House of Commons
Justice Committee

Draft Constitutional
Renewal Bill
(provisions relating to
the Attorney General)

Fourth Report of Session 2007–08

Report, together with formal minutes, oral and written evidence

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Summary

This Report examines the draft Constitutional Renewal Bill to see how far its provisions put into effect the recommendations of the previous Report of our predecessor Committee (the Constitutional Affairs Committee) on the Constitutional Role of the Attorney General and whether they are likely to achieve the target of enhancing public confidence in the office of the Attorney General.¹

The Draft Bill makes no substantial change to the current situation. The Attorney General remains both chief legal adviser to the Government and a Government minister. The post’s relations with the Directors (DPP; Director of the SFO; Director of the Customs and Revenue Prosecution Service) are defined by an (as yet) unwritten “protocol”. We are concerned about the terms on which the Directors serve and their guaranteed independence. There is no justification for giving the Attorney General power to halt investigations by the Serious Fraud Office; the powers to halt actions by the Directors of the prosecuting authorities should be uniform.

The accountability of the Attorney General remains limited - it is not clear, for example, how the content of the new Annual Reports to be made under the Draft Bill will improve on current Annual Reports. In addition, reports on directions not to prosecute (or to the SFO not to investigate individual cases) are unlikely to create greater accountability, given the limits on the information which they will contain.

We favour a statutory duty being placed on ministers to observe the Rule of Law.

The question of publishing the Attorney General’s legal advice is difficult. But we note the scope for enhancing public confidence if it were to become the practice to publish all or most of an advice where it is referred to in support of a political case being put forward by the Government.

The main problem with maintaining public confidence in the office of the Attorney General arises from combining the functions of legal adviser with ministerial functions; while we acknowledge that it is difficult to draw the line between legal and political considerations, and that these have to be balanced with care in particular cases, we believe that transparency requires separating the political functions of the Attorney General from the legal functions.

The Draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister: it gives greater power to the Executive; and it does not add to transparency.

¹ Constitutional Affairs Committee, Fifth Report of Session 2006-07, Constitutional Role of the Attorney General, HC 306
1 Introduction

Background

1. On 17 July 2007, the Constitutional Affairs Committee (re-named Justice Committee on 6 November 2007) reported on *The Constitutional Role of the Attorney General*. It concluded that there were “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”. The Report of our predecessor Committee recommended 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”.

2. The role of the Attorney General in three particularly controversial matters highlighted concerns in relation to the office: advice on the legality of invading Iraq; potential prosecutions in the “cash for honours” case; and the decision to hold investigations by the Serious Fraud Office into BAE Systems. As a result of these three cases, public confidence in the office of the Attorney General became a major political issue.

3. The House of Lords Select Committee on the Constitution reported in April 2008 on *Reform of the Office of Attorney General*. This was a useful examination of the arguments for and against reform of various aspects of the Office of Attorney General. It was also a helpful collection of a range of evidence on which we have relied when preparing this Report.

4. In July 2007 the Prime Minister launched his Green paper on the Governance of Britain. The goals set by the Prime Minister for the constitutional reforms were ambitious:

“We want to forge a new relationship between government and citizen, and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power. The proposals published in this Green Paper seek to address two fundamental questions: how should we hold power accountable, and how should we uphold and enhance the rights and responsibilities of the citizen?”

5. The Government’s main concern in relation to the office of Attorney General was to restore public confidence in the role, following the controversies mentioned above. The

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2 Constitutional Affairs Committee, Fifth Report of Session 2006-07, *Constitutional Role of the Attorney General*, HC 306; the Constitutional Affairs Committee operated as the Justice Committee from the creation of the Ministry of Justice on 9 May 2007. We were formally re-named with an extended membership on 6 November 2007.

3 Ibid., Summary

4 Ibid., Summary

5 At the time of writing, this case is *sub judice*

6 Seventh Report of Session 2007–08, HL Paper 93

7 Ministry of Justice, *The Governance of Britain*, July 2007 Cm 7170, p 5
Governance of Britain Green Paper stated that." The Government is fully committed to enhancing public confidence in the office of the Attorney General".8

6. Following the Green Paper, in July 2007 the Government issued a consultation paper on the role of the Attorney General, which asked whether:

- the Attorney General should continue to be both the Government’s chief legal adviser and a Government Minister
- the Attorney General should remain as superintending Minister for the prosecution authorities
- the legal advice of the Attorney General should be made public
- the Attorney General should attend Cabinet only where necessary to give legal advice
- a parliamentary select committee should be established specifically to scrutinise the Attorney General. 9

7. There were 52 written responses to the Government’s consultation. Of those who responded on this point, 27 out of 38 favoured the Attorney General remaining as the chief legal adviser to the government, and continuing to be a Minister. There was also strong support for the Attorney retaining the function of superintending the main prosecution authorities (Crown Prosecution Service, Serious Fraud Office, and Revenue and Customs). The majority of respondents also favoured the Attorney General attending Cabinet only when necessary to provide legal advice, and retaining a general presumption that the Attorney’s legal advice should not be disclosed.10

8. The Government responded to our predecessor Committee’s Report in January 2008. It was not supportive of the radical changes advocated in that Report. It summarised the responses to the Government consultation as follows:

“Overall, most respondents counselled against major structural change, taking the view that "mistaken perception is a weak foundation on which to base reform" and that "most of the institutional reforms [proposed] are neither necessary nor desirable, and would not significantly improve the political independence and political accountability of prosecutorial decision-making". Hence most respondents thought the Attorney General should remain a Government Minister whilst retaining the role of the Government’s chief legal adviser and Ministerial responsibility for the prosecuting authorities.”11

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9 Attorney General, The Governance of Britain, A Consultation on the Role of the Attorney General, July 2007, Cm 7192
10 Attorney General, The Governance of Britain, A Consultation on the Role of the Attorney General, July 2007 Cm 7342-III, paras 70 & 84

**Procedure for scrutiny**

10. The Draft Constitutional Reform Bill was set down to be examined by a Joint Committee. We note the recent comments of the Liaison Committee in relation to the practice of decisions to refer a Draft Bill to a Joint Committee without proper consultation with the relevant House of Commons departmental select committee:

   While we recognise that some draft bills will be particularly suited to scrutiny by joint committees, it is for the House, not the Executive, to assess the most effective form of scrutiny, and we object strongly to the fact that the Government has sought to pre-empt the House’s consideration of how to scrutinise draft bills by bringing forward motions for the appointment of joint committees without proper consultation. We reiterate the comment of our predecessor committee in 2005: there should be a presumption in favour of draft bills going to departmental select committees for pre-legislative scrutiny, where they are ready and willing to undertake this.

   We concur with the views of the Liaison Committee and reject the assumption that the Government should decide the means by which Draft Bills are scrutinised.

11. Notwithstanding the decision to refer the Draft Bill to a Joint Committee, the Public Administration Select Committee examined parts of the Draft Bill and the accompanying White Paper relating to the Civil Service, lawmaking powers, treaties, passports and the royal prerogative. It published its Report on Wednesday 4 June.

12. In consultation with representatives of the Government and colleagues on the Joint Committee on the Bill, we decided to carry out an inquiry into the provisions in the Draft Bill relating to the Attorney General in order to follow on from the work of our predecessor Committee. We note that the Joint Committee has also been taking evidence on these provisions. We have co-operated with them to the full and exchanged the written evidence which both Committees have received. Our inquiry has been a short one, in order to complement the work of the Joint Committee and contribute our views to the process of scrutiny of the Draft Bill within the challenging timetable set for the completion of their work. The main part of the Joint Committee evidence on the provisions affecting the Attorney General will be taken after completion of our inquiry, but we note the useful evidence taken by them so far.

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12 Ministry of Justice, Cm 7342-I, -II, and -III
15 Uncorrected transcripts of evidence taken before the Joint Committee on the Draft Bill, HC 551-i-viii.
13. We would like to express our gratitude to colleagues on the Joint Committee for their co-operation and to those who gave us oral and written evidence.¹⁶

**Purpose of the report**

14. Our inquiry did not range across all provisions of the Draft Bill. We concentrated solely on the provisions relating to the Attorney General, in the light of our predecessor Committee's previous Report.

15. The purpose of this Report is:

- to examine the proposed provisions of the draft Constitutional Renewal Bill to see how far they put into effect the recommendations of the previous Report; and

- to see how far the Draft Bill is likely to achieve the target of enhancing public confidence in the office of the Attorney General.
2 Duties of the Attorney General

16. Much of the debate about the duties of the Attorney General has focused on the office rather than on the functions to be carried out by the office holder. In this report we wish to concentrate solely on the functions of the Attorney General and identify by what sort of office holder they would best be carried out. We are concerned with the question of who exercises the various powers, not with the question of who should have the title of Attorney General. We set out here a brief account of the current duties of the Attorney General along with a description of the related conclusions and recommendations made by our predecessor Committee, which form the basis of our assessment of the Government’s proposals.

Chief Legal Adviser

17. The chief role of the Attorney General is that of the Government’s in-house legal adviser. This role is combined with the role of a Minister and a politician who follows the party whip. Until comparatively recently, the Attorney General was expected to be able to advise on a wide range of matters based on personal knowledge of the law. In reality, much of this advice is nowadays prepared by civil servants who are expert lawyers in a particular field, for example EU law. The Attorney General may also consult specialist counsel when necessary. The Attorney is responsible for the advice, which is usually not made public.

18. The Attorney General has usually been a senior barrister of considerable standing in the profession as well as a senior politician. As such, he has provided a connection between the law and politics. It is noticeable that nowadays the demands of both legal and political work mean that it is almost impossible for a senior lawyer to maintain a sufficiently active practice to take up the role of the Attorney General in the traditional way, while serving as a Member of Parliament. In recent years, the Attorney General has been a Member of the House of Lords. This represents a major change to the role of the Attorney General, who previously as a Member of this House had the advantage of close contact with colleagues in both the elected House and the legal profession. It has been left to the Solicitor General to answer for the Law Officers in the House of Commons.

19. Rt Hon Lord Falconer of Thoroton QC, when giving oral evidence to the Joint Committee on the Draft Bill, commented on the dual nature of the Attorney General’s advice:

In relation to … the use of force … the Attorney General’s advice is effectively definitive because it is never going to come to court as to whether or not the advice on whether force was used was justified. That puts upon the Attorney General an incredible onus to give of his best in relation to what the advice has to be as his genuine view. There he is almost like a judge. There will be other issues where it is quite legitimate for the Attorney General to say, “We are being sued; it is best that the government take these defences, I am not quite sure whether we will win or lose.” Again, he has to think about what is in the best interests of the government, but he has to give objectively his best advice. Whichever it is he has to objectively consider
what is the right advice to give, and that is a function that I think is not at all political.\textsuperscript{17}

20. In our predecessor Committee’s Report we saw no reason why the role of legal adviser to the Government should be carried out by a political appointee, or a member of the governing party.\textsuperscript{18}

\textbf{Superintendence of Prosecutions}

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

\begin{itemize}
\item[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.
\item[b)] The power to refer unduly lenient sentences to the Court of Appeal.
\item[c)] The power to terminate criminal proceedings on indictment by issuing a nolle prosequi.
\item[d)] The power to refer points of law in criminal cases to the Court of Appeal.
\end{itemize}

22. 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.\textsuperscript{19} This is by nature a ministerial function, and the Attorney General and Solicitor General are held to account in Parliament for the effective management of the services and their use of resources.

23. Rt Hon Lord Goldsmith QC, when he was Attorney General, suggested that ‘superintendence’ encompassed:

> "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."

24. 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

\begin{footnotes}
\end{footnotes}
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."

25. The Attorney General is the arbiter of “public interest” when deciding whether or not to continue with a prosecution.

26. Our predecessor Committee’s Report on the Constitutional Role of the Attorney General recommended separation of the ministerial functions from the responsibility for prosecutions. It said that depoliticising the prosecution role should be one of the central purposes of reform, not least in order to restore public confidence in the role of Attorney General.

Political Role

Criminal Justice Policy

27. The Attorney General shares responsibility for the criminal justice system in England and Wales with the Secretary of State for Justice and the Home Secretary. The Attorney General sits on the National Criminal Justice Board and has joint responsibility for the cross departmental Office for Criminal Justice Reform, which is now based in the Ministry of Justice.

28. Our predecessor Committee’s Report on the Constitutional Role of the Attorney General concluded that the Attorney General’s ministerial functions relating to criminal justice policy should be exercised by a minister in the Ministry of Justice.

Attendance at Cabinet

29. There was widespread agreement among those questioned in the course of our predecessor Committee’s previous inquiry into the Role of the Attorney General, and

21 cps.gov.uk/victims_witnesses/codetest.html
22 cps.gov.uk/victims_witnesses/codetest.html
23 The classic statement of “public interest” was by Sir Hartley Shawcross in 1951: see HC Deb, 29 January 1951, column 681
among many witnesses subsequently, that the Attorney General should not regularly attend Cabinet meetings. The view of Lord Falconer when he gave oral evidence to the Joint Committee on the Draft Bill was typical:

“I do not think that the Attorney General should attend meetings of the Cabinet. I think the Attorney General should only attend the Cabinet to give the Cabinet legal advice as required, and he should not be a member of the Cabinet, obviously, on that basis. The reason I think that is because you need in relation to the Attorney General giving the advice to the Cabinet to make it clear that he is not part of that group, he is somebody advising that group, because only if he is somebody who is not part of that group can the advice be said to be objective.”

30. Our predecessor Committee recommended that the Attorney General should attend the Cabinet by invitation, and then only for the consideration of specific and relevant agenda items. The arrangements for the Attorney General to attend Cabinet should be clear and specific to giving legal advice – the danger of the Attorney General participating generally in Cabinet policy-making is that it blurs the distinction which should be clearly maintained between the function of legal adviser and a member of the ministerial and political leadership.


3 Provisions in the Draft Bill

Duties of the Attorney General

31. In line with the responses to the consultation, the Government concluded that the Attorney General should remain the Government’s chief legal adviser, should remain a Minister, and therefore a member of one of the Houses of Parliament. In keeping with previous convention, the Attorney would attend Cabinet when required, although the White Paper notes that “The Attorney General’s responsibilities in relation to the formulation of criminal justice policy…. may also necessitate attendance at Cabinet”.29 However, the present Attorney General told us that the Prime Minister had asked her to attend all Cabinet meetings unless prevented from doing so by other duties.30

32. The principal changes proposed in the Draft Bill are that:

- the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in cases of national security)
- the requirement to obtain the consent of the Attorney General to a prosecution in specified cases will, in general, be transferred to the DPP or specified prosecutors
- the preparation of a statement ("protocol") of how the Attorney General and the Directors (i.e. the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office) are to exercise their functions in relation to each other, and the terms under which the Directors hold office
- the Attorney General’s power to halt a trial on indictment by entering a nolle prosequi will be abolished
- the Attorney General must submit an annual report to Parliament.31

33. The main difficulty in relation to the role of the Attorney General is the division between the political and legal aspects of the post. This raises the question of the purpose of the Attorney General’s role. We note that Professor Bradley, in his evidence to the Select Committee on the Constitution in the House of Lords, called for a restatement of the Attorney General’s role.32 We see considerable virtue in a firm statement of the extent and limits of the role and of the conventions.

34. The Attorney General’s role should be more clearly defined and the conventions which affect the Office should be comprehensively set out. The Draft Bill provides an opportunity to do this.

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29 Ministry of Justice, The Governance of Britain –Constitutional Renewal, March 2008 Cm 7342-I, para 62
30 Q 43
31 See Part 2 of the Draft Bill
32 House of Lords, Reform of the Office of Attorney General, Seventh Report of the Select Committee on the Constitution, Session 2007-08 HL Paper 93, para 18
35. The Draft Bill only partially puts into effect the recommendations made in our predecessor Committee's Report on the Constitutional Role of the Attorney General: the central issue is the division between political responsibilities, as exercised by a minister, and legal responsibilities which need to be carried out in a non-political way. Until this basic problem is dealt with in some way, the reasons for limited public confidence in the role of Attorney General will remain. Professor Vernon Bogdanor, giving evidence to the Joint Committee on the Bill, said:

“The public, I think, believe that the powers that are given to a politician will generally be used for political purposes and so the fewer those powers conflict the better, and I think the whole question of the Attorney General raises very fundamental problems about the separation of powers and about how the position of the Attorney General is compatible with the independence of other authorities such as the DPP and the SFIO; how it would make sense to have a minister who is responsible to Parliament but yet responsible for the working of bodies which are independent. There is a huge area of difficulty here which, frankly, I think the draft Bill does not confront.”

36. Although the Draft Bill removes a significant amount of responsibility in relation to prosecutions from the Attorney General to the non-political Director of Public Prosecutions, the Draft Bill makes no substantial change to the dual role of the Attorney General as a member of the Government and its chief legal adviser. It is that role which, as was noted by our predecessor Committee's Report on the Constitutional Role of the Attorney General, was the cause of much of the public criticism. It can be argued that there is a general benefit in accepting that it is not always possible to split legal from political advice. However, one of the aims of the Draft Bill is to restore public confidence in the office of Attorney General by making it clear where responsibility lies.

37. This point was emphasised by Rt Hon Lord Falconer of Thoroton QC, the former Lord Chancellor, in oral evidence to the Joint Committee on the Draft Bill:

“I think if you are the Attorney General who is part of a group of politicians making decisions about should we stop a prosecution which the Prime Minister is very keen to stop – and there is no secret about that – I cannot envisage that the public out there do not think that the fact that you are part of that group has an influence on your decision. I would like to make it clear that I am not suggesting at all that that is what has happened, but the idea that the public do not think that you are – and this is not my word – part of the “gang” must have an impact on public perception.”

38. The creation of a clear “audit trail” depends on clear accountability for decision-making. Where advice is both legal and political and, because it has a legal aspect, it is unpublished, then accountability for the advice is not possible.

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33 Uncorrected transcript of oral evidence taken before the Joint Committee on the Draft Bill on 13 May 2008, HC (2007-08) 551-i, Q14
34 See for example para 51ff
35 Uncorrected transcript of oral evidence taken before the Joint Committee on the Draft Bill on 21 May 2008, HC (2007-08) 551-iv, Q194
39. The Draft Bill only partly addresses the major problem identified in our predecessor Committee’s Report on the Constitutional Role of the Attorney General: the difficulty of combining the political and legal duties of the Attorney General.

