

## **The Attorney General's Office (AGO) – written evidence (RLC0019)**

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

1. The Attorney General's Office is pleased to submit evidence to the Constitution Committee on the role of the Law Officers.
2. The historical role of the office of the Attorney General and its evolution has been the subject of scrutiny by Parliamentary Committees in the recent past. The Committee has recourse to that information and so it is not intended to rehearse those inquiries and discussions which are set out clearly and which are readily available.<sup>1</sup>
3. The Attorney General was questioned at some length on her views on the role, its development and the intersection between law and politics at the beginning of this year by the Justice Select Committee.<sup>2</sup> In that hearing the Attorney General referenced the works of Professor John Edwards and rather than set out the history and constitutional status of the role we would refer the Committee to his works.<sup>3</sup>
4. The Attorney General stated to the JSC that "the political thread that runs through this role is vitally important. The alternative is that the Attorney General would be an unelected, apolitical official. We already have many of those working for the Government. I think there is virtue in having someone who is political there." There have been some that have advocated for a non-political post such as the Treasury Solicitor to take on the function, but it is argued that a dedicated minister is needed to oversee and hold to account the work of operationally independent colleagues. The Attorney General can do this in a way that the Lord Chancellor cannot as he does not provide legal advice to government.
5. The UK is not unusual or unique in having an Attorney General with both legal and political dimensions. This tradition is shared with Attorneys General in Canada, Australia, New Zealand, and many other Commonwealth countries. The US Attorney General has prosecuting and investigatory powers

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<sup>1</sup> Reform of the Office of the Attorney General. *Select Committee on the Constitution 7<sup>th</sup> Report of Session* (2007-8).

House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (2006-7)

<sup>2</sup> The work of the Law Officers. *House of Commons Justice Select Committee*. Oral evidence given by Rt Hon Suella Braverman QC MP (25 January, 2022)

<sup>3</sup> Edwards, J. *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964); Edwards, J. *The Attorney General, Politics, and the Public Interest* (Sweet & Maxwell, London, 1984).

and is still a political appointment, in the UK we have no such powers. The different aspects of the role – legal, political, and constitutional – have been present for as long as the role has existed, and different occupants have expressed their approach to the role in different ways over the years. Events, too, have a way of bringing the role of the Attorney General into focus, depending on the issues that arise during their tenure.

6. Within the Department we articulate the mission of the AGO as “Making law and politics work together at the heart of government.” This mission aims to describe the philosophy underpinning the role of the Attorney General, looks to bring together the advisory, public interest, policy and sponsorship functions, and serves as a reminder of the necessity of the political nature of the role. Without a political appointment to the role of the Attorney General, no single officeholder in government would be charged with the responsibility of making law and politics work together.
7. As the Attorney General set out at the JSC, there are benefits to sitting at the intersection of law and politics. The political aspect equips the Law Officers with intimate knowledge of the policy goals and pressures on ministerial colleagues, which in turn aids the credibility and influence of the Attorney General when undertaking the legal task of offering constructive advice about both the legal constraints and possible lawful and proper alternatives of proposals. The political role gives the Attorney General insight and traction, whereas the legal role offers professional judgement but also obligations to her profession as a barrister.
8. The complexity of serving at the intersection of law and politics means that the office of Attorney General will always attract scrutiny and comment. A recent paper by Policy Exchange in January of this year<sup>4</sup> provided a thoughtful treatise on the debate and sets out that in the UK the Attorney General has never been considered an apolitical actor. It remarks that whilst there is a necessity to avoid political partisanship in public interest determinations and avoid public remarks that would bring the judiciary and rule of law into contempt, these are distinct from advancing a “good-faith constitutional rationale for policy reform mooted by the Government”, or the ‘legitimacy of the executive inviting Parliament to correct what it views as an erroneous and constitutionally heterodox line of Supreme Court jurisprudence’.<sup>5</sup>
9. Policy Exchange also stated that “In the UK, the principle that judgments and trends in judicial thinking are properly debateable has been, and should always remain, an important contribution to determining where the common good lies. Law Officers, with their dual political and legal roles and ability to

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<sup>4</sup> Casey, C. Larkin, J. ‘Crossing the Line? The Attorney General and the Law/Politics Divide’, *Policy Exchange* (January 2022).

<sup>5</sup> Casey, C. Larkin, J. ‘Crossing the Line’, p. 15.

grapple with the minutiae of judicial doctrine and legal commentary, have a useful role to play in these debates. There is no good argument that we have seen, or can discern, for the proposition the Attorney General's engagement in robust but respectful intellectual critique of jurisprudential trends is beyond the constitutional pale."<sup>6</sup>

10. The complexity of the role does not negate the legitimacy of the Law Officers being able to have a foot in both camps, political and legal, and it has been shown time and time again that the incumbents of these posts are mindful of the careful path they need to tread.

