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Select Committee on the Constitution

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Reform of the Office of Attorney General

Report with Evidence

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Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 1228/5960
The Committee's email address is: constitution@parliament.uk

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Baroness Scotland of Asthal, Attorney General
Oral Evidence, 12 December 2007 1

NOTE:
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(Q) refers to a question in oral evidence

Reform of the Office of Attorney General

Introduction

1. A remit of the Committee is "to keep under review the operation of the constitution". In recent years, a debate has been taking place about whether—and if so, how—to reform the office of Attorney General (and consequently the role of the Solicitor General[1]). This debate was placed on a more formal footing when the Government released a consultation paper[2] on the role of the Attorney General as part of the process set in motion by the Green Paper on *The Governance of Britain*.[3] The Law Officers carry out functions of great constitutional importance. The Committee therefore decided to take oral evidence on the role of the Attorney from the current holder of that post, Baroness Scotland of Asthal QC, and to seek written evidence from two constitutional academics with divergent views on the subject: Professor Anthony Bradley[4] and Professor Jeffrey Jowell QC.[5]

2. In the light of this evidence and the findings of the House of Commons Constitutional Affairs Select Committee[6] in their recent report,[7] it became apparent that there are a number of different ways in which the post of Attorney might evolve. With this in mind, we now take the opportunity to set out the main arguments for and against reforming each of the different parts of the Attorney's role. **We trust that this report will prove useful as a 'handbook' to guide members of the House through the continuing debate on the role of the Attorney.**

The Role of the Attorney General

3. The office of Attorney General dates back to the 13th Century, although the current title was adopted in the 15th Century. The office assumed its modern shape in the 17th Century, when the Attorney became the legal adviser to the Crown. The Attorney and the Solicitor General are appointed by the Queen on the recommendation of the Prime Minister, as are all ministers. Subsequently, letters patent are issued under the Great Seal

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1 The Solicitor General is also a Law Officer of the Crown. The Law Officers Act 1997 provided that any function of the Attorney may be exercised by the Solicitor General, and the Solicitor is to all intents and purposes the Attorney's deputy. In recent years it has become customary to have one Law Officer in each House of Parliament.

2 *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192. See paragraphs 20ff below.

3 Cm 7170.

4 Emeritus Professor of Constitutional Law at the University of Edinburgh and a former legal adviser to this Committee.

5 Professor of Law at University College London.

6 Now known as the Justice Committee.

7 Constitutional Affairs Committee, 5th Report (2006–07): *Constitutional Role of the Attorney General* (HC 306).

authorised by warrant under the royal sign manual, and they both swear an oath. The Attorney's key duties can be divided into four categories.[8]

The Attorney General as Provider and Co-ordinator of Legal Advice

4. The Attorney, along with the Advocate General for Scotland, is the senior legal adviser to the Crown. This involves providing high-level advice to ministers, the Cabinet and also on occasion to the Queen and Parliament. Clearly, the provision of legal advice to the Government is important in giving practical effect to the constitutional principle of the rule of law. From time-to-time the Attorney represents the Government in legal proceedings in the courts of England and Wales, the European Court of Justice, the European Court of Human Rights and other international tribunals.

5. Within government, much of the day-to-day legal advisory work is carried out by lawyers employed by the Government Legal Service (the largest part of which is the Treasury Solicitors Department). These lawyers have a right of access to the Attorney, which enables them to raise issues of concern irrespective of what their own department's view may be. The Government also relies on independent members of the Bar for legal advice and representation. The Attorney appoints the First Treasury Junior (Common Law)—the 'Treasury Devil'— and the First Treasury Junior (Chancery), and panels of barristers of varying degrees of seniority whom departments may instruct.[9] The Attorney also appoints 'advocates to the court' (formerly known as an *amicus curiae*) to assist a court in particular cases and 'special advocates' to represent the interests of parties in certain national security cases.

The Attorney General's Role in Individual Prosecutions

6. Routine decisions about the conduct of prosecutions in individual cases in England and Wales are made by staff of the Crown Prosecution Service (CPS), headed by the Director of Public Prosecutions (the DPP, appointed by the Attorney), or by other prosecuting authorities such as the Serious Fraud Office (SFO) and the Revenue and Customs Prosecutions Office. However, the Prosecution of Offences Act 1985 stipulates that the DPP "shall discharge his functions under … the superintendence of the Attorney General", and the other prosecuting authorities operate under a similar framework. In practice this means that, in various types of situation, the Attorney is required to take an interest in a particular prosecution or proposed prosecution. One such situation is where a statutory provision stipulates that the Attorney's consent is required before a prosecution may be

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8 There is no universal agreement about the number of categories into which the Attorney's role can most appropriately be divided. We believe that the formulation set out in this report is the most coherent.

9 The First Treasury Junior (Common Law) and First Treasury Junior (Chancery) are members of the Bar of England and Wales in private practice who receive instructions more or less exclusively from Government. The common law First Treasury Junior is known colloquially as the 'Treasury Devil'. Former Treasury Devils include: Harry Woolf 1974–79 (later Lord Chief Justice of England and Wales and now a member of this Committee); Simon Brown 1979–84 (now Lord Brown of Eaton-Under-Heywood, a Lord of Appeal in Ordinary); John Laws 1984–92 (now Lord Justice Laws); and Stephen Richards 1992–97 (now Lord Justice Richards). The Attorney General is also responsible for the appointment and operation of four panels of barristers; Government departments may instruct those on the panels to advise and conduct litigation on behalf of the Crown. See http://www.tsol.gov.uk/attorney_generals_panel_of_counsel.htm.

brought.[10] Another is where some important public interest consideration (such as national security) may require a high-level determination as to whether an investigation or prosecution should continue.

7. Under the Criminal Justice Act 1988, the Attorney also has the power to refer what appear to be unduly lenient sentences to the Court of Appeal; in practice, such cases are identified by a specialist unit within the CPS and advice is sought from independent counsel before the Attorney decides whether to make a reference. Similarly, under the Criminal Justice Act 1972, where a person tried on indictment has been acquitted, the Attorney may seek the opinion of the Court of Appeal on a point of law which has arisen in the case.

The Attorney General as Minister

8. The Attorney's role as a minister has several facets. He or she shares responsibility for criminal justice policy with the Home Office and Ministry of Justice—the Office for Criminal Justice Reform, a cross-departmental team, was set up in 2004 to coordinate this area of work. In addition the Attorney, along with the Solicitor General, is responsible and accountable to Parliament for the work and effectiveness of those agencies which fall under the superintendence of the Office of the Attorney General, including: the CPS; the SFO; the Revenue and Customs Prosecutions Office; the Army, Royal Navy and Royal Air Force prosecuting authorities; HM Crown Prosecution Service Inspectorate; and the Treasury Solicitors Department. The Attorney also sets general prosecutorial policy. Finally, as a minister, the Attorney may be invited by the Prime Minister to attend Cabinet.

9. Although these functions are ministerial in nature, it is important to note that the Attorney's responsibilities for legal advice and individual prosecutions are non-ministerial. In these roles, he or she is not subject to collective responsibility and must act independently of the Government.

Other Functions of the Attorney General

10. In addition to the responsibilities described above, the Attorney has several other roles such as: applying to the High Court for orders to restrict the activities of vexatious litigants; involvement in contempt of court proceedings; and responsibilities in relation to charities.

Background to the Reform Debate

11. The current debate about reforming the role of Attorney is in part a response to three major controversies in the last five years involving Baroness Scotland of Asthal's predecessor, Lord Goldsmith QC. The first of these related to his role as legal adviser to the Crown, whilst the other two concerned his role in prosecution decisions. These controversies are described in more detail below.

Iraq

12. The nature of the Attorney's advice to the Prime Minister over the legality of invading Iraq in 2003 was an important issue in both the parliamentary and

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[10] For example, the Racial and Religious Hatred Act 2006 (inserting new sections into the Public Order Act 1986).

the public debate that took place at the time. The key question was whether it would be legal to invade Iraq without a second United Nations Security Council resolution to supplement resolution 1441, which had given Iraq "a final opportunity to comply with its disarmament obligations".[11] Lord Goldsmith provided his advice to the Prime Minister on 7 March 2003 but, relying on convention, the advice was not made public. However, on 17 March Lord Goldsmith delivered a public summary of his position in the form of a parliamentary written answer, in which he explained why he believed that an invasion would be legal.[12] The invasion commenced three days later, on 20 March.

13. Over two years later, on 28 April 2005, after a number of articles in the press and continuing pressure on the Government, the Attorney's full advice of 7 March 2003 was made public. That advice was different in several respects from the position set out in the written answer of 17 March 2003, giving a more qualified opinion on the legality of the war. The full advice set out the following conclusions:

> "I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force [but] I accept that a reasonable case can be made that Resolution 1441 is capable in principle of reviving the authorisation in [resolution] 678[13] without a further resolution".[14]

14. The differences between the original advice and the summary of it disclosed at the time gave rise to speculation that the Attorney had been placed under political pressure to temper his opinion to align it with the Government's intentions.[15] This in turn led some people, including a number of legal and constitutional experts, to question whether it is appropriate for the Government's chief legal adviser also to be a politician and a member of that Government.[16]

BAE Systems

15. The second controversy concerned the decision to drop an SFO investigation into whether the British defence company BAE Systems had paid bribes to Saudi Arabian officials in order to secure a lucrative defence contract. On 14 December 2006, Lord Goldsmith told the House of Lords that the SFO had concluded that "there is no guarantee that this investigation would lead to prosecution" and that "the potential damage to the public interest which [an 18 month] period of investigation would cause is such that it should discontinue that investigation now". He added that he would go "somewhat further" because he considered that "there are obstacles to a successful prosecution so that it is likely that it would not in the end go ahead". He went on to explain that he had "obtained the views of the Prime Minister and

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11 See http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement.

12 HL Deb WA 2–3 17 March 2003.

13 Resolution 678, agreed in 1990, authorised the use of force against Iraq to eject it from Kuwait and to restore peace and security in the area.

14 See http://www.number10.gov.uk/output/Page7445.asp.

15 See, for example, http://www.independent.co.uk/news/uk/crime/goldsmith-under-pressure-from-legal-profession-over-impartiality-526620.html and http://www.timesonline.co.uk/tol/comment/columnists/simon_jenkins/article386415.ece.

16 See, for example, http://www.guardian.co.uk/guardianpolitics/story/0,,1472869,00.html.

the Foreign and Defence Secretaries as to the public interest considerations" and that they had "expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives".[17]

16. The decision to drop the investigation was, and remains, controversial. Although Lord Goldsmith was absolutely clear that this decision had been made by the Director of the SFO after close consultation with the British ambassador in Saudi Arabia, it was not perceived in this way by much of the media, with the Government and Lord Goldsmith being accused by some of intervening in response to pressure from Saudi Arabia.[18] This speculation again led to a debate about the role of Attorney, this time over his responsibilities in respect of prosecution decisions and the public interest.[19]

Cash for Honours

17. The debate over the Attorney's involvement in prosecutions was further stimulated by the so-called 'cash for honours' investigation. That investigation focused on whether there had been any breach of the Honours (Prevention of Abuses) Act 1925, which banned the sale of honours, or the Political Parties, Elections and Referendums Act 2000, which required parties to declare donations of more than £5,000 (as opposed to loans made at a commercial rate of interest). The investigation also considered whether there had been a conspiracy to pervert the course of justice.

18. While the investigation was in progress, the prospect of Government ministers or officials being charged brought to the fore the question of whether the Attorney could genuinely be politically impartial if issues relating to the prosecution were referred to him. Some felt that the Attorney should step aside from making any decisions in the matter but Lord Goldsmith declined to do so.[20] However, he later told the Constitutional Affairs Select Committee that if issues were referred to him, he would seek advice from independent counsel and "make public that advice". He also undertook to "consult opposition parties" on the commissioning of such advice.[21]

19. In June 2007, when Gordon Brown MP took over from Tony Blair MP as Prime Minister, Baroness Scotland of Asthal QC succeeded Lord Goldsmith as Attorney. The new Prime Minister announced that the Government intended to consult on reforming the post of Attorney and that, in the meantime, Baroness Scotland of Asthal would not make key prosecution decisions in individual criminal cases "except if the law or national security requires it".[22] (This was in fact already the existing position: no Attorney in recent times has taken an individual prosecution decision not required by

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17 HL Deb 14 December 2006 cols 1711–13.

18 See, for example, http://www.ft.com/cms/s/0/3aa11c36–8be1–11db-a61f-0000779e2340.html and http://www.guardian.co.uk/print/0,,329702255–117700,00.html.

19 See, for example, http://www.guardian.co.uk/commentisfree/story/0,,1973386,00.html.

20 See, among others, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/06/npolitics06.xml and http://www.independent.co.uk/news/uk/politics/goldsmith-refuses-to-stand-aside-over-cashforhonours-445868.html.

21 See http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/7020704.htm, QQ 46 and 51.

22 HC Deb 3 July 2007 col 817.

law.) Shortly afterwards, the CPS announced that no charges would be brought in connection with cash for honours.

The Government Consultation

20. On 3 July 2007, the Government announced a major programme of constitutional renewal with the publication of the Green Paper on *The Governance of Britain*. The Green Paper contained a section on the role of the Attorney, which noted:

> "The Government is fully committed to enhancing public confidence and trust in the office of Attorney General and is keen to encourage public debate on how best to ensure this and will listen to the views of all those with an interest. We will therefore publish a consultation document before the summer recess which considers possible ways of alleviating these conflicts (or the appearance of them) and invites comments".[23]

21. Shortly afterwards, on 24 July 2007, the Constitutional Affairs Select Committee published its report on the *Constitutional Role of the Attorney General* which concluded that the role should be radically reformed.[24] The recommendations of the report are discussed in greater detail below.

22. Two days later, the Government published their consultation paper on the role of the Attorney.[25] The consultation paper set out the history and current role of the Attorney, the present debate on the functions of the post, options for change, and, as an appendix, details of the role of the Attorney General in other jurisdictions.

23. The consultation document's overview stated that "The Attorney General carries out a number of roles which have the potential to create tension with each other. The Attorney is a politician and a member of the Government, but also acts as an independent legal adviser and guardian of the public interest".[26] Whilst citing the advantages of the current arrangements, such as the direct accountability of the Attorney to Parliament and the ability to ensure that the Government can be consulted on the public interest considerations of sensitive individual criminal cases, the Government flagged up two areas of particular tension. First, the tension between the Attorney's function as a minister and member of the Government, and being an independent guardian of the public interest and performing superintendence functions (for example on decisions relating to sensitive prosecutions). Second, the tension between being a party politician and a member of the Government, and the giving of independent and impartial legal advice.

24. The paper set out a number of options for change, including the following:

- Separating the Attorney's role as chief legal adviser to the Government from that of political Government minister, or reforming the way in which the Attorney currently performs this function so as to address any tensions between the roles.

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23 Cm 7170, paragraph 54.

24 5th Report (2006–07), HC 306.

25 *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192.

26 Ibid, pp 2–3.

- Publishing the Attorney's legal advice to the Government in some circumstances, or making public the legal basis for key Government decisions.
- Reforming the role of the Attorney in relation to criminal proceedings, perhaps simply by clarifying the ambit of that role, or by removing or limiting the public interest functions in relation to criminal prosecutions.
- Removing the Attorney's criminal justice policy function.

The consultation closed on 30 November 2007.

25. On 12 December 2007, we took evidence from Baroness Scotland of Asthal. Before considering the nature of the consultation responses, we explored the apparent lack of accurate public—and parliamentary—awareness of the office of Attorney. Baroness Scotland of Asthal conceded that "there is not a real understanding of what the Attorney does and when the Attorney does it". Referring to the example of the BAE Systems investigation, she pointed to "a general misconception that that was a decision taken by the Attorney. Of course it was not. It was a decision taken by the Serious Fraud Office Director" (Q 3). Reflecting on this lack of awareness, she noted that "all the contributors talk about perceptions of conflict, as opposed to the reality of conflict, but there is, of course, this important issue as to whether perceptions do not of themselves distort the reality and, therefore, how do you deal with that whole issue. There has never been any suggestion that any of the Attorneys General in the past have ever behaved in any way other than with total propriety" (Q 6). She later added, "I think what is not acceptable is that the misconceptions should remain, because that would be very corrosive" (Q 8).

26. Turning to the consultation responses, Baroness Scotland of Asthal told the Committee that the majority of people who responded felt that "there is nothing of fundamental difficulty in relation to the Attorney General's role" (Q 2) and that "the more radical proposals that were certainly voiced in the CASC report do not appear to have gained a great deal of support from those who have contributed" (Q 5). However, "some [people] have suggested that there need to be some changes"; in particular, "the real issue has been in relation to the power that the Attorney has to direct in relation to individual prosecutions". There was also "some concern" as to whether the Attorney should or should not attend Cabinet, and "there has been an issue raised in relation to the criminal justice policy role that has been adopted by the Attorney". The suggestion that the Attorney should be someone "who sits outside of government" had been "very much seen as a minority view" (Q 2).