40. The Draft Bill does not provide for a clear split in the role to create a non-political legal adviser and refer the political duties to a minister in the Ministry of Justice; therefore the ambiguity of the Attorney General’s position in the public eye remains. As a consequence the Draft Bill does not fully satisfy the concerns previously expressed by our predecessor Committee about the need to reform the office and restore public confidence in the office of Attorney General.

**Superintendence of prosecutions**

**Individual directions**

41. The Draft Bill removes the power of the Attorney General to give a direction in relation to an individual case.\(^{36}\) This is to some extent a formalisation of the current procedure, where most decisions are taken independently by the Directors. However, it usefully makes explicit the responsibilities for decisions and adds transparency to the system. This goes in the direction of the core recommendations of the previous Report on the Constitutional Role of the Attorney General in removing decisions on the law from ministers.

42. The Draft Bill transfers powers over individual cases to the Directors, except where the Attorney General retains specific consent functions. We approve.

**National Security**

43. However, under the Draft Bill, as an exception to the general rule that the Attorney General cannot give a direction in relation to an individual case, the Attorney General has a statutory power to intervene to prevent or stop prosecutions for the purpose of safeguarding national security under Clauses 12 – 15. Additionally, and only in relation to the Serious Fraud Office, the Attorney General is empowered to give a direction to the Director of the Serious Fraud Office that no investigation of specified matters is to take place.\(^{37}\)

44. The power to direct the Director of the Serious Fraud Office to halt investigations of particular matters is one of the potential areas in which there is scope for considerable political controversy in the exercise of the Attorney General’s functions. When we examined the Attorney General about this, her justification was based on the fact that the SFO had been established with the power to carry out investigations, so the whole of the SFO work was placed under the same provisions.\(^{38}\) This justification is insufficient. There is no reason to treat serious fraud differently from other crimes. It would be more logical to give the Attorney General the same powers in relation to each of the prosecution authorities.

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\(^{36}\) Clause 2 (1)

\(^{37}\) Clause 12(1)(a)

\(^{38}\) Qq 59-64
45. **We see no reason to give the Attorney General special powers to direct the SFO to discontinue investigations (as opposed to proceedings).** The work of the SFO should be placed on the same footing as this respect as the other prosecution agencies.

46. Where the Attorney General has given a direction or withdrawn a direction, he or she must prepare a Report for Parliament on the exercise of this power as soon as is practicable (or as soon as the Attorney General is “satisfied” that no further delays are necessary for the purpose of safeguarding national security). Information need not be included in a report if the Attorney General is “satisfied” that:

- A claim to legal professional privilege could be maintained in respect of the information in legal proceedings
- Inclusion of the information would prejudice to national security or seriously prejudice international relations or
- The information would prejudice the investigation of a suspected offence or proceedings before any court.39

47. The accompanying White Paper on the Governance of Britain claims that the Report to Parliament will make clear who took the decision in such exceptional cases and therefore who should be held to account.40 It remains to be seen whether most circumstances where use of the power to give a direction to halt a prosecution or SFO investigation is warranted would not also be affected by the exemptions under Clause 14. We note also that one of the reasons for excluding information from the Report is to protect international relations. This is a significant step further than national security on which the basic power to give a direction is based.

48. In addition, the Attorney General has the power to acquire information for the purposes of intervening to safeguard national security. A person who without reasonable excuse fails to comply with the requirement to provide information within a specified period is guilty of an offence.41

49. JUSTICE suggests that the powers of the Directors should extend to decision-making on all matters even those relating to consideration of national security. In its view, the Attorney General’s powers should be restricted to the making of a submission on national security in an appropriate case to the relevant Director.42

50. It is not self-evident that the Attorney General is the appropriate Minister to direct that a prosecution should be stopped on national security grounds. The Attorney General does not have ministerial responsibility for national security or detailed knowledge of such matters. It would be the Prime Minister, assisted by the Foreign, Home or Defence Secretaries, who would make a judgment that proceedings in a particular case pose a danger to national security and it is therefore the Prime Minister who should account to

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39 Clause 14
41 Clause 15
42 JUSTICE, (background paper), para 5, 9 (not printed)
Parliament for that judgment. When we questioned the present Attorney General on this point, we were not convinced that any Attorney General would substitute his or her judgment on national security so as to override that of the Prime Minister by whom they were appointed.\(^{43}\)

51. Professor Jowell in his evidence argued that sections 12 and 13 of the Draft Bill (powers to halt prosecutions or investigations) "fly in the face of the fundamental constitutional principles of the rule of law and separation of powers".\(^{44}\) He also points out that the provision provides a very broad discretion to the Attorney General (who will act "if satisfied" of the need to do so). Clause 13 (5) (a) seeks to prevent any possibility of judicial review by providing that a certificate signed by a Minister of the Crown certifying that the Attorney’s direction was “necessary for that purpose” (i.e. to safeguard national security) shall be “final and conclusive”. Taken together, these powers allow the Attorney General to make a decision which is excluded from examination by the courts. Clause 13 (5) (a) is effectively an “ouster” clause, which in practical terms sets aside the jurisdiction of the courts. Professor Jowell says: “These provisions brazenly seek to evade … recent developments of constitutional principle.”\(^{45}\) **We see no case for the inclusion of the ouster clause.**

52. Our predecessor Committee concluded in its Report on the Constitutional Role of the Attorney General that there should be power to give directions to end prosecutions in the national interest; there is a clear case for such a power, whether it is exercised by the Directors or by the Attorney General. However, the provisions relating to giving directions to halt proceedings or investigations by the SFO give rise to particular concerns:

- The scope of the powers is too broad, since they are based on the Attorney General being "satisfied" which, in conjunction with the power to issue a certificate which is conclusive evidence of the need to make the direction, allows the Attorney General (and the Government on whose behalf the Attorney General acts) to take action in a controversial area without accountability in the courts.

- The accountability to Parliament cannot be a sufficient safeguard since the Reports to Parliament are unlikely to contain all the information relating to making the decision to halt proceedings or an investigation.

**Protocol**

53. The relations between the Attorney General and the Directors of the three prosecution agencies will be governed by a protocol. Clause 3 provides that the Attorney General must, in consultation with the Directors, prepare a protocol stating how the Attorney General and the Directors are to exercise their functions in relation to each other. This protocol is to be published and reported to Parliament.\(^{46}\)

\(^{43}\) Q 77ff  
\(^{44}\) Ev 24, para 15  
\(^{45}\) Ev 24, para 20; and see Q 22  
\(^{46}\) Clause 3(3)
54. The protocol is intended as an important component in a package of proposed reforms to the Attorney General’s role. In a letter to the Chairman of the Committee the Attorney General said that the aim of the protocol was to:

set out in an authoritative public document and in more detail than hitherto how the statutory relationship of “superintendence” between the Attorney General and the prosecuting authorities is to operate. It will provide greater clarity, both as between the Attorney General and the Directors themselves, and for Parliament and the public at large, about the respective roles and responsibilities of the Attorney General and Directors. The protocol will need to be sufficiently specific in its terms to meet his aim of achieving greater clarity, whilst being sufficiently flexible to meet the varying activities workloads of the prosecuting authorities over time and so as not to require constant amendment (although the protocol may of course be revised and clause 3 (4) of the draft Bill requires the Attorney General to keep it under review from time to time).  

55. Officials in the Attorney General’s Office and the three prosecuting departments are discussing what the proposed protocol should say. Clause 3(3) of the draft Bill sets out the general area which the protocol may cover. The Attorney General envisages that the protocol will include provisions about:

- The setting of the strategic direction for the prosecuting authorities, the setting of their objectives and the drawing up of their business plans
- The ways in which the prosecuting authorities report to the Attorney General on their activities.
- The circumstances and ways in which the prosecuting authorities are to consult the Attorney General or provide her/him with information
- The role of the Attorney General and the prosecuting authorities in relation to prosecution casework, including the handling of those cases in which the Attorney’s statutory consent is required for a prosecution; and the handling of any case involving a direction by the Attorney General on national security grounds (clause 12 of the draft Bill)
- The roles of the Attorney General and the prosecuting authorities in contributing to criminal justice policy to ensure (among other things) it properly reflects the impact on prosecutorial operational practice
- The Attorney General’s accountability to Parliament for the work of the prosecuting authorities, and how the Directors support the Attorney in that role.

56. Professor Jowell that it was "not at all clear whether this protocol is designed to strengthen or weaken the Attorney's duty to uphold the rule of law". He noted that the Attorney General’s political role was reinforced by the provision which requires the
protocol to set out the roles of the Attorney General and the Directors in relation to "criminal justice policy".\textsuperscript{49}

57. This document is clearly crucial to the working relationship between the Attorney General and the prosecuting authorities. It will set the tone for the practical working relations and to a great extent influence the real independence of the three Directors.

58. \textbf{We cannot comment on the draft of the protocol, since it is not yet prepared. We very much regret that the Draft Bill has been put before Parliament for consideration before a draft of such an important document is ready. The protocol should be published well before the Bill is introduced in the Autumn.}

\textbf{Provisions for tenure of office of Directors}

59. The Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions will be given fixed-term appointments to enhance their independence.

60. The Council of Europe’s Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, (section 5), stipulates that:

\begin{quote}
"States should take measures to ensure that:

a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures …

[…]

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review”.
\end{quote}

61. Professor Jowell in his memorandum says that Clauses 4 to 6 of the Draft Bill which deal with the Attorney General’s powers over the tenure over the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions "enhance the appearance, and indeed the realistic possibility, of political control of the prosecutorial system”. The Council of Europe recommends a much more transparent review of the tenure of public prosecutors that these sections provide.\textsuperscript{50}

62. In oral evidence Professor Jowell expanded on this point:

\begin{quote}
"Section 3 provides for the protocol and then provides that the protocol may include various matters and that the Directors and the Attorney must “have regard to the protocol” and then we get sections 4 to 6 which provide that “the Attorney may remove the Directors from office if he is satisfied that they are unable, unfit or unwilling to carry out their functions.” Then it goes on to define “unfit” as “failing to
\end{quote}

\textsuperscript{49} Clause 3(2)(f)

\textsuperscript{50} Ev 23, para 8
have regard to the duty to obey the protocol”. We do not know what could be in the protocol.\textsuperscript{51}

Professor Jowell thought that “failing to have regard to the duty to obey the protocol” could mean anything and gave “an easy opportunity for an Attorney to dismiss a prosecutor”.\textsuperscript{52}

63. Although the Directors do not have to obey the protocol in each and every case they are bound to have regard to it. The Draft Bill gives significant power to the Attorney General to dismiss a Director on the basis of failure to have regard to the duty to obey an, as yet unwritten, protocol. This leaves the position of the Directors unclear. The Directors ought to have clearer security of tenure than is apparent in the Draft Bill.

\textit{Attorney General's prosecution consent functions}

64. The Government has "taken on board the views of respondents (to its consultation), the majority of whom have thought most consent powers should be transferred to the prosecuting authorities, and considered the recommendations of the Law Commission in this area."\textsuperscript{53} As a result, the Government proposes the following reforms in relation to the Attorney General giving consent to prosecutions:

- in relation to offences where there is no pressing need for there to be a requirement to obtain consent (of the Attorney or another person), the requirement to obtain consent should be abolished;
- in relation to a very small range of offences which are particularly likely to give rise to consideration of public policy or public interest (such as most Official Secrets Act offences and war crimes), the obligation to obtain the consent of the Attorney General should be retained; and
- in relation to other offences, the power to consent should be transferred to the Director of Public Prosecutions or other appropriate Director.\textsuperscript{54}

65. We approve of these principles and note that the Government is still examining precisely which of the above categories affect the Attorney General’s consent function.\textsuperscript{55} This reform is in line with the general approach of the previous Report on the Constitutional Role of the Attorney General. We approve of the proposed reform to the Attorney General's functions in relation to consent to prosecution.

\textsuperscript{51} Q 27
\textsuperscript{52} Q 29
Abolition of nolle prosequi

66. Nolle prosequi (the power to halt trials on indictment) will be abolished and replaced with powers to direct the halt of prosecutions in cases of national interest. This has been generally welcomed by commentators. It is a power which is used in limited circumstances.

67. The power is a historic one. There is little case law on it and the basis on which the power can be exercised has not been authoritatively defined. Since the establishment of statutory prosecuting authorities such as the CPS (who have powers to bring a prosecution to an end by a variety of mechanisms including discontinuance) the Attorney General’s practice has tended to be to confine the use of the power in cases brought by a statutory prosecuting authority to situations where, after the indictment has been signed, it is found that the accused for reasons of ill health or other medical reason is unlikely ever to be fit to stand trial and there is no other way of disposing of the indictment. However the power is not confined by law to those cases. Often it is the prosecutor who asks the Attorney to enter a nolle, although on occasions the defence may apply for a nolle (usually where the prosecutor considers that the case should continue in the public interest). Where the defence makes the application, the Attorney General consults the prosecuting authority.

68. In theory, proceedings which are brought to an end by virtue of a nolle prosequi can be re-started, but in practice this is not done. This reform is in line with the general approach of our predecessor Committee’s Report on the Constitutional Role of the Attorney General in that it will tend to transfer powers relating to prosecutions to the Directors. Abolition of nolle prosequi does, however, potentially leave a gap in provision for halting certain types of trial.

69. We are uncertain of the utility of the proposed abolition of the nolle prosequi, given that it is not clear by what it will be replaced. This reform is of little practical importance, given that it is so infrequently used, but it will in a small way remove some power over prosecutions from the Attorney General.

Accountability

Annual Report

70. Under Clause 16(1), as soon as practicable after 4 April the Attorney General must lay before Parliament a Report on the exercise of his or her functions during the previous year. The Attorney General, under Clause 16(2), need not include information in an Annual Report if circumstances apply which cover the same exemptions as those set out in Clause 14 (3)(relating to Reports to Parliament on directions under section 12).

56 JUSTICE (background paper) paras 4 &10 (not printed)
57 Since 2001 the Attorney General’s Office has received approximately 75 requests for a nolle prosequi and a nolle prosequi has been entered in 5 of these cases to date.(A small number of the more recent applications are still under consideration).
71. It is hard to gauge what the new Annual Report would add to the existing system. Without further information we are unable to reach a firm conclusion about whether it will significantly add to the process of accountability of the Attorney General.

Accountability for legal advice

72. Part of the argument relating to accountability for the work of the Attorney General covered the question of whether legal advice should be made public. There are, of course, many circumstances where the Attorney General gives legal advice in matters of a high political controversy. This question has returned in relation to the provisions of the Draft Bill. We note the evidence given to the Joint Committee in relation to this question by Lord Falconer and Democratic Audit.58

73. The Government is entitled to Legal Professional Privilege in respect of the advice which it receives. It is for the Government, alone, as client to waive this right in a given case. The Attorney General cannot give any information about the legal advice given within Government. It is therefore meaningless to talk about ‘accountability’ (especially to Parliament) in relation to such legal advice. The Government, on the other hand, is accountable for how it uses the legal advice. As such, the notion of accountability is an irrelevance to the functions of the Government’s legal adviser, but the true accountability is often blurred as the Government relies on legal advice which is not disclosed but which can give an apparent authority to its actions in an unspecified way.

74. This is not a straightforward issue. There are clearly circumstances where legal advice cannot be made public—where proceedings may be contemplated, for example. But where the Government relies on legal advice to support what is essentially a political argument, then the case for publication becomes overwhelming if public confidence is to be maintained in the role of the Attorney General.

75. The question of publishing the Attorney General’s legal advice is difficult. But we note the scope for enhancing public confidence if it were to become the practice to publish all or most of an advice where it is referred to in support of a political case being put forward by the Government.

Reasons for Attorney General being a Member of either House

76. Much emphasis has been placed on the need for the Attorney General to be a Member of either House of Parliament in order to be properly accountable. This was a major feature of the evidence put before us in the course of our predecessor Committee’s inquiry into the Constitutional Role of the Attorney General.59

77. Professor Robert Hazell, when giving oral evidence to the Joint Committee on the Draft Bill about the Government’s proposals, gave a typical expression of this point of view when he said:

58 Uncorrected transcript of oral evidence taken before the Joint Committee on the Draft Bill on 21 May 2008, HC (2007-08) 551-iv, Q203; Memorandum submitted by Democratic Audit to the Joint Committee on the Draft Bill, para 52

59 Constitutional Affairs Committee, Fifth Report of Session 2006-07, Constitutional Role of the Attorney General, HC 306, paras 89-95
“...I think the law officers have to be accountable, they have to be accountable to Parliament, and the best way for them to be directly accountable to Parliament is for them to be Members of Parliament, of either House.”

78. However, while it is clear that political accountability is appropriate for the ministerial functions exercised by the Attorney General (superintendence of the prosecuting authorities and involvement in criminal justice policy), it is not at all clear that such political accountability is appropriate or even possible for the function of the Government's legal adviser.

79. In the majority of the main common law jurisdictions, 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. In the course of our predecessor Committee's previous inquiry, we noted the interesting examples of Ireland and Scotland. The 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. The Lord Advocate loses office like all other ministers if the Executive falls. However, the present Lord Advocate was reappointed and has served in Executives of different political colours.

80. The key question is whether a non-political office holder could perform some of the functions of the Attorney General, while other functions remained with the ministerial office holder, fully accountable to Parliament. If this split is carried out, the question of which office retained the title of Attorney General is a secondary one.

81. The Report of our predecessor Committee recommended that the provision of legal advice and legal decisions on prosecutions should rest with someone who was appointed as a career lawyer and who was not a politician while the Attorney General's ministerial functions should continue to be exercised by a minister. The Government has not found an alternative model which would offer the same degree of assurance to the public that legal advice and decisions are genuinely independent.

**Continuing ministerial duties of the Attorney General**

82. Various commentators have criticised the continuation of the split role of the Attorney General as a person with ministerial responsibilities relating to the formulation of criminal justice policy, with the Home Secretary and the Secretary of State for Justice, while at the same time combining this with the role of chief legal adviser to the Government and, in addition, with the function of superintending the Directors responsible for prosecutions.
83. The justification for giving the Attorney General shared ministerial responsibility for the criminal justice system was expressed by the Government as follows:

“The Government recognises the importance of the prosecutors having a “voice” in the formulation and implementation of criminal justice policy, and in ensuring that policy decisions and legislation in that area are operationally workable. The Government also agrees with the majority of respondents that that “voice”, to be effective, needs to be a Ministerial one. The Government considers that it would be artificial to divorce Ministerial responsibility for the superintendence of the prosecuting authorities from Ministerial responsibility for ensuring the “front-line” experience of the prosecutors informs the development of criminal justice policy.”

