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THE ATTORNEY GENERAL FOR ENGLAND AND WALES

This paper has been prepared to assist the Assembly and Executive Review Committee to consider the role of the Attorney General and the functions of the Office of the Attorney General in England and Wales.

The paper details the background to the Consultation into the role of the Attorney General, as a result of increasing tension regarding the various roles of the Attorney General and analyses the Government responses in relation to the concerns raised.

This paper contains information from:

- House of Commons Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07,
- The Governance of Britain - Constitutional Renewal, Government Policy Proposals;
- The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General; and
- The Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08

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SUMMARY OF KEY POINTS

The Attorney General for England and Wales has been the subject of debate and consultation over the past few years due to tensions arising about the various different roles that she occupies. The main areas that the debate has focused on are:

- Tension between the various functions of the Attorney General- being a Minister and a member of the Government, and being an independent guardian of the public interest and performing superintendence functions;
- Tension between being a party political and a member of the Government, and the giving of independent advice.

These tensions led to the Constitutional Affairs Select Committee of the House of Commons issuing a consultation on the Constitutional Role of the Attorney General identifying possible areas of reform.

Legal adviser

The Attorney General is legal adviser to the Crown and the Crown's representative in the Courts. The Attorney General also oversees the Government's in-house legal advisers and is the Minister responsible for the Treasury Solicitor's Department. This role is combined with the role of a Minister and a politician who follows the party whip.

The Attorney General also has Ministerial oversight of the Government Legal Service, and a role in overseeing the quality of the legal advice being provided to Government and the conduct of Government litigation.

A ‘Guardian of the Rule of Law’?

The House of Commons Constitutional Affairs Committee's, fifth Report of Session 2006-07 stated that in addition to defending the public interest in the exercise of his responsibilities.

Role as Minister with responsibility for superintending prosecuting authorities

The Attorney General has a number of functions in relation to criminal proceedings and is the arbiter of 'public interest' when deciding whether or not to continue with a prosecution. The Attorney General is also responsible by statute for the superintendence of the main prosecuting authorities: the Crown Prosecution Service, Serious Fraud Office, Revenue and Customs Prosecutions office and the Director of Public Prosecutions in Northern Ireland.

Guardian of public interest

The Attorney General is the guardian of public interest, in particular in certain kinds of legal proceedings. The Attorney General's independent public interest role includes consultation by the prosecuting authorities on individual criminal cases as part of the superintendence role.

Responsibilities on behalf of Parliament

The Attorney General has additional responsibilities in relation to Parliament covering the Constitution and conduct of proceedings in Parliament, including: questions of parliamentary privilege; the conduct and discipline of Members; and the meaning and effect of proposed legislation.

Human Rights issues

The Attorney General has an important role in the process of preparing legislation and has a duty under section 19 of the Human Rights Act 1998 to ensure the compatibility of Government Bills with the Convention rights.

Criminal Justice Policy

The Attorney General has, with the Home Secretary and the Secretary of State for Justice, tripartite responsibility for criminal justice policy. The three Ministers are jointly responsible for the Office of Criminal Justice Reform. The split in the role of the Attorney General in relation to the fact she occupies a ministerial role regarding the formulation of criminal justice policy and also acts as chief legal adviser to the Government.

Draft Constitutional Renewal Bill

The principal changes proposed in the Draft Bill are:

- 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 of the main prosecuting authorities 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; and
- The Attorney General must submit an annual report to Parliament.

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1. INTRODUCTION

This paper provides information on the Attorney General for England & Wales and the various agencies that are part of the overarching Attorney General's Office. The paper will examine the various functions of the Attorney General and the relationship that she has with the Crown Prosecution Service. The annex to this paper contains an extract from the Constitutional Affairs Committee- *Inquiry into the Constitutional Role of the Attorney General*, which lists the functions of the Attorney General for England and Wales.

The numerous roles of the Attorney General have created tensions and resulted in a number of commentators calling for changes to the Office of the Attorney General. These tensions have given rise to a debate about the Attorney General's role, which has focused on two areas:¹

- Tension between the various functions of the Attorney General- being a Minister and a member of the Government, and being an independent guardian of the public interest and performing superintendence functions;
- Tension between being a party political and a member of the Government, and the giving of independent advice.