27. On 25 March 2008, the Government set out how they intend to take forward *The Governance of Britain* reforms in a three-part Command Paper consisting of a White Paper, a draft Constitutional Renewal Bill and an analysis of the various consultation responses.[27] These documents contain a number of proposed statutory and non-statutory reforms to the role of Attorney. The main points are as follows:

- the Attorney would continue to be the chief legal adviser to the Crown, a Government minister and a member of one of the Houses of Parliament;

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[27] Cm 7342-I, 7342-II and 7342-III.

- the Attorney would continue to superintend the main prosecuting authorities, but would no longer have the power to direct them to prosecute or not to prosecute an individual criminal case;
- the Attorney would however have the power to stop or prevent a prosecution (or investigation by the Serious Fraud Office) where this is thought to be necessary for the purpose of safeguarding national security—and must report to Parliament each time this provision is used;
- the requirement for the Attorney to consent to individual prosecutions for certain offences would be reformed; depending on the offence, the consent requirement would be a) abolished, b) transferred to the Director of Public Prosecutions or other appropriate Director, or c) retained; and
- the Attorney would lose the power to enter a *nolle prosequi* (that is stop a trial on indictment).

28. In addition to these changes, the oath of the Attorney (and the Solicitor General) would be modified to require the post-holder to respect the rule of law, and the Attorney would have to make an annual report to Parliament.

29. Most of these proposals are contained in the draft Constitutional Renewal Bill and will be scrutinised by a Joint Committee of both Houses of Parliament. Because this is a draft bill, there is considerable scope for debate on the substance and the detail of the Government's proposals before the formal legislative process begins (it is expected that the Constitutional Renewal Bill will be announced in the next Queen's Speech).

Reform Options

30. We now consider the main arguments for and against reforming the role of the Attorney in three distinct areas: legal advice; prosecutions; and criminal justice policy.

Legal Advice

31. The key question with respect to the Attorney's advice function is whether it is appropriate for the Government's chief legal adviser to be affiliated to a political party and appointed by the Prime Minister as a member of that Government, or whether that role should be filled by an 'independent' legal adviser further removed from the political arena.

32. In evidence, Professor Jowell argued that "however 'semi-detached' from politics the Attorney may claim to be, if he or she is a member of either House of Parliament and takes the whip of the governing party, the role is clearly 'political'". Therefore, "when the Government does justify its actions on the basis of the Attorney's advice there may be occasions when those actions will be perceived to be based upon a partisan interpretation of the law". Countering the argument that the strong independent traditions of the Attorney are a sufficient safeguard against biased decisions, Professor Jowell stated, "the tradition of actual independence is not the only point here. The appearance of lack of independence is what matters. Justice must not only be done, but also [be] seen to be done". This had also been the impetus behind reforms to the judicial appointments system, he suggested: "Parliament in its wisdom acknowledged that the mere appearance of lack of judicial independence from the executive necessitated a new scheme of appointments by the independent Judicial Appointments Commission" (p 29).

33. Turning to the question of whether it is necessary to have a "political" Attorney "infused with a necessary understanding of the wider policy context and realities of government", Professor Jowell thought that such a criterion was "unacceptable insofar as it suggests that the Government would prefer to seek a convenient legal opinion from someone sympathetic to its policy goals" (p 29). In any case, he said, it would be easy nowadays to find someone outside politics with the requisite knowledge of "the political aspects of the kind of law upon which the Government is likely to need advice" because "there is now a very large cohort of barristers and solicitors specialising in public law who are of the highest quality and sensitive to policy considerations". Moreover, he asserted, "there is little reason to believe that an independent attorney drawn from this cohort would command any less authority with ministers than a 'political' attorney" (p 30). Alternatively, he suggested, it might be possible to retain some of the 'political' qualities of the current system whilst also reducing the "obvious appearance of bias that a fully political attorney inevitably attracts" if the Attorney were to be appointed by the Prime Minister for the duration of the term of government from amongst specialist practising lawyers (p 32).

34. Such an "independent" Attorney, Professor Jowell believed, would be under "no inhibition from attending Cabinet for the purpose of monitoring the legality of decisions". Indeed, "freed from competing political demands, she would have more time for the systematic monitoring of the legality of decisions as they emerged from the various centres of government (including Departments and Cabinet Committees)" (pp 30–31).

35. Professor Jowell's conclusions are similar to those reached by the Constitutional Affairs Select Committee. Drawing on the example of the Lord Advocate in Scotland, the report stated that "it is not necessary to be either a politician or a minister in the usual sense in order to be a member of the Government". Moreover, addressing suggestions that an independent Attorney might be sidelined, the Committee found that "no sensible minister would ignore the advice of an independent Attorney General who is not a Government minister. We note that ministers already accept the legal views of Treasury Counsel, who are not political insiders". The report concluded that legal advice should be provided by an independent, non-political career lawyer because:

> "We see no reason why the official exercising the role of legal adviser to the Government should be a political appointee or a member of the governing party. Both in perception and reality, it would improve the independence and public confidence in the impartial nature and authority of the provision of legal advice if it were not the responsibility of someone in political life".[28]

36. Professor Bradley took a different view from Professor Jowell and the Constitutional Affairs Select Committee. He emphasised that it was very hard to separate the political and legal duties of the Attorney because "the difficult scenarios facing the office must often arise in shades of grey, rather than in the clear contrasts of black and white". This applied particularly to the Attorney's role as the Government's senior legal adviser where there was no "bright line between legal and political considerations" (p 24).

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[28] *Constitutional Role of the Attorney General*, paragraphs 70–72.

37. Considering the possibility of an 'independent' Attorney, Professor Bradley concluded:

> "I consider it to be doubtful whether an 'independent' lawyer outside the structure of central government and not holding ministerial office would command the authority that at present goes with the office of Attorney General. Nor is it clear to me how such a new public officer could be made accountable or responsible for the manner in which he or she performs that role." (p 25)

38. Lord Goldsmith also made this point in his written evidence to the Constitutional Affairs Select Committee, suggesting that advice provided by an Attorney who is also a member of the Government "tends to be more heeded by ministers because it comes from one of their colleagues" and that "a minister receiving unwelcome advice is perhaps less likely to sweep it aside when it comes from a ministerial colleague rather than a civil servant or some external lawyer".[29] He also pointed to other aspects of the Attorney's role that would not be so effectively performed by an 'independent' lawyer. For example, referring to his role in negotiating for the return of British detainees held at Guantanamo Bay, which involved "difficult issues of law", Lord Goldsmith said "I do not believe I could have handled that role effectively had I not been a member of the Government, and been seen to be speaking with the authority of Government". He also quoted from a speech by Professor Jowell:

> "When [the Attorney] expresses these values [in relation to Guantanamo Bay and human rights] as a Minister of the Crown, rather than a mere detached outside adviser, they are articulated not as mere expressions of the law but of Government policy".[30]

39. The current Attorney, Baroness Scotland of Asthal, was unable to set out her position when giving oral evidence to this Committee because the Government's consultation process was still ongoing at the time. However, she did emphasise that in recent times "there have been no attorneys general, to my knowledge, where there has ever been a suggestion that the political complexion changed the way in which they gave their advice" (Q 25).

Prosecutions

40. The question in respect of the Attorney's role in prosecutions is whether it is appropriate for a member of the Government to be involved in certain decisions to prosecute or not to prosecute as part of his superintendence function. The issue of whether it should be the Attorney who fulfils the ministerial function of being accountable to Parliament for the work and effectiveness of the prosecution agencies is considered in the next section.

41. Professor Jowell wrote that "since the recent BAE [Systems] and loans for peerages sagas, which demonstrated so graphically how the Attorney's involvement in prosecutorial decisions can attract a perception of party-political bias, it is difficult to see how the opportunity for reform of the office could be declined" (p 31). Baroness Scotland of Asthal accepted that there were problems with public perceptions: "I think we are going back, are we not, to talk about the need to reassure, to make clear and to deal with

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[29] Ibid, Ev 59.

[30] Ibid, Ev 60.

perception, and it may have been an ill-informed perception, but there was a perception that the Attorney and attorneys general in the past had been responsible for directing in individual cases because they had power to direct" (Q 66).

42. Professor Jowell went on to note that the principal argument against reform was that "it is legitimate, in a decision to prosecute, to take into account the 'public interest'" and that a member of the Government is "best able to identify the public interest". However, he pointed out that there were limits to the notion of public interest. First, it is "not synonymous with the interest of the ruling party"; and second, it should not permit the Attorney freedom "to take into account 'political' considerations that are wholly unrelated to the purpose of the law under which the matter is being prosecuted"—so, for example, "it is not clear that the Attorney may properly take into account, in deciding to drop a prosecution for corruption, the ground that a prosecution may antagonise a foreign government and therefore lead to a loss of exports and employment in the UK". Such a motive would be "extraneous to the objects and purpose of the law … against corruption—and thus offends the rule of law" (p 31).

43. Nonetheless, Professor Jowell said, "there are a range of issues that may legitimately be taken into account in a decision whether or not to prosecute", for example national security or the fact that a conviction might lead to a national strike. But in his view, it was not necessary to have a 'political' Attorney in order to identify these kinds of matters. For example, in Ireland, "an independent DPP has proved perfectly capable of making these decisions": he consults the government in "sensitive cases" but makes the decision "untainted by the perception of unacceptably partisan bias". Having said that, Professor Jowell also suggested that "since decisions on the public interest are based upon considerations of policy rather than strict legality, it would be constitutionally appropriate for them to be acknowledged to be taken on the direction of the relevant minister, who would then be properly answerable to Parliament for the decision" (p 31).

44. The Constitutional Affairs Select Committee report argued that "the Attorney General's responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role"[31] and suggested that "the present situation where the Attorney General has both ministerial functions and is responsible for making decisions with regard to prosecutions results in a potential conflict of interest". The Committee therefore recommended that the Government "separate the policy functions and the prosecutorial functions of the Attorney General", thus removing "the potential for the allegations of lack of independence and political impropriety". The 'ministerial' functions would instead be carried out by a minister in the Ministry of Justice, whilst an independent Attorney—the same career lawyer who would provide the Government with legal advice—would be responsible for deciding on prosecutions and "exercising a propriety and public interest role".[32]

45. However, the Committee also accepted that there needs to be "a mechanism through which ministers can communicate to the independent Attorney General their recommendation or their insistence that a particular

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[31] Ibid, paragraph 56.

[32] Ibid, paragraph 83.

prosecution should not proceed on national security grounds". Therefore, ministers would be able to instruct the Attorney, "in a process which would have to be transparent", that "on national security or public interest grounds a prosecution should not proceed".[33] Moreover, "where ministers instruct the independent head of the prosecution service on public interest grounds, whether national security or other grounds, the Secretary of State for Justice would be accountable to Parliament for that instruction".[34]

46. By contrast, Professor Bradley concluded that the Attorney's current role in individual prosecutions was unobjectionable in many ways, although it did need a measure of reform. In spite of what some people have claimed, he found that the Attorney's role in initiating civil proceedings and individual prosecutions did not constitute a breach of the constitutional doctrine of separation of powers because "a decision to prosecute is not itself a judicial decision but one that leads to a judicial decision by the criminal court of first instance or on appeal". In other words, this function of the Attorney is an executive function so there are no constitutional difficulties in the Attorney retaining the role, provided that decisions are never based on "politically partisan considerations" (p 24). Lord Goldsmith reinforced this point in his written evidence to the Constitutional Affairs Select Committee, noting that he took prosecution decisions "independently of Government, in the public interest".[35]

47. The position was somewhat different in respect of decisions **not** to prosecute, Professor Bradley noted, since "these appear to bar access to due process of law"—although he also implied that, because the option of pursuing a private prosecution or judicial review was available to aggrieved parties, this was not a bar to the Attorney taking such decisions. Notwithstanding this conclusion, Professor Bradley commented that the power of the Attorney to prevent a prosecution (whether public or private) from proceeding by issuing a *nolle prosequi* "may need to be the subject of legislation". If it was felt not to be sufficient to rely on "conventional safeguards against abuse" of the *nolle prosequi* power, he thought that it might be necessary "to require such a decision to be approved by (for instance) the Queen's Bench Divisional Court" (p 24).

48. Professor Bradley also indicated that the number of circumstances in which the Attorney is required by statute to approve a decision to prosecute should be kept to a minimum. He therefore proposed "a rigorous review of the statutes that require the approval of the Attorney General to be given to certain prosecutions, with the aim of shortening this list of offences, possibly by substituting the approval of the Director of Public Prosecutions for that of the Attorney" (p 26). This would not affect the Attorney's role in respect of certain sensitive individual prosecution decisions, such as those involving national security. Baroness Scotland of Asthal warned us, however, that "in the last year Parliament's desire to have the Attorney, as opposed to the DPP, determine these issues has continued with ever-growing appetite, it seems to me. There have been suggestions in the House of Lords that the DPP should do this: 'No, no', goes the cry, 'Go higher, go higher. We need the Attorney to determine this'" (Q 60).

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33 Ibid, paragraphs 82–83.

34 Ibid, paragraph 105.

35 Ibid, Ev 60.

Ministerial Functions

49. The key question here is whether the Attorney should continue to exercise ministerial responsibility in the field of criminal justice policy, which includes being accountable to Parliament for the prosecution services.

50. Professor Jowell noted that this function may require "the concentration of resources on the enforcement of certain crimes … and the corresponding reduction of concentration on others". Given that such decisions concern "the allocation of scarce resources, a matter traditionally within the realm of the executive", he concluded that they may "appropriately be taken by the Minister of Justice or Home Secretary (perhaps in consultation or in conjunction with the Attorney)" (p 31). Similarly, as noted above, the Constitutional Affairs Select Committee concluded that the ministerial functions of the Attorney "would be more appropriately carried out by a minister within the new Ministry of Justice".[36]

51. Moreover, the Constitutional Affairs Select Committee reported that "while there was no consensus about the Attorney's General's role as a minister there was unanimous agreement that he or she should not regularly attend Cabinet meetings" in the way that a normal Cabinet minister would do.[37] The Committee quoted Lord Mayhew of Twysden, a former Attorney, as saying:

> "In my time it was the established convention that you were of Cabinet rank but not a member of the Cabinet, and you went by invitation to deal with the specific item of business and then you left. I think that was important because the members of the Cabinet have to accept legal advice from the Attorney and I think it would be more difficult for them to do so if he had been present taking part in a contested debate about policy because they might be tempted to think that if he gave them adverse advice to their political interest that was simply [to] reinforce the view that he had taken in the course of argument".[38]

52. The Committee therefore concluded as follows:

> "We recommend that, regardless of whether there are any changes to the ministerial or party political status of the Attorney General, the old convention with respect to the Attorney General's attendance at Cabinet should be re-established. The Attorney General should attend the Cabinet by invitation only, and then only for the consideration of specific relevant agenda items".[39]

53. Professor Bradley agreed in part with the Constitutional Affairs Select Committee and Professor Jowell. On the one hand, he felt that the Attorney's ministerial role in superintending the prosecution services should be retained "on the basis that it … is concerned with general issues of prosecuting policy that arise from existing criminal law, being matters on which there should be public knowledge and accountability to Parliament" (p 25). On the other hand, he recommended that the Attorney's role in criminal justice policy through the trilateral Office for Criminal Justice Reform should be ended,

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[36] Ibid, paragraph 83.

[37] Ibid, paragraph 84.

[38] Ibid, Ev 17.

[39] Ibid, paragraph 86.

leaving this policy area to the Home Secretary and Secretary of State for Justice. Under this proposed arrangement, "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" (p 26).

54. Like the Constitutional Affairs Select Committee and Professor Jowell, Professor Bradley also recommended that the Attorney "should attend Cabinet meetings only when oral advice is required on a specific issue". In addition, he noted that "a re-statement of the conventions related to the Attorney should emphasise that he or she does not share in the collective responsibility of ministers for Cabinet decisions" (p 26).

The Question of Accountability

55. We now consider the implications of reform for the Attorney's accountability. The Constitutional Affairs Select Committee report stated that "it does not necessarily follow that in order to be accountable to Parliament the Attorney has to be a member of either the Commons or the Lords".[40] Indeed, even under the current arrangements the extent of the Law Officers' accountability to Parliament was "heavily circumscribed".[41] Instead, the Committee suggested, an independent Attorney could be accountable to Parliament in the same way as the Parliamentary Ombudsmen and the Electoral Commission. The report also cited the example of the Lord Advocate in Scotland who, even if he or she is not a Member of the Scottish Parliament, can take part in parliamentary proceedings (but may not vote) and be questioned by MSPs about the exercise of his or her functions.[42]

56. Professor Jowell pointed out that some of the Attorney's functions should not be subject to parliamentary accountability anyway. For example, the Attorney is not accountable to Parliament for the provision of legal advice to the Government because "where the Government acts upon legal advice, it is its actions that may appropriately be challenged by Parliament and not the advice upon which the actions are based". The question of whether a particular Government action is legal or not is a matter for the courts alone. Similarly, Professor Jowell said, "some decisions in the area of the Attorney's prosecutorial powers are not ideally amenable to substantive parliamentary scrutiny—such as the decision not to prosecute on the ground of lack of sufficient evidence" (p 32). He did accept, though, that parliamentary accountability was important in respect of other prosecutorial decisions, such as some decisions not to prosecute on the grounds of public interest. In such cases, he said, "direct responsibility could properly be taken by the relevant minister, who would then be answerable to Parliament for the decision" (p 33).

