House of Commons
Constitutional Affairs Committee

Constitutional Role of the Attorney General

Fifth Report of Session 2006-07

Report, together with formal minutes, oral and written evidence

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The Constitutional Affairs Committee

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Summary

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**

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\(^1\) 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".\(^2\) 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 painfulllest 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”.\(^3\)

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”.\(^4\)

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.\(^5\)

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1. Rt Hon Lord Williams QC and Rt Hon Lord Goldsmith QC
2. Q 319
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. 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; 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
security requires it, not to make key prosecution decisions in individual criminal cases. 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.  

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8 HC Deb, 3 July 2007, col 817

2 The Constitutional Role of the Attorney General

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.\(^{10}\) 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”.\(^{11}\)

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.

\(^{10}\) http://www.lslo.gov.uk/goldsmith.htm

\(^{11}\) 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.  

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”.  

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”. 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”.  

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...”  

**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, which has been supported by Attorneys General ever since: “it

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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
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”. 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.”

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. 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.”

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. In cases of major importance the Attorney
General may represent the Government in the hearing in person.
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.  

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, 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. He identified this role as “most obviously my role as the Government’s chief legal adviser, although it goes wider”. 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”. 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”. 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”.

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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, and that he would have halted the investigation on different grounds. The lines of accountability were further blurred by the fact that the Attorney General sought his own independent legal advice in this particular case.

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
result of the 2005 Act, the constitutional balance had indeed been “radically altered”. 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”.

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.

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”. 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.”

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 Sargent 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
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.”

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”. 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.

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 role.”

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38 Q 106
39 Ev 49
40 Rt Hon Jack Straw MP
It is right that there should be a lawyer at the heart of Government...to ensure that the law is properly respected.”

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. Neither did it disturb the position of the prosecutors, who remain outside the control of an ordinary political Minister. 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.”

**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. 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...” 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”. 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.

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

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.49 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.50

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”?51 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”.52 This, he argued, has resulted in claims that “the time had come to appoint an independent Attorney, as in other countries”.53

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.54 The case file was handed to the Crown Prosecution Service (CPS) on 20 April 2007,55 and on 4 June 2007 the CPS asked

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
55 http://news.bbc.co.uk/1/hi/uk_politics/5174108.stm
the police to “undertake further inquiries”. 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 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."

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. 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.”

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”. He confirmed that this would mean “the whole of the advice which relates to the decision not to prosecute”. Lord Goldsmith also

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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.  

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 but also to suggestions that the case could be subject to judicial review. 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. 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”.

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.

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”, and that while he agreed with that decision, that his view was not based “quite on the same grounds”. 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

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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.
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”.\(^{71}\) In examining
the public interest in this case, Lord Goldsmith acknowledged that he had consulted a
“number of other Ministers”\(^ {72}\) 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”.\(^ {73}\)

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...”\(^ {74}\) 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”.\(^ {75}\) 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”.\(^ {76}\)

**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, Elfy\(n\) 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”.\(^ {77}\) 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.\(^ {78}\) 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.\(^ {79}\) 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
\(^{76}\) 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
\(^{79}\) 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 (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. 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”.

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”. 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.”

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”. 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
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”.

**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”. 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”, 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”.

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.

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”. 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

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.”

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

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”. 93 Much of the evidence which we received was similarly cautious about changing the nature of the office of Attorney General. 94 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” 95 — he maintained that the issue was not “with the role itself but with its perception”. 96

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”. 97 The solution he suggested was “not to change the role but to provide more information as to its boundaries and scope”. 98 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”. 99

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”, 100 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”. 101 Lord Mayhew agreed “there was mileage and merit in that…” 102 Lord Mayhew also suggested that a further means of improving clarity would be to produce “a statutory statement” of the Attorney General’s

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
responsible. He argued that this would be particularly useful in clarifying the Attorney General’s non statutory role in relation to upholding the public interest.\footnote{\textit{Q 132}}

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”.\footnote{\textit{Q 156}} 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.”\footnote{\textit{Q 159}}

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.\footnote{\textit{Attorney General, The Role of the Attorney General in Changed Constitutional Circumstances}, Birmingham College of Law. 29 November 2006} 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”.\footnote{\textit{Ev 81}} 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”.\footnote{\textit{Ibid}}

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”.\footnote{\textit{Q 94}} 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,
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. 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.111

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.\(^{112}\)

\[^{112}\text{See also David Pannick QC, “The time has come to reconsider the office of the attorney general”, The Times, 27 February 2007.}\]
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. The most interesting and instructive models of depoliticised 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”. 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. 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”.

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. 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

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.\footnote{Ev 109}

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.\footnote{Ev 107} 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.\footnote{Ev 107} In the last 35 years only two Attorneys General have been Members of Parliament.\footnote{Ev 108}

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”,\footnote{Ev 92} 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.\footnote{Ev 92}

The Lord Advocate is a member of the Executive and accountable to the Scottish...
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.\footnote{124}

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”. \footnote{125} 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”. \footnote{126}

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…”. \footnote{127} 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, \footnote{128} 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”. \footnote{129}

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”. \footnote{130} When it was put to him that

\footnotesize{\begin{tabular}{@{}l} 127 Q 136  \\
128 Q 155  \\
129 Q 155  \\
130 Q 40 \end{tabular}}
he took the Labour Whip in the House of Lords, he acknowledged “well, if that is the definition, yes, of course”. He reaffirmed this point of view about his semi-detached political role in his second appearance before us.

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”. 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”. 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”. 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.

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) had made it “more important than ever
that there be within Government someone who can give prominence to the maintenance to the Rule of Law".\textsuperscript{138} 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”.\textsuperscript{139}

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”.\textsuperscript{140} 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”.\textsuperscript{141}

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”.\textsuperscript{142} 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”.\textsuperscript{143} 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”.\textsuperscript{144} 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

\textsuperscript{138} Ev 105
\textsuperscript{139} Attorney General, The Role of the Attorney General in Changed Constitutional Circumstances, Birmingham College of Law. 29 November 2006
\textsuperscript{140} Q 106
\textsuperscript{141} Q 106
\textsuperscript{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
\textsuperscript{143} Q 92
\textsuperscript{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.\(^{145}\) 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”.\(^ {146}\) 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”.\(^ {147}\)

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”.\(^ {148}\) 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”.\(^ {149}\)

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.”

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”. 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”.

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”. He suggested that the UK should follow the Irish model, 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”. 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.

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”.\(^{157}\) 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”.\(^{158}\) 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”.\(^{159}\)

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

\(^{157}\) Q 116
\(^{158}\) Q 116
\(^{159}\) bbc.co.uk/go/pr/fr/-/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”. 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”. 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”. 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”. In response to the question of “whether you want accountability or whether you want some distance and separation”, Lord Goldsmith responded that in his judgement “being accountable is better”.

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. 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. 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”. 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”. 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”. 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”. 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”.

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”. 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”.

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”.\(^{175}\) 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”.\(^{176}\)

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”.\(^{177}\) 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.\(^{178}\) 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.”\(^{179}\) 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”.\(^{180}\)

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.

\(^{175}\) 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.  

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 controversiability 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”.

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.” 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.” In this context, he argued “having the organ grinder there is absolutely essential; monkeys would have been regarded as inadequate I think”. 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”.

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”. 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”.

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

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.\footnote{Q 160} While Lord Goldsmith argued that the “advantages outweigh the disadvantages”\footnote{Q 44} of the current arrangements, we disagree. \textbf{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. \textbf{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.

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

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
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

Tuesday 17 July 2007

Members present:

Mr Alan Beith, in the Chair

Bob Neill  Mr Andrew Tyrie  Keith Vaz  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

[Adjourned till Tuesday 24 July at 4.00pm]
Witnesses

Wednesday 7 February 2007

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

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
Oral Evidence

Taken before the Constitutional Affairs Committee

on Wednesday 7 February 2007

Members present

Mr Alan Beith, in the Chair

David Howarth
Mrs Siân C James
Bob Neill

Mr Andrew Tyrie
Dr Alan Whitehead
Jeremy Wright

Witness: Rt Hon Lord Goldsmith QC, a Member of the House of Lords, Attorney General, gave evidence.

Q1 Chairman: Mr Attorney General, welcome back to the Committee. Thank you very much for your memorandum, which is very helpful and I think saves us from asking quite a number of things we might otherwise have had to. It sets out very clearly your view of your role and gives us some other interesting material as well. In that memorandum you have referred to select committees and when stressing your accountability to Parliament you said that you could see value in scrutiny by a suitably well-informed select committee. I take it that you had us in mind when you wrote those words. In fact, you might be interested to know that when the Committee was first set up it was originally proposed that the Attorney General’s office should come under our scrutiny, but mysteriously it failed to be included.

Lord Goldsmith: I am aware of that. Of course I had you in mind, although it is not, of course, for me to say which (if this was the view of the House) ought to be such a select committee, but you are absolutely right, that is one of the points I can pick up. I see merit in a slightly more regular communication with the Select Committee than I actually have at the moment.

Q2 Chairman: Is there not an associated problem? The Minister of State in the Department for Constitutional Affairs said as recently as last Saturday, “It is a contradiction in terms to have an accountable office-holder who was unable to publish the advice he had given to the people to whom he was accountable. It is not enough for government ministers to say that the advice is lawful. Backbenchers, let alone the wider public, want to see for themselves what the arguments are.” Do you agree and is that Government policy?

Lord Goldsmith: I am aware of that. Of course I had you in mind, although it is not, of course, for me to say which (if this was the view of the House) ought to be such a select committee, but you are absolutely right, that is one of the points I can pick up. I see merit in a slightly more regular communication with the Select Committee than I actually have at the moment.

Lord Goldsmith: I do not agree, and it is not Government policy. I am getting very helpful advice from ministerial colleagues at the moment from a number of directions. It is not Government policy and I do not agree. There is one point, from what I understand she said, which is important and I would want to underline it. It is this point about accountability, which I think is hugely important. On that issue, as I understand what she has said, she takes the view, as I do, that it is important to have the law officers within rather than without. Indeed, as you said when we started, you have been voting on me at the moment in a sense and the fact is that if one takes the example of BAE, on three occasions now I have addressed and answered questions in the House of Lords on this, the Solicitor General has also on three occasions dealt with that. We have dealt with a large number of parliamentary questions (PQs), also with correspondence, none of which would, I believe, you could really expect to happen but for the fact that the law officers are within and therefore accountable to Parliament. I think that is a very important positive point. The other point is the issue in relation to legal advice and I set out in the memorandum—and it is well-understood, it goes back a long time and the arguments have been well-rehearsed—why confidentiality generally attaches to the legal advice which is given. I do not think it would be in the interests of the Government, for example, or of the country, if there was litigation and advice given to the Government about the litigation, that that should be published. That would only give aid and comfort, as it were, to others.

Q3 Chairman: During litigation?

Lord Goldsmith: That is an example which I give, but there are other examples as well. As I say, they are set out in the memorandum, which I appreciate you have read. If I can address quite directly then the question which I know is at the forefront of many people’s minds, what if there were to be another occasion where a Prime Minister came to the House saying, “For this reason and that reason military action is something that we want to undertake, the Government believes should be undertaken, and we ask you, Parliament, for your view on that.” I think under those circumstances, first of all Parliament would expect and would have to receive a full explanation of the legal basis for that, but it would be a matter for the Prime Minister of the day to determine whether a way of doing that was to disclose legal advice which had been received in that respect.

Q4 Chairman: That directly contradicts Harriet Harman’s statement that backbenchers, let alone the wider public, want to see for themselves what the arguments are.
Lord Goldsmith: I appreciate that, but I am sure I have not come here simply to have a debate about why I disagree with certain statements which have been made outside government by a fellow minister. I am putting forward, and I have put forward in the memorandum, what I understand at present to be Government policy and what the arguments are in relation to that and I have just addressed I think the key question, what would happen if we found ourselves in this situation again? As I have said, and I have no problem with this at all, it would be for the Prime Minister of the day to determine how to ensure that Parliament, and therefore the public at least through Parliament, understood the basis upon which military action was being proposed.

Q5 Chairman: For those of us who have been in the House for quite a long time things have in a sense changed slightly because the concept of sending for the Attorney was one which was quite current when I first entered the House and the notion that he would be asking the Prime Minister’s permission in order to make clear something which the House needed to know to make a decision did not seem to enter into that consideration.

Lord Goldsmith: If I may say so, I think you raise a very important point about the sending for the Attorney because I think things do seem to have changed. I have always responded when I have been asked, for example, by select committees to come and give advice really on the legal position. I did it in relation to assisted dying. I have done it in relation to the rule of sub judice and I have done it in the House itself, my House, in relation to smacking. I think there is more opportunity for that to be done, but I think that is partly a question for Parliament to say, “On these occasions we actually want to hear from the law officers on this or that issue,” and then one has to determine whether it is the right moment to do it and it is appropriate to do it. As the memorandum says in principle, I think that I would welcome more of that.

Chairman: We will return to some aspects of this later.

Q6 David Howarth: There are two phrases which constantly come up in your memo and in discussion with the Attorney General. One is the Rule of Law and the other is the public interest, and I just want to explore for a while your conception of both those phrases. Can we start with the Rule of Law. How would you define the Rule of Law?

Lord Goldsmith: It is a very good question, because different people define it in different ways. For me there are really three key elements in relation to the Rule of Law. One of those is compliance with the law and that means domestic and international obligations. That is a key part of the Rule of Law and I am very happy to expand on the way in which my role is concerned with that aspect of the Rule of Law. The second part of the Rule of Law, as I see it, is the relationship with the courts. That is partly respect for the courts and their judgments, which is a hugely important part of having the sort of democratic arrangements which we have, and again I can illustrate the significance of that, but it is also about being sure that within appropriate boundaries—and there are one or two boundary limits on this—we subject ourselves as government to the scrutiny of the independent courts. One of the big criticisms, in my view, of what our otherwise very close allies, the Americans, did in relation to Guantanamo Bay was to try and put it offshore and away from the courts. I think that was completely wrong and it is something which we would, I hope, never have contemplated. So that is the second element of the Rule of Law. The third element of the Rule of Law, I believe, is that there are 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. I think there are some of those on which we ought not to be compromising. One of those is a fair trial, for example, which I think is a key principle. So those are the three headings into which I would put the Rule of Law.

Q7 David Howarth: Let us take the second one first. I think the first one we will come back to and the third we will take as read, but the second one, the degree to which government respects the principles of legality through subjecting itself to the courts. One aspect of your job has to do with prosecutorial discretion. That is non-reviewable?

Lord Goldsmith: Well, it is an area where I am accountable to Parliament.

Q8 David Howarth: But not to the courts?

Lord Goldsmith: There is not a case where they have reviewed the exercise by me of discretion, but they have in relation to the Director of Public Prosecutions and other prosecutors. That is a relatively recent development, it has happened in recent years, but they have not in relation to any decision I have made.

Q9 David Howarth: Do you think that situation is satisfactory, that you are in a sense outside the Rule of Law when you exercise prosecutorial discretion?

Lord Goldsmith: I absolutely resist the suggestion that I am outside the Rule of Law. I do not think that is so.

Q10 David Howarth: In that second sense, obviously not in the first?

Lord Goldsmith: No, I do not think that can be right. For example, any prosecutorial decision, if it is a decision to prosecute, finds itself in front of the courts in any event and the courts will then determine whether or not the prosecution should have taken place if there is not sufficient evidence there, and the courts and judges will not be slow to criticise if they think that although technically there was a case to bring it was wrong in the public interest, the second area you want to talk about. So I do not accept that at all, but there is a question about accountability of the Attorney General. The last time it was debated in the courts, the view of the House of Lords was that when it came to the exercise of that discretion the Attorney General’s
accountability was to the public through Parliament rather than through the courts. Those are two different mechanisms for accountability.

Q11 David Howarth: The controversy is always about decisions not to prosecute rather than to prosecute, and that is the one where the courts manage to exclude themselves. We are back to Gouriet through to BAE Systems.

Lord Goldsmith: Not always. I had a lot of controversy over decisions to prosecute in relation to events which took place in Iraq. That was a decision to prosecute, not to not prosecute, but I accept the point that there is a difference between the two.

Q12 David Howarth: Yes, and the question is whether a decision not to prosecute, say in the case of BAE “S” is itself fully within the Rule of Law.

Lord Goldsmith: We have had three hours, I think, of debate this afternoon but, if I may, I am not going to let that point go by without saying a word about it because I absolutely reject that. I think it is enormously important to stress that the decision was taken by the Director of the SFO and there has been threatened a judicial review of his decision, so that is something which may end up in court. It is not a question of the Attorney General’s decision, but they may try and judicially review me as well. So be it, we will see what the court has to say about that, but what I do not understand is why it is first of all not accepted that that was his decision when he says that it was, and he said that very clearly on a number of occasions, never mind about what I think about people not saying that is the case. He is a very senior, experienced public servant who has been doing this for a long time and why it is not accepted when he says that was his decision I think is really something one needs to ask about. Secondly, we know there is a controversy in relation to the decision itself, one taken in relation to national security, and people will have to judge for themselves what they are saying, that they do not think there was a risk to national security or that they would have been prepared to run it in any event. Some of these decisions are tough decisions. The Director was faced with a tough decision. He explained again today in an interview why he took that decision and I think people should respect him for that and accept that.

Q13 David Howarth: But you had a part in that decision. You have an overall superintendency of the SFO and the DPP?

Lord Goldsmith: Yes.

Q14 David Howarth: How do you understand that relationship?

Lord Goldsmith: In that particular case, he told me that his decision was that he should not continue with the investigation in the light of the information that he had and, as I have said very openly and came to the House of Commons (as the Solicitor General did, too) to say I agreed with that decision. Not quite on the same grounds that he had because I had looked very carefully at the case. I had spent some three days with the investigators from the SFO. I had taken independent legal advice myself and I did not actually think the case was going to get anywhere. I did not think that it was right that we subject this country and the people in this country at risk, serious risk, of national security for, in the Director’s view, an uncertain case and in my view a case which would not actually have got anywhere.

Q15 David Howarth: That takes us on to the public interest part of your thesis. Just an aside, I think at one point the Government was suggesting on that particular case that there was some sort of balance to be struck between the Rule of Law on one side and the public interest on the other. I gather you have now renounced that position?

Lord Goldsmith: I have not renounced it because it was never my position. Let me just be clear about this, because the SFO, when they made their decision, announced it. It was a market sensitive decision, it affected the market considerably and there were all sorts of leaks so they moved very quickly to announce it, which is entirely understandable. That is also why the Solicitor General and I came quickly to the House. We had to wait until after the markets were closed, but we came at that stage. In their press release the SFO used an expression, they said that it was necessary to balance the Rule of Law against wider national considerations. I know what they meant by that. It was necessary to balance the desirability of bringing a prosecution, which is generally what you do, against other considerations. That is a perfectly proper balance. I come back to that. I think with hindsight it was an unfortunate expression because it could be misunderstood and that is why in the debate last week I was very happy to say that if anyone takes that as meaning that we or I think that you can set aside the Rule of Law for reasons of expediency or general interest, that is absolutely not the position. But the Rule of Law does recognise that in all 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. That is set out in the code for Crown Prosecutors—I see that you have a copy there—which has been always referred to. It is laid before Parliament and it is required by statute to be provided, and that has always required those two considerations, so there is nothing wrong with looking at whether the public interest is in favour of prosecuting or not.

Q16 Chairman: You took a different view from the Director of the Serious Fraud Office as to whether the case could actually have a chance of being successfully prosecuted?

Lord Goldsmith: Yes, I did. The case had been investigated for two years. A lot of material has appeared in the press about invoices, about payments which were being made by BAE, allegations of a slush fund. That really relates to the period before 2002. It was in 2002 we changed the law in any event to make corruption of an overseas official clearly an offence. The SFO’s view was that
they could not prosecute in relation to any of that anyway. I agreed with that. Then there was a question about the future. They said it would take a further 18 months to investigate. I had for quite some time raised with them, because this was not the first time the case had come up, concerns I had about some difficulties which I believed would exist in prosecuting that case. I raised them and I said, “You are going to have to deal with that issue,” and then we get the case back again but there still is not an actual problem to that issue, and indeed the evidence which is emerging to my mind makes that an insuperable problem. So I did not believe that the case would be able to go ahead. I think it is right to look at some of those issues because I stand at the Despatch Box from time to time on cases which have failed and I have done it in the House of Lords on the Jubilee Line, on the Burrell case and on Trooper Williams and, as I have said before, if people do not actually say, “Couldn’t you see this coming?” that is the sort of look in their eyes. I do think, therefore, there is an important reason to stop and look, and if it is clear that actually it is going to be insuperable at the end of the day you need to take that into account at that stage.

Lord Goldsmith: Absolutely. The public interest can often not require any external views whatsoever. For example, it may not be in the public interest to prosecute someone for an offence if it is likely to not add anything to the sentence because they are already facing a lot of other serious charges. It may not be in the public interest to prosecute because someone is very ill. You may go to a doctor to find out if that is so. 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. For example, if you can see that a prosecution might require the disclosure of sensitive information you need to know how damaging the disclosure of that information might be. So you would need to know, perhaps from the Defence Secretary or the Home Secretary, or the Prime Minister or the Foreign Secretary what the implications for the disclosure of that information would be. As Sir Hartley Shawcross said in a very famous answer in 1951 (that is why it is called “the Shawcross exercise”), you go to ministers and say, “Advise me, please, as to your view of the public interest considerations.” It is then for the prosecutor to decide, to form his own judgment, but you need to be informed by those who know best what the public interest considerations are in that case.

Q17 David Howarth: Coming back to the public interest, just in broad terms were those issues legal issues or issues of fact?
Lord Goldsmith: In a sense they are both. They are fundamental issues which one has to handle in a corruption case, and there are particular difficulties about whether it would have been possible to deal with those in the context of the particular constitutional position in Saudi Arabia and the particular circumstances.

Q18 David Howarth: It has been suggested that there is a problem with the definition of “corruption” as opposed to establishing facts in a trial.
Lord Goldsmith: There is a proper and lively debate about how the law of corruption should operate in this country. We have worked on the basis of a definition of corruption which requires you to have a principal and an agent. So what you are really saying is, is the agent acting disloyally to the principal? The normal way you do that straightforwardly in an ordinary corruption case is that you call the managing director to say, “Of course I didn’t authorise the sales director to use £50 notes,” or whatever it may be, “and he was the agent for the company”. You need to have those two. There is a case for whether that is the right way for our law. The Government put forward a bill. It was essentially torn to pieces on pre-legislative scrutiny and we have not yet brought anything else back.

Q19 David Howarth: Coming back to the point about public interest, and we may as well stay with the BAE “S” case since it is fresh in everyone’s mind, how do you go about deciding what the public interest requires? Is there this thing called the Shawcross exercise and perhaps you could tell the Committee what that involves?

Lord Goldsmith: We did go to a number of other ministers, that is quite right. We did not go to the Secretary of State for International Development. I do not believe he could have added in any way to the knowledge on the national security considerations, which were the problem. That is not his area. He could have told us that we have a commitment to somehow or other to look into the Director reach his consideration. It has been suggested that there

Q20 David Howarth: But which ministers do you go to and how do you decide which ministers to go to? The issue in the BAE case, for example, something which has been raised in the Commons, is that apparently you did not go to the Secretary of State for International Development?
Lord Goldsmith: That is right.

Q21 David Howarth: How did that decision, which presumably is your decision alone, come about?
Lord Goldsmith: We did go to a number of other ministers, that is quite right. We did not go to the Secretary of State for International Development. I do not believe he could have added in any way to the knowledge on the national security considerations, which were the problem. That is not his area. He could have told us that we have a commitment to fighting corruption, but I knew that and I knew that there was a public interest in doing that in any event, and so did the Director of the Serious Fraud Office, who after all has been working on that issue and has been setting up special arrangements to deal with it. So I do not believe that he actually would have been able to add to the sum of knowledge which would have helped the Director reach his consideration.

Q22 David Howarth: Another matter which has come up quite recently is the suggestion that there is a number of Shawcross exercises in that case and you went out to ministers on several occasions. I was just wondering how that would work. For example, was there ever a time when the advice coming back from
ministers, or from the Intelligence Service or the Security Service, was that national security was at risk but nevertheless in the exercise of your independent judgment you decided that the investigation should nevertheless continue, but eventually you decided differently?

**Lord Goldsmith:** No. There was a developing situation, as I have indicated in an answer I have given. There was a Shawcross exercise something like a year ago, but the public interest that was put forward was the effect on this country of not being able to succeed in getting a new contract for BAE, because at that stage there was consideration of that contract.

**Q23 David Howarth:** Is there not a problem with that as a public interest because that would violate Article V of the OECD Convention?

**Lord Goldsmith:** Which is why the investigation went on. I agree with you about that. So there was an evolution of this.

**Q24 David Howarth:** A later Shawcross exercise asked about national security.

**Lord Goldsmith:** Yes.

**Q25 David Howarth:** You are very clear in your own mind that national security and international relations are quite separate, because narrowly one would think that they are at least overlapping?

**Lord Goldsmith:** Do you have in mind the terms of Article V of the Convention?

**Q26 David Howarth:** Yes.

**Lord Goldsmith:** My view in relation to that is very clear. I do not believe that the OECD Convention prevents any country which has signed up from having regard to something so fundamental as national security. I do not believe we would have signed up to this Convention if we believed that we could not have regard to national security. Put on one side commercial considerations, ordinary diplomatic relations, I do not believe we would have signed up to it. I would be astonished if any country would have signed up to it on that basis and there is absolutely nothing in the Convention which says, certainly explicitly, that you cannot. So I do not believe that national security is something you cannot take into consideration at all.

**Q27 David Howarth:** The problem with that is that a definition of national security which is that broad would undermine the international relations part of the Treaty itself?

**Lord Goldsmith:** I do not know, if I may say so, why you regard it as so broad. The details—and I have set this out in a letter to the Leader of the Liberal Democrats and to other people as well—why Saudi Arabian cooperation in the counter-terrorism field is regarded by those who understand it as so important. That is not a broad definition of national security, that is really quite a narrow definition of national security, recognising security to citizens in this country and to others within our shores.

**Q28 David Howarth:** But it is certainly part of international relations as well and it is also not what the prosecutor’s code says either. Probably this is the right time to raise that point. The prosecutor’s code talks about information coming out rather than cooperation, which is a different thing.

**Lord Goldsmith:** The prosecutor’s code makes it clear the public interest factors it sets out are not exhaustive. I have absolutely no doubt at all, and it does happen, that having regard to the effect on national security is a proper public interest consideration, and it is a consideration which has to be borne in mind by prosecutors when, for example, you were considering a prosecution which, as I say, would regard a disclosure of information or something which would actually affect national security. Thank goodness there are not that many cases of that sort.

**Q29 David Howarth:** But you think the code needs to be amended?

**Lord Goldsmith:** I do not think it needs to be amended at all. As it says in terms, it sets out a non-exhaustive list and it does specifically refer to national security.

**Q30 David Howarth:** But not in that way?

**Lord Goldsmith:** Well, it is an example. It makes absolutely no sense to say, which is the normal case, “If it would involve revealing information which would be damaging about national security then you don’t go ahead, but if it in itself damages national security, you do.” That would be absolutely absurd.

**Q31 David Howarth:** The reason this distinction seems to matter is that it is the cooperation version which is in fact part of international relations, perhaps unlike the revealing information version?

**Lord Goldsmith:** I absolutely stand where I am in relation to this and where the Director is. The Convention took a very important step, which we entirely support, that countries should not have regard to commercial considerations in determining investigation or prosecution and what I would term “general relations” with another state. It is no use saying just, “Well, if we prosecute in this case they will get upset with us,” in a sort of very general sense, but I do not accept that we would have signed up to that Convention if the effect was that there is a case in which national security would be put at jeopardy—the way, for example, the Prime Minister has spoken about it—and that is something that we simply cannot regard. We cannot have said, “We have signed up to put our citizens’ lives at risk,” particularly against an uncertain, or in my view a case which would never have gone ahead.

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1 Note by witness: The Attorney General acknowledges that “commercial considerations, ordinary diplomatic relations” are excluded from consideration by Article 5 of the OECD Convention. But he “[does] not believe we would have signed up to it” if it had excluded matters of national security.
Q32 Jeremy Wright: Lord Goldsmith, can we turn to some of the other tensions which are inherent in the different aspects of your role. Part of your job is to be an adviser on the law to members of the Government and another part of your job is to be in effect the supervisor of prosecutions. How do you resolve the tension which would arise in circumstances where the potential subject of a prosecution would be a member of the Government or a supporter of the Government?

Lord Goldsmith: Let me be very clear, I am not an adviser to members of Government in their personal capacity.

Q33 Jeremy Wright: But your job is to give legal advice to the Government.

Lord Goldsmith: Not to any individual member. I know very well what you have in mind, but it is no part of my responsibilities to give advice to an individual member of the Government about his or her personal position. For that they would have to go to other lawyers. It is certainly not my job.

Q34 Jeremy Wright: So there is no tension in that, in your view?

Lord Goldsmith: No, absolutely not.

Q35 Jeremy Wright: Let me turn to another one. You gave a very interesting lecture to Birmingham College of Law in November of last year.

Lord Goldsmith: Thank you for saying that.

Q36 Jeremy Wright: We have all read it. We know how interesting it is. You identified a number of different things which again were facets of your role. One of the things you said was that you share—political “collective responsibility” with the Home Secretary and the Lord Chancellor for criminal justice policy and the delivery of criminal justice, but you have also said—and not just in the course of that lecture—that it is very important in your role to avoid any party political considerations. Is there, in your view, any tension between those two things, because if you are responsible for the delivery of policy is that not in a sense a political consideration which you should be avoiding?

Lord Goldsmith: I am not sure I said “political collective responsibility” but I will not quibble about that, and they all overlap to a degree, and we all understand your arguments in that respect, but would your life not actually be easier if there was separation into different people all of these different roles so that there was no suggestion that there might be an unnatural and undesirable overlap between these different aspects? Lord Goldsmith: I think this is about the office and not about me in any event. Whether my life is easy or not is not really the point.

Q37 Jeremy Wright: In many respects there are various different facets to your role, and you have been clear about that, and they all overlap to a degree, and we all understand your arguments in that respect, but would your life not actually be easier if there was separation into different people all of these different roles so that there was no suggestion that there might be an unnatural and undesirable overlap between these different aspects?

Q38 Jeremy Wright: I am talking about any holder of your office, not necessarily you.

Lord Goldsmith: I understand. It is quite a difficult job. One of the reasons it is quite a difficult job is because there are difficult decisions to be made, but somebody has got to make them.

Q39 Chairman: That sounds a bit like the Prime Minister’s language there! Lord Goldsmith: I am certainly not putting myself at that point at all, but just to take BAE as an example, there was a difficult decision to be made about national security and this case. As it happened, it was the independent prosecutor who made it, but someone has got to make that decision and separating the role differently does not get away from that problem; someone still has to make it. My view—and it is the view, I note, of those who have served in this office before and they say it very strongly—is that it is better that the person who may be faced with those decisions is inside rather than outside, has this very important accountability to Parliament, and it is a very considerable banner and light that one has in front of one, that one will have to explain decisions to Parliament, and I think it is better to do that. I think also on the policy side it is better. To take the example of the prosecutors, when I came into this job I believe we had a prosecution service, the Crown Prosecution Service, which had never really fulfilled its proper functions and its proper possibilities. It was created in 1986 as a good idea, but it was under-funded, it was under-managed, under-resourced and very, 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. The prosecutors recognise their responsibilities to the communities, they are visible to communities, they take account of communities’ concerns, they protect victims in a way that did not happen before and they deal with specialist prosecutions. 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 ministers from the Prime Minister down about the need to find those resources and the need to provide those powers and responsibilities, to debate with the Home Secretary the proper allocation of responsibilities between police and prosecutors. I do not believe that would have happened and that is another reason why I believe having someone in my position on the inside has actually been beneficial. There are other reasons which I set out.

Q40 Chairman: Could not the minister of justice have been doing that, amongst other things, while you or some other person—well, I will not say you because you are actually a politician now—

Lord Goldsmith: I am not sure about that actually, but anyway—

Q41 Chairman: Well, we are quite sure. You take the Labour Whip in the House of Lords.

Lord Goldsmith: Well, if that is the definition, yes, of course.

Q42 Chairman: A minister of justice could have been doing the very job you describe for the Crown Prosecution while somebody else, not a politician, was taking those prosecutions?

Lord Goldsmith: I do not think it would have happened. I do not believe it would happen. The prosecutors are quite a small group compared with the demands of prisons, the police and courts.

Q43 Chairman: They are not doing very well financially either at the moment!

Lord Goldsmith: Well, I have done reasonably well for those I have been looking after is all I can say.

Q44 Jeremy Wright: I think the Chairman’s argument is not that it is not right to have a champion for the CPS in government, able to speak to government with the authority of a minister, the question is, why does that have to be the same person as someone who deals with legal questions and legal decisions which part of your job also involves? Why does it have to be the same person? Is it not why does it have to be a person but why the same one?

Lord Goldsmith: My own view is—and I have thought very hard about these questions over a period of time, not just as a result of recent comment but over a period of time and that is reflected to some extent in what I have said publicly about it—there are advantages and disadvantages in all arrangements that one can think of and I certainly do not suggest that the present arrangement is not capable of some improvement and I suggest some in the paper which I have put forward. But my judgment is, having done it—and it is the judgment of those who have done this before me—is that the advantages outweigh the disadvantages.

Q45 Mr Tyrie: We have, I think it is fair to say, a considerable amount of controversy and some might argue a collapse in public confidence in aspects of your role. We have had the Iraq advice controversy, we have had the BAE advice, a decision of controversy, and then there is the “cash for honours” issue. How do you think we can restore public confidence in the office of the Attorney General?

Lord Goldsmith: I think there is actually a much broader question about confidence in politics or parts of politics at the moment, and I think we are affected by that. We will all have our views on the Iraq conflict. I think there has been a great concern from many that the statements which were made, the belief that there was about the existence of WMD did not turn out to be the fact. It was not actually part of my advice, but I think it has coloured the whole of the debate in relation to this. I think in so far as you term as “cash for honours” I have been clear as to what would happen if a question was referred to me.

Q46 Mr Tyrie: Why do you not just explain what that is now, for the benefit of the Committee?

Lord Goldsmith: I will, absolutely. If a question is referred to me—there was one yesterday which was not, and there is absolutely no reason why it should have been, but if it is referred to me then my office will appoint independent leading counsel to advise and, I make it 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.

Q47 Mr Tyrie: You said in your original letter and statement on that that you would make public the conclusions of that advice. Are you now making it clear to us that you will publish the whole of that advice?

Lord Goldsmith: I just want to look to see precisely what I said. What I had in mind at the time was that it is possible—this is all hypothetical, absolutely, and I do not know anything about the state of this—

Q48 Mr Tyrie: But my question is quite straightforward.

Lord Goldsmith: I appreciate that, but I really must make that point clear.

Q49 Mr Tyrie: Are you now saying that you will publish the whole of the advice which you were given?

Lord Goldsmith: The whole of the advice which relates to the decision not to prosecute. What I had in mind is that somebody might write an advice which deals with more than one person in relation to which there could be a prosecution. I do not think it would be right to publish that. That might be prejudicial.
Q50 Mr Tyrie: I think what you have said will be perceived as an advance on where we were, and a welcome one, and I am grateful for that. There remains the question to which Helena Kennedy has alluded with respect to the Iraq advice. On the Iraq advice she said that there was only a couple of lawyers who would have concluded that going to war without a second UN resolution was legal. Whether that is true or not—
Lord Goldsmith: It certainly is not.

Q51 Mr Tyrie: Let us set, whether or not it is true to one side. There is a public confidence issue here with respect to the person you choose to supply this advice. Will you undertake also to consult Opposition parties in an attempt to secure prior agreement on whom you will consult and from whom you will seek that advice?
Lord Goldsmith: I have not thought about that before, but I am perfectly content to do that.

Q52 Mr Tyrie: I am very heartened by that. I think those are two very valuable reassurances. We have been discussing your accountability to Parliament in a more general sense. Do you think it is reasonable that you can refuse to come before a select committee of the Commons?
Lord Goldsmith: I do not believe I ever have.

Q53 Mr Tyrie: I did not ask you whether you have refused. I asked you whether you think it is reasonable that you are constitutionally capable of refusing?
Lord Goldsmith: Well, I have always come when I have been invited to a Commons select committee.
Mr Tyrie: I will ask the same question a third time. Do you think it is reasonable constitutionally that you can refuse to come before a select committee in the Commons?

Q54 Chairman: Has nobody told you that you could refuse?
Lord Goldsmith: If they had, I still would have come. The reason I am putting it that way is that I do not quite understand what the reason is for this constitutional position. Anyway, the position as far as I am concerned—

Q55 Mr Tyrie: You are a Member of the House of Lords and therefore—I never thought I would find myself instructing the Attorney General—
Lord Goldsmith: On parliamentary procedure, perhaps.

Q56 Mr Tyrie: Maybe that points to what I am moving towards saying, which is that I wonder whether your reply reflects an aspect of the risks of having somebody in an office of such political sensitivity who, as far as I am aware, has never been involved in an election, has not been a Member and is not at the moment a Member of the House of Commons?
Lord Goldsmith: I certainly have not been elected to office in this House. I have been involved in elections, but they are a different form, not general political elections. I entirely accept the point. I am not a Member of the House of Commons. That is the way things have turned out and it is the Prime Minister who chose me to perform this role. I think it is a very serious point and I want to make clear what my position is. I do not think it would be right, whether constitutionally possible or not, for an Attorney General, wherever he comes from, to refuse to attend before a select committee of the House of Commons. I make that very clear. I think it would be right to do so, and indeed part of what I have actually said in this memorandum is to suggest the possibility of a more regular communication either with this select committee or with another select committee looking particularly at the role of the law officers. Secondly, at the time of taking this office I even wondered whether it was possible in some way to be able to, as it were, accountable to the House of Commons. There are jurisdictions in which ministers, wherever they are, are capable of being summoned before either House. I entirely understand the Commons takes a view about only hearing from its own Members.

Q57 Mr Tyrie: Both Houses do.
Lord Goldsmith: Well, whether both Houses do or not, I raised the possibility, as I say, shortly after I had taken office as to whether that would be possible. I was told it was not possible, so no standing at the Bar of the House of Commons and dealing with issues from there.

Q58 Mr Tyrie: You have suggested creating a department headed by you accountable to a select committee directly. Is not part of the problem going to be that some of the information the select committee will want to see in order to assess whether you are doing a good job is the very advice which is never going to be available? Therefore, do you not think that we need to put in place arrangements where ex post facto this advice is made available and that where still there may be sensitivity, that the government perceives, a mechanism is found where a group of parliamentarians, probably from that committee, can read that information in camera and cross-examine you in a private session about that information?
Lord Goldsmith: I think one would have to look absolutely at both constraints on certain information—there could be all sorts of information, information about individuals, information about national security, all the rest of it—and how one actually dealt with those. I think those are very proper things that one would want to look into. There are arrangements which exist already within the select committee machinery where certain committees do look at certain material which is not publicly available and they do it on particular terms.

Q59 Mr Tyrie: You were thinking in particular of—
Lord Goldsmith: I was thinking of the ISC, for example, the Intelligence and Security Committee.
Q60 Mr Tyrie: I am very concerned by this cross-examination because you are unaware that the Intelligence and Security Committee is not a select committee of Parliament.

Lord Goldsmith: Forgive me.

Chairman: I have an interest as a member of it.

Mr Tyrie: It cannot come to its own conclusions and publish them independently of prior scrutiny and censorship by the Prime Minister. Therefore, it does not provide the same level—and indeed the reports are, whether one calls them censored, redacted, whatever you like, abridged or redacted from time to time. So that does not give us the full assurance that we would like. You referred to security—

Chairman: I must not allow a question to pass on something which I ought, in my position, to correct, which is that of course the committee is entirely free to come to its own conclusions.

Mr Tyrie: It is free to come to its own conclusions, but when it publishes them the Prime Minister—

Chairman: I do not think it is helpful for us to have a debate across the floor of the Committee about facts which can be established. I think you had better put a question to the Attorney General.

Q61 Mr Tyrie: I did not begin the debate with you, but I will come to the point I wanted to ask, which is that you referred to the fact that there were security issues behind the decision not to go ahead with the BAE investigation, issues of national security?

Lord Goldsmith: I did not say they were behind the decision, I said they were the reason for the decision.

Q62 Mr Tyrie: They were the reason for the decision?

Lord Goldsmith: Yes.

Q63 Mr Tyrie: Why not refer those to the Security and Intelligence Committee?

Lord Goldsmith: Well, nobody has made that suggestion so far. If the suggestion is made, if that was something which the Security—

Q64 Mr Tyrie: Perhaps the Chairman will take that away as a thought.

Lord Goldsmith: Maybe, but I must be very clear about this. This is not my intelligence information. This is not my national security assessment, and there are others from the Prime Minister down who would have a view in relation to that, but if I may come back to the point. Pick me up on parliamentary procedure in the House of Commons by all means, but the fundamental point—and I hope it was helpful—was actually to come to this Committee and say, first of all, I think in the debate about whether you want some civil servant dealing with these issues or you want somebody within Parliament, who is accountable to Parliament, my judgment is that being accountable is better. Think of the implications otherwise. The questions you are putting to me now, the questions which have been put to Mike O’Brien in the House this afternoon, the questions which have been put to me in the House of Lords, none of those would have been put about BAE if there had been a civil servant who was responsible for this. The second point is that I recognise there are questions about whether or not there is enough accountability and I say that here is a mechanism one could look at, which is to have a select committee which is in a position to have a more regular communication with the Attorney General. You say to me there may be stuff which you cannot reveal. You are absolutely right. I respond to that by saying, then let us look at whether it would be appropriate to have mechanisms for doing that and what those could be. I thought it might be helpful to refer to the ISC as an example of how things are done. I am sorry that you do not think it is.

Q65 Mr Tyrie: I do think that we have quite a serious problem with the perception of your office publicly. We have a former Solicitor General who has said that you should publish advice. We have the current Lord Chancellor who says, and I quote, that the role of the Attorney General in Government “is no longer constitutionally sustainable” and we have a current controversy raging where all public confidence, I think, has probably seeped out of the idea that an individual appointed by the Prime Minister may have a say in whether Members of the Government are prosecuted. When you put all that together, I think we have quite a serious problem, do you not?

Lord Goldsmith: Let me respond, because in relation to the last matter you put to me before whether I would be happy to consult the Opposition in relation to the choice of counsel. It was an idea which had not occurred to me and I am happy to agree with it. Did I discuss with the Shadow Attorney General from the Conservative Party what I was going to do in relation to that particular aspect? Yes, I did. Was he content with the conclusion I reached? Absolutely.

Q66 Mr Tyrie: I was asking a more general question. I have noted what you said on that other point, Lord Goldsmith, and I have said that I welcome it very much.

Lord Goldsmith: But you raised it again, and what I am saying is that although you put these points forward and you make observations about what you think the position is, I am saying that when it comes to these issues I do discuss with Opposition spokesmen what the issue should be and they are supportive. I believe, of the difficult decisions which have to be made, at least from the Conservative Party, the main Opposition party.

Q67 Mr Tyrie: My question to you, though, was a more general one: do you think that we have got now a serious problem of a more general type that we need to address with respect to your office?

Lord Goldsmith: I do not. I do not agree with the remarks you have quoted from the Lord Chancellor. I think there is a very important issue which I have tried to bring which is whether you want accountability or whether you want some distance and separation. I think that is a key point. I have expressed my view about it. Other former holders of this office like, I believe, the
Shadow Attorney General from the Conservative Party, take the view that that accountability is very important.

**Q68 Mr Tyrie:** You are making it clear that you completely disagree with the Lord Chancellor and that he is barking up the wrong tree?

**Lord Goldsmith:** I have expressed my view about these key issues in relation to accountability. I have said in relation to legal advice, which is the other issue you have identified, that the next time (if, God forbid, it happens) there is a question of military action it would be for the Prime Minister of the day to determine—and I have a very strong prediction as to what would actually happen (it is not my call, it would be his)—whether or not advice should be made available to Parliament. I have also said that I think it is very important that the basis of it, in any event, should be fully explained.

**Q69 Mr Tyrie:** It sounds as if you are saying you are flatly contradicting the Lord Chancellor. You think that the role of the Attorney General in Government is currently constitutionally sustainable. In fact, you seem to be going further than that, or implying that you are going further than that, saying that it is really a very good arrangement?

**Lord Goldsmith:** I have set out in the paper the arguments. I have also made certain suggestions for consideration as to how things can be dealt with. I think that is the positive side of what I have come to do. I welcome the debate, but I do not think I have come here simply to have disagreements with fellow ministers.

**Q70 Chairman:** You do recognise that as far as the public is concerned there is a considerable difficulty in establishing or re-establishing confidence in the notion that somebody who is in a senior political position (and by definition is a Member of the Government, committed to supporting it) is required to make decisions in which some element of distance is needed because they may be decisions on which he could wrongly be influenced by his position in the Government? That feeling is quite strong amongst members of the public.

**Lord Goldsmith:** It is really important to make it clear, which I have sought to do, that my duty is to the law and not to party politics or party loyalties, and that is what successive Attorneys General have always said. We always remember the one incident in the 1920s when that did not appear to be the case. That is, as it were, emblazoned in burning lights in the Attorney General’s offices. I knew about it when someone else took that office, almost on the first day. That is the primary duty and that is what we carry out, and former Attorneys General, and I believe not only that it is possible but that we do in fact reach that conclusion. I make decisions which my colleagues do not agree with, I tell them there are things that they cannot do. They accept that, even though it may be disadvantageous to the Government, to the party, that they cannot do what they want. Everyone knows about the things I have said they can do because that is the one big thing that is there very much in the public, but people do not know about the things that have been said that cannot be done.

**Q71 Bob Neill:** Mr Attorney, is not the problem this, though, that despite the very best endeavours and the best integrity of yourself and previous and successive Attorneys General the public will never be convinced of that situation? They will never be convinced of that situation unless either all the advice which you give is disclosed or there is a construct arrived at in which the person who defies public interest is not a Member of the Government but perhaps accountable to Parliament? It must be possible to have a construct which gives that situation, is it not?

**Lord Goldsmith:** I do not believe you would have the same degree of accountability at all.

**Q72 Bob Neill:** In what sense?

**Lord Goldsmith:** You would not be able to summon (as has happened to the Solicitor General and to me) the law officers to come into Parliament on so far three occasions on BAE in both our cases, to make statements and to answer questions.

**Bob Neill:** Are there no means by which Parliament can set up officers who are able to be summoned or who are held to be accountable through other means? You do not think so?

**Q73 Chairman:** Not parliamentary ombudsmen necessarily, but accountable to Parliament in the duties they carry out?

**Lord Goldsmith:** I think, if I may say so, the accountability is in a very different way from actually responding directly to questions from Members of both Houses in debates in Parliament and oral questions.

