



The Governance of Britain

A Consultation on the Role of the Attorney General



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THE GOVERNANCE OF BRITAIN A CONSULTATION ON THE ROLE OF THE ATTORNEY GENERAL

FOREWORD BY THE ATTORNEY GENERAL

“The role of Attorney General, which combines legal and ministerial functions, needs to change. While we consult on reform, 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”.

The Prime Minister, the Rt. Hon Gordon Brown MP, 3 July 2007

In the Green Paper *The Governance of Britain* the Government has set out proposals for radical constitutional reform. This includes a commitment to reforming the role of the Attorney General. It is a complex role which has evolved over centuries and comprises a broad and varied range of functions which are fundamental in upholding the rule of law. My predecessors have helped to ensure that the Government acts in accordance with the law; protected the public interest across a range of issues; spoken up for the rule of law at home and abroad; and promoted improvements to the administration of justice – in particular in their oversight of the prosecuting authorities.

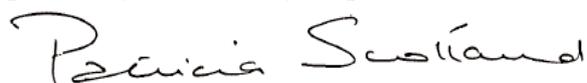
Whilst these issues remain as important today as ever, the Government’s commitment to rebalancing power between the executive, legislature and the people inevitably involves reform of this historic office, which straddles different parts of the constitution. As we come to reform the role we need to make sure we address those areas where there is the potential for conflict whilst enhancing the administration of justice, the maintenance of the rule of the law and the protection of the public interest. Given the overarching nature of the Attorney General’s current role it will be important that any changes we make take account of the effects on Government and the justice system as a whole and enhance public confidence in the office.

We need a comprehensive public debate, with the widest range of interested parties, about what the role of the Attorney General should be.

The Constitutional Affairs Select Committee of the House of Commons (CASC) has recently issued a report on the Constitutional Role of the Attorney General¹. The Government will consider its findings carefully, along with all the other options for reform, in the context of this wider consultation process. The Government will therefore decide on its response to the CASC report in the light of this consultation.

I believe that through this consultation, we have an opportunity to make changes which will enhance the appreciation of the rule of law and confidence in the administration of justice.

The Solicitor General, Vera Baird, and I warmly welcome this opportunity for debate and reform. We hope that all who read this consultation document will respond to it positively and thereby help us devise the best solution for the 21st century.



The Rt Hon The Baroness Scotland QC

¹ HC 306.

OVERVIEW

The Attorney General currently 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. This consultation document sets out a number of options for changing the role and functions of the Attorney General. The test for any proposal for change should be whether it enhances the effective administration of justice, the maintenance of the rule of law and the protection of the public interest, and enhances public confidence in the office.

As the chief Law Officer of the Crown (in the wider sense, i.e. the Government and, on some issues, Parliament and the Queen), the Attorney General is currently the Crown's principal legal adviser; has ministerial responsibility for areas of criminal and civil justice, including superintendence of the main prosecuting authorities; and is responsible for exercising certain functions as guardian of the public interest (including functions in relation to individual criminal cases).

This set of responsibilities has evolved gradually over the centuries. The current arrangements have certain advantages. They provide for the Attorney General's direct accountability to Parliament. They ensure that the Government can be properly consulted on the public interest considerations (and in particular national security implications) of sensitive individual criminal cases.

For years, Attorneys General have faithfully been discharging their duties. They have acted independently in the public interest, protected the public through ensuring effective criminal prosecutions, and advised Government on the legal merits of its policies, legislation and actions. They have played a key role in protecting and upholding the rule of law and facilitating the governance of Britain.

But in recent years the complex and varied nature of those responsibilities has given rise to a debate about the Attorney General's role, which has focussed on two areas:

- tension between the various functions of the Attorney General - being a Minister and a member of the Government, and being an independent guardian of the public interest and performing superintendence functions (e.g. on decisions relating to sensitive prosecutions);
- tension between being a party politician and a member of the Government, and the giving of independent and impartial legal advice.

These tensions have led a number of commentators (including the Constitutional Affairs Select Committee) to call for changes to the office. In *The Governance of Britain*, the Prime Minister announced that the Government too, thinks the Attorney General's role must change along with the wider constitutional framework.

The Government is fully committed to enhancing public confidence and trust in the office of Attorney General. The options outlined in this paper are directed to that end.

The Government recognises that some of the changes contemplated in this document could have significant constitutional implications, and should therefore be implemented only after thorough consultation and careful consideration, and only if they will strengthen and enhance confidence in the administration of the justice system and the rule of law. The Government is therefore keen to encourage public debate on these issues and to hear the views of all those with an interest, including Parliamentarians, the

judiciary, the legal profession, other parts of the justice system and the public at large. The Government will consider carefully, in particular, the report of the Constitutional Affairs Select Committee on the Constitutional Role of the Attorney General, and will decide on its response to that report in the light of this consultation.

Pending the outcome of the consultation, the Attorney General has indicated that she will not make key prosecution decisions in individual criminal cases except where the law or national security requires it, for example where her consent to the prosecution of a particular offence is required by statute. She will continue to be briefed by the prosecuting authorities about important and sensitive cases, and will remain accountable to Parliament for decisions of the authorities which she superintends.

1. HISTORY AND ROLE OF THE LAW OFFICERS

History

1.1 The origins of the office of Attorney General, as the person responsible for pleading the sovereign's interests before the royal courts, can be traced back to the thirteenth century, although the modern title of "Attorney General" is thought to have first been used in 1461². Court records of that time also begin to acknowledge the post of King's Solicitor, and this became the office of the Solicitor-General for England in 1515³.

1.2 In the 1890s the right of the Attorney General to undertake private practice was restricted and in 1893 the Law Officers' Department was created in London. By the early 1900s the energies of the Attorney General were focused exclusively on Government business in the courts and Parliament.

1.3 The Attorney General's original place in Parliament was in the House of Lords where he was expected to officiate as adviser and attendant when called upon but without enjoying any responsibility in the Upper House's determinations⁴. By the beginning of the sixteenth century, the Attorney General was generally consulted by the Government regarding points of law and had the conduct of important State trials⁵. As the House of Commons assumed greater importance, it became desirable for the Attorney General to be available to explain to the House of Commons the legal implications of Government measures and the Attorney General was given a seat in the House of Commons.

1.4 There is no legal requirement for the Attorney General to be a member of Parliament but this has continued to be the norm. No Attorney General since 1928 has been a member of the Cabinet, but to a greater or lesser extent Attorneys have been invited to attend its meetings, and have been a member of certain Cabinet committees, including Domestic Affairs Committee and the Legislative Programme Committee.

1.5 Any function of the Attorney General may be exercised by the Solicitor General, and anything done by or in relation to the Solicitor General in the exercise of those functions is treated as if it were done by the Attorney General⁶. References in this consultation paper to the Attorney General should therefore be treated as including the Solicitor General. This situation could, of course, change as part of a package of reform.

1.6 Over the years the role of the Attorney General has therefore developed from being the legal representative of the sovereign to being an important figure in Government and finally a salaried Minister of the Crown.

Role of the Advocate General for Scotland and the Attorney General for Northern Ireland

1.7 As part of the devolution settlement, a new Law Officer, the Advocate General for Scotland, was created. The Advocate General is the UK Government's principal legal adviser on Scots law and, in conjunction with the Attorney General, provides legal advice to Government departments on a wide range of legal issues including human rights, European and constitutional law. The Attorney General, the Solicitor General and the Advocate General are collectively known as the United Kingdom Law Officers.

