardle, Director of the Serious Fraud Office. We received several memoranda, details of which are listed on page 48.

9. Between taking oral evidence and the publication of this report, the Department for Constitutional Affairs ceased to exist, and was replaced by the new Ministry of Justice on 9 May 2007. The Rt Hon Lord Falconer of Thoroton QC retained his role of Lord Chancellor, and became the Secretary of State for Justice. Later, following a change of Prime Minister on 27 June 2007, Rt Hon Jack Straw MP, became Secretary of State for Justice and Lord Chancellor, and Rt Hon Baroness Scotland of Asthal QC was appointed Attorney General. On taking office she announced that, except if the law or national

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6 Constitutional Affairs Committee, *Party Funding—oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

7 On two separate occasions: 7 February 2007 and 27 June 2007

security requires it, not to make key prosecution decisions in individual criminal cases.<sup>8</sup> In the Green Paper *The Governance of Britain* published on the 3 July 2007, the Government indicated that it would publish a consultation paper before the summer recess on the role of the Attorney General.<sup>9</sup>

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8 HC Deb, 3 July 2007, col 817

9 Ministry of Justice, *The Governance of Britain*, CM 7170, p. 24

## 2 The Constitutional Role of the Attorney General

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10. The Attorney General has a variety of different responsibilities: he or she is the Government's chief legal adviser, superintends the prosecution agencies, is a Government minister with responsibility for criminal justice and acts as the guardian of the public interest in certain other cases.<sup>10</sup> In his written evidence to the Committee the then Attorney General, Rt Hon Lord Goldsmith QC, said that he exercised these varied functions on the basis of three overriding principles: "to give legal advice and take decisions based on a scrupulous approach to the law and to evidence; where I am exercising my public interest functions, to act on the basis of an objective, dispassionate assessment of the public interest, without regard to party political considerations; and to act independently, fairly and with accountability".<sup>11</sup>

### The current responsibilities of the Attorney General

#### *Chief legal adviser to the Government*

11. One of the main functions of the Attorney General is the provision of legal advice to the Government. Until comparatively recently, the Attorney General was expected to be able to advise on a wide range of matters based on his own knowledge of the law. In reality, much of this advice is prepared by civil servants who are lawyers, expert in a particular field, for example EU law. The Attorney General may also consult specialist counsel when necessary. The Attorney General provides political 'cover' for the advice, which is usually not made public.

#### *Superintendence of the prosecution agencies*

12. The Attorney General has a number of functions in relation to criminal proceedings, which include:

- a) The requirement for consent to prosecute certain categories of criminal offences, such as those relating to Official Secrets, corruption, explosives, incitement to racial hatred, and certain terrorism offences with overseas connections.
- b) The power to refer unduly lenient sentences to the Court of Appeal.
- c) The power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
- d) The power to refer points of law in criminal cases to the Court of Appeal.

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<sup>10</sup> <http://www.lso.gov.uk/goldsmith.htm>

<sup>11</sup> Ev 58

13. The Attorney General is also responsible by statute for the superintendence of the main prosecuting authorities: the Crown Prosecution Service (CPS), Serious Fraud Office (SFO), Revenue and Customs Prosecution Office (RCPO) and the Director of Public Prosecutions in Northern Ireland.<sup>12</sup>

14. The concept of ‘superintendence’ has never been categorically defined. In broad terms, the Attorney General has suggested that ‘superintendence’ can be said to encompass “setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall ‘effective and efficient administration’ of those authorities, a right for the Attorney General to be consulted and informed about difficult, sensitive and high profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day to day running of the organisation”.<sup>13</sup>

15. During his period of office, Lord Goldsmith emphasised this dimension of his role. He told the Committee that it had been “one of my highest priorities as Attorney General to strengthen and improve the prosecution service. I set out my vision at the start of my term and have devoted much time and effort to it”.<sup>14</sup> He added: “When I came in to this job...we had a prosecution service...which had never really fulfilled its proper functions...it was under-funded, under-managed, under-resourced and...very lacking in confidence. I believe, not just because of what I have done, although I have done a lot of it in the last five and a half years, it is now a service which is confident, which has increased resources and which has increased powers and responsibilities”.<sup>15</sup> Although the Attorney General’s superintendent functions are exercised independently of his functions as a Government minister who is jointly responsible for criminal justice with the Home Secretary and the Lord Chancellor, Lord Goldsmith claimed that his position as a minister had enabled him to achieve significant improvements in this area: “I do not believe that those changes to the prosecutors would have taken place unless there had been someone in Government, able to talk to the minister from the Prime Minister down about the need to find those resources...”<sup>16</sup>

### *Arbiter of the public interest*

16. In exercising his function as superintendent of the prosecution agencies, the Attorney General has to take particular responsibility for ensuring that the public interest is taken into account when deciding about whether or not to bring or discontinue prosecutions. In 1951, Sir Hartley Shawcross, the then Attorney General, made the classic pronouncement on the public interest and his role in exercising his prerogative and statutory responsibility in relation to prosecutions,<sup>17</sup> which has been supported by Attorneys General ever since: “it

12 Ev 58

13 Ev 58 for a more detailed discussion see Joshua Rozenberg, ‘The Director and the Attorney’ in *The Case for the Crown* (1987), pp. 179-189; and see Q 217

14 Ev 58

15 Q 39

16 Q 39

17 John Edwards, *The Attorney General, Politics and the Public Interest*, (1984), p 318

has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution".<sup>18</sup> He continued:

“The true doctrine is that it is the Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have on public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may...consult with any of his colleagues in Government, and indeed...he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.”<sup>19</sup>

17. In practice, the current Code for Crown Prosecutors identifies a two stage test as to whether prosecutors should proceed with a prosecution. The first is the evidential test, which asks whether there is enough evidence to secure a conviction. The second is that a prosecution must be in the public interest.<sup>20</sup> The CPS code states that:

“the public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.”<sup>21</sup>

Ultimately, it is for the Attorney General to take responsibility for this decision.

### ***Representing the public interest in civil proceedings***

18. Apart from superintending the prosecution agencies, the Attorney General has a variety of other responsibilities and powers to safeguard the public interest in individual cases, e.g. the power to bring proceedings for contempt of court; power to bring proceedings to restrain vexatious litigants; power to bring or intervene in certain family law and charity proceedings and, most importantly, the power to bring or intervene in other legal proceedings in the public interest.<sup>22</sup> In cases of major importance the Attorney General may represent the Government in the hearing in person.

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18 HC Deb, 29 January 1951, column 681

19 HC Deb, 29 January 1951, cols 683-684

20 [cps.gov.uk/victims\\_witnesses/codetest.html](https://www.cps.gov.uk/victims_witnesses/codetest.html)

21 [cps.gov.uk/victims\\_witnesses/codetest.html](https://www.cps.gov.uk/victims_witnesses/codetest.html)

22 Ev 60

### ***Responsibilities on behalf of Parliament***

19. The Attorney General has additional 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 may 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 indeed the trial judge. Such cases have usually arisen where parties seek to question proceedings in Parliament contrary to Article IX of the Bill of Rights. In that way, the Attorney performs the important function of representing the interests of Parliament in the courts.<sup>23</sup>

### ***Responsibility as criminal justice minister***

20. As part of the trilateral responsibility for the criminal justice system in England and Wales between the Lord Chancellor and Secretary of State for Justice,<sup>24</sup> the Home Secretary and the Attorney General, the latter also exercises a political role as a criminal justice Government minister. Together with the two Ministers of the Crown with responsibility for criminal justice and other ministers and officials, the Attorney General sits on the National Criminal Justice Board; he also has shared responsibility for the cross-departmental Office for Criminal Justice Reform, which is now ‘domiciled’ in the new Ministry of Justice. The Attorney General therefore participates in the formulation of criminal justice policies.

### ***A “Guardian of the Rule of Law”?***

21. In addition to his role in defending the public interest in the exercise of his responsibilities, Lord Goldsmith considered that ‘upholding the Rule of Law’ was one of his key functions.<sup>25</sup> He identified this role as “most obviously my role as the Government’s chief legal adviser, although it goes wider”.<sup>26</sup> In oral evidence to the Committee, Lord Goldsmith identified three specific elements in relation to his role in upholding the Rule of Law. The first aspect he identified was compliance with the law, “that means domestic and international obligations”.<sup>27</sup> The second aspect was the relationship with the courts, which he defined as “partly respect for the courts and their judgments” but also about “being sure within appropriate boundaries...we subject ourselves as Government to the scrutiny of the independent courts”.<sup>28</sup> The third element was identified as “certain basic values which it is important to stand up for. Quite a number of them are to be found, of course, in the European Convention”.<sup>29</sup>

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23 Oral evidence taken before the Joint Committee on Parliamentary Privilege, HC (1998-99) 21-II and HL (1998-99) 43-II, Q 231

24 Changed from Secretary of State for Constitutional Affairs on the 9 May 2007.

25 Ev 59

26 Ev 59

27 Q 6

28 Q 6

29 Q 6

## Conclusion

22. The Attorney General's functions can be divided into two distinct categories: the first relates to legal decisions about prosecutions on a technical basis, frequently made by legal staff working under his superintendence. These may involve underlying political considerations either relating to policy more generally or to specific cases. However, this system is not transparent, and the division of the responsibility and lines of accountability between the Attorney General and the Directors of the various prosecution agencies is unclear. For example, in giving oral evidence to the Committee, Robert Wardle, the Director of the Serious Fraud Office, made it clear that it was his decision to halt the investigation into the BAE Systems case. However, the then Attorney General, Lord Goldsmith also made it clear to the Committee that had there been disagreement between himself and the Director, the final decision would rest with the Attorney General<sup>30</sup>, and that he would have halted the investigation on different grounds.<sup>31</sup> The lines of accountability were further blurred by the fact that the Attorney General sought his own independent legal advice in this particular case.<sup>32</sup>

23. The second range of functions involves more traditional ministerial duties such as managing resources and accounting to Parliament and the public for policy and the use of public funds. We note the evidence of Lord Goldsmith in relation to the need for ministerial direction in the context of improving the work of the Crown Prosecution Service.

**24. While we accept that there has to be some ministerial policy direction for the prosecution services, the lack of transparency in the Attorney General's role in decision making in prosecutorial decisions is unsatisfactory. We need to consider whether responsibility for both types of function should remain the responsibility of the Attorney General.**

## Changes to the institutional landscape affecting the Attorney General's role

25. Recent reforms to the institutional landscape have given rise to questions about the status and functions of the Attorney General, in particular the Constitutional Reform Act 2005 and the creation of the Ministry of Justice.