57. Other people have been less sanguine about the question of accountability to Parliament. For example, Lord Goldsmith told the Constitutional Affairs Select Committee that the Attorney must be accountable to Parliament for his prosecutorial function, "and that means being, in my view, a member of Parliament, one or the other Houses, so that person can be summoned to the

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40 Ibid, paragraph 97.

41 Ibid, paragraph 90.

42 Ibid, paragraph 97 and p 30.

House in order to answer questions, to stand [at] the despatch box and to deal with any concerns that members have: because the Houses represent the public for these purposes and if that means being a member of the House, being a politician, then, yes, I think it needs to be a politician in that sense".[43] Similarly, Baroness Scotland of Asthal said:

> "No-one has got over the difficulty about there not being anyone accountable to Parliament at the despatch box. You would not have that. You could have a select committee, there are various other mechanisms people have come up with, but what you will be giving up is there would be no-one accountable, save and in except for if you made the Ministry of Justice or the Home Office accountable for prosecutorial authority. No-one seems to like that either, I know, but that does not seem to hold. There are lots of people who have said they think that is worse, but they have not come up with a solution of somebody standing at the despatch box and being grilled to within an inch of their lives. They have not come up with anything better." (Q 71)

58. Lord Morris of Aberavon, appearing before the Constitutional Affairs Select Committee, quoted the words of former Attorney Sam Silkin QC on this point: "to whom would [an] independent non political law officer be accountable? If there were no minister through whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister was answerable for an independent law officer would in practice have to control him, else we should have the semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament".[44] Lord Mayhew of Twysden's conclusion was categorical: "I do not see how [the Attorney] can be accountable to the Parliament unless he is a member of it, and I think it is absolutely essential for public confidence reasons that he should be".[45]

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43 Ibid, Ev 40.

44 Ibid, Ev 18.

45 Ibid, Ev 19.

APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee which conducted this inquiry were:

Viscount Bledisloe
Lord Goodlad (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Lord Norton of Louth
Baroness O'Cathain
Lord Peston
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands
Lord Smith of Clifton
Lord Woolf

Declaration of interests relevant to this inquiry

Lord Lyell of Markyate
Solicitor General (1987–1992)
Attorney General (1992–1997)

Lord Morris of Aberavon
Attorney General (1997–1999)

Lord Woolf
Chairman of the Woolf Committee, which reviewed and proposed standards of ethics and integrity for adoption in existing and future contracts for the manufacture and supply of arms by BAE Systems Limited (June 2007-May 2008).

APPENDIX 2: WRITTEN EVIDENCE BY PROFESSOR ANTHONY BRADLEY[46]

1. It is inherent in our 'unwritten constitution' that questions may arise that, from the standpoint of legal form and constitutional principle, give rise to difficulties of analysis. If such difficulties do not in fact arise as often as foreign observers might expect, this may be due to a constitutional and political culture with long experience of the way in which state institutions and holders of public office interact and practical solutions are found. But this does not mean that the results of constitutional evolution are always acceptable. Strong measures of reform are sometimes needed.

2. Before the Constitutional Reform Act 2005, the need for such reform in respect of the Lord Chancellor was overdue. This office, as it had evolved, breached the separation of powers in that it provided for a Cabinet minister to be head of the judiciary. Such a clear breach of principle, running counter to judicial independence, could no longer be defended. As I have previously explored at length,[47] the changes following that necessary reform led to the creation of a new interface between the Government and the judiciary.[48]

3. The main question considered in this note is whether a comparable piece of constitutional surgery is needed in respect of the Attorney General. In July 2007, the House of Commons Constitutional Affairs Committee recommended that the current duties of the Attorney be split in two:[49] "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". In my opinion, this would for various reasons not be a satisfactory reform. **In summary, I consider 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 would be better performed in other ways; and (2) a re-statement of the essential functions of the office and the conventions that apply to it.**

4. As the Government's chief law officer, the Attorney General has many functions that have often led in the past, and are still likely to lead, to difficult political, legal and constitutional tensions.[50] The office operates at the interface

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46 Barrister of the Inner Temple; Emeritus Professor of Constitutional Law, University of Edinburgh; visiting fellow at the Institute of European and Comparative Law, University of Oxford; formerly legal adviser to the House of Lords' Select Committee on the Constitution.

47 6th Report of the Constitution Committee (2006–07): *Relations between the executive, the judiciary and Parliament* (HL Paper 151), Appendix 4.

48 By contrast, the question of whether the Lord Chancellor should always be Speaker of the House of Lords raised issues of the relationship between the Government and the House that were less pressing from a separation of powers standpoint, but this situation had to be addressed if it were to be possible for a member of the Commons to become Lord Chancellor. This factor reinforced the case that existed in any event for the House of Lords to be able to elect its presiding officer.

49 5th Report of the Constitutional Affairs Committee (2006–07): *Constitutional Role of the Attorney General* (HC 306).

50 See for instance the discussion of numerous controversial affairs involving the Attorney General a quarter of a century ago in J L Edwards, *The Attorney-General, Politics and the Public Interest* (1984). For a perceptive discussion of more recent events, see N. Walker, "The Antinomies of the Law Officers", in M Sunkin and S Payne (eds), *The Nature of the Crown: a Legal and Political Analysis,* pp 135–69.

between law, government and politics[51] and the role will often lead to pressures relating to the 'rule of law', as politicians and media commentators look for assurance that the Government has acted or is proposing to act according to law. The 'rule of law' continues to be a diffuse and uncertain concept, despite its appearance in the Constitutional Reform Act, but the duty of the Government to act according to law is at the heart of the concept.

5. The recommendation of the Constitutional Affairs Committee is, in effect, that the office of Attorney General should be discontinued and the functions transferred to other office-holders. A related question must be whether it would strengthen or weaken the office of Attorney if it were held by a person who is not a minister; and, if so, whether this would enable the Government to receive better legal advice. Another issue is, once advice has been given, whether the change to a more independent office would help to ensure that the Government acts in accordance with that advice.

6. I do not consider that the answers to such questions are at all clear-cut. They are certainly far less clear-cut than the need to remove judicial powers from the Lord Chancellor. I suggest that this is because the present consultation is essentially concerned with relations among key players who are ***within*** the Executive, not with relations ***between*** the Executive and the judiciary. In my view, the primary functions performed by the Attorney General are properly described as executive functions, even if they require a greater degree of detachment from the customary structure of accountable government than that which applies in general to performance of executive functions.[52]

7. I doubt whether the usual 'separation of powers' analysis (based on distinguishing between legislative, executive and judicial powers) is easily applicable to a debate about how power is exercised within the executive. For that debate to be fully informed, we need to know: (a) what structures exist within the executive (and their effectiveness) for internal control of decision-making; and (b) what external procedures exist for ensuring accountability for executive decisions that have been taken. The responsibility (or accountability) of the Government to Parliament is a fundamental aspect of the 'unwritten' constitution.[53] That responsibility has a collective dimension (the responsibility of the whole Government to Parliament for all that ministers do); individual ministers also owe a personal responsibility to Parliament. However, the conventional position in respect of the Attorney General is that, although he or she is a minister and a member of the Government, and (like other ministers) holds office at will of the Prime Minister, he or she does not share in the collective responsibility of the Government to Parliament for all purposes. Moreover, the Attorney is entrusted with certain classes of decision which fall outside the customary processes of collective responsibility and are reserved to the Attorney to act in his or her own

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51 As Edwards said, "This unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutors, the State and the citizenry at large" (op cit, p viii).

52 Although my conclusions in this note are broadly in line with those expressed by Lord Lyell of Markyate in his letter to the Attorney General's Office dated 5 November 2007, the analysis made in this paragraph departs from his description of the office. The divergence may in part arise from the different meanings that can be attached to the term, 'executive'.

53 Though important aspects of that responsibility (including the duty of ministers to give 'accurate and truthful information' to Parliament) were in March 1997 adopted in written form by each House, and are now included in the *Ministerial Code.* This successful development suggests that, contrary to the view of the Joint Committee on Conventions (Session 2005–06, *Conventions of the UK Parliament,* HL Paper 265/HC 1212) it is possible and may be helpful to state constitutional conventions in writing without changing their status.

judgment of what the public interest requires. For these decisions he or she is individually answerable or accountable to Parliament. A key aspect of this position in relation to prosecution decisions is stated in the well-known 'Shawcross convention'.[54]

8. The conventions relating to this office are complex and are often not understood, or are criticised as being unworkable and too weak to resist the pressures of the real world. Certainly, some distinctions drawn in the past relating to the office are not easy to grasp. For instance, the controversy in the 1970s over the proposed publication of the Crossman diaries led to the Attorney General (Sam Silkin QC) seeking an injunction against the publishers. Thereafter, a judgment from the Lord Chief Justice, Lord Widgery, examined both the legal basis for rules of Cabinet secrecy and the power of the courts to restrain disclosures that breached those rules.[55] Mr Silkin stated that he was acting in the case by his own decision on a matter of public interest, not as a result of any Cabinet decision; but the main evidence on which his case against the publishers was based was given by the Secretary to the Cabinet, presumably at the request of the Attorney, and not by decision of the Prime Minister or the Cabinet. In the late 1980s, by contrast, when the Attorney General sought injunctions against publication of *Spycatcher*, this time the case was brought on the decision of the Government, and was thus a matter of collective responsibility.[56] In law, the position of the Attorney appears to have been the same in each case. But, as a matter of ministerial responsibility, the Attorney General would as the decision-maker have to answer to Parliament for his role in the Crossman diaries case, but the Prime Minister and other ministers would be answerable to Parliament for the decision to pursue the *Spycatcher* book, both in the United Kingdom and in other jurisdictions.[57]

9. These two instances illustrate different ways in which legal action can be brought on behalf of the Executive. By constitutional convention, although not in law, the Attorney General wore different hats in these two matters. However, in neither case can it be said that the Attorney was exercising *judicial* power. These decisions were no more than decisions to initiate litigation: whether the litigation succeeded or not was a matter for the courts to decide, not the Attorney General. Any view formed by the Attorney lacks the authority of a judicial decision. This is the position whenever legal advice on a civil matter is given to a department by the Attorney.

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54 Briefly mentioned in the current consultation paper, in footnote 12.

55 *A-G v Jonathan Cape Ltd* [1976] QB 752.

56 *A-G v Guardian Newspapers Ltd* [1990] 1 AC 109.

57 Walker (note 51 above) at p 148 cites para 26 of the *Ministerial Code* issued by Mr Blair in 1997, which stated: "In criminal proceedings the Law Officers act wholly independently of the Government. In civil proceedings a distinction is to be drawn between proceedings in which the Law Officers are involved in a representative action on behalf of the Government, and action taken by them on behalf of the general community to enforce the law as an end in itself". This statement also appeared in the versions of the *Code* issued in 2001 and 2005. However, it is omitted from the *Ministerial Code* issued by Mr Brown in 2007, where the section on the Law Officers (paras 2.10–13) is much briefer. In particular, the *Code* omits the summary of different circumstances in which "it will normally be appropriate to consult the Law Officers" (para 22, 1997 and 2001 edition; para 6.22, 2005 edition) and replaces it with the bald command (para 2.10, 2007): "The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations." If one of the difficulties in the present position of the Law Officers is inadequate understanding of their role, it is unfortunate that the *Ministerial Code* is now much less informative in this respect than it was before July 2007.

10. In respect of prosecutions, the same generally applies, since a decision to prosecute is not itself a judicial decision but one that leads to a judicial decision by the criminal court of first instance or on appeal. Certainly, every prosecutor exercises an important discretion in the public interest. This discretion cannot be undertaken competently without a close knowledge of the criminal process, and it ought never to be based on politically partisan considerations. But in the adversarial tradition of English law, it does not seem helpful to describe the prosecutor as exercising either a judicial or a quasi-judicial function. The position is somewhat different in respect of decisions *not* to prosecute, since these appear to bar access to due process of law. But the possibility of a private prosecution is of great importance, although it is rarely seen, and there are exceptional circumstances in which a decision not to prosecute may be subject to judicial review. Specific questions arise in relation to the power of the Attorney General to prevent a prosecution (whether public or private) continuing by issuing a *nolle prosequi.* This is a prerogative power that may need to be the subject of legislation. If it is not sufficient to rely on conventional safeguards against abuse of this power, it would be possible to require such a decision to be approved by (for instance) the Queen's Bench Divisional Court. In any event, the Human Rights Act would today require the Attorney General to take into account the effect of European Convention rights when ordering that a prosecution be discontinued.

11. Discussion of the Attorney General's role has often drawn attention to the duality that is said to be inherent in the office. Lord Dilhorne, a former Attorney and later Lord Chancellor, stated: "Every Attorney is used to wearing two hats, and accustomed to keeping his political and legal duties distinct".[58] I doubt very much whether it is as straightforward a matter as this suggests. The difficult scenarios facing the office must often arise in shades of grey, rather than in the clear contrasts of black and white.[59] The view that there is a clear-cut divide between legal and political considerations may explain why the Constitutional Affairs Committee of the House of Commons concluded that the 'purely legal functions' should be carried out by an official outside party political life and the ministerial duties should be transferred to a minister in the Ministry of Justice.

12. The lack of a bright line between legal and political considerations applies particularly to the Attorney's role as the Government's senior legal adviser. If government according to law is not to become a dead letter, the Government as a whole and all public agencies need access to reliable legal advice. An important function of the Attorney General is to have oversight or superintendence of the Government Legal Service in all its emanations in the departments. This activity is one that occurs essentially within Whitehall. It requires (a) that legal advisers across government habitually give the best legal advice that they can, in order (as is the duty of all legal advisers) to assist their clients (the departments) to achieve

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[58] Quoted in J L Edwards, *The Attorney-General, Politics and the Public Interest* (1984), p 200. The quotation continues with a discussion of what was at that time considered to be the duty of the Attorney General to appear as counsel at all tribunals of inquiry, even if the conduct of his political colleagues was being inquired into. At the Bank Rate Inquiry in 1957 into an alleged leak involving prominent Conservative ministers, the future Lord Dilhorne told the tribunal, "It is my duty to act here, as in some other fields, without any regard to political considerations of any kind, and in discharging this duty I am not in the least concerned with—indeed I am completely indifferent to—political or personal results". Walker (above, note 51, p 148) applies the term 'institutional schizophrenia' to the role of the Law Officers.

[59] To quote Edwards again, discussing the need for the Attorney to avoid partisan political considerations in deciding what is in the public interest, "The outcome of this kind of assessment of alternative courses of action involves a political judgment that may well go in opposite directions, according to the political and personal philosophy of the Attorney General in office" (op cit, p viii). It is of course simplistic to suppose that there is always only one 'objective' opinion that can be given in meeting a request for legal advice.

their desired policy goals in a lawful and effective manner; (b) that these lawyers (and the departments that they advise) may refer difficult issues to the Government's most senior legal adviser (the Attorney General) for an informal or formal opinion; and (c) that such advice when given is respected in the department concerned.[60] I consider it to be doubtful whether an 'independent' lawyer outside the structure of central government and not holding ministerial office would command the authority that at present goes with the office of Attorney General. Nor is it clear to me how such a new public officer could be made accountable or responsible for the manner in which he or she performs that role.

13. The Attorney's role in providing oversight or superintendence of the Government Legal Service has greater significance today than in the past for two reasons. First, the continuing development in the law of judicial review: this has a very wide application throughout all public life and requires legal advice in government to be based on an up-to-date understanding of the principles applied by the Administrative Court and in the appeal courts. No government should be deterred from taking action simply because of the fear that the decision *might* be subject to judicial review, but good legal advice should be able to assess the risks and implications involved. Second, the increasing prominence that must now be given to the protection of European Convention rights as a result of the Human Rights Act 1998.

14. There are certainly public officers of the watchdog kind (for instance, the Comptroller and Auditor-General, and the Parliamentary Ombudsman) who exercise a scrutinising or investigative function on behalf of Parliament over Whitehall departments. Their powers must be exercised in a manner that is independent of the administrative and political pressures that may have been operative in a decision. These officers report to Parliament on what they find, and on the response of departments to their findings. It would be possible to devise a similar watchdog charged to investigate claims that departments had failed to observe 'rule of law' principles, if it were felt that the courts were not able to do this through judicial review. (This does not mean, of course, that I consider such a watchdog to be necessary.) But such a retrospective role would be very different from the role that the Attorney General performs as the Government's senior legal adviser. And it would be constitutionally inappropriate to expect an officer of Parliament to become involved prospectively, as a party to the decision-making process.