² Edwards "The Law Officers of the Crown" (London, Sweet & Maxwell, 1964) p.27.

³ Edwards p.1-11.

⁴ Edwards p.32.

⁵ Holdsworth, William, Sir, A History of English Law Vol VI (London : Sweet and Maxwell, 1937) p. 462.

⁶ Law Officers Act 1997 s1(1), (2).

1.8 This consultation paper does not deal with the role of the Advocate General. If changes are made to the role of the Attorney General, consideration will have to be given in due course to what, if any, alterations need to be made to the functions of the Advocate General.

1.9 Until the devolution of criminal justice functions in Northern Ireland, the Attorney General is, by virtue of that office, Attorney General for Northern Ireland. Any change in the current role of the Attorney General in England and Wales might have consequential implications for Northern Ireland. However, post devolution, the functions of the Attorney General for Northern Ireland will be governed by the Justice (Northern Ireland) Act 2002 and will differ to the functions of the Attorney General for England and Wales.

Current role of the Attorney General

1.10 The Attorney General's role spans a number of areas which are of crucial importance to the administration of justice and the rule of law. They include functions which the courts, successive Governments and Parliament have, over the centuries and right up to the present day, thought fit to confer upon the Attorney General precisely because the office sits within Government and Parliament but also includes an independent, public interest dimension. Understanding the nature of these various functions is therefore central to any consideration of how the office of Attorney General should be reformed. It will be important to ensure that any reform of the position pays proper regard to the reasons why the functions have been conferred on the Attorney General in the first place, and the benefits which the current arrangements provide.

1.11 The three key roles of the Attorney General are:

- (i) Legal adviser to the Crown (in the wider sense i.e. to the Government and, on some issues, Parliament and the Queen) and the Crown's representative in the Courts⁷. The Attorney General also oversees the Government's in-house legal advisers and is the Minister responsible for the Treasury Solicitor's Department.
- (ii) Minister of the Crown with responsibility for superintending the Crown Prosecution Service, Serious Fraud Office, Revenue and Customs Prosecutions Office, the Army, Royal Navy and Royal Air Force prosecuting authorities, HM CPS Inspectorate and (with the Home Secretary and Secretary of State for Justice) the Office of Criminal Justice Reform. The Attorney General is also, with the Home Secretary and Secretary of State for Justice, responsible for criminal justice policy.
- (iii) Guardian of the public interest, in particular in certain kinds of legal proceedings – such as decisions on the bringing or termination of criminal prosecutions, charity matters, and the appointment of “advocates to the court” to act as neutral advisers to the court in litigation and “special advocates” to represent the interests of parties in certain national security cases. The Attorney General's independent public interest role includes consultation by the prosecuting authorities on individual criminal cases as part of the superintendence role.

1.12 Each of these roles is dealt with in more detail below.

⁷ The Attorney General exercises this function in conjunction with the Advocate General for Scotland in certain circumstances.

Role as legal adviser

1.13 The Ministerial Code sets out circumstances in which the Attorney General, as the chief legal adviser to the Crown, is to be consulted.

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

Ministerial Code, July 2007

1.14 In particular, the Attorney General is generally consulted on decisions which may have important repercussions and the legal position is not clear-cut. The Attorney General may also be consulted where two or more Departments disagree on a point of law.

1.15 The advice that the Attorney General gives to Government is (like all legal advice) legally privileged and confidential. In addition it is subject to a long-standing rule, set out in the Ministerial Code⁸, that neither the fact that the Law Officers have (or have not) advised, nor the content of their advice, may be disclosed outside Government without their consent.

1.16 The Attorney General also has an important role in the process of preparing legislation. For example, the Attorney General considers the human rights analysis supporting ministerial statements to be made under section 19 of the Human Rights Act 1998 as to the compatibility of Government Bills with the Convention rights. The role also includes advising generally on the constitutional propriety of proposed legislation. Parliamentary Counsel have direct access to the Attorney General where they have concerns over proposed legislation.

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

Role as Minister with responsibility for superintending prosecuting authorities

1.18 The Attorney General has Ministerial responsibility for the prosecuting authorities. Under the Prosecution of Offences Act 1985, the head of the CPS, the Director of Public Prosecutions (“DPP”), exercises his functions “under the superintendence of the Attorney General.” The Director of the Serious Fraud Office⁹ and the Director of Revenue and Customs Prosecutions¹⁰ are subject to similar provisions.

1.19 The concept of superintendence was considered in the context of a review of the Crown Prosecution Service carried out by Sir Iain Glidewell in 1998¹¹. The Glidewell report referred to different formulations of the role used by successive Attorneys General.

⁸ See paragraph 2.13 of the Ministerial Code (July 2007).

⁹ See section 1 of the Criminal Justice Act 1987.

¹⁰ See section 36 of the Commissioners of Revenue and Customs Act 2005.

¹¹ Command 3960.

1.20 For example in 1979, the then Attorney General, Sir Michael Havers, said in a Commons answer:

“My responsibility for superintendence of the duties of the Director does not require me to exercise day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but, nevertheless, I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship with him is such that I require to be told in advance of the major, difficult and, from the public interest point of view, the more important matters so that, should the need arise, I am in the position to exercise my power of direction.”

1.21 In 1998 the then Attorney General, John Morris, stated:

“My primary responsibility, therefore, is to oversee the effective and efficient administration of the prosecution authorities that I superintend ... I cannot and do not hold myself out as responsible for the day-to-day conduct of each and every prosecution ... I would not expect to answer to the House for the nitty-gritty of each and every one of the 1.3 million cases conducted annually by the prosecuting authorities that I superintend.”

1.22 It could thus be said that that the concept of superintendence encompasses, broadly: answering for the prosecuting authorities in Parliament; responsibility for the overall policies of those authorities, including prosecution policy in general; responsibility for the overall “effective and efficient administration” of those authorities, including matters of resources; a right for the Attorney General to be consulted and informed about difficult, sensitive and high-profile cases; but not responsibility for every individual prosecution decision, or for the day-to-day running of the organisation.

1.23 The legislation does not expressly provide for the Attorney General’s power of superintendence to include a power to direct the prosecuting authorities to prosecute (or not to prosecute) a particular case, or to take (or not to take) any other form of action. On this, the Glidewell report commented as follows:

“The effect of the Attorney General’s power of superintendence of the DPP, established by the practice which has been followed both before and after 1985, appears to us to be as follows:

- i) In relation to the overall conduct of the Crown Prosecution Service and to the overall prosecution policy which the Service should pursue, the Attorney General does, in the last resort, have the power to give directions to the DPP. The decisions made by the Attorney General in the present Government to reconstitute the CPS into 42 Areas, each with a CCP, must, it seems to us, have been made in the knowledge that if the DPP had been unwilling to accept the decision, the Attorney General had the power to direct her to do so. Of course, the situation did not arise. Similarly if, as would be inconceivable, the DPP wished to adopt a general policy that all alleged street robberies should only be prosecuted as theft, the Attorney General would have the power to direct her not to adopt that policy.*
- ii) Although there may be some doubt whether in theory the Attorney General does have the ultimate power to direct the DPP to prosecute or not to prosecute in a particular case, it seems that in practice all holders of both offices have accepted*

that the Attorney General's power of superintendence of the DPP is such that, in the event of a stark disagreement, the Attorney General's view would prevail. However, we find it difficult to believe that, in such a situation, an accommodation between the differing views would not be reached without a formal direction."

