SCL SOCIETY OF CONSERVATIVE LAWYERS

THE OFFICE OF ATTORNEY GENERAL

A CONSTITUTIONAL ROLE AND PROTECTOR OF THE RULE OF LAW?

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Foreword by the Rt Hon Lord Garnier QC, former Solicitor-General for England and Wales

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FOREWORD

Lord Sandhurst QC, Benet Brandreth QC and Will Knatchbull, the Society of Conservative Lawyers' Lyell scholar, have produced a valuable and insightful contribution to the continuing debate about the role of the Law Officers. Its impact is the greater for its brevity and concision. I confess its impact on me is the greater for their kindly quoting one or two things I, as a former Solicitor General, have said or written on the subject and which I repeated in July this year when giving evidence to the House of Lords' Constitution Committee who are carrying out an inquiry into this very subject.

In saying what I have said about the role of the Law Officers, I have been greatly influenced by the late Peter Rawlinson (whom the authors also mention), that great Conservative Law Officer who served as Solicitor under Harold Macmillan in the 1960s and Attorney under Edward Heath in the 1970s. 40 years ago, he led me in the longest civil jury trial ever conducted in London, a six-month defamation claim brought by the Unification Church (or "Moonies") against our clients, the Daily Mail, which successfully defended allegations that the Moonies broke up families and brainwashed their recruits. His strategic grasp of the goals we needed to achieve and how to ensure we did so, his commanding but not overbearing presence in court, his skill at explaining complex matters of fact and law to judge, jury or client, his ability to concentrate and work long hours, and to lead a team, provided me with a masterclass which I used to my benefit in my own practice but, more importantly when I became a Law Officer.

Lord Rawlinson was the very definition of a Law Officer who, by virtue of his well-deserved reputation at the Bar, earned the respect in which he was held by the Prime Ministers and fellow politicians with whom he served and the judiciary before whom he appeared as Attorney or Solicitor for the Crown. But it was not just professional experience that enabled him to fulfil the role. He was not a mere political place-filler plucked from legal obscurity with hopes or ambitions for higher office. He had the character and the wisdom of a wartime soldier who had to make hard decisions in a hurry under fire, and who was able to see legal issues and evidential problems from the point of view of someone who was wise enough to know that the client needs advice about what is lawful and right, not advice to reflect some convenient political agenda. It took character. And he knew of that fellowship, now much-abused, that used to exist between the Law, Parliament and Government.

I hope that this essay will encourage the new Conservative Prime Minister to find people who have that Rawlinsonian character needed in the Attorney's General's Office to navigate those important vessels, those metaphorical submarines which are the Law Officers, and the government itself, through our current domestic and international difficulties.

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OVERVIEW

The office of Attorney General is an ancient one, originating as purely the King's Attorney in legal cases. Since the late 19th century, the role has come to encompass political aspects. In the early 21st century it was the discharge of the duty as the chief legal advisor to the Government that gave rise to controversy.

To take but two examples. In 2003 Lord Goldsmith was required to give legal advice on matters of international law, namely whether Resolution 1441 of the United Nations Security Council provided sufficient basis for an invasion of Iraq to be legal. To outsiders, the fact that the Attorney General had initially provided an opinion in January 2003 to the effect that a second resolution would be required, but later advised that Resolution 1441 was sufficient, gave rise to the perception of partisan influence and government pressure in the investigation of the legal basis for war.

An admission in Parliament that the Internal Markets Bill would break international law in a "specific and limited way"[1] led to the resignation of Lord Keen QC, Advocate General, (among others). He wrote that he had *"found it increasingly difficult to reconcile what I consider to be my obligations as a Law officer with your policy intentions with respect to the UKIM Bill"*.

Do these and other events make change desirable? We think the answer is Yes. Our core points (which apply equally the office of Solicitor General) are these:

- Officeholders should continue to be members of one or other House of Parliament.
- Officeholders should be established practitioners with an understanding that the role is not a stepping stone to further political or ministerial advancement beyond that of Lord Chancellor/Secretary of State for Justice or the Home Office.
- The statutory duty to defend the rule of law imposed on the Lord Chancellor should be extended to the two law officers and the oath taken on appointment updated to reflect this situation.
- On appointment, the new holder would appear before a post-appointment hearing similar to that used in the Canada for their Supreme Court judicial appointments. Such hearing should not stray into hostile interrogation, but would seek to obtain confirmation of the appointee's understanding of the role and its implications for a future political career.
- Office holders should have to appear once a year before the Justice Committee of the House of Commons – the current powers given to a departmental select committee to send for persons should in this respect be put on a statutory footing of compulsion.
- By one route or another it should be established that an Attorney General while continuing to attend cabinet should not be a member of cabinet or of a cabinet committee that is not clearly related to legal or criminal justice issues.
- Similarly, officeholders should not engage in media briefings on the range of government policy issues.
- Legal advice should remain confidential and privileged. But in matters of international law the Attorney General's determination on the lawfulness of government action in relation to a treaty can provide a legal constraint. Because advice on such an issue will not be tested in the courts (at least till long after the event) the Attorney General must be mindful of the solemn and constitutional duty to advise on such legal questions objectively and impartially and be free to explain this decision to Parliament.
- At least one of the officeholders should be a member of the House of Commons. If neither is in the House of Lords, it seems likely that this will be addressed by the presence of the Lord Advocate (assuming no Scottish independence).