### *The Constitutional Reform Act 2005*

26. The Constitutional Reform Act 2005 brought about a series of changes to the role of the Lord Chancellor, which have had both a direct and indirect impact on the Attorney General, specifically in his duty to uphold the Rule of Law. Professor Jowell argued that as a

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30 Q 355

31 Q 14

32 Q 256-259



result of the 2005 Act, the constitutional balance had indeed been “radically altered”.<sup>33</sup> Lord Goldsmith explained:

“The Constitutional Reform Act effected important, far reaching and irreversible constitutional change. It has created an independent judicial appointments commission; strengthened the independence of the judges; broken the link between the judiciary and parliament, turning the House of Lords in its judicial capacity into a Supreme Court to operate from its own building from 2009. But above all it was the changes to the role of the Lord Chancellor; the abolition of his traditional position as the head of the judiciary as well as a member of the Cabinet and effective Speaker of the House of Lords...and removing effectively his power to choose judges at will”.<sup>34</sup>

In doing so, the Constitutional Reform Act 2005 removed the Lord Chancellor from the position of being the Head of the Judiciary and from being subject to the judicial oath. Section 14 of the Constitutional Reform Act 2005 amended the text of the Lord Chancellor’s oath, making specific provision that the Lord Chancellor had a duty to uphold the Rule of Law.<sup>35</sup>

27. Lord Goldsmith argued that this specific change had a potential impact on the role of the Attorney General in relation to his duty in upholding the Rule of Law. In this respect he argued that the Act “was a little odd in focusing on the role of the Lord Chancellor alone,” and agreed with Lord Goodhart’s statement that “...by changing the role of the Lord Chancellor, it has indirectly and consequently changed the role of the Attorney General”.<sup>36</sup> Lord Goldsmith explained his position further in a speech entitled *Government and the Rule of Law in the Modern Age*. He stated that:

“[...] The Law Officers play a key role as advisers on the most sensitive and difficult issues; as scrutineers of departmental analysis of ECHR compliance; and as superintending ministers for the legal services provided in Government. I superintend, for example, the Treasury Solicitor — the largest provider of legal advice to Government outside prosecutions. So I regard one of my responsibilities as Attorney General to uphold the Rule of Law. It was interesting therefore to note that when it came to the debates on the Constitutional Reform Act little attention was given by many to this aspect. Given that it is no part of the Lord Chancellor’s role to advise Government, the role of the Law Officers — who are regarded as the final authorities on legal issues in Government — deserved perhaps greater note.”<sup>37</sup>

28. When giving oral evidence to the Committee, Lord Goldsmith re-emphasised his responsibility to uphold the Rule of Law:

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33 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p.12

34 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 7

35 Ibid

36 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 9

37 Attorney General, *Government and the Rule of Law in the Modern Age* 22, February 2006

“It is not the responsibility of the Lord Chancellor to advise on the law and he does not tender legal advice to the Government. It is very important that the Lord Chancellor role is there, and traditionally it always has been, but I have always regarded a part of my role as upholding the Rule of Law. I am the one who gets called upon to give advice. I am the one who has overall responsibility for supervising Government litigation in which issues about the Rule of Law constantly crop up. Parliamentary Counsel raises concerns about the propriety or legality of proposed legislation to me, not to the Lord Chancellor. I advise the Legislative Programme Committee on whether there are issues of propriety or not. So I think the role is already extremely important in terms of the Rule of Law.”<sup>38</sup>

However, the responsibility that Lord Goldsmith claimed for upholding the Rule of Law does not require the provision of new powers or responsibilities in respect of the Rule of Law. Rather, this duty provides the framework within which the Attorney General has to exercise his many responsibilities.

29. In his written submission to the Committee, Lord Goodhart QC explained that while the Act had placed an express obligation (sections 1 and 17) on the Lord Chancellor to respect the Rule of Law and, together with all other Ministers, to respect judicial independence (section 3), he also identified that “the effect of the Act as a whole is to convert the Lord Chancellor from being a Minister with a judicial as well as political role (including making judicial appointments) and standing at a distance from mainstream politics into a straightforward departmental Minister who does not need to have a legal qualification and may sit in the House of Commons”.<sup>39</sup> Since Lord Goodhart submitted this evidence, a Secretary of State for Justice and Lord Chancellor has been appointed who, although a barrister, only practised for two years.<sup>40</sup>

### ***The Creation of the Ministry of Justice***

30. On 9 May 2007 the Government implemented a significant machinery of government change which had a major impact on the delivery of criminal justice policy. The Home Office was effectively split into two, and while it retained responsibility for policing and counter-terrorism, responsibility for the prison and probation services were transferred to the new Ministry of Justice. This was a new department which replaced the old Department for Constitutional Affairs.

31. In responding to these changes, Lord Goldsmith emphasised the points which he had made earlier in respect of the Constitutional Reform Act 2005:

“It is clear that the Ministry of Justice will now be a major policy department and its Secretary of State need no longer be a lawyer. In these circumstances the case for retaining the role of the Attorney General as a senior lawyer in Government becomes in my view all the stronger. For better or worse Government operates in a world where the law, and the need for the Rule of Law, plays an increasingly important

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38 Q 106

39 Ev 49

40 Rt Hon Jack Straw MP

role...It is right that there should be a lawyer at the heart of Government...to ensure that the law is properly respected.”<sup>41</sup>

In his supplementary written evidence to us Lord Goldsmith explained that the creation of the new Ministry of Justice did not change the Attorney’s responsibilities or those of any of his Departments.<sup>42</sup> Neither did it disturb the position of the prosecutors, who remain outside the control of an ordinary political Minister.<sup>43</sup> The Cabinet Office policy document *Machinery of Government: Security and Counter-Terrorism, and the Criminal Justice System* states that in relation to the Attorney General’s Office: “existing functions remain, including superintendence of the prosecuting authorities and other existing criminal justice responsibilities.”<sup>44</sup>

## Conclusion

32. There is a tension in the Attorney General’s comments on his role as a superintendent of the prosecution services. On the one hand he emphasised that it was “constitutionally crucial” for the independence of the prosecutors to be maintained, and welcomed the fact that they were still his responsibility following the creation of the Ministry of Justice.<sup>45</sup> However, on the other hand he argued that the changes made to the prosecution services while under his supervision “could not have been achieved” unless “I had been able, as a senior minister with specific responsibility for the prosecutors, to champion their interests within Government...”<sup>46</sup> It is not clear how the prosecution services maintain their independence if they have a senior minister as their superintendent.

33. These opaque arrangements are symptomatic of the confusion that surrounds the Attorney General’s status as a minister. The then Secretary of State for Justice and Lord Chancellor, Rt Hon Lord Falconer of Thoroton said: “the role that the Attorney General is playing is utterly different from any other Minister”.<sup>47</sup> Indeed, the regular attendance of the Attorney General at Cabinet is only a very recent development, and one which was frowned upon by both the former Attorneys General who gave oral evidence to us.<sup>48</sup>

**34. The Constitutional Reform Act 2005 and the creation of the new Ministry of Justice have changed the landscape within which the Attorney General performs his or her functions. While these changes have drawn attention to the inherent tensions in the role, neither the Constitutional Reform Act 2005 nor the creation of the Ministry of Justice have clarified or strengthened the independence of the office of the Attorney General. There is confusion about the overlap between the Attorney General’s position as the Government’s chief legal adviser, his role as the superintendent of the Prosecution services (an independent role), and his role in carrying out ‘ministerial**

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41 Ev 81

42 Ev 81

43 Ev 80

44 Ev 80

45 Ev 81

46 Ev 59

47 Q 155

48 See also paras 84-86 of this report

**functions' in relation to criminal justice policy (a party political role). In our view, the time has come to reform the basis on which he or she carries out his or her functions and to define more clearly the extent of his or her role.**

## 3 Recent Controversies around the Role of the Attorney General

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35. While it is clear to us that the constitutional arrangements for the Attorney General are in need of reform, the impetus for reform of the post has increased as a result of the Attorney General's involvement in three recent high profile and controversial matters, which have brought the inherent contradictions in the constitutional role of the Attorney General into sharp focus: the BAE inquiry; his advice on the invasion of Iraq; and the 'cash for honours' police inquiry.

36. Several commentators have made the point that the Attorney General's office offends the separation of powers.<sup>49</sup> Not least of these was the former Attorney General Lord Shawcross, following a number of incidents in the late 1970s where the then Attorney, Rt Hon Sam Silkin, declined to prosecute the Clay Cross Councillors or to prosecute the Post Office Union for its unlawful boycott of mail to South Africa during the apartheid era.<sup>50</sup>

37. In evaluating Lord Shawcross's claims, Professor Jowell concluded that "no doubt then, as nowadays, the allegations of actual bias were false but the issue is not the reality of bias but its appearance: does the Attorney's action or inaction leave a doubt in the public mind about whether his opinion was driven by law or political convenience"?<sup>51</sup> In commenting on the example of the Attorney General's advice on the legality of the war in Iraq, Professor Jowell argued that the case illustrated the "inherent tension and that the dual political and legal role of the Attorney inevitably lends itself to charges of political bias in legal decisions".<sup>52</sup> This, he argued, has resulted in claims that "the time had come to appoint an independent Attorney, as in other countries".<sup>53</sup>

### *The 'Cash for Honours' Investigation*

38. In March 2006 it emerged that the Labour Party had been the recipient of a number of secret loans in the run up to the 2005 General Election and that some of the donors had been offered peerages. Angus MacNeil MP wrote to the Metropolitan Police asking them to investigate whether the Honours (Prevention of Abuses) Act 1925 which banned the sale of honours had been broken. Investigations have also focused on whether the Political Parties Elections and Referendums Act (PPERA) 2000 was breached and whether there had been conspiracy to pervert the course of justice.<sup>54</sup> The case file was handed to the Crown Prosecution Service (CPS) on 20 April 2007,<sup>55</sup> and on 4 June 2007 the CPS asked

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49 For example, Lord Woolf in his Hamlyn lectures, Lord Steyn in a lecture to the Administrative Law Bar Association.

50 Ev 61

51 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006

52 Ibid

53 Ibid. Some Commonwealth countries do have Attorneys who combine the legal and political roles but others (such as Ireland, South Africa and India) do not.

54 [http://news.bbc.co.uk/1/hi/uk\\_politics/4812822.stm](http://news.bbc.co.uk/1/hi/uk_politics/4812822.stm)

55 [http://news.bbc.co.uk/1/hi/uk\\_politics/5174108.stm](http://news.bbc.co.uk/1/hi/uk_politics/5174108.stm)

the police to “undertake further inquiries”.<sup>56</sup> The possibility that senior Government colleagues or their aides and officials might be prosecuted has raised fundamental questions about a potential conflict of interest for the Attorney General, if faced with a decision of whether or not to pursue a prosecution.

39. In the course of our inquiry into Party Funding<sup>57</sup> Andrew Tyrie MP asked the then Lord Chancellor the following question relating to any possible prosecutions arising from the police inquiry into allegations of the sale of public honours and other matters:

“.. can you give the public an assurance that the Attorney General will not interfere in any way with the conclusions of the DPP and that the DPP would be permitted, were there to be something brought to him, to take any decisions for prosecution wholly independent of the Attorney General?”