1.24 In practice the point has never been settled definitively and successive Attorneys General have not sought to give formal directions to the prosecuting authorities.

1.25 The Attorney General also exercises non-statutory superintendence over the armed service prosecuting authorities. Importantly, those authorities are operationally independent of the Ministry of Defence and the chain of command, and hence it is to the Attorney General that they look for Ministerial and professional oversight and guidance. In that capacity the Attorney is consulted about important cases and answers for decisions of the prosecutors in Parliament.

1.26 It was considerations of this sort which led to the establishment by statute of a separate Revenue and Customs Prosecutions Office, independent of Her Majesty's Revenue and Customs and answerable to the Attorney General, rather than to the Commissioners of Revenue and Customs or Treasury Ministers.

1.27 In a similar way, the Attorney General has general oversight of the Government prosecutors (e.g. in the Department for Business, Enterprise and Regulatory Reform, the Health and Safety Executive and the Department for Work and Pensions) which the Attorney does not formally superintend under statute. Again this involves the Attorney providing professional support and guidance which is independent of the departmental Minister, including consultation on important cases.

1.28 Thus the Attorney General has wide responsibilities for the prosecution system as a whole. This enables the Attorney to provide leadership for the system as a whole, take the widest view of prosecution policy and help ensure co-ordination and consistency of approach as between the different prosecuting authorities. This is relevant to the Attorney General's wider criminal justice policy role, discussed in the next section.

Criminal justice policy Minister

1.29 The Attorney General has, with the Home Secretary and the Secretary of State for Justice, tripartite responsibility for criminal justice policy. The three Ministers are jointly responsible for the Office of Criminal Justice Reform. The Attorney General is also a member of Cabinet Committees which consider criminal justice policy. The Attorney's role in particular reflects the office's responsibility for the prosecuting authorities and their key place in the criminal justice system. The prosecutors sit at the heart of the criminal justice system and work closely with the police and other investigators, the courts, defence lawyers, and victims and witnesses on a daily basis. The prosecutors have played an integral part in the criminal justice system reform programme driven forward since 1997. Examples include enhanced services to victims and witnesses through the "No Witness, No Justice" programme; the CPS assuming responsibility from the police for charging all but the most minor offences; and prosecutorial involvement in the roll-out of "Criminal Justice – Speedy, Simple, Summary". In all these ways, operational policy development and front-line experience have improved the delivery of services to the public.

Guardian of the public interest

1.30 The third, public interest, role is undertaken by the Attorney General as an independent officer of the Crown. In exercising these public interest functions, the Attorney General acts independently of Government, and may consult Ministerial colleagues but does not act at their direction¹². The public interest functions include:

- Power to bring proceedings for contempt of court.
- Power to bring proceedings to restrain vexatious litigants.
- Power to bring or intervene in certain family law and charity proceedings, and in other legal proceedings in the public interest.
- Requirement for the Attorney General's consent to prosecute certain categories of criminal offences.
- The power to refer unduly lenient sentences or points of law in criminal cases to the Court of Appeal.
- The power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
- Appointment of advocates to the court and special advocates.
- Consultation on individual criminal cases, as part of the function of superintending the main prosecuting authorities.

1.31 A fuller list of the Attorney General's functions can be found at Annex A. It will be seen that they are a mixture of statutory and common law functions.

1.32 By way of comparison, Annex B sets out a summary of the key functions and roles of Attorneys General in other jurisdictions.

1.33 Annex C gives further details of the departments for which the Attorney General is responsible.

Attorney General's status as a Minister of the Crown

1.34 The Attorney General is a Minister of the Crown. The implications of this are that the holder of the office:

- is a member of the Government;
- is appointed by the Prime Minister and holds office while he or she retains his confidence;
- is bound by collective responsibility;
- has in the past been a more or less established member of the party in Government;
- takes the party Whip in Parliament;
- participates in Cabinet and Cabinet committees.

¹² For example, the "Shawcross" convention to the effect that, in prosecution decisions it is open to the Attorney General to consult ministerial colleagues on where the public interest lies, following which the Attorney General will then take his or her own independent decision.

1.35 Thus it can be said that the Attorney General has a political role.

1.36 Like other Ministers, the Attorney General is accountable to Parliament for the exercise of his or her functions and those of the Law Officers' departments. This includes answering oral and written Parliamentary questions. For example the Attorney General is occasionally called upon to explain decisions of the prosecuting authorities, as well as wider questions of prosecution policy. Although no Select Committee is currently dedicated specifically to scrutinising the work of the Attorney General's Office, Attorneys General have regularly appeared before Committees of both Houses. In the case of a particular prosecution decision involving sensitive questions of intelligence and national security, the former Attorney General, Lord Goldsmith, appeared before the Intelligence and Security Committee to explain the context of the decision and the national security issues. The current Solicitor General has raised the possibility that such a mechanism could be used in future in such sensitive cases¹³.

1.37 On questions relating to the legal advice the Attorney General has given to Government, accountability is subject to considerations of confidentiality and legal professional privilege. However, the Attorney General is sometimes called upon to advise Parliament itself, particularly on questions of Parliamentary privilege, the conduct and discipline of Members, and the meaning and effect of proposed legislation.

¹³ Hansard, 16 July 2007, column 53.

2. THE CURRENT ROLE OF THE ATTORNEY GENERAL – FIT FOR THE 21st CENTURY?

2.1 The Attorney General's role comprises a complex mixture of common law and statutory functions acquired over the centuries, some of which are exercised in a Governmental capacity and some in an independent public interest capacity.

2.2 Successive holders of the office have made a major contribution to upholding the rule of law and the administration of justice, helping to ensure that the Government acts in accordance with the law and with the highest standards of legal propriety, and enhancing the role of the prosecuting authorities at the heart of the criminal justice system. However it is right now to consider, as part of the programme of constitutional reform set out in *The Governance of Britain*, how best the role of Attorney General should be configured to meet Britain's needs in the 21st century.

2.3 Reform of the Attorney General's role is proposed in the Government's paper on *The Governance of Britain*¹⁴. That consultation paper specifically includes a proposal to seek to surrender or limit the powers to direct prosecutors in individual criminal cases, "which [the Government] considers, should not, in a modern democracy, be exercised exclusively by the executive". This is discussed further below. But the wider implications of proposals in this Green Paper for the Attorney General's role should also be considered. For example:

- Does the proposal to put prerogative executive powers on a statutory basis, subject to Parliamentary scrutiny and control, mean that Parliament should have access to the Attorney General's advice on these issues, or to some other source of legal advice?
- Do new ways need to be found of ensuring that, when Parliament exercises such powers, it does so in accordance with the rule of law?

2.4 In addition, one of the themes of *The Governance of Britain* is greater involvement of Parliament, and there may be implications for the way in which the Attorney General is accountable to Parliament – for example the use of new mechanisms to provide greater accountability for cases involving sensitive intelligence and security issues (see paragraph 1.36 above).

