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Chairman, Joint Committee on the draft Constitutional Renewal Bill
House of Commons
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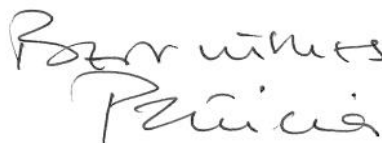
Dear Michael

JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

The White Paper on *the Governance of Britain – Constitutional Renewal* sets out the Government's proposals for reform of the role of the Attorney General and the Government's rationale for those proposals. However, to assist the Committee further in its consideration of the aspects of the draft Bill which relate to the role of the Attorney General, I enclose notes on the following matters:

- (a) **Consents to prosecution:** Clauses 7-10 of, and Schedule 1 to, the draft Bill amend the prosecution consent functions of the Attorney General. However, the attached note explains in a more discursive manner the proposals in the draft Bill.
- (b) **Annual report:** Clause 16 of the draft Bill requires the Attorney General to prepare and lay before Parliament a report on the exercise of his/her functions on an annual basis. The attached note gives an overview of what the annual report might contain. As the primary purpose of the annual report is to enhance Parliament's ability to hold the Attorney General to account, the Government is particularly interested in the views of the Committee as to what the annual report should cover.

I look forward to working with the Committee on its inquiry into the draft Bill.


BARONESS SCOTLAND QC

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Memorandum from the Attorney General's Office – CRB 25 Annex (i)

Prosecution consent functions of the Attorney General

This note sets out some additional background on the function of the Attorney General to consent to the prosecution of certain offences. The note then sets out the Government's provisional recommendations for reform of the Attorney's prosecution consent functions. The note also provides further detail as to why the draft Constitutional Renewal Bill contains both a list of specific amendments to the prosecution consent functions of the Attorney General and a power to amend other functions by way of secondary legislation.

Background to the prosecution consent functions of the Attorney General

In principle, any person can seek to institute criminal proceedings. However, for certain offences, consent must be obtained to the institution of proceedings. In some cases the consent of the Attorney General is required. In other cases, the consent of the Director of Public Prosecutions or other person is needed.

The requirement to obtain consent enables a consistent approach to be taken to decisions to prosecute where the assessment of whether a prosecution is in the public interest may be thought – or was perhaps in the past thought – to be particularly difficult; and it ensures that private prosecutions cannot be brought without proper grounds.

A number of consent provisions were created before the three main prosecuting authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office) existed and when the office of the Director of Public Prosecutions handled a comparatively narrow range of cases.

Currently, there are over 100 provisions which require the Attorney's consent to prosecution¹.

Rationale for conferring a consent function on the Attorney General:

There are varying rationales for a consent mechanism. There are also various reasons for conferring the consent function on the Attorney General rather than another person (for example, the DPP). The main reasons why the requirement to obtain the consent of the Attorney for a prosecution is included in legislation are outlined in the Law Commission's report on Consents to Prosecution². However, it is not always apparent why a particular consent function has been conferred on the Attorney, especially where the legislation which has conferred the function dates back a number of years.

Proposals for reform

Schedule 1 to the draft Constitutional Renewal Bill contains a number of amendments to the prosecution consent functions of the Attorney General. The list of amendments in Schedule 1 is supplemented by the power in clause 8 of the draft Bill to amend other prosecution consent functions of the Attorney by way or order. (Clause 8 is discussed further below.)

¹ The Attorney General's Office has conducted a comprehensive Lexis search of all public general Acts and all secondary legislation to identify provisions which require the consent of the Attorney.

² See in particular paragraph 3.27 of *Consents to Prosecution* LC255.

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The Annex to this note identifies which prosecution consent functions of the Attorney are to be abolished (Category 1), retained by the Attorney General (Category 2), transferred to the Director of Public Prosecutions or other Director (Category 3, sub-divided into 3 sub-categories).

Status of the proposals to amend the consent functions: Note that as the White Paper on the *Governance of Britain* made clear, (see paragraph 92), further work is needed to determine how each prosecution consent function of the Attorney General should be categorised. *The list of amendments to the prosecution consent functions detailed in the draft Bill and annex to this note is therefore provisional and liable to be revised in light of further discussions with the prosecuting authorities, the comments received via the pre-legislative scrutiny process and further work being carried on by the Law Commission in relation to offences in connection with bribery.*

Prosecution consent functions not dealt with by the draft Bill/this note: Under the package of reforms to the role of the Attorney General proposed in the White Paper on the *Governance of Britain*, the Attorney General will retain functions in relation to contempt of court. Some of these functions take the form of a requirement to obtain the consent of the Attorney for prosecution of an offence which relates to breach of reporting restrictions or otherwise for conduct which amounts to a contempt of court. These consent functions are not addressed by this note.