Lord Falconer replied:

“Of course. It is a matter for the DPP and the Crown Prosecution Service to make decisions in relation to this in the normal way and, of course, the Attorney General would not interfere in the normal course of decisions being made.”<sup>58</sup>

40. We took this to mean that the Attorney General would not be involved in the decision as to whether there should be a prosecution or not. However, in the light of later public statements made by the then Attorney General about his duties in relation to decisions about prosecutions arising from the police inquiry, the Chairman of the Committee wrote to the then Lord Chancellor seeking clarification of his answer. We received a letter in reply from Lord Falconer and subsequent correspondence from the then Attorney General.<sup>59</sup> In his letter of 7 December, Lord Goldsmith said:

“However, I know the Lord Chancellor well understands that he was not in a position to give an ‘assurance’, as you have termed it, as to how I would act. No other Minister, however distinguished or senior, has the ability to bind the Attorney General in how he exercises his role.”<sup>60</sup>

41. When giving oral evidence to the Committee, Lord Goldsmith gave the following commitment: “...if it is referred to me then my office will appoint independent leading counsel to advise, and, I make clear, in the event that there is not a prosecution then I will make public that advice. That will mean that the public will know openly, it will be transparent, what the reasons are and why”.<sup>61</sup> He confirmed that this would mean “the whole of the advice which relates to the decision not to prosecute”.<sup>62</sup> Lord Goldsmith also

56 <http://news.bbc.co.uk/1/hi/uk-politics/6718417.stm>

57 Constitutional Affairs Committee, *Party Funding-oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

58 Q 97

59 Constitutional Affairs Committee, *Party Funding-oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

60 Ibid

61 Q 46

62 Q 49

said that he would be “perfectly content” to consult Opposition parties in an attempt to secure prior agreement on who he would consult and from whom he would seek advice.<sup>63</sup>

**42. We welcome Lord Goldsmith's commitment to publish the whole of the advice that relates to the decision not to prosecute should there be no prosecutions as a result of the Police's inquiry into allegations of 'cash for honours'. We also welcome his willingness to consult Opposition parties before deciding who should provide that independent advice. We hope that the new Attorney General will honour these commitments. However, we are concerned that this does not address the fundamental conflict of interest that the new Attorney General may face in deciding whether or not to pursue a prosecution.**

### **Saudi/BAE case**

43. The decision taken to drop a Serious Fraud Office investigation into allegations that Saudi officials were bribed to win an order for a British arms firm has attracted significant levels of public scrutiny and controversy. As Attorney General, Lord Goldsmith was at the centre of this controversy which not only led to heavy public criticism<sup>64</sup> but also to suggestions that the case could be subject to judicial review.<sup>65</sup> Media speculation has focused on whether the Attorney General changed his mind in his decision of whether or not to prosecute as a direct result of political pressure from Downing Street.<sup>66</sup> Lord Goldsmith himself acknowledged the controversial nature of this case, and stated that “this is the only case in the nearly six years I have been privileged to hold this office that there has been any sustained suggestion that a decision has been politically driven”.<sup>67</sup>

44. Lord Goldsmith defended his position during a debate in the House of Lords on 1 February, in which Baroness Williams of Crosby called attention to the responsibilities of the Attorney General, other members of the Government and the Serious Fraud Office for compliance with the United Kingdom's treaty obligations and the Rule of Law regarding the alleged bribery and corruption of foreign officials.<sup>68</sup>

45. In oral evidence to the Committee, Lord Goldsmith stressed to us that the decision (not to prosecute) “was taken by the Director of the Serious Fraud Office”,<sup>69</sup> and that while he agreed with that decision, that his view was not based “quite on the same grounds”.<sup>70</sup> Lord Goldsmith also corrected any misunderstanding about his comments in respect of balancing the Rule of Law and the public interest. He said: “if anyone takes that as meaning that we ... can set aside the Rule of Law for reasons of expediency or general interest, that is absolutely not the position”. He continued: “the Rule of Law does recognise that in all

63 Q 51

64 For example, “Lord Goldsmith's folly has now been brutally exposed”, *The Guardian*, 1 February 2007.

65 Q 12. See also Will Woodward and David Leigh, *The Guardian*, 16 December 2006, also available at [guardian.co.uk/Saudi/story/0,,1973357,00.html](http://guardian.co.uk/Saudi/story/0,,1973357,00.html).

66 David Leigh and Rob Evans, *The Guardian*, 1 February 2007, [www.guardian.co.uk/print/0,,329702255-117700,00.html](http://www.guardian.co.uk/print/0,,329702255-117700,00.html) add corner house evidence.

67 Ev 80

68 HL Deb, 1 February 2007, col 339

69 Q 12

70 Q 13

prosecutions the prosecutor will have to take account of two factors, the sufficiency of the evidence and whether the public interest is in favour of prosecuting or not”.<sup>71</sup> In examining the public interest in this case, Lord Goldsmith acknowledged that he had consulted a “number of other Ministers”<sup>72</sup> but maintained that “occasionally there are public interest considerations where it is legitimate to seek the views of other Ministers, not on whether there should be a prosecution but on what the public interest is”.<sup>73</sup>

46. Graham Rodmell of Transparency International (UK) said “that decision and the involvement in it of the Attorney General...raise very serious concerns about the constitutional propriety of the Attorney General’s roles, and his abilities to perform them in a manner consistent with the public interest in the maintenance of both the Rule of Law and the highest standards of public conduct...”<sup>74</sup> Lord Lester of Herne Hill QC has written that the BAE case “shows how fragile and inadequate are our present constitutional arrangements for protecting the Rule of Law”.<sup>75</sup> Professor John Spencer, Selwyn College, Cambridge argued that the case raised the broader question of whether it was appropriate that an Attorney General (as a member of the executive) should have the legal right to stop a prosecution. Professor Spencer argued that this position had only evolved by convention, and that this convention was “inconsistent with the politically independent administration of justice”.<sup>76</sup>

### ***Iraq and the publication of legal advice?***

47. Much of the discussion of the initial decision to invade Iraq was based on the advice given to the Government by Lord Goldsmith as Attorney General as to whether the invasion of Iraq was legal without a second resolution from the UN Security Council. The Government faced calls for the publication of that advice in full. On Tuesday 9 March 2004, Elfyn Llwyd MP tabled a motion for debate 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”.<sup>77</sup> While the motion was rejected in the House of Commons by 283 votes to 192, following continuing pressure and increasing media scrutiny, the Attorney General’s full advice on the legality of the war with Iraq was published on 10 Downing Street’s website on 28 April 2005. The document showed that the Attorney General’s advice of 7 March 2003 had examined possible doubts and arguments about the legality of the war. However, none of these concerns had appeared in the published advice of 17 March 2003.<sup>78</sup> This only served to fuel speculation that Lord Goldsmith had changed his mind on the legality of going to war with Iraq in the face of direct political pressure from Downing Street.<sup>79</sup> As a

71 Q 15

72 Q 21

73 Q 19

74 Ev 50 and 51

75 *The Guardian*, 1 February 2007, available at [www.guardian.co.uk](http://www.guardian.co.uk)

76 Ev 106

77 HC Deb, 9 March 2004, col 1397

78 [http://news.bbc.co.uk/1/hi/uk\\_politics/vote\\_2005/frontpage/4482029.stm](http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4482029.stm)

79 <http://www.guardian.co.uk/Iraq/Story/0,,1164079,00.html> and <http://politics.guardian.co.uk/foi/story/0,,1445145,00.html>



result of this case there has been recent debate about whether the Attorney General's legal advice to Government should be published as a matter of course.

48. Writing in the *Guardian* on 1 February 2007, Patrick Wintour reported a speech due to be delivered by the Rt Hon Harriet Harman MP, then Minister of State, Department for Constitutional Affairs<sup>80</sup> (apparently in her private capacity) on Saturday 3 February. It suggested that the Minister would say that public trust in the role of the Attorney General had been undermined, and this should be addressed by requiring his legal advice to be published as a matter of course.<sup>81</sup> David Pannick QC agreed, and argued that “the Attorney General's ultimate client is not the Government but the public, the Attorney General should have the power, if necessary, to publish his or her legal views on important matters, while maintaining the confidentiality of discussions with ministers”.<sup>82</sup>

49. However, there was little support for this position amongst our witnesses. Lord Goldsmith told the Committee that “the Attorney General is, and must remain, an adviser to the Government and not to Parliament. He or she cannot serve these two clients simultaneously without running into impossible problems of confidentiality and conflict of interest”.<sup>83</sup> In oral evidence to the Committee the then Lord Chancellor, Lord Falconer of Thoroton argued that:

“The right position is that in very many cases it will be inappropriate to disclose the advice that has been given because you want to be sure that Government departments and ministers take advice. As somebody pointed out, if there is a chance that the advice will immediately be published, that will discourage people from time to time from taking advice. You also need to have a conversation very frequently with your lawyer as to what the position is. You want to be free to have that conversation without embarrassment. I think there are certain occasions where it is absolutely critical that the advice is published because the consequences of the advice are so significant and one of those is obviously in Iraq where the Attorney General did publish a statement of what his legal conclusions were before the decision was made by the House of Commons on the use of force against Iraq. I agree with what the two Attorneys just said, namely that generally you should not publish the advice. That should be the norm.”<sup>84</sup>

50. Rt Hon Lord Morris of Aberavon QC likened the relationship of the Attorney General and the Government to that of a family solicitor and a client. He argued that: “most of you would not wish to have the advice of your family solicitors broadcast in the market place”.<sup>85</sup> He added that it is “entirely a matter between the Government and the Attorney if it were opened up, and it has not been opened up except in very rare and exceptional cases

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80 Harriett Harman became Minister of State for Justice on the 9 May 2007.

