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**House of Lords Constitution Committee inquiry into the Role of the Lord
Chancellor and the Law Officers**

INTRODUCTION

1. I have been invited by the House of Lords Constitution Committee to give oral evidence to aid their inquiry into the current role of the Lord Chancellor and Law Officers. These submissions are intended to supplement my oral evidence.
2. My submissions are organized around the following questions:
 - (i) *How is the rule of law being protected within the Government, and how do the Law Officers ensure this?*
 - (ii) *Is it appropriate or helpful for the Law Officers, as Government legal advisers, to be politicians serving in Government?*
 - (iii) *Would it be preferable for the Law Officers' role in advising the Government to be separated from that of political Government ministers, i.e. independent roles unaffiliated to a political party?*
 - (iv) *What are the constitutional boundaries that constrain the Law Officers?*

SUMMARY

1. The Law Officers, along with hundreds of career civil service lawyers in the Government Legal Department, play a critical role upholding respect for the rule of law within Government. Career lawyers deal with the bulk of the legal questions facing Government departments whereas the Law Officers provide advice in respect of a small sub-section of legal questions; typically, the most sensitive and politically salient.
2. Together, these lawyers help uphold the rule of law within Government by scrutinising policy decisions and draft legislation for compliance with statutory *vires*, the Human Rights Act 1998, rule of law values like promoting prospectivity and legal certainty, and international law.
3. Proponents of the status quo make several arguments against significant reform of the Attorney General's Office. First, they argue the history of the Law Officers demonstrates they can, for the most part, maintain careful balance when simultaneously carrying out their role as legal advisor and guardian of the public interest/rule of law on the one hand, and their position as a member of Government on the other. No evidence has been advanced that actual bias or partisan concerns has influenced the legal advice of successive Law Officers.
4. Second, defenders of the status quo argue the political dimensions of the office are *complementary* to the Attorney's role as legal advisor. The political aspect of the role is said to provide the Attorney General with tacit and intimate knowledge of the policy goals and priorities of her ministerial and party colleagues and the political pressures they are under. This in turn aids

her task of offering constructive advice which can speak to both the constraints her colleagues are bound by, and any possible lawful and proper alternatives they can avail of so they might still advance their policy agenda.

5. Third, proponents of the status quo argue it maintains democratic accountability. The Law Officers do not handle the routine legal questions faced by Government; instead, they handle the most controversial and politically salient legal questions. They also settle the most contested questions, for example where advice given by government lawyers advising different departments conflicts. Some commentators maintain it is appropriate for these kinds of sensitive legal questions – which can have wider policy and political repercussions – be determined, in the last, by a legal figure who is ultimately democratically accountable to Parliament.
6. For others, the UK's dual legal-political model of chief legal advisor is imprudent as its political dimension invites unacceptable risks. Potential risks include that of actual politicisation of legal advice, or the public perceiving legal advice to be politicised. There is scant evidence for the former concern, and even proponents of reform do not attribute actual bias to successive Attorneys General when dispensing advice. However, the latter concern, of the risk of perceived politicisation, certainly has reasonable grounds. Debates over reform must therefore grapple with the question of whether an ultimately mistaken – but perhaps still damaging – perception of politicisation is sufficient justification for far-reaching reform. Codification of the Law Officers role and responsibilities in a document akin to the *Ministerial Code* may well be a less radical way to address such concerns.
7. Another reasonable concern is that high levels of confidentiality over legal advice might make the Attorney General's purported democratic accountability more illusory than real, given that Parliament cannot scrutinise advice for potential partisan influence if it cannot see it. Again, while this concern has a point, it is one that can plausibly be addressed by measures far short of radical reform. For example, by permitting the disclosure of the details of legal advice to inform debate and aid parliamentary scrutiny in cases of exceptional public importance. The convention against disclosure has not been absolutely enforced in recent decades, and it may be worth consciously examining and outlining its current parameters to see if the clear need for confidentiality of legal advice can be qualified in a limited way by concerns for democratic accountability.
8. I do not make substantive arguments for, or against, replacing the UK's current model with an apolitical chief legal advisor drawn from the civil service or private practice. Rather, I stress it is critical for legislators to recognise the ways in which any proposed reform in this direction would involve very difficult trade-offs; between values and principles like legal expertise, concern for the rule of law, independence from partisanship, concern for the government's ability to implement policy for the common good, and democratic accountability.
9. Some legal systems – like Ireland, Japan, and Israel – do opt for non-elected career lawyers to serve as chief legal counsel to government, with moderate to very high levels of insulation from politics. This more apolitical and

technocratic model has several obvious qualities. An entirely technocratic and apolitical system may act as a powerful safeguard against abuses of executive authority. They also ensure, whether by rule or convention, that the chief legal advisor will always be someone with very considerable professional expertise and gravitas. They may also decisively remove any *perception* the provision of legal advice or public interest functions have been subject the inappropriate politicisation.