2.5 The current multi-faceted nature of the Attorney's role has given rise to a debate which has focussed mainly on the tension between the Attorney's political status as a Government Minister and the functions as:

- The Government's chief legal adviser. The question arises how the Attorney General can give independent legal advice to Government when he or she is part of Government. The Attorney would fall with the Government and can be dismissed by the Prime Minister like any other minister. This question was raised particularly in relation to the advice on the legality of military action against Iraq in 2003.
- The independent guardian of the public interest. For example, in the *Gouriet* case the then Attorney General refused consent to the bringing of proceedings to enforce the law against the Union of Post Office Workers, whose members had refused to handle mail between England & Wales and South Africa, in a protest

¹⁴ Cm 7170.

against apartheid. That decision was taken in the Attorney General's independent public interest capacity, though the Government of the day also clearly had a legitimate policy against apartheid. In the area of sensitive prosecutions, the Al-Yamamah arms contract with Saudi Arabia is the most recent example. Some have questioned how the Attorney General can be seen to be impartial in weighing up or advising on the public interest on matters in which the Government may itself have a strong policy interest (for example in the protection of jobs).

Attorney General as Government Minister and legal adviser

2.6 The first area of tension arises between the Attorney General's position as a Government Minister, and the role as the provider of independent and impartial legal advice to Government. Attorneys General have worked on the clear basis that their duty is to give wholly independent and impartial legal advice, and they are bound by professional codes of conduct to that effect.

2.7 However, some believe that the Attorney General cannot truly be (or be seen to be) independent from the Government (or party), with the result that the Attorney General's advice lacks at least the appearance of complete impartiality, or even that the Attorney may come under pressure to slant the advice in a particular way to support the Government or political party in Government.

2.8 On the other hand it has been argued that the advice of the Attorney General is more likely to be accepted by Ministers because it comes from one of their number, who understands the wider political and policy context, rather than being provided externally. Thus it is the Attorney General's membership of the Government that gives the advice to Ministerial colleagues its credibility and authority with them.

2.9 Furthermore, it is argued, the Attorney General's advice, as well as needing of course to be honest and authoritative, is advice to a particular client (the Government) on how its policies may lawfully be achieved, including advice on the legal risks attached, the prospects of successful challenge and so on. It is, like other legal advice, subject to legal professional privilege and is not generally published. In this way, the Attorney General operates like an in-house lawyer. It is generally accepted that in-house lawyers (including those in business or the Government Legal Service) are entirely capable of providing independent legal advice to the highest professional standards.

2.10 However, some commentators have suggested that the Attorney General's advice to Government should not (or not always) be treated in the same way as legal advice given to a private organisation. The Government is not a business and the relationship of the Attorney General to the Government is arguably of a different order to that of other in-house lawyers. This raises the question of whether, at least for some purposes, "the public" (or Parliament), rather than the Government, should be treated as the Attorney General's client. Lord Bingham has said:

"There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war; it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client."

2.11 Concern has similarly been expressed that the legal advice which the Government receives from the Attorney General is not generally disclosed to Parliament or to the public, even where the advice relates to very significant decisions, for example the decision to take military action against Iraq in 2003¹⁵.

Exercise of public interest functions

2.12 The second area of perceived tension arises between the Attorney General's position as a Government Minister and politician and the post's public interest functions. This has given rise to the suggestion or perception that the Attorney General might come under pressure to exercise those public interest functions in a way which reflects the political or policy interests of the Government or party to which he or she belongs, rather than wholly independently and in the public interest.

(i) Functions in relation to individual prosecutions

2.13 Particular concerns have been expressed about the Attorney General's role in relation to decisions about individual criminal cases, including the granting or withholding of consents to prosecute and in relation to those cases where the Attorney General is consulted by the prosecuting authorities as part of the superintendence role, and where there is perceived to be a risk of conflict of interest. In its recent report the Constitutional Affairs Select Committee commented: "The Attorney General's responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role."¹⁶ To address such concerns, other common law jurisdictions have moved to separate the ministerial role from individual prosecution decisions (Annex B sets out some examples).

2.14 The Attorney General's role in relation to consents to prosecution has been considered by the Law Commission. The Law Commission concluded that the existing functions of the Attorney General to give consent to prosecutions should (if not abolished altogether) be transferred to the DPP except where the offence involved national security or had some international element¹⁷.

2.15 However, some commentators, including some who gave evidence to the Constitutional Affairs Select Committee, have taken the view that, for all its tensions, the advantages of the current system outweigh the disadvantages.

¹⁵ The Attorney General disclosed the basis of his legal advice in a written answer to a Parliamentary question on 17 March 2003, and on the same day the Foreign Secretary expanded on that answer in a letter to the Foreign Affairs Select Committee.

¹⁶ Constitutional Role of the Attorney General, HC 306, paragraph 56.

¹⁷ See Consents to Prosecution LC255.

(ii) Other public interest functions

Much of the comment about potential conflict between the Attorney General's Governmental and public interest functions, as discussed above, relates to the role in relation to individual criminal prosecutions. However the Attorney General has a range of other public interest functions which, similarly, have to be exercised independently of Government. These include:

- The bringing of proceedings for contempt of court
- Intervening in certain family and charity cases to protect the public interest
- Bringing proceedings to restrain vexatious litigants
- Appointment of advocates to the court (neutral advisers to the court) and special advocates (to represent the interests of parties in cases involving sensitive national security issues).

2.17 On occasion, the contempt role can be controversial and (as in relation to prosecutions) give rise to accusations that the Attorney General has (for example) acted to restrain a publication for political motives. Any alternative model for exercising this role would still involve striking a balance between the interests of justice and the freedom of the press, often in the most sensitive of cases, and could therefore sometimes be controversial.

2.18 For the most part the Attorney General's other public interest functions have not attracted controversy or criticism and there is seldom any suggestion that they have been exercised for any political or other improper motive.

3. THE OFFICE OF THE ATTORNEY GENERAL: OPTIONS FOR CHANGE

3.1 This Chapter outlines options for changing the role of the Attorney General. The options focus in particular on the tensions between the Attorney General's various roles.

3.2 The Government wishes to hear all views on this issue and those consultees who consider that other changes, not outlined in this paper, should be considered are invited to raise alternatives.

Role as legal adviser

3.3 The pros and cons of the current arrangement are set out above. Clearly any Government will continue to need access to legal advice of the highest calibre on which it can rely in taking decisions of great sensitivity, often involving issues with major political, financial or international, national security or military implications.

3.4 If the role of chief legal adviser were to be separated from the role of Minister, who would exercise it? Options which have been suggested include:

- The Treasury Solicitor or other appointed (non-political) official
- Independent counsel, either on a retained basis (like First Treasury Counsel at present) or on an ad hoc basis.

3.5 Whatever model were adopted, it would be important to ensure that the advice came from a source with whom Ministers and departments can be totally frank and in whom they have complete confidence. Any such advice would need to reflect a proper understanding of the wider political and policy context and the realities of Government, whilst of course being wholly professional, independent and impartial advice. The role would need to be performed by someone capable of taking an overview of Government legal issues and litigation in order to ensure a consistency and coherence of approach.