15. The Attorney General's role in superintending the Crown Prosecution Service and other prosecution authorities is a subject of great importance but not one on which I can offer any new comments. I consider that the role should be retained, on the basis that it does not extend to decision-making in specific cases and is concerned with general issues of prosecuting policy that arise from existing criminal law, being matters on which there should be public knowledge and accountability to Parliament. This role should engage the Attorney's individual responsibility, and other ministers should respect this (they should not claim credit for prosecutions that succeed, nor should they attempt to pre-judge decisions of the courts).[61] However, in my view the distinct character of this responsibility of

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[60] The three versions of the *Ministerial Code* issued in 1997, 2001 and 2005 all referred specifically to the role of the Law Officers in resolving doubts that departmental legal advisers may have regarding the legality or propriety of proposed legislation or administrative action. This reference is absent from the 2007 version: see note 58 above.

[61] Cf Constitutional Reform Act 2005, s 3(1): duty of all ministers to 'uphold the continued independence of the judiciary'.

the Attorney General 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. On another criminal law matter, there needs to be a rigorous review of the statutes that require the approval of the Attorney General to be given to certain prosecutions, with the aim of shortening this list of offences, possibly by substituting the approval of the Director of Public Prosecutions for that of the Attorney.

16. With the similar aim of strengthening the distinctive position of the Attorney General, as compared with other ministers, he or she should attend Cabinet meetings only when oral advice is required on a specific issue. A re-statement of the conventions relating to the Attorney should emphasise that he or she does not share in the collective responsibility of ministers for Cabinet decisions.

17. Given these and other changes, I consider that the office should continue to be held by a minister, and that there should continue to be a strong convention that the Attorney (and the Solicitor General) should be a member of one or other House. The requirement of being a lawyer of standing must also continue: I consider it valuable that political parties that may need to form a government should be able to call on the services of good lawyers who are sympathetic to their programmes, whether or not they have previously been active in Parliament or in politics.

18. Notwithstanding the pervasive effects of judicial review in securing legal accountability of public authorities, there is still a need for enhancing the accountability of government to Parliament. Specifically in relation to the Law Officers, there is a need for clarification and re-statement of the conventional rules or principles that apply to them. In particular, the position that emerged in the *Gouriet* controversy in the 1970s was unsatisfactory. Despite Lord Denning's views to the contrary, the judges did not require the Attorney to justify to them the decision he had taken not to prosecute the post office workers, on the ground that he was accountable to Parliament.[62] But in Parliament Mr Silkin refused to give reasons for the decision. It is probable that both the procedure of judicial review and the working of Parliament have moved on since then in an age when greater openness in government is required. It should not be possible for the Attorney to avoid accounting for decisions taken in the public interest without indicating the factors that had been taken into account.

19. To summarise, a re-statement of the conventions that apply to the office of Attorney General should emphasise that, for many functions of the office, the Attorney has individual responsibility to Parliament and that his or her decisions do not engage the collective responsibility of the Government. While the Attorney gives advice to ministers, departments and the Cabinet as required, he or she is not to be identified with ministerial or Cabinet decisions. The Government must continue to be able to keep confidential the Attorney's advice, like that given by

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62 See *Gouriet v Union of Post Office Workers* [1978] AC 435.

members of the Government Legal Service, but that advice may be published in specific cases; when this occurs, the advice should be published in full.

20. One task of the Attorney General that seldom comes to public notice is the oversight that the office renders for the Parliamentary Counsel who draft primary legislation. In my view, the function is essentially a specialised aspect of the work of the Government Legal Service and it should continue: published bills are for the most part within the collective responsibility of the Government, and within the particular responsibility of the ministers named on the bill. Under the Human Rights Act 1998, section 19, every government bill must be accompanied with a ministerial certificate stating whether or not the bill is consistent with Convention rights. The two Houses are entitled to expect that such certificates will, if necessary, have been given after the contents of a bill have been considered closely by or on behalf of the Attorney General. But no assumption should be made in Parliament that the Attorney personally approves any particular legislative proposals.

21. In a similar way, the Attorney General should continue to have ministerial oversight of the Treasury Solicitor's Department. While decisions as to the litigation in which departments are concerned must be for the client department to take, there are likely to be issues arising from the activities of the Treasury Solicitor on which it may be necessary to seek clearance or approval from the Attorney General.

22. Finally, I make brief suggestions (without discussing the issues) for dealing with some of the Attorney's tasks that are peripheral to the main functions of the office.

(a) Each House of Parliament should today be able to secure its own legal advice, where there is a good reason for doing so, particularly on matters affecting parliamentary privilege and on issues involving action by ministers. The Attorney's traditional role in advising Parliament should to this extent be modified.

(b) The Director of Public Prosecutions could be entrusted with the Attorney's duties relating to contempt of court, since these are within the quasi-criminal jurisdiction of the courts.

(c) One minor function of the Attorney General that should be discontinued or assigned elsewhere is the residual role relating to the enforcement of charity law.

(d) Recent developments in public law (as a result of legislation and judicial decision) make it unnecessary for the procedure of relator actions to be kept in being.

(e) So far as I know, the position of the Attorney as head of the Bar of England and Wales has become a purely 'dignified' matter, and it need not be altered, except if it might be thought to prevent a solicitor from holding the office.

(f) There should be no change in the formal position of the Attorney General under the Crown Proceedings Act 1947, as the residual defendant in any civil proceeding brought against the Crown when it is not known which department should be named as defendant.

23. I have summarised my general position on the role of the Attorney General in paragraph 3 above, and need not repeat it here. There is ample scope for some modernisation of the office, and for a re-statement of the conventions that apply to it, but I do not consider that a case has been made for bringing the office to an end.

APPENDIX 3: WRITTEN EVIDENCE BY PROFESSOR JEFFREY JOWELL QC

Approach to the issue

1. I shall in this paper argue that our Attorney General (the Attorney) should no longer be a serving politician and government minister (a 'political' attorney). I shall consider the Attorney's role: (a) as legal adviser to the Government, and (b) in respect of the superintendence of prosecutorial decisions. The discussion will be set in the context of constitutional principle (by which I mean those principles which are expected to guide public decisions in a constitutional democracy).

Constitutional principle

2. Three principles are relevant to the Attorney's role: First, is the fundamental tenet of public law that no person should be a *judge in his or her own cause*. This principle seeks to avoid conflict of interest by requiring certain public decisions to be made by a decision-maker who is: (i) independent of the executive, (ii) independent of the parties to the relevant dispute, and (iii) impartial.

3. It is important to note that this principle is not met only when the decision-maker is in fact independent and impartial. The appearance of bias subverts public confidence in the integrity of official decisions. The common law therefore requires many official decisions not to give rise to a perception of a "real possibility of bias" in the mind of a "reasonable and fair-minded observer". Similarly, Article 6(1) of the European Convention on Human Rights (incorporated in our law through the Human Rights Act 1998) requires any decision affecting a person's 'civil rights and obligations' to be taken by a decision-maker who is 'independent and impartial'—in appearance as well as fact.

4. The question here is whether the Attorney's role as a party politician and member of the Government (the 'political' attorney) may give rise, in any or all of her various functions, to an appearance of the real possibility of bias in the mind of a "reasonable and fair-minded observer". If so, are there other overriding reasons to exempt the Attorney from the bias rule that applies to decision-makers at all levels in this country?[63]

5. A second principle is *the rule of law*, which requires that all laws are applied equally and without regard to irrelevant or improper considerations.

6. A third principle is *the separation of powers*, which requires aspects of the legal system to be free of political direction.

7. These principles, where they appropriately apply, should be presumed to be implemented by all public officials in any constitutional democracy, in the absence of compelling argument to the contrary.

A. Legal advice

8. Applying these principles to the issue of the Attorney's role as the Government's legal adviser, it is clear that where legal advice is proffered to the Government by a serving politician who is also a member of that government, that advice is vulnerable to being construed as influenced by partisan political considerations.

63 The common law and Art.6(I) of the ECHR generally exempts decisions involving 'policy' or 'expediency'. See Woolf, Jowell and le Sueur, *de Smith's Judicial Review*, ch.10 (2007).

However 'semi-detached' from politics the Attorney may claim to be, if he or she is a member of either House of Parliament and takes the whip of the governing party, the role is clearly 'political'. Where the Attorney attends Cabinet regularly, the appearance is that of an in-house lawyer who is also a member of the Board.

9. In giving advice the Attorney does not decide any person's 'civil rights or obligations' (under the requirement Article 6(1) ECHR). After all, the Government is under no obligation to follow that advice, and may indeed also seek further advice elsewhere. This role may not therefore technically violate the letter of Article 6(1) of the ECHR or the common law regarding bias and conflict of interest. Nevertheless, as a recent case points out, the appearance of bias has to be seen in the round.[64] Therefore, when the Government does justify its actions on the basis of the Attorney's advice there may be occasions when those actions will be perceived to be based upon a partisan interpretation of the law. This was seen in respect of the Attorney's advice on the Iraq war where, however scrupulously impartial it was in practice, his dual role gave rise to a widespread view that the advice was tailored to political convenience.

10. The Attorney, in evidence to your Committee, argues that where the public are under a misapprehension that the Attorney was biased, that misapprehension ought not to be fatal to the role of the attorney but should simply be countered by argument and explanation. She believes (and other past Attorneys agree in their submissions to the Consultation Exercise) that the strong independent traditions of the Attorney are a sufficient safeguard against biased decisions. With respect, the dual structure of the Attorney's role inherently encourages these misapprehensions. More importantly, the tradition of actual independence is not the only point here. The appearance of lack of independence is what matters. Justice must not only be done, but also seen to be done. A tradition of actual independence was, similarly, pleaded against the reform of the appointment of judges (then appointed by the executive). In the end Parliament in its wisdom acknowledged that the mere appearance of lack of judicial independence from the executive necessitated a new scheme of appointments by the independent Judicial Appointments Commission.[65] The Attorney is not a judge, but there is no doubt that, however independent and impartial she is in fact, her membership of the government induces an appearance of partisanship which in some situations will dent public confidence not only in the integrity of the Attorney's advice, but also in the integrity, and indeed legality, of the actions of the Government based upon that advice—thus offending the constitutional principles set out above.

Is current political office a necessary qualification for the Attorney?

11. The first justification of the present system is that the advice from a 'political' attorney will be infused with a necessary understanding of the wider policy context and realities of government.

12. This argument contains different strands. It is clearly unacceptable insofar as it suggests that the government would prefer to seek a convenient legal opinion from someone sympathetic to its policy goals.

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64 See *R (on the application of Brooke et al) v. The Parole Board, The Lord Chancellor and Secretary of State for Justice* [2007] EWCH 2036 (Admin), where it was held that the Parole Board's various connections with the Department of Justice presented an appearance of bias. Although few of those connections would on their own have been regarded as biased, they cumulatively created the impression of lack of structural independence.

65 Under the Constitutional Reform Act 2005.

13. A more acceptable strand of this argument assumes that an 'independent' attorney will inevitably lack the necessarily unique combination of legal and political knowledge that advice to government requires. This argument is sometimes taken further to suggest that, in reality, any ministers contemplating a challenge to the rule of law (such as the recent proposal to exclude the jurisdiction of the courts in asylum and immigration cases) is more likely to accept advice to the contrary from an Attorney who is a fellow-politician rather than an outsider.

14. It is of course important that the Attorney possess the necessary combination of legal and political skills. However, as was noted by Lord Rodgers of Quarry Bank, in a debate he initiated in the House of Lords in 2005, the pool of qualified lawyers in the House of Commons has significantly declined over the past 40 years.[66] A somewhat larger pool is available for appointment to the House of Lords (at least in its present state of reform). The discussion in your Committee with the Attorney seemed to assume that an independent Attorney would be drawn solely from the ranks of the career civil service. There may well be well-qualified candidates in this group however, account should be taken of the considerably wider pool from which an independent Attorney could today be drawn. In recent years there has been a significant increase in the number of lawyers who are conversant with the political aspects of the kind of law upon which the Government is likely to need advice. Following the dramatic increase in judicial review, there is now a very large cohort of barristers and solicitors specialising in public law who are of the highest quality and sensitive to policy considerations. There is little reason to believe that an independent attorney drawn from this cohort would command any less authority with ministers than a 'political' attorney. [See paragraph 25–26 below for further consideration of the appointment of such an independent attorney].

Lawyer at the heart of government?

15. I have previously raised the question as to whether, since the Constitutional Reform Act 2005 removed the need for the Lord Chancellor to be a lawyer, the possible absence of a lawyer at the heart of government justifies the retention of the 'political' attorney (while strengthening her duties to uphold the rule of law and with a revised oath of office ensuring that the Attorney act on behalf of the public[67]).

16. Experience in other countries with an independent attorney indicates that there are attorneys who are more or less independent of government, and attorneys who are more or less persuasive. Their influence depends more on their personal status, integrity and powers of persuasion than their membership of a particular party or government.

17. However, there are strong reasons to suggest that an independent attorney would be even better placed than a 'political' attorney to monitor the rule of law at the heart of government. First, being independent, there would be no inhibition from attending Cabinet for the purpose of monitoring the legality of decisions. Indeed, this would be an important part of the Attorney's role under a specific statutory duty to uphold the rule of law. Secondly, freed from competing political demands, she would have more time for the systematic monitoring of the legality

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66 Lord Rodgers calculated that the number of barristers in the House of Commons had fallen by two thirds (from 100 to 34) between 1964 and 2005. HL Deb. 15 Dec.2005.

67 Jeffrey Jowell, *Politics and the Law: Constitutional Balance or Institutional Confusion?* JUSTICE/Tom Sargent Lecture, 17 October 2006, published in JUSTICE Journal, Nov.2006 p.18, at p. 28.

of decisions as they emerged from the various centres of government (including Departments and Cabinet Committees).

B. The Attorney's prosecutorial role

18. Since the recent BaE and loans for peerages sagas, which demonstrated so graphically how the Attorney's involvement in prosecutorial decisions can attract a perception of party-political bias, it is difficult to see how the opportunity for reform of the office could be declined. The principal argument against reform lies in the fact that it is legitimate, in a decision to prosecute, to take into account the "public interest". It is argued that a member of the Government is best able to identify the public interest.

19. It is important to stress, however, that the notion of the public interest has important limits. First, it is not synonymous with the interest of the ruling party in Parliament. Secondly, it should not permit the Attorney unconstrained freedom to take into account 'political' considerations that are wholly unrelated to the purpose of the law under which the matter is being prosecuted. For example, it is not clear that the Attorney may properly take into account, in deciding to drop a prosecution for corruption, the ground that a prosecution may antagonise a foreign government and therefore lead to a loss of exports and employment in the UK. Such a motive is, arguably, extraneous to the objects and purpose of the law (domestic or international) against corruption—and thus offends the rule of law.

20. Beyond those matters, however, there are a range of issues that may legitimately be taken into account in a decision whether or not to prosecute. These include matters of national security; the fact that a conviction will create unwanted martyrs, or lead to a national strike.[68] In my view it is not necessary to have a 'political' Attorney in order to identify or assess these kinds of matters. In countries such as Ireland, an independent DPP has proved perfectly capable of making these decisions. He consults in sensitive cases with the Government (in a similar way to our Attorney's consultation with ministers under the 'Shawcross Convention'), but the decision is his alone, untainted by the perception of unacceptably partisan bias.

21. Alternatively, since decisions on the public interest are based upon considerations of policy rather than strict legality, it would be constitutionally appropriate for them to be acknowledged to be taken on the direction of the relevant Minister, who would then be properly answerable to Parliament for the decision.

22. In addition to decisions about the public interest in relation to individual prosecutions, the Attorney has a role (sometimes in conjunction with other ministers, such as the Minister of Justice or Home Secretary) in establishing general prosecutorial policy. Such policy may, for example, require the concentration of resources on the enforcement of certain crimes (such as gun crime) and the corresponding reduction of concentration on others (such as possession of cannabis). Such an operational decision concerns the allocation of scarce resources—a matter traditionally within the realm of the executive. Those kinds of decisions may also appropriately be taken by the Minister of Justice or Home Secretary (perhaps in consultation or in conjunction with the Attorney).

23. Finally, mention should be made of the role of the Attorney as 'arbiter' (in the words of the Attorney in her evidence to your Committee) of the various

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[68] An example given by Lord Wilberforce in *Attorney General* v. *Gouriet* [1978] A.C.435.

prosecutorial authorities. She comments on the value attached by members of these authorities to direct access to the Attorney. With respect, I believe that that aspect of her role, like the Attorney's role in arbitrating on the legality of decisions taken by different government Departments (discussed in para. 17 above), could adequately be performed by an independent Attorney, as is done in other countries.

24. I am not therefore persuaded that the political status of the Attorney justifies the appearance of bias in the area of prosecutorial decisions. Individual prosecutorial decisions are in any event routinely left to the Director of Public Prosecutions or others and the power of direction is rarely, if ever, exercised. A properly qualified independent Attorney should be capable of performing a number of the superintendent roles without any loss to the efficacy of the Attorney's functions.