This note does not deal with provisions which require the consent of the Attorney General for proceedings brought in Northern Ireland. When the provisions of the Justice (Northern Ireland) Act 2002 come fully into force, the prosecution consent functions of the Attorney General which give rise to particularly difficult public interest considerations, in particular considerations of national security or international relations (which are both excepted matters under the Northern Ireland Act 1998) will be transferred to the Advocate General for Northern Ireland. This post will be held concurrently by the Attorney General for England and Wales. The other prosecution consent functions of the Attorney General will be transferred to the Director of Public Prosecutions for Northern Ireland.

Amending prosecution consent functions by secondary legislation: The Government proposes that the vast majority of provisions which provide for the consent of the Attorney should be amended (where amendment is needed) by primary legislation. As noted above, the draft Constitutional Renewal Bill contains a list of amendments to the prosecution consent functions of the Attorney General with a view to transferring those functions to the DPP (or other prosecutor) or, in some cases, abolishing the function (see Schedule 1 to the draft Bill).

However, some of the Attorney's prosecution consent functions are in secondary legislation or legislation which has been or is due to be repealed. In line with general drafting practice, it is not thought to be appropriate for amendments to legislation of this kind to be included on the face of the Bill.

In addition, while the Attorney General's Office have conducted a full search of existing legislation, it is possible that a further prosecution consent function might be

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identified in the future. Taking a power would enable an amendment to be made to such a provision.

In light of this, clause 8 of the draft Bill confers a power on the Attorney General to amend other prosecution consent functions of the Attorney General. This power will be used to amend the prosecution consent functions which are contained in secondary legislation or which have been, or are to be repealed. The power will also be used to amend any consent functions which have been overlooked.

Attorney General's Office
15 May 2008

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ANNEX

PROVISIONAL PROPOSALS FOR THE AMENDMENT OF THE PROSECUTION CONSENT FUNCTIONS OF THE ATTORNEY GENERAL

Category 1: Abolition

(Where it is no longer thought to be necessary for the possibility of a prosecution to be constrained by the requirement to obtain consent)

Agricultural Credits Act 1928 section 10 (restriction on publication of agricultural charges)

Agriculture and Horticulture Act 1964 section 20 (any offence under the Act – relates to the grading and transport of fresh horticultural produce)

Marine Insurance (Gambling Policies) Act 1909 section 1 (prohibition of gambling on loss by maritime perils)

Water Industry Act 1991 section 211 (offences in relation to sewerage offences derived from other Acts)

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Category 2: Retention by the Attorney

(Functions which give rise to particular public interest considerations, including national security and implications for international relations.)

These have been grouped along the following lines:

- (i) Offences which are especially likely to raise issues relating to national security;
- (ii) Offences which are especially likely to raise issues relating to international relations;
- (iii) Offences which are particularly likely to raise other issues relating to the public interest.

Note that there is a high degree of overlap between categories (i), (ii) and (iii). Categories (i) and (ii) have been merged in the analysis below. It should be recognised that a number of offences included in Category 2(i) and (ii) below will also give rise to more generalised issues relating to the public interest.

2 (i) + (ii) Offences which are especially likely to raise issues relating to national security or international relations

Anti-Terrorism Crime and Security Act 2001 sections 55 (offences under section 47 re use of nuclear weapons and section 50 re assisting or inducing certain weapons-related activities overseas), **81** (offences under section 79 re disclosures relating to nuclear security and section 80 re disclosures relating to uranium enrichment technology) **and 113B** (offence under section 113 (use of noxious substances or things to cause harm and intimidate)

Aviation and Maritime Security Act 1990 section 1(7) (endangering safety at aerodromes serving international civil aviation) and **section 16** (offences under Part II of the Act relating to the safety of ships)

Biological Weapons Act 1974 section 2 (offence under section 1 –developing certain biological agents and toxins and biological weapons)

Chemical Weapons Act 1996 section 31 (offences under sections 2 re using chemical weapons or section 11 re construction premises or equipment for producing chemical weapons)

Criminal Law Act 1977 section 9 (trespassing on premises of foreign missions, etc).