[1] HC Deb. 8 September 2020, vol. 679, c. 509.

INTRODUCTION

The Constitution Committee of the House of Lords is currently engaged in an Inquiry into the role of the Lord Chancellor and the Law Officers. It seemed a good time for us as members of the Society to look at the role of the Attorney and Solicitor General. (Note: since 1997[2] the Solicitor General has been enabled to exercise any function of the Attorney General which has led to a developed practice of collaborative working).[3] Our references to the current practice of the Attorney General should be read as referring to the collective exercise of the functions of the Attorney and Solicitor General.

The office of Attorney General is an ancient one, originating as purely the King's Attorney in legal cases. Since the late 19th century, the role has come to encompass political aspects. The tensions inherent in the modern role (discussed later) have produced episodic controversy. In 1924, the Attorney General to the minority Labour Government, Sir Patrick Hastings, had advised the prosecution under the Incitement to Mutiny Act 1797 of JR Campbell, editor of *Workers Weekly* a communist publication, but then withdrew the prosecution. The circumstances were said to give the appearance of submitting to improper partisan influence from the Government and Labour backbenches. Ramsay McDonald's Labour Government suffered the largest government defeat in the House of Commons until the Brexit vote of early 2019. This has not been the last time that an Attorney General's actions have occasioned accusations of partisan influence. We discuss these below.

There is no legal requirement for the Attorney General to sit in Parliament, but this is the norm (usually as an MP but sometimes as a member of the House of Lords). No Attorney General since 1928 has been a member of the Cabinet, but they "attend" cabinet and are members of several Cabinet Committees, including the Domestic Affairs Committee and the Legislative Programme Committee.

[2] Law Officers Act 1997, S1(1).

[3] For a recent practical account of this see pages 4–5 of Sir Robert Buckland's recent Guest Paper for the IfG: 'UK government law officers understanding the role of the attorney and solicitor general', available at: www.instituteforgovernment.org.uk/sites/default/files/publications/government-law-officers.pdf

In 2007, a Government Consultation paper ('the 2007 Consultation paper')[4] raised important questions. Sadly, the responses were never published. What it had to say about the role is a good starting point for this discussion:

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 Courts. The Attorney General also oversees the Government's

[4] The Governance of Britain a Consultation on the Role of the Attorney General Cm7192.

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.

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

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 Code, 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.

Additionally, as the current website of the Attorney General's office explains[5]:

The Attorney General's Office (AGO) provides legal advice and support to the Attorney General and the Solicitor General (the Law Officers) who give legal advice to the Government. The AGO helps the Law Officers perform other duties in the public interest, such as looking at sentences which may be too low.

Responsibilities

The Attorney General's Office (AGO) is a ministerial department which supports the Attorney General and the Solicitor General (the Law Officers). The Law Officers are government ministers who:

- *provide legal advice to the Government.*
- *superintend, or oversee, the main independent prosecuting departments – the Crown Prosecution Service and the Serious Fraud Office.*
- *the superintendence relationship between the Attorney General and the directors of the two prosecuting departments (CPS and SFO) is set out in detail in the Protocol between the Attorney General and the Prosecuting Departments;*

[5] About us – Attorney General's Office (www.gov.uk/government/organisations/attorney-generals-office).

- *superintend, or oversee, Her Majesty's CPS Inspectorate, which inspects how cases are prosecuted.*
- *superintend, or oversee, the Government Legal Department, which provides legal services to government.*
- *answer questions about their work in Parliament.*
- *perform other functions in the public interest, such as looking at sentences which may be too low – these duties are independent of government.*

…

Charity law

The Attorney can help the courts when considering cases involving charities. She can also ask the Charity Tribunal to clarify any matter of charity law.

Consents to prosecute

A few serious offences need the consent of the Attorney General before somebody can be charged. Prosecutors must first decide whether there is enough evidence for a charge.

…

The departments superintended by the Law Officers are the:

- *Crown Prosecution Service (CPS)*
- *Serious Fraud Office (SFO)*
- *Government Legal Department (GLD)*
- *Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI)*
- *Government Legal Service (GLS)*

We also work with the Ministry of Justice and the Home Office to develop criminal justice policy and promote efficiency and effectiveness.

The Attorney General also provides Guidance to the legal profession on a range of matters. These include:

- Applications for Witness Anonymity Orders: the prosecutor's role
- Attorney General's guidelines on disclosure 2005–2013
- Consent of the Attorney General to prosecute how to apply
- Plea discussions in cases of serious or complex fraud
- The Law Officers' approach to contempt of court referrals
- The Prosecutors' Convention 2009 (updated 2012).

