



House of Commons
Constitutional Affairs
Committee

Constitutional Role of the Attorney General

Fifth Report of Session 2006-07



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*Report, together with formal minutes, oral and
written evidence*

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Summary

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.

1 Introduction

1. The office of the Attorney General is an ancient one, which has traditionally been at the junction between law and politics in England and Wales. The office has not remained static but has developed in order to accommodate the wide range of tasks and functions of the modern Attorney General. Traditionally, the Attorney General and the Solicitor General have been senior barristers and Members of Parliament, with considerable experience in the fields of both law and politics. All Attorneys General were, with the exception of only the most recent two past Attorneys General¹ and the current Attorney General, also Members of Parliament who sat in the House of Commons. In oral evidence to the Committee, Lord Goldsmith was not even certain that he could be described as a "politician".² This change has had a significant impact for the role of the Attorney General as the traditional interface between law and politics, and for the accountability of that Office.

2. Described by Francis Bacon as "the painfulest task in the realm" the Attorney General has "multifarious" roles. In a recent lecture, Professor Jeffrey Jowell QC summarised the role as follows: "he is of course legal adviser to the Government. Yet he is also a politician who takes the party whip and a Minister who nowadays attends all Cabinet meetings. He superintends various offices, such as the Crown Prosecution Service and a number of judicial and quasi-judicial proceedings where he must decide in the public interest. He may decide himself to bring civil actions and prosecutions or refuse to prosecute and whether or not to bring relator actions. He is also Leader of the English Bar".³

3. Professor Jowell stated that: "one set of relationships in our democracy that has been subject to the most dramatic alteration in recent years is between politics and the law; the appropriate balance between those decisions which are in the province of politicians and those which belong to the law is one of the most fundamental question in all constitutional theory and has great practical importance".⁴

4. Part of the framework where law and politics meet is in the historic office of the Lord Chancellor, who has had a duty to uphold the Rule of Law within Government. Recent changes in the role and responsibilities of the Lord Chancellor under the Constitutional Reform Act 2005 transformed the role of the Lord Chancellor, and in doing so have brought the tensions which are inherent in the multiplicity of the roles performed by the Attorney General into sharp focus, and have raised several questions about his constitutional role. The Lord Goldsmith has himself commented on this in several speeches, specifically in relation to his role in upholding the Rule of Law.⁵

1 Rt Hon Lord Williams QC and Rt Hon Lord Goldsmith QC

2 Q 319

3 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p.11

4 For example see *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law, 29 November 2006, and *Government and the Rule of Law in the Modern Age*, 22 February 2006.

5 Ibid

5. At the same time, the Attorney General's position has also come under scrutiny in connection with his position as head of the prosecution authorities, as the Government's Chief Legal Adviser and as a member of the Government. Particular difficulties were identified in relation to the police investigation into allegations about Cash for Honours and whether the Attorney General should play any role in determining (if necessary) whether the Crown Prosecution Service (CPS) should proceed with prosecutions. We have already published a Special Report containing the correspondence between the Chairman of the Committee, the then Attorney General and the then Lord Chancellor on this matter.⁶ In addition, the Attorney General's independence has been questioned as a result of a decision not to prosecute in the BAE Systems case, and in relation to the advice he gave on the legality of taking military action in Iraq.

6. Furthermore, recent changes to the machinery of government, the division of the Home Office and the creation of a new Ministry of Justice have also raised questions about the office of the Attorney General, his or her functions, and the position of the Office in the trilateral framework for the formulation and delivery of criminal justice policy in England and Wales. These factors combined have resulted in intense scrutiny of the role and functions of the Attorney General, and subsequent calls for the reform of that Office and role.

7. In the light of the considerable recent changes to the constitutional arrangements for the maintenance of the Rule of Law and the continuing commitment of the Government to modernise the constitution, we decided to inquire into the constitutional role of the Attorney General. We concentrated on three specific areas:

- how the office works;
- the impact on the office of recent controversies; and
- what options there are for reform.

8. We took oral evidence from Rt Hon Lord Goldsmith QC, the then Attorney General;⁷ Rt Hon Lord Falconer of Thoroton QC, the then Lord Chancellor and Secretary of State for Constitutional Affairs, and two former Attorneys General: Rt Hon Lord Morris of Aberavon KG QC and Rt Hon Lord Mayhew of Twysden QC. We also took evidence from Robert Wardle, Director of the Serious Fraud Office. We received several memoranda, details of which are listed on page 48.