10. However, such qualities must be balanced against potential costs. Highly technocratic and apolitical bodies may tend toward conservatism and caution when dispensing legal advice. This model may excessively legalise the democratic policymaking process, hamstringing the political branches from testing the boundaries of the law where it is uncertain, and, by privileging legal advice, prevent or impede good-faith dialogue between the political branches and Courts about matters such as the content of the law, the extent of constitutionally permissible change, or how the law should be best interpreted.
11. More generally, there can be democratic costs that accompany a highly technocratic and apolitical model, given that it will inevitably allow unelected legal advisors to wield considerable influence and power over the policymaking process. It may grant considerable and controversial influence over the functions of the elected branches to officials who will be, by deliberate design, largely unaccountable for their decisions.
12. It is therefore critical any proposed alteration to the office of Attorney General in the UK should have to pass through a well-rounded and clear-eyed assessment of the potential advantages and observable disadvantages (which are perhaps less commonly ventilated) that will accompany any new, apolitical, model.
13. Finally, I note that the current constitutional boundaries of the Attorney General's Office are policed by an admixture of safeguards. These include the personal integrity of the office holder, the possibility of political accountability, and a constitutional culture willing to sanction misuse of authority.

SUBMISSIONS

i. How is the rule of law being protected within the Government, and how do the Law Officers ensure this?

1. The *Ministerial Code* provides that the Government has an "overarching duty...to comply with the law and to protect the integrity of public life" when pursuing their policy goals and exercising their powers.¹
2. Parliament and the judiciary are the most visible actors helping ensure the Government adheres to the rule of law. The former by subjecting ministers to parliamentary scrutiny for their actions, the latter through the mechanism of judicial review.

¹ Ministerial Code (Cabinet Office 2020) para 1.3.

3. However, *within* the executive it is Government lawyers who are at the front-line of ensuring the rule of law is respected. Government lawyers ensure that concern for law and legality remain “ever-present considerations” for politicians and officials.²
4. The organization of Government lawyers in the England & Wales is somewhat complex but, for simplicity’s sake, can be pictured as having a pyramid-type structure.
5. At the base of the pyramid are career civil service lawyers who provide day-to-day legal advice to ministers and officials on countless legal questions. The Government Legal Department (“**GLD**”) - which has a staff complement of around 2000³ and is headed by the Treasury Solicitor⁴ - provides this function for most government departments and ministers. A minority of departments, like the Foreign Office and Cabinet Office, rely on their in-house departmental legal advisors. These lawyers play a critical role in ensuring that the routine work of dozens of departments– from administrative decisions to the formulation of legislation both primary and secondary – remains compliant with statute, human rights law, and constitutional conventions.⁵
6. Atop this base, at the apex of the Government lawyer pyramid, stands the Law Officers. This group includes the Attorney General for England and Wales, Solicitor General for England and Wales,⁶ and the Advocate General for Scotland (who advises the UK government on Scots law).
7. Today, the main function of the Law Officers is to serve as legal advisors to the Crown via her Prime Minister and the Cabinet. The Law Officers are, by convention, members of government but not members of cabinet.⁷ Traditionally, Attorneys General attended cabinet meetings on request as a need for advice arose.⁸ However, recent Attorneys General have reported that there is now an ‘expectation’ that the Attorney General will regularly attend cabinet meetings.⁹
8. The Law Officers handle only a small fraction of legal questions concerning the Government. Their advices concern the most difficult, pressing, and politically sensitive legal questions.¹⁰ Successive versions of the Cabinet Office’s *Ministerial Code* have referred to the importance of the Law Officers

² Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (The Constitution Unit, 2013) 94.

³ <https://www.gov.uk/government/publications/workforce-management-information-for-gld-ago-and-hmcpsi-201819>.

⁴ Barry K Winetrobe, ‘Legal Advice and Representation for Parliament’ in Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament* (Butterworths, 1998) 95.

⁵ Yong (n 2) 15-17.

⁶ The Attorney General of England and Wales also holds the Office of Advocate General for Northern Ireland and advises the UK government on Northern Irish law.

⁷ The Attorney General has not been a member of cabinet since 1928.

⁸ Elwyn Jones, ‘The Office of Attorney-General’ (1969) 27 *Cambridge Law Journal* 43, 47.

⁹ Conor McCormick and Graeme Cowie, ‘The Law Officers: A Constitutional and Functional Overview’ *House of Commons Library Briefing Paper* (May 2020) 49.

¹⁰ S S.C. Silkin, ‘The Function and Position of the Attorney-General in the United Kingdom’ (1978) 12 *Bracton Law Journal* 29, 34.

advice, and specified they must be consulted where: the legal consequences of action by the government have important policy repercussions; if a department legal advisor is unsure of the legality or constitutionality of legislation; if the *vires* of subordinate legislation is in dispute; or where two or more departmental legal advisors are in disagreement.¹¹ A request for legal advice may also be made directly to the Attorney General at cabinet level, particularly if it involves an issue on which the Prime Minister has taken a policy lead.