81 [guardian.co.uk/uk\\_news/story/0,,2003074,00.html](http://guardian.co.uk/uk_news/story/0,,2003074,00.html)

82 David Pannick QC, *The Times*, 27 February 2007

83 Ev 49

84 Q 144

85 Q 139

over 500 years, so there must be some value in maintaining not only the concept of not revealing the advice but also whether the Attorney has been consulted at all”.<sup>86</sup>

## Public confidence in the role of the Attorney General

51. Lord Goldsmith has acknowledged the public controversy that surrounded his role over recent years. In oral evidence to the Committee he said that “there are aspects of what I do which have been controversial,” but added that “that has always been the case with Attorneys General”.<sup>87</sup> For example, in his book *The Attorney General, Politics and the Public Interest*, John Edwards, founder of the Centre of Criminology, Faculty of Law, University of Toronto, argued that there have been “distinct whiffs of political pressure being exerted”,<sup>88</sup> since the 1950s, and that “the ability to resist such pressures will vary according to the experience, personality and determination of the Law Officers concerned”.<sup>89</sup>

52. In his written evidence to the Committee Lord Goldsmith listed some of the controversial decisions of his predecessors, which included: the decision of Sir Peter Rawlinson not to prosecute Leila Khalid, a member of the PLO arrested for the attempted hijack of an Israeli airliner in 1970; the cases of the Clay Cross councillors and Gouriet in the time of Sam Silkin; Sir Michael Havers’ consent to the prosecution of the civil servant Clive Ponting under the Official Secrets Act, following disclosure of information relating to the sinking of the *Belgrano*; and the collapse of the Matrix Churchill trial, leading to the Scott report into Arms to Iraq, in the time of Sir Nicholas Lyell.<sup>90</sup>

53. Referring to the difficulties facing Attorneys General, Lord Goldsmith cited the example of the recent controversy over his role in the event of investigations into party funding. He said “some commentators suggested I should simply stand aside from any involvement, but as I pointed out that it is not possible where my consent is actually required by law. No prosecution under those provisions can go ahead without it. In fact, as I also pointed out, the position goes further than that because of my constitutional responsibility to be answerable for prosecutions in this country”.<sup>91</sup> Based on both his own experiences and that of his predecessors, Lord Goldsmith concluded that :

“It is inherent in the role of Attorney General that it sometimes falls to the holder of that office to make controversial or unpopular decisions. As one academic writer has put it: ‘It would seem that where politically contentious decisions are concerned, the Attorney General is unlikely to escape criticism whatever [decision] he makes’. However the examples I have mentioned give the lie to any idea that the role of

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86 Q 140

87 Q 102

88 p. 321

89 p. 321

90 Ev 61

91 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006

Attorney General has become more ‘political’ or more controversial in recent years.”<sup>92</sup>

However, in highlighting the inherent tensions of the role of the Attorney General, Lord Goldsmith has only served to strengthen the case for the reform of the office of Attorney General. It is precisely his “constitutional responsibility to be answerable for prosecutions,” which is at the heart of the problem.

**54. Recent controversial issues including the ‘cash for honours’ investigation, the decision not to prosecute in the BAE Systems case and allegations of political pressure to amend legal advice on the war in Iraq, have compromised or appeared to compromise the position of the Attorney General. The perceptions of a lack of independence and of political bias have risked an erosion of public confidence in the office.**

**55. We agree that there are inherent tensions in the role of the Attorney General and that this is not a new situation. However, it is time that these issues were addressed. The tensions which have been highlighted by these three controversial cases, alongside the institutional problems identified earlier, point to the need for the reform of the role and responsibilities of the Attorney General.**

**56. The Attorney General’s responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role. Allegations of political bias, whether justified or not, are almost inevitable given the Attorney General’s seemingly contradictory positions as an independent head of prosecutions, his or her status as a party political Prime Ministerial appointment, and his or her political role in the formulation and delivery of criminal justice policy. This situation is not sustainable.**

## 4 Options for Reform

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57. In a lecture on 16 April 2007, Rt Hon Lord Woolf, the former Lord Chief Justice of England and Wales, warned against the reform of the office of Attorney General. He said: “like the Lord Chancellor, the Attorney General is part of the glue that holds the constitution together. At present he is a means of communication between the judiciary and the Government and at a time when the other constitutional changes are taking place it would be as well not to interfere with his historic office”.<sup>93</sup> Much of the evidence which we received was similarly cautious about changing the nature of the office of Attorney General.<sup>94</sup> While Lord Goldsmith acknowledged that it would be wrong to dismiss the voices which had been raised in concern — it was “undeniable that there is an issue to be addressed”<sup>95</sup> — he maintained that the issue was not “with the role itself but with its perception”.<sup>96</sup>

### Minimal reform

58. Lord Goldsmith identified the need for increasing public education and public information around his role, in particular the distinction between “my public interest role and my role as a Government minister”.<sup>97</sup> The solution he suggested was “not to change the role but to provide more information as to its boundaries and scope”.<sup>98</sup> Lord Mayhew of Twysden QC agreed that there was a “perceptual tension” associated with the role of the Attorney General, which was “why the true position as a matter of education...is so important”.<sup>99</sup>

59. One means of achieving better public understanding would be to seek greater clarity of the role of the Law Officers. Lord Goldsmith emphasised that “this must be done through a mechanism which will benefit public understanding but not change the role”,<sup>100</sup> and he mentioned the possibility of changing the oath of the office of the Attorney General in order to “improve clarity around his role and function”.<sup>101</sup> Lord Mayhew agreed “there was mileage and merit in that...”<sup>102</sup> Lord Mayhew also suggested that a further means of improving clarity would be to produce “a statutory statement” of the Attorney General’s

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93 University of Essex Clifford Chance Lecture, *Judicial Independence not Judicial Isolation*, 26 April 2007

94 For example see Ev 49.

95 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 16

96 Ibid

97 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 17

98 Ibid

99 Q 136

100 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 17

101 *The Economist*, 10 February 2007, p35. See also Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p 14

102 Q 133

responsibilities. He argued that this would be particularly useful in clarifying the Attorney General's non statutory role in relation to upholding the public interest.<sup>103</sup>

60. The then Lord Chancellor, Lord Falconer, did not believe that greater clarity would be sufficient. He said that “the public look at these issues in a different way now from the way they looked at them in the past...this is nothing to do with the most prominent instances; it is to do with a change in people's views and a desire for greater clarity in what people do”.<sup>104</sup> He added:

“...I do not think the status quo is maintainable because it is perfectly plain...that there is so much attention now being focused on the role, with a searchlight on it which is not at all inappropriate. I cannot believe in the light of what everybody, including the Attorney General himself has said, that the current arrangements would remain completely in place. That is the inevitable consequence of a change in the political climate over a long period of time, the fact that people are looking at it, the fact that everybody has a variety of views on what the way forward would be.”<sup>105</sup>

### A “Serious Government Department”

61. In his original written submission to us Lord Goldsmith suggested the need for a “serious” Government department to support his office.<sup>106</sup> Lord Goldsmith expanded on this during his Birmingham lecture where he stated his belief that “the future constitutional role of the Attorney General...should comprise the responsibility for a serious Government Department with clear objectives which include upholding the Rule of Law, a duty to the Crown and the guardianship of the public interest and the resources to fulfil that role”.<sup>107</sup> Lord Goldsmith raised the issue of a possible expansion of his role. He stated that “future consideration should be given to whether some functions (such as human rights or constitutional law) might sit better with the Law Officers than with the Ministry of Justice”.<sup>108</sup>

62. However, Lord Goldsmith failed to explain to us what he meant by a “serious” Government Department. It was unclear how this would relate to the Lord Chancellor and his duties or, indeed, what exactly the responsibilities of that department would be. In oral evidence to the Committee, Lord Goldsmith said “I would simply put it in terms that I think there are responsibilities which I have to carry out, which I believe...it is in the public interest that they are carried out. It needs support in order to do that and I get support in different ways. That is really all I will say”.<sup>109</sup> It also remains unclear as to why human rights and constitutional law might sit better with the Law Officers as opposed to the current arrangements. It did not appear to us that vital questions had been addressed,

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103 Q 132

104 Q 156

105 Q 159

106 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006

107 Ibid

108 Ev 81

109 Q 94

including the potential scope for disagreement and conflict with the other departments responsible for criminal justice.

**63. We disagree with Lord Goldsmith’s assessment that the problems relate only to the perceptions of the role of the Attorney General rather than to the nature and multiple functions of that role. While we see merit in improving the clarity of the existing role and functions through public education as a means of re-building public confidence, Lord Goldsmith’s proposals for the reform of the Attorney General’s office do not address the inherent tensions in the role. In that sense, far more fundamental questions need to be considered about the functions of the office of Attorney General and its constitutional position.**

### **The political role of the Attorney General**

64. There are several options for the reform of the office of the Attorney General. As previously noted in this report, at present, the Attorney General has both ministerial/political and non-ministerial/non-political functions. The then Lord Chancellor, Lord Falconer of Thoroton, identified two potential models other than the status quo for an Attorney General whose role is to give legal advice and superintend the prosecution services: a non-politician who sits either in the Commons or the Lords, or a non-politician who sits in *neither* House.<sup>110</sup> It is difficult to see how non-political status could apply to a Member of either House except a cross-bencher in the Lords. Both models are based on the separation between the Attorney General’s technical legal functions and the elements of the job which are of a political nature. In practice, achieving such a clear delineation of political and non-political functions may prove to be difficult. For example, taking prosecutorial decisions on the basis of the ‘public interest’ may involve purely legal considerations, but on occasions, determining the ‘public interest’ can be inherently political.

**65. It is both possible and desirable to ensure transparency and accountability in prosecutorial decision making. There are models which could improve the clarity, transparency and accountability of this decision making process. For example, the Attorney General could be an independent legal adviser to the Government but not a member of the Government; the Attorney General could be a member of the Government, but have no responsibility for the provision of legal advice and no prosecutorial functions; or the office of Attorney General could be abolished, with a junior minister within the Ministry of Justice performing the policy functions, an independent officer undertaking the legal advice and independent prosecutorial role and the Secretary of State taking overall political responsibility and accountability for controversial prosecutorial decisions. The question of who holds the title of Attorney General is secondary: the important point is the separation of purely legal decisions or advice from functions which have political content, and the titles of either Attorney General or Solicitor General could be attached to either of the offices if the functions are split.<sup>111</sup>**

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110 Q 160

111 See also paragraph 96 of this report.

66. In other jurisdictions, many of the duties of the Attorney General are carried out by non-political officials. We note the interesting examples of Ireland and Scotland [see text box]. Given that both the political and institutional context in which the Attorneys General operate in these jurisdictions is very different, it is neither possible nor desirable to copy them directly. However, the very existence of a non-political Attorney General in Ireland demonstrates the potential for change in England and Wales. The position in Scotland is closer to that in England and Wales where the Lord Advocate is bound by the collective responsibility of the Executive, except in respect of retained functions. He or she also loses office like all other ministers if the Executive falls. The key question to be addressed is whether a non-political office holder could perform some of the functions of the Attorney General, while at the same time maintaining his or her influence over ministers, and retaining his accountability to Parliament.<sup>112</sup>

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<sup>112</sup> See also David Pannick QC, "The time has come to reconsider the office of the attorney general", *The Times*, 27 February 2007.

## The role of the Attorney General in other jurisdictions

In the majority of the main common law jurisdictions, it appears that Attorneys General do not have ministerial responsibility for the development of criminal justice policy, and their offices are largely confined to the provision of legal advice and supervision of the system of criminal prosecutions.<sup>113</sup> The most interesting and instructive models of de-politicised Attorneys General are in Ireland and Scotland.