**Q74 Bob Neill:** I understand where you are coming from, but the concern is this, is it not, that ultimately somebody has to be the arbiter of public interest and can you ever convince the public in the current circumstances, the way things develop, as constitutional arrangements do, that somebody who is a member of any political party can do that with the confidence of the general public, despite your best endeavours to do so?

**Lord Goldsmith:** If I may say so, stripped to what you have actually said, it is an astonishing proposition because the public elect politicians in order to act for the public good and in the public interest. To say that elected politicians—and I am not even elected—cannot be trusted to judge what the public interest is I think is surprising.

**Q75 Bob Neill:** I think, with respect, Mr Attorney, you know full well that I am using a very narrow legal definition of the public interest for these purposes and not a more general one. I am sure you know that.

**Lord Goldsmith:** I wanted to make the point, the proposition that people can be trusted, I believe, to be able to see what the public interest is.
Q76 Bob Neill: But you would agree, I think, that the definition of people who can be trusted, I believe, to be able to see what the public interest is, public interest in relation to the person who initiates prosecutions, is a particularly specific and important one.

Lord Goldsmith: Can we just take it a stage further, because the only case in which the public interest has arisen in a way which is controversial is in relation to BAE, which was a decision by the Director and not by me.

Q77 Bob Neill: I understand that, but a decision by the Director after you had made clear, I think it is fair to say, your advice or your view as to what the public interest was?

Lord Goldsmith: No, I had not.

Q78 Bob Neill: You did not tell the Director your concerns about the public interest?

Lord Goldsmith: No, the Director had the information. You look at me in a surprising way, but you are wrong about this. The Director formed his view. He actually formed his view after meetings (which I had not attended) with our Ambassador, and of course seeing the information that I had seen. I did not press him to reach that view. I did not even recommend to him that he reach that view. He came forward with it.

Q79 Chairman: You reached the same conclusions for entirely different reasons?

Lord Goldsmith: No, I did not say entirely different reasons because national security was important, but he came to me and he said that this was the conclusion he had reached. This is what he believed. Of course I knew the basis of the information, but he said that he was not pressured. He said that this was all done perfectly professionally and I do not think it is right to let suggestions that that was not the case go without contradicting them.

Q80 Bob Neill: Can I ask more generally, are there ever circumstances in which you express a view to the Director as to whether a prosecution should proceed or not?

Lord Goldsmith: Certainly.

Q81 Bob Neill: Have there ever been instances where the Director has been minded not to proceed with a prosecution and you have expressed a view that the prosecution should proceed?

Lord Goldsmith: Now you are talking about the Director of Public Prosecutions.

Q82 Bob Neill: The prosecuting authority.

Lord Goldsmith: We have had discussions about cases from time to time and we have always reached a common view in relation to them.

Q83 Bob Neill: Has that sometimes involved the prosecutor coming to your view?

Lord Goldsmith: I can think of one or two cases where it has, not controversial cases in that sense at all, but equally there have been cases where I have raised questions about cases, and that is part of the role. Part of the role of superintendence is that somebody comes and you look at it and you say, “Well, just hang on a second, what about this? Is that right or not?” and you debate that, and sometimes they will say they will get further advice from outside and they will come forward and you have a discussion about it.

Q84 Bob Neill: So there are discussions which start off like that, where the Director says, “I don’t think there is enough here,” and you think there is and after a discussion sometimes the Director may say, “Okay, yes, I’m persuaded. I think we should go ahead”? That is perfectly feasible?

Lord Goldsmith: Or the other way round, he will say, “I think you should go ahead,” and I am saying, “Is that absolutely right? What about this? What about that?” and at the end of it—I can think of some examples—I have said, “Well, all right, you go ahead.”

Q85 Bob Neill: You are saying there have been examples of that?

Lord Goldsmith: Absolutely.

Q86 Bob Neill: Okay. Finally, just to finish on BAE, because I do not want to spend all the time talking about that, what was the last stage at which prosecuting counsel was involved in the BAE considerations and his advice sought?

Lord Goldsmith: I do not know precisely because leading prosecuting counsel was involved in another big trial, but I had the benefit of seeing advice and having talked to him on previous occasions, and also having received independent advice myself from very senior and experienced criminal counsel.

Q87 Bob Neill: Separately from the counsel who was instructed at the time?

Lord Goldsmith: Yes. I had a view and wanted to have that view checked to see if there was something I was overlooking on this, and I was not.

Q88 Bob Neill: Again just in terms of process, is that a common thing for you to do as Attorney General, to ask a separate independent leading counsel for advice?

Lord Goldsmith: Yes, it does happen.

Q89 Bob Neill: Frequently, or occasionally?

Lord Goldsmith: I do not think it has happened frequently, but it has happened in a number of cases, and I think it is a very proper thing to do.

Q90 Dr Whitehead: The talk in the air at the moment is of a potential split in the Home Office and the creation of a department of justice. What do you think would be the impact of such a change on your office and also for law officers in general, and do you think that were there to be a department of justice, for example, the Attorney General’s Department might be associated with that in some way or would it remain separate?
Lord Goldsmith: Apart from dealing with the merits of that which is in the air overall, which is a matter which is subject to discussion within Government at the moment, I think there are three points to make. First of all, we have operated a system of, call it trilateralism, in which the three who have a responsibility in relation to criminal justice—the Home Secretary, the Lord Chancellor and I—have together been involved with chief officers on the National Criminal Justice Board. We have collaborated in relation to considering changes to criminal justice policy and delivery. I think it is very important that that should remain because that is the way that one gets the best joining together of the different agencies involved in the criminal justice field. Secondly, I think it is enormously important that the prosecutors are not brought within any ministry of justice, if that is what is created. I think it is very important that they continue to have a minister who champions them but who is not distracted, as it were, by championing other parts of the criminal justice system, and who also supports them and their independence. Thirdly, there would be questions raised, which are really for discussion within Government, about whether, if there is a redistribution, there are functions which might more naturally fit even with the Attorney General’s office than with any other office, but as I say, those are matters to be debated within Government. What I certainly do not consider, and nobody is suggesting, is that somehow the Attorney General’s office falls within some ministry of justice.

Q91 Dr Whitehead: I would concur with other Members of the Committee, it was a very interesting lecture which you undertook for the Birmingham College of Law in November. You stated your 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.” That fairly clearly suggests to me that you have in mind what you term as “a serious Government Department” in its own right. What would you define as “a serious Government Department”?

Lord Goldsmith: Can I just pick up on one point, if I may, because I thought it was actually the reason why in the first instance this Committee was interested in seeing me.

Q92 Chairman: It was, indeed.

Lord Goldsmith: Absolutely, what is the role of the Attorney General in relation to the Rule of Law. There cannot conceivably be the position that there is only one minister in Government who is concerned with the Rule of Law; indeed, I am not sure I would want to be a member of a government in which every other minister thought he was licensed to be cavalier about law, and indeed all ministers are responsible themselves for that, but I do think the Attorney General has a very important role in relation to the Rule of Law in relation to advising—and s.19 of the Human Rights Act has been an important part of that—and in other things that are done, taking positions in relation to aspects of policy which conform with my conception of what the Rule of Law is. But I think you have to have, as it were, the back-up to be able to do that.

Q93 Chairman: You could do that now, even in quite a small Government Department.

Lord Goldsmith: But I have increased the size of the Department. I did not have any people with policy background at all in the Department—excellent lawyers, but no Whitehall experience when I started. I do now have a small team and I think that is helpful. In relation to international matters, constantly these days what matters in relation to the prosecution of crime is international cooperation, but we have not really had any coordinated approach as far as the prosecutors are concerned in relation to that, so I have now brought somebody in to be able to help to do that. This afternoon I was chairing a committee which is concerned with access to justice in a voluntary way, what is done in relation to the provision of legal advice pro bono. I have started an initiative in relation to international public interest work, again trying to coordinate the work which is done within Government and the work which is done outside by the voluntary sector. I think these are important parts of what I can do and I think one needs support in order to do that.

Q94 Dr Whitehead: So a serious government department would be a department which was under the general heading of the collective responsibility of Government in terms of the discharge of responsibilities within that department, as far as that serious department was concerned, I would imagine?

Lord Goldsmith: I would simply put it in terms that I think there are responsibilities which I have to carry out, which I believe—forgive me for coming back to it—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.

Q95 Dr Whitehead: Would you say that as far as a serious government department is concerned the doctrine of how government departments relate to each other in terms of collective Cabinet responsibility, collective responsibility for the work of those government departments is in effect a form of accountability to the rest of Government in the sense of being held to account for the activities of that department, as opposed to giving an account for the activity of that department?

Lord Goldsmith: I think in relation to some aspects of what I do and what is done there is a responsibility in relation more generally to the rest of Government, but in relation to particular functions I am absolutely clear that they are exercised independently and they are not a matter for collective responsibility, such as decisions in relation to prosecution, such as legal advice, such as decisions in my guardianship of the public interest role.
Lord Goldsmith: I entirely accept that there is a distinction between areas which are within the field of collective responsibility and those which are not. In relation to those which are not within collective responsibility, leaving aside legal advice, which is a rather special case, I regard myself as accountable to Parliament. In relation to the other areas, in so far as I am acting collectively with other ministers, then we are all accountable for what we do.

Lord Goldsmith: Then I am not sure I do recognise that distinction. If I appeared to agree with it before, I should not have done because it seems to me, if I may say so, that when you are considering a decision independently, not as part of Government policy, and you are considering making that decision, the fact that you may have to stand in the House and explain that decision under searching questions seems to me to be a very important part of accountability.

Lord Goldsmith: If by “looked at” you mean discussing them and explaining, absolutely. To some extent that is what I am trying to do today. But in terms of what is the best thing to do about the role, I have been doing the job which I have been given. Others will want to structure things in a different way. It is not my decision whether that happens or not. But I do want to underline, if I may, just two points quickly. One is that the point has been made that elision of roles has already been unpacked as far as the Lord Chancellor’s Department is concerned, it is not something which might be looked at in terms of understanding those two roles better in terms of the Attorney General’s Department?

Lord Goldsmith: Forgive me, I am not sure I really understand the distinction in the context.
involved. He said explicitly that he was providing it to me not as a minister but as a guardian of the administration of justice, and that is what is taking place.

Q103 Chairman: You seem to be arguing that you needed a serious government department not because you had identified a number of functions which would be better carried out in the Attorney General’s office but because only if one had a serious department could one have enough people at the top to give the range of advice on the general range of government that you would find appropriate. I find that a very odd argument for having a big department.

Lord Goldsmith: I never said “big”; you picked up on the word “serious”. The Attorney General’s office was once simply described as “the Attorney General’s Chambers”. I think it is right that we should be resourced sufficiently to be able to do the job.

Q104 Chairman: You just want a few more people? You are not actually arguing that there are functions currently done elsewhere which might usefully be gathered under the Attorney General?

Lord Goldsmith: I think if one is looking in an area in which I already act at redistribution of functions it probably is a good moment to look at whether there are other functions which would be better performed in different places, but that is a matter, I think, for Government to consider.

Q105 Chairman: You are very reluctant to put a bid in for any functions at all?

Lord Goldsmith: I am not the slightest bit reluctant, I am just not sure this is the place to do it.

Q106 Chairman: There is something else Dr Whitehead mentioned which I wanted to pursue with you briefly, which are the changes that have occurred from the 2005 Constitutional Reform Act. Many people argued at the time that the change in the role and nature of the Lord Chancellor profoundly affected the availability of commitment to the Rule of Law within Government. Both the fact that he was no longer a judge and the fact that he might in the future not be a lawyer, for example, were cited as reasons perhaps to regard the role of the Attorney General as taking over some of the responsibility the Lord Chancellor previously had in Government. The Lord Chancellor is given a specific responsibility the Lord Chancellor previously had in the Attorney General as taking over some of the functions at redistribution of functions which would be better performed in different places, but that is a matter, I think, for Government to consider.

Q107 Chairman: When I was first elected to this House both the Attorney and the Solicitor General were in the House of Commons. Now the Attorney is in the Lords it looks unlikely, does it not, given the difficulties of sustaining legal practice as a barrister at the appropriate level while doing a full-time job as a Member of Parliament, that in future there are going to be strong candidates for the position of Attorney General in the Commons? Are we resigned to the fact that it is now permanently a Lords appointment and more often than not somebody brought into the Lords because they are given that appointment?

Lord Goldsmith: I was not brought into the Lords because I was given this appointment, I had been in the Lords for two years before I was given this appointment, just for correction of that doubt, nor indeed was Gareth Williams, who preceded me. It will be for Prime Ministers of the day to determine where they can find the people to carry out this role. I recognise the point you make about the difficulty of carrying on a legal practice with the present demands on a constituency MP and that may well have an impact on the size of the pool which would be available. That is why, if I may say so, I think it is important to recognise first of all that I am privileged to be a Member of the House of Lords and I am accountable there. I think strengthening accountability through to the Commons in any way in which that can be done is something which is desirable and having set out some ideas about that and some ideas about the possible change to the oath, or perhaps even a statutory responsibility to try to make very clear what it is the Attorney General does, I had hoped to address some of the questions about the way in which the role can be performed in the future.
Chairman: Mr Howarth has a further point he wishes to put to you.

Mr Howarth: On that point, I note that the number of barristers in the Commons is apparently now down to 34, contrary to the popular belief that it is somewhere over 600.

Bob Neill: The number of Silks is even less!

Q108 Mr Howarth: If I could go back finally to the point about your role as superintendent. I do not fully understand how this works, because you described it as a largely consensual relationship, perhaps supervisor in a general sense, but nevertheless fairly equal, but there is inherent in the role of the Attorney General a hierarchy, that you have powers which are given to you and not to the DPP or to the Director of the Serious Fraud Office. For example, there are statutes where your consent is required for prosecution, and you have the power to stop any prosecution by *nolle prosequi*?

Lord Goldsmith: Yes.

Q109 Mr Howarth: I was just wondering whether there is any occasion, in your experience, in your relationship with the Directors where you have had to refer to those kinds of powers?

Lord Goldsmith: In relation to consent, obviously, because if it is for me to consent then I have to consent. So that obviously is referred to. In terms of using the *nolle prosequi* power, I cannot recall any instance where with either of the Directors I have, if this is the way of putting it, threatened to use that power, no. You are quite right that ultimately I do have that power. But could I just go back, because we are just picking on one particular aspect of superintendence. Superintendence is much, much wider than this. There is the issue of looking at policy in relation to the CPS and I am constantly meeting with the CPS, with their Chief Executive, with the senior people, looking at the way prosecutors are being trained, how they are dealing with cases generally in the magistrates' courts and policy in relation to the way the job is done is a constant matter of concern. We were picking up on cases, not cases with my consent, cases which are sensitive or difficult where they may come and say, "We're keeping you informed about this case," and I am saying that what tends to happen there is that I will either say, "Thank you very much. There is no issue with that," or raise questions with them, and then that will more normally than not lead to a discussion about it and the reaching of an agreement rather than the exercise of control.

Q110 Mr Howarth: So if you were asked the Jeremy Paxman question, "Did you threaten to overrule him?" you would answer, "That's not the way it works"?

Lord Goldsmith: It is not really the way it works with the two Directors, no.

Q111 Chairman: Thank you very much, Mr Attorney. We have had some very interesting exchanges. I do not expect you to withdraw your previous offer to come to the House of Commons select committees more often than hitherto.

Lord Goldsmith: No, not at all.

Chairman: And I have both the hope and the expectation that we shall see you again. Thank you very much.
Ev 16  Constitutional Affairs Committee: Evidence

Wednesday 28 February 2007

Members present

Mr Alan Beith, in the Chair

David Howarth  Mr Andrew Tyrie
Mrs Siân C James  Keith Vaz
Bob Neill  Dr Alan Whitehead

Witnesses: Rt Hon Lord Morris of Aberavon KG QC and Rt Hon Lord Mayhew of Twysden QC, gave evidence.

Chairman: Good afternoon, Lord Mayhew and Lord Morris, and a very warm welcome to you and thank you for giving us the benefit of your experience. I think some members of the Committee may have interests to declare.

Bob Neill: I am currently a non-practising barrister, but used to specialise in criminal law and I was in the same chambers as Lord Morris, and still am.

Chairman: Mr Vaz?

Keith Vaz: I am an employed barrister, and it should be noted I was Parliamentary Private Secretary to Lord Morris for a year.

Q112 Chairman: Do you think, either or both of you, that the role, and nature of the role, has changed since you were Attorney Generals?

Lord Mayhew of Twysden: Chairman, perhaps I might begin? I do not think it has changed in character. I think that it has changed perhaps in scale in that he is responsible for a few more things, but in character it remains the same. I had the advantage of reading the lecture the present Attorney General gave to Birmingham Law School, which I know you have seen, and the role seemed to me to be very familiar as he described it.

Lord Morris of Aberavon: Chairman, I would agree on that. I think what has changed since Sir Peter Rawlinson was the Attorney is that I suspect it was a slightly more leisurely activity then, because he used to boast that he went to every circuit in the land, except for some reason to the Wales and Chester Circuit, to prosecute, which could not be done now. I hesitated long and hard before taking the decision not to prosecute personally in the second of the war crimes; I could not really see myself being away for three months, including a trip to Belarus, and carry on with the machinery of government, and that is why it has become exceedingly difficult except for very short matters. But I understand the present Attorney has done very much better.

Q113 Bob Neill: I was interested in that. I ought to say that Lord Morris led me on a number of occasions when we were at the bar, but that is a concern. Is it practical nowadays for the Attorney with the other burdens and if, let’s say, they are also a practising politician as well, to be able to prosecute in high profile cases? Is it desirable that Attorneys should still try and get out into court? Can they do it? Have we really got the calibre of advocates who are likely to be in the gene pool, if you like, that is available for selection given the other constraints as well?

Lord Morris of Aberavon: That is the big difficulty about the House of Commons and drawing attorneys from the House of Commons because whether it is an industry or whether it is trade unions it is exceedingly difficult to be reasonably competent in one’s own field and attend to one’s constituency and the House of Commons, particularly when there are sometimes narrow majorities. I managed to do it, practice as such and be a member of the House of Commons, by confining myself, as Mr Neill would agree, to London and the home counties. If I had returned to my native Wales it would have been sheer impossibility. Coming back to the question, it is much more difficult but the present Attorney has made valiant efforts. I did four or five heavy cases, one on human rights in the House of Lords, one in the International Court of Justice in the Hague which went on for some time, I think a week, which was not too bad, when Yugoslavia sued a number of nations for the bombing of Yugoslavia; there were a number of instances in Strasbourg but those were very short and comparatively easy, but the big one which I would have liked to have done would have been the war crimes one.

Q114 Bob Neill: Lord Mayhew, does that perhaps make a point; that it is perhaps not practical to do trials, you cannot really do work in the first instance as Attorney any more, and it has been confined to appellate work?

Lord Mayhew of Twysden: I think it has become progressively more difficult. It was and remains important that the Attorney, if he can without prejudice to the rest of his work, get into court. He is by title Leader of the Bar and it does have its importance, if I can put it like that. I found it very difficult and I had been away from the bar for four years doing other ministerial jobs before I became Solicitor General but I did as a law officer make it my business, with great difficulty, I may say, to appear in both the European courts in civil matters and in the High Court here, and I think I am right in saying the Court of Appeal. I never appeared before the Judicial Committee in the House of Lords, but I found it was important and I did it as a matter of policy.
Q115 Chairman: Why was it important?
Lord Mayhew of Twysden: I think it is important because it does emphasise the characteristic of the Attorney General that he is a representative of an independent profession, Leader of the Bar, and he brings hopefully with him the product of that position—that is to say, an ability to put the public interest in its right place which is pre-eminent, and to separate issues in an analytical way. But it is a second order importance. I know that Lord Rawlinson used to be very critical of Attorneys subsequent do him for not going into court much, and I very much agree with what Lord Morris has said about the valiant efforts the present Attorney General has made. I think it is very good. I do think it is a trifle more easy if you are in the House of Lords rather than having a House of Commons constituency.

Q116 Chairman: One of the other things you do as an Attorney General is sometimes attend the Cabinet, although the present Attorney General seems to attend the Cabinet all the time. Is that not quite a significant change?
Lord Mayhew of Twysden: Yes, I think it is, and 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. I think that 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 reinforce the view he had taken in the course of argument. I think it is important that he should only go to deal with legal matters by invitation.

Lord Morris of Aberavon: I would agree. I do not know technically whether the present Attorney is a member of the Cabinet or attends Cabinet. Certainly I was never a member of the Cabinet and I never attended Cabinet but I did attend the War Cabinet on many occasions and, of course, many Cabinet committees, and I agree with Lord Mayhew that I think the last instance of anyone being a member of the Cabinet is FE Smith, and that is going back to about 1920 or thereabouts. I take the general view that he should be available to attend, and when Sam Silkin was Attorney he would wait for his item outside—I was in Cabinet—and be called in for Item No 3, and then once Item No 3 or whatever it was was disposed of, Mr Silkin, the Attorney, would depart. Of course, if you can sit in Cabinet then there is a lot of preparatory work which is an additional burden which I would not wish, as Attorney, to do.

Q117 David Howarth: What would the item be when you attended? Would Item 3, for which the Attorney attended, be specifically about legal advice on a matter, and then you would attend for that and then when legal advice was given and discussed you would leave, or would the item be the whole policy decision in an area, about which legal advice had been requested.
Lord Mayhew of Twysden: In my time it could be both, I think. I suppose a specific example might be whether a particular policy proposal would be consistent with our international obligations under the European Convention, it might be, or under any of the other pieces of legislation binding us in European law, or it might be something which, having seen the Cabinet agenda, you knew was coming up and you thought it would be advantageous to go and make a contribution on the basis of the law. It could be either.

Q118 David Howarth: And in effect you could request to go.
Lord Mayhew of Twysden: Yes, certainly.
Lord Morris of Aberavon: Yes. Likewise on Kosovo there were lots of legal issues. That lasted 69 days and for 68, or the first 68, I was consulted almost every day on the detail of targeting and whether it fell within the Geneva Convention. That was a very heavy burden. So when the War Cabinet met one was able to bring colleagues up to date, not only of the actual legal issues which were those of that morning but also on how things had gone so far, from my point of view.

Q119 Mrs James: I would like to expand a little bit on the role of the Attorney General particularly as a member of the House of Commons. What do you think of the potential consequences for both the accountability and the independence of the post, should the Attorney not be a member of the Commons, or vice-versa should, or should not, be a member of the House of Lords?
Lord Mayhew of Twysden: I have to say that I think it is preferable by quite a distance that he should be in the House of Commons, the reason 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. That is not to say that the House of Lords is not a good second best, it is, and it depends of course considerably on the calibre of the Solicitor General who would then always be in the House of Commons, but the important point it seems to me is that the House of Commons will always insist, if it possibly can, upon having the actual decision-taker stand at the despatch box and justify the decision. Having it at second-hand will seldom be regarded as sufficient—so it seemed to me on the basis of my experience, at any rate. The corollary of that is that it is an enormous assurance to the holder of the job we have both done that you are able, if you realise a storm is brewing, to ask to come to the House of Commons and make a statement and get in first, which I have done on more than one occasion and have been very glad to be able to do so.

Lord Morris of Aberavon: There was a general and well-founded belief in my time in the Commons against a spending minister being in the House of Lords; the House of Commons are responsible for supply. Likewise, as regards a law officer, I was the
last Attorney in the House of Commons, and I complained to two, if not three, previous party leaders about the absence of a follow-on or an absence of competition, so far as I was concerned, so that the Prime Minister could choose. This was the position and it may be improved now for all I know, but the basic issue is the need for a parliamentary accountability, and if I may, and I cannot improve on these words, I quote from what Sam Silkin wrote in 1978, a very distinguished law officer. If it were otherwise, he said, “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 ever were, we would have returned full circle, for accountability without control is meaningless and whatever minister was answerable for an independent law officer would have to 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”. I cannot improve on that.

Q120 Mrs James: There are other methods of securing accountability, for example by making an office holder an officer of the House of Commons, similar to the Ombudsman or Comptroller and Auditor General. Would this be possible for the office of Attorney General?

Lord Morris of Aberavon: I am not aware that the Ombudsman can stand at the bar of the House and answer questions, and that is the crucial test. You never know how it is going—whether you will do well or badly. It was Lloyd George who said that he would never make a speech in the House of Commons without having butterflies in his stomach and every time I had to face the House of Commons I always had butterflies in my stomach because there is no better discipline. There is my former PPS smiling and he knows—we were always glad to have him there and it seems to me they are going in opposite directions. There are two horses being ridden there and it seems to me they are going in opposite directions.

Chairman: Had we existed at the time you would have been given a very rough time in this Committee on the same subject, but I accept it is not the same thing.

Q121 Mrs James: Quoting Lord Lester, who spoke in the House of Lords on 1 February, he said: “as elsewhere in the Commonwealth, parliamentary accountability for the Attorney and the DPP could easily be secured by having an elected Cabinet minister of justice”. Do you agree or disagree with that?

Lord Mayhew of Twysden: I am familiar with the quote, of course, and I looked at the schedule which was attached to the Attorney’s submission to this Committee in which he very helpfully set out the various arrangements in most of the Commonwealth countries, and it seemed to me that what Lord Lester was saying was more admirable was found in Australia and Canada and New Zealand, to have the head of the prosecution service the Attorney General who sometimes doubled up as the minister of justice, he was far more involved in political matters than the Attorney General is here, and I could not see how that married up with Lord Lester’s earlier remark in the same debate, the same speech, in which he had said how can it be possible for the Attorney General to give, let us say, his consent in a quasi judicial matter to the prosecution of a particular defence when he is so concerned with political matters? There are two horses being ridden there and it seems to me they are going in opposite directions.

Lord Morris of Aberavon: I think he defeats himself in his second comment.

Q122 Mrs James: Lastly, given that most legal advice to the Government is in practice given by civil servants and lawyers, for example, relating to compliance, etcetera, does the Attorney General need to be a politician at all?

Lord Morris of Aberavon: I think he does if you accept the Silkin Test of accountability. 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, many more and I will not detain the Committee—I think it would be a sorry day if we lost the accountable person answerable to Parliament, and I agree with Lord Mayhew 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.
Lord Mayhew of Twysden: I agree with that, if I may add. It goes back to the point about accountability, which I do not want to dwell upon in any superfluous way, but 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. I had the advantage of reading the transcript of your questioning session with the Attorney on 7 February and I agree, if I may say so, and I do say so, strongly with the way in which he dealt with that particular question. I will not take time but to take one example, if he has got to argue for more of resources for the Crown Prosecution Service, for example, he can do so much more persuasively with ministerial colleagues, it seems to me, than if he is somebody who is completely detached. I endorse everything the Attorney said really in answer to that general point.

Lord Morris of Aberavon: I would agree and go further, Chairman. Now, I think since Lord Mayhew’s time, there is this tripartite machinery of the Lord Chancellor, the Home Secretary and the Attorney General to look at justice considerations generally, the speeding up of justice and bringing people before the courts, and certainly in my time and I have no reason to believe it has changed, that joined-up government—to use a phrase which has now gone out of fashion—certainly was working well, and he had to be a politician.

Q123 Mr Tyrie: You said a moment ago, Lord Mayhew, that you do not think that an institution can be accountable to Parliament unless it is represented in it. I was running examples through my mind to see whether I agreed with that idea. Does this mean that, for example, you would oppose independence of the Bank of England on the grounds that a decision as serious as the setting of interest rates, which was once directly the responsibility of the Chancellor, now lies in the hands of the Governor, who is not a member of Parliament and who is accountable only to the—albeit powerful—Treasury Select Committee?

Lord Mayhew of Twysden: No, I would not oppose that; I thought it was a very proper reform. My point is that I believe the House of Commons, and the House of Lords too, would not regard it as sufficiently accountable if the man responsible for exercising jurisdiction over the Prosecution Service in this country, for example, was not able to come and justify himself or herself in person.

Q124 Mr Tyrie: But just to pursue the parallel, that is exactly what the Governor does when he comes to justify the decisions he has taken on the Monetary Policy Committee. Indeed, he has a statutory responsibility to show his accountability to Parliament in that way.

Lord Mayhew of Twysden: Yes. I do not think he does it in the Chamber of the House of Commons.

Q125 Mr Tyrie: In a Select Committee.

Lord Mayhew of Twysden: In a Select Committee, and of course the Attorney can be brought before a Select Committee—and has been. I just do not think it would be regarded as sufficient accountability if he is not able to be brought or to come of his own volition to the Chamber of the House of Commons. It is a matter of balance and a matter of degree, but that happens to be my view.

Q126 Mr Tyrie: I am really asking why.

Lord Mayhew of Twysden: Because 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.

Q127 Mr Tyrie: And you think those decisions are of greater importance than the setting of interest rates?

Lord Mayhew of Twysden: I think they are seen, and properly seen, as more important. I agree they are quite different in character, and the other is, of course, very significant in its effect upon people’s lives but not quite so significant as can be brought about by a prosecution or a decision not to prosecute.

Lord Morris of Aberavon: The liberty of the subject is involved. Certainly in my time in the House of Commons that would have been regarded as a very important matter and the Attorney or his Deputy may have to reply to an adjournment debate on a particular case. I had to do that in the well-known case of Owen Oyston, I think, in Lancashire, and it was very important that there was somebody there to explain what had happened.

Q128 Bob Neill: Can I follow up that last point before I move on? Prior to Scottish devolution there were instances, albeit I suspect more by accident than design, when there were not Scots lawyers, often Scots law officers, in the Commons and sometimes in neither House. Did that fundamentally undermine their accountability?

Lord Mayhew of Twysden: I do not know how things were viewed in Scotland.

Q129 Bob Neill: But they were carrying out essentially the same roles.

Lord Morris of Aberavon: The basic point is this: that the Scots could not get a reasonable lawyer elected to the House of Commons!

Q130 Bob Neill: I understand why it happened and I am glad that is not a problem south of the border—

Lord Morris of Aberavon: If they could, they would!

Q131 Bob Neill: I have that point, Lord Morris, but did it in practice make them so significantly less accountable?

Lord Morris of Aberavon: When it first happened the cry late at night is that we send for the Lord Advocate knowing the Lord Advocate never had a seat in the House, but it is very much second best. Now, of course, he is a member of the Scottish Executive.
Q132 Bob Neill: Indeed. I accept it is different now. So it was second best. The other point I wanted to come back to is the point you raised, Lord Morris, about the tripartite machinery. We have seen a change in the constitutional position of one part of that, the Lord Chancellor, in the 2005 Act to the point that he need not even be a lawyer, and the question is should there be a lawyer at the heart of government. I wonder what thoughts both of you have as to the implications of the change of the Lord Chancellor’s role for the Attorney’s role?

Lord Mayhew of Twysden: I rather agreed with what the Attorney said in his memorandum to you or to Birmingham Law School, I cannot quite remember which was Attorney General for a statutory statement of his responsibilities, and in particular in relation to the public interest and upholding the public interest he makes the contrast with his own position which is non statutory in that regard with the 2005 Act and the Lord Chancellor. I thought there was mileage and merit in that but I do not think that the change in circumstance is sufficient, for example, to warrant his going as of right every time to Cabinet, something we have already discussed.

Q133 Bob Neill: He did say that in particular he thought that the role of the Attorney upholding the Rule of Law, which you alluded to, Lord Mayhew, was underestimated in the new arrangements. Should that be codified in some way?

Lord Mayhew of Twysden: It may not be underestimated; perhaps it is understated in the sense that we have already identified. He also went on to say that there is plenty of scope for more education in what was Attorney General for a statutory statement of his responsibilities, and I think that is absolutely true. I think there is a terribly damaging public fashionable mantra now that if somebody is confronted in public life with a contrast and a conflict between his public duty and his private or his political party interest he cannot be trusted to do his public duty. I think that is a terribly damaging and quite unjustified fashionable mantra and I think on the positive note it is highly desirable that there should be a much greater public education on the matter. Secondly, I think it is very desirable that nothing should be done to feed that on the basis that in some quarters is suggested for the Attorney’s role at the moment in the light of what is described as “recent events”.

Lord Morris of Aberavon: Could I add and agree with that that in the Constitutional Reform Act, and I think the Attorney in his evidence to you, Mr Chairman, was referring to that, under Section 3, the Lord Chancellor, “other ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary”. I certainly would not object to spelling out the name of the Attorney; whether it adds anything when the words “other ministers of the Crown” are there is maybe doubtful. Likewise, the code of conduct for ministers: “The code should be read against the background of the over-arching duty on ministers to comply with the law, including international law and treaty obligations to uphold the administration of justice and to protect the integrity of public life”. Well, there are two limbs there which cover the Attorney General, he being a minister of the Crown.

Q134 David Howarth: You have mentioned several times the twin concepts of the public interest and the Rule of Law as being key aspects of the Attorney’s job and, Lord Mayhew, you also mentioned the fashionable cynicism about people’s ability to carry out their public functions in a political context. Do you think there might have been a serious change here in the relationship between the Rule of Law and the public interest in the following way: that before that cynicism was prevalent the Attorney’s function in upholding the Rule of Law would strengthen public confidence in the Attorney’s role in upholding the public interest, that there would be a positive relationship between the two, but now, because of cynicism and because of recent events, it works the other way around, that because the Attorney is involved in political decisions that undermine public confidence in the Attorney’s attachment to the Rule of Law itself? I refer to the advice on the legality of the war in Iraq and to more recent events on prosecutions and refusals to prosecute.

Lord Mayhew of Twysden: Well, I do not think that his responsibilities as guardian of the public interest are essentially separate from his responsibility to secure the upholding of the Rule of Law; I think it is part of the same thing. The Rule of Law requires that, for example, in the case of prosecuting decisions the public interest should play a part in the decision so I do not regard there as being a dichotomy here, though sometimes it appears to be believed that there is. I am not able to judge, to measure, what is described as the prevalent mood of public cynicism. I have referred to a fashionable mantra but I actually think that the British public are pretty shrewd about these matters and I do not think they do take their considered opinions from the size of the headline, if I can put it like that. So I would be very reluctant and saddened, indeed, to find a constitutional arrangement which has stood the test of time for a very long time indeed overturned on the basis of, well, let’s call them “recent events” which do constitute no more than a short run of controversial decisions. I know that you are to hear the Lord Chancellor shortly and it has been reported that he said that the role of the Attorney General is no longer constitutionally sustainable. That is a fine sonorous phrase and I am sure you will be asking him what it means, and what it is in recent events that has brought it about.
House and facing immense controversy regarding something which had happened in west Africa. The Khalid case again was perhaps even more controversial, which you may or may not have read, and it is worth reading. One never knows what happened. I seem to remember the case, and I have not read it anywhere, it is just youthful recollection, of a Russian athlete in the middle of some important international negotiations who was charged with shoplifting in Oxford Street—there is a whole range of matters which can cause controversy when you have a very quiet patch and then something of that kind erupts; it is nothing new in my view, and unless you start off with a mantra that you cannot trust an active politician to hold the office of Attorney General, which may well be a point of view, then I think you have to wear it and prefer the fact that whoever does the job and has done it for 500 years and more with all these flaky bits can do it and it should be done in this way because the biggest prize is accountability to Parliament.

**Q135 David Howarth:** I have one final question which arises out of the previous discussion about the effectiveness of accountability to Parliament, which I think is your main theme. Would you agree that the effectiveness of that scrutiny in the Commons in terms of upholding the Rule of Law side of the Attorney’s job depends on the commitment of members of the House of Commons to the value of the Rule of Law, and that if members of Parliament no longer collectively have the same commitment to the value of the Rule of Law that will have a knock-on effect on scrutiny of the Attorney’s role on that side of the Attorney’s job?

**Lord Mayhew of Twysden:** Yes, it would, and very lamentable it would be, but if they were so indifferent to the Rule of Law as the question supposes they would soon put paid to any alternative arrangement that might have superseded the present one. If I could just add a word or two to the last discussion, I do wonder what is the purpose of having principles of public life to which everybody adheres if we are going to adopt a course which would imply that really it is not reasonable to trust anybody actually in public life vested with heavy responsibilities to adhere to those, starting with the Attorney General. It does seem to me to be a curious approach.

**Q136 Dr Whitehead:** Is there not, though, what one might call a perceptual tension, and maybe a perceptual tension that has increased in recent years, but nevertheless a tension which is inherent in the fact that, on the one hand, the Attorney General must be seen to be defending the public interest and, on the other hand, providing legal advice to government where the perceptual tension may exist in terms of the legal advice being seen as how to get the Government out of a problem, rather than speaking truth to government in the interests of public interest?

**Lord Morris of Aberavon:** Well, there are two distinct things here. 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, and I am confident that all have done their best to give the best possible advice to the Government and they have the advantage of having their own counsel, they can go out to independent counsel if necessary, the Treasury Solicitor’s department—they can give the best advice they possibly can. Now, that is the Government’s legal adviser and in that part he is a minister, full stop, but on the public interest side on a decision to prosecute, or matters of chancery or whatever, he is there as the guardian of a public interest, and a whole host of things which I will not weary the Committee with which have been spelt out by the Attorney in his memorandum where it is quite a different role completely to his role as legal adviser, and it was pitifully put, of course, by Shawcross many years ago, which dealt with the situation of his role in that capacity—quite independent, not as a minister, in an ordinary sense but rather an independent person.

**Lord Mayhew of Twysden:** But I agree with Dr Whitehead’s point that there is a perceptual tension, certainly, and that is why the true position as a matter of education, as we have touched on already, is so important. I think it can be made more vivid, however, by reference to past decisions of different attorneys. What is described as the prevalent rule of cynicism is based upon the recent headlines but if the public are going to be presented with a major change in our constitutional arrangements of this character and in this context then they will want to look at the thing much more in the round and go back over past decisions. If I may refer to the case of Westland where there was some local difficulty, the Attorney General at that time, with public knowledge, Lord Havers as he became, wanted, entirely properly, in due course to become Lord Chancellor but it did not prevent him from saying that he would put the police into No 10 unless there was a proper inquiry into what had taken place. That is rather a vivid illustration, so it seems to me, and I have some reason to recall it. There was another occasion, a very unhappy one, when it fell to me to authorise the prosecution of a Conservative backbencher but it did not occur to me, nor should it have done, that this should be influenced in any way by partisan considerations. There are other illustrations to be made and the public and those who are advising the public will really want to look at the thing in the whole. By saying that I do not want to give any indication at all that it is my view that so-called recent events have undermined the workability of our present arrangements; I do not think they have.

**Lord Morris of Aberavon:** I would agree. My example would be the war crimes prosecution. I had spoken against the Bill, voted against the Bill, was asked by many journalists before the election what my approach would be, and I made the obvious point: “This is the law of the land and if it comes to me to decide whether to prosecute or not then I will look at it with all the care that is necessary in any matter where the Attorney’s consent has to be obtained”, and on that particular case my wish, as I said earlier, would have been, had I the time, to
prosecute myself despite the stance I had taken, and I had taken the stance on the basis of it was too late and we would only get millions, and millions we got, too, but it did not inhibit me at all in reaching a proper decision, evaluating I think over a period of three days and talking to leading counsel, as regards whether a prosecution should take place.

**Q137 Dr Whitehead:** You mentioned earlier Lord Lester’s two statements in the House of Lords on 1 February. Taking the first one which is the statement concerning the Attorney General being a member of the government and their most senior legal adviser in independent law guiding the public interest, he said “How can he claim credibility to act quasi judicially when he plays a highly political role at the heart of government?”, and I think you have alluded to that tension but in responding to Lord Lester’s question, could it not be the case that perhaps playing a political role in the heart of government and having the credibility to act quasi judicially and defending the public interest, actually the outcome of the Attorney General’s deliberations might be, as it were, to be unfair to his own side in order to demonstrate precisely that independence and defence of the public interest?

**Lord Mayhew of Twysden:** All institutions are staffed by human beings and therefore are the subject of the fallibility of mortality, but I think that somebody who comes with the background that a lawyer will bring to the job ought to be able to distinguish, and I think has shown that they are able to distinguish, between what are proper considerations and what are not and what is a proper balance and what would be an unjustifiable one. I understand the point.

**Q138 Keith Vaz:** You have already told the Committee, Lord Morris, that you disagree with the reported statements of the Lord Chancellor that the role of the Attorney General in government is no longer constitutionally sustainable. Do you also disagree with Harriet Harman’s statement that it was a contradiction in terms to have an accountable holder who was unable to publish the advice that he had given to the people to whom he was accountable?

**Lord Morris of Aberavon:** On the first point I will read very carefully the explanation the Lord Chancellor gives in elaborating that comment which, frankly, I do not understand—

**Q139 Keith Vaz:** Careful, he is behind you. **Lord Mayhew of Twysden:** I hoped he was! **Lord Morris of Aberavon:** Be that as it may, I am very relieved you are here! On the Harriet Harman point, again, that is news to me. Let me explain. Lord Mayhew and I appeared before the House of Lords Select Committee on the prerogative of going to war and the need to have parliamentary consent, and we both came down that Parliament should be consulted and we put forward the suggestion which was accepted that there should be a convention of the constitution, and in my case that should be endorsed by each party leader before an election in order to ensure that the convention subsisted; that before committing troops there should be the consent of the House of Commons. But I put it forward there in evidence, and I have the evidence here, that I likened the relationship of the Attorney and the Government to that of a family solicitor and a client and I would suspect, I hope rightly, that most of you would not wish to have the advice of your family solicitors broadcast in the market place.

**Q140 Keith Vaz:** So she is wrong?

**Lord Morris of Aberavon:** Definitely wrong, and this particular Damascene conversion baffles me, that that is the basis of it; that it is an entirely a matter between the Government and the Attorney and if it were opened up, and it has not been opened up except in very rare and exceptional cases 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.

**Q141 Keith Vaz:** Lord Mayhew, do you agree with that? Do you think there is a contradiction? Should the advice be published? Is Harriet Harman wrong?

**Lord Mayhew of Twysden:** I think the reasons that have been given to support the convention are sound. There does have to be absolute candour in an advice if it is to have maximum value, and for it to have maximum value it must be based upon instructions from the client which, again, are fully candid. I think that it is entirely proper that the character of the advice given by the Attorney General should be made public; I think that the doctrine is evolving and I think the situation is evolving sufficiently to justify in what is called a proper case the client, the Government, saying: Well, in this case I am content that the full opinion can be made public, but it is a matter of legal professional privilege; it is exactly the same in character, as Lord Morris has indicated just now, and I think there are good, sound, practical reasons in terms of the value of the opinion that is going to be given for maintaining the general rule, so I think she is wrong.

**Lord Morris of Aberavon:** And it is for the client, which is the Government, to decide whether to lift the prohibition. There may be cases, if our convention on going to war comes to pass and is accepted by the Government of the day—and it may well be at a later stage, then as part of the Prime Minister’s explanation to the House of Commons as to going to war he may want to play all his cards, but he would be the client, and he—

**Q142 Chairman:** The worry is that he might not want to do so. **Lord Morris of Aberavon:** Well, but I would not object to it in principle. That is the general rule that has prevailed, that it is a client/advocate relationship which needs candour on both sides, and perhaps the
parading of facts, which might not always be advantageous to either.

Q143 Chairman: Lord Mayhew and Lord Morris, thank you very much indeed for giving us a really interesting session this afternoon. We now have the opportunity to ask the Lord Chancellor the questions on which you were most interested in hearing the answer. Thank you very much indeed.

Lord Mayhew of Twysden: I hope the answer will be sustainable!

Witness: Rt Hon Lord Falconer of Thoroton, QC, a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor, gave evidence.

Q144 Chairman: Lord Chancellor, welcome back again, only a week later from your last visit. We will get on to the constitutional sustainability of the office of the Attorney General shortly but at this stage perhaps I might ask you one or two questions that were exercising the previous witnesses. It was that quotation from the ex-Solicitor General, the Minister of State in your Department, that it was a contradiction in terms to have an accountable officer who was unable to publish the advice he had given to the people to whom he was accountable. Do you agree?

Lord Falconer of Thoroton: I do not agree with 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. There are litigation considerations in relation to it as well. I do not know if you have had a chance to read what Lord Bingham said in a recent lecture. He is saying, where there are very big issues like war, it may be that you should publish.

Q145 Chairman: Do you think, as David Pannick suggested, that the Attorney should have the power himself to decide that it is appropriate, even in circumstances when his client so-called, the Prime Minister, did not think so but Parliament might well have a very proper interest in the advice he was giving?

Lord Falconer of Thoroton: No, I do not. If he is giving advice to the executive, ultimately it is the executive that decides, but there is an issue about his role in giving advice to Parliament as well. There has been a debate going on for quite some time about what is the precise best arrangement for the Attorney General. I very much welcome your Committee looking at this because I think we need to have a moderately open debate. I make it clear that I do not come saying that the government has proposals in relation to change. If you look at Professor Jowell, David Pannick, Lord Bingham, Lord Goldsmith himself in relation to a lecture he delivered last year, they are all raising questions about the precise role and function. I am extremely keen that we should be able to participate in that debate. On the question about should the Attorney have the choice himself whether he publishes or not, there will be times I think in which Parliament itself will want advice on issues. The Attorney advises both Parliament and the Executive from time to time. I think we need to consider the extent to which the Attorney giving Parliament advice is an appropriate course where, for example, Parliament then gets a definitive view itself on particular issues.

Q146 David Howarth: Going back to the way Lord Morris put it, that if there was complete disclosure there would be disclosure effectively of the instructions that were given to the Attorney, the facts as the client sees them, even if the instructions themselves were not disclosed, it is usually very easy to reconstitute those instructions from the text of the advice. One of the things lawyers do is try to work out from what the other side is up to what the other side thinks the facts are. Is not the point in this particular case that the public should know what the facts are in the government’s mind at least in those cases which are not a matter of immediate litigation but where the issue is more a political one than a commercial one? The very essence of political debate is what did the government think the facts were, for example, in the case of the war in Iraq.

Lord Falconer of Thoroton: Yes, of course Parliament and the public should know what are the facts upon which the Government is operating. It is not just in relation to issues like war in Iraq; it is also in relation to issues such as are we discriminatory under the law in breach of various directives by having differential ages at which people can retire. There is no difficulty in relation to either of those issues—this is overstating it and putting it too crudely—in Parliament summoning the relevant minister to Parliament and saying, “Tell us what the position is in relation to weapons of mass destruction. Tell us what the position is in relation to whether you think it is discriminatory to have differential ages for retirement.” There is no
difficulty in getting the facts on which legal advice may be required. If you are saying that you need to be sure the same facts are being given to the lawyer—

Q147 David Howarth: Yes, that is the point. Lord Falconer of Thoroton: If the lawyer has been told one thing and Parliament has been told another, that would be wholly wrong, but I do not think that is perceived to be a particular problem.