9. The Law Officers' decision is, by convention, accepted as binding, making it the last word on internal legal questions for the Government.

10. Here are some concrete examples of how Government lawyers, including the Law Officers, help protect the rule of law within Government:

- Departmental bills submitted to the Parliamentary Business and Legislation Cabinet Committee must be accompanied by a legal memorandum drafted by GLD advisors or other in-house advisors. This memorandum includes "full and frank assessment of legal risk" arising from the issues engaged by the bill,¹² including *inter alia* analysis of its compatibility with the Human Rights Act 1998.
- This memorandum is shared with the Law Officers, who also consider its HRA compatibility and satisfy themselves with the memorandum's cogency.
- The Law Officers also scrutinize bills for consistency with rule of law values by examining them for (a) potentially oppressive retrospective effect and (b) likelihood of early commencement before the typical two-month period post-royal assent elapses.¹³ In these circumstances, the Law Officers consent must be given for bills proceed to Parliament.
- Aside from questions arising under the HRA, Law Officers also advise on sensitive legal issues like the *vires* of secondary legislation and international law implications of Cabinet decisions, such as the legality of the use of armed force and proper legal interpretation of international treaties.

ii. Is it appropriate or helpful for the Law Officers, as Government legal advisers, to be politicians serving in Government?

11. In the next few paragraphs, I outline the strongest arguments in favour of the status quo.

¹¹ See Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers (Cabinet Office, London, 2001) para.22; Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers (Cabinet Office, 2005) para. 6.22-6.44; Ministerial Code (Cabinet Office, 2018) para. 2.10-2.13.

¹² 11.11.

¹³ 'Guide to Making Legislation' (Cabinet Office 2022) para 3.10.

12. Defenders of the current model argue that the history of the Law Officers demonstrates they can, for the most part, maintain careful balance when simultaneously carrying out their role as legal advisor and guardian of the public interest/rule of law on the one hand, and their position as a highly political animal and member of government on the other.
13. Some argue the Law Officers have largely been able to do their advisory and public interest work in a way that can withstand political pressure savouring of party advantage because of a combination of several factors. Namely, a combination of a supportive constitutional culture and tradition, a dedication by the Officers to constitutional norms of independence in functions concerning the public interest and rule of law, adherence to legal professional ethics, legal expertise, and above all, the personal integrity of the Officers.¹⁴
14. For example, successive Attorneys General have strongly rejected the notion partisan politics clouds their functions which implicate the rule of law, like giving legal advice. Instead, they maintain that when responding to legal queries they try to offer impartial detached advice in the manner of a professional lawyer's advice to any client: to give an objective and reasonable analysis of the law as they see it using their legal expertise and judgment.¹⁵
15. For the Law Officers, this sometimes involves seeking additional expert input, and in difficult cases it is not unusual for them to get preliminary advice from either the lawyers in their Office or "from a silk, and in particular from First Treasury Counsel"¹⁶ to aid their legal deliberations.¹⁷
16. The fact previous Attorneys General have felt confident in offering what they consider forthright politically detached advice, even if it might have unwelcome consequences for the Government, is perhaps testament to their ability to maintain a stance of detachment.¹⁸ A recent concrete example of this disposition in action can be seen with Attorney General Sir Geoffrey Cox QC MP's advice on the legal effects of the Northern Irish Backstop in the EU-UK Withdrawal Agreement; advice which undoubtedly proved a serious political thorn in then Prime Minister May's attempt to secure parliamentary approval for her Brexit deal.¹⁹
17. It is fair to say, however, that while they strive for political detachment when giving advice, Attorneys General do not regard themselves as legal

¹⁴ Conor Casey and John Larkin QC, 'Crossing the Line: The Attorney General and the Law/Politics Divide' *Policy Exchange: Judicial Power Project* (December 2022) 12.

¹⁵ Conor Casey, 'The Law Officers: The Relationship between Executive Lawyers and Executive Power in Ireland and the United Kingdom', in (Oran Doyle, Aileen McHarg, & Jo Murkens eds., 2021) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* 296; Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press 1999) 297.

¹⁶ The first treasury counsel is a barrister nominated by the Government to provide legal advice and representation in the most sensitive and impactful public law matters. It is invariably a barrister of considerable esteem.

¹⁷ Yong (n2) at paras 4.7 & 4.20.

¹⁸ Casey (n15).

