



The Government's response
to the Constitutional Affairs
Select Committee Report on the
*Constitutional Role of the
Attorney General*



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*Presented to Parliament
by the Attorney General,
by Command of Her Majesty*

April 2008

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CONSTITUTIONAL AFFAIRS SELECT COMMITTEE REPORT ON THE CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL: GOVERNMENT RESPONSE

Introduction

1. The Government greatly appreciates the time and effort that the Committee has spent in contributing to the debate on the role of the Attorney General. The Report of the Committee, taken with the responses to the consultation exercise undertaken by the Attorney General as part of the Governance of Britain agenda (*A Consultation on the Role of the Attorney General*¹) have informed the Government's proposals for reform in this area. We are grateful to the Committee for its Report and the contribution it has made to the debate on the role of the Attorney General. We are also grateful to all those who gave evidence in the preparation of the Report.
2. On 25 March 2008 the Government published a White Paper entitled *The Governance of Britain: Constitutional Renewal*. This should be read alongside the Analysis of Consultation, the draft Bill entitled the Constitutional Renewal Bill and the Explanatory Notes to the draft Bill which were published by the Government on that date.
3. Those documents are available on the *Governance of Britain* website (<http://governance.justice.gov.uk>).
4. The White Paper and associated documents set out in detail the responses which were received to *A Consultation on the Role of the Attorney General*, the Government's response to respondents and the Government's proposals for reform of the office of the Attorney General.
5. The White Paper should be regarded as the Government's primary response to the Committee's Report.
6. However, there are a number of points raised by the Committee in its Report to which the Government considers it appropriate to respond separately, directly to the Committee.
7. In light of this, the Government sets out its further response to the Report below.
8. The Committee has said that, as part of the pre-legislative scrutiny of the draft Constitutional Renewal Bill, it proposes to consider elements of the draft Bill and White Paper. The Government looks forward to considering the Committee's further comments and welcomes the Committee's continuing contribution to the debate on the role of the Attorney General.

¹ *The Governance of Britain: A Consultation on the Role of the Attorney General*, CM 7192, The Stationery Office, London, July 2007.

Summary

9. The Government has concluded that, in line with the views of the majority of the respondents to the consultation on the role of the Attorney General, that the Attorney General should remain the Government's chief legal adviser and that the Attorney General should remain a Minister and a member of one of the Houses of Parliament. The Government considers that the merits of this approach are very strong.

10. The Government has noted the concerns expressed by the Committee and some respondents that the combination of the roles of the Attorney General might give rise to a *perception* that a conflict of interest may arise. As outlined in the White Paper, the Government has proposed a number of measures to streamline and to clarify the role of Attorney General and the basis on which the Attorney exercises his/her functions and to make the operation of the office more transparent. In particular, the Government proposes to modify and clarify the relationship between the Attorney and the prosecuting authorities and to provide that the Attorney has no power of direction in relation to individual cases save in certain exceptional cases.

11. The Government has carefully considered the Committee's recommendation that the functions of the Attorney General should be split between a Minister in the Ministry of Justice and a career lawyer who is not a politician or member of the Government. For the reasons set out in the White Paper, the Government has not accepted this proposal.

Summary of the proposals in the White Paper

Role as chief legal adviser

12. For the reasons set out in full in the White Paper, the Government believes that the Attorney General should remain the Government's chief legal adviser. The Government also believes that the Attorney General should continue to be a Minister and a member of one of the Houses of Parliament.

13. The Government believes that it is necessary to maintain the current position whereby legal advice given by the Attorney General is not generally disclosed. It will, however, remain open to the Government, in exceptional cases, to waive privilege and disclose its legal advice, as has occasionally happened in the past.

Attendance at Cabinet

14. As the White Paper sets out, the Attorney attends Cabinet on the invitation of the Prime Minister, where he considers it appropriate for the Attorney to attend (for example where the Attorney's role as chief legal adviser and guardian of the rule of law suggests that attendance of the Attorney is appropriate).

15. At present, the Prime Minister considers that it is appropriate for Baroness Scotland to attend Cabinet on a regular basis. This reflects the Prime Minister's view that her personal experience will provide a valuable contribution to Cabinet discussions.

Oath of office and annual report

16. The Government proposes to modernise by non-statutory means the oath of the Attorney General (and Solicitor General) to provide for an express duty to respect the rule of law. The Government also proposes to bring forward legislation to require the Attorney General to report to Parliament on the exercise of his or her functions on an annual basis.