Q1 Do consultees consider that the role of chief legal adviser to the Government should be separated from that of a political Government Minister? If so, who should exercise the role?

3.6 If on the other hand the Attorney General is to remain the Government's chief legal adviser, there are nonetheless possibilities for reform. Options might include the following –

- The current practice whereby the Attorney General attends meetings of Cabinet could be modified. If there were changes to this practice, provision would need to be made to ensure the Attorney General attended Cabinet where necessary in the capacity of chief legal adviser to the Government e.g. when legal matters were being discussed or legal input was necessary (though it will not necessarily always be easy to identify in advance when such issues will arise).
- The involvement of the Attorney General in Cabinet Committees could be reviewed. That involvement could be limited to matters raising legal issues or relating to the preparation of legislation¹⁸. (Membership of Committees in the capacity of Minister with responsibility for the prosecuting authorities and in relation to criminal justice policy is dealt with below.)

3.7 Changes need to be made to the Attorney General's archaic oath of office¹⁹, which could be modified to make it clear that, when exercising public interest functions, the Attorney's duty is to uphold the rule of law and the public interest, rather than the interests of the Government of the day or the party in power²⁰.

3.8 The above changes could be made without legislation. However it is possible that some proposals could if necessary be underlined and enshrined in legislation. For example, the Attorney General could be made subject to an express statutory duty to uphold the rule of law along the lines suggested above.

3.9 We could also look at ways of providing greater transparency in the exercise of the Attorney General's functions, and ensure greater confidence that they are being exercised objectively and independently of improper influence.

- A clear commitment could be given that a full explanation of the legal basis for any decision to use armed military force would be given to Parliament.
- Accountability to Parliament could be enhanced by the creation of a select committee specifically to scrutinise the exercise of the Attorney General's functions.
- The Attorney General could give a commitment (if a member of the House of Lords) always to accede to requests to appear before any Commons Committee (or vice versa), although formally he or she could not be required to do so.
- A commitment could be given that the Attorney General will exercise his or her public interest functions in a way which is clearly institutionally separate from Government – i.e. that there will be no involvement by the Government in the taking of any public interest decision, including any decision on a criminal case. Provision might be made for those exceptional cases where there needs to be consultation with Government, for example over the national security or other wider public interest implications of a decision; in that case, a commitment could be given that the Attorney General would, in appropriate cases, explain to Parliament that such consultation had taken place, and on what basis.

3.10 Again the above measures could be implemented without legislation, though if thought appropriate they could be given legislative force.

¹⁸ The Attorney General's current role in relation to legislation is outlined at paragraph 1.16 above.

¹⁹ Under the current oath the Attorney General swears to "duly and truly minister The Queen's matters and sue The Queen's process after the course of the Law, and after my cunning ... I will duly in convenient time speed such matters as any person shall have to do in the Law against The Queen as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth. And I will be attendant to The Queen's matters when I shall be called thereto".

²⁰ See for example section 6A of the Promissory Oaths Act 1868 which requires the Lord Chancellor to swear to "respect the rule of law".

Q2 What are consultees' views on the options for change in paragraphs 3.6 to 3.10?

Disclosure of legal advice

3.11 As noted above²¹, the legal advice given by the Attorney General is, like other legal advice, privileged and is not generally disclosed. Legal professional privilege reflects the importance of ensuring that lawyers and clients can be completely open with one another. Hence the Attorney General's advice (again like other legal advice) will typically contain a frank and confidential assessment of the strengths and weaknesses of the Government's case; the likely grounds for any challenge; the risks of success of such a challenge; and the possible ways of reducing that risk.

3.12 Some people believe that the Attorney General's advice goes to the heart of the legality of Government action and should therefore be publicly disclosed (at least in the case of key Government decisions such as the use of armed military force). To meet that concern, one possible step would be to provide for Parliament to be given a full explanation of the legal basis for such key decisions.

3.13 Alternatively provision could be made for Parliament to have its own separate source of legal advice when it is being asked to take key decisions so it can better scrutinise the basis for the Government's decision.

3.14 It has also been suggested that there is a case for more routine publication of the Attorney General's advice on the grounds that Parliament and the people should be informed of the legal basis on which Government is acting. However, any provision for general disclosure of the advice would need to address the following issues, amongst others:

- the need to avoid disclosing information where necessary to protect national security, individual privacy, commercial confidentiality or other key interests;
- the need to ensure that Ministers and departments are not inhibited from seeking the advice of the Attorney General where appropriate.

Q3 Do consultees consider that legal advice to the Government should be published (and if so in what circumstances), or that the legal basis for key Government decisions should be made publicly available?

The Attorney General's role as superintending Minister for prosecuting authorities and Minister with responsibility for criminal justice policy

3.15 The Attorney General has these functions because it was thought appropriate for them to be exercised by a Minister of the Crown who is accountable to Parliament and who acts in the public interest. The Attorney General has been considered an appropriate recipient of these functions given the legal expertise of the holder of that office, and the fact that the office stands at the heart of Government whilst yet being capable of acting independently of it. This approach has the following benefits:

- It ensures that the Government can be properly consulted, through the Attorney General, on the public interest considerations (in particular national security implications) of very sensitive cases.

²¹ Paragraph 1.15.

- The Attorney General is directly accountable to Parliament for the exercise of these functions.
- There is a dedicated senior Minister with specific responsibility for prosecutorial policy and for championing the interests and role of prosecutors. This has helped secure significant improvement and modernisation of the Crown Prosecution Service and ensure that the prosecuting authorities are properly funded for their work.

Legitimate role of Government in relation to criminal prosecutions

3.16 It is important to recognise that “the public interest” is not just a legal concept, completely detached from wider policy considerations. On highly sensitive cases, for example those involving national security, the Government has an obligation to decide where the public interest lies. Completely removing any relationship between the Government and the prosecutors on individual prosecution decisions would prevent the Government from providing any input on national security issues (or any other public interest issues), by that direct route.

3.17 Currently prosecutions are conducted under the superintendence of an Attorney General who is a member of the Government and can be expected to be sensitive to the wider public interest considerations, and is in a position to consult Ministerial colleagues about them (through the well-established mechanism of a “Shawcross” exercise²²) and then to be held accountable by Parliament.

3.18 The legitimacy of the involvement of a Minister of the Crown in decisions where national security or an international element is at issue was recognised by the Law Commission as part of its Report on Consents to Prosecution²³.

3.19 The Government also has a legitimate interest in overall prosecution policy. For example, in recent times the Attorney General has ensured that prosecutors give greater priority to certain categories of case, such as street crime, rape, counter-terrorism, animal rights extremism and tackling radicalisation. Under the current arrangements the Attorney General, as a Government Minister responsible for the prosecuting authorities, is able to participate in discussions of policy in this area and to take account of wider Government priorities. The arrangements enable the Attorney General to make a direct contribution to the development of criminal justice policy informed by the practical front-line experience of prosecutors. If the Attorney General did not undertake this role, it would need to be taken on by another Minister.

Parliamentary accountability

3.20 An important feature of the current system is that the Attorney General is directly accountable to Parliament on the floor of the House, as is her deputy, the Solicitor General. Indeed, the House has exercised its ability to question the Attorney General and the Solicitor General on many occasions on matters of great public interest, or matters relating to the implications of individual criminal cases. Paragraph 1.36 above deals with this in more detail.