Q148 Mrs James: I want to turn to the accountability of the Attorney General. We had very interesting responses from Lord Mayhew and Lord Morris on this issue. Should the Attorney General be a member of the House of Commons and, if so, are there any potential consequences for the accountability and independence of that post? Conversely, would it help or would it be better if he was a member of the House of Lords?

Lord Falconer of Thoroton: The first question is what do you think the Attorney General should do. The Attorney General currently gives legal advice to the government and superintends the prosecution services; he has the public interest role which he describes well in the material produced, and he does some ministerial functions, in particular in relation to the criminal justice system. With those ministerial functions, it is impossible for him not to be a member of one or other House. He has to be accountable for those ministerial functions. If the Attorney General 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. 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. The first question is what do we want the Attorney General to do. If it is not to include traditional, ministerial functions, I think the Committee should address the issue; should he be in Parliament or not? In some ways being out of Parliament gives him greater separation from the politicians. Being in Parliament makes him accountable, makes him part of the group and to some extent he is superintending them.

Q149 Mrs James: Interestingly, the two previous Attorneys General were quite equivocal about this. They saw it as very important that it remained as a function within the House of Commons. Given that most legal advice is given to the government by civil servant lawyers et cetera, do you think the Attorney General needs to be a politician at all?

Lord Falconer of Thoroton: It is not to do with the current Attorney General; it is to do with the change in the times. If you look at the ministerial things and those things that are not party political, if you take away the ministerial things, in some ways it would be better that he or she was not a politician because there would be no doubt in people’s minds, but what you would lose would be the accountability. You would not be able to say directly in the House of Commons or in the House of Lords, “Why did you give this advice? Why did you decide this or that?”

The precedent question is do we want the Attorney General to be a politician or not?

Q150 Mrs James: Where do you think that debate should be had then?

Lord Falconer of Thoroton: I am completely neutral in relation to this. Part of the debate involves this Committee expressing views in relation to it. We need to debate it and I would like to make it clear I do not have a view one way or the other in relation to that.

Q151 Chairman: The two former Attorneys who were in earlier did not take your model and distinction between the independent functions and the ministerial functions on the basis that it is the ministerial ones they need to be accountable for in Parliament and not the others. They both advanced cases of functions in relation to prosecutions, for example, for which they had been accountable and thought it right that they were accountable. They mentioned specific cases where they had adjournment debates about decisions to prose cut or not to prosecute. Do you disagree with them about that or do you think it less important?

Lord Falconer of Thoroton: I am speaking to some extent from my own experience as being Solicitor General. I know that totally different considerations would apply to issues such as should a prosecution be stopped, which is really where the big issue always arises. Those issues had to be dealt with in a completely objective, non-party way, doing it in a quasi-judicial way. I see a very fundamental difference from that role to the role of how we are getting on in bringing in persistent young offenders and speeding up the system. People are pressing us persistently in relation to that. I see a difference between being asked about a particular decision like that, which is like a semi-judicial role, and a political decision. A judge comes to a decision on the basis of what are moderately well defined parameters and in accordance with his own proper view of the facts. The idea that he should be questioned about why he came to that particular decisions feels a totally different sort of issue from “How are you getting on in bringing more criminals to justice?”.

Q152 David Howarth: Might we turn to an area where at least at the perception level there might be a serious problem in the political role of the Attorney General? The Attorney has the power to stop any prosecution and in some circumstances the Attorney’s specific consent is necessary for a prosecution. What about the case of potential prosecution of ministers, the Attorney’s fellow ministers? Is it not almost impossible, especially in this cynical age, to stop the perception that there might be some bias in the way that decision was reached, even though it might well have been reached perfectly properly and quasi-judicially?
Lord Falconer of Thoroton: Those decisions obviously have to be made in accordance with the law and that means applying proper considerations. Every Attorney General would obviously accept that.

Q153 David Howarth: As you know, the problem with that reply is that that discretion is unreviewable under the Buring doctrine so there is no judicial accountability; there is only political accountability.

Lord Falconer of Thoroton: It has to be done in accordance with the law. There is political accountability. That is correct. I would not completely accept that those decisions are unreviewable by the courts. I suspect that there is a vestigial jurisdiction in the courts to review them. Somebody has to make those decisions. The way that politics have changed means that one needs to be much clearer now about the roles that individually people perform. That is in part what motivated the changes in relation to the role of the Lord Chancellor, where the idea of having a judge in Cabinet who was also Speaker of the House of Lords, which was not causing me to do not think any particular public confidence difficulties, was something that was not, I believe and believed at the time, sustainable in the long term in the sort of climate that currently exists.

Q154 David Howarth: Would it not be better in this type of case specifically to have a different system? Other countries have experimented, perhaps not happily, with ideas such as special prosecutors. Is there not an argument, specifically in the case of the potential prosecution of ministers, for a different system?

Lord Falconer of Thoroton: I am not in favour at all of the idea of special prosecutors because I believe the Crown Prosecution Service and the other state prosecuting bodies like the Serious Fraud Office or Her Majesty's Revenue and Customs are completely unpolitical and are not in any circumstances regarded as unreliable. I do not think for one moment the issue is would a prosecution be properly looked at by the prosecution authorities. I have made it absolutely clear that I am quite sure that any Attorney General, including this Attorney General, will act with complete propriety in relation to his role in that. The question is, looking at the whole package of what the Attorney does, if it has essentially got to be non-political, should he be a politician.

Q155 Dr Whitehead: That brings us back to Lord Lester’s comments in the House of Lords on 1 February where he did not distinguish exactly between the question of the Attorney General having credibility to act quasi-judicially and being a minister. His exact definition was, “... plays a highly political role at the heart of government ...”, which appears to go beyond the idea that someone is a minister but a minister of a particular kind from other ministers, in as much as he is the person providing independent legal advice and therefore is detached from the normal run of ministerial activity that all that entails. How do you respond to Lord Lester’s distinction?

Lord Falconer of Thoroton: Put aside the question of whether any particular Attorney has been highly political, which I do not accept. The role that the Attorney General is playing is utterly different from any other minister. I thought John Morris was entirely accurate. It was a perfectly good analogy. 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.

Q156 Dr Whitehead: Presumably there are different families. There are families and Mafia families.

Lord Falconer of Thoroton: There are different lawyers as well.

Lord Falconer of Thoroton: Whatever one may say about the role of the family lawyer, I think there is frankly fairly widespread feeling that the recent controversies have undermined public confidence in the role of the Attorney General and have certainly damaged public perception of the Attorney General’s independence. Is that, do you think, just bad luck because of the cases that have particularly come to public attention recently, or do you think the distinction that may have to be made between the minister who is not perhaps like other ministers and the family lawyer who is advising a particular family is something that the public is simply not going to wear? Therefore, is the situation repairable or is the damage so great that, regardless of the niceties of the argument, reform is now inevitable?

Lord Falconer of Thoroton: I do not accept that public confidence has been irretrievably lost. I do accept that the public look at these issues in a different way now from the way they looked at them in the past. In 1950 a Labour minister was alleged to have committed an act of corruption, a man called Belcher. He received a holiday in Margate from somebody and this was alleged to have affected his decisions. A tribunal was set up and the Labour Attorney, Sir Hartley Shawcross, then cross-examined Belcher to complete extinction, revealing how unreliable and unsatisfactory he was. The criticism then was that Shawcross was much too anti his own party. In those days there did not seem to be a particular issue in relation to that. 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.

Q158 Dr Whitehead: It is interesting that you raise the example of Lord Shawcross in as much as the criticism was that he was unfair to his own side. In the present climate, would you not think that it would be very difficult for a modern Attorney General not to be unfair to his own side in order to demonstrate that he really was independent?

Lord Falconer of Thoroton: I am quite sure that any Attorney General would deal with it in a way that was entirely proper.
Chairman: That is impressive confidence. I am not sure what it is based on.

Q159 Mr Tyrie: Can I take you back to your own remarks which both the former Attorneys General have insisted that you comment on at length, thoroughly and comprehensively, when you said or at least you were reported in The Guardian as saying that the role of the Attorney General in government is no longer constitutionally sustainable?

Lord Falconer of Thornton: Please look at the article. What it says is, “The role of the Attorney General in Cabinet is no longer constitutionally sustainable. Lord Falconer has warned” which you would have thought sounded like a quote. That is not in quotation marks. What I actually said was, “It is very difficult to see the status quo as being maintainable. We need to see what are the alternatives. I am conscious of the fact that some of the things the Attorney General does are in fact conclusive on particular issues such as whether a prosecution stops, which is a matter that has to be done independently of political considerations.” What I was saying there was I do not think the status quo is maintainable because it is perfectly plain—I am talking generally—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. What I am trying to say there is I do not think that the status quo is maintainable.

Q160 Mr Tyrie: Have you particular bits of the role that you think are unsustainable? You have posited two models.

Lord Falconer of Thornton: I think there are three. One is the current model broadly where you have a minister and the non-ministerial person put together, who is effectively a politician in either Commons or Lords. The second is somebody who is in either the Lords or the Commons but is a non-politician. Although this is not quite the position in Scotland, the Lord Advocate has for the first time been somebody who is not a member of the governing party. She is somebody who is specifically non-political. Although she has some ministerial roles, she has basically said, “My role is to do the superintendence of prosecution and to give legal advice.” A third model is somebody who is not a politician, who is in neither House of Parliament and does the 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, which the Attorney described in his evidence. It is basically one of those three models.

Q161 Mr Tyrie: That is extremely helpful. The evidence you are giving us will help us. I do not have a view but on the idea of having someone who is not a politician. The former Attorneys General both felt that it would be wrong for an Attorney General or someone playing that role not to be answerable directly to the House of Commons or to Parliament. What would be your response to that?

Lord Falconer of Thornton: I can see that there would be considerable merit in it 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. 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. 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. The other argument for why it is good to have a politician or somebody in the House of Commons or the House of Lords doing it is that the Attorney or the Solicitor understands better the people he is advising and they would respond better being advised by a fellow Member of Parliament than to somebody from the outside. That is a view strongly espoused by some former Attorneys General. Others say, “Why would you not pay attention?” If the Treasury Solicitor says something to me, I am not going to say him, “Well, you are not a Member of Parliament.”

Q162 Chairman: One of the problems with the non-politician line is that, following the change in your own position such that your successor could be a non-lawyer, if the Attorney also ceased to be in government as a lawyer, you could have a situation in which there was not a senior lawyer in government. Is that a problem or is it not?

Lord Falconer of Thornton: It could well be a problem and I see force in that argument. The difficulty is you have to be clear what role an individual is playing. If you are in government as a politician doing partly legal and partly non-legal stuff, your role is slightly blurred. A lot of this depends on what you think the Attorney General should be doing and if he is doing an exclusively lawyer’s role then quite a lot of it becomes easier, it seems to me.

Q163 Mr Tyrie: That is extremely helpful. As a non-lawyer, I generally take a lead from advice I get from people who have thought about it a great deal. You said at the beginning that you had a completely open mind on these matters. My impression, listening to you, is that the first of your three models is one that you have some doubts about, where we should carry on as we are pretty much, and that therefore we
should be looking at one of the other two. Have you any inclination at all between these or do you have a completely open mind?

Lord Falconer of Thoroton: I have particular views but I am not prepared to express a particular view in favour of one or other model because there is a policy element in this as to what should be done about the Attorney General one way or the other. There is no proposal to change the role. I am in this delicate position of being keen to see a debate take place. All I can do is put before you what I think the particular model and pros and cons are in relation to it.

Q164 Mr Tyrie: I think it is fair to say that there already was a debate. Your intervention was a slight misquotation although you confirm that the status quo cannot be maintained and that the role was not sustainable. They are not far away from one another. The fact that you have intervened in that way certainly accelerated the process whereby people would think about this and it probably has had some influence over whether this Committee should look at it. Do you have a time frame over what is now and what may well become uncertainty over the role of the Attorney General and when it should be brought to a conclusion?

Lord Falconer of Thoroton: No. I do not. How long is a piece of string? How long should a debate go on? Will an answer emerge? I suspect this Committee will produce a report. The Government will be obliged, quite rightly, to respond to it. The consequence of that will be that we will have to form a view on what the right and the wrong thing to do is. I can tell you that we will deal with your report within a reasonable time but I cannot tell you when the debate will end.

Q165 Mr Tyrie: We are talking about the intention to do something in this Parliament, are we?

Lord Falconer of Thoroton: I am keen for there to be a debate. The government has no view about change or no policy to change at the moment.

Q166 Bob Neill: I get the sense that your view is that, whilst it might be desirable to have somebody who is a lawyer at the heart of government, to use the current Attorney’s words, it is not essential to have somebody who is a lawyer because they are a lawyer, as opposed to somebody who happens to have that experience.

Lord Falconer of Thoroton: I think it is absolutely vital that any government has a source of definitive, legal advice. When you say “at the heart of government”, there must be somebody who is able to say, “This is the legal position in my view” and there must be a convention that prevents government departments going and getting advice until they get the advice that they want. There needs to be a hierarchy of legal advice. It has always been the case that the Attorney General’s view is definitive within government. Whatever model you have, you need to preserve that.

Q167 Bob Neill: I accept that but on some of the models you posit that need not be a politician.

Lord Falconer of Thoroton: I agree.

Q168 Bob Neill: If we go down the route of one of those models, which is that the Attorney is essentially the lawyer, the giver of advice and the sanctioner of prosecutions, do we not then have to look at how that changed role impacts upon the role of the Treasury Solicitor and of the DPP?

Lord Falconer of Thoroton: You probably would do, yes, though again the Treasury Solicitor and the DPP’s role will continue exactly as before. Indeed, the Attorney General’s statutory functions, both in relation to advice and in relation to prosecutions, can continue as before. The question is what is the nature of the person doing the job. Is he or she a politician or not? Is he or she somebody in Parliament who is a party politician? Is he or she somebody in Parliament who is not a party politician?

Q169 Bob Neill: Do you think it would be helpful under those circumstances to have somebody other than the DPP, for example, as the ultimate sanctioner of prosecutions? Would that be a duplication perhaps?

Lord Falconer of Thoroton: I do not think it would be necessary to make that change. Many statutes require the Attorney General’s consent to prosecutions. I do not think you need to change that. You just need to address the issue of what is the basic structure within which the Attorney sits.

Q170 Bob Neill: That goes in a very different direction to the current Attorney’s suggestion that his role should comprise responsibility for a serious government department.

Lord Falconer of Thoroton: I read with enormous interest his evidence before this Committee. He corrected somebody when they said “big Government department”. I thought he was meaning the Attorney General should have proper support. I am sure that is right and I am sure the support he should get should be the support that is commensurate with the role he is playing. Siân James asked me the question about defining what he should do first. Practically everything else fits into place.

Q171 Bob Neill: Do your own thoughts indicate that doing that, setting clear objectives, which I take is part of it, goes beyond reforms to the oath and other matters that the current Attorney has already conceded?

Lord Falconer of Thoroton: The Attorney refers to changes to the oath. If you took the view that that was sufficient, that would be sufficient, as it were.

Q172 Bob Neill: I get the sense you are saying that we should perhaps go much further than that.

Lord Falconer of Thoroton: I am not expressing a view one way or the other in relation to that.
Q173 Bob Neill: I am not going to get one, even if I try.

Lord Falconer of Thoroton: You are not. That is correct.

Q174 Chairman: You have said that it is a good thing there is a debate and that you do not have a time frame for it. You will remember that when you were appointed Lord Chancellor and Secretary of State for Constitutional Affairs, at 6pm the post of Lord Chancellor had been abolished. By 10pm it had been reinstated and you discovered that you had to be put in a wig and gown and sat on the woolsack by 11 the next morning. There was, as has been generally acknowledged, a back of an envelope job done on fundamental constitutional change. We keep reading in our newspapers that there could be a substantial shuffle round of functions affecting the Home Office, your department and possibly even the Attorney General who, when he spoke to us, seemed to be thinking of at least some of the functions in relation to the criminal justice system that he might gain in all of this. Are we going to suddenly discover some day next week that another back of an envelope job has been done?

Lord Falconer of Thoroton: Could I deny, both formally and informally, that the abolition of the Lord Chancellor was a back of an envelope job? There is a difference, it seems to me, between a machinery of government change where you change which minister is responsible for which bits of government—which is being discussed—and one where you abolish a particular office, which is what the Lord Chancellor’s role involved. It is public that there are discussions going on about whether or not the Home Office’s functions should be divided. There are discussions going on as to whether that would lead to the creation of what is traditionally called a Minister of Justice. Those discussions are pretty well advanced. I cannot tell you what conclusion they will reach but that is the position.

Q175 Keith Vaz: We know the conclusions because Francis Gibb has already written about them in The Times. Have you seen that table setting out exactly which parts of the Home Office you are going to have, which parts are going to be kept by the Home Secretary? It is a done deal, is it not?

Lord Falconer of Thoroton: I cannot comment on it save to say that discussions are going on.

Q176 Keith Vaz: This is a public discussion. Did you not say it was in the public domain?

Lord Falconer of Thoroton: I said it is public that there are those discussions.

Q177 Keith Vaz: Can you confirm what has been put in The Times? Next week are we going to see exactly that same formula being announced by the Government?

Lord Falconer of Thoroton: I cannot confirm or deny what is said in The Times.

Q178 Keith Vaz: Presumably you are part of these discussions?

Lord Falconer of Thoroton: There are discussions going on.

Q179 Keith Vaz: Clearly the last Lord Chancellor was not part of the discussions.

Lord Falconer of Thoroton: This is a different sort of issue to that issue. To have a machinery of government change where there is a reworking of Whitehall is a different thing from the abolition of the Lord Chancellor’s role. It is public that there are these discussions going on. They are internal discussions and an announcement will be made in due course.

Q180 Keith Vaz: Are you in favour of the Home Office being split and some of the functions that are being undertaken by the Home Office being transferred to your department? Are you in favour or against it? You must have a view on that.

Lord Falconer of Thoroton: Obviously it depends where the discussions end up but I have said in the past publicly that a Ministry of Justice is in principle a good idea and this might be the time to do it.

Q181 Keith Vaz: There must be two Lord Falconers of Thoroton in the House of Lords because I have an answer that you gave to Lord Lester of Herne Hill on 7 July 2003 in which he asks you whether you are in favour of a Ministry of Justice and you reply: “My Rt Hon friend, the Prime Minister, responding to the questions after his statement in another place on 18 June set out clearly why we do not favour the creation of a Ministry of Justice. I commend his views to the noble Lord.” This must be the other Lord Chancellor.

Lord Falconer of Thoroton: David Falconer.

Q182 Keith Vaz: Is there a David Falconer?

Lord Falconer of Thoroton: No.

Q183 Keith Vaz: You are now in favour of it?

Lord Falconer of Thoroton: I am in principle in favour of bringing together as effectively as possible as many justice functions as can constitutionally be put together.

Q184 Keith Vaz: You have changed your mind since 7 July 2003?

Lord Falconer of Thoroton: I find it difficult to remember what the context of that was in particular.

Q185 Keith Vaz: Do you want to have a look?

Lord Falconer of Thoroton: I do not think it would help.

Q186 Keith Vaz: We read also in The Times that your officials have already registered a website, www.justice.gov.uk. Do you know about this? Is that right?

Lord Falconer of Thoroton: That is true.

Q187 Keith Vaz: Why have they done this if there is not going to be a Ministry of Justice?
Q188 Keith Vaz: Looking down the list of ministerial responsibilities, your department seems to have 50 separate areas to look after. The Home Office has 70. The Attorney General appears to have 16. This is the list published by the government. The Attorney General is quite keen not just to get more secretarial support, which is what you seemed to be indicating, a couple of extra diary secretaries perhaps. He wants a beefed up department. You have been in all three of these departments, so nobody is more experienced at answering these questions than yourself.

Lord Falconer of Thoroton: It is a question of having gone through the experience of having been in the Home Office, the Law Office Department and the Lord Chancellor’s Department.

Q189 Keith Vaz: You can see that there is a possibility, not just of splitting it two ways but possibly three ways and some of the functions that the Home Office has should perhaps go to the Attorney General’s office and some of your functions—for example, human rights, et cetera—should go to the Attorney General’s department. Would you oppose a beefed up Attorney General’s department?

Lord Falconer of Thoroton: It goes back to the question of what role you think the Attorney General should play. If you think he can be a legal adviser and a minister as well, it would be possible to address the issue whether or not responsibilities of a ministerial sort such as human rights and freedom of information should go to the Attorney General.

Q190 Chairman: That decision might be pre-empted by a decision next week that a certain set of functions should be shunted off to the Attorney General’s office which would pre-empt the debate about what his role should be, would it not?

Lord Falconer of Thoroton: That is, in theory, true. The debate about the role of the Attorney General needs to precede any conclusions about what happens to the Attorney General’s role.

Q191 Keith Vaz: Do you think that, as a result of these changes that have come about because of problems specifically with the way in which the Home Office is handling immigration rather than any of the other areas, to give the Home Office a better focus, this would improve the delivery of justice?

Lord Falconer of Thoroton: Only if the changes improve the delivery of justice are they worth doing. They have two bits to them: the terrorism issues and the justice issues. The conclusions that are reached have to improve both.

Q192 Keith Vaz: You are sure this is not just reform for reform’s sake because this has been an area that has had a lot of modernisation obviously led by yourself and the Prime Minister over the last four or five years? It really does need to be done, does it?

Lord Falconer of Thoroton: There is no point in doing it unless you see, for example, better outcomes in relation to reducing reoffending, quicker criminal, civil, family cases, much more effective use of court time. There is only ever any point in doing it if you can identify an outcome for the people using the public service affected.

Q193 Keith Vaz: Going back to this list, which I know you cannot comment on because you are reluctant to do so, there are no areas in that list which cause you concern in respect of any conflicts of interest that may occur if, for example, prisons or any other of those areas come into your department? You have looked at that very carefully?

Lord Falconer of Thoroton: You have to consider very carefully issues of conflict of interest but currently courts and legal aid are the two big areas of expenditure in the Constitutional Affairs Department. The courts are independent between the defence and the prosecution. I do not see any conflict there. The debate is about prisons and probation. I would not see any conflict there. Criminal policy is another area. I would not see any conflict there.

Q194 Keith Vaz: You assume you are getting all those next week?

Lord Falconer of Thoroton: I do not know if I made it clear that there are discussions going on. I have a script that I keep to in relation to this. I would not like to comment further. You have many journalists who could answer these questions. They appear to be well informed.

Q195 Keith Vaz: Can I move on to judicial appointments? You must be very pleased with the performance of the Judicial Appointments Commission, bearing in mind that they have just had to completely look again at the way in which they have appointed circuit judges. Have they done well in your eyes?

Lord Falconer of Thoroton: It is extremely important that we have a Judicial Appointments Commission. It would be wholly wrong to seek to judge them by one particular competition where they accepted that they were not happy with their procedures and changed them.

Q196 Keith Vaz: They are pretty critical of your department, are they not? Have you seen the memorandum that was given to this Committee as a result of our letter to Baroness Prashar?

Lord Falconer of Thoroton: No.

Q197 Keith Vaz: She says that the Commission came to an early view that the selection processes that it inherited from yourself, Lord Chancellor, were too lengthy and cumbersome and that there were significant differences between the old and the new
Q198 Keith Vaz: Do you think one of the problems is that the people who were responsible for the last lot of problems in the selection of immigration judges that you told the Committee about previously were seconded to the Judicial Appointments Commission? Basically, they have the same people who worked for you working for them so it is not a surprise that this has gone wrong. Do you know how many are still seconded?

Lord Falconer of Thoroton: I do not know but perhaps I can write and tell you. The arrangements are new. Inevitably there will be a huge overlap in people because it is a difficult role to perform. My department was doing it before. It is quite right that lots of people who were doing it before are now doing it in the Judicial Appointments Commission, but it is a different set-up. It is a different accountability arrangement. It is a totally different way of doing it. I would expect there to be different results.

Q199 Keith Vaz: Can I assume that as a result of these serious problems it is a bit disappointing, having modernised the system and created a new commission, that the first thing they do—

Lord Falconer of Thoroton: It is one competition. It is the appointment of circuit judges. They have accepted they made a mistake. They have gone back in relation to that particular competition and they are in the process of putting it right. I do not regard that as an indication of the fact that I should regard them, in your words, as disappointing.

Q200 Keith Vaz: Have you had Baroness Prashar in?

Lord Falconer of Thoroton: I see her regularly.

Q201 Keith Vaz: Have you discussed this particular issue with her?

Lord Falconer of Thoroton: I have.

Q202 Keith Vaz: You are happy with the assurance that she has given you?

Lord Falconer of Thoroton: I am happy that she is completely on top of the position and keen to make sure it works well.

Q203 Chairman: If I could turn to Judge Collins’s comments on county courts, he stated that county courts were operating on the margins of effectiveness and with further cuts looming we run the risk of bringing about a real collapse in the service. That is pretty serious.

Lord Falconer of Thoroton: I disagree completely with what he is saying. There are various performance targets in relation to county courts. Can I provide them to the Committee? Between April 2006 and January 2007, 94.59% of processes were dealt with within five days with a target of 94%. That has dropped from 96.03% in the previous nine months to 94.59%. There are marginal changes in relation to it. They are not changes that in my view remotely justify the language of his honour Judge Collins. It is in the context of there being pressure on resources which means that bits of the system—indeed, all bits of the system—do in some cases have a little less money.

Q204 Chairman: Do you think the industrial dispute is a factor in the current situation?

Lord Falconer of Thoroton: Yes, but the industrial dispute affects the whole court system. I do not hear criminal court judges saying to me there is a prospect of a collapse of the system. I do not hear family judges saying to me there is a risk of a collapse of the system. I do not hear judges in the High Court saying that. I very strongly reject what his honour Judge Collins is saying. Yes, the position in relation to resources is not perfect but almost every other bit of the system is getting on and making it work. I do not think for one moment that the statistics which I will supply the Committee with justify the sort of remarks he has made.

Q205 Chairman: We will look at those statistics with some interest. Some Members of the Committee went to see the North Liverpool Community Justice Centre which was a very interesting experience. When are you going to publish the evaluation?

Lord Falconer of Thoroton: I do not know.

Q206 Chairman: You can let us know.

Lord Falconer of Thoroton: We are definitely going to publish the evaluation.

Q207 Chairman: In November you announced the creation of 10 new community courts. How will these follow the North Liverpool model or will they really be the Salford model where you do not have the single building; you do not have all the other agencies on the spot and you do not have a single, dedicated judge?

Lord Falconer of Thoroton: You have a single building in these other magistrates’ courts. What you do not have is accommodation for the CPS, the Housing Department, et cetera in the same building. The essence and the success, we think, of North Liverpool has been the extent to which the judge, Judge Fletcher, has become accepted as both a part of the community and somebody who understands what the community feels about things. He has also been successful in, for example, making sure that every day before his list starts there is a meeting of all the professionals involved. In Salford on a Tuesday—it is only one day a week and it covers...
Q208 Chairman: It seemed to us that the success of the Liverpool model was based partly on the fact that it was a relatively self-contained community with very little movement in and out. The same people could easily be brought back before the judge, for example, to deal with their fine payments and compliance with community sentences. Very considerable investment had gone into the building so that it was possible to accommodate all the agencies they needed to deal with, like housing and other support agencies, and the judicial resources were also highly concentrated and there were special arrangements made with the High Court to make this possible. You could not replicate that in the 10 places you listed in November. You were in danger of raising false expectations for what could be achieved.

Lord Falconer of Thoroton: I hope the Committee has the opportunity at some stage to go to Salford. I hope you are not being over-influenced by the Law in Action Programme which sought to draw the distinctions that you are drawing.

Q209 Chairman: We were impressed by what we saw. Liverpool was very impressive.

Lord Falconer of Thoroton: I have been to both Liverpool and Salford. They are very different in their physical feel. You are absolutely right about the fact that all the agencies are under the same roof but the ethos is very similar. Eccles is the bit of Salford that the community court there serves. There appears to be that same degree of connection and that seems to me to be the critical point.

Q210 Chairman: I hope the evaluation will be fairly soon.

Lord Falconer of Thoroton: Do you want some material from me in relation to that? Of course I will notify you of the date of the evaluation. Do you want some material about the comparison between Salford and North Liverpool?

Q211 Chairman: If you want to supply us with some more material, that would be very useful.

Lord Falconer of Thoroton: Would you also like roughly where we have got to in relation to the ten?

Q212 Chairman: Yes.

Lord Falconer of Thoroton: I was hoping I could persuade you that you do not need to have all of that expenditure on bricks and mortar and judicial resources to deliver the essence of community justice. If you were going to come to that view, there are other people who take the same view as me who have a degree of expertise that I do not have.

Q213 Bob Neill: I imagine the one thing that is key to it is the ability of the judge to deal with them all under one jurisdiction?

Lord Falconer of Thoroton: That has been incredibly useful, yes, sitting in the crown court as well as the magistrates’ court. Judge Fletcher would agree with you in relation to that but he would not say it was critical. What is the success of it? The sense that the court in the community it serves is perceived to be a contributor to solving that community’s problems, not something completely remote and separate.

Chairman: In raising this question we do not want to discourage the department from innovation. It seems to us to be a very worthwhile experiment.

Q214 Mr Tyrie: I wanted to ask whether you had any thoughts or views at all to express on reform of the composition of the House of Lords.

Lord Falconer of Thoroton: I will express views in relation to it on 12 and 13 March. My views are quite well known. The Lords do an incredibly good job at amending legislation and being a revising chamber. We should keep the same powers. There should be an elected element in the House of Lords. I do not believe introducing an elected element necessarily means that you lose the right relationship between the Lords and the Commons.

Q215 Mr Tyrie: What about the size of the elected element?

Lord Falconer of Thoroton: I have said 50/50.

Q216 Chairman: We shall see. Lord Chancellor, thank you very much indeed. If indeed your responsibilities extend, you may find yourself in front of us on a wide variety of other matters.

Lord Falconer of Thoroton: I would welcome the opportunity of coming back if there is any sort of announcement.

Chairman: Thank you very much.
Wednesday 27 June 2007

Members present:

Mr Alan Beith, in the Chair

Mrs Siân C James
Julie Morgan
Bob Neill

Mr Andrew Tyrie
Keith Vaz
Jeremy Wright

Witness: Robert Wardle, Director, Serious Fraud Office, gave evidence

Chairman: Mr Wardle, good morning and welcome. I think we have to declare any interests we might have around the table.

Jeremy Wright: I am a non-practising member of the Bar.

Bob Neill: So am I.

Keith Vaz: So am I.

Q217 Chairman: Mr Wardle, we are very grateful to you for coming along this morning. We are trying to cast light upon the role of the Attorney General and, indeed, look at the way that role might be changed in the future; so it would be helpful, to begin with, if you could describe how in practice the relationship between yourself and the Attorney works in making decisions under the Prosecutorial Code.

Robert Wardle: Certainly Chairman. I act under the Attorney’s superintendence under the 1987 Criminal Justice Act, much in the same way as the Director of Public Prosecutions and the Revenue and Customs Prosections Office. Superintendence is not defined, as far as I am aware, although there have been some pronouncements of it. I think in practice it means that the Attorney sets prosecution policy; I think he is there to deal with resourcing issues, the size of the office and particularly he has a right to be advised on cases of any real sensitivity or difficulty. Likewise, I am in a position to be able to consult him if I want advice, for example, on the public interest or possibly even on evidential matters. The Serious Fraud Office is slightly different, of course, to the other prosecutors because we do not only prosecute, we also have the responsibility for investigation, and that means the Attorney is involved, perhaps at a much earlier stage than he might otherwise be if it was a traditional police investigation, with the Crown Prosecution Service dealing with the subsequent prosecution. In terms of my relationship, I will brief the Attorney on any particular case, any particularly large case, one where the public interest is obviously very important, and I see him on regular basis to give him a run down on the 60 or 70 cases that we have in the office either in relation to prosecution or investigation.

Q218 Chairman: That is a very important point you made to us in that your role is different from that of the DPP, because if the police were investigating the matter the Attorney would have no role in deciding at that stage that an investigation should not be continued.

Robert Wardle: That is right.

Q219 Chairman: I think that is a point that may not have emerged in a lot of the public discussions so far.

Robert Wardle: I am sure that is right.

Q220 Chairman: Is consulting the Attorney automatic if the possibility of not prosecuting on public interest grounds arises?

Robert Wardle: No, it will depend on the case. For example, I may well decide, have decided in a number of cases over the last year, that because of people’s health, for example, the public interest requires that there should not be a prosecution. I would not necessarily consult him on that. If it was a very high profile case, I might well do, or I might speak to him before hand to alert him as to what was going on, and I think, if a case is likely to hit the headlines or get into the press, it is useful for him to know in advance what is likely to happen.

Q221 Chairman: Is it common or even precedented for the Attorney to halt the process at the investigation stage?

Robert Wardle: No, I can think of no case where that has occurred. I think if an investigation is proceeding and is likely to cause difficulty, particularly to the public interest, then I would want to consult him about that. Obviously, the BAE case in relation to the investigation into the Al Yamamah contracts with Saudi Arabia was such a case and I think the only one that I can recall. That said, in other high profile cases the Attorney would have been briefed as to the progress of the investigation, as to where we were going, what the likely outcome would be, whether there were any particularly difficult evidential or legal difficulties that might come up, and certainly in relation to some of the cases where we have funding from the Reserve, ring-fenced funding, the very large ones, it is quite proper that he should know that to ensure that we are not wasting our money on something that is not going to end up in court at the end of the day.

Q222 Chairman: In the BAE case were both the issues (the issue of the evidential strength of the case and the national security issue) raised in these discussions with the Attorney from an early stage?

Robert Wardle: Most certainly, yes. Certainly the evidential difficulties were; the public interest difficulties as they arose. From recollection, the public interest was first raised just before Christmas.
Q223 Chairman: You have publicly not agreed with the Attorney’s view that (if I can sum it up; and I think he used these words) this case was not going to get anywhere. He has stated that in his view, as opposed to yours, the ground for ceasing the investigation was that it could not lead to a successful prosecution.

Robert Wardle: He certainly took that view. I took a slightly different view. I took the view that I would prefer to continue the investigation, to obtain the evidence, before making a final decision as to whether charges could be brought under corruption legislation or, indeed, anything else, but to continue the investigation was, in my view, likely to cause grave damage to the public interest, to national security, and I fully accept that the result of the investigation would be uncertain. We thought we probably knew what was going to happen, but one can never tell. One does not know whether one can get the evidence, one does not know whether one can get the evidence in admissible form and, in any event, who would be likely to be a defendant. Whether it might be individuals. It might be a corporate entity, I do not know, but at the end of the day I felt we were not able to do that and to that extent I disagree with the Attorney.

Q224 Chairman: But you said that, in your view, it would be damaging to national security?

Robert Wardle: Yes.

Q225 Chairman: That was not a view that originated with you, was it?

Robert Wardle: No, of course not. The damage to national security was as a result of representations made to the Attorney which were shown to me. In my role as a director of the Serious Fraud Office, of course, I had to make a prosecution decision, but if the investigation itself was likely to cause damage, then, again, I would take the view I can stop the case, stop the investigation, on the basis of the public interest.

Q226 Chairman: The Prime Minister has said, “I am perfectly happy to take responsibility for it. Let me explain why I gave the advice that I did. It would lead to the complete wreckage of a relationship which is of fundamental importance to the security of this country, to the state of the Middle East and to our relationship with countries in the Middle East. That is why I took the decision.” That is the Prime Minister speaking. Was that represented to you in those terms from the Prime Minister, or is that disguised in some way?

Robert Wardle: No, I have not—. My recollection is that the Prime Minister took the decision to give the advice as to the damage to the national interest, to security and the like. I do not know whether he has taken the decision as to the prosecution. I do not think he did, and I certainly take the view that that was my decision. My decision was based on what I had seen, the memoranda sent to the Attorney by the Prime Minister, and it was also based on conversations I had with our then ambassador to Saudi Arabia.

Q227 David Howarth: I must try, first of all, to find out what sort of information you had before you. Are you saying that you made your own investigations as to the national security situation?

Robert Wardle: No, I was shown the memorandum from the Prime Minister to the Attorney General and I was shown the accompanying papers from, I think it was, Sir Richard Mottram, and that was quite clear as to the damage that they felt would be caused were the investigation to continue. I also had the opportunity, as I say, of speaking to the ambassador as to the likely reaction of the authorities in Saudi Arabia were we to continue with the investigations, were we to continue to effectively follow the money trail through Switzerland.

Q228 David Howarth: So, when you are taking this decision, there are two things you have in mind presumably. On the one hand there is the Prosecutorial Code with its test about public interest?

Robert Wardle: Yes.

Q229 David Howarth: And, on the other hand, there is the OECD Treaty?

Robert Wardle: Yes.

Q230 David Howarth: Let us start with the OECD Treaty. The OECD Treaty states that in this case you are not allowed to take into account matters of economic consequence.

Robert Wardle: Certainly.

Q231 David Howarth: And also matters of international relations.

Robert Wardle: It does, but I do not think it says that I cannot take into account national security. This is a matter, of course, that is presently before the court; my decision is subject to judicial review. I should say that the application has been refused by the judge at first instance, the applicants are applying for an oral hearing to renew their application for permission, but I took the view that relations between states, certainly commercial interests, were not matters I should consider, and did not consider them, but I did not think that the OECD Treaty prevented me from considering national security.

Q232 David Howarth: But the statement that the Chairman read out from the Prime Minister is in terms of international relations: damaging relations with an important friend, and so on.

Robert Wardle: Yes.

Q233 David Howarth: So was the memorandum from the Prime Minister in similar terms?

Robert Wardle: No, the memorandum made it perfectly plain we were talking about security.
Q234 David Howarth: That brings me to the second part of your decision, which is the Prosecutorial Code. The Prosecutorial Code seems to say that, yes, you can take into account national security in terms of preventing the release of information that would be damaging to national security. What was the information that would have been damaging to national security in this case? What was its nature?

Robert Wardle: It is not a question of the revelation of information necessarily. The damage would have been caused by the continuance of the investigation, probing into the bank accounts. We were told that that would offend the authorities in Saudi Arabia because they regarded that there were obligations of confidentiality.

Q235 David Howarth: Surely that is always the case in the kinds of investigation that you carry out—

Robert Wardle: Certainly.

Q236 David Howarth: —where a state is involved?

Robert Wardle: That may well be the case, but the result of that—I think this is the best way of putting it—would, in effect, have caused damage to national security.

Q237 David Howarth: Has that damage been subsequently caused anyway by the revelations about what the exact nature of the investigation was?

Robert Wardle: I cannot say that. I hope not.

Q238 David Howarth: So, what you are saying is that the damage to national security was not simply a matter of the revelation of the names of the people involved.

Robert Wardle: The damage would have been caused by the continuance of the investigation. Because it would have caused offence, I can put it that way, that offence would have stopped co-operation in areas of great importance to national security.

Q239 David Howarth: You used the word “confidentiality”, and I was just trying to get at what was confidential. Was it the identities of the people involved? Was it the fact of the investigation? The fact of the investigation was public knowledge.

Robert Wardle: The fact of the investigation was public knowledge. I think it was perhaps more to do with the pursuit of the money trail, particularly through the accounts in Switzerland.

Q240 David Howarth: I am still trying to understand why that is a matter of confidentiality. The only sense it could be is if the identities of people were revealed. That is why I am surprised at your answer that it did not have to do with the identities of people, unless we trying to protect Swiss banking, which I think we halted a long time ago.

Robert Wardle: No, we are certainly not trying to do that. Obviously where those payments have been made to the individuals and where they had finally ended up. This was a corruption investigation; of course it was. I do not know what the result of that would have been had we followed those accounts through. I know there has been a good deal in the press, I know there has been a good deal on the television, but I do not know that. Whether that be so or not, who can tell. We were looking to see whether payments had been made to an agent or a public official that would, in effect, have given grounds for a prosecution in this country.

Q241 David Howarth: Was that person’s official position a matter of importance in the decision to end the prosecution?

Robert Wardle: That is not quite right. I think that it was still then at the investigational stage of course. Whether the identity of the individual would have emerged, we needed to know in order to be able to say whether that would effectively have come within the 1906 Prevention of Corruption Act; in other words that the person or individual who finally got the payment was either acting as an agent or a public official.

Q242 Mr Tyrie: I would like to clarify one or two points that you have already alluded to. Presumably you do not stop an investigation whenever it might cause offence to another country if you investigate a bank account that might be sitting in Switzerland somewhere?

Robert Wardle: Absolutely.

Q243 Mr Tyrie: What was it particularly in this case that was so offensive that you felt triggered the public interest element of your decision?

Robert Wardle: The advice I was given was that the authorities in Saudi Arabia felt that this was a private matter, a private agreement between two governments, and for cultural reasons, whatever it was, they would have found it so much an offence that they would not co-operate with us on important issues.

Q244 Mr Tyrie: Did you agree with that view?

Robert Wardle: I was satisfied, on what I had been shown and certainly the conversations I had with our ambassador, that that was right, that the co-operation would have been withdrawn. In fact, yes, I would have been satisfied it would have been. Certainly there was a very serious risk.

Q245 Mr Tyrie: What are we talking about here is the security co-operation, the co-operation for exchange of information about matters relating to anti-terrorism?

Robert Wardle: Absolutely.

Q246 Mr Tyrie: What was your reaction when you discovered that another government, effectively, was putting a gun to our heads and saying, “You are not to investigate further, otherwise we will withdraw co-operation arrangements and leave your country less well defended”?

Robert Wardle: My reaction was, I suppose. I was resigned to it, that is where we were, and disappointing certainly when one has invested a good deal of time and a great deal of work on the
part of my professional staff. It was very disappointing, of course it was, but sometimes you have to accept that.

Q247 Mr Tyrie: Do you think that there would be room for doubt in the forming of that judgment or do you think it was absolutely clear-cut? Maybe I will put the question another way and give you a moment to think about the answer you may want to give. If those papers that you said you received from Richard Mottram—. I think you said it was Richard Mottram?

Robert Wardle: Yes.

Q248 Mr Tyrie: And if the evidence that you were given by the ambassador was written down and put on a piece of paper or you were to come over and give it in oral evidence in a closed session to a group of people who could see these papers and then they could report on its general conclusions, are you confident they would come to the same judgment, or do you think that there is some room for doubt and that those people might come to another judgment? This is a finely balanced thing.

Robert Wardle: I understand. I do not think it was finely balanced. I was satisfied, on what I had heard and what I had seen, that the damage was going to be done. There is a limit, of course, to what you can do if you are investigating or prosecuting to get behind it—I fully accept that—but I certainly did whatever I could do to get as much evidence behind that sort of information as I could. I think talking to the ambassador was particularly helpful, certainly in my mind. Put it another way. If this had occurred again, I think I would make the same decision. I do not think I would be in any doubt about it.

Q249 Mr Tyrie: Just to be clear, this was in order to maintain the flow of information coming from Saudi Arabia to Britain to enable us to reduce the risk of terrorism?

Robert Wardle: Yes, I think that is right, certainly as far as domestic terrorism was concerned, and also I think there was an issue of the security of our soldiers serving overseas.

Q250 Mr Tyrie: I will come on to the serving overseas soldiers in a moment, but were you at the time that you made this judgment also able to look at the extent to which the Saudi Government was dependent or finding valuable information that we were passing them in their security interests? In other words, were you in a position to form an overall judgment about the likely reaction of the Saudi Government?

Robert Wardle: I think that I was, again, because of the help from the ambassador. I went into, or I was told of, the effects that would occur to us. Balancing that, “Were the Saudis bluffing?”, I suppose really is the way one can approach it. From what I was told, my view was that they were not.

Q251 Mr Tyrie: Can I ask you briefly about the news that we have had from the United States that a Department of Justice investigation is underway?

Robert Wardle: I cannot give you the exact date. It would have been round about November of last year that his legal secretary told me that he was intending to consult his own silk. Of course, we had a team, we had a first-rate criminal silk in the team line up and others. If he wanted his own advice, that is fine.

Q252 Mr Tyrie: But the general conclusion that I am perhaps leading you to is that this issue is not going to go away, is it? There are going to be more and more demands for forensic examination of the basis of this decision?

Robert Wardle: I simply do not know. That may not be the case as a result of the United States’ investigation, although I do not think the Department of Justice themselves have even confirmed that there is one, but so be it. I believe it has come up. Whether the Swiss investigation will have any effect, again, I simply do not know.

Chairman: Any supplementary points? Mr Neill?

Q253 Bob Neill: On that last point in relation to the MLA, if it ever happens, an MLA request, there are a number of grounds upon which it can be granted or sometimes refused, one of which, I think, is national security or other interest?

Robert Wardle: Yes.

Q254 Bob Neill: Would you expect to be consulted if that event arose?

Robert Wardle: Yes.

Q255 Bob Neill: Have you been in the past?

Robert Wardle: I cannot remember being asked about another MLA request where national security was an issue. Certainly, as far as this one is concerned, we will be consulted, but we may be asked to carry it out.

Q256 Bob Neill: In relation to BAE, the Attorney told us that, as well as spending about three days going through, as I understand it, the case papers and talking to the investigators, he also sought independent legal advice?

Robert Wardle: Yes.

Q257 Bob Neill: At what stage were you aware that the Attorney had sought advice independent of yourselves?

Robert Wardle: I cannot give you the exact date. It would have been round about November of last year that his legal secretary told me that he was intending to consult his own silk. Of course, we had a team, we had a first-rate criminal silk in the team line up and others. If he wanted his own advice, that is fine.

Q258 Bob Neill: You make the point that you have an experienced in-house team and you always brief the prosecuting team much earlier than other agencies?
Robert Wardle: Absolutely, yes.

Q259 Bob Neill: I was wondering whether you could assist me about this. Have there been other instances when you have found the Attorney seek independent advice outside the prosecution team in relation to such an investigation or potential prosecution?

Robert Wardle: Not in one of my cases, as far as I am aware, although I understand it has happened in others.

Q260 Bob Neill: The final thing I wanted to ask, if I may, more generally. You talked about those circumstances upon which you would seek advice from the Attorney on public interest and you also said on evidential matters.

Robert Wardle: Yes.

Q261 Bob Neill: I am interested in the set-up. You have got your very experienced in-house lawyers, the team who will present the case in the Crown Court brought in much earlier on. What sort of circumstances are there where you would need to seek the Attorney's advice on matters of evidence when you have got a silk and experienced juniors to do that?

Robert Wardle: Perhaps I should qualify it. Maybe not so much matters of evidence but whether the case we are putting forward is one that is likely to result in a conviction; in other words, the evidential test. Sometimes we are bringing cases where the law may be unclear, there may be decisions that we would have to rely on, and it is at that stage that I would probably consult the Attorney. I think that is how I would put it.

Q262 Bob Neill: No doubt on the basis of the advice you had had from your silk and others at that point?

Robert Wardle: Yes. You would almost certainly have a conference, if it was a big case, and you would go along and discuss it, certainly.