### *The Irish model*

The Constitution of Ireland adopted in 1937 provided for an Attorney General “who shall be the adviser of the Government in matters of law and legal opinion”.<sup>114</sup> The Constitution also provided for the prosecution of all indictable crime, and both functions were exercised by the Attorney between 1937 and 1974. However, the Prosecution Offences Act 1974 transferred “all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General” to the newly created Director of Public Prosecutions.<sup>115</sup> James Hamilton, Director of Public Prosecutions in Ireland since 1999, explained that the rationale for the creation of that office was twofold:

“Firstly, it was thought desirable to reduce the Attorney General’s workload because of the increased burden of advising the Government in relation to matters of EC law following Ireland’s accession to the European Communities. Secondly, the change was intended to avoid what was thought to be a possible public perception that political influence could be brought to bear on prosecutorial decisions”.<sup>116</sup>

This model differed significantly from the English model of a Director of Public Prosecutions in that the Attorney General was not given any function of general superintendence over the work of the Director. The 1974 Act specifically provided that the Director should be independent in the performance of his functions. It is therefore unlawful to communicate with the Director in order to influence the decision of whether to initiate or withdraw criminal proceedings and decisions about sentence review on the grounds of undue leniency are also solely a matter for the Director.<sup>117</sup> The Director is accountable to Parliament through the Public Accounts Committee.

In addition to exercising the function as legal adviser to the Government, the Attorney General has a function to act as a representative of the public in legal proceedings for the assertion of the protection of public rights. Although this dual function has been criticised on the grounds that the Government itself might act contrary to the rights of the public, the Constitution Review Group Report 1996 recommended that the Attorney General

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113 Ev 62- Ev 68

114 Ev 107

115 Ev 107

116 Ev 108

117 Ev 108



retain this function as there was an insufficient workload to justify the creation of a separate office.<sup>118</sup>

The Attorney General has no executive responsibilities other than for the management of his or her own office which is responsible for handling the State's litigation and the drafting of Parliamentary legislation as well as giving advice to Government. The Minister for Justice, Equality and Law Reform is responsible for prisons, policing, the courts and law reform. The Attorney General is also responsible for the Law Reform Commission's vote and has the power to refer matters to them.

Article 30 of the Constitution prohibits the Attorney General from being a member of the Government. However, the modern practice is for the Attorney General to attend all Cabinet meetings.<sup>119</sup> The Attorney General does not necessarily have to be a Member of Parliament, and is appointed by the President on the nomination of the Taoiseach.<sup>120</sup> In the last 35 years only two Attorneys General have been Members of Parliament.<sup>121</sup>

### ***The Scottish model***

In comparing the position of the Attorney General in England and Wales with that of the Lord Advocate in Scotland, Rt Hon Elish Angiolini QC, the current Lord Advocate of Scotland, warned that it would not be "sensible to draw too close a comparison between them",<sup>122</sup> because the two systems are very different and have developed in different ways. However, there are broad comparisons that can be drawn in terms of a consideration of possible future models for the Attorney General of England and Wales, his or her role in Government and relationship with Parliament.

The Lord Advocate has four key roles and areas of responsibility. She is head of the systems of prosecution and investigation of deaths; the principal legal adviser to the Scottish Executive; she represents the Scottish Executive in civil proceedings and represents the public interest in a range of statutory and common law civil functions. Section 48 of the Scotland Act makes provision for her to take independent decisions as head of the systems of criminal prosecution and investigation of deaths. Furthermore, the Lord Advocate has been given a particular role in relation to ensuring that legislation passed by the Scottish Parliament is within the legislative competence of the Parliament, and has particular powers under the Scotland Act in relation to the resolution of legal questions about the devolved powers of Ministers and the Parliament.<sup>123</sup>

The Lord Advocate is a member of the Executive and accountable to the Scottish

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118 Ev 109

119 Ev 107. See also Prof James Casey (1996) *The Irish Law Officers: Roles and Responsibilities of the Attorney General and Director of Public Prosecutions* (Round Hall Sweet and Maxwell).

120 EV 107

121 Ev 108

122 Ev 92

123 Ev 92

124 Ev 93

125 Ev 92

126 Ev 92

Parliament, but not necessarily a Member of that Parliament. Section 27 of the Scotland Act states that if a Law Officer is not an MSP he or she is empowered to participate in the proceedings of the Parliament but may not vote. The Lord Advocate can therefore be questioned by MSPs about the exercise of his or her functions, although she may not be required to answer questions or produce documents relating to the operation of the system of criminal prosecution in any particular case if it is considered that it might prejudice criminal proceedings or would otherwise be contrary to the public interest. Under the Parliament's Standing Orders, written questions about the operation of the systems of criminal prosecution and investigation of deaths are answerable only by the Law Officers, as are oral questions on those matters in all but exceptional circumstances (Rules 13.5.1, 13.7.1 and 13.8.3). A Law Officer may resign at any time and must do so if the Parliament resolves that the Executive no longer enjoys the confidence of the Parliament.<sup>124</sup>

The Lord Advocate argued that "...in Scotland there continues to be considerable merit in having a Ministerial head of the system of prosecution who is immediately accountable to the Parliament- subject to the safeguards to my independence which are provided by the 1998 Act".<sup>125</sup> Rt Hon Lord Boyd of Duncansby QC also saw merit in this system. He said "like other Ministers she is bound by the doctrine of collective responsibility except where she is exercising her retained functions (head of the systems of criminal prosecutions and investigation of deaths). In these cases she acts independently of any other person". However, he concluded that it was "a little early to see it as a model for others to follow".<sup>126</sup>

67. We examine below the Attorney General's main roles from the point of view of dividing his or her political and technical duties.

### **Chief legal adviser**

68. The first function of the Attorney General in Government is his or her role as the Government's chief legal adviser. The former Attorney General, Lord Morris of Aberavon identified that "the lion's share of the Attorney's time is taken as principal legal adviser to the Government...basically he is an in-house lawyer as some of our major corporations would have..."<sup>127</sup> While Lord Falconer agreed about the value of the confidential nature of the relationship between the Government and the Attorney in his role as legal adviser,<sup>128</sup> he raised the issue of whether it was either necessary or appropriate for the Attorney General, as legal adviser, to be a Government Minister. He said: "you want the Attorney General to be like the family solicitor, somebody completely trusted, but the family solicitor is not a member of the family and that seems to me to be the critical point".<sup>129</sup>

69. At present, not only is the chief legal adviser to the Government a Minister, but he is also a politician who follows the party whip. However, Lord Goldsmith was hesitant in acknowledging this. When addressing the claim that he was "actually a politician," Lord Goldsmith responded "I am not sure about that actually".<sup>130</sup> When it was put to him that

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127 Q 136

128 Q 155

129 Q 155

130 Q 40

he took the Labour Whip in the House of Lords, he acknowledged “well, if that is the definition, yes, of course”.<sup>131</sup> He reaffirmed this point of view about his semi-detached political role in his second appearance before us.<sup>132</sup>

70. Rt Hon Lord Mackay of Clashfern argued that the changes to the role of the Lord Chancellor brought about by the Constitutional Reform Act 2005 “make it even more important that the senior legal adviser to the Government should be a member of the Government with free access to the Cabinet documents, with opportunity to attend Cabinet where appropriate and with the authority and experience that the Government could not easily ignore”.<sup>133</sup> However, as illustrated by the position of the Lord Advocate in Scotland, it is not necessary to be either a politician or a minister in the usual sense in order to be a member of the Government.

71. Lord Goldsmith disagreed that advice would be more independent or carry greater credibility if it were given by someone outside Government: first, he strongly resisted “the suggestion that lawyers in Government are incapable of giving independent or impartial advice”; second, he argued that he was best placed to give frank, well informed and constructive advice “precisely because, as a Minister, I am in a position to understand the system of Government, the process of policy formulation and the overall context within which the advice is sought”.<sup>134</sup> Lord Falconer disagreed with Lord Goldsmith's arguments, and said: “if the Treasury Solicitor says something to me, I am not going to say him, “well, you are not a Member of Parliament”.<sup>135</sup> We agree. No sensible minister would ignore the advice of an independent Attorney General who is not a Government minister. We note that ministers already accept the legal views of Treasury Counsel, who are not political insiders.<sup>136</sup>

**72. We agree with the view expressed by Lord Falconer that the status quo is not maintainable, and suggest that a series of steps should be taken to reform the role of the Attorney General. We see no reason why the official exercising the role of legal adviser to the Government should be a political appointee or a member of the governing party. Both in perception and reality, it would improve the independence and public confidence in the impartial nature and authority of the provision of legal advice if it were not the responsibility of someone in political life.**

### ***Upholding the Rule of Law***

73. It is a duty of the Attorney General as a Government Minister to uphold the Rule of Law. The Rt Hon Lord Boyd of Duncansby, Solicitor General for Scotland from 1997-2000 and Lord Advocate from 2000-2006, argued that the changes to the role of the Lord Chancellor, (also outlined earlier in this report)<sup>137</sup> had made it “more important than ever

131 Q 41

132 Qq 317-323

133 Ev 92

134 Ev 59

135 Q 161

136 Q 161

137 See paras 26-29

that there be within Government someone who can give prominence to the maintenance to the Rule of Law”.<sup>138</sup> In his Birmingham speech, Lord Goldsmith elaborated on this issue. He said, “as the Lord Chancellor no longer needs to be a lawyer, if the Attorney General were an employed official, there would be no lawyer at the heart of Government. I believe this would be a significant and unwise departure from the conventions of the past. There needs to be someone who can assess public interest, who “embodies the traditions of an independent profession and who embraces the values of legality and the Rule of Law”.<sup>139</sup>

74. Lord Goldsmith said that given that it is no longer necessary for the Lord Chancellor to be a lawyer “I freely confess I believe it would be important that there would remain a senior lawyer at the heart of Government and the only other candidate for that is the Attorney General”.<sup>140</sup> He added that “the Attorney General will have to continue to be a lawyer, and indeed a senior lawyer because it is a serious legal job which has to be done”.<sup>141</sup>

75. Lord Goldsmith gave no concrete reasons about why it is such a necessity for a lawyer to be ‘at the heart of Government’, or what this meant. Professor Jowell also challenged this assertion and asked the key question “does that matter? He added “we do not necessarily want...a doctor to head up the Department of Health”.<sup>142</sup> In the context of upholding the Rule of Law, Lord Goldsmith himself went on to say that “there cannot conceivably be the position that there is only one minister in Government who is concerned with the Rule of Law”.<sup>143</sup> However, there are several alternative methods of ensuring that the Rule of Law is upheld within Government. For example, Professor Jowell identified that at present there was “no specific statutory duty upon any minister to protect or promote the Rule of Law in any specific way”.<sup>144</sup> Making it a duty of every member of the executive to uphold the Rule of Law is one example of how this can be achieved without its being a specific ministerial responsibility of the Attorney General.