²² See footnote 12 above.

²³ The Law Commission recommended that the function of consenting to a prosecution in relation to an offence which involved national security or has some international element should continue to be exercised by the Law Officers – see paragraph 1.25 of Consents to Prosecution.

Champion within Government for the prosecuting authorities

3.21 These arrangements also provide for the prosecuting authorities to have a dedicated Ministerial voice within Government, to act as their champion when, for example, bidding for resources, whilst respecting their independence in the taking of individual prosecution decisions.

3.22 It is also important to recognise that very little of the work that the Attorney General does in the public interest in relation to criminal matters attracts any public comment or criticism at all. Week by week, the Attorney General and Solicitor General exercise their functions in relation to criminal matters with no suggestion of any political or other improper motive.

3.23 This is illustrated by their role of referring unduly lenient sentences to the Court of Appeal. In 2006, the Attorney General and Solicitor General considered 359 potential cases (on average about one a day). Of these, 143 cases were referred to the Court of Appeal. In 79% of those cases the Court agreed that the sentence passed was unduly lenient (and in 75% increased the sentence). This is an important jurisdiction. Many of the cases the Attorney General considers attract much public and media comment – including sometimes concerted campaigns calling for a sentence to be referred. Some cases are controversial and there may be bitter disappointment when the Attorney General decides not to refer a sentence. But there is no doubt that decisions in such cases are taken purely on the basis of an objective assessment of the law, the evidence and the public interest.

3.24 It is unlikely that controversy could be completely avoided whatever model were adopted for taking such decisions, given the nature of the issues.

3.25 There is a broad range of options for change in this area. Five particular options are outlined below. They seek to focus on the areas where particular concerns have arisen whilst, so far as possible, retaining the advantages of the current system as outlined above. However, consultees are also invited to put forward other options.

(i) Clarify the ambit of the Attorney General's role as superintending Minister for prosecuting authorities

3.26 A clearer delineation of the respective functions of the Attorney General and the prosecuting authorities could increase transparency, remove any perception of political interference in prosecutorial decisions and improve accountability and public confidence.

3.27 This option would involve making a clear separation between the Attorney General's ministerial responsibility for the operational delivery of prosecutions from the right to make decisions in individual prosecutions. This could mean –

- Clarifying the role of the Attorney General in relation to individual prosecutions. This could involve making it clear that the Attorney General cannot give a direction as to whether a particular prosecution should or should not be brought. The circumstances in which the Attorney General should be informed or consulted about a prosecution could also be clarified.
- Conferring specific and limited powers on the Attorney General to set high level policy (including prosecution policy) for the prosecuting authorities.

3.28 This option would retain the key aspects of the current system as set out at paragraph 3.15. It would ensure that Government can be properly consulted on the public interest considerations of sensitive cases; the Attorney General would continue to be directly accountable to Parliament in relation to the actions of the prosecuting authorities; and the prosecuting authorities would retain a dedicated senior Minister with specific responsibility for prosecutorial policy and for championing the role of prosecutors.

3.29 Legislation would be needed to achieve this.

3.30 Consideration would need to be given to whether it was appropriate for the Attorney General to retain certain functions (possibly including a power to give directions) in relation to cases which gave rise to implications for national security (or possibly the wider public interest).

(ii) Remove/limit public interest functions in relation to criminal prosecutions

3.31 The Attorney General has a range of responsibilities relating to representing the public interest in criminal proceedings, which it may be appropriate to reassess. For example, the Attorney General is required by statute to consent to certain prosecutions²⁴. An alternative option would be to remove from the Attorney General some or all of the existing public interest functions which relate to criminal prosecutions. For example:

- The requirement for the Attorney General's consent to the bringing of certain criminal prosecutions could be removed entirely, or transferred to the Director of Public Prosecutions. This would involve revisiting the Law Commission's report on this topic in 1998, which has never been implemented (see paragraph 2.14 above).
- The power to enter a *nolle prosequi* (to halt trials on indictment) could be abolished.

3.32 These changes would require legislation and would change the role of the Director of Public Prosecutions. Views are invited on whether these changes would increase or decrease the risk of controversy and conflict over decisions to prosecute.

3.33 Again, consideration would need to be given to whether it was appropriate for the Attorney General to retain certain functions in relation to cases which gave rise to implications for national security (or possibly the wider public interest).

3.34 If the Attorney General were to cease to be able to make decisions about individual prosecutions, consideration would need to be given to whether some other figure should be able to exercise the function of taking final decisions on the public interest – for example the DPP, or a non-political Solicitor General.

(iii) Remove criminal justice policy function

3.35 A further option would be for the Attorney General to give up functions relating to criminal justice policy, while continuing to be the superintending Minister for the prosecuting authorities. At present the Attorney General is able to contribute to policy development particularly through providing specialist and operational policy expertise which focuses on practical delivery. This option would involve ending the Attorney's

²⁴ This applies as much to old legislation (for example, the Explosive Substances Act 1883) as it does to new (for example, the Terrorism Act 2003).

shared responsibility for the Office of Criminal Justice Reform (as part of the trilateral arrangements with the Home Office and the Ministry of Justice), and ending or restricting the Attorney's participation in Cabinet and Cabinet Committee deliberations on policy issues which relate to criminal justice. The political nature of the role which is associated with policy-making would therefore be somewhat diminished.

3.36 However, unless alternative mechanisms were put in place, this would reduce the extent to which the role and views of the prosecutors were taken into account in the development and implementation of criminal justice policy. Those consultees who consider that this option is the best way forward are invited to consider what alternative mechanisms should be put in place to ensure that the views of prosecutors are taken into account in the development of criminal justice policy.

(iv) Transfer of criminal justice policy functions and superintending functions to another Minister

3.37 Another option would be for the Attorney General's present responsibility for criminal justice policy, together with superintendence of the prosecuting authorities, to pass to another Government department.

3.38 However, this change could give rise to concerns about the risk of replacing existing conflicts of interest with new ones. The concerns which have been expressed about the role of the Attorney General in relation to prosecutions focus on the perceived potential for decisions to be inappropriately influenced by political motives. Similar concerns could arise if responsibility were passed to another Minister. Safeguards would therefore need to be put in place to ensure the independence of individual prosecution decisions.

3.39 One of the implications of moving criminal justice policy and superintending functions would therefore be that no Minister would be directly accountable to Parliament for individual prosecution decisions. A measure of accountability could be achieved instead by requiring the DPP and the heads of the other prosecuting authorities to answer to an appropriate select committee.

Q4 Do consultees consider that changes to the role of the Attorney General in relation to criminal proceedings (including the role as superintending Minister for the prosecuting authorities) are needed? What are their views on the options outlined at paragraphs 3.26 to 3.39? Should other options be considered?

Exercise of public interest functions other than those relating to individual prosecutions

3.40 The exercise of the Attorney General's public interest functions, other than those which relate to individual prosecutions, rarely gives rise to controversy, although there have been exceptions.

3.41 Options for changing the manner in which the Attorney General exercises his or her functions are outlined above at paragraphs 3.6 to 3.10. Implementation of any of these proposals would of course impact on these public interest functions.

Q5 What if any changes do consultees consider are necessary to the Attorney General's public interest functions (other than those functions which relate to individual criminal prosecutions)?