Q263 Jeremy Wright: I wanted to take you back briefly to the line of questioning that Mr Howarth was pursuing earlier on about the qualifications on what considerations you should take into account in deciding whether or not to proceed with a prosecution and whether you should not. What he was putting to you was that, in terms of international relations, that was a matter which should not be taken into account, but that national security, quite properly, could be. I think that was the thrust of your evidence.

Robert Wardle: Yes.

Q264 Jeremy Wright: What I am not entirely clear about is that, when you described your understanding of the national security consideration in this case, my reading of what you were saying was that there would be damage to the relationship between this country and the Saudi Arabian Government which would then cause the flow of information to either lesson or cease altogether?

Robert Wardle: Yes.

Q265 Jeremy Wright: Is not the difficulty with that that what, in effect, you are saying is that the damage to national security is a knock-on effect of the damage to international relations? It is not a case here where pursuing a particular prosecution would involve the release of information which would instantaneously damage British national security. There is a knock-on effect, is there not?

Robert Wardle: I take that point, but I do not think it makes any difference. If the damage is going to be done, that is that.

Q266 Jeremy Wright: You say it does not make any difference, but is not the problem with that that every case which might damage international relations might, as a knock-on effect, damage national security?

Robert Wardle: Yes, but I did not discontinue this investigation because of the damage to international relations; I only did because of the very great risk of damage to national security. There are other cases, certainly, where we pursue our inquiries overseas, which may well cause damage to international relations, but I would not normally take that into account unless there was any subsequent damage that might be caused. I think one would have to look at the case, the importance of the case, the seriousness of the case. If it was a relatively trivial one, it would not be at the SFO but then, obviously, one would not deal with it; but if it was a serious case, such as this investigation was, then it would need an awful lot to stop me pursuing it in terms of causing damage, as it were, to another country or the people in power at the time.

Chairman: Mr Howarth, do you want to come back on that?

Q267 David Howarth: I want to come back to the point about risk and the paper that you were shown and the points that Mr Tyrie was putting to you. Did any part of those papers take into account the risk that the information about Prince Bandar, for example, would come out into the public realm anyway?

Robert Wardle: From recollection, and I do not have copies of those papers, I do not think it did.

Q268 David Howarth: So the assumption was that the closing off of the investigation would mean that all that information would remain private, was the word you used?

Robert Wardle: Yes. I think that is right.

Q269 David Howarth: Does that also apply to the obvious problem which would flow from Mr Tyrie's question, which is that if other countries get to know that Britain gives in to this sort of pressure, that in itself could be a threat to our national security? Was that risk taken into account in the decision?

Robert Wardle: No, it was not expressed in the risk, and I am not sure how much of a risk it really is. I think this was an exceptional case. We are continuing other investigations, both into BAE
Robert Wardle: immediately?

Robert Wardle: something you would want to consider

Robert Wardle: had been told it was being discontinued.

Robert Wardle: prosecution given the fact that time had passed,

Robert Wardle: was there ever going to be the likelihood of

Robert Wardle: need to stop, one would need to take stock of where

Robert Wardle: with the investigation, whether there

Robert Wardle: got to with the investigation, whether there

Robert Wardle: that the end product of all this would be that the

Robert Wardle: when he asked for that independent legal advice,

Robert Wardle: suspicion in your mind that this might happen?

Robert Wardle: that the threat of the collapse of the flows of information

Robert Wardle: on possible terrorist activities in the UK, under

Robert Wardle: arrangements to keep the assessment of the national

Robert Wardle: led you to halt the investigation?

Robert Wardle: constant review and that every three to six months,

Robert Wardle: that the threat may not remain at the same level

Robert Wardle: This investigation has already taken

Robert Wardle: in the future.

Robert Wardle: These questions, but let me put it very plainly.

Robert Wardle: the sort of investigation which, given the enormous amount of work that has

Robert Wardle: in other words, have you put in place

Robert Wardle: to reopen it, I do not think it can be

Robert Wardle: am not ruling out anything as to what will happen

Robert Wardle: a year, you go back and ask: is this threat at the same

Robert Wardle: on constant review and that every three to six months,

Robert Wardle: a year or two, we cannot say. This investigation has already taken

Robert Wardle: several years. Is this the sort of investigation which,

Robert Wardle: or two, we cannot say. This investigation has already taken

Robert Wardle: As to reopening it, I do not think it can be

Robert Wardle: at this stage absent any new developments.

Robert Wardle: Assuming that the level of threat

Robert Wardle: to review which led you to halt the investigation?

Robert Wardle: were to reduce dramatically, which would e

Robert Wardle: there was great interest in the Attorney

Robert Wardle: as to what will happen in the future.

Q270 Mr Tyrie: A couple of quick things. First of all, on the issue of national security, clearly we are at a state of some tension and a heightened level of threat. That threat may not remain at the same level as it is now, that may diminish in a year or two, we cannot say. This investigation has already taken several years. Is this the sort of investigation which, given the enormous amount of work that has already been undertaken, you might want to return to? In other words, have you put in place arrangements to keep the assessment of the national security threat under review which led you to halt the investigation?

Robert Wardle: The answer to the second point is, no. As to reopening it, I do not think it can be reopened at this stage absent any new developments. I am not ruling out anything as to what will happen in the future.

Q271 Mr Tyrie: But do you not think it is important that we do keep the assessment of this threat, that is the threat of the collapse of the flows of information on possible terrorist activities in the UK, under constant review and that every three to six months, a year, you go back and ask: is this threat at the same level? Are we still confident that pursuing this investigation would lead to a security risk?

Robert Wardle: Assuming that the level of threat were to reduce dramatically, which would effectively allow me to reverse the decision, I would then have to decide whether I could start up an investigation, again, having told the company and individuals and the like that it had been discontinued.

Q272 Mr Tyrie: I have to be hypothetical in asking these questions, but let me put it very plainly. Suppose there is a change of sentiment about this in the Saudi regime?

Robert Wardle: Certainly.

Q273 Mr Tyrie: That could change over night.

Robert Wardle: Certainly.

Q274 Mr Tyrie: Would not the sense of a security threat be something you would want to consider immediately?

Robert Wardle: If that did happen I think one would need to stop, one would need to take stock of where we had got to with the investigation, whether there was any practical way of reviving it and, if so, whether there was ever going to be the likelihood of a prosecution given the fact that time had passed, given the fact that individuals had been told or the company had been told it was being discontinued.

Q275 Mr Tyrie: Could I ask your office to consider that they should keep under review the assessment of the national security risk and be available to answer questions before this Committee, or others, to enable you to say that you think it is unchanged?

Robert Wardle: Well, I will certainly—I. I think the team will do that in any event.

Q276 Chairman: You can always ask them.

Robert Wardle: I can always ask them.

Q277 Mr Tyrie: Otherwise where does this leave the credibility of the Act that we have so recently put on the statute book? That is what the public are concerned about.

Robert Wardle: Can I make this point, because I think there is a danger here. First of all, nobody has been charged, certainly nobody has been convicted, but I am conducting other investigations into alleged offences relating to corruption which involve BAE Systems Plc in other countries, such as South Africa, Romania, Czechoslovakia, and there are others. Of course I will look at the evidence on all those cases, I will look at the public interest on all those cases, and we will be looking at anything else that may occur.

Q278 Keith Vaz: You have not spoken to the Prime Minister about this?

Robert Wardle: No.

Q279 Keith Vaz: The only politician you have spoken to is the Attorney General?

Robert Wardle: And the Solicitor of course.

Q280 Keith Vaz: The Solicitor General?

Q281 Keith Vaz: You have known since November that there was great interest in the Attorney General’s office on this matter. Did you suspect, when he asked for that independent legal advice, that the end product of all this would be that the investigation would be discontinued? Was there a suspicion in your mind that this might happen?

Robert Wardle: No. Well, it was well before November. Ever since we commenced the investigation in 2004 the Attorney has been informed of it, kept up-to-date, quite properly so, because it is a case of the highest interest.

Q282 Keith Vaz: You have regular meetings and big cases are discussed at regular meetings?

Robert Wardle: Yes, and it is also a case where—. The corruption legislation, as I am sure you know, is particularly difficult to deal with, particularly overseas.

Q283 Keith Vaz: Have you seen the legal advice that he obtained? You have received a lot of stuff, have you not? He showed you the memo from the Prime Minister. You have seen that.
Robert Wardle: I have not seen the legal advice, I have certainly not seen the written advice, although I was certainly present at one meeting with the silk he instructed.

Q284 Keith Vaz: Does that agree or disagree with the legal advice that you obtained?
Robert Wardle: I think there was a difference in emphasis as to how one might approach an investigation.

Q285 Keith Vaz: You put a great deal of store on the views of the ambassador in Riyadh. Is this Sherard Coper-Coles?
Robert Wardle: Yes, it is.

Q286 Keith Vaz: Surely the ambassador in Riyadh, being part of the Foreign Office, would be expected to say to you that if you proceeded with an investigation it is going to damage relations between Britain and Saudi Arabia. That is the role of British Ambassadors abroad.
Robert Wardle: Certainly.

Q287 Keith Vaz: Who are there to maintain relations between countries, but you seem to be convinced by him on this.
Robert Wardle: Certainly, because he is in post, he will know what the reaction will be, whether that reaction will take place and he, whose business it is to know these things, can tell me what the effect of that reaction would be.

Q288 Keith Vaz: When did you first consult him on this?
Robert Wardle: The 30 November last year, I believe I met him.

Q289 Keith Vaz: So the Attorney goes off and gets his independent legal advice, the legal secretary rings you from Buckingham Gate and says, independent legal advice, “You ring up the ambassador.” This is your initiative, is it?
Robert Wardle: Not quite, no. It was a period when I was almost living in Buckingham Gate.

Q290 Keith Vaz: Have you not got your own offices?
Robert Wardle: Yes, in Elm Street. I will not say it all melds into one, but it was happening very quickly. We obviously had this problem. We knew that there was an issue, that public interest was going to be an issue. The Attorney was concerned to see whether the case could be run, quite properly. We were concerned with that, we were looking at it and eventually we met. I say “eventually”, we met with him on 30 November.

Q291 Keith Vaz: How many meetings have you had. How many meeting did you have with Sherard Cowper-Coles?

Robert Wardle: Three.

Q292 Keith Vaz: Face to face?
Robert Wardle: Yes.

Q293 Keith Vaz: And at each of those meetings he said, “Woe is me if you carry on with this. It is going to be really damaging”.
Robert Wardle: Basically, yes.

Q294 Keith Vaz: Was there a representative of the Attorney’s chambers at those meetings?
Robert Wardle: The meeting on 30 November was certainly attended by the legal secretary, and indeed others. That was at the Foreign Office. The meeting on 8 December was just attended by myself and the Assistant Director Mrs Garlick and the case controller Matthew Cowie, and the last meeting, which I think was on 12 or 13 December, was attended by myself, Helen Garlick, Jonathan Jones, legal secretary, and the Solicitor General.

Q295 Keith Vaz: So, whatever your view, you had the Prime Minister, the Attorney General, the Ambassador in Riyadh, basically all these people— the Foreign Office, the Prime Minister’s Office, everyone was saying it had to be discontinued. You had to go along with this, did you not?
Robert Wardle: Everyone was saying—. The Attorney was not saying but the Foreign Office was saying, “This will be the effect. This is the damage”. This happens in cases. Sometimes, for example—

Q296 Keith Vaz: But you said it was unprecedented?
Robert Wardle: It is unprecedented in the way it happened, but I am talking about public interest considerations.

Q297 Keith Vaz: The public interest takes us to the heart of the question of accountability?
Robert Wardle: Absolutely.

Q298 Keith Vaz: Is it determined by you or is it determined the Attorney General?
Robert Wardle: On this occasion it was determined by me.

Q299 Keith Vaz: First.
Robert Wardle: Yes.

Q300 Keith Vaz: And then he came to his conclusion.
Robert Wardle: No, he himself had reservations about the amount of evidence we could obtain and whether that could lead to a prosecution in any event—forget the public interest aspect of it—and I fully accept that there are difficulties with that. Remember that we are still investigating, we have not completed the investigation. My own view was that that should have continued in any other case where public interest considerations had not arisen, but here they did because it was the very fact of the continuation of the investigation which was causing the problem, not the prosecution.
Q301 Keith Vaz: You did not fly out to Saudi Arabia at any time?
Robert Wardle: No.

Q302 Keith Vaz: What was the cost of the whole investigation?
Robert Wardle: At that stage, I think we put it at about 1.3 million, plus some staff costs, and that does not include the costs of Ministry of Defence police. I think it is in that region, but I would have to check that.

Q303 Keith Vaz: And at end of all that expenditure you still did not have anyone to prosecute?
Robert Wardle: That is right.

Q304 Keith Vaz: So, in any other case you would probably have brought it to a conclusion anyway, having spent that money. Have you spent that kind of money on other investigations?
Robert Wardle: Certainly.

Q305 Keith Vaz: You have?
Robert Wardle: Yes.

Q306 Keith Vaz: So you have spent more?
Robert Wardle: On other investigations, yes.

Q307 Keith Vaz: And not found anyone to prosecute?
Robert Wardle: I think that does from time to time happen. I cannot think of any at the moment. The cost of an SFO investigation is, typically, about a million pounds.

Q308 Keith Vaz: In terms of accountability, are you happy with the way in which this has occurred?
Robert Wardle: Yes.

Q309 Keith Vaz: The accountability to Parliament being—
Robert Wardle: I think I am. I think the fact that the Attorney is able to go to Parliament and account for it is important, because it is a place where it can be debated, it can be looked at, it can be examined and, indeed, before this Committee.

Q310 Keith Vaz: And no regrets?
Robert Wardle: I think that is putting it—

Q311 Keith Vaz: There is a long pause!
Robert Wardle: It is putting it a bit high to say no regrets. If you lived with one of these investigations, you see the commitment that our people put into it, the huge amount of work, the huge amount of work from the MoD police. Of course one regrets it has ended up where it has.

Q312 Keith Vaz: Do you think it has damaged the reputation of the SFO, which in recent years has actually been enhanced and now people feel, “Gosh, make some representations to the Prime Minister, get on to an ambassador in a foreign country, speak to the Attorney General and it is going to be discontinued”. Have they all gone round you and left you in the middle and damaged your reputation?
Robert Wardle: I do not think they have done that—gone round me and left me in the middle.

Q313 Keith Vaz: The Saudis did not approach you, did they?
Robert Wardle: No, of course not, and I would not expect them to do so. Did it damage the SFO? Has it damaged our reputation for dealing with corruption? I think perhaps it has, of course it has, but it was an exceptional case, exceptional circumstances. I think what now is important is that we continue to pursue investigations, not only into BAE but into the other cases. Remember, the SFO has only recently, in the last couple of years, taken over responsibility for this sort of work and it is particularly difficult work. We have been supported, particularly by the Attorney, and indeed by the Treasury, in relation to the Iraqi investigations.

Q314 Chairman: Mr Wardle, thank you very much indeed for coming this morning and for the clarity and frankness of the evidence you have given. We very much appreciate it.
Robert Wardle: Thank you very much.

Lord Goldsmith: Certainly. It depends on what aspect. Can I distinguish policy, organisation, priorities, resources and then individual decisions? So far as the former are concerned, I have been actively engaged with each of the prosecuting authorities. We will discuss general policy, for example the organisation of the service, the relations with the police, particular decisions. For example the prosecution services and to what extent it is by formal guidance, frequent contact with heads of services, that sort of thing.

Witness: Rt Hon Lord Goldsmith QC, a Member of the House of Lords, Attorney General, gave evidence.
the new powers which over the years that I have been in office the CPS have got have obviously been the subject of detailed discussion. If they have a policy on tackling domestic violence, they will come and consult on that and we will discuss it, or, in relation to issues of law, if there is a question of change in the law on rape, for example, then I would discuss that with the CPS. So there are a lot of issues, and that would be conducted in a number of different ways. There would be briefings from the CPS that would go through my policy department and director of policy. I would discuss this with the heads of the CPS or the other prosecuting authorities’ policy departments, I would meet with them, I would have advice from my officials on those issues and I would meet regularly with the Chief Executive and the Director of Public Prosecutions for the CPS, with the Director of the Serious Fraud Office, with the Director of Revenue and Customs Prosecutions Office for that, and I would also meet with the heads of the prosecuting departments from other government departments. So, that is quite a substantial part of the activity. So far as individual decisions are concerned, all the prosecutors would expect to keep me informed and to consult me on major or very sensitive cases, and they would do that generally by sending regularly what is called a “sensitive case list”, which they would keep for their own purposes too, of those cases which may be sensitive for some reason—that may be perhaps because it has attracted interest in the newspapers, it is a difficult case, it involves particular individuals. I would see those, my lawyers would provide briefing on them and I may have some comments or I may ask questions like, “What is going to happen next?”, and then occasionally there will be cases where I would have meetings with the Director or the relevant official from the department and discuss those cases. What would happen then is that they would say, “We are minded to take this decision”. I give an example which is fairly obvious. When the CPS decided that they were going to prosecute the Metropolitan Police under section three of the Health and Safety Act over the death of Mr Jean Charles de Menezes but not prosecute in relation to that. Sometimes I would raise questions and say, “What about this? What about that? Can you get some further information. I am a bit uncomfortable about this aspect or that aspect”, and a discussion would take place, but it would usually be in the form of my asking questions, I hope sometimes probing questions, as to whether they had got the right decision, because I know that the likelihood is that on decisions like that I may have to stand at the despatch box, or Mike O’Brien will have to stand at the despatch box, and explain to the House of Commons and the House of Lords, “Did you consider this point or that point? What did you think? Did you think it was right not to prosecute the individuals, for example, for manslaughter or for something else”. So we need to be comfortable in relation to that. I hope that is a general answer to that.

Q317 Julie Morgan: Does the superintendent of the prosecution services need to be both a lawyer and a politician?

Lord Goldsmith: Well, we have had the debate before as to how far I regard myself as a politician. I was brought up by the Chairman who said, “You are a Member of Parliament”, which I am, “and therefore you must be”.

Q318 Chairman: And you take the Government Whip!

Lord Goldsmith: And I take the Government Whip. I accept that entirely. I think that the superintendent of the prosecuting authorities does require to be a lawyer with experience and standing, because these are legal decisions that are actually being taken when it comes to professional decisions. I think it is also helpful when it even comes to the priority and the resource and all that sort of issue, because the prosecuting authorities will be saying, for example, “We would like to change but we think we might change our policy in relation to domestic violence, but there are these legal issues”, or, “We do not think it would be right to change the definition of ‘consent’”, or, “It would be right to change the definition of ‘consent’ in relation to rape”, and they would explain it in legal terms. So, I think on the professional decisions, individual decisions, it is absolutely essential that it is a lawyer of seniority and experience who does that. I think it is also right, as you know, that the person who superintends is the person who is accountable to Parliament, and it therefore means that that person should be, in my view, accountable to Parliament, and that means being, in my view, a member of Parliament, one or the other Houses, so that person can be summoned to the House in order to answer questions, to stand in the despatch box and to deal with any concerns that members have: because the Houses represent the public for these purposes and if that means being a member of the House, being a politician, then, yes, I think it needs to be a politician in that sense. The only reason I quibble is because, with respect, I am not a career politician, I never have been. I entirely accept I have not been elected. In one sense it is partly an attribute rather than a defect, I understand that, but from my point of view, I have been a professional lawyer all my life and that is the side of me which is absolutely dominant.

Q319 Chairman: You do seem to have some hesitation about being a politician.

Lord Goldsmith: I am sorry, particularly in this forum, for suggesting that. I think I do, for this reason, because genuinely I do regard the lawyer side as being absolutely dominant. I have said this before, I do not take part, in a sense, in the regular political debate. I do not go on Question Time, and I do not actually go round the country canvassing. I do not have to for my own purpose and I do not really do it for anybody else. I just keep myself, to some extent, distant from that, precisely because I think that that is not the dominant side of what I do.
Q320 Chairman: The Solicitor General cannot do that.

Lord Goldsmith: No, I entirely accept that.

Q321 Chairman: Nor could the Attorney if he were in the Commons?

Lord Goldsmith: I absolutely agree. You are absolutely right. I am expressing my personal view, because you have picked up a little degree of hesitancy.

Q322 Julie Morgan: Do you think there is an uneasy fit between those two jobs?

Lord Goldsmith: No, I think it can be done, and I think my predecessors, Paddy Mayhew and others, were very clear as to what their professional judgments needed to be. They obviously played a political role, but if I am a bit sensitive about it I suppose it is because of accusations that have been raised, saying, “This man is just a politician and he should not be doing this”. Whereas, in fact, the way I reach judgments on these cases is not as a politician, absolutely not, it is as a lawyer trying to understand the legal issues and the proper public interest issues.

Q323 Julie Morgan: So being in the Government and taking the Labour Whip has never influenced any of your decisions as a lawyer

Lord Goldsmith: Absolutely not. I think it actually gives me an advantage. Again, I have said this before, and so have other law officers, when I tell members of the Government (two things) that they cannot do something, they accept it with good grace from me because they know, as it were, that in a sort of general sense I am on their side and if I am saying they cannot do it is not because I am being political about it from another angle. I think it also helps that I understand what their overall objectives are (this is back to the issue of attending Cabinet) because I think it helps to hear the debate to understand what it is that colleagues are trying to do, what their objectives are. I think it helps you to help them to reach their objectives through a proper and lawful route, rather than sitting in a back room and waiting for them to come up with a policy when you just have to say yes or no. That is my view. It is why I think company secretaries should sit in board meetings.

Q324 Mrs James: Can I develop this theme a bit further. How can the prosecution services maintain their real and perceived independence if they have a senior government minister who is a political appointee as their superintendent?

Lord Goldsmith: I absolutely believe they can. It has happened for a very long time over the years. Obviously, a key issue for that is it being clear that when it comes to exercising decisions in relation to prosecution, then the law officer has to act independently of government. That is very clear. Again, forgive me for repeating myself, but it’s an absolute act of faith in my office, because in 1923, when the then Attorney General was thought to have changed his decision as a result of the Cabinet having required him to, that led ultimately to a vote of no confidence in Ramsey MacDonald and his first government falling, and the officials in the office are absolutely vigilant to make sure that decisions which are being taken are being taken on proper legal grounds. I do believe that is so, and that is why I think some of the suggestions that are made about the political influence in decisions are very unfortunate but completely untrue.

Q325 Mrs James: So you think the people within your department, within the system, are making doubly sure, that they are very sensitive about this issue?

Lord Goldsmith: I am sure they would be.

Q326 Mrs James: And are absolutely aware of it?

Lord Goldsmith: I am sure they would be. None of my officials have ever said to me, I am glad to say, “Look, we think that you are not taking the right considerations into account”, but they are deeply involved in all the decisions. They get briefings on all the cases, they sit in on meetings always and they can see the basis upon which the decision is being made. I have no doubt that they would say something if they thought a decision was being made on an improper basis. I know of a former law officer who told me that he started a conversation on the phone with a senior politician on one occasion and one of his members of staff came rushing in saying, “What are you doing? Do you not realise you should not be taking this decision on a political basis”. I am sure he was not, but it just illustrates the sensitivity to this.

Q327 Chairman: Everybody is aware of the role of the Attorney in deciding whether to continue with a prosecution on public interest grounds, but in relation to the Serious Fraud Office it seems that you have a slightly different role in that you can also decide whether an investigation should cease. That is not quite the same situation as arises if, say, the Metropolitan Police were investigating a major matter. You would not be deciding on their behalf, would you, that the investigation should cease?

Lord Goldsmith: I agree about that. I agree that is a difference. Indeed, when, therefore, the BAE case came up, that was something that I had to reflect on, but I think at the end of the day, if your view is, for example, as it was the Director’s view, that continuing the investigation was going to give rise to the national security concerns that have been identified, then it is appropriate for the Attorney General to be involved in considering that decision with him.

Q328 Chairman: Would that not have happened if it had been the Metropolitan Police that were carrying out the investigation?

Lord Goldsmith: It might have done. There are occasions where what has happened is that the Metropolitan Police, or any other police force, might be involved in an investigation and they may say to the prosecutor, “Look, we have not completed this investigation, but we want to know, will you actually go ahead with this prosecution if we do all this further work?”, and it may be because they are concerned about the work that is involved or it may
be something else, but it would be perfectly proper for the prosecutor, faced with that, to say, “Actually, if all you can show is X, Y and Z, we would not continue with it”, or even to say, “Actually, this is not a case that we would continue with in the public interest”. This is at the other end of the extreme, but I know that the Metropolitan Police will not investigate certain cases because they believe the CPS would not continue them on public interest grounds; so I think it is perfectly proper for a prosecutor to be involved in that decision.

**Q329 Chairman:** Can you really imagine that in cash-for-honours you would turn to the Metropolitan Police and say, “Don’t investigate this any further because I don’t think on public interest grounds a prosecution would follow?”

**Lord Goldsmith:** I plainly would not have done that in that particular case. I can give an example. You will recall that two British citizens were killed in Gaza, one undoubtedly by Israeli defence forces and one perhaps by Israeli defence forces, and the Coroner raised the question of whether this was something that the Attorney should take up and seek to pursue through the extradition process. That has involved me being in discussions with the Metropolitan Police to find out whether they would be prepared to investigate that and whether it is something that ought to be done generally in the public interest in a broad sense, that is, for an investigation to take place and for a prosecution to be brought. In one of those cases I have persuaded the Metropolitan Police to carry out a particular part of the investigation which I think actually throws new light on one of those cases. That is a somewhat different, specific issue.

**Q330 Chairman:** We were puzzled by what the Prime Minister said in relation to the BAE Systems case. When you try to understand the process in which politics and prosecution decisions meet we find it rather puzzling. He was asked about the BAE Systems case and he said, “I’m perfectly happy to take responsibility for it”—that is the decision not to proceed—“Let me explain why I gave the advice I did. It would lead to the complete wreckage of a relationship that is of fundamental importance to the security of this country, to the state of the Middle East and to our relationship with countries in the Middle East. That’s why I took the decision. I did not regret it then and I do not regret it now.” This implies a very direct involvement of the Prime Minister in a rather political sense in a process which you have previously described as very separate from the political process.

**Lord Goldsmith:** Yes. If one takes the whole of the Prime Minister’s comments in context, what he is saying very clearly is he takes responsibility for the advice that was given and that the consequence of continuing would be the withdrawal of cooperation and he understood the significance of this. It was not only his view because we know about the views of others who were consulted. As I have explained and put in the memorandum, under the Shawcross doctrine it is very proper for prosecutors to ask ministers about what the public interest considerations of continuing a case would or would not be, but it must be for the prosecutors to reach their decision and they alone must reach that decision in the light of that. If you have read the memorandum in relation to BAE which we put in under Freedom of Information requests, you will see in fact that in December 2005 there was a view from ministers that the consequence of continuing the investigation would damage our commercial interests. The result was, however, that I said, “No, that is not a legitimate reason for stopping this investigation. It goes on”.

**Q331 David Howarth:** In fact that raises an interesting point in itself. The Prime Minister’s statement plainly includes legally inadmissible reasons and it talks about international relations. Who advises the Prime Minister on the legality of the advice that he gives?

**Lord Goldsmith:** I do not think it happens in quite that way. The answer is he knew very well because he had been told that Article 5 of the OECD Convention could not take into account, in particular, commercial considerations. At the end of the day, it is not a question of whether the Prime Minister’s advice is lawful. It is a decision which is made by the prosecutors and the prosecutors have to consider what the factors are that they are being asked to take into account and decide whether they are proper or not. The Director has been absolutely clear and I have been absolutely clear that commercial considerations were no part of it. What it was was national security. I have said I am quite clear that the OECD Convention does not prevent you from taking into account national security considerations and I note that since I said that Mr Justice Collins in the High Court has absolutely confirmed that. He said he thinks that the case that the decision of the SFO is judicially reviewable is unarguable. That may go on, as all these cases do, but that is the present view. I have also noticed with some interest that Professor Mark Peith, who was the chairman of the LOECD Bribery working group, is reported to have said that he also accepts that national security is a legitimate ground and is not in breach of Article 5, though he adds a rider, which is that it must be in cases of extreme necessity. Where he quite gets the rider from is not really for today. I think when British lives are at stake it is a case of extreme necessity. The principle of it is accepted. I can give you that detail if it helps.

**Q332 David Howarth:** Yes. These arguments are continuing. I am not wanting to follow the line of the legal argument but another part of the problem. We have heard this morning from Mr Wardle that the advice as he saw it did not take into account the risk that all the information about Prince Bandar and
about the nature of the investigation will come out, but it has come out. It has come out in the press in the sense that various other investigations are under way. Does that not suggest, since as far as we know the dire consequences for national security have not happened and cooperation has not been withdrawn, that the original advice was unduly pessimistic about the consequences of this information being revealed?

**Lord Goldsmith:** Firstly, I do not think it does because the fact that certain newspapers print certain allegations is not the same as the State actually pursuing action on a particular basis. Secondly, I think one has to make a judgment on the information at the time and the judgment was very, very clear and I think the Director was entirely entitled to rely on the judgment that was made. I have not heard the session you had with the Director, but I was told that the question had been put to him of whether he would take the same decision today and I understand that his answer to that is that he would in light of what he was told and even what he knows now.

**Q333 David Howarth:** What I am interested in is your role as a filter and whether, knowing what you now know, you might be more sceptical of claims of serious damage to national security of this nature in future and so might you advise your successor to be more sceptical now that you know, or at least we think you know, that the consequences did not occur?

**Lord Goldsmith:** With respect, I think you are absolutely wrong to say that the consequences have not occurred because there have been some reports in a newspaper and, therefore, that proves that none of this was going to happen. One starts to get into the nature of the security consideration, which I think the Chairman knows more about perhaps than others because I understand this has been looked at in the ISC.

**Q334 David Howarth:** One of the points was about the nature of the security consideration and what we heard this morning was it was a question of confidentiality, of privacy, of these matters not being discussed publicly and yet they are.

**Lord Goldsmith:** They are by some. It seems to me that there is a big difference between allegations which are denied being reported in newspapers and the State directly taking an active stance against particular people. I just want to add one other thing. Please do not lose sight—and I am sure you will not—of the fact that when it came to my particular views about this, I also had a different view from the Director about whether this investigation would have got anywhere. Rather interestingly, I think the things that have come out tend to support what I was saying about never being able to prove that these payments were not actually approved and known about by the Saudis at the highest level. We could go into that if you want to.

**Q335 David Howarth:** Yes, we do want to go into that.

**Lord Goldsmith:** I had raised for quite a long time with the Director and the staff an issue about whether this prosecution, which was not based on the particular gentleman that you have identified but on another aspect of this, would ever get anywhere on the basis that BAE had always said that the payments were known of and approved by the Saudis. Our corruption law does not allow us ultimately to pursue a corruption case if the principal has approved. There is a question about who the principal was. That was an issue, as I say in the information memorandum, that I had raised with the SFO over the months, asking how they were going to prove this and I allowed them, I believe rightly, the opportunity to pursue certain lines of enquiry to see if they could. At the end of the day and having taken independent legal advice myself, I take a different view from the Director. I do not think ultimately they would have been able to get over that. I was then faced with the risk that we would have a period of, on the SFO’s estimate, 18 months of further investigation, further proceedings, at the end of which I do not think the case would have gone ahead. There is a bit of the role of superintendence there in this sense. I have stood at the Despatch Box on a number of occasions explaining why high profile cases have collapsed, i.e. Princess Diana’s butler, the Jubilee line, Trooper Williams, and there are others as well. People sometimes say, “Well, you’re now explaining what happened at the last moment, that you couldn’t actually proceed with this case. Couldn’t you see that coming?” Sometimes you have to look ahead and say, “Can you actually see this coming? Is it right if you can see something coming to allow the country to be put at risk during that period?” Weighing that against the national security, in my mind it seemed that the Director was right to say, “Bring this to a conclusion now”.

**Q336 Mr Tyrie:** We have heard that the decision was taken on the basis of national security by the Director of the SFO. He did use an interesting phrase where he said, which relates to the Chairman’s opening question, “I took the view that this was my decision and not the Prime Minister’s”. He did not say, “This was my decision and not the Prime Minister’s”. One of the points was about confidentiality, privacy, of these matters not being discussed publicly and yet they are.

**Lord Goldsmith:** He said that many times. He said it on television. He has said it in newspapers.

**Q337 Mr Tyrie:** Be that as it may, he took the decision or he thinks he took the decision. Do you think that SFO directors are the people best placed to make judgments on such difficult national security issues?

**Lord Goldsmith:** He had the benefit of very clear advice, some of which, as you know, he got directly from our ambassador at meetings in which I did not participate. He saw the same information as I did, which was a very clear view expressed by the Prime Minister with the benefit of advice from those others within government whose job it is to know about security risks, not just ministers but also officials. I think he was perfectly entitled to take that view. If I thought he was completely wrong I certainly would
have said so. I never shied away from saying I agreed with the decisions, although for me it was a somewhat different decision because I was weighing up these national security considerations against a case which I thought at the end of the day would not go ahead at all. So I thought then it was the right decision to take and I think now it was the right decision to take.

**Q338 Mr Tyrie:** I am just probing because you have been strongly supportive of retaining an Attorney General role similar to your own. Although you have persistently said, apparently correctly, that this was a decision made by the SFO, is this not exactly the sort of area where you would want a government minister who has access and experience to the interpretation of national security evidence to take a decision?

**Lord Goldsmith:** He did have that because he had me.

**Q339 Mr Tyrie:** But you did not take the decision.

**Lord Goldsmith:** I understand that. It comes back to what I was saying about superintendence. I can express a view, I can be involved and consulted on cases where again I am not taking the decision, but I hope that the ability to discuss it—

**Q340 Mr Tyrie:** You hope you will be persuasive.

**Lord Goldsmith:** Not necessarily that. That is only one side of it. I hope that I will help the prosecutors identify the right issues and help them look at certain matters that they might not otherwise have done. If I thought, which I did not, that the Director was going wrong in relation to the decision, I would have said so.

**Q341 Mr Tyrie:** This has been a decision taken largely on the basis of advice, although not entirely, from an ambassador at one moment in time, at one particular level of security risk, on the basis of one set of evidence about the terrorist threat and the importance of information that is being exchanged on that terrorist threat. I am summarising, perhaps crudely, what I have just heard, but I do not think, if you look at the transcript, it is a million miles away from what we have just heard. That risk may change. The security risk may be different in a year or two. The perception of the Saudi administration of the damage that they feel it would do might change. Is this not something we should keep under review?

**Lord Goldsmith:** I am not sure you can and, for reasons which were given by the Chairman in opening, it will not be my view about that which has any relevance in the future. I want to go back if I may. I do not know what the Director has said. I know—and I have said this and he has confirmed it—he saw information which was not just from the ambassador. I know the ambassador’s views were very important because he was on the ground and knew the situation, but he saw the same information that I have seen from the Prime Minister which sets out the views of others within Government and other very senior officials.

**Q342 Mr Tyrie:** When you say “from the Prime Minister”, is that the information that came from Richard Mottram, which perhaps went via the Prime Minister, or is this a separate briefing that came via the Prime Minister?

**Lord Goldsmith:** It was part of the same package. It certainly came from Richard Mottram and indeed the Permanent Secretary at the Foreign Office as well as taking account of the views of the agencies. I think one has to recognise that there are moments at which a decision has to be made. On the basis of the information that the Director had and indeed that I had, if one takes a different view as to the decision he took it has to be on one of two bases. Either one thinks one knows better than the people whose job it is to judge what the risk to national security is and it is their job to know or you say I do not mind, even if their judgment is right, that the consequence of this might be a risk to British lives, I would rather continue with this uncertain or, in my view, very likely not to continue at all prosecution and risk those lives. I think you have to make the decision on that basis at that time and I believe the Director was right to make it at that time.

**Q343 Mr Tyrie:** I would like to ask about the Department of Justice’s apparent opening of an investigation. We do not know for sure that they are going to open an investigation. I heard you commenting on that briefly on the radio this morning. Can we just clarify, first of all, what the position is within Government? If a request for mutual legal assistance is made, who will take the decision on whether to accede to it?

**Lord Goldsmith:** Requests for mutual legal assistance come through the Home Office, which is what we call the central authority for these requests, but if the request is for information from a particular government department just as if it is a request for particular information from a private individual, I think it would be for that department or that individual to consider whether they thought it was necessary, right or appropriate for them to respond.

**Q344 Chairman:** Is that an oversight in the recent reorganisation, that it was not transferred from the Home Office to the Ministry of Justice?

**Lord Goldsmith:** As far as I am aware it has not.

**Q345 Chairman:** I am slightly surprised that it has stayed with the Home Office.

**Lord Goldsmith:** There was something of a debate as to where it ought to go. There had been discussions going on as to whether it ought to come to the Attorney General’s office because it is the prosecutors who tend to have to deal ultimately with the requests for information. I am not aware that has been resolved.

**Q346 Mr Tyrie:** Who is going to be responsible and accountable to Parliament for the decision?

**Lord Goldsmith:** I do not know what the request is going to be about. If the request is for information from the Ministry of Defence as to how the contract came to be entered into or how it has been run or
something like that, ultimately they will have to be accountable for decisions they take as to what information they provide. Obviously there are mechanisms in all mutual legal assistance arrangements ultimately for a determination to be made if someone who is being asked to provide information does not want to do so.

Q347 Mr Tyrie: Perhaps you can scroll forward just a few hours to when you are no longer the Attorney General and try and speak as somebody who has been the Attorney General. Do you think the Government should do everything it can to cooperate fully with an investigation, if there is one?

Lord Goldsmith: I really do not think it is right for me to comment on that because I do not know what the nature of the investigation is and I do not know what the questions are that are being asked. I really do think it is inappropriate for me, even as a hypothetical out-of-office person, to comment on this.

Q348 Mr Tyrie: I want to ask you about something you mentioned yesterday before the Human Rights Committee and it was also mentioned on the radio, which is that I think it is your view that there should be an investigation into directions given at Brigade level on the treatment of prisoners. No doubt you will have examined in some depth the issue of extraordinary rendition, which is a related issue.

Lord Goldsmith: Not in some depth but of course I am aware of the issues, yes.

Q349 Mr Tyrie: Do you think there is now a case for an investigation into the treatment of those British residents and British subjects who allege that they have been maltreated and tortured in some cases as a consequence of finding themselves in what is known as the High Value Prisoner Programme in the United States?

Lord Goldsmith: May I repeat what I said yesterday, which is that the acknowledgement in September 2006 that there were facilities being operated under a covert detention policy I think was a matter of great concern. I think it is very important that it should not happen again. That is not something that we have been running. I am assured that it is not something in which we have ever been involved and I believe those assurances. We have never knowingly been involved in that. I am not sure to what extent it is for me sitting here to say very much more than that at this stage.

Q350 Mr Tyrie: Perhaps I will rephrase it with one last question. If I may commend you, I think it was excellent you did say what you said about Guantanamo Bay, which has certainly been in advance of the current Government position, that is, that Guantanamo Bay is wrong legally and ethically. Do you also think that the programme of extraordinary rendition is wrong ethically and legally, that is, the kidnapping of people and taking them to places where it is widely alleged and now substantiated by a large number of investigations in Canada, Italy and Germany they may be tortured?

Lord Goldsmith: The answer to that essentially is yes, but I think I need to define the language because I think people use the language slightly differently. I am a lawyer and a cautious lawyer about this. Rendition is a way of bringing people to a legal process where they can be put on trial and there is nothing wrong with that. Extraordinary rendition may sometimes mean bringing people to a legal process because there is not some existing extradition treaty and there may be nothing wrong in that.

Q351 Chairman: It has been found to be true in a case in this country.

Lord Goldsmith: It has. I said there may be nothing wrong. It would depend upon what the arrangements are. If there are arrangements in place which are being circumvented, that would be different from a case where there simply are no arrangements. If this is what the position is, of taking people and then moving them to a place which is, as it were, outside the legal process, where the detention can be reviewed, I am sorry, whatever the exigencies of the situation, if they are then subjected to treatment which we would regard as inappropriate, I would unhesitatingly say that that is wrong.

Q352 Bob Neill: I am very glad to hear you say this. I wanted to come back very briefly to Mr Tyrie’s point about MLA requests. I understand your point, but just to get it clear in my mind, it depends on what the nature of the material requested is. You referred to the instance of MoD material. If an MLA request relates to the material which has been amassed in the course of an SFO investigation, who then politically, as you understand it, takes the decision and who is accountable for that?

Lord Goldsmith: I would think in the first instance the SFO would consider whether it was right to pass over certain information to another government. It would be for them to take the decision in the first instance to do that.

Q353 Bob Neill: In terms of accountability to Parliament, is that then dealt with internally?

Lord Goldsmith: If a request was raised about that in Parliament, it would be the Attorney who would have to answer for that.

Q354 Bob Neill: The thing that interested me about the relationship between the SFO and the Attorney that the BAE issue has raised was this question that you have superintendence and I think you define that as being the right to be informed and consulted on sensitive, high profile cases. You see a point about this in the BAE instance and there is the fact that your advice might be sought by the Director in relation to public interest matters and so on. Are you saying you would be reluctant to intervene directly in the conclusions as to whether an investigation should proceed or not or are there circumstances when you would think it is necessary that—

Lord Goldsmith: Are you restricting this question to investigations?
Q355 Bob Neill: To prosecutions.

Lord Goldsmith: I take the view, which I believe was the conclusion which Sir Ian Glidewell reached when he looked at the CPS, that if ultimately, after discussion, there is a difference of view between an Attorney General and a Director then the Attorney General’s view should prevail. I have never had to test it. I think it would be quite a big thing if it had to be tested. I do not direct.

Q356 Bob Neill: In the BAE situation of course it did not come to that because you and the Director reached a conclusion that you broadly agreed about albeit by slightly different routes. From the perception of the public, in terms of how independent that decision can be, you have the Director and his team, the distinguished Queen’s Counsel and they can instruct and prosecute a case, have a view and along comes the Attorney who has his own silk to give his own advice. Does that really help the perception that the Director has a free hand in coming to his decision?

Lord Goldsmith: I do not see why not. I do not see why it should be wrong for the Attorney who is concerned about aspects—and I have done it in other cases—to say, “I am not absolutely sure. I do not think this approach is right”, and rather than simply relying upon my own view about that say, “Let us get somebody else who is experienced and who is independent to take a view on it. If it turns out I have got that wrong then that is fine”. It is very important to understand that the Attorney stands outside Government when it comes to prosecuting decisions. It is not a matter for collective responsibility. It is not a matter I would ever allow to be discussed in Cabinet, absolutely not. My colleagues know that they cannot, except in the specific context of a formal Shawcross inquiry, come and lobby me about a particular prosecution and I hope my successor will take exactly the same view.

Q357 Bob Neill: I accept what you say about that. In terms of the perception of the public who may be more cynical about these things, is there perhaps a structural problem here? It may not be the answer. I know you have indicated your concerns in the past. Should that be an argument for saying maybe you should look towards something nearer the Irish model, where the Director of Public Prosecutions in their case or the SFO Director has almost complete cooperation and independence from the Attorney?

Lord Goldsmith: I have always been clear with you and with others that I recognise that there are some disadvantages in the present arrangements but that I believe the advantages outweigh those disadvantages. I think the other models are not as good. I have great admiration for the present Director of Public Prosecutions in Ireland whom I know well. The fact remains at the end of the day that prosecution is a function of Government. It is one of the basic things that Government is there to do, protect law and order and protect individuals through that process. It is not some wholly independent private activity. I think the present Lord Advocate in Scotland put that point extremely well. What that means is Government has a real and proper interest not in whether a particular decision is taken on the evidence but on the way the Prosecution Service is run. If, for example, Government was of a view, as indeed it has been, that many women are subjected to violence at home which has not been treated seriously by the police or by prosecutors, that that needs to change and to say in those circumstances the prosecutors now need to set up a system where they have domestic violence specialists, where they are able to have a policy which deals with domestic violence and take a more robust view of it, I think it is very proper for Government to say to that to a Director. I think if you have an entirely independent Director the Director may say, “That is not my view”. I think Government is entitled, through a proper independent law officer, to be able to say, “I think we should look at whether or not you can take a different priority in relation to this particular sort of crime”. That is an example.

Q358 Bob Neill: That is a very topical note in the light of what I think was on Despatches, that is, the question of honour killings and investigations there. It is something that has interested me. I take it you would say that those particular types of offences, honour killings, should be a top priority for the police for all the reasons that you have talked about, would you not?

Lord Goldsmith: A priority, yes. Thank you for raising it. Because I take that view, several months ago I called a meeting to which I invited parliamentarians, community leaders, the police and the prosecutors and I said that we had to look at this problem of so-called honour killings. In fact, they are not honour killings at all, they are dishonourable. I said that we ought to look at this to see whether there is more that we can do. I think it was helpful for someone in Government to be able to organise that. In the same way, I have been concerned about whether or not everyone has taken seriously enough particular rabid incitements to violence and whether we were sufficiently robust in looking at that. Again I got the police and the prosecutors over and said “Can you do more?” and they have now set up a national strategy to deal with that. It is a good example of where Government has a proper role to play through a law officer rather than perhaps through a wholly political minister who will be seen as sort of tub thumping rather than trying to get things right.

Q359 Bob Neill: Would you say homicide, whatever the motive, should have the same priority?

Lord Goldsmith: Yes. I think I would go further than that because when a young woman, for example, is killed by her own relatives that is even worse because
they are the very people she should be able to turn to for protection and support. I absolutely agree with you. I think it is a very important issue.

Q360 Keith Vaz: When you were outside the room the Director of the SFO said he felt that the reputation of the SFO had been damaged by the stagger of BAE. Do you agree with that?

Lord Goldsmith: I can see why he says that. There has been a lot of stuff in the press, some of it grossly unfair, distorted, unsubstantiated, but that sort of thing does have an effect.

Q361 Keith Vaz: When I asked him if he had any regrets he said no, but there was a long pause. Do you have any regrets about decisions?

Lord Goldsmith: About the press?

Q362 Keith Vaz: We all have regrets about the press. Not about the press, regrets about the decisions.

Lord Goldsmith: No. You have to take tough decisions and that is the problem. I have always been clear about this from the start. I was uncomfortable about this and I was uncomfortable about it not because it was a wrong decision but because I thought it could lead to a view that this country was not as committed to tackling corruption overseas as I believe it is, which is why I also made sure that we got £22 million from the Chancellor so that the SFO would have additional resources to take on a new category of corruption cases, those in relation to a humanitarian call for food, and why I asked the Director, though he did not have any difficulty in responding positively, to get on with the remaining allegations in relation to BAE and to pursue them as quickly and rigorously as he could. In that sense I think the decision had to be taken, but it has some consequences and we will have to work to overcome those. I have no doubt the SFO is a professional organisation taking decisions which it believes are in the interests of the public of this country and in the public interest and I hope that that reputation, if it is damaged at the moment, will quickly be restored.