Geneva Conventions Act 1957 section 1A (offences under section 1 re grave breaches of the Convention)

International Criminal Court Act 2001 sections 53 (offences under section 51 re genocide, crimes against humanity and war crimes, and section 52 re conduct ancillary to matters covered by section 51) and **54** (offences against the administration of justice by the ICC)

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Internationally Protected Persons Act 1978 section 2 (proceedings for offences which would not be offences but for s1 of the Act (attacks and threats on protected persons))

Nuclear Explosions (Prohibition and Inspections) Act 1998 section 3 (offence under section 1 - causing of a nuclear explosion)

Nuclear Material (Offences) Act 1983 section 3 (offences under sections 1 and 2 which would not be an offence but for the provisions of this Act, disregarding certain other enactments. Offences are acts involving nuclear materials abroad which if done in the UK would constitute one of the listed offences; and offences involving preparatory acts and threats both in the UK and abroad.)

Official Secrets Act 1911 section 8 (in relation to any offence under the Act)

Official Secrets Act 1989 section 9 (consent required for all offences under the Act with the exception of that under s.4(2) where the consent of the DPP will suffice)

Protection of Trading Interests Act 1980 section 3(3) (failure to comply with a requirement imposed by s1(2), to inform the Secretary of State of any requirement placed on a company by a foreign government which may affect UK trade, or to knowingly contravene any directions given under s 1(3) or s 2 (1), directions in relation to ignoring the anti- UK trade requirements of foreign governments outside of the latter's territory, including the production of information to overseas courts and governments)

Serious Crime Act 2007 section 53 (prosecutions where conduct likely to take place outside England and Wales)

Suppression of Terrorism Act 1978 section 4(4) (offences which but for but for s4 would not be an offence. Section 4 extends the UK courts' jurisdiction in respect of offences committed outside United Kingdom. The offences include murder, kidnapping, false imprisonment, nuclear offences and firearm offences.)

Taking of Hostages Act 1982 section 2 (hostage-taking)

Terrorism Act 2000 sections 63E (offences under sections 63B, 63C and 63D re terrorist attacks abroad by or on UK nationals) **and 117** (certain offences under the Act which have been committed for a purpose connected with the affairs of another country)

Terrorism Act 2006 section 19 (Attorney, rather than DPP, consent needed for offences under the Act if offence committed for a purpose connected to the affairs of another country)

United Nations Personnel Act 1997 section 5 (offences which, disregarding certain enactments, would not be offences apart from sections 1-3 of the Act. Offences include attacks on UN workers outside the UK, attacks outside the UK on premises or vehicles associated with the UN or threats to carry out such offences)

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Offences under secondary legislation relating to sanctions (where the consent of the Attorney is required for the prosecution of offences, other than summary offences) (See for example Article 2 of the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 SI 1996/3171)

2(iii) Offences which are particularly likely to raise other issues relating to the public interest

No additional offences identified

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Category 3A: Transfer to DPP (or other prosecutor) with safeguards

(Consent functions which are not to be abolished or retained by the Attorney but which relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director but decision on consent will have to be taken by the Director personally, or by a person authorised by the Director to take the decision.)

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

** indicates that the consent function is to be transferred to the DPP and Director of SFO, exercisable concurrently.

Aviation Security Act 1982 section 8(1)(a) (offences under Part I excluding those contained within sections 4 and 7. Offences include hijacking, destroying, damaging or endangering the safety of an aircraft, other acts endangering or likely to endanger the safety of the aircraft, ancillary offences)

Criminal Justice Act 1988 section 135 (torture)

Income and Corporation Taxes Act 1988* section 766 (offences under s 765 re requirement for Treasury consent for certain transactions)

Landmines Act 1998* section 20 (Offences under section 2 re participation in the use, development, production, acquisition, possession or transfer of an anti-personnel mine)

Official Secrets Act 1920 section 8(2) (no summary proceedings for a misdemeanour under the 1911 or the 1920 Act except with the consent of the Attorney)

Prevention of Corruption Act 1906 section 2(1)** (offence under section 1 re corrupt transactions with agent)

Public Bodies Corrupt Practices Act 1889 section 4(1)** (any of the corruption related offences under the Act)

Solicitors Act 1974 section 42(2) (failure to disclose the fact of being struck off or suspended)

War Crimes Act 1991 section 1(3) (offences of murder, manslaughter or culpable homicide, irrespective of the nationality of the accused at the time of offending, if that offence was committed between 1/9/39 and the 5/6/45 in Germany or in the German occupied territories, and constituted a violation of the wars and customs of war)

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Category 3B: Transfer to DPP (or other)

(Consent functions which are not to be abolished or retained by the Attorney but which do not relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director without requirement to be taken personally by Director or authorised person.)