9. Between taking oral evidence and the publication of this report, the Department for Constitutional Affairs ceased to exist, and was replaced by the new Ministry of Justice on 9 May 2007. The Rt Hon Lord Falconer of Thoroton QC retained his role of Lord Chancellor, and became the Secretary of State for Justice. Later, following a change of Prime Minister on 27 June 2007, Rt Hon Jack Straw MP, became Secretary of State for Justice and Lord Chancellor, and Rt Hon Baroness Scotland of Asthal QC was appointed Attorney General. On taking office she announced that, except if the law or national

6 Constitutional Affairs Committee, *Party Funding—oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

7 On two separate occasions: 7 February 2007 and 27 June 2007

security requires it, not to make key prosecution decisions in individual criminal cases.⁸ In the Green Paper *The Governance of Britain* published on the 3 July 2007, the Government indicated that it would publish a consultation paper before the summer recess on the role of the Attorney General.⁹

8 HC Deb, 3 July 2007, col 817

9 Ministry of Justice, *The Governance of Britain*, CM 7170, p. 24

2 The Constitutional Role of the Attorney General

10. The Attorney General has a variety of different responsibilities: he or she is the Government's chief legal adviser, superintends the prosecution agencies, is a Government minister with responsibility for criminal justice and acts as the guardian of the public interest in certain other cases.¹⁰ In his written evidence to the Committee the then Attorney General, Rt Hon Lord Goldsmith QC, said that he exercised these varied functions on the basis of three overriding principles: "to give legal advice and take decisions based on a scrupulous approach to the law and to evidence; where I am exercising my public interest functions, to act on the basis of an objective, dispassionate assessment of the public interest, without regard to party political considerations; and to act independently, fairly and with accountability".¹¹

The current responsibilities of the Attorney General

Chief legal adviser to the Government

11. One of the main functions of the Attorney General is the provision of legal advice to the Government. Until comparatively recently, the Attorney General was expected to be able to advise on a wide range of matters based on his own knowledge of the law. In reality, much of this advice is prepared by civil servants who are lawyers, expert in a particular field, for example EU law. The Attorney General may also consult specialist counsel when necessary. The Attorney General provides political 'cover' for the advice, which is usually not made public.

Superintendence of the prosecution agencies

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

- a) The requirement for consent to prosecute certain categories of criminal offences, such as those relating to Official Secrets, corruption, explosives, incitement to racial hatred, and certain terrorism offences with overseas connections.
- b) The power to refer unduly lenient sentences to the Court of Appeal.
- c) The power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
- d) The power to refer points of law in criminal cases to the Court of Appeal.

¹⁰ <http://www.lso.gov.uk/goldsmith.htm>

¹¹ Ev 58

13. The Attorney General is also responsible by statute for the superintendence of the main prosecuting authorities: the Crown Prosecution Service (CPS), Serious Fraud Office (SFO), Revenue and Customs Prosecution Office (RCPO) and the Director of Public Prosecutions in Northern Ireland.¹²

14. The concept of ‘superintendence’ has never been categorically defined. In broad terms, the Attorney General has suggested that ‘superintendence’ can be said to encompass “setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall ‘effective and efficient administration’ of those authorities, a right for the Attorney General to be consulted and informed about difficult, sensitive and high profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day to day running of the organisation”.¹³

15. During his period of office, Lord Goldsmith emphasised this dimension of his role. He told the Committee that it had been “one of my highest priorities as Attorney General to strengthen and improve the prosecution service. I set out my vision at the start of my term and have devoted much time and effort to it”.¹⁴ He added: “When I came in to this job...we had a prosecution service...which had never really fulfilled its proper functions...it was under-funded, under-managed, under-resourced and...very lacking in confidence. I believe, not just because of what I have done, although I have done a lot of it in the last five and a half years, it is now a service which is confident, which has increased resources and which has increased powers and responsibilities”.¹⁵ Although the Attorney General’s superintendent functions are exercised independently of his functions as a Government minister who is jointly responsible for criminal justice with the Home Secretary and the Lord Chancellor, Lord Goldsmith claimed that his position as a minister had enabled him to achieve significant improvements in this area: “I do not believe that those changes to the prosecutors would have taken place unless there had been someone in Government, able to talk to the minister from the Prime Minister down about the need to find those resources...”¹⁶