The appointment of a non-political Attorney

25. How should an independent Attorney be appointed? Practice in other countries differs. Some appoint their Attorneys for a term of years. This means that the Attorney's appointment could straddle more than one government. Others appoint the Attorney for the term of the government only. In either case, the appointment is normally made by the equivalent of the Prime Minister, perhaps after consultation with the leader of opposition parties (or, in the USA, with the advice and consent of the Senate). Council of Europe countries are increasingly considering the appointment of their Attorneys by the equivalent of our Judicial Services Commission.

26. If our Attorney were not to be a member of either House of Parliament, but appointed by the Prime Minister for the duration of the term of the government, then some of the 'political' qualities of the existing office would be retained, yet free of the obvious appearance of bias that a fully political attorney inevitably attracts. A requirement of consultation with the opposition on the appointment would affirm that the Attorney's role in defining the 'public interest', in decisions about prosecution at least, is not confined to determining the interest of the government of the day.

Accountability to Parliament

27. Is the 'political' role of the Attorney justified by the fact that her decisions are subject to scrutiny by Parliament?

28. In respect of the Attorney's role of legal advice, this justification carries little weight. Put simply, where the Government acts upon legal advice, it is its actions that may be appropriately challenged by Parliament and not the advice upon which the actions are based. The appropriate forum for testing the legality of the matter is the courts. Thus if the Attorney advises that it is legal to impose sanctions upon country K, and the Government then decides so to do, it is not within the competence of Parliament to challenge the substance of the Attorney's advice on that matter (which in any event is normally kept confidential).

29. Similarly, some decisions in the area of the Attorney's prosecutorial powers are not ideally amenable to substantive Parliamentary scrutiny—such as the decision not to prosecute on the ground of lack of sufficient evidence (as has been seen in relation to the decision not to prosecute the loans for peerages allegations).

30. However, in respect of other prosecutorial decisions (such as some decisions not to prosecute on the grounds of 'public interest', and matters of operational

policy) direct responsibility could properly be taken by the relevant Minister, who would then be answerable to Parliament for the decision.

31. There are also other forms of accountability which could be developed for an independent attorney. These include the requirement of an Annual Report and regular attendance at a designated Parliamentary Select Committee.

APPENDIX 4: MEMORANDUM FROM BARONESS SCOTLAND OF ASTHAL QC ON ATTENDANCE OF ATTORNEYS GENERAL AT CABINET

When I gave evidence to the Constitution Committee on 12 December 2007, I undertook in response to a question from Lord Morris to let you have some further information as to the current practice whereby the Attorney General attends (but is not a member of) Cabinet.

The historical position is discussed in full by J. Ll. J Edwards in *The Law Officers of the Crown* [1964]. I enclose a copy of the relevant chapter.

But in brief, up until the early twentieth century, the general practice was for the Attorney General not to be a member of Cabinet but to attend in an advisory capacity when appropriate. However, in 1912, the then Attorney General (Sir Rufus Isaacs) was invited to be a member of Cabinet. This practice was continued in relation to his immediate successors as Attorney General. Over the following years, some Attorney Generals were Members of Cabinet and some were not. The attendance as a member of the Attorney General gave rise to a certain amount of criticism and the practice was discontinued in 1928.

Thereafter, the Attorney General received all relevant Cabinet Papers. The Attorney General attended on an ad hoc basis to advise on legal or constitutional aspects of matters being considered by Cabinet. In more recent years, the Attorney General, as the Minster with the responsibility for superintending the prosecuting authorities, also sometimes attended Cabinet when matters relating to the prosecuting authorities (including spending or efficiency matters) or relevant aspects of criminal justice policy were being discussed.

The extent to which, on this basis, the Attorney General attended Cabinet varied significantly in practice.

In 2005 the Prime Minister decided that the Attorney General should routinely be invited to attend Cabinet meetings. That practice continues today. However, neither Lord Goldsmith nor myself have been members of the Cabinet.

I hope that you find the above helpful.

Baroness Scotland QC

APPENDIX 5: COMPARISON OF THE PROVISIONS RELATING TO THE LAW OFFICERS FROM DIFFERENT EDITIONS OF THE *MINISTERIAL CODE* (SEE PROFESSOR BRADLEY'S PAPER FOR FURTHER INFORMATION)

Blair's 1997 version of the Ministerial Code

The Law Officers

22. The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. It will normally be appropriate to consult the Law officers in cases where:

a. The Legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic field;

b. A Departmental Legal Adviser is in doubt concerning

(i) the legality or constitutional propriety of legislation which Government proposes to introduce; or

(ii) the vires of proposed subordinate legislation; or

(iii) the legality of proposed administrative action, particularly where that action might be subject to challenge in the courts by means if application for judicial review;

c. Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee;

d. There is a particular legal difficulty which may raise political aspects of policy;

e. Two or more Departments disagree on legal questions and wish to seek the view of the Law Officers.

By convention, written options of the Law Officers, unlike other Ministerial papers, are generally made available to succeeding Administrators.

23. When advice from the Law Officers in included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this done, the complete text of the advice should be attached.

24. The fact and content of opinions or advice given by the Law Officers, including the Scottish Law Officers, either individually or collectively, must not be disclosed outside Government without their authority.

25. Ministers occasionally become engaged in legal proceedings primarily in their personal capacities but in circumstances which may have implications for them in their official positions. Defamation is an example of an area where proceedings will invariably raise issues for the Minister's official as well as his private position. In all such cases they should consult the Law Officers before consulting their own solicitors, in order to allow the Law officers to express a view on the handling of the case so far as the public interest is concerned or, if necessary, to take charge of the proceedings from the outset.

In criminal proceedings the Law Officers act wholly independently of the Government. In Civil proceedings a distinction is to be drawn between

proceedings in which the Law Officers are involved in a representative capacity on behalf of the Government, and action undertaken by them on behalf of the general community to enforce the law as an end in itself.

Brown's 2007 version of the Ministerial Code

The Law Officers

2.10 The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations.

2.11 By convention, written opinions of the Law Officers, unlike other ministerial papers, are generally made available to succeeding administrators.

2.12 When advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached.

2.13 The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 12 DECEMBER 2007

Present	Bledisloe, V	Quin, B
	Goodlad, L (Chairman)	Rodgers of Quarry Bank, L
	Lyell of Markyate, L	Rowlands, L
	Morris of Aberavon, L	Smith of Clifton, L
	Norton of Louth, L	Woolf, L
	O'Cathain, B	

Examination of Witness

Witness: Baroness Scotland of Asthal, a Member of the House, Attorney General, examined.

Q1 ***Chairman:*** Baroness Scotland, may I welcome you very warmly to the Committee. We are not being televised this morning but we are being broadcast on the audio. May I ask the first question? We would be extremely interested if you would share with us what has prompted the current debate about reform of the Office of the Attorney General. Is it to do with a perceived adverse perception of the office and the need, perhaps, to enhance public confidence or with real practical difficulties?

Baroness Scotland of Asthal: I think the first thing to say is it should be seen in the context of *The Governance of Britain* document, which, as you know, was issued by the Government, looking at the constitutional realignment that may be contemplated and how to reconnect or better connect the public with things that are done in Parliament and the Executive—that was part of the framework—but also, I think (and you have seen and had the advantage of reading the CASC Report) it is about an issue as to whether there is a perception that the role of the Attorney General has within it some inherent conflicts, and this Committee will know that this is an issue that has been brought up from time to time in relation to the Attorney's role. Therefore, it was considered right that we should have, for the first time in the 700 years of its history, an opportunity to look again to see whether the disparate roles currently discharged by the Attorney should properly remain as they are or whether there could not be another different construct which would better fit it for the 21st century; and it was on that basis that we had a very open consultation. You will note the consultation period concluded on the thirtieth of last month and we are now considering the responses that we have had to it. We have had about 50 written responses and we have also held a series of seminars and meetings, including, in fact, a very useful session with members of both Houses to which a number of people came, some of whom, of course, are in this room and part of this Committee. We thought it was very important for us to have a very comprehensive consultation so that we could have all views and have an opportunity to consider them most fully.

Q2 ***Chairman:*** Now that the consultation period has closed, could you give us an indication of whether the balance of opinion amongst the consultees appears to favour or not favour a change to the role of the Attorney?

Baroness Scotland of Asthal: I would be very happy to do that. Could I just say, too, that we will be obviously very anxious and interested to hear what this Committee has to say, and we would want to take this Committee's views into account before coming to any conclusions? I want to make that plain. The real thrust of the report so far has been that the majority of people feel that there is nothing of fundamental difficulty in relation to the Attorney General's role. Some have suggested that there need to be some changes. The real issue has been in relation to the power that the Attorney has to direct in relation to individual prosecutions. That is an issue which has caused quite a lot of interest. As I say, we have not concluded all the analysis of the contributions that have been made. Most people seem to believe that there is not an inherent difficulty in the Attorney remaining a minister. There is some concern as to whether the Attorney should or should not attend Cabinet, there has been an issue raised in relation to the criminal justice policy role that has been adopted by the Attorney and whether that should be something that should be maintained, and there has been a suggestion, a minority suggestion, that the Attorney should be someone who sits outside of government, but that has been very much seen as a minority view.

Q3 ***Chairman:*** Do you think, Lady Scotland, that there is any public misunderstanding and, indeed, misunderstanding within government of the role of

the Attorney and, if so, what, if anything, should be done to rectify that?
Baroness Scotland of Asthal: I think there is. One of the strong impressions that certainly I have had during this consultative period is that there is not a real understanding of what the Attorney does and when the Attorney does it. I will just give an example which many people have used in relation to BAE Systems. That is an inherently difficult decision, no matter who is responsible for undertaking it. There is a general misconception that that was a decision taken by the Attorney. Of course it was not. It was a decision taken by the Serious Fraud Office Director. However, that is not well understood in the public. There is misunderstanding in terms of the three roles that the Attorney plays, one as adviser to the Government, Her Majesty and Parliament, the second in relation to heading up the prosecutorial authorities and being responsible for their superintendence and supervision and, the third, acting as an independent guardian of the public interest. Those issues are not understood well and one can understand why, historically, that was so, because the Attorney's advice is given to government, it is not disclosed, it is not disclosed in terms of whether the Attorney has been asked to give advice, and so in the past, I think, the public face of the Attorney was perhaps not at the forefront, whereas now having a better understanding of the public generally that the Attorney is there to uphold the rule of law, to be the guardian, is perhaps of greater interest and importance now that the role of the Lord Chancellor has changed. Certainly that is the thrust of comments that have been made by a number of contributors, that the significance now is that the Attorney remains the only senior lawyer in government who has to be a lawyer. The Lord Chancellor may be a lawyer but need not necessarily be a lawyer provided they have the relevant experience. So, I think there is an increasingly large communication role so that the public and, indeed, colleagues within government better understand the function of the Attorney, but I have to confess to this Committee that I had thought I really understood with great particularity the role of the Attorney having had the privilege of acting as a government minister for eight years, being a lawyer and having worked very intimately with a number of attorneys, certainly in the last six years. I too have been surprised that I did not comprehensively understand the intimate interrelationship. One of the things that have become very clear to me is the importance of the Attorney acting as the head of the Government Legal Service in being available to all members of the Government Legal Service as a direct matter of right so that they can come to ask for the Attorney's help and support. The roles that the Attorney plays as arbiter, as part of the supervisory and superintendence role, means that we are able to work with a number of prosecutorial authorities, including those who are attached to different government departments, and I have been very struck by the importance that the Government Legal Service places on having the opportunity to have direct access to the Attorney and the importance, for instance, that a number of Her Majesty's Armed Services and prosecutors within the Armed Services have to the fact that the Attorney remains there as a matter of reference, support, but also a firm upholder of the rule of law with a degree of independence and rigour which they find of great comfort.

Q4 ***Baroness Quin:*** You have partly answered what I was going to ask. It certainly seemed to me, rather shame-facedly, as a minister looking back on that time that I did not really understand very much about the role of the Attorney General. I wonder if, as a result of this process, whether or not major changes are made, whether, indeed, you will feel it important to ensure that ministers and MPs as well as the public outside do have a clear concept of the role of the law officers generally and of the Attorney in particular?
Baroness Scotland of Asthal: I do think that that is incredibly valuable. One of the things that I have done since becoming Attorney is to create an Attorney General's newsletter, which is going to be made available to peers, MPs and others, not least because I think it is very important for people to better understand what we do, why we do it and how we do it and the services that are available, and certainly this process has highlighted to me the need for better communication and better understanding. So, that is something which has been very important, I think, that has come out of this process and I would absolutely agree with you.

Q5 ***Lord Morris of Aberavon:*** Attorney, I am encouraged by your remarks that, following the consultation, nothing of fundamental difficulty has emerged as regards comments on the role of the Attorney General apart from points of detail, which we will return to. Am I right in thinking, if that is so, that the bulk of the consultees give a contrary view to the trenchant and radical report of the House of Commons Committee?
Baroness Scotland of Asthal: That does appear to be so at the moment, but I need to be very cautious, because, of course, we have culled that impression from the various seminars and others that we have had and the first trawl of the results but there are some real issues, notwithstanding, that have arisen within the detail of how it is done, the way it is done and whether there should be changes. The more radical proposals that were certainly voiced in the CASC Report do not appear to have gained a great deal of support from those who have contributed so

far, but I think these contributions are quite wide and far-ranging and I would not like to give an impression that there is going to be no change because in the detail there are quite some significant suggestions about how things could be improved and changed, and the Government itself, of course, is going to look very much to see how this role will fit within the *Governance of Britain* framework and some changes may be advocated as a result of that. I certainly do not want to give the impression that we are saying no change because some of the minority views have been very strongly and cogently expressed and we will need to explore whether they do not have more merit than at first blush they may appear to have.

Q6 ***Lord Norton of Louth:*** It is really on what you have already said about the roles of the Attorney. You have mentioned that there are several and they are listed in the consultation paper, and you referred as well to a conflict of roles, and that is part of the debate. Similar claims, of course, were made about the role of the Lord Chancellor, all the debates we had three or four years ago. Do you see any parallels between the current debate and that which took place over the role of the Lord Chancellor?

Baroness Scotland of Asthal: I think the issue in relation to the Lord Chancellor was very different because, of course, we were talking about three different hats, the issue of the Executive being involved with the judiciary and those matters, which are constitutionally very different, I think, from the role of the Attorney, where it has never been suggested that in-house lawyers have any internal conflict in the exercise of the independent legal role that they play in giving advice and assistance to their clients, and so I think that the Attorney's situation is materially different. When I say conflict, I think all the contributors talk about perceptions of conflict, as opposed to the reality of conflict, but there is, of course, this important issue as to whether perceptions do not of themselves distort the reality and, therefore, how do you deal with that whole issue. There has never been any suggestion that any of the attorneys general in the past have ever behaved in any way other than with total propriety; so there has been no impugning of the integrity of the Attorney's role, but there is this whole issue as to how do we deal with perceptions in relation to it.

Q7 ***Lord Norton of Louth:*** It is that perception point that I would like to follow up. You said that there may have been a change. What are the reasons for that? The perception that possibly a political appointee is not able to carry out a judicial role with an independent mind. Where do you think that comes from? Is it, as I think you are implying, just a greater awareness or the Attorney being more in the public eye?

Baroness Scotland of Asthal: I think there have been a number of issues which have coalesced around the same time, which, I think, has given rise to some misconceptions, and I think we have set them out in the consultation paper. I have mentioned one already. For example, the issue of the misunderstandings in relation to BAE, who makes that decision. There were also, of course, at the time of considering these, questions being raised in relation to the advice in relation to Iraq or the position that might have arisen in relation to the "cash for honours" case. We know historically that from time to time attorneys general past and present have had to deal with troublesome and difficult issues, but what we are trying to do here is not necessarily just respond to those issues but to see whether there is anything fundamentally systematically wrong with the way in which it is currently structured and, if not wrong, are there things that we could do which would enhance the rule of law, enhance the efficacy and the transparency of this role and improve the system to make it better than it currently is. I think that is certainly something which is very worthwhile looking at because the Attorney's role has mutated. There have been various accretions to that role over a period of time and we do need to look to see whether we now have the right construct for the 21st century so we get the very best out of the role, but certainly my experience of the role is it is very complex. These three hats are well integrated and one of the things that we are looking at is, if you disaggregate all or any of them, what are the consequences of that disaggregation? Will it mean that we will get an improved system, in which case I think it will be very worthwhile doing? Will it diminish the efficacy of the role and, therefore, we would have to be very cautious? This has been a fascinating exercise and we will be looking very, very carefully at the detail of the submissions that have been made, because many of those submissions are themselves complex. I do not want to say they are curates eggs, but some eggs are perfectly formed and wonderful and others are simply inherently interesting.

Q8 ***Lord Norton of Louth:*** So, essentially, it is a case of separating process from perception and making sure there is no change of process as a result of a misperception.