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

** indicates that the consent function is to be transferred to the DPP and Director of SFO, exercisable concurrently.

Adoption and Children Act 2002 section 99 (offences under section 9 re failure to comply with regulations in relation to adoption services or section 59 re disclosure of information)

Building Act 1984 section 113 (offences created under the Act require the consent of the Attorney unless the proceedings are brought by the party aggrieved or the local authority/body who has the duty to enforce the relevant provision)

Care Standards Act 2000 section 29 (offences under Part II, unless the prosecution is brought by the National Care Standards Commission or the Secretary of State (where he is for the time being exercising the functions of the Commission) or the National Assembly for Wales. Offences include operating an establishment which requires a licence without a licence and making false descriptions of establishments and agencies)

Cancer Act 1939 section 4(6) (publication of an advertisement consisting of an offer to treat, prescribe for, or give advice in relation to the treatment of, cancer)

Children and Young Persons (Harmful Publications) Act 1955 section 2(2) (printing, publishing, selling, or letting of, or having in one's possession for the purposes of the selling or letting, works to which this Act applies: works likely to fall into the hands of children which reveal, in mostly picture form, the commission of crime, acts of violence or cruelty and incidents of a repulsive or horrible nature)

Counter-Inflation Act 1973 section 17(9) (offences under the Act. Repealed by s33(4), Sch. 2 Competition Act 1980 as from 1st January 2011)

Criminal Law Act 1977 section 4(2) (consent required for conspiracy to commit an offence for which consent is required)

Customs and Excise Management Act 1979 section 147* (consent for offence under Customs and Excise Acts unless prosecution instituted by order of Commissioners) *This is to be repealed on a day to be appointed by virtue of CJA 2003 s41 & 332, Sch 3 para 50 and Sch 37 pt 4*

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Explosive Substances Act 1883 section 7(1) (offences under the Act including offence under section 2 re causing an explosion likely to endanger life or property, section 3 re attempt to cause an explosion, or making or keeping explosive with intent to endanger life or property, section 4 re making or possession of explosives under suspicious circumstances, and section 5 re accessories)

Highways Act 1980 section 312 (offences under sections 167, 177, and those provisions referred to in Schedule 22 of the Act)

Housing Act 1985 section 339 (offences under Part X when the local authority is being prosecuted. Part X relates to overcrowding and related matters)

Law of Property Act 1925 section 183 (fraudulent concealment of documents and falsification of pedigrees)

Law Reform (Year and a Day Rule) Act 1996 section 2(1) (Consent required for the institution of proceedings for a fatal offence: murder, manslaughter, infanticide or any other offence of which causing another's death is a component; and aiding, abetting, counselling or procuring another's suicide.)

Merchant Shipping Act 1995 sections 15 and 143 and Schedule 3A (offences in relation to fishing vessels and pollution and safety regulations)

Mines and Quarries Act 1954 section 164 (offence under section 151 re fencing of mines and quarries)

National Health Service Act 2006 section 269 (offences in relation to notices of births and deaths)

National Health Service (Wales) Act 2006 section 200 (offences in relation to notices of births and deaths)

Prevention of Oil Pollution Act 1971 section 19 (offences under the Act unless proceedings brought by harbour authority or, in certain cases, the consent of the Secretary of State or a person authorised by him has consented. Offences relate to the discharge of oil into the waters of a harbour in the United Kingdom and failure to comply with a requirement of a harbour master, or in respect of obstruction of a harbour master)

Public Health (Control of Disease) Act 1984 section 64 (consent required for offences under the Act or byelaws made under the Act unless prosecution brought by the party aggrieved, the local authority/body who has the duty of enforcing the provision or the person who made the byelaw. A constable may also take proceedings in certain cases)

Public Health Act 1936 section 298 (in relation to any offence under the Act unless proceedings taken by a party aggrieved, a council or a person whose function is to enforce the provisions in question)

Public Order Act 1936 section 2(2) (prohibition of quasi-military organisations)

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Public Order Act 1986 sections 27, 29L (incitement to race/religious hate offences)

Serious Organised Crime and Police Act 2005 section 128 (trespass on designated sites)

Shipping and Trading Interests (Protection) Act 1995 section 7 (for offences in relation to coastal shipping)

Theatres Act 1968 section 8 (offences under sections 2, 5, 6 of the Act, or under the common law in relation to the publication of defamatory material in the course of a play. Offences include presenting or directing in public a play which is obscene, contains threatening, abusive or insulting words likely to stir up hatred against a group of the population due to their colour, race, ethnic or national origins, or contains threatening, abusive or insulting words with intent to, or where the performance taken as a whole is likely to, cause a breach of the peace)

Vehicles (Crime) Act 2001 sections 14 and 30 (offence under Parts 1 and 2 unless proceedings brought by a local authority or a constable)

Water Act 1945 section 46 (offences under the Act unless proceedings are brought by the Minister of Health, a local authority, statutory water undertakers, or person aggrieved. Offences include offences under byelaws made under powers granted by the Act and provision of false information) (Repealed with savings by Water Act 1989.)