### **Role of the Law Officers**

11. There are four UK Government Law Officers: the Attorney General, the Solicitor General, the Advocate General for Scotland and the Advocate General for Northern Ireland. The Attorney General holds the office of Advocate General for Northern Ireland, *ex officio*.

#### *Advisory*

12. The term 'the Law Officers' refers to the UK Law Officers, who are the Attorney General, the Solicitor General and the Advocate General for Scotland. The Attorney General for England and Wales is also the *ex officio* Advocate General for Northern Ireland. The Attorney General is the Chief Law Officer for England and Wales and is the Chief Legal Adviser to the Crown. The Solicitor General is in practice the Attorney General's deputy and may exercise any function of the Attorney General. The Advocate General for Scotland is the principal legal adviser to the Government on Scots law. Jointly with the Attorney General, the Advocate General for Scotland also advises the Government on legal issues, including human rights.
13. The Law Officers are members of or may attend a number of Cabinet committees and subcommittees, such as the National Security Council. This means that, in accordance with best practice for advisory lawyers, they may be involved in offering advice at an early stage in policy formulation or operational implementation, which can be a useful way of guiding policy with an eye to legal constraints or issues.
14. The advisory role of the Attorney General – and its interaction with the political dimension – is not always well understood. The 2007 House of Commons report suggested that until "recently" the Attorney General advised "based on his own knowledge of the law". A cursory examination of histories of that role make it clear that this has not been the position for several

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<sup>6</sup> Casey, C. Larkin, J. 'Crossing the Line', p. 15.

generations. The 2007 report sought to summarise the then-current position: "In reality much of this advice is prepared by civil servants who are lawyers, experts in a particular field... The Attorney General may also consult specialist counsel when necessary. The Attorney General provides political 'cover' for the advice".<sup>7</sup> The true position is much more complex, and aptly summarised by Professors Daintith and Page:

The English process of refining issues and obtaining various kinds of opinion could obviously go on without the Law Officers being involved at all. Often they are not, as where a departmental legal adviser both takes counsel's opinion and consults opposite numbers elsewhere, without troubling the Law Officers. What makes their advice different in such cases is the second factor, of status: that is to say, their status as ministers. By advising, the Law Officers take the issue out of the framework of intradepartmental relationships between civil servants (the legal advisers) and their ministers, and into—at least potentially—that of inter-ministerial discussion. Whatever the extent or quality of the Law Officers' personal input, this necessarily gives the advice a political dimension, even while it remains 'an objective view of the law as he sees it' (Attorney-General's Chambers 1996a: 1). Ideally, the advice will reflect professional politicians' ... understanding of the problems confronting the politicians whom they are advising ... the need to pursue a coherent policy, the tactical problems of introducing legislation to deal with a technical snag and the need to express advice in a way which can be passed on intelligibly to the public. (Archer 1978: 6)

Whatever its style or content, it may be discussed in Cabinet or Cabinet Committees; it may need to be defended in Parliament (though not necessarily, or even normally, by the Law Officer who gave it...) ... this character is intimately linked to the reasons for which references are made to the Law Officers, particularly from departments...<sup>8</sup>

15. As to when a reference to the Attorney General is made, in practice, the basic criteria remain as they were summarised by Attorney General Sir Hartley Shawcross in 1953: legal difficulty, considerations of policy or public relations, or there being a large amount at stake.<sup>9</sup> The Ministerial Code puts it simply as 'critical decisions involving legal considerations' (at [2.10]). Far from merely providing political 'cover', we see that the political and legal are inseparable – indeed that is the reason why advice from the Attorney General is sought. Even though the Attorney General is a politician, he or she still has to give an 'objective view of the Law' *necessarily* set in its political context.

16. Seen in this light, whether an Attorney General sees themselves as more or less 'political' is beside the point. The domain of legal views available to them

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<sup>7</sup> House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (HC 306, 2007), p. 11.

<sup>8</sup> Daintith, T. and Page, A. *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (OUP, 1999) p. 301.

<sup>9</sup> Shawcross, H. *The Office of the Attorney-General* (The Law Society, 1953) p. 6.

is fixed by available statute and precedent. No Attorney can create new law, but they can resolve disputes between rival – but always respectable – legal positions across government. The Attorney General’s role is to give the full range of legal options and legal risks to cabinet colleagues, embedded in their proper political and policy context. As Daintith and Page conclude: ‘we may summarize our discussion on the nature of the Law Officers’ advice simply by saying that, in marked contrast to the opinions of leading counsel which its history evokes, it is informal in character, pluralistic in inspiration, and political in authority’.