Baroness Scotland of Asthal: Yes, and also being clear, if there is a misperception, that that is the case and then thinking, in very concrete terms, as to how we should deal with any misperception, because I think what is not acceptable is that the misconceptions should remain, because that would be very corrosive. We need to think, I think, and, if necessary, be bold

in the way in which we address those misperceptions so that we arrest them and change them because a continuation of them, I do not think, would be acceptable.

Q9 ***Lord Rowlands:*** Given you have already described your roles as complex, have you in your experience so far thought there is a potential conflict of interest? Is there a potential?
Baroness Scotland of Asthal: I think, in practice, there does not appear so far to have been. Can I look to the future and say there never will be? I do not think I can—I have not got a crystal ball—but I do think that the role itself is predicated on having integrity. I think that was certainly one of the submissions that have been made—I think it was the Lord Chief Justice in his submission—that the most important thing is that, whoever has this role, I think it was said, should have integrity. I do feel that I agree with that, because there are a number of occasions when the Attorney's primary role will be to be the guardian of the public interest and to act totally independently of government.

Q10 ***Lord Rowlands:*** Embarrass government?
Baroness Scotland of Asthal: Absolutely. I think one of the things I have certainly understood better is the opportunity to be brutally frank in a way that is entirely helpful to good governance of government.

Q11 ***Viscount Bledisloe:*** I must confess that I was somewhat surprised by your remarks about in-house lawyers. I think my perception at the Bar, and I think the perception of a very large number of other people, would be that in-house lawyers were not very independent, that first of all they had rather taken on the corporate spirit of, "We must be right and they must be wrong", and, secondly, that they did not like the idea of telling their boss that he had made a fool of himself and got it all wrong and, very frequently indeed, that they took the problem to the Bar so that one could take on that responsibility rather than having to do it themselves. Is that not something that is inherent in any role where you only have one client and would not any other solution than the present one make that worse rather than better than it is at the moment?
Baroness Scotland of Asthal: I can certainly understand that you would say that somehow of that perception. The situation of the Attorney is, of course, slightly different, because you have the Government Legal Service who give advice to the various departments, and when they are in need of greater assistance or there is an area of conflict, they tend to come to the Attorney to give the final determination. So, in many ways, the Attorney is used as the counsel of final determination in the same way as you would go to an independent member of the Bar to say, "We do not agree", and particularly, "We do not agree within government departments, who sorts it out, who says what the law actually is", and that is the Attorney. Independence, of course, is inherent in the lawyer's role, exercised in the lawyer's role, because clients really should not go to a lawyer to hear what they want to hear, they need to go to hear what they need to hear, and there is quite often a big difference between the two. If you have a lawyer who tells you what you want to hear, you usually have a fool for a client and a fool for a lawyer. You really need someone who will tell you, in a very unvarnished way, what you need to know so that you can make the most judicious judgment as to how to present your case in a way that would be lawful and sound.

Q12 ***Viscount Bledisloe:*** I could not agree with you more, but do you not think that any other alternative than the Attorney General as it now roughly is would be likely to make that worse rather than better?
Baroness Scotland of Asthal: I think this is obviously an issue that is still for final determination, but I can certainly say to you that the view overall from those who have contributed so far seems to be that there is significant merit in retaining the balance that we currently have, namely with it being a minister having oversight, having that independent role and the Attorney exercising the judicious oversight that the Attorney currently has over matters legal in government. That seems to be the thrust of most of the contributions so far. As I say, we do need to look at the detail.

Q13 ***Baroness O'Cathain:*** First of all, Attorney, how do we address you? People used to say Mr Attorney. We cannot say Mr Attorney. How do we address you?
Baroness Scotland of Asthal: I think people have neutered me. They tend to call me Attorney, without gender.

Q14 ***Baroness O'Cathain:*** I do not think we would ever neuter you, Attorney. One of the points you made earlier, and I am just thinking about the huge scope of this job, and from a managerial point of view it was must be absolute chaos to try and organise it, but you said everybody in the Government Legal Service has the right to approach the Attorney. How many people are there in the Government Legal Service? How many heads?
Baroness Scotland of Asthal: About 2,000 people, but each department will have a head, a legal adviser, and it has certainly been emphasised to me how valuable and how important the Government Legal Service sees that opportunity: because there may be times when the Government Legal Service feels that they need the help, advice and support of the Attorney to

ascertain whether the advice they are giving is sound and robust, but also it can be of great assistance if they express a view which may be controversial or difficult for the department perhaps to understand if they have the assistance of the Attorney, who can, if necessary, have very direct conversations in a way that would be helpful.

Q15 ***Baroness O'Cathain:*** So, if there was somebody in one of these departments who actually approached the head of the legal services in that department and did not feel satisfied with the response, or whatever, would that person be able, as a right, to approach you?
Baroness Scotland of Asthal: I think normally that would not happen, but you could do that. As I understand it, any member of the Government Legal Service who feels that they would like to be assisted by the Attorney's advice has an independent right to approach the Attorney irrespective of what the department's view may be. For instance, you could have an adviser, and it is usually a matter for the senior adviser because if a junior, of course, is concerned about something, the norm is for them to go to the more senior people in their department, and that is the normal way it would go, but if you have got the senior adviser in the Government Legal Service for that department and there is a concern that they have about any issue, then they have an independent right to go to the Attorney irrespective of the view that the department may take; so the Attorney can be there almost as a bulwark for those who may need the Attorney's assistance.

Q16 ***Lord Woolf:*** Is that because the individual legal adviser should have the independence you referred to, and if the independent legal adviser comes to the conclusion that something which is being done by the department is not appropriate, then it is a tremendous safeguard to that independent adviser to be able to go in those circumstances?
Baroness Scotland of Asthal: Yes.
Lord Woolf: I apologise for interrupting.

Q17 ***Baroness O'Cathain:*** No, that teases out what I was really thinking. So, everybody really does have the right, but in practice it would not necessarily be that. But you could have a rogue legal adviser heading up one of the departments. There is always a rogue somewhere, in companies anyway, but probably not in the Civil Service?
Baroness Scotland of Asthal: Not in the Civil Service and not amongst lawyers.

Q18 ***Baroness O'Cathain:*** Oh, come on!
Baroness Scotland of Asthal: But there is that opportunity, and I have certainly had it very forcefully expressed to me that that is very valuable, because the Attorney is the head of the Government Legal Service. So, if you like, the lawyers have a twin-track oversight, one is the departmental oversight but lawyers are overseen by the Attorney; so you have got that double insurance policy.

Q19 ***Lord Smith of Clifton***: Attorney General, section one of the Constitutional Reform Act 2005 states that nothing in that Act adversely affects the existing constitutional principle of the rule of law or the Lord Chancellor's role in relation to the rule of law. You have touched on this, but what is the Attorney General's role in relation to the rule of law and how does this role relate to that of the Lord Chancellor?
Baroness Scotland of Asthal: Of course the Attorney is the *de facto* law officer and, therefore, it will be the Attorney who will be asked to determine on issues that pertain to law as it relates to the Government. So, although the Lord Chancellor has always had a responsibility in relation to the rule of law, it has always been the law officers who are responsible for advising the Government on any particular difficult issue as to what the legal position is.

Q20 ***Lord Smith of Clifton***: If we were to move to a situation in which the Lord Chancellor had no background in the law and the Government's chief legal adviser was, say, a career civil servant rather than a ministerial colleague chosen by the Prime Minister, do you think there would be a risk that ministers would be less respectful of the need to understand and act upon the requirements of the rule of law?
Baroness Scotland of Asthal: I think many of the respondents (and we referred to this, of course, in the consultation paper) have pressed the importance of having someone of comparable status being able to advise, assist, if necessary challenge a fellow minister in a way that is helpful, and there has been a question raised that, if that person was outside of government, would they have the same sort of efficacy and/or weight given to the view? It has been, of course, of interest, taking up the point that Viscount Bledisloe has raised, that quite often you will get advice from external counsel and others will still ask for the advice of the Attorney, and so there does appear to be something else which reaffirms that. I am interested that Viscount Bledisloe should have made the reference to outside counsel, because quite often outside counsel may just say exactly what internal counsel has said, but having someone else say it is always what is very helpful.

Q21 ***Lord Smith of Clifton***: Should the Attorney General's role in relation to the rule of law be expressly recognised in statute?

Baroness Scotland of Asthal: That has been an issue for debate. One of the things that have arisen is because the Attorney's role has developed over time and does not have a statutory framework, is there now a time when that should change? Some have suggested, for instance, should we change the Attorney General's oath. When I took my oath, it is the most wonderful 16th century oath, but I was asked to use my cunning on behalf of Her Majesty. If I could find it, I am sure I would use it with great facility, but that is because cunning, of course, has changed in its perception. It was your wisdom, your acuity, your ability to understand that was really being talked about in that old-fashioned way. So some have said should we now bring the oath into the 21st century and make it clearer as to precisely what the Attorney has to do? What does it mean to act as guardian of the public interest and be there as the bulwark for the rule of law? Should there be something expressly said in the oath which makes that clearer? Those, of course, are things that we are going to look at.

Q22 ***Lord Smith of Clifton***: Lord Bingham stated recently that judges are "bound to construe a statute so that it did not infringe an existing constitutional principle if it were reasonably possible to do so". Is not the implication that, if it were not possible to construe an Act of Parliament in such a way, then judges might feel it necessary to rule the Act illegal? Under section one of the Constitutional Reform Act 2005 the rule of law is classed as "an existing constitutional principle". Can you therefore envisage a situation in which a judge rules that an Act of Parliament is illegal because it breaches the rule of law, and what are the implications for the principle of parliamentary sovereignty?
Baroness Scotland of Asthal: The first thing to say is, of course, parliamentary sovereignty remains and is supreme, and of course the courts will construe the Acts made, particularly in relation to the European Convention on Human Rights, as to be compliant as opposed to non-compliant, but we are still left in the situation that, of course, we do not have judge-made law, Parliament makes the law, and it is still the judiciary's responsibility to interpret Parliament's intention in a way that is consistent with the framework given to it by the legislation. So, none of that has changed, but, of course, there is now a new development, I think, as a result of the way in which the Convention has been interpreted through the Human Rights Act, as to whether we should extend it beyond that. It is a very interesting debate that we are now having as to have we changed the ambit of those issues in a way that changes the constitutional realignment? Part of the *Governance of Britain* debate, I suppose, has led us to look at that issue more carefully.

Q23 ***Chairman:*** Could I ask briefly, pursuant to Lord Smith's question, whether the draft Constitutional Renewal Bill will include proposed reforms to the role of the Attorney General?
Baroness Scotland of Asthal: I cannot say that it will and I cannot say that it will not because the consultation period has concluded, as I said, but our conclusions have not been arrived at yet; and I need to make that clear to this Committee because we are going to look very, very carefully at the detail, and although the majority may be saying one thing, if we scrutinise the minority views and the minority views are seen to have some knotty, difficult and important issues, then they may have to be given greater weight than at present appears likely. I think I need to make that absolutely clear, because it would be quite wrong if, having gone away and scrutinised those submissions, we were to find that there were things within it that actually do make us think again or that the contributions that have been made by others going in one direction actually might not go in one direction if those issues were better taken into account. I just need to say that is where we are at. I am not in a position to say we have come to any view at all.

Q24 ***Lord Lyell of Markyate:*** Attorney, I think you are quite right to give that answer, if I may say so. You are having consultation; you must keep an open mind. I have made some contribution. I am very sorry, I could not come, for reasons of family illness, to your particular meeting, and I made it clear that I agree with what seems to be the majority that there is not a case for fundamental change, but there will be benefit from arguing it through and clarifying more clearly so as to overcome this position of alleged perception. I actually do not think the adverse perception is anything like as wide as its proponents make out. However, those who suggest change are calling for the Government's Chief Legal Adviser to be a career lawyer who is not a politician or a member of the Government, and it is said that advice offered to government by such a lawyer would be perceived—you see that word again—to be more independent than that offered by a politically appointed Attorney General. What do you think critics of the current system mean by the term "independent" in this context?
Baroness Scotland of Asthal: I think they mean that the individual has no political affiliation. There is clearly the perception that if one is attached to one political party or another that *a fortiori* will besmirch or colour the nature and quality of the legal advice that has been given, that it will be slanted one way or another, and the way in which, therefore, you get away from that possible perception is to choose a lawyer of distinction outside of government who does not have any known political affiliation. That is quite

an interesting idea. If you think of the majority of lawyers, that may be quite a challenge, but that is the perception that people have, that if you have an alignment with a political party of any sort, that disables you from giving independent, objective legal advice, and there are some who feel that very strongly indeed.

Q25 ***Lord Lyell of Markyate:*** Can you give an instance where any previous Attorney General has allowed his advice, as far as you can see, to be besmirched, or somewhat besmirched, and, if I can ask the direct question, would you ever allow your advice to be tainted in this way?
Baroness Scotland of Asthal: I have to say, absolutely not. I think any lawyer worth their salt would probably give you the same answer. There have been no attorneys general, to my knowledge, where there has ever been a suggestion that the political complexion changed the way in which they gave their advice. It is quite interesting, no-one has impugned the Attorney's decision. Of course there were issues in relation to 1924 and what happened then, but certainly in recent history there has never been any such suggestion.

Q26 ***Lord Rowlands:*** It might not apply to sixteenth century attorneys general!
Baroness Scotland of Asthal: It may not.

Q27 ***Lord Morris of Aberavon:*** May I come to pre-appointment hearings, a curious but interesting suggestion in the *Governance of Britain* that the Ombudsman, the ruling Government and parliamentary one and the various independent inspectors should be subject to independent hearings. Has anything emerged in the consultations that you have had about the role of the Attorney about that kind of suggestion? What is your reaction to it, and, specifically, should the Attorney be added to that wide list of great characters?
Baroness Scotland of Asthal: There has not been a great deal of attention on those issues. The Attorney at the moment is not accountable to any select committee. There have been suggestions that should that occur: should the Attorney, in the same way as the Lord Chancellor and/or the Home Secretary, be answerable to a Parliamentary select committee for review and matters of that sort. That has not played a huge part in the consultations but there are certainly things that we should look at. It has been quite interesting how many of the more difficult or more avant-garde suggestions have not seemed to garner a great deal of support. Those who propose it say that does not diminish its merit, they simply say that these are times for change, and so I do feel, almost on behalf of the minority voice who have put this forward, I should say to this Committee that they hold their views very strongly indeed, particularly the issue raised by the noble and learned Lord Lyell on having someone who is not a minister. The minority who hold that view hold it quite passionately.

Q28 ***Lord Lyell of Markyate:*** Could I briefly follow up on that, because the Attorney General advises the Government and he must be able to bind the Government. The Government must take his advice or he must certainly go and there is a constitutional crisis. Is not one of the strengths, therefore, of the present position that the Attorney is truly accountable to Parliament? Parliament can ask very difficult questions and, therefore, get a level of accountability which it would be much more difficult to achieve with a career lawyer who was some sort of public official.
Baroness Scotland of Asthal: I think that is a point that has been made very, very strongly indeed, and the question that I have been asking, and a number of people have been asking too, is if this lawyer is a public official outside of government, how do you get that parliamentary accountability? I think this Committee will be aware that in the six years that my predecessor was attorney there was some very rigorous questioning by both Houses of Parliament. At the moment, of course, we have the Solicitor General in the Commons and the Attorney in the House of Lords, but there was very rigorous cross-examination and debate about a number of prosecutorial and other decisions, and Parliament could have its say. In undertaking this consultation, because it is very interesting, the idea of not having a minister is, I think, a very interesting concept, we have asked: how would you supplement or exchange that rigour? What would you put in its place? The contributions do not actually explore that in any way successfully so far. I have not read all of them, maybe somebody has, but how do you get that accountability has been a loud question that has been asked because we want to improve the Attorney's accountability, not reduce it, and we have not yet had a persuasive answer.

Q29 ***Lord Rowlands:*** As we have opened up the question of accountability, perhaps I might put a question I might have put to you later. Which of your roles are accountable to Parliament as at this moment?
Baroness Scotland of Asthal: We are accountable by way of questions and debates, and we are invited, as I have been invited today, by committees to come an give evidence and/or to speak to them, and I do not think historically the Attorney has ever declined to attend on any occasion before any committee that they have been asked to attend, but there is not a formal committee which is specifically tasked with

overseeing the Attorney's discharge of the Attorney's duties.

Q30 ***Lord Rowlands:*** I think one of the problems that has arisen is the problem of grappling with the concept of parliamentary accountability when governments and attorneys general have said, "Well, we cannot tell you whether we have been advising and also the nature of our advice." How can you have that and still claim parliamentary accountability, because that is almost the essence of parliamentary accountability?
Baroness Scotland of Asthal: I think it is because of the division between the legal advice that the Attorney gives to the Government as a client and the accountability that one can have for prosecutorial and other policy issues about which you can speak. So, it would clearly be improper to talk about legal advice on individual cases or issues that are *sub judice*, not least because it is felt that the departments have to be free to be able to ask for the Attorney's advice and to receive the Attorney's advice without it necessarily having been lauded that that advice has been sought, because we want people to continue to seek the Attorney's advice whenever they feel inclined, and the one thing that would not be helpful is if departments felt that it was unwise to seek the Attorney's advice because that would become known and something would be made of that. One of the advantages is that you can give your advice confidentially in a way that makes it more likely to be absorbed.