Arbiter of the public interest

16. In exercising his function as superintendent of the prosecution agencies, the Attorney General has to take particular responsibility for ensuring that the public interest is taken into account when deciding about whether or not to bring or discontinue prosecutions. In 1951, Sir Hartley Shawcross, the then Attorney General, made the classic pronouncement on the public interest and his role in exercising his prerogative and statutory responsibility in relation to prosecutions,¹⁷ which has been supported by Attorneys General ever since: “it

12 Ev 58

13 Ev 58 for a more detailed discussion see Joshua Rozenberg, ‘The Director and the Attorney’ in *The Case for the Crown* (1987), pp. 179-189; and see Q 217

14 Ev 58

15 Q 39

16 Q 39

17 John Edwards, *The Attorney General, Politics and the Public Interest*, (1984), p 318

has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution".¹⁸ He continued:

“The true doctrine is that it is the Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have on public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may...consult with any of his colleagues in Government, and indeed...he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.”¹⁹

17. In practice, the current Code for Crown Prosecutors identifies a two stage test as to whether prosecutors should proceed with a prosecution. The first is the evidential test, which asks whether there is enough evidence to secure a conviction. The second is that a prosecution must be in the public interest.²⁰ The CPS code states that:

“the public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.”²¹

Ultimately, it is for the Attorney General to take responsibility for this decision.

Representing the public interest in civil proceedings

18. Apart from superintending the prosecution agencies, the Attorney General has a variety of other responsibilities and powers to safeguard the public interest in individual cases, e.g. the 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, most importantly, the power to bring or intervene in other legal proceedings in the public interest.²² In cases of major importance the Attorney General may represent the Government in the hearing in person.

18 HC Deb, 29 January 1951, column 681

19 HC Deb, 29 January 1951, cols 683-684

20 [cps.gov.uk/victims_witnesses/codetest.html](https://www.cps.gov.uk/victims_witnesses/codetest.html)

21 [cps.gov.uk/victims_witnesses/codetest.html](https://www.cps.gov.uk/victims_witnesses/codetest.html)

22 Ev 60

Responsibilities on behalf of Parliament

19. The Attorney General has additional responsibilities in relation to Parliament covering the constitution and conduct of proceedings in Parliament, including: questions of parliamentary privilege; the conduct and discipline of Members; and the meaning and effect of proposed legislation. The Attorney General may intervene in court proceedings to assert the privileges of either House, either of his or her own motion or, more usually, at the request of the House authorities or indeed the trial judge. Such cases have usually arisen where parties seek to question proceedings in Parliament contrary to Article IX of the Bill of Rights. In that way, the Attorney performs the important function of representing the interests of Parliament in the courts.²³

Responsibility as criminal justice minister

20. As part of the trilateral responsibility for the criminal justice system in England and Wales between the Lord Chancellor and Secretary of State for Justice,²⁴ the Home Secretary and the Attorney General, the latter also exercises a political role as a criminal justice Government minister. Together with the two Ministers of the Crown with responsibility for criminal justice and other ministers and officials, the Attorney General sits on the National Criminal Justice Board; he also has shared responsibility for the cross-departmental Office for Criminal Justice Reform, which is now ‘domiciled’ in the new Ministry of Justice. The Attorney General therefore participates in the formulation of criminal justice policies.

A “Guardian of the Rule of Law”?

21. In addition to his role in defending the public interest in the exercise of his responsibilities, Lord Goldsmith considered that ‘upholding the Rule of Law’ was one of his key functions.²⁵ He identified this role as “most obviously my role as the Government’s chief legal adviser, although it goes wider”.²⁶ In oral evidence to the Committee, Lord Goldsmith identified three specific elements in relation to his role in upholding the Rule of Law. The first aspect he identified was compliance with the law, “that means domestic and international obligations”.²⁷ The second aspect was the relationship with the courts, which he defined as “partly respect for the courts and their judgments” but also about “being sure within appropriate boundaries...we subject ourselves as Government to the scrutiny of the independent courts”.²⁸ The third element was identified as “certain basic values which it is important to stand up for. Quite a number of them are to be found, of course, in the European Convention”.²⁹