**76. We recommend that following the Constitutional Reform Act 2005 the Government should give further consideration to the statutory arrangements for ‘upholding the Rule of Law’ within Government. It is not appropriate that the responsibility for upholding the Rule of Law lies with one member of the Government alone. We suggest that this be explored within the context of the development of a new Ministerial Code.**

**77. Furthermore, while we note Lord Goldsmith’s claim that it is necessary to have a lawyer at the heart of Government, we question the merits of this claim. The inept handling of the beginning of the process of reform which culminated in the Constitutional Reform Act 2005 and the secretive process of establishing a Ministry of**

138 Ev 105

139 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006

140 Q 106

141 Q 106

142 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p. 12

143 Q 92

144 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p.15

Justice, which was trailed in the newspapers before consultation either of the judiciary or the Lord Chancellor, were seemingly unaffected by the presence of lawyers within Cabinet.

### *Criminal justice policy and the 'Superintendence' of public prosecutions*

78. The third dimension of the Attorney General's role in Government involves taking joint responsibility for aspects of criminal justice policy.<sup>145</sup> David Pannick QC has suggested that "the political functions that the Attorney General currently performs as a criminal justice policy minister, including superintendence of the Crown Prosecution Service and other prosecuting authorities, should be transferred to a political Minister for Justice as they are incompatible with an independent legal role".<sup>146</sup> Lord Falconer agreed that this was one option for the potential reform of the office of Attorney General, however he also suggested a variation to this model: that the Attorney General would be "somebody who is not a politician, who is in neither House of Parliament and does the independent legal advice, the superintendence of the prosecution role in the sense of deciding whether a prosecution will start or finish, and has a propriety and public interest role".<sup>147</sup>

79. Lord Boyd of Duncansby disagreed and claimed that he would be "particularly concerned" if it was suggested that in any new arrangements superintendence of the prosecution services could be transferred to the Ministry of Justice with a non-political Attorney General retaining responsibility for individual decisions. He argued that this "would weaken the role of the prosecution services within the criminal justice system and give rise to concerns that there would be a loss of independence".<sup>148</sup> He also made a broader point:

"the arguments in favour of an independent Attorney suggest that it is possible to excise politics from his responsibilities. Of course it is important that the Attorney act independently...when taking individual decisions in relation to prosecutions. However the prosecution of crime is a responsibility of the State and it has a pivotal role in the criminal justice system. Apart from ensuring that the system is democratically accountable it is important to ensure that the policies that are pursued reflect public and political concern".<sup>149</sup>

80. Lord Goodhart QC argued that this combination of different responsibilities within the same office meant that there was indeed a potential conflict in the Attorney General's role as Government minister and as the superintendent of public prosecutions. He said:

"The row over the decision to stop the investigation into allegations of bribery involving BAE Systems shows that conflicts may arise. However, although I disagreed with the decision to stop the investigation, I am not certain that this proves that it would be desirable to separate the two functions of the Attorney General. The

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145 See para 20 of this report

146 See also David Pannick QC *The time has come to reconsider the office of the attorney general* The Times, 27 February 2007

147 Q 160

148 Ev 105

149 Ev 105

CPS is part of the structure of Government. While it is clear that day-to-day activities of the CPS should be handled as independently from the Government as possible, there are cases where it is not in the public interest to prosecute. It would be wrong for the Government itself to take that decision. Equally, it would be difficult to leave a final decision to the DPP or other senior official. The Attorney General, holding a position half way between the Government and the CPS, may well be in the best position to take the decision. It requires an Attorney General to be independent and tough-minded, but it is not easy to think of a better alternative.”<sup>150</sup>

81. Despite acknowledging this tension, Lord Goldsmith argued that separating the roles would not avoid the necessity of making difficult decisions. He said that in the BAE case for example, “there was a difficult decision to be made about national security in this case. As it happened it was the independent prosecutor who made it, but someone has to make that decision and separating the role differently does not get away from that problem”.<sup>151</sup> He concluded that on balance:

“I think it is helpful that when it comes to the formulation of criminal justice policy there is somebody in the circle who, first of all has this relationship with the prosecutors who are at the frontline and know what works, what does not work and what the problems are, and, secondly, who is able to bring considerations — and I do believe it is part of my role- on the Rule of Law as to how we should be proceeding in relation to criminal justice. I think it is better to be on the inside than on the outside”.<sup>152</sup>

82. Professor Spencer argued that the example of the BAE Systems case cited above raises the more fundamental question of whether “it is necessary for the Executive (in whatever shape or form) to have a power to stop prosecutions on the grounds of the State”.<sup>153</sup> He suggested that the UK should follow the Irish model,<sup>154</sup> where new prosecution arrangements have set the Director of Public Prosecutions “free from the power of the Attorney General to give him orders in a given case”.<sup>155</sup> **It would be a major departure from past practice for the Government to abandon any role in seeking the ending of prosecutions on national security grounds or other wider public interests grounds. There is likely to be a need for a mechanism through which Ministers can communicate to the independent Attorney General their recommendation or their insistence that a particular prosecution should not proceed on national security grounds. This should be a transparent process.** The then Prime Minister, Rt Hon Tony Blair’s insistence, in reply to a question from Sir Menzies Campbell on 13 June 2007, that he took full personal responsibility for the advice which led to the ending of the BAE Systems investigation implies that this approach is part of the present arrangements.<sup>156</sup>

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150 Ev 49

151 Q 39

152 Q 36

153 Ev 106

154 See text box on page 27

155 Ev 107

156 HC Deb, 13 June 2007, col 753

83. The present situation where the Attorney General has both ministerial functions and is responsible for making decisions with regard to prosecutions results in a potential conflict of interest. While separating these two functions would not make difficult decisions any easier to make, it would remove the potential for the allegations of lack of independence and political impropriety. We recommend that the Government separate the policy functions and the prosecutorial functions of the Attorney General. The ‘ministerial’ functions would be more appropriately carried out by a minister within the new Ministry of Justice. This would also allow the Attorney General to be a truly independent superintendent of the prosecution services, responsible for deciding on prosecutions and exercising a propriety and public interest role, except in those cases where he or she was instructed by ministers, in a process which would have to be transparent, that on national security or public interest grounds a prosecution should not proceed.

### *Attendance at Cabinet*

84. While there was no consensus about the Attorney General’s role as a minister there was unanimous agreement that the he or she should not regularly attend Cabinet meetings. Both Lord Morris of Aberavon and Lord Mayhew of Twysden disapproved of the modern practice of the current Attorney General’s regular attendance at Cabinet.

85. Lord Mayhew told the Committee: “...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 Cabinet, and you went by invitation to deal with the specific item of business and then you left”.<sup>157</sup> He explained that this was important because “the members of the Cabinet have to accept legal advice from the Attorney and I think it would be more difficult for them to do so if he had been present taking part in a contested debate about policy because they might be tempted to think that if he gave them adverse advice to their political interest that was simply (to) reinforce the view that he had taken in the course of argument”.<sup>158</sup> It is worthy of note that on 22 May 2007 the new SNP Government in Scotland decided to stop inviting the Lord Advocate to attend the weekly meetings of senior Ministers in order to promote her “independence from the political process”.<sup>159</sup>

86. **We recommend that, regardless of whether there are any changes to the ministerial or party political status of the Attorney General, the old convention with respect to the Attorney General’s attendance at Cabinet should be re-established. The Attorney General should attend the Cabinet by invitation only, and then only for the consideration of specific relevant agenda items.**

### **How should the Attorney General be held accountable?**

87. The accountability of the Attorney General’s office is one that has attracted a great deal of debate, including contributions from Lord Goldsmith when he was Attorney General. There is a broad debate to be had about the merits of parliamentary accountability, and

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157 Q 116

158 Q 116

159 [bbc.co.uk/go/pr/fr/-/1/hi/Scotland/6678697.stm](http://bbc.co.uk/go/pr/fr/-/1/hi/Scotland/6678697.stm)

whether the office holder should be a Member of the House of Commons or the House of Lords in order to ensure proper accountability.

88. Lord Falconer pointed out that the most desirable accountability arrangements for the post depend upon its functions. So, for example, he argued that if some of the ministerial functions were removed from the Attorney General and he “instead does legal advice and the superintending prosecution and the public interest roles only, which are things where instead of doing it on a basis where there are political choices to make but there are only legal choices, I think there are two possible models, one where he is not in Parliament and not accountable because he is perceived to be separate”.<sup>160</sup> He continued, “in some ways being out of Parliament gives him greater separation from the politicians...The other is where he is in Parliament, as long as he is the Attorney General, in which case he is answerable for issues like legal advice or making decisions about prosecutions, but it is a different sort of accountability to normal ministers...Being in Parliament makes him accountable, makes him part of the group and to some extent he is superintending them”.<sup>161</sup> Both the desirability and appropriateness of particular accountability arrangements should be dependent upon the roles and functions the Attorney General is to perform.

### *Inside or outside Parliament?*

89. There was a general consensus in the evidence that we received in support of the Attorney General (in the current form of the office) being accountable to Parliament. Lord Mackay of Clashfern argued that “the personal accountability of an individual to Parliament for the way he conducts public office is an important principle of our constitutional law and to undervalue it would be a great mistake and likely to undermine the integrity of our system in the longer term”.<sup>162</sup> Lord Mayhew, speaking in the House of Lords on the 1 February 2007, said that the Attorney General “must be accountable to Parliament if there is to be maximum trust or at least minimum scepticism”.<sup>163</sup> In response to the question of “whether you want accountability or whether you want some distance and separation”,<sup>164</sup> Lord Goldsmith responded that in his judgement “being accountable is better”.<sup>165</sup>

90. However, at present, the extent of the Law Officers accountability to Parliament is heavily circumscribed. Parliamentary Questions relating to legal advice are not normally answered — unless the Government (as the notional “client”) decides otherwise.<sup>166</sup> The relevant Select Committee which includes the Attorney General within its remit (at the time of writing, the Home Affairs Committee) may only inquire into the administration and expenditure of his office and related legal departments. Individual cases and appointments and advice given within Government by the Law Officers are specifically

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160 Q 148

161 Q 148

162 Ev 92

163 HL Deb, 1 February 2007, col. 349

164 Q 67

165 Q 64

166 Successive Governments have done this only very rarely. See Q 140.



excluded. The *sub judice* rule, which restricts debate in relation to cases proceeding through the courts, also severely limits the extent to which the work of the Law Officers is subject to scrutiny.

91. Lord Goldsmith acknowledged that the accountability of the Attorney General before Parliament and especially the House of Commons could be improved, and suggested that this could be achieved by effective scrutiny by a Select Committee.<sup>167</sup> In oral evidence to us, the Attorney General said: “there is no Parliamentary committee specifically charged with scrutinising the work of my office...I can see value in such scrutiny by a suitably well informed Select Committee”.<sup>168</sup> He acknowledged, however, that there would be some limitations in relation to “current criminal cases and national security issues,” but continued that “such an arrangement could significantly enhance accountability for, and understanding of, the Attorney General’s role”.<sup>169</sup> We see no need to set up a Select Committee solely to deal with the Law Officers’ Department, when scrutiny of the Law Officers could be undertaken by the Committee responsible for the Ministry of Justice.

