



The Government's Response  
to the Justice Committee Report  
on the Draft Constitutional Renewal Bill  
(provisions relating to the Attorney General)



The Government's Response to the Justice  
Committee Report on the Draft Constitutional  
Renewal Bill (provisions relating to the Attorney  
General)

Presented to Parliament by the Attorney General by Command of  
Her Majesty the Queen

July 2009

Cm 7689

£5.50

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ISBN: 9780101768924

## Introduction

In its response<sup>1</sup> to the report of the Constitutional Affairs Committee on the role of the Attorney General,<sup>2</sup> the Government welcomed the Committee's contribution to the debate on the role of the Attorney General and looked forward to considering the Committee's comments on the Government's proposals for reform of the role of the Attorney General as set out in its White Paper<sup>3</sup> and the draft Constitutional Renewal Bill published alongside it.

The Justice Committee published its report *Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* on 24 June 2008.

Once again the Government greatly appreciates the Committee's commitment and contribution to the debate on the role of the Attorney General. The Government is grateful to the Committee for the time and effort that it has put into the preparation of this Report, as it is grateful to those who gave evidence to the Committee. This contribution has played a crucial part in the comprehensive public debate on the role of the Attorney General that the current Attorney called for when the consultation exercise was started in July 2007, and we were also greatly assisted by the report of the Joint Committee.

The Government is also grateful to the Committee for its forbearance while waiting for this response to its Report.

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<sup>1</sup> **The Government's response to the Constitutional Affairs Select Committee Report on the *Constitutional Role of the Attorney General*, Cm 7355 April 2008**

<sup>2</sup> **Constitutional Affairs Committee, Fifth Report of Session 2006-07, *Constitutional Role of the Attorney General*, HC 306**

<sup>3</sup> ***Governance of Britain: Constitutional Renewal* published 25 March 2008**

## **Summary**

The Government's settled view is that the Attorney General should remain the Government's chief legal adviser, a Minister and member of one of the Houses of Parliament, and that the Attorney General should continue as the Minister responsible for superintending the prosecuting authorities.

That is not to say that important changes are not needed; the Government is clear that reform is required to clarify the Attorney General's role and make it more transparent, with the result that public confidence in the role will be enhanced. To that end certain changes have been, or will be, made principally in relation to the Attorney General's role as superintending Minister of the prosecution authorities. As no change in the law is required to bring about these significant reforms the Government has decided not to bring forward any legislation relating to the Attorney General.

## **Response to comments and recommendations of the Committee**

In some instances one response has been provided for several recommendations.

### **Recommendation 2**

*The Attorney General's role should be more clearly defined and the conventions which affect the Office should be comprehensively set out. The Draft Bill provides an opportunity to do this. (Paragraph 34)*

### **Recommendation 3**

*The Draft Bill only partly addresses the major problem identified in the Constitutional Affairs Select Committee's Report on the Constitutional Role of the Attorney General: the difficulty of combining the political and legal duties of the Attorney General. (Paragraph 39)*

### **Recommendation 4**

*The Draft Bill does not provide for a clear split in the role to create a non-political legal adviser and refer the political duties to a minister in the Ministry of Justice; therefore the ambiguity of the Attorney General's position in the public eye remains. As a consequence the Draft Bill does not fully satisfy the concerns previously expressed by the Constitutional Affairs Select Committee about the need to reform the office and restore public confidence in the office of Attorney General. (Paragraph 40)*

The Government remains of the view for the reasons set out in the White Paper (at paragraph 51) that the Attorney General should remain both chief legal adviser to the Government and a Minister and member of one of the Houses of Parliament.

## **Recommendation 5**

*The Draft Bill transfers powers over individual cases to the Directors, except where the Attorney General retains specific consent functions. We approve. (Paragraph 42)*

In order to increase public confidence, the Government is of the view that some clearer delineation between the functions of the Attorney General and of the prosecuting authorities is needed; that while the Attorney General should continue to superintend the prosecuting authorities, there should be greater clarity in the separation of the role of Minister with responsibility for the prosecution system and that of making decisions in individual prosecutions.

There has been doubt as to the meaning and extent of the power of superintendence in relation to individual prosecutions and the Government acknowledges that there needs to be particular clarity about the Attorney's role in individual prosecutions. The Attorney General announced in 2007 that while the Government consulted on reform of the role she would not make key prosecution decisions in individual criminal cases except if the law or national security requires it. The Attorney General intends to continue with this practice. The Government does not believe that it will be necessary to make any legislative changes in this area.