¹⁹ Casey (n15).

technocrats. They instead seek to combine their professional expertise as trained lawyers with a desire to assist their ministerial colleagues in the common goal of implementing the Government's policy agenda.²⁰

18. Defenders of the status quo argue the political dimensions of the office are, in many respects, *complementary* to the Attorney's role as legal advisor. The political aspect of the role is said to provide the Attorney General with tacit and intimate knowledge of the policy goals and priorities of her ministerial and party colleagues and the political pressures they are under. This in turn aids her task of offering constructive advice which can speak to both the constraints her colleagues are bound by, and any possible lawful and proper alternatives they can avail of so they might still advance their policy agenda.²¹ In other words, they act as a "buffer between politicians and the lawyers" translating "purist legal thinking into something that ministers could understand."²²
19. The argument the political, ministerial, dimension of the Attorney General's work is complementary to their legal work has been endorsed (perhaps unsurprisingly) by several previous incumbents. Sir Geoffrey Cox MP QC, the most recent former Attorney General, stated that one of the advantages of having a political element is that the Officer "knows which issues his colleagues are struggling with, which issues have to be accentuated and emphasised to drive home the point, and which points are not necessarily so important."²³ Another relatively recent Attorney General maintained that while the legal advice they gave was not coloured by the political views they hold, it was also "important that all lawyers have the ability to give advice to their clients in ways that their clients find most useful. And it seems to me that having somebody who also has a political background enables the Law Officers to do that".²⁴ Yet another former Attorney General said his ability to give good legal advice was aided by his getting to know his colleagues "policies, their intentions, their methods, indeed their very temperaments and characters."²⁵ This former Law Officer added that the better an Attorney General is able to understand the "stresses and the strains" that eventually result in policy, the better able they are to "assist in ensuring that if there is a lawful and a proper way of achieving its objectives, that way will be found."²⁶
20. Several academic commentators have additionally observed how the political status of the Attorney General helps lend their advice weight and status.

²⁰ J LJ Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell 1984) 70. One former Attorney General argued that to be able to offer the most impactful and constructive advice a Law Officer must "know the colleague he is dealing with, and the colleague he is dealing with must know the Law Officer, and know him well enough to be able to place his trust in his experience, his wisdom, and his full-hearted desire to achieve the governmental objectives which unite them in a common Ministry". Casey and Larkin (n14) 12.

²¹ Yong, (n2) 61.

²² Yong (n2) para 4.8.

²³ Evidence of Sir Geoffrey Cox QC MP to House of Commons Justice Select Committee HC1887 Wednesday 23 January 2019.

²⁴ Evidence of Jeremy Wright QC MP to the House of Commons Justice Select Committee, 15 September 2015.

²⁵ Silkin, (n10) 37.

²⁶ Id.

Professors Daintith and Page write that, as politically responsible lawyers, the work of the Law Officers has a “special quality and status” amongst both their ministerial peers and other civil servant Government lawyers.²⁷ In Professor Yong’s 2013 study of Government lawyers commissioned by UCL’s *Constitution Unit*, the senior career civil service lawyers he interviewed all suggested the dual legal-political dimensions of the Attorney’s role were complementary.²⁸ Yong documents that those interviewed:

“[S]aw no need for reform. The key benefit, they argued, in having the chief legal adviser as a minister, was that he – or she – had knowledge of the political pressures on ministers, which in turn aided the Attorney General in carrying out the act of ‘translation’; but it also helped from the point of view of the Attorney General’s colleagues – it gave his or her advice more weight.”²⁹

21. In a similar vein, in written evidence supplied to this Committee in 2007, Professor Anthony Bradley doubted “whether an ‘independent’ lawyer outside the structure of central government and not holding ministerial office would command the authority that at present goes with the office of Attorney General.”³⁰

22. Another advantage advanced in favour of the status quo concerns accountability. As noted above, the Law Officers do not handle the routine legal questions faced by Government. Instead, they handle the most controversial and politically salient legal questions. They also settle the most contested questions, for example where advice given by government lawyers advising different departments conflicts. Some commentators, like the late Professor Bradley, maintain it is appropriate for these kinds of sensitive legal questions – which can have wider policy and political repercussions – be determined, in the last, by a legal figure who is ultimately democratically accountable to Parliament. As a minister, the Law Officers are ultimately accountable for their decisions and advice in a way that a career civil servant with statutory tenure protections will not be. One former Attorney General stressed the importance of the fact “[E]very decision which the Attorney-General takes, every piece of advice which he gives, every statement which he makes, is one for which in some form or other he may ultimately be held accountable in Parliament.”³¹

23. In sum, for proponents of the status quo, there is no convincing evidence that Attorneys General have failed (save for a handful of *allegedly* documented instances which are discussed below) to successfully balance the political and legal elements of their role in a manner justifying broad reform. On the contrary, they consider there is good reason to think having a democratically accountable politician-lawyer at the heart of Government decision making has been beneficial to upholding the rule of law and the

²⁷ Page and Daintith (n15) 297.

²⁸ Yong (n2) 4.9.

²⁹ Id.