This has resulted in the Constitutional Affairs Select Committee of the House of Commons issuing a consultation on the Constitutional Role of the Attorney General identifying possible areas of reform. In 'The Governance of Britain', the Prime Minister announced that the Government too, thinks the Attorney General's role must change along with the wider constitutional framework.²

The paper will analyse the issues arising within 'The Governance of Britain- a Consultation on the Role of the Attorney General' and the various reports in response to the consultation:

- House of Commons Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07;
- The Governance of Britain- Constitutional Renewal, Government Policy Proposals;
- The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General; and
- Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08

2. THE FUNCTIONS OF THE ATTORNEY GENERAL

2.1 LEGAL ADVISER³

The Attorney General is legal adviser to the Crown and the Crown's representative in the Courts. The Attorney General also oversees the Government's in-house legal advisers and is the Minister responsible for the Treasury Solicitor's Department. This role is combined with the role of a Minister and a politician who follows the party whip.

¹ The Governance of Britain; A Consultation on the Role of the Attorney General:
<http://www.attorneygeneral.gov.uk/attachments/Consultation%20on%20the%20Role%20of%20the%20AGO.pdf>

² Ibid

³ Ibid

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 prepared by civil servants who are expert lawyers in a particular field. The Attorney General may also consult specialist counsel when necessary. The advice that the Attorney General gives to the Government is legally privileged and confidential, which has been an issue of concern and was raised within the Consultation on the Constitutional role of the Attorney General.

Government Legal Service

The Attorney General also has Ministerial oversight of the Government Legal Service, and a role in overseeing the quality of the legal advice being provided to Government and the conduct of Government litigation. This includes considering whether proceedings against the UK before the European Court of Justice should be defended; and establishing, by open competition, panels of barristers whom departments can instruct.⁴

2.2 A 'GUARDIAN OF THE RULE OF LAW'?⁵

The House of Commons Constitutional Affairs Committee's, fifth Report of Session 2006-07 stated that in addition to defending the public interest in the exercise of his responsibilities, Lord Goldsmith considered that 'upholding the Rule of Law' was one of his key functions.

Lord Goldsmith identified three specific elements in relation to his role in upholding the Rule of Law:

- Firstly he identified compliance with the law, 'that means domestic and international obligations.'
- The second aspect was the relationship with the courts, which he defined as "partly respect for the courts and their judgements" but also about "*being sure within appropriate boundaries.....we subject ourselves as Government to the scrutiny of the independent courts*"⁶; and
- The third element was identified as "*certain basic values which it is important to stand up for. Quite a number of them are to be found, of course, in the European Convention*".⁷

2.3 ROLE AS MINISTER WITH RESPONSIBILITY FOR SUPERINTENDING PROSECUTING AUTHORITIES

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

- (a) The requirement for consent to prosecute certain categories of criminal offences, such as those relating to Official Secrets, corruption, explosives, incitement to racial hatred, and certain terrorism offences with overseas connections;

⁴ The Governance of Britain; A Consultation on the Role of the Attorney General:
<http://www.attorneygeneral.gov.uk/attachments/Consultation%20on%20the%20Role%20of%20the%20AGO.pdf>

⁵ House of Commons Constitutional Affairs Committee, Constitutional Role of the Attorney General Fifth Report of Session 2006-07:
<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf>

⁶ Ibid

⁷ Ibid

- (b) The power to refer unduly lenient sentences to the Court of Appeal;
- (c) The power to terminate criminal proceedings on indictment by issuing a nolle prosequi; and
- (d) The power to refer points of law in criminal cases to the Court of Appeal.⁸

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

The Attorney General is also responsible by statute for the superintendence of the main prosecuting authorities: the Crown Prosecution Service, Serious Fraud Office, Revenue and Customs Prosecutions office and the Director of Public Prosecutions in Northern Ireland. This is a ministerial position and both the Attorney General and the Solicitor general are held to account in Parliament for the effective management of their services and resources.⁹