Q31 ***Lord Rowlands:*** In that answer, therefore, am I right in saying that two of your three roles are not really accountable to Parliament in that sense?
Baroness Scotland of Asthal: You are accountable to Parliament in terms of your guardianship of the public interest, you are accountable to Parliament in relation to prosecutorial supervision and superintendence, because that is of a policy and a general nature, but you cannot disclose to Parliament the nature and content of the legal advice that you give as legal adviser to Her Majesty, to Parliament and to government because, of course, the Attorney also acts as the adviser to Parliament and Her Majesty too; so in that role of legal adviser you are not entitled to disclose the particular nature of the advice that is sought from you.

Q32 ***Lord Lyell of Markyate:*** In the hope of helping to clarify this often misunderstood position, is it not important to distinguish between the convention and the legal position? Every single citizen, and it applies to government, has a right to take legal advice and for that to be done confidentially.
Baroness Scotland of Asthal: Absolutely.

Q33 ***Lord Lyell of Markyate:*** That is the law of confidentiality and it is a convention in Parliament, exactly as you have said, that the Attorney does not reveal whether they have advised or what their advice is, because government, obviously, needs to be able to take advice in confidence, but the privilege is actually not the privilege of the Attorney General, it is the privilege of the Government itself, and if it wishes to release that, as indeed it often does—on the Maastricht matters I came on a number of occasions and gave to Parliament the advice that I had given to government—the government can waive its privilege?
Baroness Scotland of Asthal: Absolutely.

Q34 ***Lord Lyell of Markyate:*** Some may think that it might have been wiser to have waived it a little bit more often in recent years, but it can do so and, therefore, it does not need to be so secretive, but there is a very good reason for the general confidentiality.
Baroness Scotland of Asthal: I think that is absolutely right. As Lord Lyell says, it is similar to the situation that any client would be in. The privilege belongs to the client and the client is entitled to waive that privilege if they deem it to be appropriate so to do. But, of course, there are difficulties about waiving that privilege too often, because it then is said that you are only waiving the privilege when it suits you. I know historically there has been a view that one should not waive the privilege because you cannot waive the privilege in fair weather if you are not prepared to waive it in foul. There have been a number of occasions, I think, when the Government has very much wanted to waive the privilege because it has felt that if anyone could see what we saw, of course, they would be so much happier, but then you have got to be content to do it on other occasions too, and I think (and I can say this because I have not been doing this job for very long) that, looking back over the last 70 years or so, there have been a number of occasions when the Government has taken the view that to preserve the tradition, to preserve the general position, has been more valuable than the advantage of allowing it to be waived for this particular circumstance. There is always that balance that you are probably better off keeping it as opposed to using it in a way that may be seen by others to be simply advantageous when you want it. I know that looking historically. I am sure Lord Lyell will remember that there have been times when the governments of the day have argued and debated that issue.
Lord Lyell of Markyate: I quite agree.

Q35 ***Lord Morris of Aberavon:*** My understanding is you would take a robust view to maintain the status quo, despite the seductive tones of various

government departments that would like to reveal—I think I have that as regards Japanese compensation—and a formula was devised that the department had consulted and obtained legal advice at a higher level, perhaps immodestly, but that would be your position?
Baroness Scotland of Asthal: I think there are real advantages in having the situation that we now have where the departments are able to come to the Attorney, when they need to come to the Attorney, confident that they can do that confidentially.

Q36 ***Lord Rodgers of Quarry Bank:*** I would be tempted, I think, to explore what I call the mystique of the independence as seen by attorneys general, but I think at the moment my particular question is to ask you, if you will, to clarify—you have already said it but if you would be kind enough to clarify—whether the independence would be increased if the Attorney General relinquished responsibility for policy aspects of the criminal justice system currently handled by the Office for Criminal Justice Reform, leaving responsibility for the role to the Ministry of Justice and the Home Office?
Baroness Scotland of Asthal: I think that has been a matter which has exercised quite a lot of attention, and I think the reason it has is because the Committee will know that this position has evolved over the last few years and the whole purpose of creating the Office for Criminal Justice Reform was to try and bring the criminal justice system into better alignment, each part of it. You will remember that there was the *Justice for All* report which Lord Justice Auld was responsible for, which basically said that the criminal justice system was not a system because you had disparate silos working in disparate ways and what now needed to happen was for the three independent parts of the criminal justice system to come together in a way that would enhance synergy and make it better understood, and that is where the Office for Criminal Justice Reform came from. The Attorney, of course, remains responsible for prosecutorial oversight of all the prosecutors who are responsible for that part of it. The question that has arisen is whether you can have the advantages that we have culled from that new framework, having the Office for Criminal Justice Reform, having the Lord Chancellor, the Attorney General and the Home Secretary working together as part of the National Criminal Justice Board, formulating systems so that they work and are practical and are for the benefit of the public, whether you can have that conjoined approach without the Attorney discharging part of the policy role in terms of prosecutorial policy, and there is a debate now as to whether the Attorney should be simply responsible for operational prosecutorial policy or more broadly, but I think that is a debate that is currently on-going because of the effective and efficient way that the Attorney has been able to contribute to the better maintenance of the criminal justice system. If you change and revert back to the old system, would you lose some of the real advantages that we have culled from working together or not? That is a very active debate on policy.

Q37 ***Lord Rodgers of Quarry Bank:*** May ask a supplementary about your role in the Cabinet? In the past (and there may have been exceptions) the attorneys used to be summoned to Cabinet because there were big issues. Our understanding is that when you were appointed you may attend Cabinet as a matter of routine. If this is the case, without in any way breaching confidences, do you see yourself when you are there as dealing only with attorney general type issues or would you feel that you could participate in general discussions? You have been a minister in other departments, the Foreign Office, for example. If Cabinet is discussing an issue which is not related to your attorney role but out of your political background and ministerial knowledge, what do you say? Do you participate or do you sit silent?
Baroness Scotland of Asthal: Firstly, it would be quite improper for me to disclose what happens at Cabinet, as I am sure you are very well aware.

Q38 ***Lord Rodgers of Quarry Bank:*** I am asking about the process, not about the subject.
Baroness Scotland of Asthal: The first thing relates to your question in terms of policy. The Attorney at the moment shares criminal justice policy with two other secretaries of state, so there is a question as to whether it would be proper for the Attorney to participate in that discussion. Having taken on the role of Attorney, I have decided that, pending determination of this consultation period, I should be circumspect in the amount that I participate. I am always invited to Cabinet. I attend. I do not attend always; I attend whenever I deem it appropriate to do so, and I will determine how that situation will change after the consultation period. I have taken the view that, until this consultation is concluded, that is the best way forward, but I think it would be inappropriate for me to answer that question in any further detail.

Q39 ***Lord Rodgers of Quarry Bank:*** You have said you "deemed to attend Cabinet". That is rather an unusual expression, because the Prime Minister invites you to attend. For you to say you deem to attend would be rather strange.
Baroness Scotland of Asthal: The Prime Minister invites me to attend, I have been invited to attend every single Cabinet. It has not always been possible for me to attend every single Cabinet.

Q40 ***Lord Rodgers of Quarry Bank:*** That is a difference between possible and deem.
Baroness Scotland of Asthal: Particularly if I am in Iraq, if I am doing something which I believe to be in the Government and public interest and it is not, therefore, possible for me to attend and if there is not an issue of real moment that I am asked to attend upon, then I think it is perfectly proper for me to not attend Cabinet if I am obliged to be doing other duties. If the Prime Minister ever asked me to come notwithstanding my other duties, of course I would go.

Q41 ***Lord Lyell of Markyate:*** Briefly, I think there was a change when Lord Goldsmith began to come regularly. It certainly was not my experience, during my five years, of going regularly. I went when there were specific issues, but I can say that there were three or four Cabinets in a row when I did just get an invitation for no particular reason, and there was discussion amongst senior ministers and we decided that that was not a wise thing to do. I think the great tradition of the office is that, although it is of Cabinet rank, in order to maintain both the perception of that independence as well as the reality, there is a great deal to be said for not doing so, for not attending every Cabinet.
Baroness Scotland of Asthal: I think that is a view that has been expressed. Another view has been expressed slightly differently, namely that it is far better for people to get legal advice early, particularly when they are debating issues or issues are crystallising, than to get advice after it has crystallised and before you can change things. I think there has been an issue as to whether it is not helpful (and I am putting this because we have not come to any view), particularly bearing in mind that in the future you may have a Lord Chancellor, who always used to be round the table all the time with his rule of law hat, who may not be a lawyer, in those circumstances, to have someone who does have that legal discipline, who can perhaps make a contribution, a judicious contribution, when the need arises. I think there is a whole area of discussion here. There are those who believe that the Attorney should always be there for those reasons, and there are those who believe that the prior position should be maintained, but I also say that there is this new issue as to the Attorney's role in the joint or tripartite relationship with the Office for Criminal Justice Reform and the fact that the prosecutorial policy position is still one the Attorney should discharge, and that is a matter which, of course, is being looked at and discussed.

Q42 ***Lord Morris of Aberavon:*** When did this practice start in modern times of regularly attending Cabinet? Was it under Lord Goldsmith? The last formal member of Cabinet, if I recollect correctly, was FE Smith, and that would be in the 1920s, if not earlier. Since that time he has not been a member of the Cabinet. I did not attend regularly, although I attended all the Kosovo war cabinets, not the Cabinet itself. Is this a change that has occurred fairly recently?
Baroness Scotland of Asthal: I am not sure. I have to say to the Committee I have not investigated this myself, so I cannot say to you it occurred when Gareth Williams was Attorney and then when Peter Goldsmith was Attorney. I am not sure as to when precisely the change occurred.

Q43 ***Lord Morris of Aberavon:*** Can we have a note on this, if you do not mind?
Baroness Scotland of Asthal: I would certainly be very happy to do that.
Chairman: Thank you very much indeed.

Q44 ***Baroness O'Cathain:*** In this Committee's report on relations between the Executive, the judiciary and Parliament we recommend that, "Where a department has any doubt about compatibility of a bill with Convention rights, ministers should seek the involvement of the law officers at a formative stage of policy-making and legislative drafting." What has been your experience of involvement at an early stage?
Baroness Scotland of Asthal: I think the Attorney is approached on a number of different areas and at different stages. So, there will be occasions when departments will approach my office, but they basically approach my office at a time when they are worried and/or unsure, but you will know that, in terms of the certification of priority, all of those can be overviewed by the Attorney General's office and so we will see them.

Q45 ***Baroness O'Cathain:*** You did say "can be"?
Baroness Scotland of Asthal: They are.

Q46 ***Baroness O'Cathain:*** They are not by automatic right?
Baroness Scotland of Asthal: No, they are, because what will happen is that we are asked, through the Cabinet Committee process, to look at legislation, and my office has the opportunity to scrutinise the certificates that are given, and if there are issues of concern in relation to compatibility, we are able to raise those as well as issues being raised with us.

Q47 ***Baroness O'Cathain:*** On all the bills we get they are certified by the Secretary of State whose department is responsible for the bill that they actually comply with the Convention. Does that mean the buck stops with the Secretary of State or does the buck actually stop with you? If it stops with you, should it not be that the Attorney General—

Baroness Scotland of Asthal: No, the buck stops with the Secretary of State, the person who signs the certificate, because you may sign the certificate having obtained advice.

Q48 ***Baroness O'Cathain:*** I see.
Baroness Scotland of Asthal: The advice of the Attorney, or lack of advice of the Attorney, would not necessarily be something which would be discussed.

Q49 ***Baroness O'Cathain:*** Taking that to its logical conclusion, there would never be a bill then that you would not have agreed with if it had been signed by the Secretary of State under the terms that we normally see, that the Convention applies and that everything is all right?
Baroness Scotland of Asthal: I think this is an interesting discussion, because, of course, you are now all asking me that which I am not entitled to do, that is to say when I have or have not—

Q50 ***Baroness O'Cathain:*** Excuse me, Attorney, I did not ask you to do it. I am asking you the question, would that be the way you would do it?
Baroness Scotland of Asthal: I think I can put it in this way. There is an opportunity for the Attorney to look at and question the certificates or the intention to sign certificates. It is, in the final analysis, a matter for the Secretary of State who signs to be satisfied that they are compatible when they sign it.

Q51 ***Lord Woolf:*** I wonder if before I come to the main thing I am going to ask you about, I can ask you about some provisional matters. The Attorney was always regarded as head of the Bar. Are you still regarded as head of the Bar?
Baroness Scotland of Asthal: I am indeed.

Q52 ***Lord Woolf:*** The Attorney always used to have a special relationship with the Treasury junior, and it was the practice of having a common law Treasury junior and a Chancery Treasury junior. That practice, I believe, has just been departed from to this extent, that somebody who was not a Chancery practitioner has been appointed a Chancery Devil. Was this an indication of a difference in the relationship?
Baroness Scotland of Asthal: I do not think so. I think what has always been the case (and you will be very familiar with this) is that the person most and best suited to the job is always appointed, and I think we have never had anyone who is not acknowledged to be a person of real talent and acuity at the Bar because we have wanted the very best to take that job, so I do not think that anything should be construed as a result of this change.

Q53 ***Lord Woolf:*** Is there any practical difficulty arising in regard to Treasury Devils and the ability to get the best person to do the job, because whereas in the past it was understood that you would have a right, if you wished to do so, to become a High Court judge at the end of the period, that can no longer be assured because of the Appointments Commission? ***Baroness Scotland of Asthal:*** I do not know whether that has had any significant impact. The truth is, of course, if you choose someone of unsurpassed excellence it would be reasonable to suppose that, unless, of course, they did not discharge their duties honourably and well, they would be of the calibre to entitle them to be considered for High Court appointment. I do not think there has been any suggestion that that is a problem. Indeed, one of the things that I have been really encouraged by and grateful for is the very high quality of the people, not only who are part of my department in the Attorney General's Office, we tend to get the very best of the Government Legal Service still coming to the Attorney, but also we have some superb, really first-rate Treasury counsel, and the people who we have on the list are, I think, amongst the very best of the Bar. So, if we come back to this whole pond of independence, you do not just have the Attorney General, you have the best of the Government Legal Service and very high quality counsel to assist the Attorney in coming to the decisions that the Attorney has to take. I will not say that they are always available at three o'clock in the morning if suddenly we have to make a decision, but that ability to cull advice from the very best of the Bar, I think, is fundamental to the high quality of the advice that the Attorney General's Office is allowed to give and does give. I think we would not be as good if we did not have those wonderful members of the Bar upon which to call.

Q54 ***Baroness Quin:*** I just want to come in on a supplementary before your main question. You talked about the qualifications for the job. Does it not seem a little bit strange that in government there are one or two positions which are basically reserved to people with particular backgrounds, whereas, for example, you could become Foreign Secretary without having any previous interest in foreign affairs or the Arts Minister without ever having shown the slightest interest in the subject before?
Baroness Scotland of Asthal: I think it comes back to whether you think understanding of the law is something which is fundamental to government and fundamental, therefore, to the Attorney's role. There are many other levels of expertise you can gain from outside experience. The problem, I would have thought, in having an attorney who is not a lawyer is that quite often the Attorney is asked to determine between a number of lawyers and so you

have legal opinions coming, for example, from a number of different departments. They may all come to perfectly sound views. For instance, it may be that three different departments come to different views as to what the law is in relation to statute X. Each of those decisions fall within the ambit of reasonable disagreement, so they are all inherently reasonable, but they are different, and you have to come up with one view which would bind the whole of government. You tend to need somebody who understands the legal mind and the legal concepts to be able to do what is, in effect, almost a mediator's role, to determine what was the essence of what Parliament intended, "What did we as a government intend?" and now, "What is the construct that we must now come to?", which may be will not make everybody happy but actually gives voice to what the law actually is. That, I think, if I may respectfully say so, does need a lawyer to do that, and so it may be that the last remaining role in government which does need special expertise will be the Attorney. We have already determined that the Lord Chancellor no longer needs to be a lawyer, but I think law is fundamental to democracy—that is my view—the rule of law is fundamental, and there does have to be, I believe, someone responsible to guard that in the public interest in government. We have benefited from there being an attorney for 700 years. Whether that attorney is inside or outside government, of course, is a moot point, which we have discussed, but I do not think anybody suggests that the Attorney or the person who gives legal advice to government should not be a lawyer. I think that would be a perilous course upon which to embark.

Q55 ***Viscount Bledisloe:*** Should we not add to that list of things that have to be considered an ability to judge what judges are likely to decide? After all, you are not in the end trying to get the right answer, you have trying to get the answer that the judges will say is the right answer.