### ***A Member of the Commons or Lords?***

92. There was no general agreement as to which House the Attorney General—if he or she were to remain in Parliament—should belong. Lord Goldsmith argued that the Attorney General, as a rule, should be a Member of House of Lords, he said “it is desirable that the Government’s chief legal adviser should be as free as possible from personal conflicts of interest...the Attorney General should not be faced with the need to defend a seat in the Commons”.<sup>170</sup> David Pannick QC has argued that the “independence of the Attorney General demands security of tenure. Appointment for a period of five years irrespective of a change of government (and subject to removal, like a High Court judge, by Parliament) would ensure that no Attorney General need worry—or appear to be worried—by the prospect of the next reshuffle”.<sup>171</sup> He argued therefore that the Attorney General should automatically be a Member of the House of Lords, but that he should “regularly report to the Constitutional Affairs Select Committee in the House of Commons”.<sup>172</sup>

93. Other advantages to being a Member of the House of Lords were identified. Lord Mayhew agreed that in terms of the Attorney General being able to attend court, that this was a “trifle more easy if you are in the House of Lords rather than having a House of Commons constituency”.<sup>173</sup> However, he added that “I think it is preferable by quite a distance that he should be in the House of Commons, the reasons being that the accountability to Parliament of the Attorney General seems to me to be absolutely key to the public confidence that anybody needs who exercises his jurisdiction”.<sup>174</sup>

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167 Ev 58 and Ev 62

168 Ev 62

169 Ev 62

170 Ev 49

171 See also David Pannick QC, “The time has come to reconsider the office of the attorney general”, *The Times*, 27 February 2007

172 *Ibid*

173 Q 115

174 Q 119

94. Lord Morris agreed, and quoted Sam Silkin's words of 1978 about the importance of accountability to the House of Commons: "to whom would the independent non-political law officer be accountable? If there were no minister through whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister was answerable for an independent law officer would in practice have to control him, else we should have the semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament".<sup>175</sup> Lord Morris added: "He is the head of the Treasury Solicitors, they are answerable to him; he has standing counsel both in civil matters and crime; and he has his own 'Treasury devil' who is a very senior lawyer, and he has to take the broader view which includes the national interest. For all those reasons—and many...I think it would be a sorry day if we lost the accountable person answerable to Parliament, and...preferably, without any disrespect to present holders or previous holders of the office, to the House of Commons. It is the House of Commons that we should aim to get someone answerable to".<sup>176</sup>

95. In defence of the current position, Lord Goldsmith stated "once the Law Officers are in different Houses the nature of the job of Solicitor General is quite different from what it was before 1997, with the Solicitor General becoming in effect a replica in the Commons of the Attorney General in the Lords".<sup>177</sup> Furthermore, Lord Boyd stated that it might not always be possible to get someone from the Commons, mainly because of a lack of qualified lawyers in the Commons. Indeed, Professor Jowell noted that in 1964 there were 100 barristers in the Commons but that this number had fallen to only 34 by 2005, even though during that time the profession itself had increased its numbers five-fold.<sup>178</sup> Lord Boyd continued "accordingly consideration might be given to allowing the Attorney, when a Member of the House of Lords, to address the House of Commons and answer questions in the House."<sup>179</sup> He added that he made this suggestion with "some diffidence" as he appreciated "that may have wider constitutional implications and may offend some sensitivities of the House".<sup>180</sup>

**96. We have not given detailed consideration to the role of the Solicitor General, but our recommendations are not based on the idea that the Solicitor General should continue to act as a representative of the Attorney General in the Commons, if the Attorney General becomes a non-political legal adviser. That would be to confuse the line of accountability, and it would seem more appropriate for the Solicitor General's role, if it remains, to be that of deputy to the non-political Attorney General, and to be undertaken by a career lawyer.**

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175 Q 119

176 Q 122

177 Ev 50

178 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p11

179 Ev 105

180 Ev 106

### *Alternative models of Parliamentary accountability*

97. It does not necessarily follow that in order to be accountable to Parliament the Attorney General has to be a Member of either the Commons or the Lords. There are a variety of models, including those for the Parliamentary Ombudsmen and the Electoral Commission, who remain accountable to Parliament without being a Member of either House. Another interesting example is that of the Lord Advocate in Scotland, who, although not an elected Member of the Scottish Parliament, and therefore without voting rights, is held accountable to the Scottish Parliament as she is a Member of the Scottish Executive.<sup>181</sup> Both Lord Morris and Lord Mayhew rejected these other models as being inappropriate for the Attorney General. Lord Mayhew of Twysden said: “I think that the controversiality of his decision and the fact that it impinges upon individual liberty is such that most Members of the House of Commons in my time would have regarded it as very much second best to be able to have him only in a Select Committee”.<sup>182</sup>

98. Lord Morris of Aberavon made the point that the Ombudsman cannot stand at the Bar of the House and answer questions, which was perceived to be the “crucial test.”<sup>183</sup> Lord Mayhew of Twysden agreed, noting that in his experience his appearance at the dispatch box was crucial to satisfy the House that they had received “an honest explanation of a difficult decision.”<sup>184</sup> In this context, he argued “having the organ grinder there is absolutely essential; monkeys would have been regarded as inadequate I think”.<sup>185</sup> He added: “I do not see how he can be accountable to the Parliament unless he is a Member of it, and I think it is absolutely essential for public confidence reasons that he should be”.<sup>186</sup>

99. However, in his oral evidence to the Committee, Lord Falconer questioned the basis upon which accountability to Parliament was regarded as such a necessity. While he acknowledged that there was of course, “considerable merit in being possible to question in parliament, either Lords or Commons, the Attorney General on decisions such as BAE if that is a decision that he had taken,” he added “on the other hand, if the position is that these sorts of decisions, either referred to legal advice or prosecutions, are to be taken on a quasi-judicial basis, they are being taken in effect—whether it be the giving of advice or the forming of a view about whether a prosecution should go ahead—on a quasi-judicial basis”.<sup>187</sup> He continued therefore “in one sense, that is not particularly a matter where accountability is so critical. Politicians get advice a lot of the time and there is a difference between the decisions they make on the basis of that advice and the quality of advice that they get”.<sup>188</sup>

**100. We believe that the issue of accountability is key. The central cause of dissatisfaction with the role of Attorney General stems from the fact that the current**

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181 See text box on p. 28

182 Q 126

183 Q 120

184 Q 120

185 Q 120

186 Q 122

187 Q 161

188 Q 161

arrangements blur the distinction between action taken by the Attorney General as a minister and action taken by the Attorney General as a legal adviser. This is more than just a presentational problem. The office should be reformed so that the public and Parliament can be clear about the basis on which decisions are taken. Parliament and the public have the right to be able to identify an audit trail which shows whether a decision is taken on a technical, legal basis or whether the decision as a political one. If a decision has been taken on the basis of political instructions, it is ministers who should take responsibility and be accountable for those instructions.

## 5 Conclusion

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101. The role of the Attorney General has evolved over centuries. It developed at a time when there were sufficient members of the Bar of the right professional stature who were senior Members of the House of Commons. It also worked well when the law was less specialised—in the 19th century a senior lawyer could be held to ‘know the law’ in a way which is not possible today. Current conditions make this role untenable.

102. Other comparable jurisdictions have moved away from the English model. The Constitutional Reform Act 2005 and the creation of the Ministry of Justice in May 2007 have changed the legal and political landscape. The presence of the Attorney General in the House of Lords has altered the traditional status of the Attorney General as being both a senior Member of the Bar and of the House of Commons. In this sense, he or she is no longer at the junction between law and politics in the same way as before—a point effectively conceded by Lord Goldsmith when he was reluctant to be described as a politician.

103. The tensions which we have identified in our Report have been brought into sharp focus as a result of a series of recent controversial and high profile cases involving the Attorney General. The ending of the BAE Systems investigation and the Attorney General’s potential role in deciding whether or not there will be prosecutions following the ‘cash for honours’ investigation, have raised serious public concerns about how independence and impartiality can be guaranteed in making such decisions. Therefore, reform is also required in order to restore public trust in the Attorney General’s role.

104. In evaluating options for reform, this Report focused on addressing the question of what should be the role and function of the Attorney General. In answering this question, Lord Falconer, the then Lord Chancellor, identified three options: the status quo; somebody who is in either the Lords or the Commons but is a non-politician; and somebody who is not a politician, who is in neither House of Parliament and gives legal advice, the superintendence of the prosecution role in the sense of deciding whether a prosecution will start or finish, and has a propriety and public interest role.<sup>189</sup> While Lord Goldsmith argued that the “advantages outweigh the disadvantages”<sup>190</sup> of the current arrangements, we disagree. **We have concluded that the status quo is not an option, and on balance, we agree that de-politicising the prosecution role should be one of the central purposes of reform, not least in order to restore public confidence in the role.**

105. This report identified several different models as to how this could be achieved. **While not attempting to provide a detailed blueprint for reform or to prescribe a specific detailed model for reform, 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**

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189 Q 160

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**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 that instruction.**

106. Furthermore, an Attorney General of this type should not be a party-political appointment, and should not, as a matter of course, attend Cabinet or be a member of either House of Parliament. He or she should attend Cabinet only in the capacity as legal adviser and only on specific agenda items. Parliamentary accountability of this very specific and clearly defined role could be achieved by a variety of mechanisms currently used to hold to account other officers of the House, for example the Ombudsmen or the Comptroller and Auditor General.