84. The ministerial responsibility of the Attorney General has attracted much criticism from commentators, both from those in favour of the reforms in the Draft Bill and those against. For example, Professor Anthony Bradley (who is overall in favour of the reforms in the Draft Bill), in his written evidence to the Lords Constitution Committee said:

“…in my view the distinct character of this responsibility of the Attorney General [superintending the prosecution authorities] is not assisted by the present trilateral system of shared responsibility for criminal justice that involves the Attorney acting with the Home Secretary and the Secretary of State for Justice in the Office of Criminal Justice Reform. I suggest that this trilateral system should be replaced by one based on joint responsibility of the two Cabinet ministers. The Attorney General and the Director of Public Prosecutions would be consulted on proposals for reform; but the Attorney would not share in the collective responsibility of ministers for such matters as legislation affecting criminal justice, and allocation of financial resources to the courts.”

85. Professor Bradley subsequently emphasised this point, saying that the Attorney General’s essential functions are to do with matters in which ‘rule of law’ considerations come into play; they are not a matter for collective decision-making and they ought not (for instance) to be influenced by electoral factors or by opinion polls. Both Professor Jowell and Roger Smith, Director of Justice, pointed out the potential conflict between the function of giving legal advice and formulating policy.

86. On the other hand there are genuine public policy issues which are not just matters for the courts and/or lawyers. The decision to halve the time taken to bring young offenders before the court was a policy decision which had considerable public support. Courts and the legal profession would not have achieved the aim without significant ministerial leadership by the Lord Chancellor and the Attorney General as well as the Home Secretary.

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63 Ministry of Justice, The Governance of Britain – Constitutional Renewal, March 2008 Cm 7342-I, para 96
65 Ev 26
66 Qq 23 & 24
67 Q 24
87. We asked the Attorney General for her view on the need to take part in the formulation of ministerial policy. She referred to the Auld Review of the criminal justice system, which identified the problem of policy makers operating in “silos”. She said:

“...improvements (to the criminal justice system) have been predicated upon the Ministry of Justice working hand in glove with the Home Office and working with us as the prosecutors, trying to make the system have the most integrity that we can cull from the opportunities that we have before us...”

88. Although we acknowledge that the prosecution function does have an important contribution to make to the formulation of criminal justice policy, there is a tension if a single office combines this function with that of the Government’s chief legal adviser. We agree with Professor Jowell that there are other mechanisms for ensuring that the prosecution authorities have a voice. This dual role of the Attorney General has attracted criticism, and detracts from the clear distinction in the line of responsibility between the ministerial policy makers and those charged with prosecutorial and legal advice functions. The Ministerial role of the Attorney General in relation to criminal justice policy should be separated from the role of legal adviser.

**Select Committee on the Attorney General**

89. Part of the discussion of whether the Attorney General should be a minister has included the question of whether there should be a specific Select Committee to cover the Office of the Attorney General. This was raised by the Government in their consultation paper and some have called for such a Committee of the House to scrutinise the work of the Attorney General. The Office of the Attorney General is already adequately covered by the select committee system in the House—it is now expressly included in our remit. There is no need for a specific Committee to scrutinise the Attorney General—we have that function and look forward to exercising it increasingly.

**Miscellaneous responsibilities**

90. 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.

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68 Q 33  
69 Q 33  
70 See above, para 6  
71 See e.g. Memorandum submitted by Democratic Audit to the Joint Committee on the Draft Bill, para 51  
72 House of Commons Standing Order No 152  
73 Constitutional Affairs Committee, Fifth Report of Session 2006-07, Constitutional Role of the Attorney General, HC 306, Ev 60
91. We see little reason to continue this area of the Attorney General’s responsibilities in the current way. It would be better if such matters were expressly taken out of the political sphere.

92. The functions of the Attorney General in relation to safeguarding 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 functions could be better performed by a non-political office holder.

**Rule of Law**

93. Our predecessor Committee’s Report on the Constitutional Role of the Attorney General, refers to changes consequent on Constitutional Reform Act 2005, as a result of which the Attorney General is the only lawyer within Government (as the Lord Chancellor need not be a lawyer). The question was raised about who within Government would ensure that the Rule of Law was followed if not the Attorney General?

94. Professor Jowell has argued that if the political role of the Attorney were retained (on the ground of the need to have a lawyer at the heart of government) then at the least the Attorney ought, like the Lord Chancellor, to be placed under a statutory duty to uphold the Rule of Law. In addition, her oath of office should be revised to reinforce that duty, and to make clear that she acts in the public interest.74

95. The Rule of Law is the basic principle on which all our freedoms rely. In practical terms, it guarantees that officeholders can resist pressure from Government to take decisions which are inappropriate—and can be seen to be independent. We have already noted above (paragraph 43ff) the very broad powers which the Draft Bill would give to the Attorney General to halt proceedings or SFO investigations. Allowing too extensive powers can create the real or perceived situation of Government pressure being applied to ensure that a decision is taken in a particular case for reasons which are improper or illegal. The public duty to observe the Rule of Law should be strengthened.

96. We favour a statutory duty being placed on all ministers to observe the Rule of Law. An Attorney General (whether political or not) could still be the active conscience of Government—if the Attorney General’s advice is not taken, then that would be a political decision for which the Government would take responsibility. The Attorney General’s oath of office should be reformed to cover the duty to uphold the Rule of Law.

**Amendment of the Act**

97. Most of our inquiry relates to the work of our predecessor Committee on the Constitutional Role of the Attorney General. However, we have one additional point to make in relation to Clause 43, which is a ”Henry VIII” clause, enabling ministers to amend primary legislation by statutory instrument.

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74 Ev 23, para 5; and see Q 26
98. Clause 43 reads as follows:

43 Power to make consequential provision

(1) A Minister of the Crown, or two or more Ministers of the Crown acting jointly, may by order make such provision as the Minister or Ministers consider appropriate in consequence of this Act.

(2) An order under subsection (1) may –
   (a) amend, repeal or revoke any provision made by or under an Act;
   (b) include transitional, transitory or saving provision.

(3) An order under subsection (1) is to be made by statutory instrument.

(4) A statutory instrument containing an order under subsection (1) which amends or repeals a provision of an Act may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(5) A statutory instrument containing an order under subsection (1) which does not amend or repeal a provision of an Act is subject to annulment in pursuance of a resolution of either House of Parliament.

99. Clause 43(1) is not without precedent. But we note that the scope of the power to amend the Act in practice depends upon how specific the provisions are under the Bill. We recommend that the Joint Committee, when it looks at the totality of the provisions of the Bill, considers whether any of them could be made more specific in order to reduce the area in which Clause 43(1) would operate.
4 Conclusions

100. In the light of the need for reform, which our predecessor Committee made clear in its Report on the Constitutional Role of the Attorney General, and the Government’s stated aim of enhancing public confidence in the role of the Attorney General, we have examined the extent to which the Draft Bill changes the basis on which the Attorney General would carry out the functions of the Office.

101. Professor Robert Hazell in his evidence to the Joint Committee on the Draft Bill said that it: “...proposes very little major change to the role, other than slightly greater accountability, in particular through the requirement to produce an annual report.” He approved of this outcome because of the need to preserve accountability to Parliament which was only possible in his view if the Attorney General (or the persons carrying out the duties set out in the Draft Bill) were a Member of either House (as noted above—see paragraph 77). Lord Falconer (speaking from a very different point of view) agreed about the limited range of the Draft Bill:

“There is nothing very much in this Bill which really changes the position of the Attorney General… after what started off as a quite optimistic proposal to reform the office of Attorney General it has all sort of sunk into a number of slightly pointless provisions.”

Lord Falconer even called the Draft Bill “a sort of Constitutional Retreat Bill”. These remarks were echoed by Professor Jowell.

102. Overall, despite some welcome changes which are in line with our predecessor Committee's recommendations, where, for example, responsibility for legal matters is more clearly devolved to Directors, we believe that the Draft Bill represents little change of significance in the role and powers of the Attorney General. The provisions in the Draft Bill would set in statute arrangements which already exist in practice. The Draft Bill tends to formalise the status quo and would even increase the power of the Attorney General to act without scrutiny—for example, by issuing a conclusive certificate of reasons for making a direction to hold a prosecution or investigation.

103. The main areas in which there is public concern about the Attorney General’s role arise from fears that a political office holder may not be independent when acting as legal adviser or making decisions about ending prosecutions or—as newly proposed in the Draft Bill—investigations by the Serious Fraud Office. This was the main reason for the earlier recommendation that the legal and ministerial roles should be separated. The Government, and others who see a positive benefit in continuing political and legal decision-making in a
single office, have not so far demonstrated that there is an alternative or better way of achieving greater public confidence.

104. The provisions of the Draft Bill do little to add to the accountability of the Attorney General. We are not convinced that the new Annual Report would add much to the ability of Parliament to hold the Attorney General to account and it is highly unlikely that any Report to Parliament on directions given to the Directors in connection with a particular case involving national security would contain information that was of use.

105. The Prime Minister’s stated aims in respect of his constitutional reforms (as noted above in paragraph 4) are ambitious. His intention to forge a new relationship between Government and the citizen and to start a journey towards a new constitutional settlement which entrusts Parliament and people with more power is not likely to be assisted by the provisions in the Draft Bill relating to the Attorney General.

106. The Draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister: it gives greater power to the Executive and it does not sufficiently increase transparency.
Conclusions and recommendations

1. We concur with the views of the Liaison Committee and reject the assumption that the Government should decide the means by which Draft Bills are scrutinised. (Paragraph 10)

2. The Attorney General’s role should be more clearly defined and the conventions which affect the Office should be comprehensively set out. The Draft Bill provides an opportunity to do this. (Paragraph 34)

3. The Draft Bill only partly addresses the major problem identified in our predecessor Committee’s Report on the Constitutional Role of the Attorney General: the difficulty of combining the political and legal duties of the Attorney General. (Paragraph 39)

4. The Draft Bill does not provide for a clear split in the role to create a non-political legal adviser and refer the political duties to a minister in the Ministry of Justice; therefore the ambiguity of the Attorney General’s position in the public eye remains. As a consequence the Draft Bill does not fully satisfy the concerns previously expressed by our predecessor Committee about the need to reform the office and restore public confidence in the office of Attorney General. (Paragraph 40)

5. The Draft Bill transfers powers over individual cases to the Directors, except where the Attorney General retains specific consent functions. We approve. (Paragraph 42)

6. We see no reason to give the Attorney General special powers to direct the SFO to discontinue investigations (as opposed to proceedings.) The work of the SFO should be placed on the same footing in this respect as the other prosecution agencies. (Paragraph 45)

7. We see no case for the inclusion of the ouster clause. (Paragraph 51)

8. Our predecessor Committee concluded in its Report on the Constitutional Role of the Attorney General that there should be power to give directions to end prosecutions in the national interest; there is a clear case for such a power, whether it is exercised by the Directors or by the Attorney General. However, the provisions relating to giving directions to halt proceedings or investigations by the SFO give rise to particular concerns:

- The scope of the powers is too broad, since they are based on the Attorney General being "satisfied" which, in conjunction with the power to issue a certificate which is conclusive evidence of the need to make the direction, allows the Attorney General (and the Government on whose behalf the Attorney General acts) to take action in a controversial area without accountability in the courts.

- The accountability to Parliament cannot be a sufficient safeguard since the Reports to Parliament are unlikely to contain all the information relating to making the decision to halt proceedings or an investigation. (Paragraph 52)
9. We cannot comment on the draft of the protocol, since it is not yet prepared. We very much regret that the Draft Bill has been put before Parliament for consideration before a draft of such an important document is ready. The protocol should be published well before the Bill is introduced in the Autumn. (Paragraph 58)

10. Although the Directors do not have to obey the protocol in each and every case they are bound to have regard to it. The Draft Bill gives significant power to the Attorney General to dismiss a Director on the basis of failure to have regard to the duty to obey an, as yet unwritten, protocol. This leaves the position of the Directors unclear. The Directors ought to have clearer security of tenure than is apparent in the Draft Bill. (Paragraph 63)

11. We approve of the proposed reform to the Attorney General’s functions in relation to consent to prosecution. (Paragraph 65)

12. We are uncertain of the utility of the proposed abolition of the nolle prosequi, given that it is not clear by what it will be replaced. This reform is of little practical importance, given that it is so infrequently used, but it will in a small way remove some power over prosecutions from the Attorney General. (Paragraph 69)

13. It is hard to gauge what the new Annual Report would add to the existing system. Without further information we are unable to reach a firm conclusion about whether it will significantly add to the process of accountability of the Attorney General. (Paragraph 71)

14. The question of publishing the Attorney General’s legal advice is difficult. But we note the scope for enhancing public confidence if it were to become the practice to publish all or most of an advice where it is referred to in support of a political case being put forward by the Government. (Paragraph 75)

15. The Report of our predecessor Committee recommended that the provision of legal advice and legal decisions on prosecutions should rest with someone who was appointed as a career lawyer and who was not a politician while the Attorney General’s ministerial functions should continue to be exercised by a minister. The Government has not found an alternative model which would offer the same degree of assurance to the public that legal advice and decisions are genuinely independent. (Paragraph 81)

16. The Ministerial role of the Attorney General in relation to criminal justice policy should be separated from the role of legal adviser. (Paragraph 88)

17. There is no need for a specific Committee to scrutinise the Attorney General—we have that function and look forward to exercising it increasingly. (Paragraph 89)

18. The functions of the Attorney General in relation to safeguarding 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 functions could be better performed by a non-political office holder. (Paragraph 92)
19. We favour a statutory duty being placed on all ministers to observe the Rule of Law. An Attorney General (whether political or not) could still be the active conscience of Government—if the Attorney General’s advice is not taken, then that would be a political decision for which the Government would take responsibility. The Attorney General’s oath of office should be reformed to cover the duty to uphold the Rule of Law. (Paragraph 96)

20. We recommend that the Joint Committee, when it looks at the totality of the provisions of the Bill, considers whether any of them could be made more specific in order to reduce the area in which Clause 43(1) would operate. (Paragraph 99)

21. The Draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister: it gives greater power to the Executive and it does not sufficiently increase transparency. (Paragraph 106)
Draft Report (Draft Constitutional Renewal Bill (provisions relating to 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 106 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

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

Written evidence was ordered to be reported to the House for printing with the Report.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 24 June at 4.00 pm.]
 Witnesses

Tuesday 10 June 2008

Roger Smith, Director, JUSTICE, and Professor Jeffrey Jowell QC  Ev 1

Rt Hon Baroness Scotland of Asthal QC, Attorney General, and Jonathan Jones, Director General, Attorney General's Office  Ev 6

List of written evidence

1  Attorney General  Ev 15; Ev 22
2  Professor Jeffrey Jowell QC  Ev 23; Ev 25
3  Professor Anthony Bradley  Ev 26
Reports from the Constitutional Affairs (now Justice) Committee during the current Parliament

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Oral evidence

Taken before the Justice Committee
on Tuesday 10 June 2008

Members present
Mr Alan Beith, in the Chair
Mrs Siân C James
Alun Michael
Mrs Linda Riordan
Dr Alan Whitehead
Mr Virendra Sharma
Mr Andrew Turner

Witnesses: Roger Smith, Director JUSTICE, and Professor Jeffrey Jowell QC, gave evidence.

Q1 Chairman: Welcome, Mr Smith and Professor Jowell, I think it is welcome back, certainly in Mr Smith’s case and your case too, is it not?
Professor Jowell: I beg your pardon?

Q2 Chairman: Have you been before us before, I cannot remember?
Professor Jowell: No, I do not think I have.

Q3 Chairman: Mr Smith certainly has. I wonder if I could start by asking you how far the provisions in the draft Bill represent a significant change in the allocation of functions—
Roger Smith: You are not going to finish that question, are you!
Professor Jowell: I sense we shall have some time to think about it.
The Committee suspended from 4.20 pm to 4.36 pm for a division in the House.

Q4 Chairman: With apologies for the delay and the ways of the House of Commons. I am going to resume very briefly by saying: has the Government made enough of a difference to its original ideas to ensure that these changes might enhance public confidence in the operation of the functions carried out by the Attorney General?
Professor Jowell: In respect of the Attorney General’s role I do not think there has been significant change that justifies the title that this Bill is one of “Constitutional Renewal”: I think it amounts more to tinkering around the edges. I subscribe personally to the conclusions in the report of the Constitutional Affairs Committee in that respect. I would like to see an independent Attorney General as operates in quite a few countries.; some of them in the Commonwealth—Ireland, India, Cyprus, South Africa and so on—but one has to concede nevertheless that in this Bill there is less opportunity for the Attorney to interfere in the prosecutorial process, and I applaud that, but other aspects of the Bill amount, in my view, to constitutional regression, in particular the free hand that is given to the Attorney in respect of interfering on grounds of national security, without any possibility of a challenge of a court. This is true constitutional regression and in fact is contrary to the fundamental principle of the rule of law. In one other respect I think the Bill is to be welcomed: it provides for somewhat greater parliamentary accountability—an annual report and one or two other things—but in some respects I think even that reform tends to enhance the appearance of a connection between the Attorney and Parliament rather than the other way round, that the Attorney should really be attached much more to the legal system and the law and the rule of law.

Q5 Chairman: Would it not be clearer if we just set the term aside for the moment because what we are discussing is a bundle of functions some of which, it can be argued strongly, should be exercised independently and some of which do have a more obvious ministerial accountability dimension. An accountable decision to suspend something on public interest grounds sounds like a ministerial decision. Would it not be better if we identified what the functions were and whether they should be exercised regardless of what the title of the office is?
Professor Jowell: Yes quite. In my view, all those functions could, as in other countries, be performed by an independent Attorney General who is not under the shadow of the perception of political bias. Indeed, it is not only a question of public perception, I think there is a predilection that even the most independent Attorney has to fight if they are a minister—part of the Government, part of the governing party—and at the same time performing the role of an independent lawyer: it just does not work. We have had some very independent Attorneys, but I think they have had to fight against their own political inclinations in order to be so, and we have had some less independent Attorneys over the years.
Roger Smith: Generally from JUSTICE I would applaud the Government for taking on the issue of the Attorney General, but it seems to me that it has only dealt with one of the issues which is the individual prosecution powers of the Attorney, and it has rather spoiled its approach there by clauses 12 and 13 which give greater powers than the Attorney has now in relation to national security. It does not deal with the issue independence of legal advice and that is a current issue. It does not deal either, whatever you think about it, with the role of the Attorney General as one of the ministers responsible
for criminal justice policy. It deals with only one of the three major issues for me and I have problems with how it dealt with the first.