³⁰ House of Lords Constitution Committee, ‘Reform of the Office of Attorney General: Appendix 2 Written Evidence by Professor Anthony Bradley’ (7th Report of Session 2007-2008) 25.

³¹ Silkin (n10) 38.

provision of independent, yet politically attuned and usefully constructive, legal advice.

iii. Would it be preferable for the Law Officers' role in advising the Government to be separated from that of political Government ministers, i.e. independent roles unaffiliated to a political party?

24. At the heart of intermittent political and academic calls to reform the Law Officers is a conviction that the incumbent dual legal-political model of the UK government's chief legal advisor is imprudent and should be reformed in favour of an apolitical model. In the next few paragraphs, I will outline the core arguments grounding this position.
25. The first thing to note is that critiques sometimes equivocate between two distinct risks associated with the Attorney's political dimension. One is that there is a risk the Attorney General will substantively allow partisan considerations to colour their legal advice.³² The other is that there is a risk the public may *perceive* advice to be politicised, which will undermine faith in the Office and in the Government's dedication to the rule of law;³³ perhaps breeding cynicism toward the notion of the rule of law itself.
26. It seems to me that there is a far stronger evidential basis for the latter concern than the former. To be sure, in the last several decades there have been several allegations of improper political influence being brought to bear on the Attorney General while discharging their independent functions. However, this has occurred mostly in the realm of prosecutorial decision-making, final say over which is near exclusively in the hands of the independent Director of Public Prosecution, save for a sub-set of exceptional cases implicating national security or which justify a *nolle prosequi*.³⁴
27. When it comes to the provision of legal advice however, there are only rare occasions where concerns about the actual politicisation of advice have been explicitly raised. The most prominent and well-trodden controversy being the long-running debate over whether political pressures were brought to bear on the Attorney General when he gave legal advice in the run up to the Iraq war.
28. This (hotly contested) outlier aside, no commentator of which I am aware maintains that successive Attorneys General have allowed partisan bias to substantively affect their work. For example, although the House of Commons Constitution Committee ultimately recommended reform of the Office back in 2007, neither it nor the respondents who supplied evidence to the Committee suggested actual politicisation was a concern.³⁵

³² Neil Walker, 'The Antinomies of the Law Officers' in (eds.) Maurice Sunkin and Sebastian Payne, *The Nature of the Crown* (Oxford University Press 1999) 161.

³³ House of Lords Constitution Committee, 'Reform of the Office of Attorney General: Appendix 3 Written Evidence by Professor Sir Jeffrey Jowell QC (7th Report of Session 2007-2008) 29.

³⁴ Alexander Horne, 'The Law Officers: Standard Note' House of Commons Library (August 2014) 8.

³⁵ UK Government, 'The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General' (April 2008) para 44; Ministry of Justice, 'The Governance of Britain – Constitutional Renewal' (March 2008) para 53.

29. The more well-grounded critique of the current model concerns the risks of *perceived* politicization. This is a concern advanced by several prominent commentators. Professor Sir Jeffrey Jowell QC, for example, argued that “where legal advice is proffered to the Government by a serving politician who is also a member of that government, that advice is vulnerable to being construed as influenced by partisan political considerations.”³⁶
30. I think this concern has a point. If one were to ask a reasonably informed observer - the proverbial person on the street - they would likely agree that it should be more difficult for a politician-lawyer to give objective detached legal advice to a party colleague - including their political boss - relative to an entirely apolitical official with civil service tenure protections. One benefit of a move to an apolitical technocratic model then is that it may definitively end any perception of politicisation of legal advice.
31. While such concerns are legitimate, it seems to me they must be weighed with several other considerations before they should be used to undergird calls for wide-reaching form. For a start, if one thinks the Office is largely functioning well and that there is no evidence of *actual* partisanship in its advice-giving work, then one may reasonably ask: is an ultimately mistaken perception of the Office a strong enough foundation on which to justify significant change to a long-standing constitutional institution?
32. To be sure, for some critics of the status quo, the risk of perceived bias or politicisation - whether factually misplaced or not - is indeed sufficient to justify reform.³⁷
33. But for its defenders, more evidence would have to be adduced as to the supposedly damaging quality of any perception of political bias - such as erosion of public or parliamentary faith in the Government’s commitment to the rule of law due to the Attorney General’s position - before reform of an otherwise well-functioning constitutional office should be grounded on such concerns. They might instead advocate less radical change to meet such concerns, such as a codified restatement of the Attorney’s role and responsibilities to accompany the *Ministerial Code* which stresses the independent aspects of their role.
34. Finally, proponents of reform might also point out that arguments in favour of the status quo based on the notion the Attorney General is democratically accountable to Parliament for their advice-giving role are grossly overstated. They are ostensibly overstated because Parliamentarians cannot truly assess, for example, whether there actually has been politicisation of legal advice because of the intense levels of confidentiality pervading the Law Officer’s work. There is clearly truth to this concern, given the constitutional conventions against both revealing that advice was given by the Officers and disclosing the content of the advice itself. Both conventions are quite

³⁶ Jowell (n33) 28. See also Walker, (n32) 149.