The concept of ‘superintendence’ has never been categorically defined. In broad terms the Attorney General has suggested that ‘superintendence’ can be said to encompass:

setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall ‘effective and efficient administration’ of those authorities, a right for the Attorney General to be consulted and informed about difficult, sensitive and high profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day to day running of the organisation.”¹⁰

2.4 GUARDIAN OF THE PUBLIC INTEREST

The Attorney General is the guardian of public interest, in particular in certain kinds of legal proceedings- such as decisions on the bringing or termination of criminal prosecutions, charity matters, and the appointment of ‘advocates to the court’ to act as neutral advisers to the court in litigation and ‘special advocates’ to represent the interests of parties in certain national security cases. The Attorney General’s independent public interest role includes consultation by the prosecuting authorities on individual criminal cases as part of the superintendence role.¹¹

2.5 RESPONSIBILITIES ON BEHALF OF PARLIAMENT

The House of Commons Constitutional Affairs Committee’s, fifth Report of Session 2006-07 reported that the Attorney General has additional responsibilities in relation to Parliament covering the Constitution and conduct of proceedings in Parliament, including: questions of parliamentary privilege; the conduct and discipline of Members; and the meaning and effect of proposed legislation. The report stated that the Attorney General may intervene in court proceedings to assist the privileges of

⁸ House of Commons Justice Committee, Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698.pdf>

⁹ House of Commons Justice Committee, Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698.pdf>

¹⁰ The Governance of Britain; A Consultation on the Role of the Attorney General:

<http://www.attorneygeneral.gov.uk/attachments/Consultation%20on%20the%20Role%20of%20the%20AGO.pdf>

¹¹ Ibid

either House, either of his and her own motion or, more usually, at the request of the House authorities or indeed the trial judge. Arguably, the Attorney General performs the important function of representing the interests of Parliament in the Courts.¹²

2.6 HUMAN RIGHT ISSUES

The Attorney General has an important role in the process of preparing legislation and has a duty under section 19 of the Human Rights Act 1998 to ensure the compatibility of Government Bills with the Convention rights:

*Section 19 of the Human Rights Act requires that for every Government Bill the Minister in charge in each House make a statement that in his/her view the Bill's provisions are compatible with the Convention rights. Alternatively, if s/he is not able to provide that personal assurance, s/he must state that nevertheless the Government wishes the House to proceed with the Bill.*¹³

2.7 CRIMINAL JUSTICE POLICY

The Attorney General has, with the Home Secretary and the Secretary of State for Justice, tripartite responsibility for criminal justice policy. The three Ministers are jointly responsible for the Office of Criminal Justice Reform. The Attorney General sits on the National Criminal Justice Board and has joint responsibility for the cross departmental Office for Criminal Justice Reform in the Ministry of Justice.

There have been criticisms raised in relation to 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.¹⁴

The justification for giving the Attorney General shared ministerial responsibility for the criminal justice system was expressed by the Government as:

*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.*¹⁵

3. HOUSE OF COMMONS CONSTITUTIONAL AFFAIRS COMMITTEE CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL, FIFTH REPORT OF SESSION 2006-07, JULY 2007¹⁶

This report identifies inherent tensions in combining ministerial and political functions and states that real and perceived political independent has to be combined with a

¹² Ibid

¹³ Cabinet office:

http://www.cabinetoffice.gov.uk/secretariats/economic_and Domestic/legislative_programme/guide_html/echr.aspx

¹⁴ House of Commons Justice Committee, Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698.pdf>

¹⁵ Ibid

¹⁶ <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf>

role of an intrinsically party political nature in one office holder, this is at the heart of the problem. The Report recommended that the current duties of the Attorney General be split into 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.

The report identified several events that took place prior to this report that called into question the role of the Attorney General:¹⁷

- The Constitutional Reform Act 2005 changed the status of the Lord Chancellor from being one of a judge, who took the judicial oath of office, to that of a Secretary of State who had a legal duty to protect the independence of the courts. This has left the Attorney General as the only member of the Government who is required to be legally qualified;
- The creation of the Ministry of Justice in May 2007 also raised questions about the Office of the Attorney General, its functions, and the position of the office in the trilateral framework for the formulation and delivery of criminal justice policy in England and Wales;
- The office's role in three particular controversial matters have highlighted further concerns: advice on the legality of invading Iraq; potential prosecutions in the "cash for honours" case; and the decision to halt the investigations by the Serious Fraud Office into BAE systems. The evidence in relation to the BAE case was instructive in showing the inherent tensions in the dual role of the Attorney General and in particular the sometimes opaque relationships with the prosecution services.