Functions in relation to the prosecuting authorities and criminal proceedings

17. For the reasons set out in full in the White Paper, the Government proposes that the Attorney General should continue to superintend the main prosecuting authorities. But the Government proposes to legislate to provide expressly that the Attorney General has no power to give directions to prosecute or not to prosecute in any individual case (except where national security is involved – discussed further below).

18. The Government proposes to establish a protocol which will set out more fully the detail of the superintendence relationship between the Attorney General and the main prosecuting authorities.

19. It is also proposed that there should be legislation to enhance the independent status of the main prosecuting authorities by providing for fixed term appointments for the Directors of those authorities.

20. The Government proposes to legislate to provide for the Attorney General to have an exceptional power to give a direction to stop a prosecution on grounds of national security. The legislation will require the Attorney General to report any exercise of the power to Parliament as soon as is practicable (except where a delay is itself required to protect national security).

21. The Government proposes to legislate to provide that the Attorney General should cease to have the statutory function of giving consent to prosecutions except in relation to a small category of offences which are considered to have a high policy/public interest element (for example, prosecutions under the key provisions of the Official Secrets Acts). In other cases the requirement for consent should transfer to the Director of Public Prosecutions (or in certain cases the Director of another prosecuting authority) or, in relation to certain offences, be removed altogether.

22. The Government proposes to legislate to abolish the Attorney General's power to enter a nolle prosequi (to stop a trial on indictment).

23. The Government believes that the Attorney General should retain other functions that relate to criminal proceedings (including powers in relation to unduly lenient sentences and the referral of points of law).

24. The Government also believes that it is right that the Attorney General continues to play a role, along with the Home Secretary and Justice Secretary, in the formulation of criminal justice policy.

Other functions of the Attorney General

25. The Government does not propose any other changes to the functions of the Attorney General. Nor does the Government propose any changes to the functions of the Attorney General for Northern Ireland.

Additional points raised by the Committee

Conflict between the different roles of the Attorney?

26. The Committee concluded that there is an inherent tension between the role of the Attorney General as the chief legal adviser to the Crown, superintending Minister of the prosecuting authorities and as the Minister with trilateral responsibility for the formulation of criminal justice policy. This conclusion underpinned the Committee's specific recommendations, including the suggestion that the Attorney General's functions

be split, with the functions in relation to prosecutions and the provision of legal advice resting with a career lawyer who is not a politician or a member of the Government and the Attorney's Ministerial functions being transferred to a Minister in the Ministry of Justice.

27. The Government has considered carefully the Committee's report. We have also had the benefit of a wide range of views from respondents to *A Consultation on the Role of the Attorney General*.

28. The Government has concluded that the fact that the Attorney exercises a number of different roles, rather than being a weakness as the Committee suggested, is one of the real strengths of the office. This was a view shared by a number of respondents. For example, the Criminal Bar Association took the view that:

"The dual role of the office [as chief legal adviser and Minister of the Crown] is not a constitutional weakness but a fundamental constitutional strength."

29. The synergy between the functions of the Attorney General means that their concentration in a single office strengthens the exercise of each.

30. Thus the fact that the Minister who superintends the prosecuting authorities is also a senior practising lawyer means that he/she is able fully to understand the functioning of the prosecuting authorities and is in a position to add real value to the exercise by the prosecuting authorities of their functions and properly to supervise the exercise of those functions. The Attorney, as a senior practising lawyer, can provide advice and counsel as to the co-ordination of cross cutting issues and the formulation of the strategic objectives of the prosecuting authorities. A Minister who was not legally qualified could not possibly superintend the prosecuting authorities in the same way. And the fact that the Attorney also provides independent and impartial legal advice, and exercises a number of functions on a public interest basis, means that the Attorney, unlike other Ministers, is particularly suited to defending the independence of the prosecuting authorities.

31. A number of respondents made this point. Professor Jeremy Horder commented that:

"The Attorney General should be primarily the guardian of the independence of the CPS and of the DPP in particular. The Attorney General should be regarded as shielding the CPS/DPP from becoming mired in political controversy."

32. The fact that the Attorney is a lawyer and superintending Minister for the prosecuting authorities means that the Attorney has a deep understanding of the operation of the prosecuting authorities. No other Minister would be in as good a position to ensure that the interests of the prosecuting authorities are properly taken into account in the formulation of criminal justice policy.