The Government believes that, through the protocol between the Attorney General and the directors of the prosecution authorities, the meaning of superintendence will be better understood. This will also bring greater clarity between oversight of the system and decisions in individual prosecutions.

Of course the power to give a direction, which derives from the superintendence relationship between the Attorney General and the Directors, is distinct from the Attorney General's function of giving consents to prosecutions. The Government's view on consents is that in due course some will need to be abolished and others transferred. Work will continue on this and such abolition or transfer achieved when there is parliamentary time.

## **Recommendation 6**

*We see no reason to give the Attorney General special powers to direct the SFO to discontinue investigations (as opposed to proceedings.) The work of the SFO should be placed on the same footing in this respect as the other prosecution agencies. (Paragraph 45)*

The functions of the DPP and the Director of Revenue and Customs Prosecutions are essentially limited to criminal prosecutions; the functions of the Director of the Serious Fraud Office cover investigations as well as prosecutions. All the Directors discharge their functions under the superintendence of the Attorney General. That superintendence extends further in the case of the Director of the Serious Fraud Office, commensurate with his extra responsibilities.

## **Recommendation 7**

***We see no case for the inclusion of the ouster clause. (Paragraph 51)***

With no provisions in the Bill on the role of the Attorney General this recommendation has been superseded.

## **Recommendation 8**

*Our predecessor Committee concluded in its Report on the Constitutional Role of the Attorney General that there should be power to give directions to end prosecutions in the national interest; there is a clear case for such a power, whether it is exercised by the Directors or by the Attorney General. However, the provisions relating to giving directions to halt proceedings or investigations by the SFO give rise to particular concerns:*

- The scope of the powers is too broad, since they are based on the Attorney General being "satisfied" which, in conjunction with the power to issue a certificate which is conclusive evidence of the need to make the direction, allows the Attorney General (and the Government on whose behalf the Attorney General acts) to take action in a controversial area without accountability in the courts.*
- The accountability to Parliament cannot be a sufficient safeguard since the Reports to Parliament are unlikely to contain all the information relating to making the decision to halt proceedings or an investigation. (Paragraph 52)*

Likewise with no provisions in the Bill on the role of the Attorney General this recommendation has been superseded. The Attorney General has reserved the right to take key decisions in individual criminal cases if national security requires it.

### **Recommendation 9**

*We cannot comment on the draft of the protocol, since it is not yet prepared. We very much regret that the Draft Bill has been put before Parliament for consideration before a draft of such an important document is ready. The protocol should be published well before the Bill is introduced in the Autumn. (Paragraph 58)*

The Government intends to publish the Protocol shortly. It has been developed jointly by the Attorney General and the prosecuting authorities.

### **Recommendation 10**

*Although the Directors do not have to obey the protocol in each and every case they are bound to have regard to it. The Draft Bill gives significant power to the Attorney General to dismiss a Director on the basis of failure to have regard to the duty to obey an, as yet unwritten, protocol. This leaves the position of the Directors unclear. The Directors ought to have clearer security of tenure than is apparent in the Draft Bill. (Paragraph 63)*

The terms of appointment of the Directors and the grounds for dismissing will continue to be settled by the Attorney General in accordance with existing legislation. The Government believes that the Directors should be able to serve more than one term but that only one reappointment should be possible. It is intended that in future Directors will be offered a five year contract with the prospect of renewal for a further two years.

The protocol has been developed in close consultation with all the Directors who unequivocally support it. It will set out how the superintendence relationship between the Directors and the Attorney General will work.

### **Recommendation 11**

*We approve of the proposed reform to the Attorney General's functions in relation to consent to prosecution. (Paragraph 65)*

The Government considers that in the long term some consents to prosecute need to be abolished or reallocated to the Directors to provide the safeguards that Parliament intended and this work will continue and be completed when parliamentary time allows.

### **Recommendation 12**

*We are uncertain of the utility of the proposed abolition of the nolle prosequi, given that it is not clear by what it will be replaced. This reform is of little practical importance, given that it is so infrequently used, but it will in a small way remove some power over prosecutions from the Attorney General. (Paragraph 69)*

The Government has further considered the power to enter a nolle prosequi and come to the conclusion that it should be retained. The power is not used very often, indeed very sparingly, and usually only in a case where a defendant is ill and there is no other way of bringing the proceedings to an end. The Government has decided that the power serves a useful purpose and so does not intend to abolish it.