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.

RECENT DEVELOPMENTS

In the early 21st century, it was the discharge of their duty as the chief legal advisor to the Government that gave rise to controversy. Lord Goldsmith was required to give legal advice on matters of international law, namely whether Resolution 1441 of the United Nations Security Council provided sufficient basis for an invasion of Iraq to be legal. Ultimately, he advised that:

'On balance, the "better view" was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441'.[6]

To outsiders, the fact that the Attorney General had initially provided an opinion in January 2003 to the effect that a second resolution would be required, but later advised that Resolution 1441 was sufficient, gave rise to the perception of partisan influence and government pressure in the investigation of the legal basis for war.

The incidences of controversy (see further below) might be thought only to be individual manifestations of the inherent tensions in the role. No doubt in consequence:

- two separate parliamentary committees held inquiries into the role of the Attorney General and options for reform.
- The House of Commons Constitutional Affairs Committee published their report in July 2007 concluding that "the status quo is not an option"[7] and that the Attorney General should become a non-political appointee with their ministerial functions transferred to a Minister in the Ministry of Justice.

[6] See Executive Summary of the Report of the Iraq Inquiry, para 471, p. 66, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535407/The_Report_of_the_Iraq_Inquiry_-_Executive_Summary.pdf

[7] Constitutional Affairs Committee, *Constitutional role of the Attorney General* (2006–07, HC 306), para 104, p. 41.

It is worth quoting in full the summary from the Report, it explains the tension well:

The office of Attorney General is an ancient one. It combines legal administration and the provision of independent legal advice with the political duties of being a member of the Government. He or she is also superintendent of the prosecution services in England and Wales. Recent events have called into question the sustainability of this divided set of responsibilities. First, the Constitutional Reform Act 2005 changed the status of the Lord Chancellor from being one of a judge, who took the judicial oath of office, to that of a Secretary of State who had a legal duty to protect the independence of the courts. This has left the Attorney General as the only member of the Government who was required to be legally qualified. The creation of the Ministry of Justice in May this year has also raised questions about the Office of the Attorney General, its functions, and the position of the office in the trilateral framework for the formulation and delivery of criminal justice policy in England and Wales. Second, the office's role in three particular controversial matters have highlighted further concerns: advice on the legality of invading Iraq; potential prosecutions in the "cash for honours" case; and the decision to halt investigations by the Serious Fraud Office into BAE Systems. The evidence which we took relating to the BAE case was particularly instructive in showing the inherent tensions in the dual role of the Attorney General and in particular the sometimes opaque relationships with the prosecution services. Our Report identifies inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office. Real and perceived political independence has to be combined with a role of an intrinsically party political nature in one office holder. This is at the heart of the problem. There is a lack of transparency in

how each of these functions is carried out. We acknowledge the need for accountability to Parliament and the public for all of the duties carried out by the Attorney General, but believe that reform of the office is necessary, both in order to ensure clear lines of responsibility for particular decisions and to remove any credible allegation of political pressure. These issues were brought into sharp focus by the decision to stop the investigation in the BAE Systems case. We therefore recommend that the current duties of the Attorney General be split in two: the purely legal functions should be carried out by an official who is outside party political life; the ministerial duties should be carried out by a minister in the Ministry of Justice.

[our emphasis, we have underlined those words, not because we endorse them but to show the intellectual basis for a completely new type of Attorney General].

In 2008, The House of Lords Constitution Committee published their report[8] which set out arguments for and against reform of each function of the role.

Meanwhile, the Labour Government had embarked on but left unfinished the Consultation outlined above.

The public inquiry into the handling of matters leading up to the Iraq War, "the Chilcott Inquiry" criticised the process by which the Government investigated the legal basis for the war, finding it "far from satisfactory".[9]

It said that Lord Goldsmith, the Attorney General, should have provided a detailed written report to Cabinet, but was instead asked to provide oral evidence without extensive questioning, and he did not explain what the basis would be for deciding whether Iraq had violated United Nations Security Council Resolution 1441. Goldsmith's advice changed between January 2003 – when he said that a second resolution was necessary – and March 2003 – when he said that Resolution 1441 was sufficient – and the report describes pressure being applied by the Prime Minister's Office to get Goldsmith to revise his opinion. By ultimately going to war without a Security Council resolution, the UK "undermined the Security Council's authority".[10]

Since the Brexit referendum in 2015, successive Attorneys General have been involved in high profile and sometimes controversial events. On 4 December 2018, the UK Government was found to be in contempt of Parliament for a failure to lay before Parliament the full legal advice on the effect of the proposed EU withdrawal agreement. In late 2020, the Attorney General was closely involved in the controversy surrounding the Internal Markets Bill. An admission that the Bill would break international law in a "specific and limited way"[11] led to the resignations of Lord Keen QC, Sir Jonathan Jones and Amal Clooney, the Advocate General for Scotland, the Treasury Solicitor (the head of the Government legal service) and the UK's special envoy for media freedom respectively. In his letter of resignation to the Prime Minister, Lord Keen stated that he had *"found it increasingly difficult to reconcile what I consider to be my obligations as a Law officer with your policy intentions with respect to the UKIM Bill"*.