Chairman: I think this would be a good moment to move to Mr Michael.

Q6 Alun Michael: I think it follows on the Chairman’s question about the separation of powers rather than the function of the Attorney General or the role of the Attorney General. Does the Bill deal adequately with the problem of the separation of powers in respect of the duties of the Attorney General as legal adviser to the Executive?

Professor Jowell: Not in my view. The separation of powers forbids the executive branch of government from interfering for political reasons in the investigation of crimes and in decisions on whether or not to prosecute and indeed in the proffering of legal advice. I think that is really all there is to it. It may be—and it has been in the past—that the Attorney is independent enough not to be influenced by her political predilections or political associations, but there is the question of public confidence, and in the eyes of the public at one time or another there will be issues where there will be an appearance that the Attorney is not entirely independent, so I think the advice role in particular should be separated from the political role.

Q7 Alun Michael: Can I just probe this a little further because you used the term “political bias” a few moments ago and you have used the term “political associations” at this point; there is also, is there not, a question of political judgments that have to be made and there is the point where the legal and the political judgments (“political” not being a term of abuse I suggest) have to be taken? You seem to be implying almost that there is something dirty in the political as distinct from the legal but there is the point, is there not, where political and legal judgments have to be made?

Professor Jowell: Of course there are and I totally accept that and, in my view, there are many lawyers at the moment (there used not to be even perhaps a few years ago) who have had sufficient experience of politics, who are public lawyers, who have acted for government, who have been on the list of the Treasury solicitors and so on, who could perform that role, and who have the political sophistication when making those legal decisions but who are nevertheless separate from the Government, who are not seen by the public as being associated with the Government to the extent of being a Government minister and a member of the party.

Q8 Alun Michael: You are aware of the arguments that have been put forward by Professor Hazell in support of the provisions in the draft Bill based on the need to have a person carrying out the duties of Attorney General as set out in the draft Bill as being a member of one or other of the two Houses of Parliament. How would you respond to his remarks?

Professor Jowell: I think that would perpetuate the problems that we have been facing over the last few years that in the mind of the public when that person, who is a politician, who is a minister, gives advice to her Government, it may be perceived (it is not always perceived but may be) that, however independent in practice, that person is as being affected by political convenience.

Q9 Alun Michael: I am sorry but I think you are answering the question that you had already answered. My question was about accountability to the Houses of Parliament, so the argument that Professor Hazell made was that the person carrying out functions of the Attorney General as set out in the Bill, again following what the Chairman says about separating the title and the functions, ought to be accountable to Parliament and that means being accountable to one of the Houses as a Member.

Professor Jowell: Yes, this could be arranged. The Ombudsman accounts to Parliament and presents an annual report and can come before select committees from time to time to explain their position, but the Ombudsman is not a Member of Parliament or a minister and is thereby perceived, perhaps more so then the Attorney General, to be completely independent. There are ways of achieving that accountability and on matters of national security you would expect perhaps the minister concerned who tried to stop a prosecution on grounds of national security to come before Parliament and justify rather than have this intermediary quasi political figure made accountable in that way.

Q10 Alun Michael: The implication of that would be that a minister who was not legally trained, qualified and all the rest of it would be taking a judgment. It may be the right thing to do but the implication, is it not, that he would be taking the decision and accounting to Parliament for a decision not to proceed with prosecution?

Professor Jowell: I think the decision not to proceed with prosecution on grounds of national security is not a purely legal question; it is a question involving national security which is a much broader issue. On other matters such as whether an invasion of a country is legal, frankly, I do not think that is a matter that ministers ought to be answerable for. That is a matter where the courts ought to provide the answer to that particular question. There have been very few occasions over the years when ministers have been questioned about the actual legality rather than the political wisdom of a particular decision.

Q11 Chairman: On that point, there is a further aspect to that which might not arise in the case of a decision to go to war if the advice was published but which in many other instances would arise because it would not be the normal practice for the Government to publish the legal advice which the Attorney General has given, and therefore how do you have accountability to Parliament for advice which Parliament by definition is not seeing?
Q12 Alun Michael: — I am sorry, I am not sure how agreeing with the question gives an answer to it.

Professor Jowell: I will come back to it, if I may.

Q12 Alun Michael: I am sorry, I am not sure how agreeing with the question gives an answer to it.

Professor Jowell: I will come back to it, if I may.

Q13 Alun Michael: Yes, I think I struggle with this a bit because it assumes that there is a total and easy separation of the political and the legal.

Roger Smith: I think it is messy.

Q14 Alun Michael: I think you rightly said that it is messy and it is difficult to deal with. I have had the experience of receiving advice from colleagues when I was a minister, from the Attorney, and having advice, depending on the issue, from the legal advisers within a department or from Parliamentary Counsel. I think it does differ from issue to issue. I just wonder how a non-political Attorney General could provide the joined-up advice and how a non-political Attorney General could be properly accountable for a decision not to prosecute. One of the examples that has been given is a “cash for honours” type of case for example.

Professor Jowell: Can I come back to that. There are three possibilities here. First of all, the Attorney gives advice to ministers and the advice is not published, in which case the ministers could not appropriately answer questions fully and fairly about that advice. They would have to say, as they do in most cases “We have been advised that...” Secondly, in cases where the advice may be published, or published in summary form, the matter is normally so technical and inappropriate to be questioned in Parliament except by legal experts that it is a matter to leave to the courts. The third situation perhaps is when the Attorney has given (assuming an independent Attorney) advice on an important policy matter, and of course the two questions are somewhat connected, in which case in Ireland the Attorney or others giving the advice would be able to appear before a select committee such as this and answer questions as to the legal validity of their decision. Even in a forum such as this however, I do not think it is really within the institutional capacity of Members of Parliament (with all due respect; there are some very great lawyers there) to seek to be a court of law and to probe the actual details of a legal decision.

Q15 Alun Michael: A final point and I think a question to both of you really which is how do you deal with the processes which are not as straightforward as the ones you give? Simplistic cases always look beautifully tidy. Where it is a question of saying, “I want the advice,” and the advice comes and there it is, it is a set of circumstances on which you have a yes/no decision to take, it is beautifully simple and it is possible to publish the advice. Where it is a process of iteration where perhaps there is an interface between difficult legal issues to resolve and political decisions to be taken, the separation of the legal and the political becomes a lot more messy, to use Mr Smith’s terminology. Is not the separation that you are arguing for rather over-simplistic in that it is fine for the easy cases but not for the difficult ones?

Professor Jowell: With respect, no, because with a sophisticated Attorney who is not one of your political colleagues you are a) likely to get more straightforward advice and advice that is perhaps not as convenient as you might want but it keeps one on one’s toes; and b) with a sophisticated Attorney that ought to be a person, and there are many of them around now, that understands these complex interactions between politics and law. Certainly the Irish Prime Minister gets wonderful advice from his Attorney, who has been seeped in the past in the political arena and does not attract this perception of being a crony giving advice to a fellow politician.

Q16 Alun Michael: You are speaking like a newspaper now! Does Mr Smith agree with this simplistic view?

Roger Smith: JUSTICE’s position is that it is a difficult issue and that there is a range of responses the Government may make. Professor Jowell has a very clear and I think it is a purist view, but if you do not go for as pure a view as that, there may be other things that you can do. I think my view would be that I would include within the range of things that I think should be seriously considered the notion...
that the Attorney should be as independent as Professor Jowell says. If you want to go less than that and you wanted to retain some ministerial link then I think there are things you could still do. As I say, you could make some advice publishable. I think in the main it is probably not a distinction between myself and Professor Jowell. I do not think anybody is arguing that most government advice should be made public. You as a minister get advice, it seems to me, as you as a businessman in just the same way. You are entitled to have that advice and we as the public are not entitled to know it and you as parliamentarians, frankly, are not entitled to know it. I think we have got to a position where there are issues of parliamentary accountability which you are clearly alive to and there are issues of public confidence to which we are alive and you too will be alive. I think the problem at the moment is that it may well be that this confidence is particularly shaken among those who know the most about it but it is shaken and it needs more of a response than is in the Bill.

**Q17 Dr Whitehead:** Could I concentrate particularly on the question of discontinuing prosecutions and the Attorney General’s role as far as that is concerned. At present, whether public confidence is low or not, the Attorney is the arbiter of the public interest as far as continuing prosecutions are concerned. I suppose a side issue is the extent to which public confidence being low is a subjective or an objective issue as far as whether such practices continue, but the draft Bill retains the Attorney-General’s consent function but gives responsibility for discontinuing individual cases to Directors. Is that, in your view, a substantial change and is it, in your view, a welcome change?

**Professor Jowell:** Is this the number of cases functions which go to the prosecutors and away from the Attorney General?

**Q18 Dr Whitehead:** The Attorney General retains, I understand, a generalised consent function but the actual question for individual cases—

**Professor Jowell:** Yes, in individual cases it is taken away from them.

**Q19 Dr Whitehead:** —individual continuing cases now go to Directors.

**Professor Jowell:** I think this is very much along the lines that I would argue for. I think that is a welcome development and I do concede that that part of this Bill is very welcome in that it seeks to make the prosecutor independent of the Attorney and the decision will be taken outside of the ministerial ring. If I did sound for a moment as if I was a newspaper person, Mr Michael, I do apologise but, on the other hand, I do believe that one has to look at this through the eyes of some of the public because it is very largely a question of public perception in the independence of our decision-making, and the rule of law requires that confidence in our decision-making.

**Roger Smith:** Just to follow that, I think the balance of advantage has now shifted. I think there is an advantage in having an Attorney who can stand and say, “It was me; I done it.”, and for you to say, “Well, I don’t like that,” or, “Explain yourself,” or get somebody in another House to say that. Of course you generally get the Solicitor General now and he did not make the decision and that is a bit unsatisfactory at the moment, but there were advantages in individual decision-making and they are in relation to parliamentary accountability, but I think the engagement of a minister in individual decisions on cases means that we have gone too far, we have gone beyond that and that has lost public confidence, and I think it has to go. It then gets, as you are hinting, a bit messy in terms of the Director of the Serious Fraud Office takes the decision or the DPP takes the decision not to pursue a case and you as a parliamentarian want to raise a question about that. How do you do that? Then I think, as Professor Jowell has said, there are probably other fora other than you cross-questioning the Solicitor General. Actually at the current time you would cross-question the Solicitor General and not the Attorney, and it would be unfair to say you got the monkey and not the organ grinder, but you could substitute the Directors reporting to a committee such as this for their work in the year. I think that you might end up with more parliamentary accountability, oddly enough, through the delegation of the power to the Directors than you currently have through the assignment of their power to the Attorney who is likely to be in another House.

**Q20 Dr Whitehead:** Is there not conversely, though, a case so far as issues of national security are concerned something of a question mark against the idea that confidence has been lost in the role of the Attorney General? Is there not a case there—and I put this forward as an argument without necessarily saying where one should fall on it—that inevitably that is a point where somebody, presumably the Attorney General, might have the ability to halt cases without giving a full explanation and logically in a sense because it is a question of national security you are defining where national security lies and where it does not, which is not in the realm of public confidence; it is somewhere else entirely, is it not?

**Roger Smith:** One can argue that and I can see why ministers would be very concerned. I can see why ministers have inserted clauses 12 and 13 in the Bill, although they give stronger powers than are currently with the Attorney at the moment. In a way, you as parliamentarians have to take a view on where does public confidence stand at the moment and what is a satisfactory arrangement. I think again these are questions to which there is no wholly satisfactory answer, but I think that the model that we came up with was the Attorney with powers to make submissions; decision-making with the Directors. I can see there are arguments for and against that but I think, on balance, that preserves the power of Government to make appropriate submissions and realistically to get, I would have
Q21 Dr Whitehead: I note you are saying that the power of the Government to make a formal submission. Making a formal submission is no power at all; it is a supplication, is it not? Is not the submission. Making a formal submission is no power of the Government to make a formal submission. Therefore, what are they not?

Roger Smith: The DPP is not that distant from government. The three Directors are part of the Executive. They may not be part of the Legislature but they are part of the Executive, so the Government retains the power to stop the Executive; it retains the power to stop prosecutions on issues of national security.

Q22 Dr Whitehead: They are part of the unelected Executive though, are they not?

Roger Smith: Yes.

Professor Jowell: Assuming, which I am willing to assume, that in extreme cases the Government must have the power to stop certain prosecutions, assuming that—and there are many people who think that that should not be the case but I am willing to accept that there should be—there should be certain conditions: firstly, that kind of decision should be amenable to judicial review. However, section 13 of this Bill seeks to preclude judicial review by saying that these decisions, in effect, are final and conclusive. This is what is known as an "ouster" clause which is really contrary to every tenet of the rule of law which requires access to courts to challenge ministerial decisions, so it is decisions that can be made but is not entirely exempt from scrutiny and the scrutiny really ought to be able to take place in the courts. When this has happened in the past, and the courts are increasingly over the years looking at decisions like that, they adopt a fairly wide margin of discretion to the minister—of course they do—but they do insist that he acts not simply when it is desirable or convenient, or for an improper motive, such as keeping the party in power—and I am not saying this has ever been done but things like that are not beyond our imagination and that is why we have courts to scrutinise them—and insists that they are necessary and not simply desirable under the test of proportionality. This is done every day in respect of national security cases. Yes, even if the Attorney can intervene on matters of national security to stop a prosecution, there should be the possibility, I would submit, of judicial review. That seems absolutely a constitutional fundamental which is seriously violated in section 13 of this Bill.

Q23 Mrs James: First of all, I do apologise for being late and as I returned late I may have missed your earlier responses and you may already have covered a little bit of the area that I am going to ask you about. You have touched upon the role of the Attorney General but do you think that the Attorney General should give all ministerial responsibility for criminal justice policy? Is that function inconsistent with the legal functions of the role?

Roger Smith: My position is slightly more flexible I think than Professor Jowell's. I think probably it is ideal for the purist—

Professor Jowell: I am flexible!

Roger Smith: I think that the legal adviser role is the difficult one to combine with the criminal justice role, so I could entirely see a combination of a post—and heaven knows what you would call it—which combined superintendence responsibility for the prosecution service with a general role in relation to criminal justice, and the legal adviser role, which is not necessarily linked to those at all, could be separate and could be ministerial or not, so I think it could be combined. I think there are difficulties when the legal adviser is also, effectively, a minister in the Government with responsibilities for the delivery of policy because then you potentially have a conflict between the person who should be giving the Government legal advice and someone who is running things. In some ways your adviser should be means-orientated and a minister, understandably, is ends-orientated and I think that potentially becomes too much of a conflict.

Professor Jowell: In some respects I would agree with that. I think that criminal justice policy is largely a matter for a person who is responsible for policy-making, which is the relevant minister, whether it is the Home Secretary or the Justice Minister. However, the Attorney as the legal adviser to Government, and with a role in prosecutions, may well have something to say about the delivery of policy, and I think that an independent Attorney could also contribute to that discussion from his perspective: “This is what happens in prosecutions as I know them. This is what happens in the kind of advice that I have given if you are seeking to increase the penalties for knife crimes so many times, this may offend some of the international conventions in respect to the rights of the child,” that kind of thing. Thus the Attorney might well have a role here in the same way as the Chief Justice might have a role to be consulted in this matter but, as is suggested under the protocol, that is only alluded to and in so far as it is a suggestion that the Attorney has a policy-making role in respect of criminal justice, I think that is really not the kind of role that an independent Attorney ought really to have, although his experience ought to be valuable in the policy-making process. In that sense I think I am flexible.

Q24 Mrs James: So it is important to have a voice in the formulation of criminal justice policy?

Roger Smith: Whenever superintends the prosecution services, whichever minister it is, whatever arrangements you have, has a right to say, “My
Government will prioritise this type of prosecution”—whatever it is, it could be domestic violence or corporate crime—“We will concentrate on this.” That seems a legitimate political decision about the allocation of resources and priorities which is ministerial, so anybody who is in charge of superintendence necessarily is involved with that. The extent to which you want to go beyond that—and of course the current Government has brought the Attorney into criminal justice more widely—I think that is a bit more problematic but is just about acceptable. However, it raises problems. The problem is the more you are driven into the policy, then the more there is the potential conflict between the legal adviser role.

Q25 Mrs James: And how you keep the walls up between those two roles and the interaction?

Roger Smith: Yes, so it is about the articulation of powers, how you articulate these different interests.

Q26 Mrs James: My next question is for Professor Jowell and it is on the oath of office. You have laid great emphasis on the need to change the oath. Why do you consider that important?

Professor Jowell: I consider it important first of all because the present oath has an archaic ring about it. The Attorney declares that she will serve the Queen “after my cunning” and so on, but that is not the main reason. The main reason would be so that it makes emphatically clear that her role is to uphold the rule of law and to act in the public interest, as opposed to a party political interest which she gives the impression sometimes of acting in because she is a minister of the Government. That is some way towards that separation. I think oaths have limited importance but I think that is a start. I would prefer to have a statutory duty in both those respects.

Q27 Chairman: Just on one of the other points that you raised in your memorandum, you expressed concern about the tenure of the Directors and the role of the Attorney; is that because of a change that is in this Bill?

Professor Jowell: Yes because of the change. Section 3 provides for the protocol and then provides that the protocol may include various matters and that the Directors and the Attorney must “have regard to the protocol” and then we get sections 4 to 6 which provide that “the Attorney may remove the Directors from office if he is satisfied that they are unable, unfit or unwilling to carry out their functions.” Then it goes on to define “unfit” as “failing to have regard to the duty to obey the protocol”. We do not know what could be in the protocol but I put that against the Council of Europe’s recommendations, which I cite, on the role of public prosecutors in the criminal justice system in particular, which require all prosecutors to have fairly secure tenure, not quite perhaps as secure as a judge’s but moving in that direction, and it allows only for their summary dismissal.

Q28 Chairman: Does not a comparable power exist at present within the Executive to remove the Director on grounds similarly expressed?