33. The Government also notes that there was little support among respondents for the suggestion made by the Committee that the Attorney's Ministerial functions (including the Attorney's responsibilities in relation to the formulation of criminal justice policy) be transferred to a Minister in the Ministry of Justice. A large number of respondents strongly opposed such an option. The Lord Chief Justice, Lord Phillips of Worth Matravers commented that:

"There must be complete separation between the prosecuting agencies on the one hand and the judiciary and the administration of the courts on the other. They must be, and must be seen to be, independent of each other. If the prosecuting authorities form part

of the same ministerial department as the judiciary and the courts the independence of both may be threatened and it will be difficult to maintain the necessary perception that they are truly independent of each other.”

34. Finally the Government has concluded, for the reasons set out in detail in the White Paper, that there are tangible benefits in the chief legal adviser to the Crown remaining a Minister. The Government has concluded that variant models, such as those suggested by the Committee, would affect adversely the ability of the chief legal adviser to act as the guardian of the rule of law. This approach reflects the views of the majority of respondents. The Bar Council Working Group, expressing a view that was shared by a number of respondents, commented that:

“The office embodies the principle that law should be at the heart of government. Since the change in the role of the Lord Chancellor it is all the more important now that there should be within Government a senior member of it whose primary responsibility is to ensure that the Government respects and upholds the Rule of Law. A non – political “Chief Legal Counsel” would not be in the same position, as the Attorney General is, to do this.”

35. The Government does not suggest that it would not be possible for the different roles to be exercised by different people as suggested by the Committee. However, the Government has concluded that there is real benefit in these various functions being exercised by one person. The transfer of any of these functions to another person would weaken the exercise of all of them.

36. More generally, the Government notes that the Committee proceeded on the basis that the dividing line between “technical legal functions” and “political” functions was a clearly defined one. However, as a number of respondents (including the Bar Council Working Group and the Constitutional and Administrative Law Bar Association) stressed, there is no hard and fast distinction between “legal issues” and “policy” issues, even when one is considering the provision of legal advice. Similarly, superintending the prosecuting authorities and participating in the formulation of criminal justice policy involves the consideration of legal issues, policy issues and issues of legal policy.

37. Thus the Government does not accept the suggestion in the Report that the exercise of “political” functions is somehow inconsistent with the exercise of an independent legal role. Even if the Government accepted that there was a need to split up the functions of the Attorney we are not persuaded that this would be as straightforward an exercise as the Committee suggested.

*Possible **perception** of a conflict of interests between the different roles of the Attorney*

38. The Government notes the concerns of the Committee and some respondents that the combination of these roles gave rise to a perception that a conflict of interest may arise.

39. The Government does accept that steps can and should be taken to clarify the basis on which the Attorney General exercises his/her functions. The Government also considers that the manner in which the Attorney General exercises his/her functions should be made more transparent.

40. The measures proposed in the White Paper (in particular, the obligation to prepare a protocol as to the relationship between the Attorney and the prosecuting authorities that the Attorney superintends, the obligation to report to Parliament on the exercise of the limited power of direction in relation to cases giving rise to serious concern as

to national security, the obligation to prepare an annual report on the exercise of the Attorney's functions and reform of the oath of office) are intended to achieve this.

41. The Government has also accepted that there is merit in clarifying and limiting the role of the Attorney in relation to individual criminal cases. This is appropriate both to ensure that decisions in individual cases are taken independently, and to promote public confidence in the operation of the criminal justice system.

42. This is why we have proposed legislation which provides that the Attorney may not give a direction in relation to an individual case.

43. A very limited exception is to be made in cases giving rise to a risk to national security. As the Committee recognised, the Government does have a legitimate role in assessing whether a prosecution which poses a serious threat to national security should proceed. The Government takes the view that in such cases, the Attorney should be able to have the final say as to whether such a prosecution proceeds. But in such a case, it should be made clear who has made that decision – and who should be held accountable for it. This reflects the views of a number of respondents (including the Criminal Bar Association), albeit other respondents took a different view.

44. The Government notes that neither the Committee nor the vast majority of respondents considered that any Attorney General had in recent years actually exercised his or her functions in an improper or partisan manner. The Government agrees with those respondents who took the view that “*mistaken perception is a weak foundation on which to base reform.*” (Lord Lloyd of Berwick)



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