In light of the considerable changes to the constitutional arrangements for the maintenance of the rule of law and the continuing commitment of the Government to modernise the constitution, the Committee stated that the report would inquire into the constitutional role of the Attorney General. The report concentrated on three specific areas:

- How the office of the Attorney General works;
- The impact on the office of recent controversies; and
- What options there are for reform

Conclusion¹⁸

In evaluating the options for reform, the report focused on addressing the question of what should be the role and function of the Attorney General. In answering this question, Lord Falconer, the then Lord Chancellor, identified three options:

- the status quo;

¹⁷ House of Commons Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07:

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf>

¹⁸ House of Commons Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07:

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf>

- somebody who is in either the House of Lord or the House of Commons but is a non-politician; and
- somebody who is not a politician, who is in neither House of Parliament and gives legal advice, the superintendence of the prosecution role in the sense of deciding whether a prosecution will start or finish, and has a propriety and public interest role.

The Committee stated that the status quo is not an option, and on balance, believe that de-politicising the prosecution role should be one of the central purposes of reform, to help restore public confidence in the Attorney General's role. The report concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer, and who is not a politician or a member of Government. The Attorney General's ministerial functions should be exercised by a minister in the Ministry of Justice.

The report stated that reform was needed, and welcomed the fact that both the Prime Minister and the Attorney General indicated a willingness to engage in reform. The Committee believed that in order to have an effective Attorney General, there needed to be a robust and independent prosecution service. They also noted that the provision of legal advice to government needs to have the confidence and respect of politicians and the public alike.

4. THE GOVERNANCE OF BRITAIN- ANALYSIS OF CONSULTATION RESPONSES, MARCH 2008¹⁹

Background: The Governance of Britain Green Paper

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 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; and
- A parliamentary select committee should be established specifically to scrutinise the Attorney General.²⁰

¹⁹ The Governance of Britain- Constitutional Renewal, Government Policy Proposals:
http://www.official-documents.gov.uk/document/cm73/7342/7342_i.pdf

²⁰ House of Commons Justice Committee, Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698.pdf>

4.1 SUMMARY OF CONSULTATION RESPONSES- KEY POINTS²¹

- In relation to the Attorney general's role as legal adviser, the majority of respondents (27 out of 38) favoured the Attorney General remaining as the chief legal adviser to the Government and continuing to be a Minister. A significant number of these respondents thought that other changes should be made to the role of the Attorney General;
- Strong support for clarification to the Attorney General's functions, in particular there was support for the proposal to reform the Attorney General's oath of office;
- A significant majority of respondents (21 out of 25) considered that the Attorney General should attend Cabinet only where attendance is necessary to provide legal advice or where there was otherwise a specific reason for the Attorney General to attend;
- The majority of respondents (19 out of 31) favoured retaining the general presumption against the disclosure of legal advice provided by the Attorney General. There was interest in creating limited exceptions to that presumption or ensuring that Parliament was given a proper explanation of the legal basis for key government actions;
- Suggestions of classes of advice which it might be appropriate to disclose on a regular basis included advice which is expressly relied upon by the Government, advice in relation to the use of armed forces and advice on the interpretation of existing legislation;
- There was strong support (26 out of 31) for the Attorney General retaining the function of superintending the main prosecution authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office);
- Respondents expressed general support for the proposition that it was legitimate for the Attorney General to have a role in setting the high level policy and objectives of the prosecuting authorities. However, the majority favoured reducing or ending the role that the Attorney General plays in relation to the formulation of criminal justice policy;
- There was strong support for removing or curtailing the Attorney General's role in relation to individual prosecutions. There was support for abolishing or limiting the power of the Attorney general to consent to a prosecution and ending the power to stop a prosecution by way of a nolle prosequi (to stop a trial on indictment);
- Most respondents (14 out of 16) took the view that it was legitimate for the Attorney General to have a role where a prosecution has implications for national security or international relations.