Professor Jowell: I am not absolutely sure what the position is in respect of removal at the moment. I think it would certainly be possible to. It is certainly new in the sense that it refers to the protocol.

Q29 Chairman: That is the change, is it?

Professor Jowell: Yes, that is right, and failure to take into account the protocol. Goodness knows what that may contain. Goodness knows what that phrase means and it gives an easy opportunity for an Attorney to dismiss a prosecutor. It is almost equivalent to the Prime Minister asking for the resignation of a minister, in effect dismissing him; he has total discretion to do so.

Q30 Chairman: They do not have to make any conditions.

Professor Jowell: No, and this is a kind of similar situation that we do not want to get into because I think all the Council of Europe standards insist that the prosecutor has a degree of security of tenure from the Attorney, or any other minister, more or less but not equivalent to that of a judge.

Roger Smith: I would just like to come back to the end of Professor Jowell’s answer to Mrs James—

Q31 Chairman: Could you do so rather briefly because the Attorney is waiting for us to question her.

Roger Smith: Because I think there should be a statutory duty for the Attorney to act in accordance with the rule of law as there is for the Secretary of State for Justice.

Chairman: Thank you very much indeed. We are most grateful to you both and apologies for the earlier interruption.

Witnesses: Rt Hon Baroness Scotland of Asthal QC, a Member of the House of Lords, Attorney General and Jonathan Jones, Director General, Attorney General’s Office, gave evidence.

Q32 Chairman: Attorney General and Mr Jones, welcome. We are very glad to have you with us this afternoon. Do all holders of the post of Attorney General tend to move towards the view that the functions they exercise should all be kept in the hands of themselves and future Attorneys General or have you engaged in an analysis which starts from the question, “What powers have I got and what kind of individual should be exercising those powers”?

Baroness Scotland of Asthal: I think certainly when I was entrusted with this consultation we were

deal of criticism and debate about splitting up the Ministry of Justice working hand in glove together. Having an Attorney General whose main focus is going to be on prosecutorial authority and the roles that they play is very important. Certainly, if you look at the improvements that we have been able to make in the criminal justice system as a whole, those improvements have been predicated upon the Ministry of Justice working hand in glove with the Home Office and working with us as the prosecutors, trying to make the system have the most integrity that we can cull from the opportunities that we have before us. It is that experience which has really influenced the role that the Attorney will play and has played in the recent past which is to the benefit of the citizen.

Q33 Mrs James: Why should the Attorney General not give up any ministerial responsibility for criminal policy? Is this function consistent with the legal functions of the Attorney General?

Baroness Scotland of Asthal: I think it is. What we did was we looked very much as to the role that the Attorney has played historically but also, particularly, the role that the Attorney has played most recently. You know there was the Lord Justice Auld Review in terms of whether the criminal justice system that we had was the best it could be and you remember that at that stage Auld was saying that we were not operating as a criminal justice system but were acting in silos. The whole point was to make sure that each part of the system worked in a better and conjoined way. It is a bit like having a stool which has three legs and if one of the legs is not operating properly you tend to fall over. What has happened, certainly since 2003 with the creation of the National Criminal Justice Board and now the Crime and Reduction Board that we have introduced, is we have tried to make better sense of the criminal justice system for the citizen and look at it through their eyes and think how we can work together. Having an Attorney General whose main focus is going to be on prosecutorial authority and the roles that they play is very important. Certainly, if you look at the improvements that we have been able to make in the criminal justice system as a whole, those improvements have been predicated upon the Ministry of Justice working hand in glove with the Home Office and working with us as the prosecutors, trying to make the system have the most integrity that we can cull from the opportunities that we have before us. It is that experience which has really influenced the role that the Attorney will play and has played in the recent past which is to the benefit of the citizen.

Q34 Mrs James: We know there has been a great deal of criticism and debate about splitting up the role of the Attorney General.

Baroness Scotland of Asthal: Yes.

Q35 Mrs James: Why not give the responsibility to a junior minister in the Ministry of Justice, for example, where we would be able to ensure those areas of responsibility?

Baroness Scotland of Asthal: I think because the reality is there is still a degree of tension between the different roles and it is creative and appropriate tension. For example, the prosecutor will have to be focused on two issues, firstly whether there are sufficient facts to justify a prosecution and, secondly, whether it is in the public interest to prosecute. It is important that separate and distinct balance be retained, and I just give you an example. We changed the role of the prosecutor to make the prosecutor the person who is responsible for making the charging decision. That will be a position which may not be entirely comfortable always for the other parts of the system. Having someone separately who will give voice to the important role that the prosecutor will have to have on behalf of the individual citizen that these matters will be pursued, I think, is really important. It has to be, I would respectfully suggest, of equal status to the other parts of the system which are going to be looked at. The police, of course, are going to be well catered for in terms of the Home Office. The prisons, probation and, indeed, the courts have a strong voice coming out of the MoJ. The prosecuting voice, which is a separate and distinct voice, has to have its place too if that three-legged stool is to remain balanced.

Q36 Chairman: Just for clarity, what you are arguing there is that the role of the superintendence of prosecutions which you exercise is a ministerial role.

Baroness Scotland of Asthal: Yes.

Q37 Chairman: Whether exercised by you or anybody else, the person doing it obviously has a contribution to make to the criminal justice policy?

Baroness Scotland of Asthal: I think that is to conflate, if I may respectfully say so, the policy and the independent role that the Attorney discharges in relation to superintendence and supervision of the prosecutor qua prosecutor. It is a separate role. The distinction when I am talking about the three-legged stool is when it comes to criminal justice policy and the role that the prosecutor will play in that system. In the system we have changed, as you know, the role of the prosecutor. Before the prosecutor was not allowed to have direct contact with the individual victim and witness, they were not allowed to consult in that way—

Q38 Chairman: I think you are getting beyond the point I am trying to get you to address which is to just clarify—I am not trying to disagree with you—that you define the role you currently exercise as the person who superintends overall the prosecution services.

Baroness Scotland of Asthal: It is.
Baroness Scotland of Asthal: Yes, it is.

Q40 Chairman: And it feeds into the criminal justice policy.
Baroness Scotland of Asthal: Yes.

Q41 Chairman: You cannot say the same, can you, about the person who gives the Government its legal advice? That is surely a wholly separate function?
Baroness Scotland of Asthal: It is a separate function. We have got three different functions. We have got the role of the legal adviser, the role of the superintendent, supervisor of prosecutions and the role, if you like, of the criminal justice element minister who develops policy. There is a real nexus between the last two because, of course, the different prosecutorial authorities are all superintended by the Attorney General and you would sometimes have a difference of view between the CPS, the RCPO, the SFO and the other prosecutors who are not supervised on a statutory basis by the Attorney General. All of them prosecute in the name of the Crown. If you have separate Directors exercising their discretion independently there is an opportunity for a bit of dissonance between what they do, how they do it and when they do it. There is an opportunity, and I have certainly found this clearly since having taken over the role of Attorney, that to manage sometimes the tension between those different roles is quite important on behalf of the individual citizen so you get continuity and consistency right the way through. The different Directors find it useful to have the Attorney as a conduit to have those discussions in a way that makes things more easily resolvable.

Q42 Mrs James: Just as a follow-on to my original question, you talked about the three-legged stool model, are you an equal partner with the Secretaries of State for Justice and Home Affairs in the formulation of criminal justice policy? What do you see the added-value that you bring to it?
Baroness Scotland of Asthal: Firstly, you will know that we created the National Criminal Justice Board and the Office of Criminal Justice Reform in order to create a funnel through which all the different policies will go so they make better sense to the people on the ground. What was happening, you may recall, in the past, was sometimes perfectly sound decisions were made by the Lord Chancellor in the Department that was then DCA and before that LCD, perfectly sound judgments were made by the Home Office and perfectly sound judgments were made by the Attorney. Regrettably, when you put them all together on the practitioners’ table they did not always absolutely interact in a way that made them easy to apply. The whole point of creating the Office of Criminal Justice Reform was to create that funnel so you would get that synergy and that clarity. I have unfortunately come to understand that not everyone always understands the role of a prosecutor and sometimes decisions will be made without real appreciation of the difference there is in terms of how they operate and what can be done and what cannot be done. It is very important for there to be a separate voice which can clearly explain that and champion it when it is necessary. For example, I do think that allowing prosecutors to be involved in the charging part of the system has brought us real improvements, real opportunities in terms of enhanced diversity and good practice, real acuity, sharpness, when it comes to getting the right charge for the right offence at the right time and at the earliest point. That has been a real improvement in our system and I think it would have been more difficult to achieve if you had not had the then Attorney focusing very sharply on it. Remember that my old role used to be as Minister of State for Criminal Justice and Offender Management in the Home Office so I saw it very much from the other side of the fence and it was very, very useful having the Attorney there to push certain issues, sometimes with the prosecutors, to help them better understand how they could help the system work better. One of the things I think has been a real success story is how you see now the prosecutors and the police and the courts working together through the local criminal justice board to develop and deliver better quality justice in the local areas. Those improvements would not have been deliverable without all three pushing the different participants to work together, to collaborate and to improve their performance.

Q43 Chairman: We need to move on to some other aspects of this complex issue. Why do you attend Cabinet on a regular basis, other than to give legal advice to the Cabinet when needed to do so, given that that level of involvement in Cabinet underlines the public impression that you are very much part of the political executive?
Baroness Scotland of Asthal: The first thing to say is, of course, who attends Cabinet is very much within the gift of the prime minister of the day. You will appreciate, Chairman, that I am not a full member of Cabinet and, indeed, my predecessors for the last significant period have not been either; certainly Lord Goldsmith was not. So it is for the Prime Minister to decide whether he wishes the Attorney to attend and it is right to say that I have been invited to attend Cabinet on each occasion. I have not always, as you may know, been able to take up that invitation because there have been times when I have simply, because of the discharge of my other duties, not been able to do so, if I am in Iraq, if I am sent off to do some other issue. But it is clear that if the Prime Minister ever wished me specifically to attend a Cabinet meeting I would do so. There are two schools of thought, as you will have seen from the consultation about this issue. The first is that traditionally an Attorney has not attended regularly but has only attended when called upon to do so to talk about a specific issue. There is another school of thought which says the best opportunity to give advice is early before things have crystallised to such a stage when pertinent advice might have stopped it going in the wrong direction and, therefore, because one does not know precisely when these issues are going to turn up it is prudent to have—
Q44 Chairman: You should always have your lawyer in the cupboard like the old bank manager advert who would just pop out.

Baroness Scotland of Asthal: Just in case. There is also another issue, of course. Because the Attorney now discharges the tripartite ministerial role in criminal justice, because criminal justice issues have been of real and acute interest for quite some time, there will be often opportunities to get the benefit of that advice.

Q45 Chairman: You are making a jump there, you are proceeding from saying because the superintendence role is so relevant to many criminal justice policy decisions therefore the Government’s legal adviser, who also happens at the moment to exercise both roles, has to sit through all Cabinet meetings, notwithstanding the damaging public effect this might have.

Baroness Scotland of Asthal: I hear what is said about the damaging public effect. I think there has been a big debate about whether that is or is not correct. You will know from listening to everyone that one of the delights of this issue is that you have as many views as people who expressly give you information. Certainly when we were undertaking this consultation there were many, many, many different permutations of what should happen and the conclusion that we have come to in the White Paper is that it should be subject to the prime minister of the day being able to request an Attorney. So if the prime minister of the day decided that he did not particularly wish to benefit from an Attorney’s presence then he would be open to say, “I do not wish the Attorney to attend the following Cabinet meetings”. Our current Prime Minister has come to the view that he would quite like me to attend on a regular basis and obviously for so long as that is his desire I will, as much as I can seek to comply, albeit I have to be clear with this Committee that it is not always possible for me to go and I have not always gone and there have been occasions when I have not gone for a number of weeks in succession. I would clearly go if my Prime Minister specifically asked me to be there, notwithstanding my other duties, of course I would go.

Q46 Alun Michael: There has been a lot of emphasis on the need for the Attorney General to be a parliamentarian. Why is that important?

Baroness Scotland of Asthal: I think because of parliamentary accountability. All of us who are in Parliament would have seen the occasions when Members of either House have been acutely concerned about an issue and what people really want is to be able to see, if you like, the whites of the Attorney or the Solicitor General’s eyes and, frankly, to grill them, if necessary, within an inch of their lives. My experience is parliamentarians enjoy nothing more and they really wish people to be accountable for what they do and do not do. The question which kept on reverberating through our consultation was if the Attorney or the Solicitor General is not a minister, how does the House, or either House, get the level of accountability that they currently have now. What we all want is reform which would enhance, improve and sharpen accountability, not a reform which would dull or diminish accountability.

Q47 Chairman: You could be sitting in that chair answering the same questions if you were not a minister or a Member of either House but were the Government’s legal adviser.

Baroness Scotland of Asthal: Absolutely, and I come before this Committee. What I could not do is sneak on to the front bench and be roasted. Lots of people quite relish the opportunity to do that to the Solicitor General and, indeed, to the Attorney General because they believe it is an important part of parliamentary accountability.

Q48 Alun Michael: Can we explore that a little further though. There are two Houses, the form of accountability is different in the two Houses. For instance, the form of grilling that you get in the House of Lords is regarded in some cases as rather gentler, perhaps in some cases it is slightly more professional in some aspects and by being in the House of Lords you escape the strength of political scrutiny in the House of Commons, for instance. Does it matter which House it is that you are accounting to?

Baroness Scotland of Asthal: I think the Solicitor General who appears before the Commons has, as you know, a regular slot and that accountability of the law officers is certainly pressed very hard in that House. It is also pressed very hard in the House of Lords. We have varied, have we not, from time to time, the Attorney has been in the Commons and the Solicitor General has been in the House of Lords. Certainly Charlie Faulkner was the Solicitor General in the House of Lords—

Q49 Alun Michael: John Morris was in the Commons.

Baroness Scotland of Asthal: Exactly. Then the situation changed under Gareth Williams when Gareth became the Attorney. We have had Gareth then Peter Goldsmith and now me as Attorney General in the House of Lords and we have had Mike O’Brien and now Vera Baird in the Commons. But that, of course, can change at any time dependent on the individual who the prime minister of the day alights upon.

Q50 Alun Michael: Could we go back though to the question of whether there could be equal parliamentary scrutiny which has been argued to the Committee in other evidence through other mechanisms. For instance, the Irish Attorney General reports via the Public Accounts Committee and in Scotland there is the system of the Lord Advocate who accounts for the Scottish Parliament.

Baroness Scotland of Asthal: I think we need to be really careful when we compare them. Let us just take the Lord Advocate in Scotland. The Lord Advocate is the head of the prosecutorial authority. She directs and is directly responsible for the prosecution. She is also a minister and she attends
the House and can be asked questions in the House and, in addition, if the Executive fall then the Lord Advocate falls with the Executive. I am not clear when one looks at that model which aspect of the model it is suggested that we should adopt. Of course, the nature and the extent of the jurisdiction which the Lord Advocate covers is very, very different from that covered by us.

Q51 Alun Michael: With respect, it is difficult to compare apples with pears, which is what we end up doing. In Wales you have got the situation where originally it was the appointment of a senior QC and now it has been moved to being a member of the cabinet. Virtually every pattern seems to be different.

Baroness Scotland of Asthal: Absolutely.

Q52 Alun Michael: My question is about, is it not possible to design a system which would allow the full accountability, proper scrutiny and the roasting of the incumbent without them being a Member of Parliament or a Minister?

Baroness Scotland of Asthal: That was a question that we asked and we asked those who were making proposals because we were absolutely open. They may have come forward with a different construct before this Committee, but no-one has suggested a construct which improves upon that which we currently have. Certainly when we were looking at the options, we were looking at options which would improve, enhance and sharpen as opposed to simply substitute or questionably produce a lower level of scrutiny.

Q53 Alun Michael: There is also the question of accountability for legal advice. Does accountability not lie with the government in terms of what it does with the advice as distinct from what the advice is?

Baroness Scotland of Asthal: I think there is, of course there is, accountability for those issues by the government but it does not take away the need for the government of the day to have its own law officers giving it advice and various secretaries of state feeling able to come to an Attorney for that advice with confidence that they can discuss any of those issues and get the most robust advice necessary.

Q54 Alun Michael: Could we look at another aspect of accountability then. Under the proposals there will be powers exercised in the national interest. How will that be scrutinised? Will the courts be able to examine the decisions made in the national interest?

Baroness Scotland of Asthal: The first thing to say, of course, as you have seen, is we have a procedure by which a certificate would have to be granted and also that the Attorney of the day would have to come before Parliament and declare that this had been done and obviously give some explanation in relation to why it was done. That is, of course, a very important opportunity for scrutiny. There are, of course, issues about the substance of what will be undertaken but it has very much been our experience, and, indeed, the courts have said so in relation to issues of national interest, that is very much a matter the courts have said in the past for government and the democratically-elected executive to determine.

Q55 Alun Michael: Then the accountability for the Crown Prosecution Service and other prosecution agencies. Will the Attorney General under the proposals accept parliamentary questions on matters relating to the prosecution agencies? If parliamentary accountability is still with the Attorney General then what will have changed?

Baroness Scotland of Asthal: First of all, we will have, as you will know, created a protocol. The protocol will set out the basis upon which the relationship between the Attorney General and the prosecution authorities will be managed. That will be laid before Parliament, be available for parliamentarians and the public to scrutinise and, therefore, it will be possible for parliamentarians to hold the Attorney more accurately, more effectively to account because you will have set out there that which the prosecutor should be doing, that which the Attorney should be doing. We are aware that there have been a number of MPs and Members of the Other Place, the House of Lords, who have been concerned about the way in which prosecutions have been addressed and it has been the Attorney or the Solicitor General who have had to answer those issues. One of the quite interesting things that I have come to really understand since becoming the Attorney General is that very, very few people actually understand what the Attorney General and Solicitor General do.

Q56 Chairman: We hope to assist in that process but I have been warned that we might have a vote in our House fairly soon, there are therefore a number of issues I want to move to quite quickly just to make sure that we do not omit them because we may not be able to resume after that vote.

Baroness Scotland of Asthal: The short answer to Alun’s question is, yes, the Attorney and the Solicitor General will continue to be accountable and I believe that the basis, the openness and transparency that were produced by virtue of having a protocol should make it easier for people to do that than it is now.

Q57 Dr Whitehead: What power do you have at the moment to stop investigations by the Serious Fraud Office?