³⁷ Professor Jowell writes the “tradition of actual independence is not the only point here. The appearance of lack of independence is what matters. Justice must not only be done, but also seen to be done.” *Id.*, 29.

rigorously (though not absolutely) enforced, and this clearly militates against Parliament being able hold the Law Officer's accountable for the impartiality and cogency of their legal advice.

35. Again, while this concern has a point, I think defenders of the status quo can argue that less radical change might defuse it; for example, by consciously examining the parameters of the convention against the disclosure of advice. The last two decades have demonstrated that the convention against disclosing legal advice is not understood as absolute, as advice *has* been disclosed in full or precis form on several occasion. This includes advice concerning the Iraq war, use of armed force in Syria, and the legal effects of the Northern Irish Protocol.³⁸ Indeed, it is worth noting that in its 2009 response to the House of Commons Justice Committee Report on potential reform of the Office, the then Labour Government itself suggested that "in exceptional cases" it would be "prepared to waive legal professional privilege and disclose the advice that it has received."³⁹
36. Explicit recognition by the Government that disclosure of legal advice – in full or in precis form – may be constitutionally proper, in limited and exceptional circumstances, to aid parliamentary debate and scrutiny when it concerns issues of national importance, may take much of the sting from the critique the Attorney is not truly accountable for their advice-giving function.
37. I have so far set out what I consider the strongest arguments for and against the status quo in the UK.
38. In my remaining submissions on this question, I do not propose to offer substantive arguments for, or against, replacing the UK's current model with an apolitical chief legal advisor drawn from the civil service or private practice. Rather, I confine myself to stressing it is critical for legislators to recognise the ways in which any proposed reform in this direction would involve very difficult trade-offs; between values and principles like legal expertise, concern for the rule of law, independence from partisanship, concern for the government's ability to implement policy for the common good, and democratic accountability.
39. I think debate on these questions can overlook that there is no one size fits all approach for structuring the work of senior government legal advisors, but different models each entailing different kinds of advantages and risks. I illustrate this with some comparative constitutional examples.
40. Some legal systems – like Ireland, Japan, and Israel – do opt for non-elected career lawyers to serve as chief legal counsel to government, with very high levels of insulation from politics.⁴⁰

³⁸ Casey (n15).

³⁹ UK Government, 'The Government's Response to the Justice Committee Report on the Draft Constitutional Renewal Bill (provisions relating to the Attorney General)' (July 2009) 9.

⁴⁰ Michael Asimow and Yoav Dotan, 'Hired Guns And Ministers Of Justice: The Role Of Government Attorneys In The United States And Israel' (2016) 49 *Israel Law Review* 3, 12; David Kenny and Conor Casey, 'Shadow constitutional review: The dark side of pre-enactment political review in Ireland and Japan' (2020) 18 *International Journal of Constitutional Law* 51.

41. In Japan, the Cabinet Legislation Bureau⁴¹ is the key advisory organ to the government over legal and constitutional affairs. An autonomous⁴² and technocratic⁴³ institution, it is staffed by career lawyers appointed on the basis of academic excellence and promoted on the basis of seniority. The Director of the CLB is formally nominated by the government, but by convention the latter will accede to the former's internal choice.
42. In Israel, the Attorney General is formally appointed by the Government, but its choice is highly fettered. The Attorney can only be chosen from an approved list drawn up by an independent panel. This panel consists of a former Supreme Court judge appointed by the Chief Justice, a former Attorney General appointed by the Government, and a representative appointed on behalf of the legal academy and bar association. It is also a requirement that a candidate be eligible for appointment to the Supreme Court. Upon appointment, the Attorney General serves a fixed term of 6 years and cannot be removed save in very limited circumstances.⁴⁴ The Attorney General is guardian of the public interest, in charge of State litigation, final decision-maker in respect of prosecutions, and exclusive legal counsel to the government. The Attorney General's advice on the legality of policy decisions or proposed bills is *binding* on the government, and the latter cannot seek advice from any other lawyer without the former's prior consent.⁴⁵
43. The Irish Constitution provides that the Attorney General is "the adviser of the Government in matters of law and legal opinion." The Attorney General is assisted in their work by an office of several hundred civil service lawyers and Attorneys have been known to also draw on the expertise of barristers in private practice when need arises. The Attorney General is appointed at the discretion of the Prime Minister and serves at their pleasure. They must also vacate their position should the Prime Minister resign. Aside from stipulating they are not to be members of Government; the Constitution says nothing else in terms of eligibility criteria. But there is a strong constitutional convention that the appointee must be barrister of some eminence; indeed, most who serve as Attorney General go on to join the Superior Courts and several have been appointed Chief Justice. A minority of Attorneys General have been parliamentarians, but in recent years most have had looser political affiliations with the political party in Government.
44. Although the Constitution says nothing on the issue, Attorney General's legal advice is, by convention, accepted as binding on the executive, and advice that some measure will likely be found unlawful will signal the end of a policy. Despite high levels of confidentiality over the content of legal advice,

41 Hajime Yamamoto, 'Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?' (2017) 26 Washington International Law Journal 99, 109.