²¹ Summary of consultation responses: The Governance of Britain- Constitutional Renewal, Government Policy Proposals:
http://www.official-documents.gov.uk/document/cm73/7342/7342_i.pdf

5. THE GOVERNMENT'S RESPONSE TO THE CONSTITUTIONAL AFFAIRS SELECT COMMITTEE REPORT ON THE CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL (APRIL 2008)²²

The report of the Committee, taken with the responses to the consultation exercise undertaken by the Attorney General as part of the Governance of Britain agenda have informed the Government's proposals for reform in this area.

On 25th march 2008 the Government published a White paper entitled 'The Governance of Britain': Constitutional Renewal.

Within this report, the Government concluded that the Attorney General should remain the Government's chief legal adviser and also should remain a Minister and a member of one of the Houses of Parliament.

The report stated that the Government noted the concerns regarding the perception of a conflict of interest. Within the White Paper, the Government outlined a number of measures to streamline and clarify the role of the Attorney General and the basis on which the Attorney General exercises his/her functions and to make the operation of the office more transparent. Whilst the Government acknowledged the Committee's recommendation that the functions of the Attorney General should be split between a Minister in the Ministry of Justice and a career lawyer who is not a politician or a member of Government, they did not accept this proposal.

Summary of the proposals in the White Paper²³

- The Government believes that the Attorney General should remain chief legal adviser however the report stated that it will remain open to the Government, in exceptional cases, to waive privilege and disclose its legal advice as it has done in the past;
- The Attorney General attends Cabinet on the invitation of the Prime Minister, where he considers it appropriate for the Attorney to attend;
- The Government proposes to modernise, by non-statutory means, the oath of the Attorney General to provide for an express duty to respect the rule of law. There are also proposals to bring forward the legislation to require the Attorney General to report to Parliament on the exercise of his or her functions on an annual basis;

²² The Government's response to the Constitutional Affairs Select Committee Report on the *Constitutional Role of the Attorney General*, April 2008:

<http://www.attorneygeneral.gov.uk/attachments/Government%20Response%20to%20Report%20on%20Role%20of%20Attorney%20General.pdf>

²³ The Government's response to the Constitutional Affairs Select Committee Report on the *Constitutional Role of the Attorney General*, April 2008:

<http://www.attorneygeneral.gov.uk/attachments/Government%20Response%20to%20Report%20on%20Role%20of%20Attorney%20General.pdf>

- The Government proposes that the Attorney General should continue to superintend the main prosecuting authorities but proposes to legislate to expressly state that the Attorney General has no power to give directions to prosecute or not to prosecute in any individual case.
- The government proposes to establish a protocol which will set out the detail of the superintendence relationship between the Attorney General and the main prosecuting authorities;
- Proposal for legislation to enhance the independent status of the main prosecuting by providing for fixed term appointments for the Directors;
- Government proposes to legislate to provide for the Attorney General to have exceptional power to give a direction to stop a prosecution on the grounds of national security;
- Proposal to legislate to provide that the Attorney General should cease to have the statutory function of giving consent to prosecutions except in relation to a small category of offences which are considered to have a high policy/public interest element;
- Proposal to abolish the Attorney General's power to enter a nolle prosequi (to stop a trial on indictment);
- The Government believes that it is right that the Attorney General continues to play a role, along with the Home Secretary and Justice , in the formulation of criminal justice policy.

Government response to conflict between the different roles of the Attorney General²⁴

- The Report stated that the Government has concluded that the fact that the Attorney General exercises a number of different roles, rather than being a weakness as the Committee suggested, is a strength. The Criminal Bar Association took the view:
'The dual role of the office (as chief legal adviser and Minister of the Crown) is not a constitutional weaknesses but a fundamental constitutional strength.'
- The Government states the fact that the Minister who superintended the prosecuting authorities is also a senior practising lawyer means that he/she is able to fully understand the functioning of the prosecuting authorities and be in a position to add value to the function;

²⁴ Additional points raised by Committee: The Government's response to the Constitutional Affairs Select Committee Report on the *Constitutional Role of the Attorney General*, April 2008:

<http://www.attorneygeneral.gov.uk/attachments/Government%20Response%20to%20Report%20on%20Role%20of%20Attorney%20General.pdf>

- The Government noted that there was little support among respondents for the suggestion made by the Committee regarding the Attorney's Ministerial functions to be transferred to a Minister in the Ministry of Justice. Lord Chief Justice, Lord Phillips of Worth Matravers commented:
'... if the prosecuting authorities form part of the same ministerial department as the judiciary and the courts the independence of both may be threatened and it will be difficult to maintain the necessary perception that they are truly independent of each other.'
- The Government believes that the Attorney General should be at the 'heart of government' and a number of respondents stated that there is no '*hard and fast distinction between legal issues and policy issues, when one is considering the provision of legal advice.*'

6. HOUSE OF COMMONS JUSTICE COMMITTEE- DRAFT CONSTITUTIONAL RENEWAL BILL (PROVISIONS RELATING TO THE ATTORNEY GENERAL), FOURTH REPORT OF SESSION 2007-08 (JUNE 2008)²⁵

The purpose of this report was to examine the draft Constitutional Renewal Bill to see how far its provisions put into effect the recommendations of the previous Report, completed by the Constitutional Affairs Committee, on the Constitutional Role of the Attorney General 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.

On 17 July 2007, the Constitutional Affairs Committee (re-named Justice Committee) reported on The Constitutional Role of the Attorney General. The report 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 principal changes proposed in the Draft Bill are that:²⁶

- 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 of the main prosecuting authorities 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; and
- The Attorney General must submit an annual report to Parliament.

The report analyses, in detail, the provisions of the Draft Bill in relation to the duties of the Attorney General and states the opinion of the Committee regarding each clause. The Committee stated that the Draft Bill only partly addresses the major

²⁵ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/698.pdf>

²⁶ House of Commons Justice Committee Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/698.pdf>

problem identified in the 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.

The Justice Committee stated the Draft Bill does not provide for a clear split in the role to create a non-political legal adviser and does not fully satisfy the concerns previously expressed in the Constitutional Affairs Committee report 2007, about the need to reform the office and restore public confidence in the office of the Attorney General. The Report broke down the various aspects of the Draft Bill and whether or not they approved:²⁷

- ***Individual directions***
The Committee stated their approval that the Draft Bill transfers powers over individual cases to the Directors, except where the Attorney retains specific functions.
- ***National security***
The Committee felt that there was 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 respect as the other prosecution agencies.
- ***Protocol***
The Committee stated they could not effectively comment on the protocol, as it had not been prepared yet but voiced their dissent that the Draft Bill had been put before Parliament for consideration before the draft of a protocol.
- ***Tenure of office of directors***
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 the, as yet unwritten, protocol. This leaves the position of the Directors unclear and the Committee feel the Directors ought to have clearer security of tenure than apparent in the Draft Bill.
- ***Attorney General's prosecution consent functions***
The Committee approved the proposed reform to the Attorney's functions in relation to consent of prosecution.

²⁷ Provisions in the Draft Bill, House of Commons Justice Committee Draft Constitutional Renewal Bill (provisions relating to the Attorney General), Fourth Report of Session 2007-08: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/698.pdf>

- ***Abolition of nolle prosequi***

The Committee stated that they were uncertain of the utility of the proposed abolition of the nolle prosequi, given that it is not clear by what it will be replaced. The Committee felt that this reform is of little practical importance, given that it is infrequently used, but will remove some power over prosecution from the Attorney General.

- ***Accountability- annual report/ legal advice***

- The Committee are sceptical in relation to the what the new annual report will add to the existing system and state they need further information to reach a conclusion about whether it will add to the process of accountability of the Attorney General.
- The Committee felt that the question of publishing the Attorney General' legal advice is difficult but noted that the scope for enhancing public confidence if it were practical to publish all or most of the advice where it is referred in support of a political decision.

- ***Reasons for the Attorney General being a Member of either House***

The Committee stated that the Report of their predecessor recommended 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 Committee felt that 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***

The Committee felt that the ministerial role of the Attorney General in relation to criminal justice policy should be separated from the role of legal adviser.