Following all this, the House of Lords Constitution Committee has begun the third inquiry involving the Attorney General in the last twenty-year period.

Lord Keen, the previous Advocate General, gave evidence to this Inquiry on 27 April 2022.[12] The answers he gave, based on his experience of many years at the Bar (in Scotland and in England) and most recently as the Law Officer responsible

[8] Constitution Committee, *Reform of the Office of Attorney General* (2007–08 HL 93), available at: https://publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf

[9] (n6) para 432, p.62.

[10] (n6) para 439, p. 63.

[11] HC Deb. 8 September 2020, vol. 679, c. 509.

[12] Constitution Committee, oral evidence: The Role of the Lord Chancellor and the Law Officers, (evidence session No. 4, Q50–58), available at: https://committees.parliament.uk/oralevidence/10156/pdf

for devolution aspects in Scotland, are of great weight. We have therefore set out the main questions and his answers:

"How is the Rule of Law protected within government, and what role do the law officers play in delivering that protection?

Lord Keen: We have to begin by considering what we mean by the rule of law. First, it requires that all institutions and parties should be equal before the law and subject to the law, that the law should be publicly available, and they should be capable of ascertaining what their rights and obligations are thereunder. I think it extends further. The rule of law is there to maintain stability in society in a variety of ways. It extends not just to domestic law but to the sphere of international law. There again we look for stability not only in our relations with each other but in our relations with other nations and societies …

The role of the law officers is to advise government. … to try to ensure that the policy of the Government can be implemented in so far as the Government wish that policy to be implemented but reminding the Government of their obligations to adhere to the rule of law, the constitutional principles and policy that we will adhere to those obligations in both the sphere of domestic law and of international law. …

The object of the law officers is to try to ensure that the Government never deliberately cross those boundaries. …

An obligation to direct the Government as to when they can and cannot proceed with a policy that falls within a respectable and identifiable boundary of propriety and principle having regard to the rule of law.

Is there value in having the law officers as serving members of the Government as opposed to being non-political legal advisers outside government?

Lord Keen: In my view, it is important that the law officers are members of the Government. I will come on to elaborate why in a moment. First of all, I would point out that the Government have available to them a wide range of extremely well-qualified and skillful lawyers. … The role of the law officers is to receive that advice, to analyse it and to examine it, and to see to what extent they can ensure that in light of the legal position they can still advance the Government's policy intentions. We are there to try to ensure that the Government can implement their policies. That is why it is important that the law officers are part of the Government. In addition, we would lose authority in the eyes of government if we were no longer members of the Government. We would then be seen as simply being an add-on to the Treasury Solicitor. …

As a law officer, I have to ask whether it is possible for me to find a way in which I can go to the Government – the Executive – and say, "Yes, it is possible to implement this policy. It may be hazardous. We may find ourselves on the wrong side of the line, but, be that as it may, I have found a possible way through, and, therefore, you may proceed". That is not the way in which, in general, an independent lawyer would address the matter.

Could you address that question if you were not a member of the Government?

Lord Keen: I do not believe you could do it so effectively. I do not believe that you would have access to the sort of detailed information about policy intentions that the law officers have. Furthermore, it would be far more difficult for you to be answerable to Parliament about the decisions that were being made.

Could you say what aspects of the law officers' role require them to be accountable to Parliament?

Lord Keen: The law officers have to be in a position where they can explain to Parliament the policies that have been implemented in some areas. The Attorney General has to be in a position to come to Parliament and explain why a particular policy has been adopted with regard to certain areas of the criminal law; for example, the desire to emphasise particular crimes and pursue them. It is important from that aspect that they are there to answer for that.

In addition, questions do arise. A point was made about legislation being introduced that appears to be contrary to our obligations under international law. The law officers have to be there to explain why they considered that that is not the case, and why they considered that there is a respectable

argument for the Government to pursue a particular policy position. They are best equipped to do that.

Does it matter which House the law officer is in? In your case, it is the House of Lords? Would it have been better if you were in the House of Commons, or do you think there are some instances where it is better that the Attorney General should be in the House of Lords rather than the House of Commons?

Lord Keen: … It is important that there should be a law officer in each House. ...

The challenges of being a law officer are rather different from the challenges of being a Minister in other departments. Without that background experience [of private practice], it would be extremely difficult to make the sort of judgments that are required of a law officer. It is always open to the Government, as they have done in the past, to identify a suitable lawyer and appoint them to the Lords.

Should the law officers' legal advice to the Government be published and made public on a regular basis, and, if so, under what circumstances?