Baroness Scotland of Asthal: I think one of the benefits that we traditionally have had in terms of having a senior lawyer to do this job is that they do understand the law, they understand the courts and they understand the possible: because what you are doing as a lawyer constantly is having to make judgments, not just on the arguments but which argument is likely to find favour and which argument, no matter how ingenious, or delightful, or extraordinary and interesting, may not actually get you home at the end of the day, and that is all about judgment and that judgment comes with a deal of experience and that is why we have always had, historically, senior lawyers do this as opposed to junior.

Q56 ***Lord Woolf:*** I wonder whether perhaps, following on from that, because it is an appropriate moment, I can go straight to my supplementary and then come back. Because of what you have just said, is it your intention, when it is possible to do so, to appear as counsel on behalf of the Government or even as an *amicus* to help the court, which is another traditional role of the Attorney which has always had high priority, and if it is your intention, does that apply also to Strasbourg or Luxembourg?

Baroness Scotland of Asthal: I certainly have already appeared, I appeared on an unduly lenient sentence, and, when able to do so, I would very much like to continue to appear. There is an issue as to how often one can do that because of the burdens of office, but I think it is certainly something that I would like to continue to do. One of the advantages of having a practising lawyer as Attorney and Solicitor General is that we are, of course, the only members of the Government who are still in practice and able to go the coal face, see what is actually happening in courts ourselves, whether it is by representing or not, and then come back, and that does inform policy in terms of what happens. For instance, I know that the Solicitor General in the past has gone and prosecuted lists in the magistrates' courts. Rather than just having someone tell you what is happening in courts, it is a really good thing for you to go and taste and see yourself, and, as a result of doing that, I know the last Solicitor General, Mike O'Brien, learnt a great number of things that, I think, he would not have learnt had he simply listened to that which others had told him; and I know that that is something that my Solicitor General is quite keen to do. There is an opportunity for us also to emphasise the things that we care about passionately. I care passionately about safety and security of children, about domestic violence, about rape, about those other issues, and one of the reasons, in fact, I did the unduly lenient sentences, it was by no means necessarily an easy issue, but I wanted the court to know that this is something the Attorney and, therefore, we as a government, cared about very much, the protection of children was something which was very important, and I think there is an opportunity, therefore, when there are issues like that, where it is appropriate for the Attorney and Solicitor General perhaps to show their commitment to issues and be able to address the court directly about why the Government feels that making a stand in relation to these issues is important, and the court has the advantage then of testing the Attorney.

Q57 ***Lord Woolf:*** The final matter that I wanted to ask you about is the position where you get advice in so many matters, often from specialists, who are bound perhaps to have greater knowledge in that particular area of the law, but in the end is your

position always the same or is it different depending on from whom you have got advice? Is it a question in the end of what you think is the right answer, taking into account any advice that is available?
Baroness Scotland of Asthal: Yes, I think it is. The important thing is that you can have counsel and, if you are not sure about something, you can have a consultation with counsel, you can test it and you can assure yourself that the advice you are getting is of the highest quality. It is an old-fashioned way of doing things, but we know that a number of us who have had the privilege of leading will have in any given case a junior who specialises in a particular area of law and they can give you the detail and the understanding of the area but then it is your judgment as to how you would want to present it to the court or your judgment as to whether they are sound or not, and that is why, as I say, I am very grateful to the people that we do have, because we still attract some of the best minds and it is of real interest and a challenge when you can have consultations with some excellent people and you can just tease out with them whether there is not a different way for some of the issues you are concerned about to reassure yourself that you have come to the right conclusion.

Q58 ***Lord Woolf:*** I must say, what you say is something I agree with entirely, but I think there is the other aspect of what you have just said, and that is to be the Government lawyer exposes you to a variety of work which it would be very difficult to get in any private practice.
Baroness Scotland of Asthal: It does. What is quite interesting, too, is because as the Attorney you have oversight of all the different areas, you are able to bring that understanding to the new issues that maybe one department is not aware of and there are conflicts that may be given rise to by virtue of a department quite clearly concentrating on its own area of expertise but not knowing that there is another case coming up in another area where we may actually be saying something slightly different, and, therefore, you have to understand that oversight in order to advise with the appropriate degree of care.
Chairman: Thank you.

Q59 ***Viscount Bledisloe:*** I want to turn to decisions to prosecute in individual cases. I assume you accept that in line with Gouriet it can be right to take the public interest into account as well as the merits of the individual case.
Baroness Scotland of Asthal: Yes, I do.

Q60 ***Viscount Bledisloe:*** Historically it used to be the Attorney's role to make that decision. Have you resiled from that somewhat and, if so, how can the Crown Prosecution Service, or someone like that not involved in politics, judge appropriately what is the public interest?
Baroness Scotland of Asthal: I do not think I have resiled or not resiled. One of the beauties of having this consultation period is to be able to look at that very issue. The area of the greatest degree of dissonance has been whether the Attorney should have a power to direct and, if so, in what circumstance. There has been a number of consultees who have suggested that the Attorney should no longer have the *nolle prosequi*, no longer have any right at all to direct in individual cases. That should be expunged. That is the one area that has caused quite a lot of concern and attention. Therefore, some would say, it should be the Director of Public Prosecutions or the directors of the prosecutorial authorities, as is appropriate, who should have the final say in making that balance, yes, in consultation maybe with the Attorney, yes, having acquired information about the wider issues that may pertain to government and the Government's view in relation to the public interest, but that the Attorney should no longer have the residual right to direct, and that is one issue that has caused quite a high degree of concern. When I became Attorney, so as not to prejudge or prejudice the outcome of the consultation, I made plain that I would not seek to exercise my power to direct in individual cases save and except in those areas where statute or the public interest demanded it. There are about 100 different cases where statute has determined that the Attorney General should decide on whether there should or should not be a prosecution, and what has been very interesting is that in the last year Parliament's desire to have the Attorney, as opposed to the DPP, determine these issues has continued with ever-growing appetite, it seems to me. There have been suggestions in the House of Lords that the DPP should do this: "No, no", goes the cry, "Go higher, go higher. We need the Attorney to determine this." So there is that tension and we have not yet come to any conclusion as to whether it might not be better to say that the Attorney should not have the right in individual cases, save in exceptional cases which are in the public interest. That whole area is probably the most contentious area from the consultation as to those who say yes and those who say no.

Q61 ***Viscount Bledisloe:*** I accept what I think is your view that there are too many statutes that require the Attorney's consent and that a lot of those could be repealed and a lot of those could be delegated to the Director and other similar people. I am concerned with the public interest position. Surely it has got to be somebody who has a foot both in the legal camp and the political camp who judges what is public interest, and it would be wholly inappropriate for the Director to say, "The Government tells me this will

cause a general strike, but that is not my worry. Let us go ahead and prosecute."
Baroness Scotland of Asthal: As I say, we are in the middle of a consultation. That is one of the issues that is going to be very thorny and we are seeking to deal with. You are absolutely right, the cases which are clearly public interest cases, there is a big debate as to whether that should or should not be retained because it will relate to an individual case and, in those cases, should the Attorney retain the ability, in the public interest, to direct or not? It is a very live issue.

Q62 ***Viscount Bledisloe:*** Who else could have it?
Baroness Scotland of Asthal: That is another question that is being asked. If not the Attorney, who? One of the issues that has been mooted, quite strongly, in the consultation period, by some, was whether the Ministry of Justice should take on some responsibility in this regard. That has been soundly refuted by the majority. I make no comment whether it is good or not, but we wait to see, because, as I say, the devil on this is always in the detail and when we come to scrutinise those who are dissenting, we may find they have more merit than at first blush, it appears. That is why I am being very open at this stage: because I would not want to dismiss that.

Q63 ***Lord Lyell of Markyate:*** Following up on this very important point, I must say, I was rather astonished at the way the matter was put in the Prime Minister's July statement. The fact is that you are under a statutory duty, you are appointed by statute, you have a statutory power to superintend, and that does involve the power to direct a statutory power. Whatever you tell the Prime Minister, if you really thought that something was going badly awry and if, which I am sure would not happen, the Director in question was being completely intransigent, I very much doubt if you would let things go awry. The position really is this, is it not? The power to direct is part and parcel of the power to superintend, the duty to superintend. Actually no attorney in modern times has taken a prosecution decision, but they have consulted very closely on some very difficult cases with the Director, or one of the directors, at the time and they have actually always reached agreement and the Director has taken the decision. But, if you are to have responsibility, you must have power. You cannot have real power without responsibility, and that is a very important constitutional point which should not be lost sight of.
Baroness Scotland of Asthal: I think that is a powerful point that has been made. The issue is could you retain the power to consult without necessarily having the power to direct? You are absolutely right, I have not found occasions, though there may be, where the Attorney has had to direct in an individual case; it has been done by consultation. There are those who say that if you did not have the power to direct, would the Director of the day be so attentive during the consultation and that, therefore, that has an impact, and there are others who say, no, no, no, the nature of the appointment of the sort of person who would be director of the prosecutorial authorities is such that, of course, consultation would suffice, and could you, or should you, put the consultation process into a more structured form which would give voice to the reality of what happens and make that the template? I think it is really quite an interesting debate, because there are those who say that they are worried about the independence if you have retained the power to direct in an individual case, and this is actually the area where there has been most resistance and toing and froing and difficulty.

Q64 ***Lord Lyell of Markyate:*** You know where I stand.
Baroness Scotland of Asthal: Absolutely, and, indeed, I know where Her Majesty's loyal opposition stand. They stand firmly with the position as it now is.

Q65 ***Lord Lyell of Markyate:*** May I just say, it does not matter where Her Majesty's loyal opposition stand. You come from the tradition of independence that you have inherited.
Baroness Scotland of Asthal: Absolutely, and I have listened very, very carefully to what all the previous Attorneys General have said of all complexions, and I have been very grateful, for instance, that Lord Mayhew, yourself, Lord Morris, all the attorneys of great distinction, have given me the benefit of their help and assistance, for which I would like formally to say a very heartfelt thank you.

Q66 ***Lord Morris of Aberavon:*** Thank you very much for your last remark. I have submitted my reply to your consultation. Leaving on one side the power to direct, which has never been tested (it is a general power of superintendence), when in practice that the DPP comes to you, two DPPs—Northern Ireland and here—there is consultation, there is a meeting of minds, but I have no recollection of actually taking a decision to prosecute and, hence, I do not understand what you are giving up. If the Prime Minister's comment is right, that the Attorney General has herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual criminal cases, since this does not happen in practice, not in my time, not in Lord Mayhew's time, not in Lord Lyell's time, as I understand it, what are you giving up? What does the sentence mean?
Baroness Scotland of Asthal: I think it means that there is the power; all the Attorneys General have the power to direct. There was a great deal of anxiety

around at the time, I think, that an attorney may exercise that power, albeit that attorneys had not exercised that power in the most recent past. I think what the Prime Minister was doing was making it clear, because there was concern being expressed that the Attorney had this power to direct in individual cases, and I think there may even have been a perception that the Attorney was directing prosecutions. You will remember at the time people were making quite ill-informed comments about what the Attorney was purportedly doing when he was not. They were suggesting that the Attorney had made decisions in BAE, had made decisions in these other cases, where the Attorney certainly had not. So, I think what the Prime Minister was saying is, if (which not admitted) you think she will, she will not, whilst this process is going on, and I wanted to make it clear that I had no intention to exercise that power to direct certainly during the time this consultation period was on-going. I think we are going back, are we not, to talk about the need to reassure, to make clear and to deal with perception, and it may have been an ill-informed perception, but there was a perception that the Attorney and attorneys general in the past had been responsible for directing in individual cases because they had power to direct.

Q67 ***Lord Morris of Aberavon:*** Given what happens in individual cases, it is not such a big deal after all, what you are supposed to be giving up? That is right?
Baroness Scotland of Asthal: I think some still see that it is, because if you take Lord Lyell's point, he says (and it has been strongly argued with me just the point that Lord Lyell has made) that it is an inherent part of superintendence and supervision that you retain the power to direct and that, if you give up the power to direct, then the account which could or may be taken of your consultation may not be as strong, and that is one of the issues that many people have batted backwards and forwards: because what you, Lord Morris, would really be doing would be supplanting the power to direct with a power to consult, which is what *de facto* happens. There is at the moment no expression in relation to consultation but there is a power retained which the attorneys, in their wisdom, have not sought to exercise because they have not needed to.

Q68 ***Lord Lyell of Markyate:*** I agree with what you have said, but there is an even bigger point that we are a free society under the rule of law and a democracy in which the Government of the day is responsible for a free and fair and independent prosecution service. You as Attorney are answerable for it. Therefore, are you to be bound by a decision which in the end you could not control? It would be responsibility without power, and that is, in my view, constitutionally deeply objectionable and would undercut the responsibility of government as a whole.
Baroness Scotland of Asthal: I think that is a very powerful argument that has been put on one side of the table, and we hear that. On the other side, it is said it is objectionable, that a politician—because this is when the minister becomes a politician—should have the right to direct who should or should not be prosecuted. So there is a tension between those two and I think it is a difficult issue. Constitutionally there are those who say government should not have the power to do that; they should have just the responsibility.

Q69 ***Lord Lyell of Markyate:*** Take some highly charged thing: the DPP wants to prosecute a Cabinet minister in relation to cash for questions or, the other day, some unpopular person to the Government is prosecuted for something that the DPP does not think it is fair to prosecute. Think of the political storm, quite rightly enormous. We are a democracy. In the end if you get something like that, should it not be decided by the sheer weight of opinion? We know that in the Campbell case the Labour Government was actually brought down by Patrick Hastings' changing of his mind apparently under pressure. I think, historically, that is a very complex case, but it could happen and it brings it back to accountability to Parliament.
Baroness Scotland of Asthal: I think these are powerful points on one side. It is perhaps not for me to make the case for those who say the opposite, but I think we need to listen to that voice. They are saying that this is an area which should now be put clearly outside the political realm, that although that is the position that happened in the past, now we could show independence and it would be something quite significant. I think, to answer Lord Morris's point about: "Will you not be giving up something quite trifling?", if you listen to Lord Lyell, you better understand the enormity of what we would be giving up if we did give that up. It is a very interesting but very important debate that is still going on and will be given a lot of consideration when we come to consider the submissions that are made by everyone in this regard.
Chairman: The Attorney General has been extremely generous with her time and has other commitments. Your question has been answered, has it?

Q70 ***Lord Rowlands:*** I have one subsidiary question—you raised it earlier—about the question of accountability. If we switched over to a system of non-political Attorney General, have any of those who have been advocated come up with a mechanism for accountability?

Baroness Scotland of Asthal: The short answer to that is, no, save that, of course, there has been the suggestion that there could be a select committee to which the person could be held accountable. There are issues that we are ourselves considering. For instance, should we have an annual report where we set out all the things that the Attorney General's Office has done during the year? I would quite like to do that anyway.

Q71 ***Lord Rowlands:*** That is rather a poor substitute for actually being at the despatch box.
Baroness Scotland of Asthal: No-one has got over the difficulty about there not being anyone accountable to Parliament at the despatch box. You would not have that. You could have a select committee, there are various other mechanisms people have come up with, but what you will be giving up is there would be no-one accountable, save and in except for if you made the Ministry of Justice or the Home Office accountable for prosecutorial authority. No-one seems to like that either, I know, but that does not seem to hold. There are lots of people who have said they think that is worse, but they have not come up with a solution of somebody standing at the despatch box and being grilled to within an inch of their lives. They have not come up with anything better.

Q72 ***Baroness Quin:*** Until 1999 attorneys were drawn from the House of Commons. Since then they have been drawn from the House of Lords. Is this change really a recognition that there are fewer senior lawyers in the commons than there used to be or is it perhaps a reflection of the comment that apparently our colleague, Lord Goodhart, has made, which is that it makes a great deal of constitutional sense for the office of Attorney General to be permanently in the House of Lords so that the Attorney is not faced with the need to defend the seat in the Commons? As I am asking this question, Chairman, I suddenly realise it is predicated on no change to the composition of the House of Lords, something which is in itself somewhat controversial, but perhaps I could ask you to comment?
Baroness Scotland of Asthal: I am told that the appointment of the Attorney has been on the basis of the best person available for the job at the time, but I do not know whether that is true. I think, as Lord Goodhart says, there are those who strongly say that there are advantages in having the Attorney in the House of Lords because of the fact that they will not have to stand for an election and we have continuity and that gives a degree of independence; there are others who bemoan and bewail the fact that, because of the constitutional changes that have happened in the House of Commons where you do not have what is an opportunity to have a continuing and full-time practice and be a full member of Parliament, they can no longer have that ability to choose with such great facility in the Commons. That is an issue that, I think, has given a lot of people concern, and, you are right, there is an issue if the Lords become appointed: then the Lord Goodhart point goes by the by because we will all be appointed then. There is real agreement, however, that the Attorney should still be a senior lawyer from whichever House, and there are advantages in having a member in both Houses and having a Solicitor General in one House and the Attorney in the other, or vice versa. That is certainly seen as something of real advantage.
Chairman: Attorney General, can I thank you on behalf of the Committee for your attendance and for your evidence. It has been very much appreciated.

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