- ***Miscellaneous responsibilities***

The Committee stated that the functions of the Attorney General in relation to safeguarding the public interest in individual cases could be better performed by a non-political office holder.

- ***Rule of Law***

The Committee favour a statutory duty being placed on all ministers to observe the Rule of Law. The Attorney General's oath of office should be reformed to cover the duty to uphold the Rule of Law.

ANNEX

Constitutional Affairs Committee

Inquiry into Constitutional Role of the Attorney General

Functions of the Attorney General

(*indicates functions which are wholly or partly statutory)

1. *Superintendence of and Parliamentary accountability for.
 - Crown Prosecution Service
 - Crown Prosecution Service Inspectorate
 - Serious Fraud Office
 - Revenue & Customs Prosecutions Office
2. *Requirement for Attorney General's consent to certain prosecutions.
3. *Power to refer unduly lenient sentences to the Court of Appeal.
4. *Power to refer points of law in criminal cases to the Court of Appeal.
5. *Power to bring (or consent to) proceedings for contempt of court.
6. Power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
7. Superintendence of and Parliamentary accountability for the Army, Navy and Air Force Prosecuting Authorities.
8. General oversight of the other central prosecuting authorities (e.g. DTI, HSE, DWP and DEFRA).
9. Criminal justice policy Minister (with Home Secretary and Lord Chancellor).
10. Legal advisor to the Sovereign (as her Majesty's Attorney General).
11. Legal advice to the Crown on peerage cases.
12. Approval of Royal Charters
13. Chief legal advisor to the Government.
14. Advice to Ministers involved in legal proceedings in their official capacity.
15. Consultation with Ministers in legal proceedings in their personal capacity (in circumstances defined in the Ministerial Code).
16. Advice to Parliament on certain issues, including the conduct and discipline of Members, matters of privilege and procedure, and the meaning and effect of proposed legislation.

17. Receipt of committee papers and advice to the Committee on Standards and Privileges (Solicitor General when AG in Lords).
18. Intervention in legal proceedings to assert the rights of the Parliament.
19. Responsibility and Parliamentary accountability for the Attorney General's Office.
20. Responsibility and Parliamentary accountability for the Treasury Solicitor's Department.
21. Ministerial oversight of the Government Legal Service.
22. Leader of the Bar *ex officio*.
23. Advocate for the Crown in important cases.
24. Appointment of counsel (including Treasury Counsel) to represent the Crown in criminal and civil proceedings
25. Appointments of advocates to the court (independent counsel appointed to assist the court – formerly called '*amicus curiae*').
26. *Appointment of special advocates (counsel appointed to represent the interests of individuals in certain cases, e.g. immigration appeals, involving sensitive material which cannot be disclosed in the ordinary way).
27. *Nominal claimant and defendant in civil litigation where there is no appropriate Government department (under Crown Proceedings Act 1947).
28. *Power to bring proceedings to restrain vexatious litigants
29. *Power to represent the interests of charities in certain proceedings.
30. Power to give directions under the Royal Sign Manual for the disposal of charitable gifts under Wills.
31. *Power to take part in, or instruct the Queen's Proctor to intervene in, certain family law proceedings relating to marriage.
32. *Power to make or consent to application for an order requiring a new inquest.
33. Power to bring or intervene in legal proceedings in the public interest (e.g. to seek injunctions restraining publication of sensitive material where this is contrary to the public interest).
34. Power to consent to relator actions (civil proceedings brought to enforce a public law right).
35. *Power to bring certain devolution proceedings under the Scotland Act and Government of Wales Act.

36. Taking decisions under the Freedom of Information Act in relation to papers of a previous administration.
37. *Attorney General for Northern Ireland
38. *Appointment and superintendence of, and Parliamentary responsibility for, the DPP for Northern Ireland.
39. *Appointment of and Parliamentary accountability for the Crown Solicitor, Northern Ireland.
40. *Power to certify cases for trial by jury in Northern Ireland.
41. *Provision of guidance on human rights to criminal justice agencies in Northern Ireland.

Attorney General's Office
February 2007.