42 Navraj Singh Ghaleigh, 'Neither Legal Nor Political? Bureaucratic Constitutionalism in Japanese Law' (2015) 26 Kings Law Journal, 193, 205.

43 Mamoru Seki, 'The Drafting Process for Cabinet Bills' (1986) 19 Law Japan 168, 183.

44 Aviad Bakshi, 'Legal Advisers and the Government: Analysis and Recommendations' (2016) Kohelet Policy Forum 17.

45 Elyakim Rubinstein, 'The Attorney General in Israel: A Delicate Balance of Powers and Responsibilities in a Jewish and Democratic State' (2005) 11 Israel Affairs 417, 422.

there is evidence that Attorney's General advice is quite conservative and risk avoidant in its tenor. For example, it frequently seems to prevent the Government from pursuing policies that were, at the very least, arguably constitutional/lawful and which the government strongly wished to pursue.⁴⁶

45. The model of apex government legal advisors in these systems is, compared to the UK, very apolitical and technocratic. The work of these lawyers – who are drawn from the civil service or private practice – also tends to have a larger degree of detachment from the policymaking and political concerns of the government.⁴⁷
46. This more apolitical and technocratic model has several obvious qualities. For example, opting for an entirely technocratic and apolitical system may act as a powerful safeguard against abuses of executive authority. They also ensure, whether by rule or convention, that the chief legal advisor will always be someone with very considerable professional expertise and seniority. They may also decisively remove any *perception* the provision of legal advice or public interest functions have been subject to inappropriate politicisation. Such qualities are especially important where building political and popular trust in the legality of government action is of paramount importance.⁴⁸ The point I want to stress here is that such qualities must be balanced against potential costs.
47. I have written elsewhere that highly technocratic and apolitical bodies like the CLB and Irish Attorney General may tend toward conservatism and caution when dispensing legal advice. Apex government lawyers who lack political experience might develop a risk averse disposition, approving only those policies they feel are consistent with the 'best' view of the law they think a Court might reach. They may also generally be less likely to approach legal analysis with the same inclination to constructively assist the government implement its policy mandate while staying within lawful bounds, at least when compared to a lawyer whose office has dual legal-political dimensions.⁴⁹
48. In some cases, this kind of 'constitutionally conservative' approach to legal advice risks developing its own pathologies. It might, for example, excessively legalise the democratic policymaking process, hamstringing the political branches from testing the boundaries of the law where it is uncertain, and, by privileging legal advice, prevent or impede good-faith dialogue between the political branches and Courts about matters such as

⁴⁶ Attorney's General advice has been highlighted as a very considerable obstacle to addressing Ireland's ongoing housing crisis. Successive Attorney's General have been accused of offering overly conservative interpretations of the scope of private property rights that excessively hinder Parliament's ability to regulate them for the common good. See Hilary Hogan and Finn Keyes, 'Housing Crisis and the Constitution' (2021) 65 Irish Jurist 87.

⁴⁷ See Hajime Yamamoto, 'Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law' (2017) 22 Washington International Law Journal 99-125, at 111.

⁴⁸ Like politically divided communities such as Northern Ireland.

⁴⁹ David Kenny and Conor Casey, 'Shadow Constitutional Review' (n 40).

the content of the law, the extent of constitutionally permissible change, or how the law should be best interpreted.⁵⁰

49. More generally, there can be democratic costs that accompany a highly technocratic and apolitical model, given that it will inevitably allow unelected legal advisors to wield considerable influence and power over the policymaking process. In the three countries I have mentioned, it is tantamount to a veto over policymaking. It may thus grant 'considerable and controversial influence over the functions of the elected branches'⁵¹ to officials who will be, by deliberate design, largely unaccountable for their decisions.⁵² For example, I have written elsewhere with Professor David Kenny of Trinity College, Dublin that the Irish Attorney General has become akin to a one-person Supreme Court within Government whose advice is functionally treated *as law*.⁵³
50. Of course, none of the above warrants the conclusion an apolitical and technocratic model of apex legal advisor lacks merit or is inherently less desirable than the status quo. Such systems can and do work perfectly well. I merely wish to stress that the legal rules and political norms that govern a government's appointment of its leading lawyers, and the appointee's self-understanding of their constitutional role, will have serious ramifications for constitutional politics.
51. It is therefore critical any proposed alteration in the office of Attorney General in the UK should have to pass through a well-rounded and clear-eyed assessment of the potential advantages and observable disadvantages (which are perhaps less commonly ventilated) that will accompany any new, technocratic, model.

iv. What are the constitutional boundaries that constrain the Law Officers?