Q363 Keith Vaz: You leave office as the longest serving Labour Attorney General in history. Is this still the serious department that you wanted it to be? Lord Goldsmith: I got into terrible trouble with my officials for that language, which was picked up from a speech, because it sounded as if I was suggesting that they were frivolous. It is not a frivolous department. It is a serious department, absolutely. I think it has a very important job to do. The job of the Attorney General, in short, is to help make sure the Government upholds the Rule of Law. I have tried to do that in a number of different ways and a couple of them have been referred to today. It is also to try to make sure that the wheels of Government stay running on the right legal tracks and that involves a huge amount of activity. I get to see a lot of what goes on in Government in different areas and lots of policy areas which are not as high profile as BAE but they are still important. I think it is very important that you have someone very close to Government who is able to do that.

Q364 Keith Vaz: In terms of profile, you have clearly raised the profile of the office and you have attended Cabinet meetings much more regularly than any of your predecessors. Do you think that this is a practice that should be continued by your successor? Lord Goldsmith: I believe what I have been doing is right. Obviously it is for others, including the new Prime Minister, to decide how he wants to run his Government. I notice with some interest that in a couple of the models which have been put forward as perhaps preferable to the present model, ie the Irish model, the Attorney General attends all Cabinets in the Irish model—

Q365 Chairman: He does not superintend the DPP. Lord Goldsmith: He takes some prosecuting decisions, that is quite right. That is why I think it is very important that issues about prosecutions should not be discussed in Cabinet. I have always made that very, very clear. In Scotland I think there is a bit of it. I am not quite sure what has happened in Scotland. Certainly until the recent election the Lord Advocate had attended all the Cabinet meetings of the Scottish Executive. I think it is right but others may take a different view. I think you are a better adviser if you understand what it is that your clients, the board of directors or the Cabinet is seeking to do. The fact is that today legal issues come up all the time in lots of different areas, in the balance between civil liberties and national security and new legislation. The fact is that with the way Cabinet is run it simply has not been possible to know in advance such and such an issue will come up. I think it has been right to be there in order to help with that and to intervene if necessary.

Q366 Keith Vaz: Do you think that there should have been a greater share out of responsibilities in the recent split between the Home Office and the Ministry of Justice? Should the Attorney General’s chambers have some more work to do?

Lord Goldsmith: Yes. I have said that in the memorandum. I have indicated some areas where I think it would have been logical and may still be logical.

Q367 Keith Vaz: Is that human rights?

Lord Goldsmith: Human rights and some of the constitutional law. It would make sense for the Attorney General’s office to deal with that. I have already mentioned the issue of some of our international cooperation which is essentially done by the prosecutors anyway. It is the prosecutors who make requests for mutual legal assistance and try and help deal with extradition. I think that is another area which could perfectly properly and sensibly fit within an Attorney General’s office.

Q368 Keith Vaz: When you open The Times law section next week, as a kind of summing up of your last six years, what would you like them to have said of you in the last six years?

Lord Goldsmith: I think the thing that I am proudest of has been the contribution I have made to the improvement of criminal justice and amongst that is...
the success of the prosecutors. I think the Crown Prosecution Service is completely different from what it was before 1997. It is a confident organisation. It has more money, more powers, more responsibilities and, above all, it concentrates more on what people in this country are concerned about. It is much more open, it engages with communities, it protects communities and victim protection has got much, much better. I am not claiming for a moment to take all the credit for that at all, but it does correspond with the vision I started to set out six years ago and I am very pleased with where it is. It has been a tremendous privilege. I have spent more time in court arguing cases and defending the Government than any other recent Attorney General. I think that is absolutely right because it is a way of backing up your legal advice, by being prepared to support it in front of the judges. There are obviously some areas in relation to Rule of Law where I think we have made a contribution, Guantanamo is one, but at another level, reviewing all cases of infant homicide when it looked as if some of those convictions may not have been right. Those are amongst the things that I look back on with some satisfaction. Thank you for asking the question.

Chairman: Thank you for your evidence, Lord Goldsmith. We await with interest to see whether your continuing role as a politician, because you remain a member of the House of Lords until such time as it might be changed, is exercised with the same aura on some of the things we have been asking you about.
1. I was, from 1999 until the beginning of the present session, the Liberal Democrat Shadow Lord Chancellor. In that capacity, I was actively involved in the passage of the Constitutional Reform Act 2005 through the House of Lords. As I have now become the Chairman of the House of Lords Select Committee on Delegated Powers, I have left the Liberal Democrat front bench. This submission therefore reflects my personal views and is not to be taken as the views of my party.

2. The present inquiry starts with a review of the constitutional role of the Attorney General in relation to the upholding of the Rule of Law. The “Rule of Law” is an expression which has no single definition, and has a fairly flexible meaning. I would strongly recommend the Committee to read the outstanding lecture on the subject given by the Senior Law Lord, Lord Bingham of Cornhill, at Cambridge on 16 November 2006.

3. In relatively modern times, at any rate, responsibility for ensuring that the Government complies with the Rule of Law has in theory been divided between the Attorney General and the Lord Chancellor. It is the duty of the Attorney General, as the legal adviser to the Government, to advise it on the legality under national, and international law of actions which it is considering taking. Given the doctrine of Parliamentary sovereignty, a Government could lawfully place before Parliament a Bill which would contravene the Rule of Law. If this were to happen it would no doubt be the duty of the Attorney General to draw this to the attention of the Government.

4. The equivalent role of the Lord Chancellor, prior to the Constitutional Reform Act 2005, was informal and amorphous. Lord Chancellors have never been formal legal advisers to the Government but, as a senior member of the Cabinet with a distinguished legal career behind him, any comments by a Lord Chancellor would have carried considerable weight. The exercise of this power, however, seems to have varied between holders of the office. Lord Mackay of Clashfern said in a speech in the House of Lords that, while he never himself gave legal advice to the Government of which he was a member, he did on occasion point out issues on which he thought legal advice from other sources would be desirable. By contrast, colleagues who served in the Cabinet when Lord Elwyn Jones was Lord Chancellor have no recollection of his ever having raised any similar warning.

5. The Constitutional Reform Act 2005 does not alter the powers or duties of the Attorney General. However, it has greatly altered the responsibilities of the Lord Chancellor and has thereby had an indirect but important effect on the role of the Attorney General and on the relationship between him and the Lord Chancellor. The Act has placed an express obligation (sections 1 and 17) on the Lord Chancellor to respect the Rule of Law and (section 3), together with all other Ministers, to respect judicial independence. However, the effect of the Act as a whole is to convert the Lord Chancellor from being a Minister with a judicial as well as a political role (including the making of 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.

6. This is a change which I strongly support. However, it means that the standing of the Lord Chancellor to raise issues in Cabinet relating to the Rule of Law will be weakened, notwithstanding the creation of the statutory duties mentioned above. This means that it is important that more attention should be given to the role of the Attorney General in upholding the Rule of Law. In particular, steps need to be taken to uphold the independence of the office.

7. The Attorney General is, and must remain, an adviser to the Government and not to Parliament. He or she can not serve these two clients simultaneously without running into impossible problems of confidentiality and conflict of interest (though this would not necessarily exclude a procedure for parliamentary confirmation of the appointment). But steps can be taken to strengthen the independence of the office.

8. One important step has already been taken, though only on a temporary basis. This is that the Attorney General is a member of the House of Lords. Until 1997, both the English Law Officers were always members of the Commons. In 1997, a member of the House of Lords was appointed to be the Solicitor General, and subsequently a member of the House of Lords was appointed to be Attorney General, with the junior appointment returning to the Commons. This change seems to have been due originally to the increasing difficulty of finding MPs with sufficient legal experience and stature to be credible Law Officers, but in fact it makes a great deal of constitutional sense. It is desirable that the Government’s chief legal adviser should be as free as possible from personal conflicts of interest. This means that the Attorney General should not be faced with the need to defend a seat in the Commons and should be in a position which will not lead to
possible promotion within the Government. These conditions would be satisfied if the office is permanently held within the Lords. Reform of the Lords, unless the reform involves a wholly elected Second Chamber (which seems unlikely) would not prevent this.

9. An alternative could be that the office of the Attorney General, as in Ireland, should be entirely outside Parliament. There is certainly a case for this, but on balance I would prefer to retain the degree of Parliamentary accountability which is provided by the presence of the Attorney General in the Lords.

10. Changes in the functions of the Attorney General will also, almost inevitably, lead to changes in the role of the Solicitor General, so I believe that any inquiry into the constitutional role of the Attorney General must also consider the constitutional role of the Solicitor General. 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.

THE INTER-RELATIONSHIP BETWEEN THE ROLES OF THE ATTORNEY GENERAL AND THE LORD CHANCELLOR

11. The main conclusion from the above is that, following the 2005 Act, the main burden of upholding the Rule of Law should rest on the Attorney General rather than the Lord Chancellor, given that the latter will be primarily a departmental Minister who may have little personal knowledge of constitutional law. Obviously some coordination will be necessary, but this may be a second-order issue.

Is there a conflict between the Attorney General’s role as head of prosecutions and his duties as a member of the Government?

12. It is obvious that there is a potential conflict. 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 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.

January 2007

Evidence submitted by Graham Rodmell, Transparency International (UK)

Transparency International (UK) [TI(UK)] has previously made written and sometimes oral submissions on the role and responsibilities of the Attorney General in the context of the United Kingdom’s obligations as a Contracting State to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 [OECD Anti-bribery Convention] as also in connection with proposed reform of the UKs anti-corruption laws. Relevant extracts from two earlier submissions are in Appendices 1 and 2.

The current submission arises in the narrower context of the Committee’s review of the Attorney General’s role in relation to possible prosecutions arising from the pending criminal investigations popularly encompassed by the phrase “cash-for-honours”, on which there have been exchanges between the Committee and the Lord Chancellor, between the Committee and the Attorney General and the Attorney General and the Shadow Attorney General, Dominic Grieve MP. Since those exchanges, the Attorney General made a statement in the House of Lords on 14 December 2006, announcing the decision of the Director of the Serious Fraud Office to discontinue the criminal investigation of BAE Systems plc concerning payments made in relation to the Al-Yamamah programme with Saudi Arabia. That decision and the involvement in it of the Attorney General and other members of the Government raise very serious concerns over the constitutional propriety of the Attorney General’s roles, and his ability 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, and also in conformity with the obligations of the United Kingdom as a party to the OECD Anti-bribery Convention.

In recent statements, the Attorney General has cited his statutory responsibility in relation to a small number of criminal offences. Of long-standing concern to TI(UK)—as also to the OECD Working Group on Bribery—is the requirement for the consent of the Attorney General to prosecutions under the Prevention of Corruption Acts 1889 to 1916. That restriction has been criticised by the Working Group on Bribery as inconsistent with Article 5 of the OECD Anti-bribery Convention which requires that the investigation of the bribery of a foreign public official should not be influenced by considerations of national
economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. The Working Group also took note of the absence of any consent requirement for the common law bribery offence. TI(UK) shares that concern [see appendices 1 and 2].

The Joint Parliamentary Committee who considered the 2003 Corruption Bill was critical of the restriction, and recommended that the proposed legislation change it so that consent to prosecute was removed from the Attorney General, and left to the normal and appropriate operational considerations set out in the Code for Crown Prosecutors exercised by the Director of Public Prosecutions, the Director of the SFO or other strictly independent official, well capable of considering the relevant factors, including by seeking independent specialist advice where circumstances require. This would have advantages in terms of perception, but would leave the Directors subject to the pressures of advice of the type summarised below that were referred to in the statements of 14 December 2006. TI(UK), for the reasons mentioned in the Appendices, remains unconvinced that any special filter of consent is required for these offences. Hence the Corruption Bill drafted on the instructions of TI(UK) and introduced in both the House of Commons (May 2006—10-minute rule) and House of Lords (November 2006) omits any such consent.

As TI(UK) understands it, the reason why the 1906 Act introduced a requirement for the Attorney General’s consent to prosecute was because of the novelty of public officials and politicians being prosecuted for corruption offences whereas previously they had enjoyed effective immunity. Parliament felt nervous about such possibilities and intentionally decided to ensure that a member of the government could always intervene as a political act to prevent prosecution. A century has passed, and public expectations of standards in public life have changed radically. It is neither appropriate nor acceptable for a member of the government to act as a “choke” to stop prosecution of a public official or politician. Although the Attorney General might assert that in so acting he is not exercising a political role, the role has not altered since it was introduced for overtly political reasons 100 years ago.

In relation to the “cash-for-honours” affair, the Attorney General maintains that for the small number of possible offences for which his personal consent is required: ‘It is not one which can be avoided. Nor can the consent power be delegated by the Law Officers to any third party.’ (Letter from Lord Goldsmith to Dominic Grieve MP dated 7 November 2006) The Attorney General thus confirms that the consent is of an essentially political character, incapable of being performed by anyone not a member of the government. The conflict of interest, as noted by the OECD Working Group on Bribery, is palpable. The government has a right, exercisable by one of its members, to stop a prosecution of another of its members, for reasons that are neither specified in the 1906 Act nor seemingly need to be objectively justified. The inconsistency with the United Kingdom’s obligations under the OECD Anti-bribery Convention is manifest.

The Attorney General goes on to discuss his role in relation to those prosecutions for which his personal consent is not required. Without making any distinction in the political character of his conduct, he points to his statutory responsibility for the superintendence of the CPS and states: “It is therefore normal for the CPS to consult the Attorney General on any sensitive case.” Thus, again, it appears that the Attorney General sees his supervisory role, which emanates from his membership of the government and for which he “answers to parliament”, as giving him the power to interfere in prosecutions even where there is no statutory need for his consent. This goes far beyond any conceivable role that any member of government should play in the administration of justice, and breaches the constitutional separation of powers on which the Rule of Law depends.

 Whereas on “cash-for-honours”, the Attorney General has discussed his power to stop prosecutions, in relation to BAE Systems and Al Yamamah, he has sought to justify his role in the decision to discontinue the criminal investigation, ie well in advance of any decision to prosecute. For this, there is no statutory basis; nor does he cite his supervisory role as a member of the government. Were he to do so, he would surely invite the charge of political interference in the administration of justice, which is clearly what such a role involves. Instead, he maintains an extra-governmental role as “guardian of the public interest”. This is an aspect of the office of Attorney General which seemingly involves no political role; but wholly depends on his identification of where the public interest lies, and then acting so as to protect or maintain such public interest. Oddly, he is not expected to decide what the public interest is; but to ascertain it from his colleagues who of course are acting politically. The official account of the Attorney General function here distinguishes his role as the Government’s Chief Legal Adviser, where he acts “on behalf of and as a member of the Government”. This includes his supervisory role over prosecutions.

Where, on the other hand, the Attorney General acts as guardian of the public interest, he is acting in a wholly independent and quasi-judicial capacity and not as a member of the Government. In carrying out such public interest functions, the Attorney General may seek the views of Ministerial colleagues on where the public interest lies (through what is known as “the Shawcross exercise”), but ultimately the relevant decision is for him alone. (extract from paragraph 1.17—“Office of the Attorney General—Publication Scheme”)

The distinction may be hallowed (at least from the period when Sir Hartley Shawcross was Attorney General); but is surely spurious. The Attorney General cannot be expected to know what the public interest is in relation to a specific criminal investigation; and so is expected to find out by asking his government colleagues. They are subject to no independent constraint and tell the Attorney General where, politically,
the land lies. Merely by passing such views through the medium of the Attorney General, such views are translated into an objective and “independent” judgment (note: quasi-judicial) declaration of the true public interest.

There is no mention in the official account of the need to balance this contrived ‘public interest’ with the manifest public interest in the maintenance of the Rule of Law and the independent administration of justice. In his parliamentary statement of 14 December 2006, the Attorney General attributed to the SFO Director the need “to balance the need to maintain the Rule of Law against the wider public interest.” In such balancing, if the BAE Systems/Al Yamamah case is typical, the Rule of Law will always come in second place, because the Attorney General, whose advice to the SFO Director was plainly critical, gave no evident weight to it at all. It was sufficient, it seems, for the Prime Minister together with the Secretaries of State for Foreign Affairs and Defence to declare the public interest in stopping the prosecution for that to become the public interest that the Attorney General adopted under the “Shawcross exercise”, on the basis of which his emphatic advice was given to the SFO Director.

The precise content of the various statements and advice passing between members of the government, including the Attorney General, and the Director of the SFO will emerge under Freedom of Information Act requests or in the course of pending legal proceedings. What is already evident is that the Attorney General is not in reality capable of performing the dual function as member of the government (including both his advisory and supervisory roles) and as some “wholly independent and quasi-judicial” guardian of the public interest. If there is in truth a need for such a function at all, it can surely be better performed by a judge who is independent of government.

This Government has recognised the true function of the Lord Chancellor and, despite criticism, has taken appropriate measures to disentangle that political office from the artifice of distinct legislative, judicial and executive roles. The complexities of the Attorney General’s discordant functions are of a lesser nature; and can surely be readily resolved—irrespective of the desirable reform of Home Office functions. TI(UK) urges that the Committee recommend these changes.

Given the surely unprecedented expression of serious concern by 35 of 36 signatories to the OECD Anti-bribery Convention [see Appendix 3], the strengthening of the reputation of the UK in tackling international corruption requires that these changes be made.

January 2007

Appendix 1

EXTRACT FROM SUBMISSION OF TI(UK) TO THE JOINT PARLIAMENTARY COMMITTEE ON THE DRAFT CORRUPTION BILL 2003

Attorney General’s consent to prosecution

3.15 TI(UK) considers that there should be no requirement for the AG’s consent to prosecution of offences to be created by the new legislation. It is claimed that the AG’s consent (clause 17) is required to counter the risk that the right of private prosecutions will be abused and the institution of proceedings will cause the defendant irreparable harm. Evidence of such risk is lacking. There is no corresponding requirement for the comparable offence of fraud. The prosecuting authorities are understood to have effective ways of preventing such abuse. Civil proceedings, which seem much more likely in asserting private interests, could be equally damaging and are not restrained by the AG’s consent. “Politicisation” of prosecutions would be retrograde.

3.16 The Law Commission recommended (para 7.26 of their Report) that the consent of a law officer should not apply. Article 5 of the OECD Convention requires that the investigation of the bribery of a foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. The AG’s consent requirement has been commented upon adversely by the OECD Working Group on Bribery; and, in their most recent report, it remains an issue for follow-up. However strictly the AG may exercise powers in accordance with the Code for Crown Prosecutors, there will remain a perception that, as a member of the Government, he could be influenced by considerations of the type excluded by Article 5 of the Convention.

1 Phase I Bis Report.
Appendix 2

Extract from Submission of TI(UK) to the OECD Working Group on Bribery

Phase 2 Evaluation of the UK’s Implementation of the OECD Anti-bribery Convention

Law Officers’ Consent

15. TI(UK) considers that there should be no requirement for the Attorney General’s (AG) consent to prosecution of bribery offences. It is claimed that in exercising this power, the AG applies the criteria established by the Code for Crown Prosecutors. It is therefore a duplication of the prosecutor’s function that will have already resulted in a decision to prosecute. It is further claimed that the AG’s consent is required to counter the risk that the right of private prosecutions will be abused and the institution of proceedings will cause the defendant irreparable harm. Evidence of such risk is lacking. There is no corresponding requirement for the comparable offence of fraud and it does not even apply to common law offences. The prosecuting authorities have effective ways of preventing such abuse by assuming responsibility for the prosecution and then not proceeding on grounds of insufficiency of evidence or other grounds under the Code.

16. In examining public interest grounds, most of the factors that a prosecutor considers do not really apply to foreign bribery. Considerations about the “victim” are particularly difficult to apply because there is frequently no obvious victim. The bidders for business who lose because the winner bribed are certainly “victims”, but frequently in countries where corruption is widespread, the true victims are the poor who do not get access to the schools, hospitals and services to which they are entitled because corruption damages the economy or more directly because funds for infrastructure are misapplied.

17. Worryingly, one of the public interest factors that weighs against prosecution is that details may be made public that could harm international relations, which brings the question into consideration under Article 5 of the Convention, which requires that the investigation of the bribery of a foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. The AG’s consent requirement remains an issue for the OECD Working Group. However strictly the AG may exercise powers in accordance with the Code for Crown Prosecutors, there will remain a perception that, as a member of the Government, he could be influenced by considerations of the type excluded by Article 5 of the Convention. The Law Commission recommended (para 7.26 of their Report) that the consent of a law officer should not apply. The JPC recommended that the consent of the Director of Public Prosecutions (DPP) should be substituted for that of the AG. This would be an improvement on the present situation in terms of perception, but would still remain as an unnecessary requirement.

Appendix 3

Statement of Secretary General of OECD

18 January 2007

OECD Secretary-General stresses governments’ role in anti-corruption drive

18 January 2007—OECD Secretary-General Angel Gurría stressed the important role of governments in preserving the credibility and integrity of the OECD Anti-Bribery Convention, at the session of the OECD Working Group on Bribery held in Paris on 16–18 January 2007.

The credibility of the Convention depends on its implementation and enforcement by the countries that are signatories to it, Mr Gurría made clear. “The political will of our members, collectively and individually, is of very critical importance . . . I am gratified that the OECD provides a forum where we can have a full and frank exchange of views on these issues,” he told delegates.

In the context of its regular exchange of views on recent developments, the Working Group engaged in discussions regarding the recent discontinuation by the United Kingdom of a major foreign bribery investigation concerning BAE Systems plc and the Al Yamamah defence contract with the government of Saudi Arabia. The Working Group appreciates the efforts of the United Kingdom authorities to explain the decision to other members of the Convention.

The Working Group has serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention and will discuss further the issue in March 2007, in the context of the United Kingdom written report on its implementation of recommendations set out in the 2005 Phase 2 examination report on its enforcement and application in practice of the OECD Convention. The Working Group will then consider appropriate action.
In the context of the discussion to be held in March, the Working Group would make reference to two particular recommendations in its 2005 report on the application of the Convention by the United Kingdom. These recommendations concern “the performance of the SFO and other relevant agencies with regard to foreign bribery allegations . . . including in particular with regard to decisions not to open or to discontinue an investigation” (paragraph 254 a.) and amendments that would “ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved” (paragraph 255 a.) as prescribed by Article 5 of the Convention. The entire report is available at www.oecd.org/corruption.

Appendix 4

Transparency International (TI) has been at the forefront of the anti-corruption movement since it was formed in 1993. TI is a not-for-profit, independent, non-governmental organisation, dedicated to increasing government accountability and curbing both international and national corruption. It seeks to work in a non-confrontational way with governments, companies, development agencies, NGOs and international organisations to build coalitions to combat corruption.

TI’s international secretariat is based in Berlin and there are about 90 national chapters around the world. (www.transparency.org)

TI(UK) is the national chapter for the UK and was among the first to be formed, also in 1993. (www.transparency.org.uk)

Evidence submitted by the Corner House

1. The Corner House is a non-governmental organization that focuses on environment, development and human rights. It has a track record on policy research and analysis on overseas corruption.

2. The purpose of this submission is to provide background information on the international commitments of the United Kingdom (UK) on overseas corruption as they relate to the Committee’s Inquiry into the constitutional position of the Attorney General. In particular, the submission is concerned with paragraph 3 of the Committee’s inquiry, on whether the Attorney General’s role as superintending Minister for legal services provided in Government conflicts with his duties as a member of the Government.

3. The Attorney General in his role as superintending Minister for legal services is responsible for the work of the Serious Fraud Office, which is currently the body with primary responsibility for investigating and prosecuting overseas corruption. Under current corruption legislation, the Attorney General is also responsible for providing consent for corruption prosecutions to proceed.

4. Repeated international assessments of the UK’s ability to fight corruption and of its implementation of international anti-corruption conventions have questioned the appropriateness of the Attorney General’s role in providing consent for corruption prosecutions given the risk of political influence arising from his position as a member of the Government.

5. At national level a Parliamentary inquiry into the adequacy of the UK’s Draft Corruption Bill similarly identified a conflict of interest in the requirement for the Attorney General’s consent for corruption offences, recommending that it should be replaced by the consent of the Director of Public Prosecutions (DPP) or a nominated deputy. This recommendation has been accepted by the Government.

The United Kingdom’s International Obligations

6. The United Kingdom is signatory to three major international anti-corruption conventions:
   — Council of Europe Criminal Law Convention on Corruption (1999);

7. The Council of Europe Criminal Law Convention on Corruption and UNCAC both require parties to provide full independence of specialized authorities investigating and prosecuting corruption in order to ensure that no undue pressure or influence can be brought to bear on those authorities:

2 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, available at http://www.oecd.org/document/32/0,2340,en_2649_34855_2048160_1_1_1_1,00.html
Article 20 of the Council of Europe Criminal Law Convention on Corruption provides that each party shall ensure there are specialised authorities to fight corruption and that these:

“shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure”;

Article 36 of UNCAC similarly requires that specialized authorities:

“shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without undue influence”.

8. Article 5 of the OECD Anti-bribery Convention requires that investigation and prosecution of overseas corruption offences:

“shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

9. Paragraph 6 of the Annex to the 1997 Revised Recommendation identifies the importance of prosecutorial independence and the need for decisions to be made on the basis of “professional motives”:

“In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.”

Paragraph 6 also states that the:

“Complaints of victims should be seriously investigated by the competent authorities”.

10. The commentaries to the OECD Anti-bribery Convention further explain that Article 5 is primarily concerned with securing prosecutorial independence:

“in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.”

The commentaries also indicate that the Annex to the 1997 Revised Recommendation serves to strengthen Article 5 by providing that:

“... complaints of bribery of foreign bribery officials should be seriously investigated.”

INTERNATIONAL ASSESSMENTS OF THE UNITED KINGDOM’S COMPLIANCE WITH INTERNATIONAL TREATIES

11. The OECD Working Group on Bribery, the body responsible for monitoring the implementation of the Convention, has made three evaluations of the UK’s compliance with the OECD Convention. Each of these evaluations has expressed concern over whether the UK is fully compliant with Article 5 of the OECD Convention, given the potential conflicts of the Attorney General’s dual role.

12. The review team of the Council of Europe’s Group of States against Corruption (GRECO) similarly questioned the appropriateness of the requirement for the Attorney General’s consent in its first evaluation of the UK’s implementation of the Council of Europe Criminal Law Convention on Corruption.

13. In December 1999, the Working Group on Bribery, in evaluating whether UK law was compliant with the OECD Convention, stated that it

“expects that within the exercise of prosecutorial discretion, the UK fully respect Article 5 of the Convention. In addition, the Working Group recommends that the UK reconsider the requirement that the prosecution of the bribery of foreign public officials not be instituted without the permission of the Attorney General or Solicitor General.”

14. In March 2003, in a second evaluation of whether UK law was compliant with the Convention, the Working Group noted that the UK had retained the requirement for a Law Officer’s consent in the new 2001 Act on the basis that:

“the Law Officers do not exercise their prosecution functions as members of the Government but act as impartial guardians of the public interest. When exercising their law enforcement functions the Law Officers act wholly independently of the executive and in a quasi-judicial manner.”

However the Working Group again stated that it:

“encourages the UK to ensure that Article 5 is fully respected, both in the exercise by prosecutors of discretion based on public interest, and in the exercise by a Law Officer of the right to grant or withhold consent to prosecute.”


4 “Commentaries on the OECD Convention”, http://www.oecd.org/document/1/0,2340,en_2649_34859_2048129_1_1_1_1_00.html

5 To date no country has been monitored against its implementation of UNCAC.
The Working Group went on to say that in further evaluation of the UK, it would examine:

"whether the Law Officer’s consent requirement may be an obstacle to effective implementation of the Convention and whether the UK is in a position, within the exercise of prosecutorial discretion, to fully respect Article 5 of the Convention."

15. In March 2005, in its report of the evaluation of the adequacy of the UK's implementation of the OECD Convention, the Working Group on Bribery paid considerable attention to whether the UK was able to be compliant with Article 5 of the Convention given the Attorney General’s role. The Report notes the Attorney General’s confirmation that:

"none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute... that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust."

However the OECD Working Group nonetheless once again recommends that the UK:

"... consider the appropriateness of Law Officers consent for cases of foreign bribery ..."

16. In its July 2001 report of UK implementation of the Council of Europe Criminal Law Convention on Corruption, GRECO noted that the UK intended to retain the requirement for the Attorney General’s consent in its new legislation:

"... as a protection against frivolous or malicious prosecutions".

However it went on to state that:

"... there does not seem to be any evident justification why decisions to prosecute made by professionals pursuant to established standards should be reviewed by the Law Officers (which might be interpreted as a form of political control) in corruption cases. On the contrary, the existing arrangement carries the risk of undermining public confidence in the functioning of the system."

GRECO recommended that the UK authorities:

"... ensure that there are safeguards to prevent any undue exercise of the Attorney General’s power to refuse consent to prosecutions under the Prevention of Corruption Acts."

NATIONAL ASSESSMENTS OF THE UNITED KINGDOM’S COMPLIANCE WITH INTERNATIONAL TREATIES

17. On the 24 March 2003 the Joint Committee on the Draft Corruption Bill was appointed by the House of Commons and House of Lords to examine the Draft Corruption Bill, which had been published for pre-legislative scrutiny.

18. The Joint Committee identified the Attorney General’s consent to prosecution at the outset as one of the issues to be addressed in its Inquiry.

19. In relation to questions regarding the role of the Attorney General and compliance with the OECD Anti-bribery Convention, Professor Mark Pieth, the Chair of the OECD Working Group on Bribery, in his oral evidence stated that:

"The Crown Prosecution Service knows why they go ahead and they have their rules. Why would they need an additional political officer to tell them when to stop a case? What creeps into the discourse is a very uneasy feeling that there is a possibility which is dangerous and we would have difficulties saying, 'This meets the requirements of Article 5 of the Convention.' We would suggest trying hard to abolish the consent."

Professor Pieth further questioned the need for consent:

"Why can the prosecutors in the CPS not take the decision? Why do you need somebody centralised far away from the actual case?"

Professor Pieth further explained the purpose of the Article 5 of the Convention:

"What we are trying to rule out is that somebody says, 'This is a good friend of ours, Mr Suharto you cannot do that to us', that will expose him, or the other situation where they say, 'We are gaining a lot of jobs out of this contract, we cannot expose this contract, so we will stay the investigation.' ... I believe if the CPS took the decision it would be perfectly in line with the Convention."

20. In its Report, published on the 31 July 2003, the Joint Committee on the Draft Corruption Bill stated that:

"We have been told that MPs and peers, among other public figures, are vulnerable to frivolous or vexatious private prosecutions for corruption... We therefore accept the need for some filter before prosecutions are launched."

6 http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtcorr/157/3060203.htm
7 http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtcorr/157/3060207.htm
8 http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtcorr/157/3060206.htm
The Report continues:

"... involving a member of the Government in the decision to prosecute may be counter to our international obligations. Without doubting the independence of the Attorney General and his predecessors, we accept that the appearance of ministerial involvement in the prosecution decision would best be avoided."

The Report recommended that the requirement for the consent by the Attorney General be removed and that:

"... Clause 17 be replaced by a requirement for the consent to be given by Director of Public Prosecutions or one nominated deputy."

21. In its reply to the Report of the Joint Committee on the Draft Corruption Bill of December 2003, the Government indicated that it would replace the existing statutory requirement for the Attorney General’s consent with a requirement for the consent of the Director of Public Prosecutions (DPP) or a nominated deputy:

"We are pleased to concur with the Joint Committee and are exploring the options as to how to make necessary provision in the Bill."

22. In its Consultation Paper on the Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials of 8th December 2005, the UK Government states its intention that the Director of the SFO should also be empowered to give consents:

"The Government has agreed some modifications to the published draft Bill, which flow from the recommendations of the Joint Committee which gave the Bill its pre-legislative scrutiny: . . . Replacing the requirement for the Attorney General’s consent (in clause 17) with a requirement for consent to be given by the DPP or a nominated deputy. We have since decided to add to that a power for consent to be given by the Director of the SFO, in view of the SFO’s lead role in foreign bribery cases."

23. An alternative Corruption Bill, introduced in May 2006, sponsored by a cross-party group of MPs and prepared by Transparency International-UK (TI-UK) goes further and removes the requirement for consent altogether.

24. The Corner House considers that these domestic and international examinations of the foreign bribery offence reveal a strong consensus that the requirement for the Attorney General’s consent for corruption prosecutions opens the door for accusations of political interference and fuels public mistrust.

25. The Corner House also strongly believes that recent events surrounding the termination of the SFO’s investigation into BAE Systems Plc and the Al Yamamah military contract with the Government of Saudi Arabia, provide further evidence of the conflict of interest that exists between the Attorney General’s political and “quasi-judicial” roles, underlining the need for urgent reform.

February 2007

Evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

1. The Committee has asked for a note on my perception of my role as Attorney General. It is a role I have been privileged to hold since June 2001. This has been an eventful period. It has seen the UK engaged in two armed conflicts, in Iraq and Afghanistan. It has seen major terrorist atrocities at home and abroad. The Government has had to respond to the threat from terrorism in ways that have sometimes provoked both political and legal controversy. During the same period we have seen the bedding-in of the Human Rights Act 1998, with the need to make sometimes difficult judgments on the balance between individual rights and the interests and security of society as a whole. In the criminal justice area, for which I share Ministerial responsibility with the Home Secretary and the Lord Chancellor, we have seen much closer working between the different criminal justice agencies, a greatly enhanced role for the prosecutors, and the creation of a new prosecuting authority in the Revenue and Customs Prosecutions Office.

2. As Attorney General I have been involved closely in these important issues and many others—in giving legal advice; in the development and implementation of policy, particularly on criminal justice; in scrutinising proposed new legislation; and in striving to uphold the Rule of Law. I have also had to take, or to answer for, some difficult and controversial decisions in individual cases. This note does not attempt to give a comprehensive account of all my functions or the way I have undertaken them since June 2001. (A list of my main functions is attached.) But I will comment on some of the key features of my role as I see it.

3. This note considers five particular issues:

9 http://www.archive2.official-documents.co.uk/document/cm60/6086/6086.pdf
11 http://www.lawcom.gov.uk/docs/lc255(1).pdf
— Whether the role of Attorney General could better be performed by someone who was outside Government. On this, as I explain, my clear view is that more would be lost than gained from such a change.

— Linked to that, one of the key advantages of the current system is that the Attorney General is directly accountable to Parliament. This note considers the possibility of enhancing that accountability, perhaps through a specific select committee dedicated to scrutinising the work of the Attorney General’s Office.

— Whether the nature of the Attorney General’s role, in particular in upholding the Rule of Law, could be made more explicit, for example by changes to the oath of office or by legislation.

— Whether any changes should be made to the way in which legal advice given by the Law Officers is handled, and whether it should be made available in some way to Parliament and the public.

— Options for strengthening the role of Attorney General—whether for example there are additional responsibilities which could be assigned to the office.

4. I have worked within the existing arrangements which represent the Government’s position. As I said in the House of Lords debate on the role of the Law Officers in December 2005, I have tried to do so on the basis of three overriding principles: to give legal advice and take decisions based on a scrupulous approach to the law and to the 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. I realise that there are some who wish to consider options for changing the current system. Ultimately decisions on change would not be for me or for any Attorney General; they would be a matter for the Prime Minister and the Government collectively, and potentially for Parliament.

CRIMINAL JUSTICE ROLE

5. By statute I am responsible for the “superintendence” of the main prosecuting authorities—the Crown Prosecution Service, the Serious Fraud Office, the Revenue and Customs Prosecutions Office and the Public Prosecution Service in Northern Ireland. I also superintend the service prosecuting authorities, soon to be combined into a single Service Prosecuting Authority by the Armed Services Bill.

6. The concept of superintendence has never been categorically defined. It was considered by Sir Iain Glidewell in his review of the Crown Prosecution Service in 1998. In broad terms superintendence can be understood 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.

7. The note deals below with my role in relation to individual criminal cases. That is a role I exercise independently of Government, in the public interest. But I comment first on my role as one of the criminal justice Ministers—with the Home Secretary and the Lord Chancellor—in particular given my responsibility for the prosecuting authorities. The role of the prosecutors in the criminal justice system is clearly key because they are front-line practitioners with the job of bringing offenders before the courts; and they operate at the centre of the criminal justice process.

8. It has 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. Good progress has been made, with the experience and expertise of prosecutors now being recognised in both the formulation and implementation of criminal justice policy. Some of the significant reforms made in this area include the following:

— The CPS has moved from being a demoralised backroom service, to a strong confident service. There are now CPS lawyers in all police charging centres. Prosecutors work much more closely with the police from the earliest stages of an investigation, whilst maintaining absolutely their independence in taking prosecutorial decisions.

— CPS now take charging decisions in all but minor and routine cases. As a result there are more guilty pleas and fewer cases are discontinued.

— We have greatly improved the level of service and support provided to victims and witnesses. 165 Witness Care Units have been established across all 42 criminal justice areas to improve support to witnesses; as a result fewer cases are having to be dropped because of witnesses failing to attend. And I have launched a Prosecutor’s Pledge which sets out clearly the responsibilities of prosecutors towards victims.

— There is increased engagement with communities, including specialist prosecutors for rape, domestic violence and anti-social behaviour. Prosecutors are more visible and therefore accountable to the public.

— There are strengthened arrangements for dealing with serious crime, particularly terrorism.
— The CPS play a key role in the delivery of PSA targets, in particular increasing the number of offences brought to justice by over 150,000 and reducing the proportion of ineffective trials in the courts.

— Most recently the role of the prosecutor has been recognised with the introduction of Serious Crime Prevention Orders.

— I have created a new independent prosecutor in the Revenue and Customs Prosecutions Office.

9. I do not believe these reforms could have been achieved unless I had been able, as a senior Minister with specific responsibility for the prosecutors, to champion their interests within Government, ensure that their role was properly reflected in the development of criminal justice policy, and put the case for the necessary resources and powers.

10. Within the trilateral arrangements for criminal justice, I also have lead responsibility for a number of cross-cutting issues, including offences brought to justice, experts, and criminal case management.

THE RULE OF LAW

11. A key function of Attorney General, as I see it, is to uphold the Rule of Law. That includes most obviously my role as the Government’s chief legal adviser, although it goes wider.

12. Of course only a small proportion of the legal issues that face Government are referred to the Law Officers. But by definition these are typically the issues of the greatest legal complexity or political sensitivity or which have the widest implications. In giving my advice I have sought to abide by the principles that my advice should be independent and impartial; that my approach should be constructive; and that I should be prepared to give unwelcome advice and stand firm where that is called for.

13. From time to time it is my job to say “no”—to advise that a particular course of action cannot lawfully be taken. Inevitably, those are the occasions that tend not to see the light of day outside Government, but they represent an important part of my function of upholding the Rule of Law.

14. Some would argue that such advice would be more independent, or carry greater credibility, if it were given by someone who was outside Government. I disagree. In response I would make the following points.

15. First, I strongly resist any suggestion that lawyers within Government (or any other organisation) are incapable of giving independent and impartial advice. Such an argument implies that no in-house lawyer can be independent. I do not think that can be sustained.

16. Secondly, I consider that I have been best placed to give frank, well-informed and constructive advice to my colleagues in Government 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 in which the advice is sought.

17. Thirdly, in my view such advice tends to be more heeded by Ministers because it comes from one of their colleagues. As Professor Jeffrey Jowell has recently put it: “Surely ministers are more likely to accept such advice because it comes from ‘one of them’, someone essentially on their side, rather than from some externally contracted technocrat.”12 By the same token, a minister receiving unwelcome advice is perhaps less likely to sweep it aside when it comes from a ministerial colleague rather than a civil servant or some external lawyer.

18. Discussion of the Attorney General’s advisory role tends to be hampered by the fact that my advice is (like all legal advice) covered by legal professional privilege, and is subject to a long-standing convention which prevents disclosure of the advice (or even the fact that the Law Officers have been consulted) outside Government. Should these arrangements be changed? Lord Bingham for example has said that he sees “room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer’s opinion on the lawfulness of war: it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client.”13

19. As was made clear in the Government’s evidence to the 2006 inquiry by the House of Lords Constitution Committee into war-making powers, it is important for Parliament (and the public) to be given a proper explanation of the legal basis on which such key decisions are taken. This is what happened in relation to Iraq in 2003.

20. It cannot be excluded that there may be exceptional cases where it will be right also to disclose the underlying legal advice given to the Government by the Law Officers. However, as was again explained to the House of Lords Constitution Committee, to do so in the generality of case would present difficulties.

— The purpose of legal professional privilege is to permit complete candour between client and lawyer—in both directions. Even if, in some specific cases, “the public” were to be regarded as the Attorney General’s client, in practice he would be dependent on the relevant Government department(s) for his instructions, that is to say the raw material on which his advice is to be given. The Attorney’s advice could only be fully informed if those instructions were themselves fully

13 Sixth Sir David Williams Lecture: “The Rule of Law”; Centre for Public Law, 16 November 2006.
candid. The instructions—and hence the advice—might need to make reference to sensitive matters, such as secret intelligence or military plans, which it would not be in the public interest to disclose.

— As the then Chairman of the Bar, Stephen Irwin QC said in relation to the debate about whether my advice on the use of force against Iraq should be published:

“Were this advice to be published, it would leave future Governments of whatever hue in difficulty when it comes to obtaining legal advice on major matters of public or international law. That would be clearly against the public interest. It means the Government might not ask for advice when they should or might not reveal all the facts when they do.”

— In some instances (not all) the proposed course might be susceptible to legal challenge. Any full legal advice will consider the arguments both for and against what is proposed. Publishing the advice in full would risk giving ammunition to potential challengers (whether in the UK or overseas).

— In relation to military action, there is a particular need for certainty and clarity precisely because (as Lord Bingham said) people are being asked to fight and perhaps to die. In the end what is needed from the Attorney General is a yes or no answer. The public are entitled to know that answer and the legal basis for it. But the interests of certainty and clarity would not necessarily be served by publication of the full advice which might (as mentioned) include references to arguments both ways.

21. As mentioned, my role in upholding the Rule of Law is not confined to the giving of legal advice in a narrow sense. For example the Law Officers are members of the Cabinet Committee on the legislative programme and see all draft Bills. We advise on issues of propriety and legal policy, such as the scope of delegated powers, the early commencement of Bills and questions of retrospection. Even where Law Officers’ advice has not been formally sought, we see the human rights memorandum produced on each Bill and act as scrutineers of the departmental analysis of ECHR compliance.

22. My wider responsibility to uphold the Rule of Law is illustrated by the role I played in negotiating, on behalf of the Government, for the return of the British detainees formerly held at Guantanamo Bay. Clearly there were difficult issues of law, policy and security. I do not believe I could have handled that role effectively had I not been a member of the Government, and been seen to be speaking with the authority of Government. As Professor Jeffrey Jowell has put it: “When [the Attorney General] expresses these values [in relation to Guantanamo Bay and human rights] as a Minister of the Crown, rather than a mere detached outside adviser, they are articulated not as mere expressions of the law but of Government policy.”

23. An example in another area is the review I put in place to examine nearly 300 cases of infant death following the Court of Appeal judgment in relation to Sally Clark and Angela Cannings, in order to determine whether any convictions should be reconsidered for example by being referred to the Court of Appeal.

24. More recently still, Mr Justice Girvan in the Northern Ireland High Court referred to me certain concerns about the appointment of the Interim Victims Commissioner. In doing so he referred to my “function of protecting the due administration of justice”. I have appointed Peter Scott QC to conduct an independent review of the matter.

THE PUBLIC INTEREST

25. In addition to my functions as a member of the Government, I have a number of functions which I exercise independently of Government, in the public interest. The distinction between these two roles is admittedly not always well understood but it is very long established.

26. Among my public interest functions are those which I exercise in relation to individual criminal cases. They include:

— The requirement for my 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.

— The power to refer unduly lenient sentences to the Court of Appeal.

— The power to terminate criminal proceedings on indictment by issuing a nolle prosequi.

— The power to refer points of law in criminal cases to the Court of Appeal.

27. Amongst my other public interest functions are:

— 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.

— Power to bring or intervene in other legal proceedings in the public interest.
28. I have said above that, when I am exercising my public interest functions, I do so on the basis of an objective, dispassionate assessment of the public interest, without regard to party political considerations. I believe my Ministerial colleagues would vouch for that. I acknowledge that some of the decisions I have taken have been controversial. There is nothing new in that. One of my very early predecessors, Francis Bacon, described the position of Solicitor General as “one of the painfulest places in the Kingdom”. Rather more recently, there was the notorious decision of Sir Patrick Hastings to drop the prosecution of John Ross Campbell in 1924, which led to the collapse of the Ramsay Macdonald government. Other more recent Attorneys have faced controversy, for example:

— 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.
— The collapse of the Matrix Churchill trial, leading to the Scott report into Arms to Iraq, in the time of Sir Nicholas Lyell.

29. 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 Attorney General has become more “political” or more controversial in recent years.

30. A number of other points might be made. First, the sorts of decisions to which I refer will always fall to be taken by someone, and would be liable to be controversial whichever figure took them. The recent decision to discontinue the Serious Fraud Office investigation into BAE Systems in relation to the Al Yamamah contract with Saudi Arabia was taken not by me but by the Director of the SFO. As I have explained, the Director acts under my statutory superintendence and I agreed with his decision to halt the case, although I have made clear that I thought the investigation was unlikely to lead to successful prosecutions in any event. But I venture to suggest that the decision would have been no less contentious if there had been no role for the Attorney General at all.

31. Secondly, it is worth emphasising that the Attorney General’s public interest functions are assigned to him by law. The decisions in question are not ones which the Attorney can avoid. Some of these functions are derived from the Attorney General’s common law and constitutional role and are very long-established—for example the power to enter a nolle prosequi or to consent to relator proceedings to enforce the law. But Parliament has continued up to the present day to confer new functions on the Attorney General—a recent example being the Attorney’s statutory role of appointing special advocates, to safeguard the fairness of certain proceedings involving highly sensitive material which cannot be disclosed in the ordinary way. Such functions have been conferred by Parliament presumably on the basis that they should be exercised by an office-holder of suitable authority who is capable of acting in the public interest and in the interests of the Rule of Law.

32. The third point is that as Attorney General I am answerable to Parliament (in a way which an appointed official would not be) for all my functions, including my public interest functions. This note deals next with my role in relation to Parliament.

ACCOUNTABILITY: ROLE IN RELATION TO PARLIAMENT

33. I have always regarded my accountability to Parliament as paramount. In a typical year the Solicitor General and I answer some 400 Parliamentary Questions and reply to some 250 letters from Members of Parliament or Peers. We make ourselves available to Members of either House who wish to raise particular issues with us. On occasion we are required to answer urgent questions in either House.

34. The recent SFO decision in relation to BAE Systems gives a good example of the Law Officers’ Parliamentary accountability. As soon as possible after the decision had been taken, the Solicitor General and I came to Parliament to explain it and answer questions. We have both answered oral questions and numerous written questions about the case. We have corresponded with many members of both Houses about it. Last week I responded to a further debate in the House of Lords about the case. Any change to the role of the Attorney General, or to the superintendence of the prosecuting authorities, would need to address the question of accountability to Parliament.