23 Oral evidence taken before the Joint Committee on Parliamentary Privilege, HC (1998-99) 21-II and HL (1998-99) 43-II, Q 231

24 Changed from Secretary of State for Constitutional Affairs on the 9 May 2007.

25 Ev 59

26 Ev 59

27 Q 6

28 Q 6

29 Q 6

Conclusion

22. The Attorney General's functions can be divided into two distinct categories: the first relates to legal decisions about prosecutions on a technical basis, frequently made by legal staff working under his superintendence. These may involve underlying political considerations either relating to policy more generally or to specific cases. However, this system is not transparent, and the division of the responsibility and lines of accountability between the Attorney General and the Directors of the various prosecution agencies is unclear. For example, in giving oral evidence to the Committee, Robert Wardle, the Director of the Serious Fraud Office, made it clear that it was his decision to halt the investigation into the BAE Systems case. However, the then Attorney General, Lord Goldsmith also made it clear to the Committee that had there been disagreement between himself and the Director, the final decision would rest with the Attorney General³⁰, and that he would have halted the investigation on different grounds.³¹ The lines of accountability were further blurred by the fact that the Attorney General sought his own independent legal advice in this particular case.³²

23. The second range of functions involves more traditional ministerial duties such as managing resources and accounting to Parliament and the public for policy and the use of public funds. We note the evidence of Lord Goldsmith in relation to the need for ministerial direction in the context of improving the work of the Crown Prosecution Service.

24. While we accept that there has to be some ministerial policy direction for the prosecution services, the lack of transparency in the Attorney General's role in decision making in prosecutorial decisions is unsatisfactory. We need to consider whether responsibility for both types of function should remain the responsibility of the Attorney General.

Changes to the institutional landscape affecting the Attorney General's role

25. Recent reforms to the institutional landscape have given rise to questions about the status and functions of the Attorney General, in particular the Constitutional Reform Act 2005 and the creation of the Ministry of Justice.

The Constitutional Reform Act 2005

26. The Constitutional Reform Act 2005 brought about a series of changes to the role of the Lord Chancellor, which have had both a direct and indirect impact on the Attorney General, specifically in his duty to uphold the Rule of Law. Professor Jowell argued that as a

30 Q 355

31 Q 14

32 Q 256-259

result of the 2005 Act, the constitutional balance had indeed been “radically altered”.³³ Lord Goldsmith explained:

“The Constitutional Reform Act effected important, far reaching and irreversible constitutional change. It has created an independent judicial appointments commission; strengthened the independence of the judges; broken the link between the judiciary and parliament, turning the House of Lords in its judicial capacity into a Supreme Court to operate from its own building from 2009. But above all it was the changes to the role of the Lord Chancellor; the abolition of his traditional position as the head of the judiciary as well as a member of the Cabinet and effective Speaker of the House of Lords...and removing effectively his power to choose judges at will”.³⁴

In doing so, the Constitutional Reform Act 2005 removed the Lord Chancellor from the position of being the Head of the Judiciary and from being subject to the judicial oath. Section 14 of the Constitutional Reform Act 2005 amended the text of the Lord Chancellor’s oath, making specific provision that the Lord Chancellor had a duty to uphold the Rule of Law.³⁵

27. Lord Goldsmith argued that this specific change had a potential impact on the role of the Attorney General in relation to his duty in upholding the Rule of Law. In this respect he argued that the Act “was a little odd in focusing on the role of the Lord Chancellor alone,” and agreed with Lord Goodhart’s statement that “...by changing the role of the Lord Chancellor, it has indirectly and consequently changed the role of the Attorney General”.³⁶ Lord Goldsmith explained his position further in a speech entitled *Government and the Rule of Law in the Modern Age*. He stated that:

“[...] The Law Officers play a key role as advisers on the most sensitive and difficult issues; as scrutineers of departmental analysis of ECHR compliance; and as superintending ministers for the legal services provided in Government. I superintend, for example, the Treasury Solicitor — the largest provider of legal advice to Government outside prosecutions. So I regard one of my responsibilities as Attorney General to uphold the Rule of Law. It was interesting therefore to note that when it came to the debates on the Constitutional Reform Act little attention was given by many to this aspect. Given that it is no part of the Lord Chancellor’s role to advise Government, the role of the Law Officers — who are regarded as the final authorities on legal issues in Government — deserved perhaps greater note.”³⁷