### *Superintendence*

17. The Attorney General superintends a number of organisations, collectively known as the “Law Officers’ Departments.” Superintendence is the statutory term to describe the role in relation to both the SFO and the CPS. The more commonly used term across Government is “sponsorship”.
18. On the prosecutorial side, the Attorney General superintends the CPS, the SFO, and HMCPSP (Her Majesty’s Crown Prosecution Service Inspectorate). The Attorney General is accountable to Parliament for the functioning of these departments but not involved in their day-to-day operation. They are independent in making casework decisions. The Law Officers are not involved in those decisions except where statute provides that prosecution of an offence requires the Attorney General’s consent, such as offences with potential national security or diplomatic implications. Indeed, an important part of the Law Officers’ role is safeguarding the independent decision making of the CPS and SFO.
19. One of the ways in which the role of the Law Officers has evolved since 2005 is in the maturity of the sponsorship and superintendence functions. Historically the superintendence role had less formal structures and transparency. Today, the main mechanisms through which the Law Officers’ fulfil their sponsorship role are Ministerial Strategic Boards (MSBs) and superintendence meetings.
20. The Attorney General chairs the MSBs and their overarching aim is to oversee the strategic direction of the Law Officer Departments and to hold them to account for their delivery against their respective strategic objectives.
21. Superintendence meetings are less formal than MSBs and provide an opportunity to discuss highprofile casework issues and any issues of topical interest. These meetings occur at least three times a year.
22. Alongside these two meetings, the Attorney General also seeks to regularly meet Non-Executive Board Members of the organisations.

23. Where particular issues arise, additional meetings with senior leaders may be called or requests made for additional information. An example of the Attorney General responding to serious concerns was her commissioning of an independent review in December into the SFO's policies, practices, procedures, and related culture following findings of the Court of Appeal in *R v Akle & Anor* [2021] EWCA Crim 1879.<sup>10</sup>
24. On the advisory side, the Attorney General also superintends the Government Legal Department. This relationship is different in that GLD's functions do not necessarily require independence from departmental or ministerial control. Notwithstanding the need for legal advice to be objective and impartial in the sense of meeting both lawyers' professional obligations and their obligations under the *Civil Service Code*, GLD lawyers do not require operational independence to provide this advice. For example, the provision of legal advice to the Treasury, and to the other departments for which the Treasury Solicitor acts as departmental legal adviser, should not be regarded as "independent" of instructing ministers. Ultimately, the function exists solely to support the responsibilities of such ministers. This situation can be contrasted with the CPS and SFO – where there is a recognised need for operational independence to make prosecutorial decisions.
25. Following an internal review of GLD that the Attorney General commissioned in October 2020, a number of steps have been taken to modernise and strengthen the sponsorship relationship with GLD.
26. Reflecting the arrangements in place with the CPS and SFO, a framework agreement has been established with GLD, albeit interim at this stage. The framework agreement provides for several governance mechanisms, some of which have existed in the past but on a less formal footing, to support the Law Officers in their sponsorship and oversight of GLD and its work.

### *Devolution*

27. In relation to devolution, the Attorney General has a statutory role under each of the devolution settlements, and the Advocate General for Scotland has a similar role in relation to the Scottish devolution settlement. The primary facet of this role is in considering whether Bills passed by a devolved legislature are within the competence of the legislature in question; if the Attorney General considers that a Bill is not, then they have the power to refer that Bill to the Supreme Court. This function was recently exercised with the referral of two bills passed by the Scottish Parliament, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill to

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<sup>10</sup> Attorney General's Office. *SFO Independent Review Terms of Reference*, (February 2022) pp. 1-2.

the UK Supreme Court which were then found to be outside of the Scottish Parliament's legislative competence.<sup>11</sup>

### *Public interest*

28. The Attorney General also exercises public interest functions. These are too numerous to list in full; the most significant are: considering whether to refer sentences to the Court of Appeal as unduly lenient; giving consent to prosecute certain offences; giving consent for an application to the High Court for a fresh inquest; and deciding whether to institute contempt proceedings.
29. The Attorney General's ability to represent the Government in court is important because the political role provides the opportunity for the Government to signal the importance it attaches to a particular issue (for example an unduly lenient sentence or alleged misapplication of caselaw); the judiciary in turn have the opportunity to express their interpretation of the issue in question directly to a Government minister. There is value in that interaction.
30. Finally, the Attorney General has a role as the guardian of charitable interests. This role exists alongside the Charity Commission and provides a valuable system of checks and balances in the protection of charitable interests. The Attorney General acts on behalf of the Crown as *parens patriae*, representing the beneficiaries of charitable trusts as a party in charity proceedings. The Attorney General's role in charity proceedings is to represent the public interest in having charities properly administered. The Attorney General's duties in this regard include making representations to the Court as to where the public interest lies, providing assistance to the Court in the administration of charitable trusts and representing the beneficial interests of objects or charities.

1 April 2022

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<sup>11</sup> Reference by the Attorney General and the Advocate General for Scotland - *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*. Available at: <https://www.supremecourt.uk/cases/uksc-2021-0079.html>;

Reference by the Attorney General and the Advocate General for Scotland - *European Charter of Local Self-Government (Incorporation) (Scotland) Bill*: Available at: <https://www.supremecourt.uk/cases/uksc-2021-0080.html> .