35. My Parliamentary role goes wider. On occasion I advise Parliament on matters of privilege and procedure, and I have the function of intervening in legal proceedings to assert the privileges of Parliament. I am always ready to give advice and assistance to Parliament or its Committees on particular issues. For example, I gave advice in a debate on the Bill for the Children Act 2004 on the smacking of children. I have appeared before this Committee in connection with the role of special advocates, and before the House of Lords Constitution Committee in relation to the use of prerogative powers. I gave evidence to the Committee on the Assisted Dying for the Terminally Ill Bill to explain the relevant law in that area. And I have given evidence to the Procedure Committee on the sub judice rule. There may be scope for the Law Officers being asked to advise Parliament and its committees more frequently, and I would welcome that.
36. Are there ways in which the Law Officers’ accountability could be enhanced?

— I have stressed my accountability to Parliament. At present however there is no Parliamentary committee specifically charged with scrutinising the work of my office. This would of course be a matter for Parliament itself but I can see value in such scrutiny by a suitably well informed select committee. There would of course need to be some limitations, for example in relation to current criminal cases and national security issues. But such an arrangement could significantly enhance accountability for, and understanding of, the Attorney General’s role.

— In the lecture to which I have referred, Professor Jowell suggested two possible ways of clarifying the Attorney General’s role. One is the imposition of a statutory duty (comparable to that imposed on the Lord Chancellor by the Constitutional Reform Act) to promote the Rule of Law. This might be coupled with further provisions as to the qualifications for appointment as a Law Officer and the nature of the role. As I have said previously, I do not understand these proposals to amount to any change in what the Law Officers do. Rather they would codify the role in a way which might give greater clarity and transparency.

— Professor Jowell’s second suggestion is a change in the Attorney General’s oath of office. The existing oath is very ancient and somewhat impenetrable. There might be merit in a more modern version which could explicitly set out the elements of the role, including the public interest functions and the duty to uphold the Rule of Law.

— Is there also a case for examining whether the content of the Attorney General’s role could be enhanced? The existing functions of the office (as shown by the attached list) are numerous and varied. It is for consideration whether there may be other functions, in the criminal or civil field, currently performed elsewhere in Government which would sit naturally with the Attorney’s existing functions. The current debate about the allocation of legal and justice functions within Government gives an opportunity for such consideration.

Conclusions

37. I will of course be happy to expand on any of these issues in writing or in oral evidence, if that would assist the Committee.

February 2007

Further evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

The Role of Attorney General in Other Jurisdictions

1. This note summarises the role of Attorney General or equivalent position in other jurisdictions. The note is not a comprehensive survey. It focuses primarily on those jurisdictions which have a legal system which is similar to that of England and Wales. It is based on publicly available information. In the time available, it has not been possible to have the note approved by each office holder dealt with below.

2. The note is structured on an alphabetical basis.

Australia

3. Establishment: The office of Attorney General (currently held by Phillip Ruddock) was transplanted to the Australian colonies with the reception of English law. The Attorney General is assisted by the Solicitor General.

4. Appointment: The Attorney General is appointed by the Governor-General on the advice of the Prime Minister. The Attorney General is usually, but is not always, a lawyer.

5. Link to Government: The Attorney General is a Minister and a member of the Cabinet. In addition to his role as a law officer, the Attorney General is the minister responsible for legal affairs, national and public security.

6. Role in relation to prosecutions: The Attorney General authorises prosecutions for federal crimes. In normal circumstances the prosecutorial powers of the Attorney General are exercised by the Director of Public Prosecutions. However the Attorney General maintains formal control, including the power to initiate and terminate public prosecutions and take over private prosecutions.

7. Prosecutions for certain offences require the individual consent of the Attorney General. The Attorney General also generally has the power to issue certificates which are conclusive of certain facts (e.g. that the revelation of certain matters in court proceedings might constitute a risk to national security). The Attorney General also has the power to issue a nolle prosequi with respect to a case, which authoritatively determines that the state does not wish to prosecute the case, so preventing any person from doing so.

8. Role in relation to criminal justice policy: The Attorney General advises on reform of criminal law and criminal investigation law, including potential amendments to the Criminal Code Act 1995. The Attorney General also provides policy advice on proposals for criminal offences and enforcement powers in draft legislation being prepared within the Australian Government.

9. Other functions:
   (a) Legal advice: The Attorney acts as a general legal advisor to the Cabinet. In practice, advice is issued by the Solicitor General.
   (b) Policy responsibilities: In addition to the policy responsibilities outlined above, the Attorney General has policy responsibility for, inter alia, human rights, emergency management, marriage and intellectual property. The Attorney General is the minister responsible for the Australian Security Intelligence Organisation.


Canada

11. Establishment: The post of Attorney General (currently held by Robert Nicholson) pre-dates Confederation. Before Confederation, the post had been twinned with the post of Minister of Justice. This arrangement continued after Confederation and was formalised by the Department of Justice Act 1868.

12. Appointment: The Attorney General is appointed by the Prime Minister.

13. Link to Government: The Minister of Justice is, ex-officio, Attorney General. The Minister of Justice is a cabinet post.

14. Role in relation to prosecutions: The Attorney General is the head of the Federal Prosecution Service (FPS) which is responsible for the conduct of prosecution of violations of federal law in all the provinces, as well as the prosecution of all federal offences, including Criminal Code violations, in the territories. In exercising these functions, the Attorney General must exclude any consideration based upon narrow, partisan views, or the political consequences to the Attorney General or Cabinet colleagues. The Attorney General will consult his Cabinet colleagues in certain cases, in accordance with the Shawcross principle.

15. The Attorney General also provides legal advice to investigative agencies on the criminal law implications of investigations and prosecutions. It is a long standing practice that the Attorney General not publicly discuss investigations of which he is aware or disclose the findings and reports stemming from such matters. The Attorney General may, however, privately share knowledge of an investigation with appropriate authorities, including members of the Government.

16. Role in relation to criminal justice policy: The Minister of Justice has lead responsibility in developing the criminal law, particularly in such areas as criminal justice, evidence, and extradition.

17. Other functions:
   (a) Legal advice: The Attorney General provides legal advice to federal departments and agencies which act on behalf of the Crown. Other departments do not have their own lawyers; all advice is sought directly from the Attorney General. The Attorney General also advises the Governor General.
   (b) Litigation: the Attorney General carries out all litigation for or against the Crown or any department of the Government of Canada.
   (c) Legislation: The Minister of Justice must examine every Bill introduced in or presented to the House of Commons by a minister of the Crown and every regulation submitted to the Clerk of the Privy Council for registration to determine if any of their provisions are inconsistent with the Canadian Bill of Rights and the Charter of Rights and Freedoms. The Minister must report any inconsistency to the House of Commons.
   (d) Policy responsibilities: In addition to his functions in relation to criminal justice policy (see above), the Minister of Justice is also responsible for human rights, family and youth law, administrative law, Aboriginal justice, general public law and private international law.

**Hong Kong**

19. **Establishment:** The Attorney General of Hong Kong (currently Wong Lan Yung) was renamed Secretary for Justice after transfer of sovereignty in 1997. The Secretary for Justice heads the Department of Justice.

20. **Appointment:** The Secretary for Justice is appointed by the Central People’s Government in Beijing on the advice of the Chief Executive. The position is normally held by a lawyer.

21. **Link to Government:** Before July 2002, the post was a civil service position. The Secretary for Justice is now *ex officio* member of the Executive Council.

22. **Role in relation to prosecutions:** The decision to prosecute criminal offences is the sole responsibility of the Secretary for Justice. In this capacity, the Secretary for Justice operates independently, free from any political interference.

23. **Role in relation to criminal justice policy:** No direct role.

24. **Other functions:**
   (a) **Legal advice:** The Secretary for Justice is the principal legal adviser to the Chief Executive, to the government and to individual government departments and agencies.
   (b) **Litigation:** The Secretary for Justice is the defendant in all civil actions brought against the government.
   (c) **Public interest functions:** The Secretary for Justice may also apply for judicial review to enforce public legal rights. The Secretary has a right to intervene in any case involving a matter of great public interest. The Secretary represents the public interest as counsel to tribunals of inquiry. The Secretary is the Protector of Charities and must be joined as a party in all actions to enforce charitable or public trusts. He is also responsible for bringing alleged contempts of court to the notice of the courts.


**India**

26. **Establishment:** The post of Attorney General of India (currently held by Milon Banerjee) pre-dated independence. It is now governed by the Constitution of India. The Attorney General is assisted by the Solicitor General.

27. **Appointment:** The Attorney General is appointed by the President. The appointee must be eligible to become a judge in the Supreme Court of India.

28. **Link to the Government:** The Attorney General does not have any executive authority. While he is said not to be a political appointee, it is usual for the Attorney General to change when there is a change in government.

29. **Role in relation to prosecutions and criminal justice policy:** It is not clear that the Attorney General has any role in relation to prosecutions or criminal justice policy.

30. **Other functions:**
   (a) **Legal advice:** The Attorney General is the government’s chief legal adviser.
   (b) **Litigation:** The Attorney General is the government’s primary lawyer in the Supreme Court of India.
   (c) **Parliament:** The Attorney General has the right to participate in the proceedings of the Parliament, though not to vote.

**Ireland**

31. **Establishment:** The post of Attorney General (currently held by Rory Brady) pre-dated independence but is now enshrined in Article 30 of the Constitution.

32. **Appointment:** The Attorney General is appointed by the President on the nomination of the Taoiseach.

33. **Link to Government:** Article 30 of the Constitution provides that the Attorney General shall not be a member of the Government. He attends cabinet meetings in his capacity as adviser to the Government on matters of law and legal opinion.

34. **Role in relation to prosecutions:** Article 30.3 of the Constitution provides that the prosecution of offences (other than summary offences) is a function of the Attorney General, or of some other person authorised in accordance with law to do so. However, following the enactment of the Prosecution of Offences Act 1974 responsibility for the great majority of such prosecutions has been transferred to the Director of Public Prosecutions. The DPP is wholly independent of Government. The Attorney General
retains certain prosecution functions, for example, under the Fisheries (Amendment) Act 1978. The Attorney General has a function in deciding whether warrants under the Extradition Acts 1965 to 2001 should be endorsed or not and to advise in extradition cases.

35. **Role in relation to criminal justice policy:** No direct role.

36. **Other functions:**
   
   (a) **Provision of legal advice:** The Attorney General advises the Government on the constitutional and legal issues which arise prior to or at Government meetings, including whether proposed legislation complies with the provisions of the Constitution, acts and treaties of the European Union or other international treaties to which Ireland has acceded. The Attorney General also advises as to whether the State can ratify international treaties and conventions.

   (b) **Litigation:** The Attorney General is representative of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights. He represents the State in all legal proceedings involving the State. The Attorney General defends the constitutionality of Bills referred to the Supreme Court under Article 26 of the Constitution. In addition, under the Attorney General’s Scheme the Attorney General funds certain legal proceedings which are not covered by legal aid. The Attorney General may also institute relator actions in the public interest.

   (c) **Legislation:** The Office of the Parliamentary Counsel is a constituent part of the Attorney General’s Office. The Attorney General also has functions in relation to the Law Reform Commission under the Law Reform Commission Act 1975, in respect of legislative programming as a member of the Legislation Committee which is chaired by the Government Chief Whip.

37. **Website:** [http://www.attorneygeneral.ie/index—en.html](http://www.attorneygeneral.ie/index—en.html)

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**Israel**

38. **Establishment:** The post of Attorney General (currently held by Menachem Mazuz) has not been the subject of a Basic Law or major legislation. However, the traditional rules and customs associated with the post were set out by a committee convened in 1962 and chaired by Shimon Agranat, then a Supreme Court Justice.

39. **Appointment:** The Attorney General is appointed by the Government on the recommendation of the Minister for Justice.

40. **Link to Government:** The Attorney General is not a Minister. It is a civil service post. Since the Agranat Committee reported in the 1960s, there has been an understanding that a person who possesses a strong political identity or who is known for his political activism should not be appointed to the post. The person appointed Attorney General should be free of political party influences so that his decisions may be arrived at independently and without concessions to instructions or policy of the Government or the Minister of Justice.

41. **Role in relation to prosecutions:** The Attorney General is authorized to decide whether or not to submit an indictment. He may also rule with respect to the decision of the police or the State Attorney to investigate or close a file. His other functions include the power to request that the extension of an arrested person’s detention by a court for a time period longer than 30 days; to request that the immunity of a particular Member of Knesset be waived; and to stay criminal proceedings after an indictment has been submitted.

42. **Role in relation to criminal justice policy:** No direct role.

43. **Other functions:**
   
   (a) **Legal advice:** The Attorney General is the government’s chief legal advisor. He provides counsel directly or indirectly through the government legal service. The Attorney General is also responsible for issuing guidelines to the Government on the interpretation of law and appropriate legal procedures. The Attorney General may attend government meetings in his capacity as legal adviser.

   (b) **Litigation:** The Attorney General represents the State in all civil and criminal legal proceedings. In practice, much of this responsibility is delegated to the State Attorney. If legal actions are taken against the State, the Attorney General may choose to defend, or not to defend, the State and its public bodies in court. The Government may not hire a private attorney without the consent of the Attorney General’s office, regardless of whether or not the Attorney General and his staff are prepared to represent the Government in a particular case.

   (c) **Legislation:** The Attorney General advises the Division of Legislation in the Ministry of Justice in the preparation of bills to be presented by the Government and in supervising the promulgation of regulations by all government ministries.

   (d) **Public interest functions:** The Attorney General is authorized to provide representation and to argue in any legal procedure which, in his view, involves an issue of public interest.
Malaysia

44. Establishment: The post of Attorney General (known as Peguam Negara, currently Tan Sri Abdul Gani Patail) is enshrined in Article 145 of the Federal Constitution. The Attorney General is assisted by the Solicitor General.

45. Appointment: Under the Constitution, the monarch appoints the Attorney General on the advice on the Prime Minister. The appointee must be qualified to be a judge of the Federal Court.

46. Link to Government: Under the Constitution, the Attorney General may be, but need not be, a member of Cabinet. The current postholder formerly worked in the Attorney General’s Chambers and has not previously held any Ministerial office.

47. Role in relation to prosecutions: Under the Constitution, the Attorney General has the power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

48. Role in relation to criminal justice policy: No direct role.

49. Other functions:
   (a) Legal advice: Under the Constitution, it is the duty of the Attorney General to advise the monarch or the Cabinet or any Minister upon legal matters.
   (b) Legislation: The Attorney General is responsible for the drafting of all federal legislation.
   (c) Litigation: The Attorney General represents the government in civil cases. He has rights of audience any court or tribunal in the Federation.

New Zealand

51. Establishment: The post of Attorney General (currently held by Michael Cullen) existed before independence. The existence of the office is recognised by the Constitution Act 1986. The Attorney General is supported by the Solicitor General. The Solicitor General is a non-partisan official who is not a member of the Government.

52. Appointment: The Attorney General is appointed by the Governor-General on the recommendation of the Prime Minister. While traditionally the post has always been held by a lawyer, recent appointees have not been legally qualified.

53. Link to Government: Historically, the post of Attorney General could be held either by a politician or by a senior jurist. However today, it is invariably held by a member of Parliament. The Attorney General is a Minister of the Crown. It is common for the Attorney General to have other policy portfolio responsibilities. The Attorney General is usually a member of Cabinet. At times, the Attorney General has also been the Minister of Justice.

54. In exercising his functions as Attorney General, the Attorney General is expected to disregard any political interest or partisan advantage to the Government.

55. Role in relation to prosecutions: The Attorney General heads the justice system and supervises criminal prosecutions. He has statutory powers to decide whether to stay prosecutions, give a witness or other person immunity from prosecution and to deal with requests for extradition and mutual criminal assistance. There are a number of offences for which the consent of the Attorney General is required to bring a prosecution. The Solicitor General (not the Attorney General) has the right to appeal against inadequate sentences.

56. The Attorney General has departmental responsibility for the Serious Fraud Office.

57. By tradition, successive Attorney Generals have preferred not to become directly involved in the areas of prosecution or Law Officer decisions by the Solicitor General (who as noted above is an official as opposed to a politician) in relation to criminal proceedings. The reason for this convention is said to be to prevent the administration of criminal law becoming, or appearing to become, a matter of political decision-making. The Solicitor General remains accountable to the Attorney General for the overall supervision of criminal prosecutions.

58. Role in relation to criminal justice policy: No direct role as Attorney General though particular Attorney Generals may have wider policy responsibilities.

59. Other functions:
   (a) Legal advice: The Attorney General is the principal legal adviser to the Government. In practice, it is the Solicitor General who gives legal advice, subject to the opinion of the Attorney General.
   (b) Litigation: The Attorney General has overall responsibility for the conduct of all legal proceedings involving the Crown. He is the principal plaintiff or defendant on behalf of the Government in the courts. Most litigation involving Ministers or departments is handled by the Crown Law Office, for which the Attorney General is responsible. The Solicitor General or Crown Counsel act as counsel in such proceedings. The Attorney General has occasionally appeared personally on behalf of the Government.
(c) **Public interest functions:** In addition, the Attorney General may instigate, or intervene in proceedings, which affect the public interest. He may also instigate relator actions to assert public rights. He is the Protector of Charities.

(d) **Legislation:** The Attorney General has Ministerial responsibility for the Parliamentary Counsel Office who draft all government Bills. Under the Bill of Rights Act 1990, the Attorney General must report to the House of Representatives any provision in a Bill which he considers is inconsistent with the Bill of Rights.

(e) **Judiciary:** The Attorney General is responsible for the relationship between the executive and the judiciary. The Attorney General appoints members of the senior courts. He is also responsible for protecting the judiciary from improper and unfair criticism. In that capacity, he will answer attacks on their decisions. The Attorney General is also responsible for bringing proceedings for contempt of court.

(f) **Miscellaneous:** The Attorney General has a range of other functions including making recommendations to the Governor-General on the appointment of Senior Counsel (formerly Queen’s Counsel); being a member of the Rules Committee (charged with responsibility for developing rules of court).


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**Scotland**

61. **Establishment:** The post of Lord Advocate (currently held by Elish Angiolini) dates back to the fifteenth century. Post devolution, the Scotland Act 1998 makes provision in relation to the appointment and status of the post. The Lord Advocate is supported by the Solicitor General.

62. **Appointment:** Under the Scotland Act 1998, Her Majesty appoints the Lord Advocate on the recommendation of the First Minister. The First Minister must obtain the agreement of the Scottish Parliament for his recommendation.

63. **Link to Government:** The Scotland Act 1998 provides that the Lord Advocate is a member of the Scottish Executive. Under the Scotland Act 1998, the Lord Advocate must resign if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

64. **Role in relation to prosecutions:** The Lord Advocate is the chief public prosecutor for Scotland and all prosecutions on indictment are nominally done in her name. She is the Ministerial head of the Crown Office and Procurator Fiscal Service. Local prosecutors—Procurators Fiscal—prosecute on her authority. The Scotland Act 1998 specifically provides that the decisions of the Lord Advocate, in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, must be taken by her independently of any other person.

65. **Role in relation to criminal justice policy:** No direct role.

66. **Other functions:**

(a) **Legal advice:** The Lord Advocate is the chief legal adviser to the Scottish Executive and the Crown in Scotland for both civil and criminal matters that fall within the devolved powers of the Scottish Parliament.

(b) **Parliament:** The Scotland Act 1998 provides that even if the Lord Advocate is not a member of the Scottish Parliament, she may participate in the proceedings of the Parliament to the extent permitted by standing orders but may not vote. The Lord Advocate must register her interests as if she were a member of Parliament.

(c) **Devolution settlement:** Under the Scotland Act 1998, the Lord Advocate may initiate litigation in connection with devolution issues.

(d) **Legislation:** The Lord Advocate is a member of the Cabinet Sub-Committee on Legislation and involved in the planning, management and delivery of the legislative programme.

(e) **Litigation:** The Lord Advocate oversees the handling of litigation involving the Scottish Ministers. On occasion, she may appear in person to represent the Scottish Ministers. In addition, the Lords Advocate has a general “public interest” role in litigation and may intervene in litigation in the public interest.

(f) **Investigation of deaths:** The Lord Advocate is also responsible for the system of investigation of sudden or suspicious deaths in Scotland. Her functions in this capacity are largely exercised by Procurators Fiscal, who may, on her instructions or as required by statute, conduct public inquiries into deaths in some cases. This role is analogous to the functions of the coroner in England and Wales.
Establishment: The Office of the Attorney General (currently held by Alberto Gonzales) was created by the Judiciary Act of 1789. The Attorney's remit was “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.” Over the years, this has evolved into the Department of Justice which was formally created by statute in 1870. To assist the Attorney General, the 1870 Act created the Office of the Solicitor General.

The Solicitor General also works within the Department of Justice. He is appointed to argue for the Government in front of the Supreme Court, when the government is party to a case. He is nominated by the President and confirmed by the Senate.

Appointment: The Attorney General is appointed by the President. The appointment must be confirmed by the Senate. The Attorney General must be “learned in law”.

Link to Government: The Attorney General is a member of the President’s Cabinet.

Role in relation to prosecutions: The Department of Justice develops, enforces, and supervises the application of all federal criminal laws in the United States. Department of Justice attorneys prosecute many nationally significant cases and formulate and implement criminal enforcement policy. In addition to its direct litigation responsibilities, the Department of Justice formulates and implements criminal enforcement policy and provides advice and assistance. For example, the Department of Justice approves or monitors sensitive areas of law enforcement such as participation in the Witness Security Program and the use of electronic surveillance; provides legal advice and assistance to federal prosecutors and investigative agencies; and provides leadership for coordinating international as well as federal, state, and local law enforcement matters.

Role in relation to criminal justice policy: No direct role.

Other functions: The Attorney General and the Department of Justice have a range of other functions including:

(a) Legal advice: The Attorney General represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested.

(b) Litigation: Under the 1870 legislation which established the Department of Justice, the Department has control over all criminal prosecutions and civil suits in which the United States had an interest. In addition, the Act gave the Attorney General and the Department control over federal law enforcement. In matters of exceptional gravity or importance the Attorney General appears in person before the Supreme Court though in most cases, the Solicitor General represents the Government.

(c) Law enforcement/prisons: A number of law enforcement agencies, including the FBI and DEA, are Department of Justice agencies. Similarly, the Federal Bureau of Prisons and the Marshall Service are part of the Department of Justice.

Website: http://www.usdoj.gov/ag/

Further evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

FUNCTIONS OF THE ATTORNEY GENERAL

(* indicates functions which are wholly or partly statutory)

1. *Superintendence of and Parliamentary accountability for:
   — Crown Prosecution Service.
   — Crown Prosecution Service Inspectorate.
   — Serious Fraud Office.
   — Revenue and Customs Prosecutions Office.


3. *Power to refer unduly lenient sentences to the Court of Appeal.

4. *Power to refer points of law in criminal cases to the Court of Appeal.

5. *Power to bring (or consent to) proceedings for contempt of court.

6. Power to terminate criminal proceedings on indictment by issuing a non prosequi.
8. General oversight of the other central prosecuting authorities (e.g. DTI, HSE, DWP, DEFRA).
9. Criminal justice policy Minister (with Home Secretary and Lord Chancellor).
10. Legal adviser to the Sovereign (as Her Majesty’s Attorney General).
11. Legal advice to the Crown on peerage cases.
12. Approval of Royal Charters.
13. Chief legal adviser to the Government.
14. Advice to Ministers involved in legal proceedings in their official capacity.
15. Consultation with Ministers in legal proceedings in their personal capacity (in circumstances defined in the Ministerial Code).
16. Advice to Parliament on certain issues, including the conduct and discipline of Members, matters of privilege and procedure, and the meaning and effect of proposed legislation.
17. Receipt of committee papers and advice to the Committee on Standards and Privileges (Solicitor General when AG in Lords).
18. Intervention in legal proceedings to assert the rights of the Parliament.
22. Leader of the Bar ex officio.
23. Advocate for the Crown in important court cases.
24. Appointment of counsel (including Treasury Counsel) to represent the Crown in criminal and civil proceedings.
25. Appointment of advocates to the court (independent counsel appointed to assist the court—formerly called “amicus curiae”).
26. *Appointment of special advocates (counsel appointed to represent the interests of individuals in certain cases, eg immigration appeals, involving sensitive material which cannot be disclosed in the ordinary way).
27. *Nominal claimant and defendant in civil litigation where there is no appropriate Government department (under Crown Proceedings Act 1947).
28. *Power to bring proceedings to restrain vexatious litigants.
29. *Power to represent the interests of charities in certain proceedings.
30. Power to give directions under the Royal Sign Manual for the disposal of charitable gifts under Wills.
31. *Power to take part in, or instruct the Queen’s Proctor to intervene in, certain family law proceedings relating to marriage.
32. *Power to make or consent to application for an order requiring a new inquest.
33. Power to bring or intervene in legal proceedings in the public interest (eg to seek injunctions restraining publication of sensitive material where this is contrary to the public interest).
34. Power to consent to relator actions (civil proceedings brought to enforce a public law right).
36. Taking decisions under the Freedom of Information Act in relation to papers of a previous administration.
38. *Appointment and superintendence of, and Parliamentary responsibility for, the DPP for Northern Ireland.
40. *Power to certify cases for trial by jury in Northern Ireland.

February 2007
Further evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

1. The Committee has asked for a note on my current practice relating to representing the Crown in person in civil and criminal court hearings.

2. It has traditionally been part of the Attorney General's role to act as the chief representative of the Crown (that is to say, both the Government and the Sovereign) in the courts. There is no set protocol governing the sorts of cases in which the Attorney General should appear personally. It has been for each holder of the office to determine his own practice in this respect. From time to time in the past there has been criticism of the tendency of the Law Officers to appear less and less frequently in the courts.

3. I regard it as an important part of my role to appear personally in the courts where this is merited by the significance of the case, and subject to the demands of my other Ministerial and Parliamentary duties. I believe it is appreciated by the courts. It is important for the following reasons:

   — It underlines the importance of the executive’s relationship with the courts, and of mutual respect between the two, for the executive to be represented by one of its own members in cases of particular significance. Where, for example, there is a question about the extent to which the courts should “defer” to the executive by declining to intervene in a particular area of policy or decision-making, it is particularly appropriate for these arguments to be put directly to the courts by me, as the executive’s chief legal representative. Debate on this issue through reasoned argument in court is better than in the columns of the newspapers.

   — It is a visible manifestation of my responsibility for upholding the Rule of Law within Government that I appear personally in the courts to defend the lawfulness of the Government’s actions and decisions. In giving legal advice to the Government, it is a powerful consideration that I may ultimately have to defend that advice personally before the courts.

   — In cases that go to the heart of Government policy or practice I believe I am able to represent the Government’s position with particular authority, given my Ministerial role and my involvement with, and access to, the processes of policy-making and decision-making within Government.

   — Conversely, the fact that I continue to plead in the courts means that, in giving legal advice to Government, I am able to give an informed, first-hand assessment of the likely attitude of the courts to future policies and decisions.

   — Given my responsibilities for superintending the main prosecuting authorities, it is helpful for me to have direct, recent experience of the operation of the criminal courts. (For that reason I recently—in September 2006—prosecuted a full day’s list at Highgate Magistrates’ Court.)

4. It is not possible to set out an exhaustive description of the types of case in which I might decide to appear personally. They will tend to fall within one or more of the following categories:

   — Cases with important constitutional implications.

   — Cases (including criminal cases) raising major public interest issues.

   — Cases with wide implications cutting across the business of Government generally.

   — Cases raising particularly important or novel questions of law, especially public law.

   — Cases relating to key Government policies.

   — Cases of major importance for the UK’s EU, ECHR or other international obligations.

5. It will sometimes be appropriate for me to lead when a case goes on appeal (to the Court of Appeal and/or the House of Lords) even where I have not appeared in the earlier stages.

6. A full list of the cases in which I have appeared is attached. It may be worth singling out two instances.

7. First, the challenge to the Hunting Act 2004 (Jackson and others v Attorney General). In that case I appeared personally at all stages of the litigation—the Divisional Court, the Court of Appeal and the House of Lords. The case involved a challenge to the validity of the Parliament Acts and thus raised fundamental constitutional questions about the sovereignty of Parliament, the extent to which the courts could question the validity of an Act of Parliament, and the relationship between the two Houses of Parliament. It also concerned the ability of the Government to implement its manifesto commitment. In my view it was particularly appropriate in this case for the Government to be represented personally by its senior Law Officer. In the event, the Hunting Act, and the use of the Parliament Acts in that case, was upheld at all stages.

8. Secondly, A and others v Home Secretary, the challenge to the protective detention of suspected foreign terrorists under Part 4 of the Anti-Terrorism, Crime and Security Act 2001, and the UK’s derogation from Article 5 of the European Convention on Human Rights. In that case I appeared for the Home Secretary before the Special Immigration Appeals Commission (SIAC), the Court of Appeal and the House of Lords. The case clearly raised important questions about the UK’s obligations under the ECHR, the balance between individual rights and collective security, and the extent to which the courts should intervene in decisions of the Government and Parliament in this sensitive area. The issues were key to the Government’s national security policy as well as being controversial and legally complex. Again I believe it
was right for the Government’s position in such a case to be advanced in court by its own chief Law Officer. A majority of the House of Lords found against the Government. Having argued the case personally I was naturally closely involved in determining the Government’s response to the judgment.

9. The Committee has asked whether the current practice is likely to, or should, change. From my own point of view I would expect and hope that the current practice will broadly continue. If anything I would wish to undertake more, rather than less, advocacy for the Government but pressures of other business will inevitably place limits on this. Future Attorneys General will, as I have said, determine their own practice in this area and obviously I can give no commitments about that.

27 February 2007

Annex

ATTORNEY GENERAL’S COURT APPEARANCES

R on the application of Hurst v Commissioner of Police for the Metropolis
The Attorney General appeared for the Lord Chancellor as interested party.

Issue
Extent of coroner’s duty under Human Rights Act in respect of deaths occurring before coming into force of HRA—retrospectivity of HRA.

Court
House of Lords

Date of Judgment
Awaited outcome

Outcome
Awaited

The General Medical Council v Professor Roy Meadow [2006] EWCA Civ 1390
The Attorney General intervened in this case in the public interest.

Issue
The extent to which expert witnesses are immune from fitness to practice proceedings brought by their regulating body in relation to their conduct as an expert witness.

Court
Court of Appeal

Date of Judgement
26 October 2006

Outcome
That expert witnesses were not immune from fitness to practice proceedings in relation to their conduct as expert witnesses.

Webster & French

Issue
Sentence referred by the Attorney General as an unduly lenient sentence.

Court
Court of Appeal

Date of Judgment
8 June 2006

Outcome
Sentence held to be unduly lenient, and increased.

Issue
Sentence referred by the Attorney General as an unduly lenient sentence.

Court
Court of Appeal

Date of Judgment
16 November 2005

Outcome
Court held that the original non-custodial sentence was unduly lenient and replaced it with a sentence of 2 years’ imprisonment.

Oakley Inc v Animal Ltd and others [2005] ECWCA Civ 1191
The Attorney General appeared for the Secretary of State (Intervener).

Issue
Whether the Registered Designs Regulations 2001, reg. 12, had been validly made by the Secretary of State under section 2(2) of the European Communities Act 1972.

Court
Court of Appeal

Date of Judgment
20 October 2005

Outcome
The Court held that they were validly made.

Jackson and others v Attorney General (Hunting Act 2004) [2005] UKHL 56

Issue
Whether the legislative process provided for under the Parliament Act 1911 can validly be used to amend the provisions of the 1911 Act itself, and hence whether the Parliament Act 1949 and the Hunting Act 2004 (which was passed under the 1911 Act as amended by the 1949 Act) are valid Acts of Parliament.

Court
House of Lords; Court of Appeal; Divisional Court

Date of Judgment
13 October 2005

Outcome
Decided in favour of the Attorney General

Trial of Zardad
The Attorney General appeared on behalf of the Crown.

Issue
First torture case in UK legal history. Attorney General consented to prosecute, and decided to lead the prosecution in order to mark the case’s importance

Court
Old Bailey

Date of Judgment
19 July 2005

Outcome
Initially the jury could not reach a decision. There was a retrial in 2005 and the defendant was convicted.
R v Z (Proscription of Real IRA) [2005] UKHL 35
The Attorney General appeared on behalf of the Crown.

Issue
Whether the Real IRA was a proscribed organisation for the purposes of s.3 of the Terrorism Act 2000

Court
House of Lords; Court of Appeal, Northern Ireland

Date of Judgment
19 May 2005

Outcome
It was held that the Real IRA was a proscribed organisation.

A (FC) and others v Secretary of State for the Home Department; X (FC) and others v Secretary of State for the Home Department [2004] UKHL 56
The Attorney General appeared on behalf of the Home Secretary.

Issue
Whether the UK’s derogation from Article 5, ECHR, and the protective detention powers in relation to suspected foreign terrorists in the Anti-terrorism, Crime and Security Act 2001, were lawful. The Special Immigration Appeals Commission was satisfied that there was a public emergency which justified the derogation and that in principle the protective detention powers were lawful. However, because those powers only applied to suspected foreign nationals, the Special Immigration Appeals Commission held that they were discriminatory. On appeal, the Court of Appeal held that the legislation and underlying derogation were lawful. It also held, allowing the Home Secretary’s appeal, that the differential treatment of suspected foreign terrorists as compared with suspected UK terrorists was justified and that there was no discrimination. The applicants appealed this decision.

Court
House of Lords; Court of Appeal; SIAC

Date of Judgment
16 December 2004

Outcome

R (on the application of Ullah) v Special Adjudicator; Thi Lien Do v Secretary of State for the Home Department [2004] YJGK 26

Issue
Whether the domestic court had to consider Convention rights, other than Article 3, might be engaged in the removal of a person to the receiving State.

Court
House of Lords

Date of Judgment
17 June 2004

Outcome
Other Convention rights could be engaged in the removal of a person from the UK, even if the anticipated treatment by the receiving State did not reach the minimum requirements of Article 3. However, on the facts of these cases, the applicants had not shown that other rights (namely Article 9) had been breached.
R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27
The Attorney General appeared on behalf of the Government

Issue
Razgar was an asylum seeker who resisted a removal decision on the grounds that it would violate Article 8 because he was undergoing psychiatric treatment in the UK. The Secretary of State argued that Article 8 was not violated and the applicant’s claim unfounded under Immigration and Asylum Act 1999 s.72(2)(a).

Court
House of Lords

Date of Judgment
17 June 2004

Outcome
Held that the foreseeable consequences for the mental health of an asylum seeker on removal could engage Article 8, even if the removal did not violate Article 3.

Attorney General’s Reference No. 92 of 2003 sub nom R v Pells (James Philip) [2005] ECWCA Crim 3367

Issue
Sentence referred by the Attorney General as unduly lenient. Offender had committed racially aggravated assault occasioning actual bodily harm.

Court
Court of Appeal

Date of Judgment
22 March 2004

Outcome
Court held original sentence of 12 months’ detention was unduly lenient and increased the period of detention to 30 months.

In Re McKerr [2004] UKHL 12

Issue
State’s obligations under Article 2 in relation to pre-HRA deaths.

Court
House of Lords

Date of Judgment
11 March 2004

Outcome
The duty to investigate unlawful killings under Article 2 did not arise in domestic law in relation to deaths before the Human Rights Act 1998 came into force.

R v C; R v H [2004] UKHL
Attorney General appeared on behalf of the Crown

Issue
What the judge must consider when ruling on a claim of public interest immunity.

Court
House of Lords

Date of Judgment
5 February 2004
Outcome
It was held that the judge had failed to consider in detail the material that the prosecution had sought to withhold. The House of Lords emphasised the overriding principle that derogation from the principle of full disclosure had always to be the minimum necessary to protect the public interest and must never imperil the overall fairness of the trial.

Opening of the Gaul Inquiry on 13 January 2004
Issue
Inquiry into the FV-Gaul Fishing Vessel incident
Court
Public Inquiry

Department for Environment, Food and Rural Affairs v ASDA Stores Limited
[2003] UKHL 71
Attorney General appeared on behalf of DEFRA.
Issue
Whether section 14 of the Agriculture and Horticulture Act 1964 as amended created a criminal offence that was currently applicable. The Divisional Court had ruled that criminal law had to be clear and it was necessary to have clear words in domestic legislation which imposed criminal liability by reference to present regulations and those made or amended in the future. DEFRA appealed this decision.
Court
House of Lords
Date of Judgment
18 December 2003
Outcome
DEFRA succeeded in their appeal. The House of Lords indicated that courts should not approach the interpretation of statutes/regulations implementing Community legislation as if they did not embrace future Community law changes.

Reference by Her Majesty's Attorney General for Northern Ireland Nos. 2, 6, 7 and 8 of 2003 sub nom R v Robinson, Humphreys, McGuone and James)
[2003] NICA 2
Issue
Unduly lenient sentence references by the Attorney General against sentences for death by dangerous driving and other serious driving offences in Northern Ireland.
Court
Court of Appeal, Northern Ireland
Date of Judgment
11 July 2003
Outcome
Court held that all the original sentences were unduly lenient and imposed increased sentences.

Wilson v Secretary of State for Trade and Industry
[2003] UKHL 40
The Attorney General appeared for the Secretary of State.
Issue
Appeal against a declaration of incompatibility against the Consumer Credit Act 1974 section 127(3).
Court
House of Lords
Date of Judgment
10 July 2003
Outcome

It was held that the court had been wrong to make the declaration because the events and the cause of action took place before the Human Rights Act 1998 came into force.

R (on the application of Q and others) v Secretary of State for the Home Department
[2003] EWCA Civ 36

Issue

The procedure and application of section 55 of the Nationality, Immigration and Asylum Act 2002 (claims for support from asylum seekers).

Court

Court of Appeal

Date of Judgment

18 March 2003

Outcome

The Court held that there were procedural deficiencies in the process for refusing claims for support, which could result in unfairness. However, once they were remedied, there was no reason why section 55 should not operate effectively and the “real risk” that an asylum seeker might be reduced to a state of degradation did not itself engage Article 3.

Attorney General's Reference Nos. 58 to 2002 sub nom R v Coudjoe, Day, Gordon, McGlacken, Simons, Proverbs, O'Too, Thorney and Boakye
[2003] EWCA Crim 636

Issue

Sentences referred by the Attorney General as unduly lenient. The offenders had been members of a gang called the “Pit Bull crew” and had all been convicted of gun related or drugs offences.

Court

Court of Appeal

Date of Judgment

21 February 2003

Outcome

Court held that Gordon, Thorne, Boakye and Simons’ sentences were unduly lenient and imposed increased sentences.

Attorney General's References Nos. 120, 91 and 119 of 2002 sub nom R v (1) CCE (2) NJK (3) TAG
[2003] EWCA Crim 5

Issue

These separate cases all involved, in varying degrees, sexual abuse of children (rapes, indecent assaults), with one case having an additional element of physical abuse, by either the father or someone in a position of some responsibility over the children. The issue was whether the sentences imposed by the Crown Court were unduly lenient.

Court

Court of Appeal

Date of Judgment

21 January 2003

Outcome

In each of the three cases the Court concluded that the sentences were unduly lenient. The sentences were increased from a custodial sentence of 6 months to one of 13 months' from a (non-custodial) rehabilitation order for 3 years to a custodial sentence of 3 years; and from a custodial sentence of 8 years to one of 13 years.
R v Lyons and Others (Guinness case)  
[2002] UKHL 44  
The Attorney General appeared on behalf of the Director of the Serious Fraud Office.  

**Issue**  
Whether the original convictions of “the Guinness Four” were to be set aside because the European Court of Human Rights had subsequently held that the admission of answers given under compulsion was a breach of Article 6.  

**Court**  
House of Lords  

**Date of Judgment**  
14 November 2002  

**Outcome**  
Judgment given for the Director of the SFO.  

R v Secretary of State for the Home Department, ex parte Saadi and others [2002] UKHL 41  
The Attorney General appeared on behalf of the Home Secretary.  

**Issue**  
Whether or not the detention of asylum seekers at the Oakington Detention Centre was lawful. It had previously been held by Collins, J. that it was contrary to ECHR to detain asylum seekers who were not at risk of absconding.  

**Court**  
Court of Appeal; House of Lords.  

**Date of Judgment**  
31 October 2002 (HL)  

**Outcome**  
Judgment was given for the Home Secretary in both the Court of Appeal and the House of Lords.  

R v Secretary of State for the Home Department, ex parte (1) Yogathas (2) Thangarasa  
The Attorney General appeared on behalf of the Home Secretary.  

**Issue**  
Appeals relating to decisions of the Secretary of State to order the return of the appellants (Tamil asylum seekers) to Germany as a safe third country under the Dublin Convention.  

**Court**  
House of Lords  

**Date of Judgment**  
17 October 2002  

**Outcome**  
Judgment given for the Home Secretary  

Peter Robinson v SoS for Northern Ireland and Others  
[2002] UKHL 36  
The Attorney General appeared on behalf of the Secretary of State for Northern Ireland.  

**Issue**  
Whether the election of David Trimble and Mark Durkan was lawful, being 2 days over the 2 week period provided by s.16(8) Northern Ireland Act 1998.  

**Court**  
House of Lords  

**Date of Judgment**  
25 July 2002  

**Outcome**  
Judgment given for the Home Secretary
Persey v Secretary of State for the Environment, Food and Rural Affairs and others
[2002] ECWHC 371 (Admin)
The Attorney General appeared on behalf of the Secretary of State for the Environment, Food and Rural Affairs.

Issue
This was a judicial review challenge to the decision to hold the Foot and Mouth Disease Inquiries in private. The Divisional Court had previously held in relation to the Shipman Inquiry that it was open to the courts to order a public inquiry. The Court in Persey made remarks indicating that decisions of this kind (whether or not to hold an inquiry in public) are political ones, in which the courts should not intervene. The Court accepted the principle that, while it is for the courts to say whether Government is acting unlawfully, it is not for the courts (but the electorate) to say whether Government is governing well. The Court also ruled that the right to freedom of expression (under Article 10, ECHR) does not include a right to receive information.

Court
Administrative Court

Date of Judgment
15 March 2002

Outcome
Judgment was given for the Secretary of State

Hatton and Others v UK
The Attorney General appeared on behalf of the UK Government.

Issue
The Third Section of the European Court of Human Rights had earlier found that the regime for permitting night flights at Heathrow (because of the associated noise pollution) was in breach of Article 8, ECHR. This was because in setting the night-flight limits the Government had (in the view of the Third Section of the ECtHR) failed to strike a fair balance between the economic well-being of the UK and the applicants’ right to peaceful enjoyment of their homes. The decision had implications, not just for night flights, but also for other sections (eg roads, railways) where a balance had to be struck between economic interests and environmental concerns. The UK appealed against the decision.

Court
European Court of Human Rights (Grand Chamber)

Date of Judgment
8 July 2003

Outcome
The State had not violated Article 8, but the absence of a domestic remedy gave rise to a violation of Article 13.

Kingsley v UK
The Attorney General appeared on behalf of the UK Government.

Issue
Whether someone whose rights were violated under Article 6 ECHR was necessarily entitled to monetary compensation apart from costs. On the applicant’s appeal, the Grand Chamber held that the finding of a violation under Article 6 was itself sufficient to afford “just satisfaction” in respect of the applicant’s non-pecuniary loss and no damages were to be awarded.

Court
European Court of Human Rights (Grand Chamber)

Date of Judgment
28 May 2002

Outcome
Judgment in favour of the UK Government on the issue of monetary compensation and just satisfaction.
Van Schaijk v Directeur van de Rijksdienst voor de Keuring van vee en Vlees (Foot and Mouth Disease)
The Attorney General appeared on behalf of the UK Government.

Issue
The extent of the powers conferred on Member States by Article 10(1) of Directive 90/425

Court
European Court of Justice

Date of Judgment
10 March 2005

Outcome
The Directive confers on Member States the power to adopt additional measures to control the disease, in particular to order the slaughter of animals on a holding near to a holding containing infected animals.

Ireland v UK (the MOX Plant case)
The Attorney General appeared on behalf of the UK Government.

Issue
Whether the Irish Government should be granted various injunctions (“interim measures”) it had applied for, including an injunction to prevent the commissioning of the MOX Plant at Sellafield.

Court
International Tribunal for the Law of the Sea

Date of Judgment
3 December 2001

Outcome
Judgment was given in favour of the UK Government, in that Ireland failed to obtain an injunction to prevent the commissioning of the MOX Plant. Both governments were also ordered to exchange information about discharges from the plant and to cooperate on measures to prevent marine pollution.

Further Evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

As you know, since I gave oral evidence to your Committee on 7 February I have appeared before the Intelligence and Services Committee to explain the background to the decision not to prosecute Richard Tomlinson under the Official Secrets Act. I for my part found that to be a positive exercise and would be happy if the ISC similarly wished in future to be briefed about my decisions in cases involving intelligence considerations.

As to the SFO investigation into BAE and Saudi Arabia, as you are aware the ISC in fact received briefing from SIS in relation to that case, when SIS confirmed (as indeed it has made clear publicly) that it shared the concerns of others within Government over the threat to the UK’s national interests from pursuing the investigation. I gained the impression that the ISC were satisfied by those assurances and it might be helpful if CASC were made aware of this.

22 March 2007

Further Evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

Thank you for your letter of 15 March.

I am happy to confirm the following in relation to the “cash for honours inquiry”.

First, if I am consulted by the Crown Prosecution Service on a prosecution, in the event of a decision not to prosecute I will make public all the advice received from independent senior counsel which relates to the decision not to prosecute. I say “if I am consulted by the Crown Prosecution Service” because it is of course possible that the Crown Prosecution will reach decisions not to prosecute without needing to consult me (as they did in relation to Mr Des Smith).

Secondly, I will consult opposition parties in an attempt to secure prior agreement on which independent senior counsel I will consult.

22 March 2007
Further evidence submitted by the Rt Hon Lord Goldsmith QC, Attorney General

1. I am grateful to the Committee for the opportunity to submit this supplemental memorandum. I welcome the work of the Committee which has focussed attention on the role of the Law Officers in a thoughtful way.

2. Since my previous evidence there have been some significant developments on which I would like to comment, notably evidence given by others to the Committee, and the creation of a new Ministry of Justice.

3. So far as the further evidence is concerned, two key elements emerge strongly from a number of different sources:

   — The crucial importance of accountability to Parliament which is best met by the Law Officers being members of one or other of the Houses of Parliament. This point has been strongly made by experienced witnesses and from each of the political parties.

   — The key role of the Attorney General in maintaining the Rule of Law, which is best met by the Law Officers being members of the Government. The creation of the Ministry of Justice underscores the need for an Attorney General within Government. In future he might well be the only senior lawyer within Government.