28. When giving oral evidence to the Committee, Lord Goldsmith re-emphasised his responsibility to uphold the Rule of Law:

33 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006, p.12

34 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 7

35 Ibid

36 Attorney General, *The Role of the Attorney General in Changed Constitutional Circumstances*, Birmingham College of Law. 29 November 2006, p. 9

37 Attorney General, *Government and the Rule of Law in the Modern Age* 22, February 2006

“It is not the responsibility of the Lord Chancellor to advise on the law and he does not tender legal advice to the Government. It is very important that the Lord Chancellor role is there, and traditionally it always has been, but I have always regarded a part of my role as upholding the Rule of Law. I am the one who gets called upon to give advice. I am the one who has overall responsibility for supervising Government litigation in which issues about the Rule of Law constantly crop up. Parliamentary Counsel raises concerns about the propriety or legality of proposed legislation to me, not to the Lord Chancellor. I advise the Legislative Programme Committee on whether there are issues of propriety or not. So I think the role is already extremely important in terms of the Rule of Law.”³⁸

However, the responsibility that Lord Goldsmith claimed for upholding the Rule of Law does not require the provision of new powers or responsibilities in respect of the Rule of Law. Rather, this duty provides the framework within which the Attorney General has to exercise his many responsibilities.

29. In his written submission to the Committee, Lord Goodhart QC explained that while the Act had placed an express obligation (sections 1 and 17) on the Lord Chancellor to respect the Rule of Law and, together with all other Ministers, to respect judicial independence (section 3), he also identified that “the effect of the Act as a whole is to convert the Lord Chancellor from being a Minister with a judicial as well as political role (including making judicial appointments) and standing at a distance from mainstream politics into a straightforward departmental Minister who does not need to have a legal qualification and may sit in the House of Commons”.³⁹ Since Lord Goodhart submitted this evidence, a Secretary of State for Justice and Lord Chancellor has been appointed who, although a barrister, only practised for two years.⁴⁰

The Creation of the Ministry of Justice

30. On 9 May 2007 the Government implemented a significant machinery of government change which had a major impact on the delivery of criminal justice policy. The Home Office was effectively split into two, and while it retained responsibility for policing and counter-terrorism, responsibility for the prison and probation services were transferred to the new Ministry of Justice. This was a new department which replaced the old Department for Constitutional Affairs.

31. In responding to these changes, Lord Goldsmith emphasised the points which he had made earlier in respect of the Constitutional Reform Act 2005:

“It is clear that the Ministry of Justice will now be a major policy department and its Secretary of State need no longer be a lawyer. In these circumstances the case for retaining the role of the Attorney General as a senior lawyer in Government becomes in my view all the stronger. For better or worse Government operates in a world where the law, and the need for the Rule of Law, plays an increasingly important

38 Q 106

39 Ev 49

40 Rt Hon Jack Straw MP

functions' in relation to criminal justice policy (a party political role). In our view, the time has come to reform the basis on which he or she carries out his or her functions and to define more clearly the extent of his or her role.

3 Recent Controversies around the Role of the Attorney General

35. While it is clear to us that the constitutional arrangements for the Attorney General are in need of reform, the impetus for reform of the post has increased as a result of the Attorney General's involvement in three recent high profile and controversial matters, which have brought the inherent contradictions in the constitutional role of the Attorney General into sharp focus: the BAE inquiry; his advice on the invasion of Iraq; and the 'cash for honours' police inquiry.