Implications for the Treasury Solicitor and the Government Legal Service

3.42 Under these options, no change appears to be needed in the role of the Treasury Solicitor and his Department (TSol). TSol is currently a non-Ministerial Government Department with executive agency status. The Attorney General answers for TSol in Parliament. On any of the suggested models, there would be a case for the Attorney General to remain the Minister accountable for TSol. The Attorney General would also retain Ministerial oversight of the Government Legal Service.

Q6 What if any other changes do consultees consider are needed to the role of the Attorney General?

4. LIST OF QUESTIONS FOR CONSULTATION

- Q1** *Do consultees consider that the role of chief legal adviser to the Government should be separated from that of a political Government Minister? If so, who should exercise the role?*
- Q2** *What are consultees' views on the proposals for change in paragraphs 3.6 to 3.10?*
- Q3** *Do consultees consider that legal advice to the Government should be published (and if so in what circumstances), or that the legal basis for key Government decisions should be made publicly available?*
- Q4** *Do consultees consider that changes to the role of the Attorney General in relation to criminal proceedings (including the role as superintending Minister for the prosecuting authorities) are needed? What are their views on the options outlined at paragraphs 3.26 to 3.39? Should other options be considered?*
- Q5** *What if any changes do consultees consider are necessary to the Attorney General's public interest functions (other than those functions which relate to individual criminal prosecutions)?*
- Q6** *What if any other changes do consultees consider are needed to the role of the Attorney General?*

How to respond

Please send your response by 30 November 2007 to:

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Attorney General's Office
20 Victoria Street
London SW1H 0NF

Fax: 020 7271 2433

Email: roleofattorneygeneralconsultation@attorneygeneral.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at: www.attorneygeneral.gov.uk.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

We will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

ANNEX A – Functions of the Attorney General

(* indicates functions which are wholly or partly statutory)

1. *Superintendence of and Parliamentary accountability for:
 - Crown Prosecution Service
 - Crown Prosecution Service Inspectorate
 - Serious Fraud Office
 - Revenue & Customs Prosecutions Office.
2. *Requirement for Attorney General's consent to certain prosecutions.
3. *Power to refer unduly lenient sentences to the Court of Appeal.
4. *Power to refer points of law in criminal cases to the Court of Appeal.
5. *Power to bring (or consent to) proceedings for contempt of court.
6. Power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
7. Superintendence of and Parliamentary accountability for the Army, Navy and Air Force Prosecuting Authorities.
8. General oversight of the other central prosecuting authorities (e.g. DBERR, HSE, DWP, DEFRA).
9. Criminal justice policy Minister (with Home Secretary and Secretary of State for Justice)
10. Legal adviser to the Sovereign (as Her Majesty's Attorney General).
11. Legal advice to the Crown on peerage cases.
12. Approval of Royal Charters.
13. Chief legal adviser to the Government.
14. Advice to Ministers involved in legal proceedings in their official capacity.
15. Consultation with Ministers in legal proceedings in their personal capacity (in circumstances defined in the Ministerial Code).
16. Advice to Parliament on certain issues, including the conduct and discipline of Members, matters of privilege and procedure, and the meaning and effect of proposed legislation.
17. Receipt of committee papers and advice to the Committee on Standards and Privileges (Solicitor General when Attorney General in Lords).
18. Intervention in legal proceedings to assert the rights of the Parliament.
19. Responsibility and Parliamentary accountability for the Attorney General's Office.
20. Responsibility and Parliamentary accountability for the Treasury Solicitor's Department.
21. Ministerial oversight of the Government Legal Service.
22. Leader of the Bar *ex officio*.
23. Advocate for the Crown in important court cases.

24. Appointment of counsel (including Treasury Counsel) to represent the Crown in criminal and civil proceedings.
25. Appointment of advocates to the court (independent counsel appointed to assist the court – formerly called “*amicus curiae*”).
26. *Appointment of special advocates (counsel appointed to represent the interests of individuals in certain cases, e.g. immigration appeals, involving sensitive material which cannot be disclosed in the ordinary way).
27. *Nominal claimant and defendant in civil litigation where there is no appropriate Government department (under Crown Proceedings Act 1947).
28. Government department (under Crown Proceedings Act 1947).
29. *Power to bring proceedings to restrain vexatious litigants.
30. *Power to represent the interests of charities in certain proceedings.
31. Power to give directions under the Royal Sign Manual for the disposal of charitable gifts under Wills.
32. *Power to take part in, or instruct the Queen’s Proctor to intervene in, certain family law proceedings relating to marriage.
33. *Power to make or consent to application for an order requiring a new inquest.
34. Power to bring or intervene in legal proceedings in the public interest (e.g. to seek injunctions restraining publication of sensitive material where this is contrary to the public interest).
35. Power to consent to relator actions (civil proceedings brought to enforce a public law right).
36. *Power to bring certain devolution proceedings under the Scotland Act and Government of Wales Act.
37. Taking decisions under the Freedom of Information Act in relation to papers of a previous administration.
38. *Attorney General for Northern Ireland.
39. *Appointment and superintendence of, and Parliamentary responsibility for, the DPP for Northern Ireland.
40. *Appointment of and Parliamentary accountability for the Crown Solicitor, Northern Ireland.
41. *Power to certify cases for trial by jury in Northern Ireland.
42. *Provision of guidance on human rights to criminal justice agencies in Northern Ireland.

ANNEX B

ROLE OF THE ATTORNEY GENERAL IN OTHER JURISDICTIONS

Australia

The Attorney General is a Minister and member of the Cabinet. He is appointed by the Governor General on the advice of the Prime Minister. In addition to his role as a Law Officer, in which capacity he is the principle legal adviser to the Cabinet, the Attorney is the minister responsible for legal affairs, public and national security.

The Attorney General authorises prosecutions for federal crimes and certain others where his consent is needed. Prosecutorial powers are exercised by the Director of Public Prosecutions, but the Attorney retains formal powers to commence or terminate public prosecutions. The Attorney also has additional policy responsibilities for human rights, emergency management, marriage and intellectual property.

Canada

The Minister of Justice, appointed by the Prime Minister, is, *ex officio*, Attorney General and occupies a Cabinet post. He was head of the Federal Prosecution Service, responsible for prosecutions of violations of federal law in all the provinces and for the prosecution of federal offences in the territories. However, with the implementation of the Federal Accountability Act in December 2006, Canada established a Director of Public Prosecutions with jurisdiction to conduct prosecutions for federal offences. The Director has the power to make binding and final decisions on whether to prosecute unless the Attorney General instructs him to do otherwise by means of a written public notice.

The Attorney General is also responsible for criminal justice policy and legal adviser to the Governor General. He provides legal advice to federal departments and agencies which act on behalf of the Crown. In exercising these functions, the Attorney is required to exclude any consideration based on partisan views and to exclude consideration of the political consequences for himself and Cabinet colleagues.

The Attorney General is responsible for all Crown litigation and litigation against government departments. He is also responsible for checking legislation for consistency with the Bill of Rights and Charter of Rights and Freedoms and has additional policy responsibility for human rights, family and youth law, administrative law, Aboriginal justice, general public law and private international law.