52. The constitutional culture around the Attorney General makes it very clear that respecting the values of legality and the rule of law requires an Attorney General, *at a minimum*, to not allow partisan bias, party political concerns, or pressure from colleagues, to obscure good faith attempts to offer proper legal advice, or to taint a conclusion that a particular decision is in the public interest, or cause them to sign-off on the legality of government policies under flimsy and strained legal justification.⁵⁴

⁵⁰ Gabrielle Appleby and Anna Olijnyk, 'Executive Policy Development and Constitutional Norms: Practice and Perceptions' (2020) *International Journal of Constitutional Law* (forthcoming) 1-34, at 8; Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17 *European Constitutional Law Review* 202, 221-224; Aviad Bakshi, 'Legal Advisers and the Government' (n 44) 34.

⁵¹ Casey and Kenny (n 40) 63.

⁵² *Id.*

⁵³ Conor Casey and David Kenny, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2019) 42 *Dublin University Law Journal* 89.

⁵⁴ Casey and Larkin (n14) 12.

53. Attorneys General are bound by oath and by convention to uphold the rule of law by maintaining detachment from partisan concerns and party loyalty when giving legal advice and other tasks in the public interest.
54. What ensures these constitutional boundaries are respected? Like with much of the UK Constitution, the boundaries are secured by a mixture of unwritten safeguards. These include the personal integrity⁵⁵ of the office holder, the possibility of political accountability, and a constitutional culture willing to sanction misuse of authority. I will briefly discuss each in turn.
55. For Professor Edwards, perhaps the most distinguished commentator on the history of the Office, the single most important factor to securing constitutional boundaries was personal integrity. For Professor Edwards the independence of the Attorneys General who enjoy both political and legal dimensions did not lie in the “adoption of formal constitutional structures, or even informal conventions” but ultimately rested upon the “strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office.”⁵⁶
56. The second mechanism said to help promote respect for the Office’s norms and boundaries, is the fact the Attorney General is subject to ministerial accountability to Parliament. If an Attorney General acts in a manner Parliament considers inappropriate,⁵⁷ they can inflict sanctions and hold them to account via censure. A recent prominent example was Parliament’s decision in 2018 to hold Attorney General Cox MP QC in contempt for refusing to disclose a copy of his advice to the House for scrutiny.⁵⁸ However, as noted above the confidentiality surrounding the Law Officer’s advice complicates this argument somewhat.
57. This formal accountability walks hand in hand with a constitutional culture willing to sanction perceived misuse of authority. An Attorney General who is perceived to have descended into partisan decision-making, or succumbed to political pressure, not only risks breaching the constitutional and professional norms that underpin the work of the Office (and, more broadly, those that underpin the legal profession generally), but the public and parliamentary confidence and credibility on which the office depends.⁵⁹ Where this is breached, serious political controversy and criticism tends to follow.

⁵⁵ Edwards argued this was *the* most important safeguard. He argued “the independence of the Attorney-General did not lie in the adoption of formal constitutional structures, or even informal conventions, but ultimately rested upon ‘the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office.’

⁵⁶ Edwards (n20) 67.

⁵⁷ To be clear, I am not commenting on whether the Government or Sir Geoffrey Cox QC MP acted inappropriately in initially refusing to publicly disclose the advice. I am merely stating that Parliament clearly took the view their refusal to disclose advice was unacceptable behaviour and after forming such a view was able to inflict a sanction it deemed necessary.

⁵⁸ UK Parliament, ‘Contempt motion’ on publishing of legal advice’ (4th December 2018), <https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>.

⁵⁹ Casey, (n15).

58. For example, allegations the Attorney General succumbed to political pressure to alter his initial advice over the legality of the UK's involvement in the Iraq War continues to generate deep controversy nearly two decades later for all the political actors involved.⁶⁰ Perhaps even more politically explosive in its day was the controversy that brought down the first Labour Government of Ramsay MacDonald in 1926 where a large factor in that Government's collapse was the allegation that Attorney General Patrick Hastings KC had acceded to political pressure from Cabinet colleagues in discontinuing a prosecution against a communist newspaper editor for incitement to mutiny.⁶¹
59. All of which is to say that the seriousness of these previous controversies is a measure of how entrenched the constitutional norms and expectations surrounding the Attorney General are, and how those who might overstep the Office's boundaries may be held to account by parliamentary or public censure.

Conor Casey

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⁶⁰ See Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' (29 April 2005) *The Independent*, <https://www.independent.co.uk/news/uk/crime/goldsmith-under-pressure-from-legal-profession-over-impartiality-3903.html>.

⁶¹ Jones, 'Office of Attorney General' (n8) 50.