36. Several commentators have made the point that the Attorney General's office offends the separation of powers.⁴⁹ Not least of these was the former Attorney General Lord Shawcross, following a number of incidents in the late 1970s where the then Attorney, Rt Hon Sam Silkin, declined to prosecute the Clay Cross Councillors or to prosecute the Post Office Union for its unlawful boycott of mail to South Africa during the apartheid era.⁵⁰

37. In evaluating Lord Shawcross's claims, Professor Jowell concluded that "no doubt then, as nowadays, the allegations of actual bias were false but the issue is not the reality of bias but its appearance: does the Attorney's action or inaction leave a doubt in the public mind about whether his opinion was driven by law or political convenience"?⁵¹ In commenting on the example of the Attorney General's advice on the legality of the war in Iraq, Professor Jowell argued that the case illustrated the "inherent tension and that the dual political and legal role of the Attorney inevitably lends itself to charges of political bias in legal decisions".⁵² This, he argued, has resulted in claims that "the time had come to appoint an independent Attorney, as in other countries".⁵³

The 'Cash for Honours' Investigation

38. In March 2006 it emerged that the Labour Party had been the recipient of a number of secret loans in the run up to the 2005 General Election and that some of the donors had been offered peerages. Angus MacNeil MP wrote to the Metropolitan Police asking them to investigate whether the Honours (Prevention of Abuses) Act 1925 which banned the sale of honours had been broken. Investigations have also focused on whether the Political Parties Elections and Referendums Act (PPERA) 2000 was breached and whether there had been conspiracy to pervert the course of justice.⁵⁴ The case file was handed to the Crown Prosecution Service (CPS) on 20 April 2007,⁵⁵ and on 4 June 2007 the CPS asked

49 For example, Lord Woolf in his Hamlyn lectures, Lord Steyn in a lecture to the Administrative Law Bar Association.

50 Ev 61

51 Professor Jeffrey Jowell QC, *Politics and the Law: Constitutional Balance or Institutional Confusion*, the JUSTICE Tom Sargant Memorial Annual Lecture, 17 October 2006

52 Ibid

53 Ibid. Some Commonwealth countries do have Attorneys who combine the legal and political roles but others (such as Ireland, South Africa and India) do not.

54 http://news.bbc.co.uk/1/hi/uk_politics/4812822.stm

55 http://news.bbc.co.uk/1/hi/uk_politics/5174108.stm

the police to “undertake further inquiries”.⁵⁶ The possibility that senior Government colleagues or their aides and officials might be prosecuted has raised fundamental questions about a potential conflict of interest for the Attorney General, if faced with a decision of whether or not to pursue a prosecution.

39. In the course of our inquiry into Party Funding⁵⁷ Andrew Tyrie MP asked the then Lord Chancellor the following question relating to any possible prosecutions arising from the police inquiry into allegations of the sale of public honours and other matters:

“.. can you give the public an assurance that the Attorney General will not interfere in any way with the conclusions of the DPP and that the DPP would be permitted, were there to be something brought to him, to take any decisions for prosecution wholly independent of the Attorney General?”

Lord Falconer replied:

“Of course. It is a matter for the DPP and the Crown Prosecution Service to make decisions in relation to this in the normal way and, of course, the Attorney General would not interfere in the normal course of decisions being made.”⁵⁸

40. We took this to mean that the Attorney General would not be involved in the decision as to whether there should be a prosecution or not. However, in the light of later public statements made by the then Attorney General about his duties in relation to decisions about prosecutions arising from the police inquiry, the Chairman of the Committee wrote to the then Lord Chancellor seeking clarification of his answer. We received a letter in reply from Lord Falconer and subsequent correspondence from the then Attorney General.⁵⁹ In his letter of 7 December, Lord Goldsmith said:

“However, I know the Lord Chancellor well understands that he was not in a position to give an ‘assurance’, as you have termed it, as to how I would act. No other Minister, however distinguished or senior, has the ability to bind the Attorney General in how he exercises his role.”⁶⁰

41. When giving oral evidence to the Committee, Lord Goldsmith gave the following commitment: “...if it is referred to me then my office will appoint independent leading counsel to advise, and, I make clear, in the event that there is not a prosecution then I will make public that advice. That will mean that the public will know openly, it will be transparent, what the reasons are and why”.⁶¹ He confirmed that this would mean “the whole of the advice which relates to the decision not to prosecute”.⁶² Lord Goldsmith also

56 <http://news.bbc.co.uk/1/hi/uk-politics/6718417.stm>

57 Constitutional Affairs Committee, *Party Funding-oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

58 Q 97

59 Constitutional Affairs Committee, *Party Funding-oral evidence from the Lord Chancellor on the role of the Attorney General*, First Special Report of Session 2006-07, HC 222

60 Ibid

61 Q 46

62 Q 49