Accountability

4. In my written and oral evidence I emphasised the need for accountability and stated my belief that this was best achieved by having Law Officers who were members of Parliament and indeed members of the Government who could be called to account in Parliament.

5. I note the strong support for this position from (amongst others) the former Lord Advocate, Lord Boyd of Duncansby QC, who makes the following important point:

   “Accountability to Parliament is not simply about attending occasionally and answering questions. The interaction between Members of Parliament and the Law Officers is also of great benefit. It allows MPs or MSPs to approach you informally and raise a constituency or other matter and it allows the Law Officer to gauge political reaction to current issues—More generally it does help inform considerations of the public interest when these matters come to be considered”.

6. I should underline one point: the importance of accountability in relation to prosecution decisions. This is key, and I have underlined it by the example of the BAE case where I and the Solicitor General have, between us, participated in six Parliamentary debates and answered scores of questions. But there are other examples over the years, eg the Paul Burrell case, the Jubilee Line prosecution, Trooper Williams and other military prosecutions, the “shaken baby” cases and so on.

7. In this connection the observations of the Lord Advocate in her lecture “The Lord Advocate in the 21st Century” are well made, where she underlines why prosecution is a necessary function of Government and the importance of accountability to Parliament. She observes: “The prosecution of crime is one of the most fundamental tasks of government in the widest sense—It lies at the heart of the social contract between citizen and state.” The Lord Advocate goes on:

   “[T]hose exercising these vital functions must be held properly to account for the manner in which they exercise their responsibilities—Indeed, it is only if the prosecution function is carried out as part of government that proper accountability is secured. If the system of prosecution breaks down, it is the Lord Advocate who has to account for that to Parliament. And that is correct—It would be wrong to seek to allocate that function to some semi-detached outside body.”

8. The creation of the new Ministry of Justice has not changed this position. Very importantly it does not disturb the position of the prosecutors—who remain outside the control of an ordinary political Minister. It is constitutionally crucial for the independence of the prosecutors to be maintained. For that reason—and rightly—they are left under the superintendence of the Attorney General. This, as I explained before, is a mechanism of some subtlety securing accountability to Parliament but freedom from political influence, by which cases are considered on the basis of an objective view of the evidence and the law. These arrangements work well in practice.

9. It is notable that in only one case in the nearly six years I have been privileged to hold this office (the BAE case) has there been any sustained suggestion that a decision has been politically driven. There are no cases in which a prosecutor has complained or even hinted of having been put under any inappropriate pressure. In relation to the BAE case itself, the Director of the SFO has publicly said that he had “no problem with the way the government has handled this”; and that I acted “absolutely professionally” and played “with a straight bat.”

10. As to methods of improving accountability the Committee will of course be aware of my earlier suggestions. Any changes will need to take account of important issues such as the necessary independence of prosecution decisions and the confidentiality of some information. I would also draw attention to my recent appearance before the Intelligence and Security Committee which has provided a useful way of giving information which cannot be publicly disclosed.
Rule of Law

11. I remarked in my previous evidence, and in my Birmingham lecture, why I thought that, by focussing on the role of the Lord Chancellor, in many ways too little attention had been paid to the role of the Attorney General in maintaining the Rule of Law. As I noted it is the Attorney General and not the Lord Chancellor who advises the Government on the law. The Attorney General also (for example) has a special duty in relation to the propriety and ECHR compatibility of legislation. It is the Attorney General who has been called upon by Parliament and the judges to exercise functions in the interests of the Rule of Law, and it is in that capacity that I have examined cases of miscarriage of justice.

12. I note the strong support for this position from Lord Goodhart, the distinguished Liberal Democrat Peer and present Chairman of the Council of Justice, where he says that, in the light of changes in the role of the Lord Chancellor, “it is important that more attention should be given to the role of the Attorney General in upholding the Rule of Law”.

13. The creation of the Ministry of Justice has significantly increased that importance. 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 role. It is necessary to mention only such issues as the balancing of individual rights against collective security; measures to combat terrorism; data protection; freedom of information; devolution and other constitutional change; the growing importance of international law; and many others. These issues bear upon every aspect of Government. It is right that there should be a lawyer at the heart of Government to deal with them and ensure that the law is properly respected.

Creation of the Ministry of Justice

14. In addition to the aspects discussed above, it should be made clear that the creation of the Ministry of Justice does not change my responsibilities as Attorney General or those of any of my Departments. This is expressly confirmed in the Cabinet Office policy document “Machinery of Government: Security and Counter-Terrorism, and the Criminal Justice System” of 29 March 2007, which states in relation to my Office: “Existing functions remain, including superintendence of the prosecuting authorities and other existing criminal justice responsibilities”.

15. The new arrangements preserve the trilateral structure for the formulation and delivery of criminal justice policy, involving me (with the Solicitor General and my Departments) working as joint partners with the other two criminal justice departments (the Home Office and the Ministry of Justice).

16. As the Prime Minister said in his Written Ministerial Statement of 29 March 2007:

“The existing trilateral arrangements have been a success in delivering improvements to the criminal justice system, and will continue under the new structure. To facilitate this, there will continue to be a shared National Criminal Justice Board, based in the Ministry of Justice, which will work trilaterally between the Home Office, the Ministry of Justice and the Attorney General’s Office.”

17. As I have previously explained to the Committee, these trilateral arrangements illustrate the value of involving the police and the prosecutors—who know what works on the front line—in both the formulation and delivery of criminal justice and sentencing policy. Amongst the improvements already achieved under those arrangements are better treatment for victims and witnesses; improvements in bringing offenders to justice; giving the CPS responsibility for charging decisions; and much closer working relations between investigators and prosecutors. It will be important for the trilateral relationship to be maintained.

18. My advisory, public interest, Rule of Law and other non-criminal justice functions are similarly unchanged by the creation of the new Ministry.

19. The creation of the Ministry of Justice did not result in any additional functions being conferred on the Attorney General’s Office (though there are discussions continuing on certain international issues). My own view is that in future consideration should be given to whether some functions (such as human rights and constitutional law) might sit better with the Law Officers than with the Ministry of Justice. However that is for the future.

Transparency International

20. The evidence from Transparency International (TI) dated January 2007 calls for comment. It is based on a number of surprising factual mistakes and misunderstandings.

21. First, reference is made to my statement in connection with the “cash for honours” case that there are certain offences for which my consent is required to prosecute, and that this role cannot be delegated by the Law Officers to any third party. It is wholly wrong for TI to infer that in saying this I was confirming that “the consent is of an essentially political character”. I have made it clear that the function of deciding
whether to consent to criminal prosecutions is not a political one, but is exercised by the Attorney General according to the law, the evidence and the public interest, entirely independent of Government or of political considerations.

22. The same is true of my superintendence role over the prosecuting authorities, so far as relating to individual cases. It is not correct to say, as TI do, that this role “emanates from [the Attorney General’s] membership of the government”. It is a role specifically conferred by Parliament in statute on the Attorney General. It is exercised wholly independently of Government.

23. In relation to the BAE Systems/Al Yamamah case, TI refer to my “role in the decision to discontinue the criminal investigation”. It should be stressed yet again that the decision to discontinue the investigation was taken not by me but by the Director of Serious Fraud Office, as he has repeatedly made clear. The SFO exercises its functions—including both its investigatory and prosecution functions—under my statutory superintendence. So it is simply wrong to say there is no statutory basis for my role. Again it is a role I exercise, in relation to individual cases, wholly independently of Government.

24. Finally, TI make reference to my Parliamentary statement on the BAE case of 14 December 2006, in which I quoted from the SFO press release announcing the Director’s decision to halt the investigation. This referred to the need to “balance the Rule of Law against the wider public interest”. It should be stressed that the decision to discontinue the investigation was taken not by me but by the Director of Serious Fraud Office, as he has repeatedly made clear. The SFO exercises its functions—including both its investigatory and prosecution functions—under my statutory superintendence. So it is simply wrong to say there is no statutory basis for my role. Again it is a role I exercise, in relation to individual cases, wholly independently of Government.

25. The Committee already has my views on this topic. They are largely supported by the Information Commissioner who (in his Enforcement Notice in the Iraq legal advice case) stated:

“The arguments for maintaining legal professional privilege are strong and therefore the circumstances in which the public interest will favour disclosure of information that is legally privileged are likely to be highly exceptional.”

26. It is of course important that the legal basis for the Government’s action is known but this can be done without breaching the important confidentiality of legal advice. Of course, as I said in oral evidence, if there were a matter of major importance where the Prime Minister of the day wished, exceptionally, to make public the advice he had received, that would be for him to decide.

27. But in that context I draw attention to the position adopted by the Opposition in the debate in the House of Lords on the Government’s response to the report of the House of Lords Constitution Committee on “Waging War: Parliament’s Role and Responsibility” (1 May 2007). In the course of that debate, Lord Kingsland said this:

“It is essential that the legal position is made absolutely clear before any deployment of troops, now crucial to the individual soldier. Since the development of the law under the International Criminal Court, the soldier is entitled to know where he stands and must have confidence that the conflict is legal. It is right that the Attorney General comes to Parliament to make a statement about the legality of war. It would not, of course, be appropriate for Parliament to see the advice that the Attorney General gave to the Government. Inevitably, any responsible Attorney General is bound to have to assess all the arguments, some of which might be contrary to the final position that he takes. If that document should become public, it is as sure as night follows day that there would be a very big dispute about its merits. Nothing could be more damaging to the confidence of the soldier who is about to fight. The Government have to take a view about the legal position. If, ultimately, they are proved wrong, that is a matter for future accountability. The only way they can do that is on one piece of advice from the Attorney General which is summarised and is clear it should not express doubts about the legality of the conflict or otherwise.”

28. That analysis is wholly consistent with the Government’s approach to the decision in 2003 to take military action against Iraq (although, as is well known, my legal advice in that case was eventually made public following a partial leak).

11 May 2007

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15 Criminal Justice Act 1987, section 1(2).
ATTORNEY GENERAL’S COURT APPEARANCES

(Updated as at 09.05.07)

R v Considine; R v Davis

Issue
The extent of the information that a sentencing court may take into account when assessing whether an offender is “dangerous” under section 229 of the Criminal Justice Act 2003. In particular, whether a court may take into account previous criminal conduct which has not been the subject of prosecution when making the assessment of dangerousness. The issues arose in the context of two appeals against sentence.

Court
Court of Appeal

Date of Judgment
Awaited

Outcome
The court dismissed the appeals against sentence but the reasoned judgment is awaited.

R on the application of Hurst v Commissioner of Police for the Metropolis
The Attorney General appeared for the Lord Chancellor as interested party.

Issue
Extent of coroner’s duty under Human Rights Act in respect of deaths occurring before coming into force of HRA—retrospectivity of HRA.

Court
House of Lords

Date of Judgment
Awaited outcome

Outcome
Awaited

The General Medical Council v Professor Roy Meadow [2006] EWCA Civ 1390
The Attorney General intervened in this case in the public interest.

Issue
The extent to which expert witnesses are immune from fitness to practice proceedings brought by their regulating body in relation to their conduct as an expert witness.

Court
Court of Appeal

Date of Judgement
26 October 2006

Outcome
That expert witnesses were not immune from fitness to practice proceedings in relation to their conduct as expert witnesses.

Webster & French

Issue
Sentence referred by the Attorney General as an unduly lenient sentence.

Court
Court of Appeal
Date of Judgment
8 June 2006

Outcome
Sentence held to be unduly lenient, and increased.

Attorney General’s Reference No. 80 of 2005 sub nom R v Wedlock-Ward (Adam Arthur)
[2005] EWCA Crim 3367

Issue
Sentence referred by the Attorney General as an unduly lenient sentence.

Court
Court of Appeal

Date of Judgment
16 November 2005

Outcome
Court held that the original non-custodial sentence was unduly lenient and replaced it with a sentence of 2 years’ imprisonment.

Oakley Inc v Animal Ltd and others
[2005] ECWCA Civ 1191

The Attorney General appeared for the Secretary of State (Intervener).

Issue
Whether the Registered Designs Regulations 2001, reg. 12, had been validly made by the Secretary of State under section 2(2) of the European Communities Act 1972.

Court
Court of Appeal

Date of Judgment
20 October 2005

Outcome
The Court held that they were validly made.

Jackson and others v Attorney General (Hunting Act 2004)
[2005] UKHL 56

Issue
Whether the legislative process provided for under the Parliament Act 1911 can validly be used to amend the provisions of the 1911 Act itself, and hence whether the Parliament Act 1949 and the Hunting Act 2004 (which was passed under the 1911 Act as amended by the 1949 Act) are valid Acts of Parliament.

Court
House of Lords; Court of Appeal; Divisional Court

Date of Judgment
13 October 2005

Outcome
Decided in favour of the Attorney General

Trial of Zardad

The Attorney General appeared on behalf of the Crown.

Issue
First torture case in UK legal history. Attorney General consented to prosecute, and decided to lead the prosecution in order to mark the case’s importance

Court
Old Bailey
Constitutional Affairs Committee: Evidence

**Date of Judgment**
19 July 2005

**Outcome**
Initially the jury could not reach a decision. There was a retrial in 2005 and the defendant was convicted.

**R v Z (Proscription of Real IRA)**

[2005] UKHL 35

The Attorney General appeared on behalf of the Crown.

**Issue**
Whether the Real IRA was a proscribed organisation for the purposes of s.3 of the Terrorism Act 2000

**Court**
House of Lords; Court of Appeal, Northern Ireland

**Date of Judgment**
19 May 2005

**Outcome**
It was held that the Real IRA was a proscribed organisation.

**A (FC) and others v Secretary of State for the Home Department; X (FC) and others v Secretary of State for the Home Department**

[2004] UKHL 56

The Attorney General appeared on behalf of the Home Secretary.

**Issue**
Whether the UK’s derogation from Article 5, ECHR, and the protective detention powers in relation to suspected foreign terrorists in the Anti-terrorism, Crime and Security Act 2001, were lawful. The Special Immigration Appeals Commission was satisfied that there was a public emergency which justified the derogation and that in principle the protective detention powers were lawful. However, because those powers only applied to suspected foreign nationals, the Special Immigration Appeals Commission held that they were discriminatory. On appeal, the Court of Appeal held that the legislation and underlying derogation were lawful. It also held, allowing the Home Secretary’s appeal, that the differential treatment of suspected foreign terrorists as compared with suspected UK terrorists was justified and that there was no discrimination. The applicants appealed this decision.

**Court**
House of Lords; Court of Appeal; SIAC

**Date of Judgment**
16 December 2004

**Outcome**

**R (on the application of Ullah) v Special Adjudicator; Thi Lien Do v Secretary of State for the Home Department**

[2004] YJGK 26

**Issue**
Whether the domestic court had to consider Convention rights, other than Article 3, might be engaged in the removal of a person to the receiving State.

**Court**
House of Lords

**Date of Judgment**
17 June 2004

**Outcome**
Other Convention rights could be engaged in the removal of a person from the UK, even if the anticipated treatment by the receiving State did not reach the minimum requirements of Article 3. However, on the facts of these cases, the applicants had not shown that other rights (namely Article 9) had been breached.
R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27
The Attorney General appeared on behalf of the Government

Issue
Razgar was an asylum seeker who resisted a removal decision on the grounds that it would violate Article 8 because he was undergoing psychiatric treatment in the UK. The Secretary of State argued that Article 8 was not violated and the applicant’s claim unfounded under Immigration and Asylum Act 1999 s.72(2)(a).

Court
House of Lords

Date of Judgment
17 June 2004

Outcome
Held that the foreseeable consequences for the mental health of an asylum seeker on removal could engage Article 8, even if the removal did not violate Article 3.

Attorney General’s Reference No. 92 of 2003 sub nom R v Pells (James Philip) [2005] EWCACrim 3367

Issue
Sentence referred by the Attorney General as unduly lenient. Offender had committed racially aggravated assault occasioning actual bodily harm.

Court
Court of Appeal

Date of Judgment
22 March 2004

Outcome
Court held original sentence of 12 months’ detention was unduly lenient and increased the period of detention to 30 months.

In Re McKerr [2004] UKHL 12

Issue
State’s obligations under Article 2 in relation to pre-HRA deaths.

Court
House of Lords

Date of Judgment
11 March 2004

Outcome
The duty to investigate unlawful killings under Article 2 did not arise in domestic law in relation to deaths before the Human Rights Act 1998 came into force.

R v C; R v H [2004] UKHL
Attorney General appeared on behalf of the Crown.

Issue
What the judge must consider when ruling on a claim of public interest immunity.

Court
House of Lords

Date of Judgment
5 February 2004
Outcome

It was held that the judge had failed to consider in detail the material that the prosecution had sought to withhold. The House of Lords emphasised the overriding principle that derogation from the principle of full disclosure had always to be the minimum necessary to protect the public interest and must never imperil the overall fairness of the trial.

Opening of the Gaul Inquiry on 13 January 2004

Issue

Inquiry into the FV-Gaul Fishing Vessel incident

Court

Public Inquiry

Department for Environment, Food and Rural Affairs v ASDA Stores Limited [2003] UKHL 71

Attorney General appeared on behalf of DEFRA.

Issue

Whether section 14 of the Agriculture and Horticulture Act 1964 as amended created a criminal offence that was currently applicable. The Divisional Court had ruled that criminal law had to be clear and it was necessary to have clear words in domestic legislation which imposed criminal liability by reference to present regulations and those made or amended in the future. DEFRA appealed this decision.

Court

House of Lords

Date of Judgment

18 December 2003

Outcome

DEFRA succeeded in their appeal. The House of Lords indicated that courts should not approach the interpretation of statutes/regulations implementing Community legislation as if they did not embrace future Community law changes.

Reference by Her Majesty's Attorney General for Northern Ireland Nos. 2, 6, 7 and 8 of 2003 sub nom R v Robinson, Humphreys, McGuone and James) [2003] NICA 2

Issue

Unduly lenient sentence references by the Attorney General against sentences for death by dangerous driving and other serious driving offences in Northern Ireland.

Court

Court of Appeal, Northern Ireland

Date of Judgment

11 July 2003

Outcome

Court held that all the original sentences were unduly lenient and imposed increased sentences.

Wilson v Secretary of State for Trade and Industry [2003] UKHL 40

The Attorney General appeared for the Secretary of State.

Issue

Appeal against a declaration of incompatibility against the Consumer Credit Act 1974 section 127(3).

Court

House of Lords

Date of Judgment

10 July 2003
Ev 88  Constitutional Affairs Committee: Evidence

Outcome
It was held that the court had been wrong to make the declaration because the events and the cause of action took place before the Human Rights Act 1998 came into force.

R (on the application of Q and others) v Secretary of State for the Home Department
[2003] EWCA Civ 36

Issue
The procedure and application of section 55 of the Nationality, Immigration and Asylum Act 2002 (claims for support from asylum seekers).

Court
Court of Appeal

Date of Judgment
18 March 2003

Outcome
The Court held that there were procedural deficiencies in the process for refusing claims for support, which could result in unfairness. However, once they were remedied, there was no reason why section 55 should not operate effectively and the “real risk” that an asylum seeker might be reduced to a state of degradation did not itself engage Article 3.

Attorney General's Reference Nos. 58 to 2002 sub nom R v Coudjoe, Day, Gordon, McGlacken, Simons, Proverbs, O'Too, Thorney and Boakye
[2003] EWCA Crim 636

Issue
Sentences referred by the Attorney General as unduly lenient. The offenders had been members of a gang called the “Pit Bull crew” and had all been convicted of gun related or drugs offences.

Court
Court of Appeal

Date of Judgment
21 February 2003

Outcome
Court held that Gordon, Thorne, Boakye and Simons’ sentences were unduly lenient and imposed increased sentences.

Attorney General's References Nos. 120, 91 and 119 of 2002 sub nom R v (1) CCE (2) NJK (3) TAG
[2003] EWCA Crim 5

Issue
These separate cases all involved, in varying degrees, sexual abuse of children (rapes, indecent assaults), with one case having an additional element of physical abuse, by either the father or someone in a position of some responsibility over the children. The issue was whether the sentences imposed by the Crown Court were unduly lenient.

Court
Court of Appeal

Date of Judgment
21 January 2003

Outcome
In each of the three cases the Court concluded that the sentences were unduly lenient. The sentences were increased from a custodial sentence of 6 months to one of 13 months’ from a (non-custodial) rehabilitation order for 3 years to a custodial sentence of 3 years; and from a custodial sentence of 8 years to one of 13 years.
R v Lyons and Others (Guinness case) [2002] UKHL 44
The Attorney General appeared on behalf of the Director of the Serious Fraud Office.

Issue
Whether the original convictions of “the Guinness Four” were to be set aside because the European Court of Human Rights had subsequently held that the admission of answers given under compulsion was a breach of Article 6.

Court
House of Lords

Date of Judgment
14 November 2002

Outcome
Judgment given for the Director of the SFO.

R v Secretary of State for the Home Department, ex parte Saadi and others [2002] UKHL 41
The Attorney General appeared on behalf of the Home Secretary.

Issue
Whether or not the detention of asylum seekers at the Oakington Detention Centre was lawful. It had previously been held by Collins, J. that it was contrary to ECHR to detain asylum seekers who were not at risk of absconding.

Court
Court of Appeal; House of Lords.

Date of Judgment
31 October 2002 (HL)

Outcome
Judgment was given for the Home Secretary in both the Court of Appeal and the House of Lords.

R v Secretary of State for the Home Department, ex parte (1) Yogathas (2) Thangarasa
The Attorney General appeared on behalf of the Home Secretary.

Issue
Appeals relating to decisions of the Secretary of State to order the return of the appellants (Tamil asylum seekers) to Germany as a safe third country under the Dublin Convention.

Court
House of Lords

Date of Judgment
17 October 2002

Outcome
Judgment given for the Home Secretary

Peter Robinson v SoS for Northern Ireland and Others [2002] UKHL 36
The Attorney General appeared on behalf of the Secretary of State for Northern Ireland.

Issue
Whether the election of David Trimble and Mark Durkan was lawful, being 2 days over the 2 week period provided by s.16(8) Northern Ireland Act 1998.

Court
House of Lords

Date of Judgment
25 July 2002

Outcome
Judgment given for the Home Secretary
Ev 90  Constitutional Affairs Committee: Evidence

Persey v Secretary of State for the Environment, Food and Rural Affairs and others
[2002] ECWHC 371 (Admin)
The Attorney General appeared on behalf of the Secretary of State for the Environment, Food and Rural Affairs.

Issue
This was a judicial review challenge to the decision to hold the Foot and Mouth Disease Inquiries in private. The Divisional Court had previously held in relation to the Shipman Inquiry that it was open to the courts to order a public inquiry. The Court in Persey made remarks indicating that decisions of this kind (whether or not to hold an inquiry in public) are political ones, in which the courts should not intervene. The Court accepted the principle that, while it is for the courts to say whether Government is acting unlawfully, it is not for the courts (but the electorate) to say whether Government is governing well. The Court also ruled that the right to freedom of expression (under Article 10, ECHR) does not include a right to receive information.

Court
Administrative Court

Date of Judgment
15 March 2002

Outcome
Judgment was given for the Secretary of State

Hatton and Others v UK
The Attorney General appeared on behalf of the UK Government.

Issue
The Third Section of the European Court of Human Rights had earlier found that the regime for permitting night flights at Heathrow (because of the associated noise pollution) was in breach of Article 8, ECHR. This was because in setting the night-flight limits the Government had (in the view of the Third Section of the ECtHR) failed to strike a fair balance between the economic well-being of the UK and the applicants’ right to peaceful enjoyment of their homes. The decision had implications, not just for night flights, but also for other sections (eg roads, railways) where a balance had to be struck between economic interests and environmental concerns. The UK appealed against the decision.

Court
European Court of Human Rights (Grand Chamber)

Date of Judgment
8 July 2003

Outcome
The State had not violated Article 8, but the absence of a domestic remedy gave rise to a violation of Article 13.

Kingsley v UK
The Attorney General appeared on behalf of the UK Government.

Issue
Whether someone whose rights were violated under Article 6 ECHR was necessarily entitled to monetary compensation apart from costs. On the applicant’s appeal, the Grand Chamber held that the finding of a violation under Article 6 was itself sufficient to afford “just satisfaction” in respect of the applicant’s non-pecuniary loss and no damages were to be awarded.

Court
European Court of Human Rights (Grand Chamber)

Date of Judgment
28 May 2002

Outcome
Judgment in favour of the UK Government on the issue of monetary compensation and just satisfaction.
Van Schaijk v Directeur van de Rijksdienst voor de Keuring van vee en Vlees (Foot and Mouth Disease)
The Attorney General appeared on behalf of the UK Government.

Issue
The extent of the powers conferred on Member States by Article 10(1) of Directive 90/425

Court
European Court of Justice

Date of Judgment
10 March 2005

Outcome
The Directive confers on Member States the power to adopt additional measures to control the disease, in particular to order the slaughter of animals on a holding near to a holding containing infected animals.

Ireland v UK (the MOX Plant case)
The Attorney General appeared on behalf of the UK Government.

Issue
Whether the Irish Government should be granted various injunctions (“interim measures”) it had applied for, including an injunction to prevent the commissioning of the MOX Plant at Sellafield.

Court
International Tribunal for the Law of the Sea

Date of Judgment
3 December 2001

Outcome
Judgment was given in favour of the UK Government, in that Ireland failed to obtain an injunction to prevent the commissioning of the MOX Plant. Both governments were also ordered to exchange information about discharges from the plant and to cooperate on measures to prevent marine pollution.

Evidence submitted by the Rt Hon Lord Mackay of Clashfern KT PC

I was the Lord Advocate of Scotland from 1979 to 1984, a judge of the Supreme Courts of Scotland from 1984 to 1985, a Lord of Appeal in Ordinary from 1985 to 1987 and Lord Chancellor from 1987 to 1997. The views I express in this memorandum are my own personal views based on that experience and are not influenced by nor a reflection of the Conservative Party’s views.

The Attorney General has for many years been the senior legal adviser to the United Kingdom government and the senior member of the Government who is not a member of the Cabinet. He is also the senior legal adviser to both Houses of Parliament. He superintends the prosecution system in England and Wales. Amongst many other functions he is responsible for the representation of the United Kingdom government in the courts in England and Wales and in international courts and tribunals. Sometimes appearing himself, in some of the other more important cases appointing those who represent the Crown and generally making arrangements for that representation. I regard this as an important part of the Attorney General’s functions.

When I was Lord Advocate I twice represented the United Kingdom Government in the House of Lords on the nomination of the Attorney General, on one occasion in the European Court of Human Rights and on several occasions in the European Court of Justice. To appear in court is to my mind an important function of the law officers in appropriate cases.

During my time as Lord Advocate the Cabinet was concerned among other things with the legal position of civil servants contemplating withholding their services, with relations with the European Community and in particular the possibility of obtaining a rebate on our contributions to the Community and with the legal questions arising in connection with a miners’ strike. I was invited together with the Attorney General to a number of meetings of the cabinet concerned with these matters since the Lord Advocate was responsible for advising the Government on the law of Scotland and together with the Attorney General on the law of the European Community. In my experience the discussions in which the law officers then took part would not have been suitable unless the law officers themselves were members of the Government and willing to participate within their expertise in the development of appropriate Government policy. On the other hand the legal advice which the Cabinet required needed to be independent and likely to stand up in arguments in court.
Prior to the Constitutional Reform Act of 2005 the Lord Chancellor was the senior judge in the United Kingdom and indeed generally recognised to be the senior judge in the Commonwealth. He was not a legal adviser to the Government but was responsible in my view for seeing that the Government took legal advice when this was appropriate and that the Government paid proper respect to the advice so given. Legal advice to the government was then and still is the province of the law officers. In my view the changes in 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. He should also be accountable to Parliament for the way he conducts his office and the most direct method of such accountability is by being a member of parliament. As senior legal adviser to Parliament it is highly desirable that he should be able to address Parliament as one of its members. 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.

Although the functions of the Attorney General and the Lord Advocate in their different jurisdictions are not identical the principles underlying the offices of Lord Advocate and Attorney General are the same. In Scotland the Lord Advocate is directly responsible to Parliament for prosecution decisions, before devolution, as a member of the UK government not in the Cabinet, since devolution to the Scottish parliament as a member of the Executive. The arrangements were discussed and legislated upon by the Labour government in the Scotland Act. It would seem strangely inconsistent for them to be renounced now.

The status of the Attorney General in the public service has made it possible to secure in this role Queen’s Counsel of great distinction and experience. The present Attorney General is an outstanding example of this. As Queens Counsel before I became Lord Chancellor, he was Chairman of the Bar during my time as Lord Chancellor a demonstration of the confidence of the profession in him. He has high standing in the profession and wide experience of the practice of the law.

If an idea were to gain prevalence that a person cannot be trusted to take difficult decisions where there are strong considerations tending to pull in different directions it will be a sad day for the standard of our public life. This would be not only in relation to the office of Attorney General but in relation to the many decisions which Secretaries of State have to take for example in planning and other matters where they are considered to act in a quasi-judicial capacity.

I believe that the principles on which the office of Attorney General rests are sound, that it fits well into our system of government, that it has stood the test of time and should be retained.

February 2007

Evidence submitted by The Lord Advocate, Scotland

Thank you for your letter of 21 March inviting me to comment on your investigation into the role of the Attorney General.

While there are some similarities between the responsibilities of the Attorney General in England and Wales and the Lord Advocate in Scotland, as will be seen from the attached paper setting out the role of the Lord Advocate (a copy attached at Annex A), the two posts have developed separately and independently and it would not, to my mind, be sensible to seek to draw too close a comparison between them. As a Scots lawyer, I am trained in what is essentially a very distinct system of law. The prosecution of all crime in Scotland is the responsibility of one department only and as Lord Advocate I also have responsibility for the investigation of all sudden, suspicious or unexplained deaths. It would therefore be inappropriate for me to comment in any detail about the position of Attorney General given the significant differences.

It may nevertheless be of interest to the Committee to know that I have recently delivered a public lecture (a copy attached at Annex B) in which I addressed various aspects of my role. Significant elements of that role are of course now codified in the Scotland Act 1998. As will be seen from my speech, it is my view 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 as to my independence which are provided by the 1998 Act. In the Scottish context there is, I believe, great value in having the principal legal adviser to the Scottish Executive closely involved in the processes of government.
at Cabinet level. While there are no doubt other ways in which these roles could be performed, the present arrangements work well in the context of the devolution settlement within which they are located.

Rt Hon Elish Angiolini QC
April 2007

Annex A

THE ROLE AND FUNCTIONS OF THE LORD ADVOCATE

INTRODUCTION

1. The Lord Advocate has always been the senior of the two Scottish Law Officers and has four roles:
   — head of the systems of prosecution and investigation of deaths;
   — principal legal adviser to the Scottish Executive;
   — representing the Scottish Executive in civil proceedings; and
   — representing the public interest in a range of statutory and common law civil functions.

In relation to criminal prosecutions and investigation of deaths the Law Officers have always acted independently of other Ministers and, indeed, of any other person. That duty is now expressly set out in s48(5) of the Scotland Act 1998.

2. The Solicitor General is the Lord Advocate’s deputy. He may discharge any of the Lord Advocate’s functions where the office of Lord Advocate is vacant, the Lord Advocate is unable to act owing to absence or illness, or the Lord Advocate authorises the Solicitor General to act in any particular case (Law Officers Act 1944, s 2).

3. The Scotland Act makes important special provision for the role of the Lord Advocate. Her decisions as head of the systems of criminal prosecution and investigation of deaths are to continue to be taken independently of any other person (Scotland Act 1998 s48(5)). It is outwith the legislative competence of the Parliament to remove the Lord Advocate from her position as head of the systems of criminal prosecution and investigation of deaths (SA s29(2)(e)). Further, like the other UK Law Officers, the Lord Advocate is given a particular role in relation to ensuring that legislation passed by the Scottish Parliament is within the legislative competence of the Parliament (see paragraph 21 below), 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 (“devolution issues”—see below, paragraph 27).

APPOINTMENT

4. The Law Officers are appointed by the Queen on the recommendation of the First Minister, with the agreement of the Parliament (SA s48(1)). Unlike other Ministers, however, they cannot be removed from office by the First Minister without the approval of the Parliament (SA s48(1)).

5. They are members of the Scottish Executive (SA s44(1)(c)). As such they may exercise any of the functions of the Scottish Ministers; acts of Ministers bind them and vice versa (SA s52(3) and (4)). This does not apply to the retained functions of the Lord Advocate—in effect her functions in relation to prosecution and investigation of deaths, and any other functions conferred upon the Lord Advocate by name (SA s52(5)(b) and (6)). (Nor does it apply to functions conferred on the First Minister alone.)

6. There is no concept of a Scottish “Cabinet” in the Scotland Act. The fact of a Cabinet, and the Ministers who are members of it, are matters for the First Minister. The Lord Advocate (or the Solicitor General in her place) is not a member of the Cabinet but receives all papers and attends all meetings. That position was confirmed by the First Minister in his letter to the Lord Advocate on 12 October 2006, following her appointment, when he stated: “you will, as Lord Advocate, continue to attend Cabinet in order to provide legal advice and to represent your own Ministerial interest, but, like [your predecessor] you will not be a full voting member of the Cabinet”. The Lord Advocate’s attendance at Cabinet and receipt of its papers ensures that her interests, including her prosecutorial role, are represented in collective discussion of the policies, resourcing and operation of the Scottish Executive as a whole.

7. In the United Kingdom Government, the position of the Attorney General as regards Cabinet has changed over the years, just as has that of the Lord Advocate. Presently he attends every meeting of Cabinet, receives all papers and participates fully, as a Minister of Cabinet rank, but not as a member of the Cabinet. He also attends sub-committees in much the same way as the Lord Advocate does.

8. If a Law Officer is not an MSP s/he is empowered to participate in the proceedings of the Parliament but may not vote (SA s27). S/he can therefore be questioned by MSPs about the exercise of his or her functions, although s/he 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 s/he considers that it might prejudice criminal proceedings or would otherwise be contrary to the public interest (SA s27(3)). 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).

9. 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 (SA s48(2)).

10. As noted above, the Lord Advocate’s position as head of the prosecution system and member of the Scottish Executive, and her role in relation to devolution issues and the competence of legislation, are enshrined in the Scotland Act. Neither the Executive nor the Parliament can change that—it would require legislation at Westminster.

THE SCOTTISH MINISTERIAL CODE


12. The Code specifically sets out that in criminal proceedings the Law Officers act wholly independently of the Executive (para 2.25). Paragraph 2.5 excepts from collective responsibility the Lord Advocate’s functions as head of the systems of prosecution and investigation of deaths.

13. As Law Officers, both the Lord Advocate and the Solicitor General for Scotland have the ultimate responsibility for advising the Scottish Ministers on all matters relating to the law of Scotland. As the senior Law Officer to the Scottish Executive the Lord Advocate provides legal advice on the full range of the Executive’s responsibilities, policies and legislation, including advice on the legal implications of any proposals of the Executive. The Code sets out guidance as to the circumstances in which the Law Officers should be consulted. In particular it provides that the Law Officers must be consulted in good time before the Executive is committed to critical decisions involving legal considerations. In terms of paragraph 2.22, the opinion of the Law Officers should normally be obtained on a reference from the Solicitor to the Scottish Executive and it will normally be appropriate to consult the Law Officers in cases where:

(a) the legal consequences of action by the Executive might have important repercussions in the foreign, European Union or domestic fields;

(b) a legal adviser in the Scottish Executive has doubts about the legality or constitutional propriety of proposed legislation or executive action, particularly where it concerns any devolution issue within the meaning of paragraph 1 of Schedule 6 to the Scotland Act 1998;

(c) ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations which are likely to come before the Cabinet or any other collective Ministerial meeting; or

(d) there is a particular legal difficulty that may raise political aspects of policy.

14. The Code also refers to the role of Law Officers in relation to civil proceedings. In particular it sets out a distinction to be drawn between proceedings in which the Law Officers are involved in a representative capacity on behalf of the Executive, and action undertaken by them on behalf of the general community to enforce the law as an end in itself.

15. Paragraph 2.23 states that the fact and content of opinions or advice given by the Law Officers, either individually or collectively, must not be disclosed publicly without their authority. (See paragraph 17 below.)

16. Paragraph 4.22 provides for the Lord Advocate to be consulted, or to take the lead, where it is proposed to appoint a judge or legal officer to a Royal Commission or Committee of Inquiry.

DISCLOSURE OF LAW OFFICERS’ ADVICE

17. By convention, the fact that the Law Officers have or have not advised, or been asked to advise, on a particular matter, and the content of any advice, is not disclosed publicly without their authority. This convention is accorded some recognition in the exemption provided by section 29(1)(c) of the Freedom of Information (Scotland) Act 2002 for information relating to advice, or a request for advice, by the Law Officers (as well as in section 36(1)—confidentiality of communications in legal proceedings). This exemption is however subject to the public interest test in section 2 of the Act.

CIVIL FUNCTIONS OF THE SCOTTISH LAW OFFICERS

18. The Lord Advocate is the principal legal adviser to the Scottish Executive. Apart from the fact that she has specific responsibilities in relation to the legislative competence of Scottish legislation, she also advises on general legal issues and has general responsibility for the provision of legal advice to the Scottish Executive. She has Ministerial responsibility for the Office of the Solicitor to the Scottish Executive (“OSSE”), which provides legal advice to the departments of the Executive on a daily basis, and for the Office of the Scottish Parliamentary Counsel (“OSPC”), which drafts Bills for the Executive’s legislative programme.
OPINIONS

19. As noted above, the Scottish Ministerial Code sets out the circumstances in which it is normally important to consult the Law Officers. In practice what this tends to mean is that the Law Officers may be asked for a formal Opinion where there is disagreement within OSSE, or between OSSE and Whitehall departments; where the matter is difficult or complex; or where it may be politically or presentationally sensitive or high profile. Their views may also be sought by way of a briefing note.

LEGISLATION

20. The Lord Advocate is a member of the Cabinet Sub-Committee on Legislation and contributes in that and other ways to the planning, management and delivery of the Executive's legislative programme. She oversees the drafting of Executive Bills by Scottish parliamentary counsel in OSPC. She maintains an interest in the development of the devolved Scottish statute book, including matters such as the accessibility of legislation.

21. Before a Bill can be introduced in the Parliament by the Executive, the Minister responsible must state that it is in his or her view within the legislative competence of the Parliament (SA s31(1)). This view is reached on the advice of the Law Officers. This is the only case in which the convention against revealing the Law Officers' involvement in legal advice is routinely departed from. (The Presiding Officer is also required to take a view, which may be that some or all of the provisions of a Bill are outwith competence—s31(2).)

22. The Lord Advocate also has the power to refer a Bill to the Judicial Committee of the Privy Council within the four week period after it is passed by the Parliament, for a decision whether the Bill or any of its provisions are outwith legislative competence (SA s33).

LITIGATION

23. Most civil litigation involving the Scottish Ministers is conducted on behalf of Ministers by OSSE (although in some areas, such as reparation actions, outside firms are used). OSSE remains responsible to the Lord Advocate for the conduct of all such litigation. Counsel are instructed by OSSE for all litigation in the Court of Session.

24. The selection of counsel is a matter for the Lord Advocate. She approves a list of junior counsel known as Standing Junior Counsel who may be instructed by OSSE in litigation involving the Executive. In cases where that is considered appropriate senior counsel will also be instructed. The approval of the Lord Advocate is sought in relation to the appointment of senior counsel for a particular piece of litigation. On occasion one of the Law Officers will appear in court in person to represent the Scottish Ministers.

25. In conducting civil litigation OSSE proceed on the instructions of individual departments subject to the overall supervision of the Law Officers. Any decisions as to the handling of a civil case are at the end of the day for the Scottish Ministers collectively; if a Law Officer is appearing for the Scottish Ministers in a civil case then, like any other counsel, s/he acts on instructions from them.

26. By statute, a party raising an action against the Scottish Executive may do so against the Lord Advocate as representing it; and an action by the Scottish Ministers may run in the name of the Lord Advocate (Crown Suits (Scotland) Act 1857 s1).

27. The Scotland Act makes provision for the determination of devolution issues (in effect questions about the legislative competence of the Parliament or the devolved competence of Ministers—see Schedule 6, paragraph 1). Devolution issues which arise in litigation anywhere in the UK must be intimated to the Lord Advocate (as well as to the Advocate General). The Lord Advocate (or the Advocate General) may also initiate proceedings for determination of a devolution issue (SA Schedule 6 paragraph 4(1)), and is empowered to refer devolution issues arising in litigation or otherwise to the Judicial Committee of the Privy Council (see paragraphs 32–33).

28. The Lord Advocate also has a specific statutory or common law role in relation to a number of types of action. Commonly these will include matters such as actions for declarator of death or actions for proving the tenor of a will. The Lord Advocate’s role in actions for declarator of nullity of marriage or of divorce has recently been abolished, but actions for declarator of marriage by cohabitation with habit and repute continue to be served on her. It is very unusual for the Lord Advocate to enter appearance in such cases, although it may happen for example where an action for declarator of death has implications for any criminal investigation. (Sometimes actions are served on or intimated to the Lord Advocate when they clearly should not be: in particular under section 11 of the Children (Scotland) Act 1995—the court rules providing for this were revoked in 2000.) It is for the Lord Advocate to ask the Court of Session to declare a person a “vexatious litigant” so that actions raised by that person are subject to special controls by the court. She has specific duties under the Extradition Act 2003.

29. The Lord Advocate also has a general “public interest” role in litigation. For example, she is entitled to intervene in litigation in the public interest where a proprietorial interest of the Crown or the interest of a public trust is involved. Courts will sometimes require matters to be intimated to the Lord Advocate
because they consider that there may be an element of public interest or public importance. It is unusual for the Lord Advocate to become involved in such cases, although the Law Hospital case (involving withdrawal of nutrition from a patient who was in a persistent vegetative state) is one example. The courts have also recognised the Lord Advocate as the appropriate respondent where the competence of an Act of the Scottish Parliament is challenged “as befits his role as a Scottish Law Officer acting in the public interest” — *Adams v Advocate General* 2003 SC 171.

30. The Lord Advocate also has a role in relation to the reorganisation of public (non-charitable) trusts under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Again these are fairly unusual.

31. The Lord Advocate is also responsible for the appointment of an *amicus curiae* in a case where the Court of Session has requested it. The arrangements are set out in a Memorandum of Understanding with the Lord President dated 23 July 1999.

**OTHER APPOINTMENTS**

32. The Law Officers have a range of other functions. For example, they are *ex officio* Commissioners of Northern Lighthouses. They are both members of the Bible Board. The Lord Advocate is a member of the Board of Trustees of the National Library of Scotland, and one of the Commissioners for the Keeping of the Regalia of Scotland. She provides advice to the Privy Council in relation to certain charters. The Solicitor General has certain ceremonial duties in relation to the General Assembly of the Church of Scotland.

*LSLA*

*January 2007*

**KPMG ANNUAL LAW LECTURE: 28 FEBRUARY 2007**

**“THE LORD ADVOCATE IN THE 21ST CENTURY”**

**INTRODUCTION**

It gives me great pleasure to speak here this evening. I am very honoured to have been invited to give this inaugural KPMG Annual Law Lecture. I hope it will be the first in a long series. The subject I have chosen is the role of the Lord Advocate in the 21st century.

As most of you here today know, I am privileged to be one in a very long line of Lord Advocates of Scotland. While the title has remained constant, the office is one which has developed and changed as much as our nation itself. I would, however, venture to suggest, that while most Scots are very familiar with the title of the office and know that it is an intricate part of the legal fabric and history of Scotland, there was, until recently, only a limited circle of legal and political anoraks (if I may use that term in a non-pejorative sense!) who had a full understanding of the role, and fewer still who understand how the role and that of Solicitor General for Scotland operate in action.

What I hope to do today is to set out the current role of the Lord Advocate and to dispel some of the Tolkien-like mythology which has, on occasion, given rise to some confusion.

Recently there has been a great deal of political discussion of the role of the Law Officers, both north and south of the border. The House of Commons Select Committee on Constitutional Affairs has been examining the role of the Attorney General. This investigation has revealed some differences between the views of present and former Law Officers, even where the former Law Officers are still members of the Government.

In Scotland, distinguished former Law Officers (it is, I hope, a truth universally acknowledged, that former Law Officers are invariably distinguished) have queried the role of the Lord Advocate in Cabinet. Views have also been expressed that, in their advisory role, the Law Officers should be more “detached” from Government. In relation to their prosecution functions, it has been said that they should be more accountable and should publish police reports upon which decisions are made. As I hope will become clear in the course of this speech, I think it is perfectly valid and proper for people to debate the proper role of Law Officers. I also believe it is important, though, for that debate to be informed not only by history but, crucially, by the needs of a modern 21st Century devolved Scotland. It may, nonetheless assist that process to place the office of Lord Advocate in its historical context.

Historically, the Lord Advocate, assisted by the Solicitor General, has been responsible for prosecuting in the name of the Crown. We do not know from what date the office was established, but the first recorded Lord Advocate, of the 119 who have held the office, was Sir John Ross of Montgrenan, who is formally mentioned in 1483. The duties were more onerous then than now. In June 1488 Sir John was not only in the royal army of James III against his rebellious son, he was sufficiently courageous to endanger the life of the
Prince. After the King had lost the battle, the victorious rebels accused the Lord Advocate of treason, condemned him to death (in his absence) and confiscated all his lands. His cause was taken up by Henry VII of England, and his lands were restored after the intervention of the Pope.

Along with these and other excitements (a Lord Advocate was killed at the battle of Flodden) the holder of the office became increasingly responsible for the system of public prosecution in Scotland.

While it remains possible, in some circumstances, for a private individual to mount a private prosecution, it is very rare for such a thing to happen in practice. Since the passing of the Crown Suits Act in 1857, the Lord Advocate has also been responsible for litigation for and against the Crown—in devolved terms, the Scottish Ministers—in Scotland.

The importance of the role has fluctuated in accordance with the qualities of the person holding the position, and the requirements of the time. Henry Dundas, who served as Lord Advocate from 1775 to 1783, was later an associate, colleague and confidant of William Pitt the Younger. Later, he was also heavily involved at the highest levels of Government and across a wide range of business, while the office of Lord Advocate was held by his nephew Robert. And it is possible to find, among the earlier holders of the office, persons who appear to have allowed their party loyalties to outweigh their independent judgment—at least in politically sensitive trials. It was Robert Dundas who conducted the prosecution, for sedition, of Muir, Palmer and others seeking political reform in the 1790s.

PLURALITY IN PUBLIC INSTITUTIONS

The notion of office-holders—whether prosecutors or judges or politicians—who allow their personal interests, be they family, or financial, or party political to come before the public interest, is not new. It has been a feature of the development of every society struggling towards the ideal system of administration. Such a system does not come about only by the establishment of institutions with a capacity for, and the appearance of, independence, because institutions are run by people, and if the people are not playing their part, if they are not worthy of the trust placed in them, then the institutions will fail. And it appears that any person or institution, given power and authority uncontrolled by outside influence, is at risk from the temptation to use that power and authority for improper purposes.