Baroness Scotland of Asthal: The Attorney has a power in relation to all prosecutions.

Q58 Chairman: Investigations was the question.

Baroness Scotland of Asthal: No, we do not direct investigations at all.

Jonathan Jones: This is the SFO, sorry to clarify.

Q59 Dr Whitehead: Yes, my direct question was what power do you have in terms of investigations by the SFO to in any way stop them or halt their advance?
Jonathan Jones: Successive Attorneys have taken the view that they have power of direction over all the prosecuting authorities which they superintend as part of the superintendence role and that I think we believe would include, as far as the SFO is concerned, power of direction in relation to investigations, but it has never been exercised so it has never been tested.

Q60 Chairman: Why does it have to be included in the draft Bill in a specific form if you say it exists already?

Baroness Scotland of Asthal: One of the things we are doing is changing the power of direction. We are saying that in individual cases the Attorney will no longer exercise the power of direction, save and except for those cases which relate to national security. That is a change. At the moment the Attorney has the power to direct in relation to all prosecutions. It is a power which has not been exercised but it is a power that exists nonetheless. Therefore, in terms of if there is or were to be a direct conflict between a Director of the prosecution authorities and the Attorney whose view would prevail, then the view that would prevail would be the Attorney’s view and that has been clearly set out in a number of cases, and in particular in 1998. This issue came up and it was made clear, it was Sir Iain Glidewell who made it very clear, that the final arbiter would be the Attorney General.

Q61 Dr Whitehead: When you say that you are changing the general powers of direction, is it not the case that actually there is in the draft legislation a specifically different provision relating to the direction of the Attorney General in relation to the SFO and that is a provision for directing a Director to discontinue an investigation, not just a prosecution, which is quite different from that which is within the responsibility of other Directors? Is that not a very specific difference that the draft legislation makes?

Baroness Scotland of Asthal: I do not think it is. What it is doing is making the power of direction. You will know that the SFO have a different function because the SFO both investigate and prosecute, the CPS prosecute and the investigation is undertaken by the police.

Q62 Chairman: That is precisely the point I want you to clarify and Dr Whitehead does too, which is you cannot stop the police from investigating a matter. You can decide at the end of the day prosecution is not in the public interest. What we are exploring here is the fact that you appear to be specifying in the Bill the power to stop the SFO doing something in relation to fraud which you could not stop for any other offence that the police were investigating.

Baroness Scotland of Asthal: That is because of the nature of the Serious Fraud Office, not because of any other factor. It is because of the way in which we have constructed the function that they perform.

Q63 Chairman: The outcome is that you can stop a fraud investigation but you could not stop an investigation that was for theft, for example.

Baroness Scotland of Asthal: We have to look at the basis upon which that power or direction would be operated. It is on a very, very narrow basis of national security and no other. Also, just to reassure the Committee, we believe that will be very, very rarely operated. Even in a case such as BAE it was not a decision taken by the Attorney, it was a decision taken by the Director himself.

Q64 Chairman: I am sorry to be able to relieve you of an obligation here, but the matter is now sub judice so the individual case is something we cannot explore at the moment.

Baroness Scotland of Asthal: Absolutely.

Jonathan Jones: May I just add a comment on that last point to be clear. The position at the moment is that SFO investigations are in a different position, if you like, from other investigations because they are already undertaken by an organisation that is under the superintendence of the Attorney General, whereas police investigations plainly are not. To that extent there is already a distinction and what we have done in the Bill is simply provide for the power of direction to be coextensive with that power of superintendence.

Q65 Chairman: The outcome is that the situation is different depending on what offence is being investigated as such a way as might imperil, let us say, our security relations with another country.

Jonathan Jones: That is true, but equally, as I say, the investigation of serious fraud is undertaken on a different statutory basis from the investigation of other types of offence.

Q66 Mr Turner: I am sorry, I may have misunderstood, but you seemed to be saying that the right to stop an investigation by the SFO was allowed whilst in every other case they were only decided that the police should investigate, is that correct?

Baroness Scotland of Asthal: We have got two different structures. In relation to prosecutions undertaken by the CPS, they have no purchase on the investigative part of these offences, that will be undertaken by the police. Indeed, we have slightly changed the situation inasmuch as now that the prosecutors are responsible for charging offences they have a greater engagement. Traditionally, and what remains is, there is a total separation of the two, and they will deal with the majority of prosecutions. The CPS deal with about 1.5 million different offences. The Serious Fraud Office deal with a very tightly focused aspect of fraud because not all fraud is done by the Serious Fraud Office, some of it will be done by the RCPO and some of it might actually be encompassed in the work that SOCA does. The SFO have a specific focus on serious fraud. When the Serious Fraud Office was created they subsumed within that office both the investigative portfolio and the prosecutorial portfolio, so those two are currently conjoined.
Whereas the Attorney does not have a purchase on the investigative part of the CPS role or the other investigations which are done by the police, the Attorney has had traditionally, from the inception, superintendence and supervision of all the function of the Serious Fraud Office. That is the difference.

Q67 Mr Turner: The inception having been when? Baroness Scotland of Asthal: I am just trying to think.

Jonathan Jones: The Criminal Justice Act 1987. It was 1988 that it was set up.

Q68 Mr Turner: What happened before then? Baroness Scotland of Asthal: Before then there was not a Serious Fraud Office.

Q69 Mr Turner: So what happened? Jonathan Jones: Serious fraud would have been investigated by the police and prosecuted by the CPS.

Chairman: Let us get the questioning back to Dr Whitehead.

Q70 Dr Whitehead: If, as you are saying, in a sense you are regularising the question of the power of direction, and that is the suggestion that is coming over to me in terms of what is happening in the draft legislation, how would any Director be able to decline to follow, or feel that they might be able to decline to follow, any policy relating to criminal prosecutions that they feel are inappropriate, or would they simply have to get on with it? Baroness Scotland of Asthal: In relation to all areas other than national security, the Director will, for the first time, become the final arbiter as to whether prosecution will or will not take place. At the moment the Attorney has the power, albeit it has not been used, to direct a Director in any form, so that is the RCPo, the SFO or the CPS, in relation to an individual case. That is the current position. We are proposing to remove that power of direction in all areas in relation to individual cases save and except in relation to national security where we are preserving the power to direct. What is the Attorney's view because the Attorney has the power to direct in relation to all of them. In that position I am in a similar position now to the position that Eilish Angiolini as Lord Advocate is in Scotland. We can do it all ways.

Q71 Mr Turner: Does this mean SFO as well or not? Baroness Scotland of Asthal: Yes, it does.

Q72 Mr Turner: So SFO are prosecutions in order to protect national security? Baroness Scotland of Asthal: Yes.

Q73 Mr Turner: But SFO is not always national security. Baroness Scotland of Asthal: No, absolutely.

Q74 Mr Turner: So you are including it as “in addition to”? Baroness Scotland of Asthal: No, no. In relation to all prosecutions at the moment of whatever nature the Attorney General has the power to direct, all of them: national interest, not national interest, from taking and driving away a vehicle to murder, to any crime of whatsoever nature. In practice, of the 1.5 million prosecutions that are dealt with by the CPS very, very few indeed ever get on to the desk of the Director, much less on to the desk of the Attorney General. In practice, it is very rare for an Attorney to become involved in any of those cases. However, if an Attorney did become involved in any of those cases of any species, of any nature, and there was a difference of view between a Director and an Attorney then the view that would prevail, if there ever was that conflict, would always be the Attorney’s view because the Attorney has the power to direct in relation to all of them. In that position I am in a similar position now to the position that Eilish Angiolini as Lord Advocate is in Scotland. We can do it all ways.

Q75 Chairman: And that you are changing except in respect of national security? Baroness Scotland of Asthal: Yes. The truth is historically, maybe because of the size, the Attorneys have not directed.

Chairman: I must press on because there are aspects of this we do need to explore further.

Q76 Dr Whitehead: If we come to the question of national security, the position is that you will effectively, by the draft Bill, remove your powers of direction subject to what you have mentioned as far as every service is concerned. Why is it that as far as national security is concerned you could not, as has been suggested, perhaps make a submission to the relevant Director in an appropriate case that prosecution might be halted? Why is it the case that there is a different consideration than seems to be the case elsewhere? Baroness Scotland of Asthal: The first thing to say is that in practice it is likely that the Director will be intimately involved in all these decisions and, indeed, we are really looking at the situation where there may be a dissonance, a disagreement, between the Attorney and the Director as to national security implications. In those circumstances, bearing in mind we are getting rid of the power to direct in all other areas, we thought it was right, fair, proper and, quite frankly, honest to say in relation to this one area we are retaining the power to direct. What is still likely to happen is the Director is likely to be intimately involved in it, there is likely still to be consultation and considerations, and I think it will be very rare for an Attorney to have to utilise this power. We think it is only right and proper if we are expunging the right in relation to all other areas to say that when it comes to national security, because of the importance of that issue to our country and because the fundamental nature of government is to make the safety and security of our citizens of primary importance, that is what governments do, in that one area we should preserve the Attorney’s power to direct.

Q77 Chairman: Why the Attorney? The Attorney is not a security expert. The people who will be advancing the security arguments will be the Prime
Minister, possibly the Foreign Secretary, possibly the Home Secretary. It will be they who make precisely the judgment you have just identified.

Baroness Scotland of Asthal: The reason why it should be the Attorney is the Attorney is the independent guardian of the public interest and, if we have the oath, the rule of law, so it is the one minister, if one likes, in government who has a duty to step outside of what government of the day necessarily would wish to do and ask the question on behalf of the public, “Is this in the public interest that this position be taken?” You will know, Chairman, that we currently have the Shawcross exercise. Of course, the Attorney would have to take into consideration the views of other members of Cabinet in relation to what should be done, of course that would happen, but at the end of the day it would have to be an independent exercise of discretion in the public interest by the person in government who has been entrusted with being guardian of the public interest and the rule of law. You will know that the role of the Lord Chancellor has changed significantly but it is not proposed in the White Paper for us to change that aspect of the Attorney’s role.

Q78 Dr Whitehead: Could not that entire description fit the phrase, “and therefore the Attorney General could take court action in the event that one of the services, as far as national interest is concerned, proves to be acting unreasonably”?

Baroness Scotland of Asthal: No, because it is of critical importance that the government of the day that has been entrusted with exercising the duty and responsibility for preserving the national security, and thereby the national interest, should be in a position to do so through the most appropriate minister exercising an independent view as the guardian of the public interest in government to make those decisions.

Q79 Chairman: So you would say to the Prime Minister or the Foreign Secretary, “I, as independent Attorney General, have looked at this matter and I do not think the national security issue is quite as pressing as you suggest or proceeding with this case would have the consequences you are worried about and, therefore, I conclude as Attorney General, having regard to the public interest, that your wish to end this prosecution should not be met”?  

Baroness Scotland of Asthal: I think it is of absolute critical importance that the Attorney of the day makes that decision independently in view of the responsibility that an Attorney would have in relation to the public interest.

Q80 Chairman: I asked you if that was a serious possibility, that you could see yourself turning to the Prime Minister, who tells you whether you can go to Cabinet or not, and saying, “No, Prime Minister, I have looked at the security considerations and my judgment is that they are not as important as you think they are, or the consequence is not as severe, therefore in the public interest I have decided to bring this prosecution or investigation to an end”.

Baroness Scotland of Asthal: It is absolutely, and I think this Committee has to understand this, the nature of an Attorney’s role and that is why Francis Bacon said, “It is the most painfullest job in the realm and an Attorney has to be ready to stand stalwart for the rule of law and stalwart in relation to what the public interest is”. If we are absolutely frank, it is going to be clear that, of course, any Attorney would have to take into account the collective government view of the national interest and the advantage is that the Attorney would have access to all the information at the highest possible level to inform that judgment. At the end of the day, Chairman, that is why you have an Attorney.

Q81 Chairman: But if the rule of law is so fundamental to this decision, why do Clauses 12 and 13 contain an ouster clause to prevent judicial review of this decision?

Baroness Scotland of Asthal: Because, and I think you will have seen the law in relation to this, the courts understand that this is not a question of pure law, it is a question of judgment as to what is in the national interest. If it assists, I am very happy to remind the Committee what was said in relation to this. The court said this: “The question of whether something is in the interests of national security is not a question of law, it is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision, they are entrusted to the Executive”. That was Lord Hoffmann.

Q82 Chairman: I am very familiar with that judgment, but does that not underline that the courts, if this ouster clause was not there, would not lightly trespass on the area of judgment about national security, but would exercise any discretion about whether to allow judicial review to pursue any further in full recognition of that fact, so why do you need to preclude judicial review in this way, which has been described by one critic as “brazenly seeking to evade the recent developments of constitutional principle”?

Baroness Scotland of Asthal: I do not think that you do because, of course, any Attorney taking such a decision would have to take that decision on a reasonable basis and not do so capriciously or irrationally and, therefore, of course it would be for the courts to determine whether in those circumstances the process which was adopted by the Attorney in formulating the decision was or was not subject to judicial review. In terms of the certification we are very interested to hear, for instance, what this Committee may say about the granting of a certificate. In looking at this issue
again, and I say this from my own point of view. I think the provision in the draft Bill suggests that a minister should be able to take that decision. My own view, and the Government’s view, may well be that it would be preferable to make it clear that that would be a decision made not by a secretary of state but, in fact, by the Attorney.

**Q83 Chairman:** That is the Attorney deciding whether to exercise ouster for the Attorney’s own exercise of power.

**Baroness Scotland of Asthal:** But it would be the Attorney exercising that role on behalf of the government independently as the identified guardian of the public interest and, if we change the oath, the rule of law. **Chairman:** Whether that is sustainable goes to the heart of the matter, which will continue to be discussed both in this Committee and the Joint Committee. Thank you very much indeed, Attorney General and Mr Jones, for assisting us this afternoon.
Written evidence

Memorandum submitted by the Attorney General

JUSTICE COMMITTEE: DRAFT CONSTITUTIONAL RENEWAL BILL

The Justice Committee has said that, as part of the pre-legislative scrutiny of the draft Constitutional Renewal Bill it proposes to consider elements of the draft Bill and White Paper, including those elements of the draft Bill which relate to the role of the Attorney General.

The White Paper on the Governance of Britain—Constitutional Renewal sets out the Government’s proposals for reform of the role of the Attorney General and the Government’s rationale for those proposals. However, to assist the Committee further in its consideration of the aspects of the draft Bill which relate to the role of the Attorney General, I enclose notes on the following matters:

(a) Consents to prosecution: Clauses 7–10 of, and Schedule 1 to, the draft Bill amend the prosecution consent functions of the Attorney General. However, the attached note explains in a more discursive manner the proposals in the draft Bill.

(b) Annual report: Clause 16 of the draft Bill requires the Attorney General to prepare and lay before Parliament a report on the exercise of his or her functions on an annual basis. The attached note gives an overview of what the annual report might contain. As the primary purpose of the annual report is to enhance Parliament’s ability to hold the Attorney General to account, the Government is particularly interested in the views of the Committee as to what the annual report should cover.

I look forward to working with the Committee on its inquiry into the draft Bill.

Rt Hon Baroness Scotland of Asthal QC
15 May 2008

Note 1

PROSECUTION CONSENT FUNCTIONS OF THE ATTORNEY GENERAL

This note sets out some additional background on the function of the Attorney General to consent to the prosecution of certain offences. The note then sets out the Government’s provisional recommendations for reform of the Attorney’s prosecution consent functions. The note also provides further detail as to why the draft Constitutional Renewal Bill contains both a list of specific amendments to the prosecution consent functions of the Attorney General and a power to amend other functions by way of secondary legislation.

BACKGROUND TO THE PROSECUTION CONSENT FUNCTIONS OF THE ATTORNEY GENERAL

In principle, any person can seek to institute criminal proceedings. However, for certain offences, consent must be obtained to the institution of proceedings. In some cases the consent of the Attorney General is required. In other cases, the consent of the Director of Public Prosecutions or other person is needed.

The requirement to obtain consent enables a consistent approach to be taken to decisions to prosecute where the assessment of whether a prosecution is in the public interest may be thought—or was perhaps in the past thought—to be particularly difficult; and it ensures that private prosecutions cannot be brought without proper grounds.

A number of consent provisions were created before the three main prosecuting authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office) existed and when the office of the Director of Public Prosecutions handled a comparatively narrow range of cases.

Currently, there are over 100 provisions which require the Attorney’s consent to prosecution.1

Rationale for conferring a consent function on the Attorney General

There are varying rationales for a consent mechanism. There are also various reasons for conferring the consent function on the Attorney General rather than another person (for example, the DPP). The main reasons why the requirement to obtain the consent of the Attorney for a prosecution is included in legislation are outlined in the Law Commission’s report on Consents to Prosecution.2 However, it is not always apparent why a particular consent function has been conferred on the Attorney, especially where the legislation which has conferred the function dates back a number of years.

1 The Attorney General’s Office has conducted a comprehensive Lexis search of all public general Acts and all secondary legislation to identify provisions which require the consent of the Attorney.

2 See in particular paragraph 3.27 of Consents to Prosecution LC255.
PROPOSALS FOR REFORM

Schedule 1 to the draft Constitutional Renewal Bill contains a number of amendments to the prosecution consent functions of the Attorney General. The list of amendments in Schedule 1 is supplemented by the power in clause 8 of the draft Bill to amend other prosecution consent functions of the Attorney by way or order. (Clause 8 is discussed further below.)

The Annex to this note identifies which prosecution consent functions of the Attorney are to be abolished (Category 1), retained by the Attorney General (Category 2), transferred to the Director of Public Prosecutions or other Director (Category 3, sub-divided into 3 sub-categories).

Status of the proposals to amend the consent functions

Note that as the White Paper on the Governance of Britain made clear, (see paragraph 92), further work is needed to determine how each prosecution consent function of the Attorney General should be categorised. The list of amendments to the prosecution consent functions detailed in the draft Bill and annex to this note is therefore provisional and liable to be revised in light of further discussions with the prosecuting authorities, the comments received via the pre-legislative scrutiny process and further work being carried on by the Law Commission in relation to offences in connection with bribery.

Prosecution consent functions not dealt with by the draft Bill/this note

Under the package of reforms to the role of the Attorney General proposed in the White Paper on the Governance of Britain, the Attorney General will retain functions in relation to contempt of court. Some of these functions take the form of a requirement to obtain the consent of the Attorney for prosecution of an offence which relates to breach of reporting restrictions or otherwise for conduct which amounts to a contempt of court. These consent functions are not addressed by this note.