Lord Keen: I do not consider that it should be. The general principle is that the Government, like any party, should be able to take legal advice on a confidential basis, which they can then consider. To put that into the public domain would in many ways compromise the Government in exploring policy options and deciding whether to implement them. …

To throw that sort of advice into the public domain would confuse and make far more difficult the implementation of government policy. You would have people saying that the better advice is that you do not do it. But that is not the test; it is whether or not you are entitled to do it. That is why I emphasise that the law officers are there and one of their primary duties, when they are there, is to try to ensure that government policy can be implemented."

IF THE ROLES OF CHIEF LEGAL ADVISER AND GUARDIAN OF THE PUBLIC INTEREST WERE SEPARATED FROM THE ROLE OF MINISTER, WHO WOULD EXERCISE THEM?

The 2007 Consultation paper asked whether the current role was fit for the 21st Century. As it pointed out:

"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…

2.5 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."[13]

As that paper points out, 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.

We are not attracted by these alternatives. As that consultation explained:

[13] (n4), p. 11.

"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.*
- *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".*[14]

The evidence of Lord Keen (above) and other law officers as we explain later is compelling. Though the position of the chief legal advisor as a government Minister may appear as a conflict of interest, the advice of the Attorney General is more likely to be accepted by Ministers because it comes from one of their number. One 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 real authority.

As Lord Keen reminds us, an Attorney General's advice, as well as being 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 and prospects of successful challenge in the courts. Membership of the Government and attendance in cabinet enable the Attorney General fully to understand aims and policies. While advising that a particular course of action is actually (or more likely) *potentially* unlawful, an Attorney General with a full grasp of and sympathy for political and policy aims, will wish to assist the Government in finding a more attractive/less hazardous way forward. An outsider who is a pure legal adviser and 'non-political' will quite simply be less well-equipped to give that advice albeit the Attorney General personally is likely in the modern age who have sought specialist legal advice. A government which perceives its Attorney General as 'just another lawyer' is likely to treat the advice with less respect. Indeed, we fear that Ministers might even refrain from seeking advice for fear of what they might be told by someone who is 'not one of us'. Speaking truth unto power is important. Without ready access to ministers, it is less likely.

The second area of perceived tension arises between the Attorney General's position as a government Minister 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.

The Iraq war legal advice, and the Saudi/BAE case (among others) have been modern incidents where there have been accusations of partisan influence from the Government on legal decisions of the Attorney General, whether in discharging their duty as chief legal advisor to the Government or exercising functions as guardian of the public interest.

Notwithstanding what we say above, we acknowledge that the appearance and perception of the role are no less important than the reality. Considering this, holders of the roles must be constrained in their *partisan* political activities. Professor John Edwards was persuasive when he wrote in 1984 that *"the closer and more intense the Attorney General's involvement in the politics of government… would almost certainly accelerate*

[14] (n4) pp. 17–18.

the movement towards further questioning the validity of the much-vaunted independence of the Law Officers of the Crown"[15]. The need to positively demonstrate proper detachment of the Attorney General from the politics of the Government has not been taken sufficiently seriously by successive administrations. We endorse the view of Sir Peter, later Lord, Rawlinson (Attorney General 1970–74) summarized by Professor Edwards in his 1984 work: *"the remedy is not to be found in the creation of new constitutional machinery but rather in underlining the priorities that ought to govern the law officers' response to the ever-growing demands upon their time and energies"*[16].

In other words, the Law Officers, are and should be at the very centre of government with significant duties to all arms of the State, whilst also being necessarily constrained in their political activities. This view is detectable in many of the public speeches by various holders of the positions during the Coalition years.

Developments of the 20th century brought the Attorney General to the real heart of government, such as the creation of the Cabinet's Parliamentary Business and Legislation Committee that the Attorney General sits on by necessity as much as convention. In 1999, the criminal justice system became a trilateral ministerial responsibility of the Home Secretary, the Lord Chancellor and the Attorney General.

In the 21st century, the role is under pressure to change further. Looking at Cabinet Committee lists from 2012 and currently, it appears the Attorney General has gone from being a member of one committee (the Parliamentary Business and Legislation committee which the Attorney General has long been a member of by convention) to six committees.[17] Suella Braverman QC is the first Attorney General in history to have a full-time special adviser ("Spad") of her own. It is important that she and her successors do not (and are not perceived to) undermine the fragile paradox of a government minister who is sometimes required to act in an entirely *non-political* way.

The changes to the role of the Lord Chancellor and the formalisation of the protection of the rule of law within government under the Constitutional Reform Act 2005 place added responsibility on the Attorney General. The Lord Chancellor has ceased to be a senior lawyer (or even at points a lawyer at all). In the opinion of some, this thrusts the Attorney General into a role of central importance. We agree with Professor Jeffrey Jowell and Lord Goldsmith, who have both said it had been a mistake to only specify the duty to defend the rule of law in relation to the Lord Chancellor in the Act.[18] We note that the Attorney General's Office announced in 2008 that the Oath of the Attorney General would be updated to reflect that they must respect the rule of law and to "re-emphasise the basis on which the Attorney gives legal advice and exercises her functions in the public interest, rather than on the basis of political convenience or party loyalty".[19] Unfortunately this reform was never carried forward.