The safeguard lies in creating and encouraging a plurality in public life, a system of checks and balances in which the powers conferred upon people and institutions are subject to control and scrutiny by other bodies, who may be politically and institutionally disparate, but who share a common concern for good administration in the public interest. Within such a system, it should be possible for society to confer, where necessary, discretion on particular office-holders, secure in the knowledge that there are appropriate safeguards against inefficiency or improper use of powers. Even when created, however, such a system requires constant monitoring. I would like this evening to examine the role of the Lord Advocate against that background.

In more recent times, and particularly since the creation of the post of Secretary of State for Scotland in the early part of the twentieth century, the role of the Lord Advocate has been confined largely to the provision of legal advice to the Government and the prosecution of crime in Scotland. Certainly, until some seven years ago, the Lord Advocate was also heavily involved in the process of selecting judges and sheriffs. That has, quite properly, gone with the creation of the Judicial Appointments Board.

While a recently published newspaper article on the role trumpeted in its headline “Honey—I shrunk the Lord Advocate!” (in a note of apparent rebuke and lament), my own view, for what it is worth, is that the significant restriction of the Lord Advocate’s present functions is wholly consistent with the needs of a mature democracy in the 21st Century.

Indeed, the role post-devolution is much more limited than it ever was pre-devolution. But it is still an extensive role. There has recently been prepared a note of the functions of the Lord Advocate—[you can find it on the Scottish Executive’s website16]—which sets out the various current responsibilities of the office. Apart from the continuing functions of criminal prosecutions, investigation of deaths and legal advice to the Scottish Ministers, the most esoteric functions now relate to Scotland’s lighthouses and the Bible Board for Scotland.

But there remain issues as to whether a Scottish Minister can or should combine the functions of chief prosecutor and chief legal adviser to the government. Is the office—though much restricted—still in need of further shrinkage?

It may be sensible to place the office in its modern, post-devolution, context by looking briefly at the position prior to the passing of the Scotland Act, in order to find out what has changed. I have to say that I am reluctant to look back too sentimentally at pre-devolution experience. Scotland and its institutions have moved on, and should be judged on their contemporary merits. I myself am more interested in making things work today than in comparing them with what happened in the past. But it is from the perspective of the past much of the criticism has come, so it does no harm to consider it on that comparative basis.

16 http://www.scotland.gov.uk/About/Departments/LPS/rolelordadvocate
Before devolution, both the Lord Advocate and Solicitor General were Ministers in the United Kingdom Government. In addition to their long standing responsibility for criminal prosecutions, they were chief legal advisors to the United Kingdom Government on Scots Law. So far as criminal prosecutions were concerned, the Lord Advocate and the Solicitor General dealt with matters in a traditional way, One or other—and sometimes both—of the Law Officers were in London for three to four days a week. In London they attended Cabinet committees and took part in the business of Parliament.

The system worked as it had done for many years. Decisions as to prosecution were recognised by Westminster as being for the Lord Advocate alone. Parliament at Westminster exercised a kind of self-denying ordinance in relation to the prosecution side of affairs, and did not seek to examine the details of prosecution decisions. But scrutiny was not absent. In late 1981, in what became known as the Glasgow rape case, Crown counsel decided not to prosecute three persons accused of rape, because of medical reports that a prosecution would damage the health of the complainant. The complainant subsequently asserted that she was perfectly willing and able to give evidence, and in January 1982 the then Lord Advocate, Lord Mackay of Clashfern, had to explain the position in the House of Lords, while the Solicitor General for Scotland made similar explanations in the Commons.

Nor were these sessions purely formal. Before his statement to the House of Commons, the Solicitor General was thought to have provided information to the media which was different to that which he provided to the House, and he was, in effect, compelled to resign after a devastating onslaught from Opposition MPs in the House.

On the civil side of business, any idea that Law Officers were not legally involved in policy matters is an illusion. Particularly in the House of Lords, Law Officers were used to steer through Government legislation, including both the 1978 and the 1998 Scotland Acts, as well as dealing with the usual advisory functions of the office. The Lord Advocate also had a discrete portfolio policy in relation to the law of evidence.

The net effect of these arrangements was that the Scottish Law Officers, by reason partly of the way in which Government operated, and partly of the fact that much of Government work was carried out in London, were less visible to the Scottish community and the extent of their responsibility was less apparent. So what changes have come about as a result of devolution?

**Constitutional Change on Devolution**

There can be no doubt that the fact of devolution has, from a public lawyer’s point of view, changed life radically in Scotland. We now have a Parliament passing laws down the road. We have close scrutiny of the Executive’s decisions. We have, generally, a much more responsive, accountable system of government across a very wide range of public activities. Essentially, the effect of the Scotland Act is to provide Scotland with a written constitution.

The Parliament, and the Executive, are placed in a constitutional relationship with each other, with defined legislative and executive competences, and with settled relationships with the other parts of the United Kingdom. Part of that process of writing down the constitutional position was to define the role and place of the Lord Advocate, as I shall now attempt to explain. It is necessary to explain it, because many of the changes suggested in the position of the Law Officers would simply not be possible for the Scottish Parliament or the Scottish Executive to achieve. That is not to say that these provisions could not be changed but there are clear limits to what may be done to change the position of the Lord Advocate within the framework of the Scotland Act. The Scotland Act places both Law Officers—and particularly the Lord Advocate—in a special position.

First, it is outside the competence of the Parliament to remove the post of Lord Advocate from its position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

**Devolution Issues**

Second, while the Lord Advocate has long had the right to act in the public interest in certain circumstances, she is given a new specific civil constitutional role in relation to legislation of the Scottish Parliament. Like the other law officers, the Attorney General and the Advocate General for Scotland, the Lord Advocate has the right—and probably the duty—to refer any legislation of the Scottish Parliament to the Judicial Committee of the Privy Council if she considers that it is outside the competence of the Parliament. That is a separate statutory “public interest” role conferred directly on the Lord Advocate as holder of that office. It sets her apart from the rest of the Scottish Ministers because it is a responsibility which she must exercise independently. It makes the Lord Advocate into a sort of constitutional policeman over the legitimacy of the legislation passed by the Parliament.

The Act provides for that responsibility, that exercise of discretion, to be carried out after Stage 3 and before Royal Assent. But that might be seen as something of an exceptional measure. So the Act also provides that a member of the Executive in charge of a bill must certify to the Parliament, before introduction, that the Bill is within the competence of the Parliament.
A similar duty is placed on the Presiding Officer. In practical terms, so far as the Scottish Ministers are concerned, this means that during the life of a Bill the Law Officers will be asked for legal advice to ensure the bill remains within competence. If there were ever a question of legislation being put forward by the Executive which the Lord Advocate did not approve, there would be a constitutional crisis within the Executive. The final check on that particular exercise of responsibility is, of course, with the courts, with the Judicial Committee of the Privy Council.

**SCOTTISH MINISTERS**

Next, section 44 of the Act provides that both the Lord Advocate and the Solicitor General are Scottish Ministers. Section 52 of the Act provides that the Scottish Ministers are collectively responsible for everything done by any of them. It is a sort of “one for all and all for one” provision. It sets out in print for Holyrood the doctrine of collective Ministerial responsibility which is established by convention at Westminster. So, like it or not, the Lord Advocate is fixed with responsibility for all of the decisions of Scottish Ministers. Since the Lord Advocate’s responsibility, on the civil side of business, lies in advising on legal matters, and the office carries no responsibility for policy on non-criminal matters, her interest in other Ministers’ actions is to see that they are carried out within the legal structure of the Scotland Act.

**RETAINED FUNCTIONS**

Finally, on this matter, the Lord Advocate’s functions as chief prosecutor and head of the system of investigation of deaths, and any statutory responsibilities conferred on her alone, are kept outside that collective responsibility. So my decisions as chief prosecutor are not subject to any kind of collective ministerial decision making process. And to make that even clearer, section 48 of the Act provides in terms that

“any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person”.

That last provision is not new law. It is not some novel concept inserted into the business of government in Scotland for the purposes of devolution. It is, as the use of the word “continue” suggests, a re-statement of what has always been the position. It is recognised as one of the most important aspects of the Lord Advocate’s role in relation to prosecutions, that prosecution decisions must be taken by him or her alone, and in the public interest.

**PROSECUTION IN THE PUBLIC INTEREST**

That does not mean that the Lord Advocate in the prosecutorial context operates in a vacuum, as some sort of automaton, prosecuting whenever a set number of pieces of evidence become available.

The public interest has many aspects. The prosecution of crime is an important public interest. But so, for example, is safety on oil rigs. If there is an offshore accident, there may be a question of criminal proceedings. The persons involved may be those who know how the accident came about. If they are faced with possible prosecution, they may refuse to say what happened. Is it more important to find out what happened, so as to prevent it from happening again, or to keep open the prospect of a criminal prosecution against the greatest number of potential accused? Or if a prosecution will have the effect of damaging the health of the complainer beyond repair, is the prosecution of the offender more important than that damage to the victim? If the prosecution of a spy can only succeed by revealing in court information about our intelligence-gathering capabilities, which is more important? And, to look at a more mundane example, which has actually occurred, if an 85-year-old woman neglects her cat, should she be prosecuted?

More generally, if there is a prospect of persuading people to hand in dangerous weapons, and the police want to have a knife amnesty, should the Lord Advocate block that by pointing to the letter of the law? The natural tension between accountability of the public prosecutor and her independence can make the prosecutor’s life a tough lot. The ability to resist political whim, pressure group or transient media clamour of what should be prosecuted or not is vital.

Instead, prosecution must truly reflect the public interest in a considered and independent fashion. It is, in my experience, rarely a process which receives unqualified, unanimous acclaim. Prosecution to please may be a quick fix. It may gain superficial popularity but it would surrender the very foundations of what supports a sound system of justice. The provision safeguarding that independence in the Scotland Act recognises those realities.

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17 Section 52(6)(a) Scotland Act 1998.
PROSECUTION AS A NECESSARY FUNCTION OF GOVERNMENT

But, it is said, it would be better if these prosecution decisions were taken by someone who is “independent” of Government. As I have explained, it is not possible, within the structure of the Scotland Act, for the Scottish Parliament or, indeed, the First Minister, to bring about a situation in which the Lord Advocate is separate from the Scottish Executive. That would require primary legislation at Westminster. But even if it were possible, would it be desirable?

The prosecution of crime is one of the most fundamental tasks of government in the widest sense. As a society, we have decided, over the years, that it is dangerous to leave the prevention of crime in the hands of private individuals. We have decided that we do not want gangs of vigilantes roaming our streets and ordinary citizens going about armed so as to protect themselves from criminals. Nor do we leave it to private citizens to decide whether or not to take criminal complaints to the courts. We assert that there is a public interest beyond that of the injured citizen in the prosecution of crime. We have therefore handed responsibility for these critical matters to the state, to the government. In modern Scotland that means an administration formed from a democratically-elected Parliament. We look to that administration to provide not only an efficient police force but also an effective system of prosecution and justice. Prosecution is not a function which can be farmed out to somebody sitting to one side of government. It is one of government’s most important responsibilities. It lies at the heart of the social contract between citizen and state.

Certainly, prosecution must be subject to proper safeguards; it must be undertaken in a way which does not prejudice the interests of the innocent individual; it must be undertaken for correct reasons of criminal justice, not to serve the political aims of the party in power, or the personal interests or whims of the prosecutor. And those exercising these vital functions must be held properly to account for the manner in which they exercise their responsibilities. In our system, that general accountability is to the Scottish Parliament. Indeed, it is only if the prosecution function is carried out as part of government that proper accountability is secured. If the system of prosecution breaks down, it is the Lord Advocate who has to account for that to the Parliament. And that is correct.

The fact that prosecution decisions are taken independently does not mean that they are taken unaccountably. It is for the Parliament to decide whether the Lord Advocate is carrying out that vital function to its satisfaction, not as a matter of party politics, but as a matter of sound administration. It would be wrong to seek to allocate that function to some semi-detached outside body. The prosecution system is intimately bound up with the resource provided by the Scottish Ministers, and with the aims of the criminal justice legislation put in place by the Parliament on the basis of proposals made by the Scottish Ministers. The further the prosecution system gets from the central core of government responsibility, the less easy it is to hold Ministers as a collective body responsible for how it is operated.

ACCOUNTABILITY

The result is that the present system leaves an inefficient Lord Advocate, or an irresponsible Scottish Executive, nowhere to hide. If the prosecution system fails, then the Parliament can hold the Lord Advocate, and the administration of which she forms a part, accountable for that failure. That is as it should be. For my part, I am content to be accountable to the Parliament.

As Lord Advocate, I exercise considerable powers, and carry great responsibilities. And no sensible Minister ever takes Parliament lightly. I note, in passing, that the Justice Committees of the Scottish Parliament routinely scrutinise the work of the Law Officers. That notion is also now being discussed at Westminster. I would like to make one further point, touching on accountability. The prosecutor’s judgement in starting a prosecution is clearly justiciable in the courts. That it as it should be.

No doubt, if too many pleas of “no case to answer” were sustained, then searching questions would properly be asked about the quality of the decision-making processes. While my predecessor, Lord Boyd, took the unprecedented step in 2004 of agreeing, so far as possible, to give reasons to victims for decisions to take no proceedings, the evidence which forms the basis of those decisions remains confidential. Successive Lord Advocates have been reluctant to enter into discussion on these matters, for two reasons.

First—the gathering of evidence for criminal prosecution depends to a large extent upon the confidence of those interviewed that the information they give will be unattributable unless proceedings are taken in court. (eg. On occasion the evidence may come from an informant and disclosure could lead to loss of life.)

Second—if a decision is taken not to prosecute someone, that person is presumed to be innocent. He or she is entitled to the same protection from the law and the legal system as everyone else. Anything otherwise would simply result in a trial by media without the systems of checks and balances which would be a fundamental right in any trial.

I, of course, accept that a lack of prosecutions is, in general, a proper subject for public comment and debate.

We recently investigated why, relatively speaking, it appeared fewer complaints of rape resulted in prosecution in Scotland than in other countries. And if there were a notable failure to take proceedings against people alleged to be breaching European legislation, it would be equally legitimate for the European Commission to seek an explanation.
Civil Advice

I turn to consider the Lord Advocate’s position in relation to civil advice. As I have indicated, the Lord Advocate is fixed with a statutory duty to scrutinise the legislation of the Scottish Parliament to make sure that it is within competence. After that legislation is in force, she is charged with the responsibility for defending it in the courts. In addition, she is the chief legal adviser to the Scottish Executive. And this is another issue which has attracted comment recently.

It is said by some observers that the legal advice to the Executive could also be more detached, more independent. It is said that the Lord Advocate should not be a member of the Scottish Cabinet, because that gives the office-holder too great an influence on policy decisions in which she has no or should have no interest.

Democracy and Authority

It is one of the apparent ironies of the second half of the 20th Century—and the first part of the 21st—that, at the same time as we expect Government to do more, so we limit its freedom of action. I say “apparent” because it fact comes from a healthy tension between institutions. It is a real example of the pluralism to which I referred earlier. We seek more and more positive intervention by government, through the great codes on social security, social work, education, health, housing roads and planning. And at the same time as we look to Government to provide a regime which will deliver all things to everyone, we scrutinise its actions, limit its discretions, distrust its intentions and expect the courts to save us from its excesses. The whole—welcome—development of judicial review is a response by the courts to the increasing trend of Parliament and Government to intervene in more and more detail in the life of the nation.

It is good that we should expect government to do much, and that we should at the same time expect government to exercise its functions within the law. But how does that work in the civil legal sphere? It is a truism that the Scottish Executive does not knowingly act unlawfully. But that is a very negative, parsimonious way of putting the proposition. In fact, government, in Scotland is positively determined to act lawfully.

At its most fundamental level, a constitutional administration wishes to work within the limits of the constitution. It is defined by its place in the constitutional framework and seeks to operate accordingly. It is sufficient for me to say that the Scottish Ministers want to work within the limits set by the Scotland Act and by the broader constitutional framework of the United Kingdom. They do not wish to do things outside those limits. They are conscious that they are working within a system where a very great deal of policy is delivered by means of detailed regulation.

Much of that regulation will, in the nature of things never be scrutinised closely by bodies outside Government. That should not and does not relieve the Government from the responsibility of ensuring, so far as is possible, that it is acting within the powers conferred on it by Parliament. And so, even where there is a very low risk of challenge to a piece of legislation or a Ministerial decision, the Executive is actively concerned to make that regulation, or take that decision, within what is allowed by the constitution. At the same time, Ministers naturally wish to be able to do everything which the constitution allows. They have manifestos and policies which they wish to deliver and which they are entitled to deliver. And, as I shall explain in a moment, they do not want lawyers to place unnecessary obstacles in their way. Of course in this world it is never sufficient to rely on somebody’s good intentions. It is also sensible, as I have already noted, to have a proper system of checks, balances and quality control in place. In the case of the acts of the Scottish Ministers, we have the Scottish Parliament, the Scottish media and the Scottish courts.

All of these bodies, in their different ways, and from their different perspectives, subject the legislative and executive actions of the Executive to scrutiny.

So how do we seek to achieve this recognition of and compliance with the law? We do it by ensuring that consideration of legal issues and the legitimacy of proposed action is built into the decision making process. In a democracy where the freedom of action of Scottish Ministers is absolutely constrained by considerations of European law, of Human Rights law and of United Kingdom constitutional reservations, it is necessary for Ministers and those acting in their name to ensure that any action they propose to take is taken within those restraints.

This work is largely carried out by the Scottish Executive’s in-house lawyers, in the Office of the Solicitor to the Scottish Executive. That office is responsible for advising administrative colleagues and the Ministers as to the correct legal position in any given situation. It is also responsible for drafting subordinate legislation and instructing primary legislation. With the Office of the Scottish Parliamentary Counsel, it provides the whole of the core public law legal service to the Scottish Ministers.

In terms of control, as a civil legal resource for the whole of the Scottish Executive, it operates under the general supervision and superintendence of the Law Officers. This is one of the biggest—and I would say most beneficial—developments following devolution.

The Law Officers are briefed weekly on matters of legal interest across the Executive. When any such matter becomes sufficiently important or critical, it can be referred in more detail to them for a formal opinion. So legal issues are dealt with by a single office which reports to the Law Officers, which can identify
legal issues of general application, and which can ensure that they are handled in a consistent way across the whole range of the Executive’s business. Policy Ministers can be assured that their Ministerial level advisers, the Law Officers, are aware of the important matters in each policy area.

It was Harold MacMillan who identified “events” as the factor which complicated the life of politicians. It was so in his day and it is so now. It is outside events which determine the day to day political priorities of Ministers in any Government.

Where, as in Scotland, that Government is a coalition, handling those events becomes even more challenging. Further, one of the strengths, in my opinion, of the new Parliament in Scotland is that voting patterns are not as predictable as at Westminster. This results, in broad constitutional terms, in an administration which is more responsive to the legislature. Accordingly, when events happen, there is a process of negotiation between the different parts of the coalition to settle a policy and that negotiation has to take account of the real or perceived sensibilities of the backbench members of both sides.

Given the urgency with which things happen, and the requirement for the Executive to be able to put out a settled policy line within short timescales, the process simply does not allow for lengthy ruminations when a concluded policy is referred to the Law Officers for a formal view as to its legitimacy. Indeed, since questions of legislative or devolved competence may be involved, legal advice is frequently necessary at several stages in the negotiation process. If the development of policy is to be properly informed by legal considerations, that legal consideration must be built into the process. A “detached” legal adviser who would be brought in and out would be like a legal yo-yo constantly trying to catch up with discussions in order to provide sensible advice.

I am perfectly well aware that in former times, when matters were more leisured, it was possible only to involve the Law Officers on the basis of long matured legal submissions. Sometimes these were referred to as “Memorials for the Opinion of the Scottish Law Officers”.

There are even people in the office old enough to remember the time when such memorials were stitched up with pink cord. To people who look back longingly to those days and wish that they were still with us I can only offer my sympathy (and my envy!). Life has moved on.

If a modern Government is to operate within the law but at the speed demanded of it by modern events, a modern media, a modern Parliament and a modern electorate, its legal advisers at all levels must be informed not only of its broad policy intentions but also of how its policy is developing. They must be able to input legal content to that process as it continues. This is because, however quickly a policy is formulated, it goes out as a considered policy of the administration and it is subject to the same legal controls and scrutiny from the courts as the longer-term projects.

In any event, in the context of the Scottish Executive, and in relation to civil matters, the Lord Advocate and the Solicitor General are, whether they like it or not, members of the Scottish Executive. They are Scottish Ministers. They are responsible along with their fellow Ministers for the policies and decisions of the Scottish Executive and, since their contribution to that policy making process is legal, it is their duty to make sure that those policies are within the law.

CONFLICT OF INTEREST

In any professional occupation there is a possibility that a conflict of interest will arise, where one’s personal interests, or the interests of an existing client, are at variance with those arising in some new piece of business and professionals develop ways of dealing with that. Normally they simply decline to do the new business which will cause the conflict.

That happens to prosecutors as much or as little as it does to other professionals so it will occasionally happen that a procurator fiscal will find that the police have made a complaint in relation to somebody who is personally known to the fiscal. Where that occurs, the solution is simple. The fiscal hands the papers in the case to another without the personal knowledge. Similarly, a judge who finds that a litigant—or an alleged criminal—appearing before him is known to him personally, will decline to act.

The Scottish Law Officers operate in the same way. If it should happen that criminal proceedings were contemplated against someone who is a personal friend, a family member or a professional or political colleague of a Law Officer, he or she would not deal with that matter but would instead pass it on to be dealt with elsewhere. In fact, in Scotland, the custom is that where such a matter arises, it is dealt with by a procurator fiscal and anonymously by one or more Crown Counsel without reference of any sort to the Law Officers. In that way, although Crown Counsel is acting in the name of the Lord Advocate and has all the powers of the Lord Advocate, he or she does not refer any decisions in that case to the Lord Advocate or Solicitor General personally.

In relation to civil business, it is difficult for there to be a conflict between the Lord Advocate’s interest as a legal adviser and the advice which she gives to her Ministerial colleagues. There was a time when the Lord Advocate had certain policy responsibilities in the civil area as well as her responsibilities in relation to criminal prosecution but those have long come to an end.
The Lord Advocate has no policy interest in the legal questions which come before the other Ministers in the Scottish Executive and has no interest except in advising them to the best of her ability about those legal questions.

**Nature of Advice**

It is important to realise what the function of the Lord Advocate is, when she is advising Ministerial colleagues on legal issues.

As I have already indicated, there are areas where the Lord Advocate is effectively acting as a free-standing constitutional policeman. That is a substantial part of the Lord Advocate’s legal advisory activity, and clearly the most important one. But the more usual part of the Lord Advocate’s function is to advise Ministers as to the possible legal implications of carrying out a particular policy in a particular way. It is not the function of a legal adviser to seek to use the law or his knowledge of the law to determine the policy of his client except in areas where the law is so clear that no legal argument really arises. Still less is it the function of the Law Officers to seek to determine what that policy should be.

The Lord Advocate’s duty is to the law not to party politics. The basic, fundamental function of the legal adviser is to identify two risks. The first is the likelihood that there will be a legal challenge to the policy. The second is the likelihood that any such challenge will succeed. Sometimes the risk of a challenge will be clear, and Ministers will require no advice on that issue but the question of how successful any challenge is likely to be is very much a legal judgment.

It is the function of the legal adviser to quantify both of those risks to the best of her ability. It is then for the policy Minister to make a decision. I suppose that my fundamental objection to the idea of separating the legal advisory function from government is that government is not and cannot be like that. Government—in this country at least—is within the law or it is not government at all. You cannot have a government where legal considerations are a kind of add-on extra, where the law is a sort of garnish which you dab on the top when the cooking is finished.

When I was a child we used to go on day trips to Largs, and my parents used to buy us sticks of rock, with the word “Largs” running through from end to end. That is how law and legal advice run through the operations of government Wherever you break into the processes of Government you find an appropriate level of legal input, running evenly through the operation.

Neither is legal advice some kind of barrier to the work of government. Rather it is a light showing the way through what can sometimes seem like a constitutional jungle. Where paths diverge, it informs—but does not take—the choices open to policy-makers.

So, what is the attitude of Law Officers to the rest of the Scottish Ministers? Should Law Officers be detached, distant, standing upon their professional status, the guardians of constitutional mysteries not properly understood by non-lawyers, making Delphic, *ex cathedra* pronouncements upon proposed policies? Or should they be colleagues of Ministers using their knowledge of law to assist the lawful development of policy?

Party politics does not enter the matter, nor does it need to in the devolved context. What is necessary is that policy choices made by Ministers are properly informed by sound legal advice.

The Lord Advocate’s role in attending Cabinet is also one which has attracted some debate. There is no concept of a Scottish “Cabinet” in the Scotland Act. The fact of a Cabinet, and the Ministers who are members of it, are matters for the First Minister. The Lord Advocate (or Solicitor General in her place) is not a member of the Cabinet but receives all papers and attends all meetings for the purpose of providing legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required. The Lord Advocate’s attendance at Cabinet and receipt of all its papers also ensures that her interests, including her prosecutorial role, are represented in collective discussion of the legal advice where required.
I am as conscious and as proud of being part of a modern constitution as I am of standing in a line of Lord Advocates stretching back to the reign of James the Third. Of course there are other, perfectly legitimate, ways of providing the functions which the Lord Advocate carries out and it is for others, not me, to determine what those might be. But, I do believe that the office in its current form is a sensible and effective contributor to good government in Scotland.

If any changes are made I hope they will take into account the practical as well as the theoretical needs of good governance in Scotland as well as the public interest. While the office of the Lord Advocate may have shrunk from the grandiose days of Dundas, I have no doubt that, in this case, small is beautiful and much more appropriate for the 21st century. And while the role exists in its current form I am determined to do what I can to live up to the finest traditions of my office in both its civil and criminal responsibilities.

Thank you.

Evidence submitted by the Rt Hon Lord Boyd of Duncansby QC

1. In May 1997 I was appointed Solicitor General for Scotland, at that point a Ministerial position within the UK Government. In May 1999 the position was transferred to the Scottish Executive and I was re-appointed Solicitor General. In February 2000 I was appointed Lord Advocate, a position I held until October 2006. While the relationship between the Scottish Law Officers and the Attorney General changed with devolution it remained close and I had the privilege of working with and observing three Attorney Generals in my time in office. My evidence is based partly on my observations and partly on my own experience as Lord Advocate.

2. I do not consider that the position of the present Lord Advocate should be taken as a model for the second option outlined in the Press Notice (the Attorney General is a member of the Commons or Lords but is non political). In the first place, with one exception in, I think, the early 1960’s all Lord Advocates up until now have been political appointments, many of them very distinguished. The present Lord Advocate was only appointed in October 2006 so it is perhaps a little early to see it as a model for others to follow. Secondly, and far more importantly, the Lord Advocate is, under the Scotland Act a Scottish Minister and a member of the Scottish Executive. 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. She may be independent of party but she is not independent of the Executive and is privy to many of the discussions as well as the legal issues surrounding the development of policy. Thirdly it is my evidence that it is of fundamental importance that the senior Law Officer should have and retain the confidence of both his or her Ministerial colleagues as well as the Parliament to which they are accountable. Elish Angiolini served with distinction as Solicitor General for five years before her appointment as Lord Advocate. She gained that confidence occasionally attending Cabinet, frequently meeting with other Ministerial colleagues, answering questions and participating in debates in the Scottish Parliament as well as appearing in court and undertaking public engagements. I think it would have been very difficult for a non political person who had not had that exposure to step up to be Lord Advocate. While the Solicitor General will often succeed to being Lord Advocate that will not always be possible.

3. I have read the evidence of the Attorney General, as well as that of Lord Morris of Aberavon, Lord Mayhew of Twysden, Lord Goodhart and Lord Mackay of Clashfern and am in broad agreement with what is the general thrust of their evidence—that the present position should remain. (I recognise that Lord Goodhart looks for ways to strengthen the independence of the Attorney and I disagree with him on the desirability of the Attorney sitting in the Lords). Many of the points that I would make have already been dealt with.

4. I am a strong believer in the value of democratic accountability. The Lord Advocate is the Ministerial head of the Crown Office and Procurator Fiscal Service, Scotland’s sole public prosecution service. I believe it suffered for many years from having its Minister in government in London and in the House of Lords. He was remote from the Service and remote from Scottish Members of Parliament. Questions were answered in the Commons on his behalf by a Minister in the Scottish Office, a very unsatisfactory arrangement. As a result concerns about the Service did not surface as they might have done. COPFS was a small department in a large government structure. The Service was under funded and under managed. While we were proud of our tradition of public prosecution and had within the Service many highly professional and dedicated public servants the Service was progressively failing the public.

5. Following devolution these issues became more and more apparent both in relation to particular cases that caught public concern as well as more generally. Questions were increasingly being asked in Parliament and the Justice Committee commenced an Inquiry into the running of the Service. On the back of this political and public concern I was able to undertake the widest ranging programme of modernisation and reform of COPFS ever. I do not believe that would have been possible, at least to the same extent, were it not for devolution and the accountability that it brought to the Law Officers.
6. I should also add that what was equally important was the support from fellow Ministers, in particular the First Minister, Jack McConnell, the Deputy First Minister and Justice Minister, Jim Wallace and the Finance Minister, Andy Kerr. In order to win that support it was important that I was able to attend Cabinet and argue the case for a substantial increase in resources. Reform of the COPFS became a political priority.

7. Accountability to Parliament is not simply about attending occasionally and answering questions. The interaction between Members of Parliament and the Law Officers is also of great benefit. It allows MP’s or MSP’s to approach you informally and raise a constituency or other matter and it allows the Law Officer to gauge political reaction to current issues. That is vital in being able to head off trouble. More generally it does help inform considerations of the public interest when these matters come to be considered eg in reflecting political and public concern on the level of sentencing for certain offences.

8. 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 and nowhere is this more important than 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. Recently these have centred on issues such as giving reasons for prosecution decisions, ensuring that victims are properly heard in the criminal justice system and the prosecution of rape offences to name a few. Harriet Harman as Solicitor General took initiatives on the prosecution of rape and on domestic violence. Elish Angiolini as Solicitor General undertook a review of the prosecution of rape in Scotland which coincided with other work being done inside and outside the Executive on rape.

9. Early in 2006 public concern about the level of knife crime gave rise to, amongst other things, a proposal from the Home Office that there be an amnesty for those found in possession of a knife while turning it in to a police station. Ministers in Scotland were keen to follow but in Scotland the Lord Advocate is the only Minister who can sanction an amnesty from prosecution. I refused to agree until I was satisfied that a review of the prosecution of knife crime within COPFS already under way had been satisfactorily completed and I was in a position to announce changes in prosecution policy. Fortunately I was able to do so and the knife amnesty covered the whole of the UK. The changes in prosecution policy which I announced was the most significant part of a wide ranging set of Executive initiatives and was widely covered in the press in England and Wales as well as in Scotland.

10. In giving opinions to government it is I believe very helpful to be able to understand the political background to the questions and the advice. I can think of one example where advice was sought on a highly sensitive political issue. An outside Counsel was engaged to give an opinion. His initial advice, had it been followed, would have had very severe political consequences. Before it went to Ministers it was seen by Law Officers who were able to talk through the opinion and find a way forward. The policy which flowed from that advice has been operating satisfactorily for a number of years.

11. I would agree with Lord Goodhart when he made the point that with the changes to the role of Lord Chancellor it is more important than ever that there be within government someone who can give prominence to the maintenance of the Rule of Law. In my experience Ministers within the Scottish Executive gave particular care to listen to the Lord Advocate on such issues. As a senior lawyer within government the views of the Lord Advocate were accorded respect.

12. I would be particularly concerned if it was suggested that in any new arrangement superintendence of the prosecution services could be transferred to the Ministry of Justice or some other department with a non political Attorney retaining responsibility for individual decisions. That 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.

13. There are, I believe, some initiatives and reforms which could be considered. In the first place recent debates have perhaps highlighted a lack of understanding of the precise role of the Attorney in relation to prosecutions and measures to better inform the public as well as Parliamentarians might help. Secondly while it is in my view desirable that the Attorney should come from the House of Commons I recognise that that will not always be possible. Accordingly consideration might be give to allowing the Attorney, when a member of the House of Lords, to address the House of Commons and answer questions in the House. I make this suggestion with some diffidence; I appreciate that may have wider constitutional implications and may offend some sensitivities in the House. Thirdly while I do not agree with the suggestion that there be a routine publication of the Attorneys opinions there may now be occasions where the executive could be more forthcoming with either the opinion itself or an abstract of it.

14. Finally on a general point it is of course important that the Attorney General act with integrity upholding the high traditions of the office and observing his constitutional position. I cannot think of one Attorney who has not done so. I recognise public concern over the Attorney’s position but that is not solved
by trying to remove political controversy from his office. Political accountability is a vital check on his office and the departments for which he is responsible. Removing that accountability will, in my view, simply frustrate political debate and further disillusionment in the political process.

April 2007

Evidence submitted by Professor John Spencer QC

Thank you for your letter of 21 March inviting me to send the Committee written evidence. Unfortunately it arrived just after I set off for an extended visit to Japan, and in consequence I was not able to respond by 16 April, as you asked. Although I have missed the deadline, I thought I would still reply, in the hope that my views might still be of some use or interest.

My comments in this letter will be about one aspect of the matter only: namely, whether the Attorney General ("A-G") should have the legal right to stop a prosecution.

On this my view is “no”.

The theoretical objection to this power is that it is, potentially, a tool for what is sometimes called “the instrumentalisation of criminal justice”; that is to say, the use of the criminal process by the government of the day a means of attacking its political opponents, and protecting its political friends. Historically, of course, that is one of the reasons why the power existed. The power of the A-G to start or stop prosecutions dates from the days when it was thought (at least by many people) to be quite right for the King to react to his political critics by prosecuting them for “political offences” such as seditious or blasphemous libel, and in such matters the A-G was the right arm of the government. Fortunately, nowadays nobody in this country would—at least publicly—defend the powers of the A-G on the ground that the prosecution process is inherently political, and hence a matter on which the executive must retain the final word over the institution of prosecutions. But even if the A-G’s power to control the institution of prosecutions is no longer used or justified in this crude sort of way, and the current theory is that it is just a “safety-valve” to enable prosecutions to be stopped in the rare case where the broader interests of the state are threatened by their continuance, the A-G’s power to stop prosecutions on “political” grounds is (to me) unacceptable because it undermines the notion of the Rule of Law.

The main argument for the present state of affairs is this. “In this country, the rule is one of discretionary prosecution. There are some cases in which prosecutions can and should be dropped on grounds of the broader interests of the state. To allow this does, admittedly, involve a potential risk of the ‘instrumentalisation of criminal justice’; by reason of the fact that the politicians who are in charge will see the interests of the state as coincident with their own (or those of their political supporters). But in order to guard against this risk, we have the rule that, when he makes the decision, the A-G acts independently of the government. He will, of course, listen to what his political colleagues have to say. But when he takes the decision, it is his, not theirs. And in making it, he leaves considerations of party politics out of account.”

I do not think this argument stands up, for the following reasons:

(a) The present position is enshrined in a “convention”, and it is not a Rule of Law. It exists because, since the early 20th century, successive A-G’s have chosen to follow the convention—and successive Prime Ministers have accepted this. But like all constitutional conventions, it could end by those involved just ceasing to respect it. (At one time, we thought it was a constitutional convention that Ministers did not publicly abuse judges whose decisions they did not like. But when Mr Blunkett, as Home Secretary, made a habit of it, his political colleagues smiled upon him—and the convention apparently dissolved.)

(b) The A-G’s supposed “independence” is no different, surely, from the position of any other Minister who is charged with decision-making in a particular area. It is the same in principle, as the Home Secretary’s when—as used to be the case, and is still the case occasionally—he decides on when a prisoner held on an indeterminate sentence shall be released. (And to me, it is equally inconsistent with the politically independent administration of justice.)

(c) The A-G, like any other Minister, can be removed from office at the will of the Queen (in theory)—which means, of course, of the Prime Minister. This appears to be a serious limit, in reality, on his supposed independence.

(d) The position, surely, is both contradictory and hypocritical. If it is really necessary for there to be a power to stop prosecutions in cases where their continuance would put at risk the higher interests of the state, why should this decision rest with the Attorney General? The higher interests of the State, surely, ought to be a matter not for the Prime Minister and the Cabinet to decide—not a lone Minister, who by convention is not a member of the Cabinet.

The real question, surely, is whether it is necessary for the Executive (in whatever shape of form) to have a power to stop prosecutions on grounds of the broader interests of the state. There are arguments in favour of this, and arguments against. At one time, I thought (like Lord Goodhart) that the arguments in favour were more convincing. I no longer do so. My present view is that the risks of abuse exceed the benefits. And,
as I said in an interview with Clare Dyer of the Guardian some weeks ago, one of the risks is that political leaders in other countries which do not respect the Rule of Law will lean on our Government to stop prosecutions which they find embarrassing. As long as the power exists, the Government can be put under pressure to exercise it. If it does not, the Government can reply “Sorry, we cannot help you”—as it would if a foreign dictator tried to lean on the Government to restrain adverse comment in the press.

The other argument for the present state of affairs is that “We need a Minister at the head of the CPS, who is politically responsible for it”. Yes, of course we do. But I fail to see why that means the Minister must have the power to stop a prosecution. The Home Secretary is the Minister responsible for the police; but—fortunately—that position does not carry with it the right to force the police to investigate or prosecute, or to halt an investigation in a given case.

I find it strange how, in this country, we accept as an article of political faith the need for the police to be independent of the Government in their decision-making—but do not transfer this argument to the next layer, which is the CPS (and other prosecution agencies).

As you know, the new prosecution arrangements for Northern Ireland, when eventually brought into force, will set the DPP for Northern Ireland free from the power of the Attorney General to give him orders in a given case. I think this was the right decision—and the same legal formula should be adopted for England and Wales.

April 2007

Evidence submitted by the Director of Public Prosecutions, Ireland

Thank you for your letter of 21 March 2007 in which you request me to give written evidence to the House of Commons Constitutional Affairs Committee which is considering the constitutional role of the Attorney General.

I note that the evidence you seek is in relation to the three potential models which are set forth in a press notice issued by the Committee in 2007.

I do not think it appropriate for me as an Irish citizen to make submissions to the Committee as to what model would most appropriately suit the conditions of the United Kingdom. However, it may be of interest to the Committee if I say a little about the model we have adopted in my own jurisdiction in Ireland.

I should begin by saying by way of my own background that following eight years practice at the Bar in Ireland in 1981 I became a full-time legal advisor in the Office of the Attorney General. From 1995–99 I was the senior legal advisor in the Office of the Attorney General. Since 1999 I have been the Director of Public Prosecutions in Ireland. I served as a member of the Constitutional Review Group in Ireland which among other issues looked at the constitutional role of the Attorney General of Ireland, reporting in May 1996.

What follows is a very brief summary of the structure of the law offices in Ireland. You can find a full account of this subject in Professor James Casey’s book *The Irish Law Officers: Roles and Responsibilities of the Attorney General and Director of Public Prosecutions* (Round Hall Sweet and Maxwell 1996).

The Constitution of Ireland, adopted in 1937, provides for an Attorney General “who shall be the advisor of the Government in matters of law and legal opinion”. The Constitution also provided for the prosecution of all indictable crime in the name of the People at the suit of the Attorney General or some other person authorized in accordance with law to act for that purpose. From 1937 to 1974 the Attorney General continued to exercise these functions. In addition to exercising the function as legal advisor to the government, the Attorney General had, and continues to have, a function to act as representative of the public in legal proceedings for the assertion of protection of public rights. (See Ministers and Secretaries Act, 1924, section 6.)

The Attorney General does not have executive responsibility other than for the management of his own Office which is responsible for handling the State’s litigation and the drafting of Parliamentary legislation as well as the giving of advice to the Government.

Responsibility for prisons, policing and the courts, as well as for law reform, rests with the Minister for Justice, Equality and Law Reform. There is no equivalent of the British Lord Chancellor. The Attorney General is also responsible for the Law Reform Commission’s vote and has the power to refer matters to them. While the Constitution prohibits the Attorney General from being a member of Government the modern practice is for the Attorney General to attend all cabinet meetings since almost everything discussed at cabinet may require legal advice.

The Prosecution of Offences Act, 1974, effected a transfer to the newly created office of Director of Public Prosecutions of “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” immediately before the commencements of that Act.
The consent of the Attorney General to criminal prosecution is still required in a small number of areas. These are chiefly matters which may involve international or diplomatic consequences and include breaches of the Geneva Conventions, Official Secrets Act offences, genocide and offences committed in Northern Ireland which may be prosecuted under the Criminal Law (Jurisdiction) Act 1976. The Attorney General also prosecutes certain sea fisheries offences as well as dumping at sea and sea pollution offences.

The rationale behind the creation of the Office of Director, as given in the parliamentary debates at the time, 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 ECC 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. While it was not conceded at the time that such decisions had ever in fact been influenced by political considerations, it was acknowledged that the practice of members of parliament making representations existed.

The model adopted in Ireland in 1974 differed significantly from the English model of a DPP in that the Attorney General was not given any function of general superintendence over the work of the Director. The act specifically provided that the Director should be independent in the performance of his functions. (Section 2(5))

So far as concerns the Director’s relationship with the Attorney General, the Act merely states that “the Attorney General and the Director shall consult together from time to time in relation to matters pertaining to the functions of the Director”. (Section 2(6))

I have had experience of operating this provision firstly as the principal officer in the Attorney General’s Office for four-and-a-half years and latterly as Director of Public Prosecutions for seven-and-a-half years. Consultations may be held for a variety of reasons. For example, there are many cases in which both the Director and the Attorney General are named as parties. Reform of the law is also a matter which may give rise to consultations. They have, in my experience, never been used as a means of suggesting to the Director how he should approach any particular prosecutorial decision.

There are a number of provisions in the legislation designed to reinforce the independence of the Director. It is unlawful to communicate with the Director in order to influence the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings (section 6(1)(a)). This provision does not apply to defendants, or their legal or medical advisors or members of their family. It does, however, preclude political representatives from making representations of this sort.

In Ireland the decision whether to seek a review of a sentence on grounds of undue leniency is a matter solely for the Director and not for the Attorney General. There is a prohibition on communicating with the Director for the purposes of influencing decisions in relation to applications to review sentence on the grounds of undue leniency.

Appointment to the office of Director is open to any barrister or solicitor in the State of 10 years standing, and for this purpose barristers and solicitors employed by the State are eligible. The Tánaiste has power to fix the terms and conditions of appointment. Both my predecessor and I were appointed with tenure until the normal retirement age of 65. The appointment is made by the Government, but the Government is required in the first instance to appoint from persons recommended as suitable by a committee consisting of the Chief Justice, Chairman of the Bar Council, President of the Law Society, Secretary General to the Government and Director General in the Office of the Attorney General.

The DPP may be removed from office by the Government but only after consideration by them of a report of a committee consisting of the Chief Justice, a judge of the High Court nominated by the Chief Justice and the Attorney General into the condition of health, either physical or mental, of the Director, or into the conduct of the Director, either generally or on a particular occasion.

The Director’s Office is accountable for its expenditure of public money in the same manner as any other Government Department or Office. The Director is not otherwise accountable to Parliamentary committees other than the Public Accounts Committee. I have, however, voluntarily appeared before Parliamentary Committees on a number of occasions but never to discuss specific cases. The Director’s Office is independent of all Government Ministers and has its own financial vote. Where parliamentary questions relating to the Office are asked it is usually the Taoiseach who will answer them but invariably he will decline to be drawn into discussion about individual prosecution decisions and will cite the Director’s statutory independence as the reason he cannot do so. The Attorney General is not answerable for the decisions of the Director. The Attorney General is not necessarily a member of Parliament and in the last 35 years there have only been three Attorneys who were.

It has not hitherto been the practice of the Director to give reasons in public for decisions to initiate or not to initiate a prosecution, although it is the practice to explain the reasons for decisions to the Garda Síochána (police) when communicating decisions to them. The question of giving reasons to victims of crime is under consideration at present in the Director’s office and a decision will be made in the near future whether any change in the current practice is recommended.
However, the Director has, through the system of published guidelines, set out the criteria which are used in order to guide prosecution decisions. The public interest criteria applied by the DPP in making prosecution decisions are discussed in some detail in the Director’s published guidelines (see Guidelines Chapter 4).

The criteria governing decisions to prosecute or not to prosecute are similar to those in operation in the United Kingdom, that is to say, there is a two-stage test, firstly as to whether there is sufficient evidence to prosecute, and secondly whether a prosecution would be in the public interest. These matters are dealt with fully in the published guidelines of the DPP which may be accessed on the Office’s website at www.dppireland.ie. Unlike in England and Wales we do not operate a “more than 50% rule” when evaluating the question of whether there is sufficient evidence to prosecute. We take the view that what is required is that there be a reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury. (Guidelines, 4–9)

In relation to unlawful communications with the Director, procedures are in place in the Office to see that a person making such a communication is informed of the provisions of the law in this regard and that the communication is not brought to the attention of any person who is dealing with the file. Indeed, under the Act, there is a prohibition on the person dealing with a file having regard to an unlawful communication.

In conclusion, I have set out the above provisions in the hope that they may be of some assistance to your committee in considering your recommendations. From time to time there has been criticism that the basis for prosecution decisions within our jurisdiction is not transparent. It is difficult to see how one can establish any system of accountability to government or parliament which does not at the same time open up the possibility of political interference in the process. I believe that there is general public confidence in this jurisdiction that there is no political interference in prosecution decisions. It is certainly true that the lack of political accountability coupled with the policy of not giving reasons in public for decisions can sometimes lead to a situation where there is a lack of understanding by the public as to the reasons why a particular decision has been arrived at. This is undoubtedly a problem, and the question arises as to whether it is an acceptable price to pay for an independent system. As I said earlier, the present system of not giving reasons for decisions, apart from giving them to the police (or other investigating agency), is under review.

Finally, in Ireland the Attorney General continues to exercise a public interest function as well as acting as adviser to the Government. This can cover a wide variety of issues—for example, litigating on behalf of the public as a whole on an issue such as public rights of way, or seeking a civil remedy to restrain unlawful behaviour, or acting on behalf of persons who are incapable themselves of asserting their rights (such as unborn persons). This dual function has been criticised on the grounds that a Government might itself act contrary to the rights of the public. The Constitution Review Group Report in 1996 recommended that the Attorney General should retain the two roles and that the small volume of public interest work would not justify the creation of a separate office. It there was a conflict the Review Group considered the Attorney General could assign the responsibility to act in the public interest to another senior lawyer.

I trust the foregoing information may be of some assistance to the Committee and if I can be of any further assistance please let me know.

James Hamilton

April 2007