This note does not deal with provisions which require the consent of the Attorney General for proceedings brought in Northern Ireland. When the provisions of the Justice (Northern Ireland) Act 2002 come fully into force, the prosecution consent functions of the Attorney General which give rise to particularly difficult public interest considerations, in particular considerations of national security or international relations (which are both excepted matters under the Northern Ireland Act 1998) will be transferred to the Advocate General for Northern Ireland. This post will be held concurrently by the Attorney General for England and Wales. The other prosecution consent functions of the Attorney General will be transferred to the Director of Public Prosecutions for Northern Ireland.

Amending prosecution consent functions by secondary legislation

The Government proposes that the vast majority of provisions which provide for the consent of the Attorney should be amended (where amendment is needed) by primary legislation. As noted above, the draft Constitutional Renewal Bill contains a list of amendments to the prosecution consent functions of the Attorney General with a view to transferring those functions to the DPP (or other prosecutor) or, in some cases, abolishing the function (see Schedule 1 to the draft Bill).

However, some of the Attorney’s prosecution consent functions are in secondary legislation or legislation which has been or is due to be repealed. In line with general drafting practice, it is not thought to be appropriate for amendments to legislation of this kind to be included on the face of the Bill.

In addition, while the Attorney General’s Office have conducted a full search of existing legislation, it is possible that a further prosecution consent function might be identified in the future. Taking a power would enable an amendment to be made to such a provision.

In light of this, clause 8 of the draft Bill confers a power on the Attorney General to amend other prosecution consent functions of the Attorney General. This power will be used to amend the prosecution consent functions which are contained in secondary legislation or which have been, or are to be repealed. The power will also be used to amend any consent functions which have been overlooked.

Attorney General’s Office

15 May 2008
ANNEX

PROVISIONAL PROPOSALS FOR THE AMENDMENT OF THE PROSECUTION CONSENT
FUNCTIONS OF THE ATTORNEY GENERAL

CATEGORY 1: ABDLATION

(Where it is no longer thought to be necessary for the possibility of a prosecution to be constrained by the requirement to obtain consent.)

Agricultural Credits Act 1928 section 10 (restriction on publication of agricultural charges).

Agriculture and Horticulture Act 1964 section 20 (any offence under the Act—relates to the grading and transport of fresh horticultural produce).

Marine Insurance (Gambling Policies) Act 1909 section 1 (prohibition of gambling on loss by maritime perils).


CATEGORY 2: RETENTION BY THE ATTORNEY

(Functions which give rise to particular public interest considerations, including national security and implications for international relations.)

These have been grouped along the following lines:

(i) Offences which are especially likely to raise issues relating to national security;
(ii) Offences which are especially likely to raise issues relating to international relations;
(iii) Offences which are particularly likely to raise other issues relating to the public interest.

Note that there is a high degree of overlap between categories (i), (ii) and (iii). Categories (i) and (ii) have been merged in the analysis below. It should be recognised that a number of offences included in Category 2(i) and (ii) below will also give rise to more generalised issues relating to the public interest.

2 (i) + (ii) Offences which are especially likely to raise issues relating to national security or international relations

Anti-Terrorism Crime and Security Act 2001 sections 55 (offences under section 47 re use of nuclear weapons and section 50 re assisting or inducing certain weapons-related activities overseas), 81 (offences under section 79 re disclosures relating to nuclear security and section 80 re disclosures relating to uranium enrichment technology) and 113B (offence under section 113 (use of noxious substances or things to cause harm and intimidate).

Aviation and Maritime Security Act 1990 section 1(7) (endangering safety at aerodromes serving international civil aviation) and section 16 (offences under Part II of the Act relating to the safety of ships).

Biological Weapons Act 1974 section 2 (offence under section 1—developing certain biological agents and toxins and biological weapons).

Chemical Weapons Act 1996 section 31 (offences under sections 2 re using chemical weapons or section 11 re construction premises or equipment for producing chemical weapons).

Criminal Law Act 1977 section 9 (trespassing on premises of foreign missions, etc).

Geneva Conventions Act 1957 section 1A (offences under section 1 re grave breaches of the Convention).

International Criminal Court Act 2001 sections 53 (offences under section 51 re genocide, crimes against humanity and war crimes, and section 52 re conduct ancillary to matters covered by section 51) and 54 (offences against the administration of justice by the ICC).

Internationally Protected Persons Act 1978 section 2 (proceedings for offences which would not be offences but for s 1 of the Act (attacks and threats on protected persons)).

Nuclear Explosions (Prohibition and Inspections) Act 1998 section 3 (offence under section 1—causing of a nuclear explosion).

Nuclear Material (Offences) Act 1983 section 3 (offences under sections 1 and 2 which would not be an offence but for the provisions of this Act, disregarding certain other enactments. Offences are acts involving nuclear materials abroad which if done in the UK would constitute one of the listed offences; and offences involving preparatory acts and threats both in the UK and abroad.)

Official Secrets Act 1911 section 8 (in relation to any offence under the Act).
Official Secrets Act 1989 section 9 (consent required for all offences under the Act with the exception of that under s 4(2) where the consent of the DPP will suffice).

Protection of Trading Interests Act 1980 section 3(3) (failure to comply with a requirement imposed by s 1(2), to inform the Secretary of State of any requirement placed on a company by a foreign government which may affect UK trade, or to knowingly contravene any directions given under s 1(3) or s 2(1), directions in relation to ignoring the anti-UK trade requirements of foreign governments outside of the latter’s territory, including the production of information to overseas courts and governments).

Serious Crime Act 2007 section 53 (prosecutions where conduct likely to take place outside England and Wales).

Suppression of Terrorism Act 1978 section 4(4) (offences which but for but for s 4 would not be an offence. Section 4 extends the UK courts’ jurisdiction in respect of offences committed outside United Kingdom. The offences include murder, kidnapping, false imprisonment, nuclear offences and firearm offences.)

Terrorism Act 2006 section 2 (hostage-taking).

Terrorism Act 2000 sections 63E (offences under sections 63B, 63C and 63D re terrorist attacks abroad by or on UK nationals) and 117 (certain offences under the Act which have been committed for a purpose connected with the affairs of another country).

Terrorism Act 2006 section 19 (Attorney, rather than DPP, consent needed for offences under the Act if offence committed for a purpose connected to the affairs of another country).

United Nations Personnel Act 1997 section 5 (offences which, disregarding certain enactments, would not be offences apart from sections 1–3 of the Act. Offences include attacks on UN workers outside the UK, attacks outside the UK on premises or vehicles associated with the UN or threats to carry out such offences).

Offences under secondary legislation relating to sanctions (where the consent of the Attorney is required for the prosecution of offences, other than summary offences) (See for example Article 2 of the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 SI 1996/3171).

2(iii) Offences which are particularly likely to raise other issues relating to the public interest

No additional offences identified.

Category 3A: Transfer to DPP (or other prosecutor) with safeguards

(Consent functions which are not to be abolished or retained by the Attorney but which relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director but decision on consent will have to be taken by the Director personally, or by a person authorised by the Director to take the decision.)

* indicates that the consent function is to be transferred to the DPP and Director of SFO, exercisable concurrently.

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

Aviation Security Act 1982 section 8(1)(a) (offences under Part I excluding those contained within sections 4 and 7. Offences include hijacking, destroying, damaging or endangering the safety of an aircraft, other acts endangering or likely to endanger the safety of the aircraft, ancillary offences).

Criminal Justice Act 1988 section 135 (torture).

Income and Corporation Taxes Act 1988* section 766 (offences under s 765 re requirement for Treasury consent for certain transactions).

Landmines Act 1998* section 20 (Offences under section 2 re participation in the use, development, production, acquisition, possession or transfer of an anti-personnel mine).

Official Secrets Act 1920 section 8(2) (no summary proceedings for a misdemeanour under the 1911 or the 1920 Act except with the consent of the Attorney).

Prevention of Corruption Act 1906** section 2(1) (offence under section 1 re corrupt transactions with agent).

Public Bodies Corrupt Practices Act 1889** section 4(1) (any of the corruption related offences under the Act).

Solicitors Act 1974 section 42(2) (failure to disclose the fact of being struck off or suspended).

War Crimes Act 1991 section 1(3) (offences of murder, manslaughter or culpable homicide, irrespective of the nationality of the accused at the time of offending, if that offence was committed between 1/9/39 and the 5/6/45 in Germany or in the German occupied territories, and constituted a violation of the wars and customs of war):
CATEGORY 3B: TRANSFER TO DPP (OR OTHER)

(Consent functions which are not to be abolished or retained by the Attorney but which do not relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director without requirement to be taken personally by Director or authorised person.)

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

Adoption and Children Act 2002 section 99 (offences under section 9 re failure to comply with regulations in relation to adoption services or section 59 re disclosure of information).

Building Act 1984 section 113 (offences created under the Act require the consent of the Attorney unless the proceedings are brought by the party aggrieved or the local authority/body who has the duty to enforce the relevant provision).

Care Standards Act 2000 section 29 (offences under Part II, unless the prosecution is brought by the National Care Standards Commission or the Secretary of State (where he is for the time being exercising the functions of the Commission) or the National Assembly for Wales. Offences include operating an establishment which requires a licence without a licence and making false descriptions of establishments and agencies).

Cancer Act 1939 section 4(6) (publication of an advertisement consisting of an offer to treat, prescribe for, or give advice in relation to the treatment of, cancer).

Children and Young Persons (Harmful Publications) Act 1955 section 2(2) (printing, publishing, selling, or letting of, or having in one’s possession for the purposes of the selling or letting, works to which this Act applies: works likely to fall into the hands of children which reveal, in mostly picture form, the commission of crime, acts of violence or cruelty and incidents of a repulsive or horrible nature).

Counter-Inflation Act 1973 section 17(9) (offences under the Act. Repealed by s 33(4), Sch 2 Competition Act 1980 as from 1 January 2011).

Criminal Law Act 1977 section 4(2) (consent required for conspiracy to commit an offence for which consent is required).

Customs and Excise Management Act 1979 section 147* (consent for offence under Customs and Excise Acts unless prosecution instituted by order of Commissioners). This is to be repealed on a day to be appointed by virtue of CJA 2003 s 41 & 332, Sch 3 para 50 and Sch 37 pt 4.

Explosive Substances Act 1883 section 7(1) (offences under the Act including offence under section 2 re causing an explosion likely to endanger life or property, section 3 re attempt to cause an explosion, or making or keeping explosive with intent to endanger life or property, section 4 re making or possession of explosives under suspicious circumstances, and section 5 re accessories).

Highways Act 1980 section 312 (offences under sections 167, 177, and those provisions referred to in Schedule 22 of the Act).

Housing Act 1985 section 339 (offences under Part X when the local authority is being prosecuted. Part X relates to overcrowding and related matters).

Law of Property Act 1925 section 183 (fraudulent concealment of documents and falsification of pedigrees).

Law Reform (Year and a Day Rule) Act 1996 section 2(1) (Consent required for the institution of proceedings for a fatal offence: murder, manslaughter, infanticide or any other offence of which causing another’s death is a component; and aiding, abetting, counselling or procuring another’s suicide.)

Merchant Shipping Act 1995 sections 15 and 143 and Schedule 3A (offences in relation to fishing vessels and pollution and safety regulations).

Mines and Quarries Act 1954 section 164 (offence under section 151 re fencing of mines and quarries).

National Health Service Act 2006 section 269 (offences in relation to notices of births and deaths).

National Health Service (Wales) Act 2006 section 200 (offences in relation to notices of births and deaths).

Prevention of Oil Pollution Act 1971 section 19 (offences under the Act unless proceedings brought by harbour authority or, in certain cases, the consent of the Secretary of State or a person authorised by him has consented. Offences relate to the discharge of oil into the waters of a harbour in the United Kingdom and failure to comply with a requirement of a harbour master, or in respect of obstruction of a harbour master).

Public Health (Control of Disease) Act 1984 section 64 (consent required for offences under the Act or byelaws made under the Act unless prosecution brought by the party aggrieved, the local authority/body who has the duty of enforcing the provision or the person who made the byelaw. A constable may also take proceedings in certain cases).

Public Health Act 1936 section 298 (in relation to any offence under the Act unless proceedings taken by a party aggrieved, a council or a person whose function is to enforce the provisions in question).

Public Order Act 1936 section 2(2) (prohibition of quasi-military organisations).
Public Order Act 1986 sections 27, 29L (incitement to race/religious hate offences).

Serious Organised Crime and Police Act 2005 section 128 (trespass on designated sites).

Shipping and Trading Interests (Protection) Act 1995 section 7 (for offences in relation to coastal shipping).

Theatres Act 1968 section 8 (offences under sections 2, 5, 6 of the Act, or under the common law in relation to the publication of defamatory material in the course of a play. Offences include presenting or directing in public a play which is obscene, contains threatening, abusive or insulting words likely to stir up hatred against a group of the population due to their colour, race, ethnic or national origins, or contains threatening, abusive or insulting words with intent to, or where the performance taken as a whole is likely to, cause a breach of the peace).

Vehicles (Crime) Act 2001 sections 14 and 30 (offence under Parts 1 and 2 unless proceedings brought by a local authority or a constable).

Water Act 1945 section 46 (offences under the Act unless proceedings are brought by the Minister of Health, a local authority, statutory water undertakers, or person aggrieved. Offences include offences under byelaws made under powers granted by the Act and provision of false information) (Repealed with savings by Water Act 1989.)

Article 9 of Channel Tunnel (Security) Order 1994. SI1994/570

CATEGORY 3C: TRANSFER TO DIRECTOR OF SERVICE PROSECUTIONS

Armed Forces Act 2006 sections 61 and 68 (prosecutions brought outside time only with the consent of the Attorney). (See also section 326 (disapplication of requirement to obtain the consent of the Attorney) which will need modification).

Note 2

Annual Report to Parliament by the Attorney General

Clause 16 of the draft Constitutional Renewal Bill provides that the Attorney General must prepare and lay before Parliament on an annual basis a report on the exercise of the functions of the Attorney General. This note outlines what that report might include.

Limits on the information which may be included in the annual report: Note that, in relation to a number of the functions of the Attorney General, there will be limits on the information which can be included in the annual report. This is reflected in Clause 16(2) of the draft Bill. In particular:

— Information in relation to criminal cases: Where the Attorney exercises a function in relation to a particular criminal case, it may not be appropriate for the annual report to include information about the particular case. It will be particularly important that the annual report does not include information which would prejudice the investigation of a suspected offence or proceedings before a court.

— Information which is legally privileged: The annual report will not generally include information about legal advice that the Law Officers have provided or other material for which a claim to legal privilege could be maintained.

— Information with implications for national security or international relations: Information the disclosure of which would prejudice national security or would seriously prejudice international relations will also generally not be included in the annual report.

— Personal data: It will generally be inappropriate to include personal data in the annual report.

OVERVIEW: A SUMMARY OF THE REPORT, DRAWING OUT KEY THEMES AND NOTING KEY EVENTS

Introduction

The Law Officers have various roles:

— Upholding the Rule of Law, including as Chief Legal Adviser to the Government

— Acting independently of Government in the public interest

— Superintending the Law Officers’ Departments; and

— Being Criminal Justice Ministers.

The annual report will provide an account to Parliament and to the public of what the Law Officers have done each year.
Exercise of functions in relation to the prosecuting authorities which are superintended by the Attorney under statute (CPS, SFO and RCPO): A summary of the operation of the superintendence relationship including:

- the strategic objectives and priorities which have been set, and an account of how they have been met;
- summary of co-ordination of general or cross-cutting issues;
- account of financial management and vfm.

Exercise of functions in relation to other prosecuting authorities (including the service prosecutors and Departments who exercise prosecutorial functions): To include:

- a summary of the operation of the non-statutory superintendence relationship with the Director of Service Prosecutions;
- account of proceedings at the Service Justice Board;
- summary of co-ordination of general or cross-cutting issues.

Exercise of functions in relation to criminal prosecutions: A summary of the exercise of the Attorney’s functions acting in the public interest in relation to criminal proceedings. Will include functions in relation to:

- the referral of unduly lenient sentences;
- referral of points of law; and
- consents to prosecution.

Likely to include statistics as to number of cases dealt with including, in relation to unduly lenient sentences, the proportion of cases referred by the Attorney General which have resulted in an increased sentence.

Exercise of other functions in the public interest: A summary of the exercise of the Attorney’s other public interest functions including functions in relation to:

- charities;
- family law;
- contempt of court;
- inquests;
- power to restrain vexatious litigants; and
- devolution.

In relation to casework, likely to include statistics of cases dealt with and their outcome.

Exercise of functions in relation to litigation: A survey of the functions of the Attorney General in relation to civil and criminal litigation. Likely to include details of:

- management of panels of Counsel (including Treasury Counsel) to represent the Crown in civil and criminal proceedings, including action taken to promote diversity of the panels;
- litigation in which the Attorney has intervened/participated on a public interest basis;
- litigation in which the Attorney has, at the request of the court, appointed an advocate to the court;
- role of the Attorney General in appointing special advocates;
- litigation in which the Attorney General or Solicitor General has appeared in person;
- litigation brought by the Attorney at the relation of a person who would not otherwise have standing (relator actions);
- intervention in legal proceedings to assert the rights of Parliament.

Exercise of functions in relation to oversight of the Treasury Solicitor’s Department and the Government Legal Service: Including a summary of the key trends in work undertaken by the GLS during the year; details of staffing and skills; diversity.

Exercise of functions in relation to the legal profession: A summary of the Attorney’s activities in relation to the legal profession including:

- activities in relation to pro bono;
- activities of the Attorney in capacity of leader of the Bar.

Criminal Justice Minister

Summary of cross-cutting initiatives, policy developments and system reforms led or championed by the Law Officers in their role as Criminal Justice Ministers. A report on outcomes of partnership work to reduce crime and to deliver a more effective, transparent and responsive Criminal Justice System for victims and the public.
International activities: A summary of the Attorney’s role including activities to promote the rule of law overseas and overseas visits.

Parliamentary activities: A summary of the Attorney’s role in Parliament. Likely to include:

— detail of statements made by the Law Officers to the House;
— details of appearances of the Law Officers before Parliamentary Committees;
— role of the Law Officers in taking Government legislation through Parliament;
— overview of PQs dealt with by the Law Officers;
— overview of correspondence from Parliamentarians handled by the Law Officers (not to include substantive content of correspondence except in appropriate cases).