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[15] J Edwards, The Attorney General, Politics and the Public Interest, Sweet and Maxwell, 1984, p. 76

[16] ibid, pp. 76–68.

[17] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027921/Cabinet_ Committee_-_Membership_and_ToRs__October_2021___ 2_.pdf and https://webarchive.nationalarchives.gov.uk/ukgwa/20130128200214/http://www.cabinetoffice.gov.uk/sites/default/files/resources/Cabinet_Committee_ Membership_Lists_Oct-2012.pdf

[18] See Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 19 July 2007, HC 306, paras, 26–28, 73–75, and
Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, and
Lord Goldsmith QC, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law, 29 November 2006.

[19] Attorney General's Office, Press Notice 25 March 2008. See also Alexander Horne, *'The Law officers'* (SN/PC/04485, House of Commons Library 1 August 2014) p. 15: https://researchbriefings.files.parliament.uk/documents/SN04485/SN04485.pdf

APPROACHES TO THE ROLE OF ATTORNEY GENERAL

Lord Elwyn-Jones LC argued that *"the Attorney General, when he is acting in political matters is a highly political animal entitled to engage in contentious politics."* The basic requirement according to him was that *"however much of a political animal he may be when he is dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act in an impartial and even quasi-judicial way"*[20].

This standard of evaluation focuses on the reality of how the holder deals with the tension. But today the public perception is as important as how the holder of the role separates the functions. In some functions, an Attorney General acts quasi-judicially. This may involve taking public interest decisions significant for the individuals directly involved and also the public at large. It may also be that from a legal realist perspective an Attorney General determines in some circumstances the legal constraints on the Government[21], particularly in matters of international law. In light of the direction of travel in the context of judicial bias, it is obvious that the standard the Attorney General must be assessed by is the demonstrated perception of operational independence.

Nonetheless, we do not agree with Lord Shawcross who argued for *"the adoption in England and Wales of a non-elected, non-political, public servant model for the office of Attorney General"* [22]. As Professor Edwards argues, this suggestion is fundamentally flawed in that the independent Attorney General will still have to have a relationship of accountability to the democratic institutions of the state. In reality, a Minister will still have to have some sort of supervisory relationship with the Attorney General. It may prove insufficient to insulate the Attorney General from political controversy. Professor Edwards briefly alludes to the experience of Commonwealth countries that follow this model as evidence that it may not be a solution to the tension between the legal functions and political considerations of the role.[23] We agree.

Adopting a model of a non-political Attorney General, specifically in relation to the public interest functions, would demonstrate separation from partisan political considerations but it would not and could not separate the role from the real world of political life and 'ideological and moral beliefs'. The Attorney general would still be dealing with decisions on deeply political matters when determining the public interest.

Thus, Jeremy Wright QC a former Attorney General has argued strongly[24] that the Attorney General should remain a political appointment so the holder can be held to account for determinations of the public interest. That, we have seen, is the view of Lord Keen.

There is also an argument that no matter what ministerial relationship to the independent Attorney General is constituted there will be a loss of transparency and accountability. This has been a criticism of the independent role of the Irish Attorney General. [25]

We are persuaded by Lord Rawlinson's analysis of the problem: *"the modern problem is to demonstrate the separation of the political and legal roles inherent in the present-day Attorney General"* [26]. Prime Minister Macmillan told Lord Rawlinson that *"the loyalties of a Law Officer must*

[20] Edwards (n15) p. 69.

[21] See Dr Ben Yong, *Risk Management: Government lawyers and the provision of legal advice within Whitehall* The Constitution Society, 2013, p. 16.

[22] Edwards (n15) p. 65.

[23] See Edwards (n15) pp. 65–67.

[24] Jeremy Wright, 'The Attorney General on who should decide what the public interest is' 08 February 2016, available at: www.gov.uk/government/speeches/the-attorney-general-on-who-should-decide-what-the-public-interest-is

[25] See David Kenny & Conor McCormick, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42(1) DULJ 89.

[26] Edwards (n15) p. 68.

be first to the Crown, second to Parliament, and only thirdly, almost incidentally, to the administration" [27]. But how to achieve this?

Lord Garnier has used the analogy of "two submarines" to represent the Attorney and Solicitor General.

"The life of the Law Officers, although circumscribed by limitations that a real politician would not tolerate, brings one to the very centre of power even if those at the centre do not realise it. It is not the dry and fusty world of the Dickensian lawyer's office, still less the Office of Circumlocution. Of course, the public only sees the capital ships, dressed fore and aft, steaming full steam ahead on the high seas, occasionally firing their guns, but below the surface and silently, and known only to a few in the law and in Whitehall, are the two submarines, HM Attorney and Solicitor. When we go on manoeuvres, we do so to have an effect as the Iraq War story perhaps, unfortunately, reveals but there are happier examples of activities carried out in confidence for governments of both colours where the advice and restraining hand of the Law Officers has been both sensible and well received. When we surface it is usually to resign (or not), to apply to the courts in a contempt case, or to complain of an unduly lenient sentence. But so much of our time is not spent just saying "No", but "Have you thought about doing it this way?" which is what all good lawyers should do for their clients."[28] [Our emphasis added].