**107. Reform of the office of the Attorney General is needed, and we welcome the fact that both the Prime Minister and the new Attorney General have indicated a willingness to engage in reform. Making the office fit for purpose in the 21st century is essential in developing a robust and independent prosecution service, and for the provision of legal advice to government which has the confidence and respect of politicians and the public alike. If a decision has been taken on the basis of political instructions, it is ministers who should take responsibility and be accountable for those instructions.**

## Conclusions and recommendations

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1. While we accept that there has to be some ministerial policy direction for the prosecution services, the lack of transparency in the Attorney General's role in decision making in prosecutorial decisions is unsatisfactory. We need to consider whether responsibility for both types of function should remain the responsibility of the Attorney General. (Paragraph 24)
2. The Constitutional Reform Act 2005 and the creation of the new Ministry of Justice have changed the landscape within which the Attorney General performs his or her functions. While these changes have drawn attention to the inherent tensions in the role, neither the Constitutional Reform Act 2005 nor the creation of the Ministry of Justice have clarified or strengthened the independence of the office of the Attorney General. There is confusion about the overlap between the Attorney General's position as the Government's chief legal adviser, his role as the superintendent of the Prosecution services (an independent role), and his role in carrying out 'ministerial functions' in relation to criminal justice policy (a party political role). In our view, the time has come to reform the basis on which he or she carries out his or her functions and to define more clearly the extent of his or her role. (Paragraph 34)
3. We welcome Lord Goldsmith's commitment to publish the whole of the advice that relates to the decision not to prosecute should there be no prosecutions as a result of the Police's inquiry into allegations of 'cash for honours'. We also welcome his willingness to consult Opposition parties before deciding who should provide that independent advice. We hope that the new Attorney General will honour these commitments. However, we are concerned that this does not address the fundamental conflict of interest that the new Attorney General may face in deciding whether or not to pursue a prosecution. (Paragraph 42)
4. Recent controversial issues including the 'cash for honours' investigation, the decision not to prosecute in the BAE Systems case and allegations of political pressure to amend legal advice on the war in Iraq, have compromised or appeared to compromise the position of the Attorney General. The perceptions of a lack of independence and of political bias have risked an erosion of public confidence in the office. (Paragraph 54)
5. We agree that there are inherent tensions in the role of the Attorney General and that this is not a new situation. However, it is time that these issues were addressed. The tensions which have been highlighted by these three controversial cases, alongside the institutional problems identified earlier, point to the need for the reform of the role and responsibilities of the Attorney General. (Paragraph 55)
6. The Attorney General's responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role. Allegations of political bias, whether justified or not, are almost inevitable given the Attorney General's seemingly contradictory positions as an independent head of prosecutions, his or her status as a party political Prime Ministerial appointment, and his or her political role in the

formulation and delivery of criminal justice policy. This situation is not sustainable. (Paragraph 56)

7. We disagree with Lord Goldsmith's assessment that the problems relate only to the perceptions of the role of the Attorney General rather than to the nature and multiple functions of that role. While we see merit in improving the clarity of the existing role and functions through public education as a means of re-building public confidence, Lord Goldsmith's proposals for the reform of the Attorney General's office do not address the inherent tensions in the role. In that sense, far more fundamental questions need to be considered about the functions of the office of Attorney General and its constitutional position. (Paragraph 63)
8. It is both possible and desirable to ensure transparency and accountability in prosecutorial decision making. There are models which could improve the clarity, transparency and accountability of this decision making process. For example, the Attorney General could be an independent legal adviser to the Government but not a member of the Government; the Attorney General could be a member of the Government, but have no responsibility for the provision of legal advice and no prosecutorial functions; or the office of Attorney General could be abolished, with a junior minister within the Ministry of Justice performing the policy functions, an independent officer undertaking the legal advice and independent prosecutorial role and the Secretary of State taking overall political responsibility and accountability for controversial prosecutorial decisions. The question of who holds the title of Attorney General is secondary: the important point is the separation of purely legal decisions or advice from functions which have political content, and the titles of either Attorney General or Solicitor General could be attached to either of the offices if the functions are split. (Paragraph 65)
9. We agree with the view expressed by Lord Falconer that the status quo is not maintainable, and suggest that a series of steps should be taken to reform the role of the Attorney General. We see no reason why the official exercising the role of legal adviser to the Government should be a political appointee or a member of the governing party. Both in perception and reality, it would improve the independence and public confidence in the impartial nature and authority of the provision of legal advice if it were not the responsibility of someone in political life. (Paragraph 72)
10. We recommend that following the Constitutional Reform Act 2005 the Government should give further consideration to the statutory arrangements for 'upholding the Rule of Law' within Government. It is not appropriate that the responsibility for upholding the Rule of Law lies with one member of the Government alone. We suggest that this be explored within the context of the development of a new Ministerial Code. (Paragraph 76)
11. Furthermore, while we note Lord Goldsmith's claim that it is necessary to have a lawyer at the heart of Government, we question the merits of this claim. The inept handling of the beginning of the process of reform which culminated in the Constitutional Reform Act 2005 and the secretive process of establishing a Ministry of Justice, which was trailed in the newspapers before consultation either of the



judiciary or the Lord Chancellor, were seemingly unaffected by the presence of lawyers within Cabinet. (Paragraph 77)

12. It would be a major departure from past practice for the Government to abandon any role in seeking the ending of prosecutions on national security grounds or other wider public interests grounds. There is likely to be a need for a mechanism through which Ministers can communicate to the independent Attorney General their recommendation or their insistence that a particular prosecution should not proceed on national security grounds. This should be a transparent process. (Paragraph 82)
13. The present situation where the Attorney General has both ministerial functions and is responsible for making decisions with regard to prosecutions results in a potential conflict of interest. While separating these two functions would not make difficult decisions any easier to make, it would remove the potential for the allegations of lack of independence and political impropriety. We recommend that the Government separate the policy functions and the prosecutorial functions of the Attorney General. The 'ministerial' functions would be more appropriately carried out by a minister within the new Ministry of Justice. This would also allow the Attorney General to be a truly independent superintendent of the prosecution services, responsible for deciding on prosecutions and exercising a propriety and public interest role, except in those cases where he or she was instructed by ministers, in a process which would have to be transparent, that on national security or public interest grounds a prosecution should not proceed. (Paragraph 83)
14. We recommend that, regardless of whether there are any changes to the ministerial or party political status of the Attorney General, the old convention with respect to the Attorney General's attendance at Cabinet should be re-established. The Attorney General should attend the Cabinet by invitation only, and then only for the consideration of specific relevant agenda items. (Paragraph 86)
15. We have not given detailed consideration to the role of the Solicitor General, but our recommendations are not based on the idea that the Solicitor General should continue to act as a representative of the Attorney General in the Commons, if the Attorney General becomes a non-political legal adviser. That would be to confuse the line of accountability, and it would seem more appropriate for the Solicitor General's role, if it remains, to be that of deputy to the non-political Attorney General, and to be undertaken by a career lawyer. (Paragraph 96)
16. We believe that the issue of accountability is key. The central cause of dissatisfaction with the role of Attorney General stems from the fact that the current arrangements blur the distinction between action taken by the Attorney General as a minister and action taken by the Attorney General as a legal adviser. This is more than just a presentational problem. The office should be reformed so that the public and Parliament can be clear about the basis on which decisions are taken. Parliament and the public have the right to be able to identify an audit trail which shows whether a decision is taken on a technical, legal basis or whether the decision as a political one. If a decision has been taken on the basis of political instructions, it is ministers who should take responsibility and be accountable for those instructions. (Paragraph 100)

17. We have concluded that the status quo is not an option, and on balance, we agree that de-politicising the prosecution role should be one of the central purposes of reform, not least in order to restore public confidence in the role. (Paragraph 104)
18. While not attempting to provide a detailed blueprint for reform or to prescribe a specific detailed model for reform, 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 that instruction. (Paragraph 105)
19. Reform of the office of the Attorney General is needed, and we welcome the fact that both the Prime Minister and the new Attorney General have indicated a willingness to engage in reform. Making the office fit for purpose in the 21st century is essential in developing a robust and independent prosecution service, and for the provision of legal advice to government which has the confidence and respect of politicians and the public alike. If a decision has been taken on the basis of political instructions, it is ministers who should take responsibility and be accountable for those instructions. (Paragraph 107)

# Formal minutes

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**Tuesday 17 July 2007**

Members present:

Mr Alan Beith, in the Chair

Bob Neill

Keith Vaz

Mr Andrew Tyrie

Dr Alan Whitehead

Draft Report (Constitutional Role of the Attorney General), proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 107 read and agreed to.

Summary agreed to.

Conclusions and recommendations read and agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

Several papers were ordered to be reported to the House for printing with the Report

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[Adjourned till Tuesday 24 July at 4.00pm]

## Witnesses

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### Wednesday 7 February 2007

*Page*

**Rt Hon Lord Goldsmith QC**, a Member of the House of Lords and Attorney General

Ev 1

### Wednesday 28 February 2007

**Rt Hon Lord Morris of Aberavon KG QC** and **Rt Hon Lord Mayhew of Twysden QC**

Ev 17

**Rt Hon Lord Falconer of Thoroton QC**, a Member of the House of Lords and Lord Chancellor and Secretary of State for Constitutional Affairs

Ev 23

### Wednesday 27 June 2007

**Robert Wardle**, Director, Serious Fraud Office

Ev 32

**Rt Hon Lord Goldsmith QC**, a Member of the House of Lords and Attorney General

Ev 39

## List of written evidence

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1	Rt Hon Lord Goodhart QC	Ev 49
2	Graham Rodmell, Transparency International (UK)	Ev 50
3	Corner House	Ev 54
4	Rt Hon Lord Goldsmith QC, Attorney General	Ev 57
5	Rt Hon Lord Mackay of Clashfern KT PC	Ev 91
6	The Lord Advocate, Scotland	Ev 92
7	Rt Hon Lord Boyd of Duncansby QC	Ev 104
8	Professor John Spencer QC	Ev 106
9	Director of Public Prosecutions, Ireland	Ev 107

## Reports from the Constitutional Affairs Committee

### Session 2006-07

First Report	Party Funding	HC 163
	<i>Government response</i>	<i>Cm 7123</i>
First Special Report	Party Funding – Oral evidence from the Lord Chancellor on the role of the Attorney General	HC 222
Second Report	Work of the Committee 2005-06	HC 259
Third Report	Implementation of the Carter Review of Legal Aid	HC 223
	<i>Government response</i>	<i>Cm 7158</i>
Fourth Report	Freedom of Information: Government’s proposals for reform	HC 415

### Session 2005-06

First Report	The courts: small claims	HC 519
	<i>Government response</i>	<i>Cm 6754</i>
Second Report	The Office of the Judge Advocate General	HC 731
Third Report	Compensation culture	HC 754
	<i>Government response</i>	<i>Cm 6784</i>
Fourth Report	Legal Services Commission: removal of Specialist Support Services	HC 919
Fifth Report	Compensation culture: <i>NHS Redress Scheme</i>	HC 1009
	<i>Government response</i>	<i>Cm 6784</i>
First Special Report	Legal Services Commission’s response to the Fourth Report on removal of Specialist Support Services	HC 1029
Sixth Report	Family Justice: the operation of the family courts revisited	HC 1086
Seventh Report	Freedom of Information—one year on	HC 991
	<i>Government response</i>	<i>Cm 6937</i>
Eighth Report	Reform of the coroners’ system and death certification	HC 902

### Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
	<i>Government response</i>	<i>Cm 6470</i>
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [ <i>Lords</i> ]: the Government’s proposals	HC 275
	<i>Government response</i>	<i>Cm 6488</i>
Fourth Report	Family Justice: the operation of the family courts	HC 116
	<i>Government response</i>	<i>Cm 6507</i>
Fifth Report	Legal aid: asylum appeals	HC 276
	<i>Government response</i>	<i>Cm 6597</i>
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee)	HC 243
	<i>Government response</i>	<i>Cm 6647</i>
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates	HC 323
	<i>Government response</i>	<i>Cm 6596</i>

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