Functions in relation to Northern Ireland A summary of the exercise of the functions of the Attorney General in capacity as Attorney General for Northern Ireland including:

— exercise of functions in relation to the Public Prosecution Service;
— exercise of functions in relation criminal prosecutions;
— exercise of other functions in the public interest;
— exercise of functions in relation to litigation.

Attorney General’s Office
15 May 2008

Supplementary memorandum submitted by the Attorney General

PROTOCOL WITH PROSECUTION SERVICES

This note gives the Committee an indication of how we propose to take forward the preparation of the protocol with the prosecution services envisaged in Clause 3 of the above draft Bill.

Clause 3 provides that the Attorney General must, in consultation with the Directors (i.e. the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office), prepare a protocol stating how the Attorney General and the Directors are to exercise their functions in relation to each other. The protocol will be published and laid before Parliament (Clause 3(3)).

The protocol is intended as an important component in the package of proposed reforms to the Attorney General’s role. It will set out, in an authoritative public document and in more detail than hitherto, how the statutory relationship of “superintendence” between the Attorney General and the prosecuting authorities is to operate. It will provide greater clarity both as between the Attorney General and the Directors themselves, and for Parliament and the public at large, about the respective roles and responsibilities of the Attorney General and the Directors. The protocol will need to be sufficiently specific in its terms to meet this aim of achieving greater clarity, whilst being sufficiently flexible to meet the varying activities and workloads of the prosecuting authorities over time and so as not to require constant amendment (although the protocol may of course be revised and Clause 3(4) of the draft Bill requires the Attorney General to keep it under review from time to time).

Officials from my Office and the three prosecuting departments are currently in discussion about the proposed protocol and what it should say. It is therefore too soon to provide an indication of detailed drafting. However Clause 3(3) of the draft Bill sets out the sorts of provisions which the protocol may cover. Over and above that, we envisage that the protocol will include provisions about:

— The setting of the strategic direction for the prosecuting authorities, the setting of their objectives and the drawing up of their business plans
— The ways in which the prosecuting authorities report to the Attorney General on their activities.
— The circumstances and ways in which the prosecuting authorities are to consult the Attorney General or provide her or him with information
— The role of the Attorney General and the prosecuting authorities in relation to prosecution casework, including the handling of those cases in which the Attorney’s statutory consent is required for a prosecution; and the handling of any case involving a direction by the Attorney General on national security grounds (Clause 12 of the draft Bill)
— The roles of the Attorney General and the prosecuting authorities in contributing to criminal justice policy to ensure (among other things) it properly reflects the impact on prosecutorial operational practice
— The Attorney General’s accountability to Parliament for the work of the prosecuting authorities, and how the Directors support the Attorney in that role.
A worked-up draft of the protocol will be available to support debate when the Bill comes before Parliament. I hope the Committee finds this helpful.

I am writing in similar terms to the Rt Hon Michael Jabez Foster MP, Chairman of the Joint Committee on the draft Constitutional Renewal Bill.

Rt Hon Baroness Scotland of Asthal QC
1 June 2008

Memorandum submitted by Professor Jeffrey Jowell QC

1. I have expressed my views on the general subject of the role of the Attorney General in my evidence to the House of Lords Select Committee on the Constitution.3

2. I based my argument in that evidence upon the constitutional principles outlined in its paragraphs 2-7, which in my view strongly support an end to the Attorney’s political role.

3. In particular, I argued that these days there is a substantial pool of lawyers of high status who are sensitive to political considerations and therefore could admirably fill the role of independent Attorney (as they do in other countries). Freed of the appearance of political bias, the independent Attorney could—and should—regularly monitor cabinet and cabinet committees for consistency with the rule of law.

4. In respect of the view that only a political Attorney could be properly accountable to Parliament, I argued that the Attorney’s legal advice is not amenable to political accountability. In respect of her prosecutorial functions, satisfactory mechanisms could be found for an independent Attorney to be made adequately accountable to Parliament.

5. In an earlier lecture,4 I argued that if the political role of the Attorney were retained (on the ground of the need to have a lawyer at the heart of government) then at the least the Attorney ought, like the Lord Chancellor, to be placed under a statutory duty to uphold the rule of law. In addition, her oath of office should be revised to reinforce that duty, and to make clear that she acts in the public interest.

6. I greatly regret that the Draft Bill does so little to remove the appearance of conflict of interest which the Attorney’s dual legal and political roles will inevitably attract.

7. I do welcome the removal of some of the Attorney’s consent, prosecutorial and superintendence powers, especially the abolition of nolle prosequi and the ban on her direction in individual cases.

8. However, sections 4–6, which deal with the Attorney’s powers over the tenure of the three so-called independent prosecutorial officers (Director of Public Prosecutions, Serious Fraud Office and Revenue and Customs Prosecutions) enhance the appearance, and indeed the realistic possibility, of political control of the prosecutorial system. The Council of Europe recommends much more transparent review of the tenure of public prosecutors than these sections provide.5

9. Section 15 emphasises the hierarchical nature of the relationship between the Attorney and the other prosecutorial officers by requiring those officers to provide the Attorney, on request, with information about national security, under pain of a criminal penalty. This is a most unusual provision and could permit the improbable situation of a (political) Attorney-General instituting criminal proceedings against her (independent) DPP!

10. Section 3 requires a protocol for the running of the prosecution services to be drafted by the Attorney “in consultation with” the Directors of those services and laid before Parliament. Although this protocol may usefully clarify the degree of the Attorney’s relationship with the prosecutors, it is not at all clear whether this protocol is designed to strengthen or weaken the Attorney’s duty to uphold the rule of law (which is in any event better achieved by means of a specific statutory duty to that effect). Indeed the Attorney’s political predisposition is reinforced by the provision which requires the protocol to set out (under section 3(2)(f)) the roles of the Attorney and the Directors in relation to [odq]criminal justice policy[/odq] (policy surely being a matter for the Minister of Justice).

11. Most concerning is the retention, and indeed expansion of the Attorney’s power to intervene on grounds of national security (in ways not sufficiently detailed in the Notes on Clauses), to which I shall devote the rest of this submission.

12. As a general proposition, the constitutional principle of the separation of powers forbids the executive branch of government from interfering both in the investigation of crimes or in decisions whether or not to prosecute. The constitutional principle of the rule of law also requires our laws to be enforced where practical. These principles have traditionally been regarded as open to a degree of elasticity (‘selective enforcement’) in exceptional circumstances, one category of which is national security.

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3 Published as Appendix 3 of the Select Committee’s report Reform of the Office of the Attorney General 7th Report of Session 2007-08; HL Paper 93).
13. It is important to note, however, that in recent years the courts have been anxious to limit the opportunity for any governmental official to plead national security in the absence of evidence supporting the fact that national security is genuinely at risk. This approach accords with an increasingly rigorous “culture of justification” under which all public decision-making is required to be based on cogent evidence and argument.6 Three particular developments in respect of the Attorney’s role should be noted:

(a) Whereas in the past the “prerogative” power of the Crown was considered immune from judicial review, this is no longer automatically the case.7 The Attorney-General’s prerogative prosecutorial power (as a Law Officer of the Crown) is, similarly, now subject to judicial review.

(b) The courts no longer accept the mere say-so of the government, through the Attorney, that matters of national security are in jeopardy. Although the courts may or may not probe deeply into the credibility of that evidence, at least some evidence must be produced to justify the Attorney’s claim of risk.8

(c) However, in a number of situations, where the rule of law or fundamental rights (including Convention rights) are on their face compromised, the Attorney General will be required to show that her actions are not “disproportionate”, on the basis of a series of structured tests to ensure that the means justify the ends and the measure is “necessary (and not merely ‘desirable’) in a democratic society” or “strictly required by the exigencies of the situation”.9

14. Another fundamental development, which well preceded the Human Rights Act 1998, is the assertion, contained at the core of the rule of law, that access to justice should not be denied. It has been strongly argued that the ouster of judicial review may even be unconstitutional, because it violates the rule of law which is “the ultimate controlling factor on which our Constitution is based”.10 At the very least, it has been fully accepted that the courts will interpret ouster clauses in the narrowest possible way, so as not to permit any decision that is unlawful (and is thus only a “purported decision” from judicial scrutiny).11

15. In my view sections 12 and 13 of the Draft Bill fly in the face of the fundamental constitutional principles of the rule of law and separation of powers. In this respect the title of the draft bill, “constitutional renewal”, misleads. This is constitutional regression.

16. Section 12 of the Draft Bill provides that the Attorney has the power (a) to direct the abandonment of investigations by the Director of the Serious Fraud Office (SFO) and (b) to direct that any prosecutor not institute or abandon any legal proceedings.

17. Section 12(1) permits the Attorney to make such directions “if satisfied that it is necessary to do so for the purpose of safeguarding national security” (s.12(1)). This provision provides a very broad discretion to the Attorney (“if satisfied”), qualified only by the notion of “necessity” (which may be open to a test of proportionality but is not clear on the point) coupled with the purpose of “safeguarding national security”.

18. If the decision of an Attorney under section 12 were open to judicial review, the courts could inquire into whether the Attorney was genuinely seeking to achieve the safeguard of national security (however broad that term may be) and it is at least possible that the courts could scrutinise any claim of national security to ensure proper justification under the principle of proportionality.

19. However, section 13 (5) (a) seeks to prevent any such possibility of judicial review by providing that a certificate signed by a Minister of the Crown certifying that the Attorney’s direction was “necessary for that purpose” (ie to safeguard national security) shall be “final and conclusive”. Section 13 (5) (b) provides that even a document “purporting” to be a such a certificate shall be received in evidence and treated as being such a certificate unless the contrary is proved.

20. These provisions brazenly seek to evade the recent developments of constitutional principle noted in paragraphs 13 and 14 above, although it is still possible that the courts, under the modern approach, will nevertheless insist that even that attempt at “judge-proofing” does not override the fundamental right of any interested person to judicial review of the Attorney’s directions.12

21. The draft bill seeks to make up for the lack of legal accountability of the Attorney’s directions on national security by providing for compensating political accountability. Section 14(3) requires the Attorney to lay a report before Parliament on the directions as soon as possible after issuing them.

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6 Woolf, Jowell and Le Sueur, de Smith’s Judicial Review, (6th ed. 2007); chapter 11, entitled: Substantive Review and Justification.
8 Ibid.
10 Lord Hope in R (on the application of Jackson) v. Attorney General [2006] A.C. 262 at para. 107. See generally de Smith’s Judicial Review, above, para. 4-015. See also Volume 8(2) of Halsbury’s Laws of England (1996), where “the right to the protection of the law” includes the right of “unimpeded access to the courts”.
12 On the authority of re Racial Communications [1980] 2 All ER 634, where Lord Diplock considered that although judicial decisions may still be protected under a “conclusive evidence” clause, that protection would not necessarily extend to decisions of public officials.
22. Exceptions to this requirement are provided in section 14(3), one of which is concerning. Section 14(3) provides an exemption if “the Attorney General ‘is satisfied’ that—(b) ‘the inclusion of the information would prejudice national security or would seriously prejudice international relations’”.

23. It will not be difficult for the Attorney to avoid disclosure under this provision because it lets the Attorney out of disclosing matters which he is satisfied would themselves be a danger to national security. Of more concern, however, is that section 14(3) subtly broadens the purpose of safeguarding national security to include matters of international relations. This is because under section 17(3) international relations is defined as:

(c) the interests of the United Kingdom abroad, and
(d) the promotion or protection of the United Kingdom of its interests abroad.

Under these provisions the Attorney could arguably refuse to disclose information to Parliament on the ground that commercial or diplomatic interests abroad, or even the UK’s image abroad, may be damaged by the disclosure. The Attorney would thus be able to evade Parliamentary control of a decision purportedly taken for the purpose of safeguarding national security, but in fact seeking to achieve goals which are extraneous to that purpose.

Conclusions

1. It is regrettable that the opportunity was not taken in the Draft Bill to enhance public confidence in the impartiality of the Attorney General’s office by creating an independent Attorney both to give legal advice to government and to undertake prosecutorial and other functions.

2. While the removal of some of her prosecutorial functions will serve to diminish the appearance of political bias inherent in her role, the present proposals in a number of respects shift the balance of the Attorney’s primary loyalties and modes of accountability from the legal to the political.

3. The power of the Attorney to safeguard national security free of judicial oversight or control offends fundamental constitutional principle.

4. The method of Parliamentary accountability introduced to oversee the Attorney’s directions on national security are weak, and specifically permit the Attorney to evade accountability on the basis of considerations irrelevant to national security.

23 May 2008

Supplementary memorandum submitted by Professor Jeffrey Jowell QC

This statement concerns the Attorney General’s explanation, right at the end of her evidence, of the need for the ouster clause (Qq 81–83). She cited Lord Hoffmann’s words that decisions about national security “are not matters for judicial decision. They are matters for the executive”.

The case is (as the Chair well knew) Secretary of State for Home Affairs v Rehman [2001] UKHL 47 at [50] and see again Lord Hoffmann’s further statement at [62].

It is important to note, however, that Lord Hoffmann also said in that case that “This does not mean that the whole decision [on national security] . . . is surrendered to the Home Secretary”. He went on at [54] to say that the factual basis for the decision could be examined by the court (the question of whether there was any evidence to support the decision on national security); as could the issue of its reasonableness, or whether fundamental human rights were in issue (which they were not in Rehman).

Lords Slynn and Steyn (with whom Lord Hutton agreed) were much less emphatic in that case that as to whether national security was or was not a matter wholly reserved for the executive. Indeed Lord Steyn said, citing much case-law, that “It is well established in the case law that issues of national security do not fall beyond the competence of the courts”. (at [31]). Lord Slynn said that although national security was “primarily” a matter for the executive (at [17]), the minister’s decision was open to review especially on the basis of lack of evidence (at [24] and [25]).

And of course Lord Hoffmann directly challenged the government’s judgment on national security in the later case of Belmarsh Prison (which I cite in my written evidence at footnote 9).

12 June 2008

13 A similar plea exempted the minister in the GCHQ case, note 4 above.
Memorandum submitted by Professor Anthony Bradley

In reply to your inquiry on behalf of the House of Commons’ Justice Committee, let me say first that in general I have been pleased to see the Government’s proposals relating to the Attorney General in the white paper, Constitutional Renewal. They are broadly in line with my written evidence to the House of Lords’ Select Committee on the Constitution (see the 6th Report of the Committee, 2007–08, HL Paper 93, Appendix 2). In summary, I argued there that the office of Attorney General should be retained, but subject to (1) a review of the multiplicity of functions that the office has acquired, with the aim of deciding whether some of them are no longer needed or are better performed in other ways; and (2) a re-statement of the essential functions of the office and the conventions that apply to it.

Part 2 of the draft Constitutional Renewal Bill goes a long way in this direction. I note with interest the detailed provisions it contains for giving effect to the aim of re-defining the essential functions of the Attorney as the Government’s chief legal adviser, accountable for some essential aspects of executive power (including general oversight of the prosecuting authorities). These functions must be performed in a manner that differs from the normal role of departmental ministers. The difference is that other ministers share fully in the collective responsibility of the Government for its policies and its conduct of administration; these policies may properly be motivated by political and electoral considerations. By contrast, the Attorney General’s essential functions are to do with matters in which “rule of law” considerations come into play; they are not a matter for collective decision-making and they ought not (for instance) to be influenced by electoral factors or by opinion polls.

The most important task that differs from this is the Attorney’s role in relation to criminal justice policy. In my evidence to the Committee on the Constitution (para 16), I said that the distinct character of the Attorney’s role in respect to prosecuting policy “is not assisted by the present trilateral system of shared responsibility for criminal justice that involves the Attorney acting with the Home Secretary and the Secretary of State for Justice in the Office of Criminal Justice Reform” and I suggested that the Office should become the responsibility of the two Cabinet ministers acting together. The Attorney and the DPP would be consulted on proposals for reform, “but the Attorney would not share in the collective responsibility of ministers for such matters as legislation affecting criminal justice, and allocation of financial resources to the courts” (ibid).

In Constitutional Renewal (at paras 96–97), the Government rejects this view, having decided to retain the present arrangements. The reason given is that prosecutors should have a “voice” in formulating and implementing criminal justice policy and in ensuring that policy decisions and legislation in this area are “operationally workable”; and that to be effective this “voice” needs to be a ministerial voice. The white paper states:

“The Government considers that it would be artificial to divorce Ministerial responsibility for the superintendence of the prosecuting authorities from Ministerial responsibility for ensuring the ‘front-line’ experience of the prosecutors informs the development of criminal justice policy.”

I am sorry that I must disagree with the Government’s conclusion, and in particular with the reason given in relation to ministerial responsibility. Certainly, the prosecuting authorities should be in a position to express their informed views on ministerial proposals for legislating on criminal law. But this can be achieved through arrangements within Whitehall for consulting with the Attorney and with the prosecuting authorities. The views of the prosecuting authorities expressed through these arrangements would indeed be backed up by a ministerial “voice”, since the Government has decided that the office of Attorney should continue to be held by a minister. It is not “artificial” to leave the Home Secretary and the Justice Secretary with joint ministerial responsibility for government policies in relation to criminal justice. It is these Cabinet ministers (and the other members of their ministerial teams) who are responsible to Parliament for the success or otherwise of those policies. Political criticism should be addressed to those two ministers and not to the Attorney.

A further reason why I am not persuaded by the reasoning in the white paper is that it does not take account of the need (as I explained in my paper for the Lords Committee) for there to be a re-statement of the conventions relating to the Attorney’s office as they are now understood. A re-statement of the distinctive position of this office would be more clearcut, coherent and easy to grasp, if it did not have to explain why full ministerial responsibility for criminal justice policy was included alongside the other essential functions of the office that depart from the normal conventions of ministerial responsibility. I see nothing to be gained by the Government from any assumption being made in Parliament or elsewhere that the Attorney, the DPP and other prosecuting authorities endorse or favour proposals made by the Government for changing the law on criminal justice, whether in respect of the substantive law, sentencing or criminal procedure.

Finally, it will be clear to the Justice Committee that the change that I would like to see made in this respect to the present position of the Attorney can be made administratively within Whitehall, and it does not need to be embodied in legislation. But it should figure in a future re-statement of the conventions relating to the office.

15 May 2008