If the Law Officers are submarines, then reform is required to make it clear they are in command of their own course and to provide an effective sonar to track these "manoeuvres". How is this to be achieved? We do not pretend to have the perfect answer, but here are our suggestions.

[27] Edward Garnier QC, 'Speech to the Constitutional and Administrative Law Bar Association' 17 July 2010, available at: www.gov.uk/government/speeches/speech-to-the-constitutional-and-administrative-law-bar-association

[28] ibid

1. CHANGES TO STRENGTHEN AND DEFINE THE ROLE

It follows from the analysis above that the Prime Minister of the day must have an Attorney General with whom they can work. They must share the same broad political direction of travel. But we think changes are needed in the complex modern world in which a "good chaps" theory of government cannot be relied upon.[29]

- They should be established practitioners (barrister or solicitor). Specifically in view of the quasi-judicial functions of the Law Officers, S10(3)(c)(i) of the Senior Courts Act 1981 (as amended) should apply to their appointment. This would require individuals to have 10 years of experience in practice to be appointed[30]. There should be an understanding that the role is not a stepping stone to further political or ministerial advancement, beyond that of Lord Chancellor/Secretary of State for Justice or Home Secretary. This makes it likely the appointed candidate will not have wide ministerial or policy record outside Justice or the Home Office.
- The statutory duty to defend the rule of law imposed on the Lord Chancellor should be extended to the two Law Officers.This could be done by amending S1(b) of the Constitutional Reform Act to read: *"the Lord Chancellor's and the Law Officers' existing constitutional role in relation to that principle."*
- The oath of the Attorney General should also be updated to reflect this situation. Currently, the oath reads:

  "… 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

[29] See Andrew Blick & Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times' The Constitution Society, 2019, available at: https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf

[30] That is an increase from the seven years in the Act (as amended). Ten years was the original requirement.

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."

This should be updated in a modern statutory form to aid understanding of the roles and reflect the importance of the rule of law. This could be achieved through the Constitutional reform act as was done for the Lord Chancellor's oath (s17). We suggest the oath read:

"I, [X], do swear that in the office of (Attorney/Solicitor General) I will respect the rule of law, advise the Crown, the Parliament and the Government without fear or favour on legal matters, oversee the Crown's litigation, act to protect the interests of justice and the privileges of Parliament, and act as guardian of the public interest. So help me God."

- Given that the discretion of the Prime Minister in appointing the Law Officers is limited only by convention, we have given thought to a hard limit on the power of appointment, achieved by a confirmation vote of the House of Commons. However, such a development would present a disproportionate risk of future unforeseen consequences. Instead, consideration should be given to a system of post appointment hearings, similar to those used in the Canadian system of Supreme Court judicial appointments.
- The appointees would appear before a parliamentary committee likely made up of members of the Lords Constitution Committee and the Justice Committee for a question-and-answer session. There should be limitations on what questions can be asked. Such hearings should not stray into the territory of a hostile interrogation or be used as an opportunity to attempt to relitigate concluded cases. It would seek to obtain confirmation of the appointee's understanding of the role and its implications for a future political career.
- At this hearing, the appointee should confirm his understanding that the role is not a stepping stone to further political or ministerial advancement. Though this only places a soft limit on the power of appointment the exposure to questions would be important in emphasising accountability, improving public understanding of the role, and should incentivise the Prime Minister to consider carefully which individuals are appointed.
- The Law Officers should have to appear once a year before the Justice Committee of the House of Commons. We believe this currently happens (in relation to the Attorney General) through the extension of an informal invitation and as a matter of convention. There is however no power of enforcement if such an invitation is refused. In recognition of the status of the Law Officers and the duty owed to Parliament, this arrangement should be put on a statutory footing.
- The long-standing tradition that the Attorney General is not a member of the Cabinet should be entrenched in statute, to demonstrate the operational separation of the Attorney General from the Cabinet in the exercise of legal functions.
- It may be too much for statute, but it should be established that an Attorney General should not

  – be a member of cabinet committees that are not clearly related to legal or criminal justice issues,

  – (as if an ordinary political minister) provide or engage in media briefings on the full range of government policy issues. Updates to the Cabinet Manual should be emphasise that the Attorney General is constrained in a way other ministers are not in involvement with general government policy, and this should include media appearances.

  This may be partially achieved by a new paragraph in the Ministerial Code to make clear that the Law Officers are not bound by collective ministerial responsibility to the extent that it would conflict with the discharge of their duties as legal advisers to the Government and guardians of the public interest.