### **Recommendation 13**

*It is hard to gauge what the new Annual Report would add to the existing system. Without further information we are unable to reach a firm conclusion about whether it will significantly add to the process of accountability of the Attorney General. (Paragraph 71)*

The Government considers that the Attorney General's Annual Report is an important part of her accountability to Parliament. The Attorney General may of course be constrained in what she can disclose to Parliament: legal professional privilege, the need to protect national security or international relations, and the need to avoid prejudicing a trial or investigation might all impose limits on what the Attorney General can say. But the Government considers that the Annual Report will enhance transparency and accountability and therefore public confidence in the Attorney General's role.

### **Recommendation 14**

*The question of publishing the Attorney General's legal advice is difficult. But we note the scope for enhancing public confidence if it were to become the practice to publish all or most of an advice where it is referred to in support of a political case being put forward by the Government. (Paragraph 75)*

The Government continues to believe it is necessary to be able to ask for and receive legal advice in confidence. Consequently it does not believe that it is in either the public interest or the interests of good governance for that legal advice to be routinely published. In exceptional cases the Government may be prepared to waive legal professional privilege and disclose the advice that it has received. But ordinarily the Government considers that the right balance will be struck by the Government explaining the legal basis for its decisions, rather than disclosing the advice itself.

### **Recommendation 15**

*The Report of our predecessor Committee recommended that the provision of legal advice and legal decisions on prosecutions should rest with someone who was appointed as a career lawyer and who was not a politician while the Attorney General's ministerial functions should continue to be exercised by a minister. The Government has not found an alternative model which would offer the same degree of assurance to the public that legal advice and decisions are genuinely independent. (Paragraph 81)*

The Government believes that the Attorney's roles as legal adviser and Minister can enhance each another; it does not accept that exercising a ministerial role is inconsistent with the exercise of total independence in her public interest and legal role.

### **Recommendation 16**

*The Ministerial role of the Attorney General in relation to criminal justice policy should be separated from the role of legal adviser. (Paragraph 88)*

The Government does not accept that the Attorney General's role as legal adviser should be separated from the ministerial role in relation to criminal justice policy. The Government considers that the roles strengthen one another. The Government is of the view that the Minister who superintends the prosecuting authorities should be the Attorney General, combining the function of independent lawyer with that of guardian of the public interest.

### **Recommendation 17**

*There is no need for a specific Committee to scrutinise the Attorney General—we have that function and look forward to exercising it increasingly. (Paragraph 89)*

It is of course for Parliament to decide the best means for holding the Attorney General to account and the Government has made it clear before that it will co-operate with whatever mechanisms for scrutiny that Parliament creates.

### **Recommendation 18**

*The functions of the Attorney General in relation to safeguarding 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 functions could be better performed by a non-political office holder. (Paragraph 92)*

The Government considers that through combining the roles of the Attorney General, legal adviser, Minister, guardian of the public interest, each is strengthened. To move the public interest functions to a non-political office holder could diminish the importance of those functions, and remove accountability.

### **Recommendation 19**

*We favour a statutory duty being placed on all ministers to observe the Rule of Law. An Attorney General (whether political or not) could still be the active conscience of Government—if the Attorney General's advice is not taken, then that would be a political decision for which the Government would take responsibility. The Attorney General's oath of office should be reformed to cover the duty to uphold the Rule of Law. (Paragraph 96)*

The Government will be modernising the oath of the Attorney General to refer explicitly to respecting the rule of law.

### **Recommendation 20**

*We recommend that the Joint Committee, when it looks at the totality of the provisions of the Bill, considers whether any of them could be made more specific in order to reduce the area in which Clause 43(1) would operate. (Paragraph 99)*

Not for Government comment.

## **Recommendation 21**

*The Draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister: it gives greater power to the Executive and it does not sufficiently increase transparency. (Paragraph 106)*

The changes to the role of the Attorney General that the Government proposes do not give greater power to the executive, but greatly enhance transparency and accountability. The Government's intention in looking at the role of the Attorney General was to address those areas where there was potential for conflict while enhancing the administration of justice, the maintenance of the rule of law and the protection of the public interest.

Printed in the UK by The Stationery Office Limited  
on behalf of the Controller of Her Majesty's Stationery Office

ID 621302 07/09 139 19585

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ISBN 978-0-10-176892-4