Hong Kong

The Attorney General was renamed Secretary for Justice from 1997, appointed by the Central People's Government in Beijing on the advice of the Chief Executive. The Secretary for Justice is an *ex officio* member of the Executive Council and has sole responsibility for decisions to prosecute. He operates independently in this role, free from political interference. The Secretary for Justice is the principal legal adviser to the Chief Executive, Government and individual government departments and agencies. The Secretary for Justice is the defendant in civil litigation brought against the Government. The Secretary for Justice may apply for judicial review and may intervene in any case involving a matter of great public interest.

India

The Attorney General is appointed by the President and, whilst not a political appointee, usually changes on a change of government. The Attorney exercises no executive authority. He is the Government's chief legal adviser, primary lawyer for litigation purposes and has the right to participate in Parliament, although with no voting rights.

Ireland

The Attorney General is appointed by the President on the nomination of the Taoiseach. Under the constitution he cannot be a member of the Government, although he attends cabinet meetings to advise on matters of law. Responsibility for prosecutions largely rests with DPP, although the Attorney retains some prosecutorial functions. The Attorney is representative of the public in all legal proceedings. He also has responsibility for legislation, since the Office of Parliamentary Counsel forms part of the Attorney's office.

Israel

The Attorney General (a civil servant) is appointed by the Government on the recommendation of the Minister for Justice and is the Government's chief legal adviser, in which capacity he is entitled to attend government meetings. The Attorney is authorised to decide whether prosecutions should be brought and represents the state in civil and criminal legal proceedings. He also advises the Ministry of Justice on legislation.

Malaysia

The Attorney General is appointed by the monarch on the advice of the Prime Minister and may be, but need not be, a member of the Cabinet. The Attorney has power to commence or discontinue prosecutions, other than for sharia and native court proceedings or courts martial. The Attorney is the legal adviser to the monarch, cabinet or any minister, responsible for drafting all federal legislation and responsible for the conduct of all civil litigation.

New Zealand

The Attorney General is appointed by the Governor General on the recommendation of the Prime Minister. The Attorney is a Minister of the Crown, usually occupying a cabinet post and is invariably held by a Member of Parliament, although not always by a lawyer. The Attorney is expected to fulfil his role without regard to political interest or partisan disadvantage to the Government.

The Attorney supervises criminal prosecutions, but successive Attorneys have preferred not to be involved in prosecutions, leaving these to the Solicitor General who is a civil servant, to avoid the appearance of political influence in criminal prosecution decisions. The Attorney is responsible for the conduct of all legal proceedings involving the Crown and may also instigate proceedings which affect the public interest. s

The Attorney has Ministerial responsibility for legislation and is responsible for the relationship between the executive and the judiciary.

Northern Ireland

When the relevant sections of the Justice (Northern Ireland) Act 2002 come into effect, an Attorney General for Northern Ireland will be appointed and that person will participate in the proceedings of the Assembly but not be able to vote. The Director of Public Prosecutions for Northern Ireland will exercise his functions independently of any other person and will become responsible for the majority of cases that currently require the Attorney General's consent for prosecution.

Scotland

The Crown is represented in Scotland by separate Law Officers under the titles of the Lord Advocate²⁵ (appointed by the Queen on recommendation of the First Minister, with the agreement of Parliament²⁶) and the Solicitor General for Scotland. Unlike other Ministers they cannot be removed from office by the First Minister without the approval of the Parliament. The Lord Advocate is the chief public prosecutor and chief legal adviser to the Scottish Executive and the Crown in Scotland in civil and criminal matters. He may initiate litigation in relation to devolution issues and oversees the handling of litigation involving Scottish Ministers. The Lord Advocate's position as head of the prosecution system and member of the Scottish Executive, and her role in relation to devolution issues and the competence of legislation, are enshrined in the Scotland Act. Until recently the Lord Advocate has sat in on Cabinet meetings (although not a voting member of the Cabinet); however in May the First Minister decided that this should no longer be the case in order to ensure law officers are "independent of politics". The current Lord Advocate is also the first to remain in post following a change in government.

South Africa

There are two institutions responsible for the administration of justice in South Africa: the National Prosecuting Authority and the Ministry of Justice. Both bodies operate within the Department of Justice and Constitutional Development.

The head of the National Prosecuting Authority is non-political, independent, not a member of Government and works only on behalf of the Republic of South Africa, subject to the South African Constitution (the Constitution).

The Minister of Justice is a politician and fulfils the role of Government advisor.

United States

The Attorney General is appointed by the President and confirmed by the Senate. As Minister for Justice, he presides over a large area of government policy. He is also responsible for the prosecution of federal crimes and for representing the Government in civil litigation. He also supervises and controls the Federal Bureau of Investigations, the Federal Bureau of Prisons, the Immigration and Administration Service, the United States Marshals Service and other officers concerned with legislation and the administration of justice. The Attorney is a member of the President's Cabinet, representing the US in legal matters and advises the President and heads of executive departments.

²⁵ The Attorney General has precedence of the Lord Advocate, even on the hearing of a Scottish appeal in the House of Lords.

²⁶ Scotland Act s48(1).

ANNEX C

THE ATTORNEY GENERAL'S DEPARTMENTS

The Departments for which Attorney General is accountable are:

Attorney General's Office
Crown Prosecution Service
Serious Fraud Office
Revenue & Customs Prosecutions Office
HM CPS Inspectorate
Treasury Solicitor's Department

The CPS, SFO, RCPO and HMCPSI are established by statute. The CPS is the largest prosecuting authority in England and Wales and has a general responsibility to prosecute criminal cases in that jurisdiction. The Serious Fraud Office has responsibility for investigating and prosecuting cases of serious and complex fraud. The Revenue & Customs Prosecutions Office is responsible for prosecuting cases investigated by HM Revenue & Customs. HMCPS Inspectorate has a statutory responsibility to inspect the Crown Prosecution Service and, since April 2005, the Revenue & Customs Prosecutions Office.

The Treasury Solicitor's Department (TSol) is not established by statute but its remit is to provide legal services to departments of central Government and to other publicly-funded bodies. This includes conducting most Government litigation in the courts, and providing legal advice to a range of Government and other public bodies. TSol also performs a co-ordination role in relation to issues of EC law and other legal issues affecting Government as a whole. In addition TSol has the functions of collecting *bona vacantia*, that is goods and property which pass to the Crown because they have no other legal owner. The Treasury Solicitor's department also incorporates the GLS Secretariat which supports the Treasury Solicitor in his role as Head of the Government Legal Service.

The tables below set out the budgets and staff numbers of the departments:

Net Resource Budgets (figures rounded to nearest £m)

	2005/06 Outturn	2006/07 Outturn	2007/08 Baseline budget
CPS	600	616	632
SFO	40	40	36
RCPO	34	33	37
*TSOL	70	80	87
HMCPSI	4	4	4
AGO	4	5	5

Staff numbers

	2005/06	2006/07	2007/08
CPS	8016	8230	8294
SFO	312	322	325
RCPO	257	277	325
TSOL	771	817	836
HMCPSI	46	44	52
AGO	51	53	52

* Most of TSol's expenditure is recovered through charging of fees.



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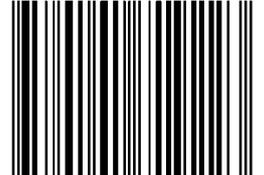
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