2. SHOULD THE ATTORNEY GENERAL SIT IN THE HOUSE OF COMMONS OR THE HOUSE OF LORDS?

In the 2007 House of Commons inquiry, Lord Goldsmith argued that in view of the changing conditions of the Bar and modern politics we should appoint the Attorney General from the House of Lords.[31] This view is not shared by Lord Keen and on balance we think it would weaken the political strength of position of an Attorney General giving unpalatable advice. An appointed peer is not politically as strong as a Member of Parliament. Further when the going gets hot, it is good that the Attorney General should have to account for matters to the House of Commons in full cry. That prospect may act to stiffen the spine of the office holder dealing with the Prime Minister or a powerful member of cabinet. In view of this, the Attorney General should (preferably) be appointed from the House of Commons, rather than the Lords, if it is possible to do so within the requirements suggested above. The future possibility of doing this is not guaranteed but as Lord Keen states in his evidence, we have not reached that point yet.

[31] (n7) Paras 92–95, pp. 37–38.

3. THE PUBLICATION OF LEGAL ADVICE

There is a strong and long-running constitutional convention that the advice tendered by the Attorney General to the Government is not made public without the consent of the Attorney General. See here again the evidence of Lord Keen. This convention was tested in 2018 when a humble address motion was used to compel the publication of legal advice on the effect of the withdrawal agreement.

There was a suggestion that legal advice had previously been regarded as an exception to the jurisdiction of humble address motions, though the Speaker ruled that the motion was effective and perceived failure to fully comply led to the Government being held in contempt of Parliament.[32]

We believe the convention should not be touched. We would hope that future Speakers will not follow Speaker Bercow. It is to be hoped that political pressure in an exceptional case may be sufficient to persuade the Government of the day to disclose at least the effect if not the substance of the advice.

[32] See Nicola Newson & Sarah Tudor, Publishing Government Legal Advice, House of Lords Library Briefing 6 December 2018, p. 10. Available at: https://researchbriefings.files.parliament.uk/documents/ LLN-2018-0115/LLN-2018-0115.pdf

4. ACCOUNTABILITY FOR LEGAL ADVICE

This is especially (but not only) pertinent in relation to matters of international law. In questions of international law, the determinations of the Attorney General do in a meaningful sense provide by themselves the legal constraints that apply to government action. It could be said that in this area they function as a supreme court of one.

It seems that although in the exercise of public interest functions the Attorney General can be said to be functioning in a quasi-judicial manner, at least the decisions are, in the domestic context, final. Thus, if a sentence is referred as Unduly Lenient, it is the Court of Appeal that has the final say. But in relation to international law, domestic courts cannot enforce unincorporated treaties. Action taken in international courts will be too late to provide effective accountability.

It is unrealistic, we believe, to seek to impose a perfect regime. There are situations such as the BAE cases (under Lord Goldsmith as AG) when, if the assertions of national interest are correct – assessed by the Law officer on the basis of secret

material – it is legitimate to act contrary to unincorporated treaties. It is imperative that in this context the Law Officers rigorously consider if there is a respectable legal argument for doing so as we have seen in Lord Keen's evidence (above).

In a context such as the then proposed Internal Markets Bill, which would have broken the Northern Ireland Protocol and the EU Withdrawal Agreement, the matter was ultimately for Parliament, which is sovereign. It is then for the Law Officer to determine whether he or she can support the proposed course, acting in accordance with his (to be imposed – see below) obligations to uphold the constitution, the law and if need be, to state his position in the House and ultimately resign.

The duty to account to the House for a legal position may be rarely activated (prima facie breaches of international law have become the obvious example) but is of great significance. The obligation of the Attorney General to Parliament as its legal advisor is afforded a whole chapter in Professor Edwards' book[33] and was more recently referred to by the previous Attorney General, Geoffrey Cox QC as being his *"solemn and constitutional duty to this House to advise it on these legal questions objectively and impartially, and to place such legal expertise as I have at its disposal".*[34]

[33] (n15) pp. 207–235.

[34] HC Hansard, 3 December 2018, col 546.

A CONSTITUTIONAL ROLE AND PROTECTOR OF THE RULE OF LAW?

It is clear that coalition Law Officers (and Lord Goldsmith) conceived the Attorney General as having a wide-ranging role at the very heart of the State and themselves as owing obligations to all three branches. These added up in total to a duty to protect the rule of law, justice and the constitutional balance itself. It is to enhance that position while preserving the important political input of the office holder that our modest proposals are made.

For perhaps too long, this central and expansive role has relied on 'good chaps'. It is completely dependent on the holders of the role being experienced senior lawyers, with a strong sense of propriety and constitutionality, acting carefully in line with the non-binding conventions. We do not wish to suggest the present or recent office holders have not behaved accordingly, but the pressures and temptations are increasing. That is why we make the proposals we do. "Pure" lawyers will no doubt say we do not go far enough. But the changes we advance are real and of substance. They will make concrete the duty to uphold the law and the obligation to account to Parliament. Currently the limitations on who can perform the role are too relaxed to justify such a powerful remit. The changes set out above represent a sensible attempt at constraining the discretion of the Prime Minister in the appointment of the Attorney General.

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