Article 9 of Channel Tunnel (Security) Order 1994 SI1994/570

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Category 3C: Transfer to Director of Service Prosecutions

Armed Forces Act 2006 sections 61 and 68 (prosecutions brought outside time only with the consent of the Attorney). **(See also section 326** (disapplication of requirement to obtain the consent of the Attorney) which will need modification)

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Memorandum from the Attorney General's Office – CRB 25 annex (ii)

Annual report to Parliament by the Attorney General

Clause 16 of the draft Constitutional Renewal Bill provides that the Attorney General must prepare and lay before Parliament on an annual basis a report on the exercise of the functions of the Attorney General. This note outlines what that report might include.

Limits on the information which may be included in the annual report: Note that, in relation to a number of the functions of the Attorney General, there will be limits on the information which can be included in the annual report. This is reflected in clause 16(2) of the draft Bill. In particular:

- Information in relation to criminal cases: Where the Attorney exercises a function in relation to a particular criminal case, it may not be appropriate for the annual report to include information about the particular case. It will be particularly important that the annual report does not include information which would prejudice the investigation of a suspected offence or proceedings before a court.
- Information which is legally privileged: The annual report will not generally include information about legal advice that the Law Officers have provided or other material for which a claim to legal privilege could be maintained.
- Information with implications for national security or international relations: Information the disclosure of which would prejudice national security or would seriously prejudice international relations will also generally not be included in the annual report.
- Personal data: It will generally be inappropriate to include personal data in the annual report.

Overview: A summary of the report, drawing out key themes and noting key events.

Introduction

The Law Officers have various roles:

- Upholding the Rule of Law, including as Chief Legal Adviser to the Government
- Acting independently of Government in the public interest
- Superintending the Law Officers' Departments; and
- Being Criminal Justice Ministers.

The annual report will provide an account to Parliament and to the public of what the Law Officers have done each year.

Exercise of functions in relation to the prosecuting authorities which are superintended by the Attorney under statute (CPS, SFO and RCPO): A summary of the operation of the superintendence relationship including:

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- the strategic objectives and priorities which have been set, and an account of how they have been met;
- summary of co-ordination of general or cross-cutting issues;
- account of financial management and vfm.

Exercise of functions in relation to other prosecuting authorities (including the service prosecutors and Departments who exercise prosecutorial functions): To include:

- a summary of the operation of the non-statutory superintendence relationship with the Director of Service Prosecutions;
- account of proceedings at the Service Justice Board;
- summary of co-ordination of general or cross-cutting issues.

Exercise of functions in relation to criminal prosecutions: A summary of the exercise of the Attorney's functions acting in the public interest in relation to criminal proceedings. Will include functions in relation to:

- the referral of unduly lenient sentences;
- referral of points of law; and
- consents to prosecution.

Likely to include statistics as to number of cases dealt with including, in relation to unduly lenient sentences, the proportion of cases referred by the Attorney General which have resulted in an increased sentence.

Exercise of other functions in the public interest: A summary of the exercise of the Attorney's other public interest functions including functions in relation to:

- charities;
- family law;
- contempt of court;
- inquests;
- power to restrain vexatious litigants; and
- devolution.

In relation to casework, likely to include statistics of cases dealt with and their outcome.

Exercise of functions in relation to litigation: A survey of the functions of the Attorney General in relation to civil and criminal litigation. Likely to include details of:

- management of panels of Counsel (including Treasury Counsel) to represent the Crown in civil and criminal proceedings, including action taken to promote diversity of the panels;
- litigation in which the Attorney has intervened/participated on a public interest basis;

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- litigation in which the Attorney has, at the request of the court, appointed an advocate to the court;
- role of the Attorney General in appointing special advocates;
- litigation in which the Attorney General or Solicitor General has appeared in person;
- litigation brought by the Attorney at the relation of a person who would not otherwise have standing (relator actions);
- intervention in legal proceedings to assert the rights of Parliament.

Exercise of functions in relation to oversight of the Treasury Solicitor's Department and the Government Legal Service

Including a summary of the key trends in work undertaken by the GLS during the year; details of staffing and skills; diversity.

Exercise of functions in relation to the legal profession: A summary of the Attorney's activities in relation to the legal profession including:

- activities in relation to pro bono;
- activities of the Attorney in capacity of leader of the Bar.

Criminal Justice Minister

Summary of cross-cutting initiatives, policy developments and system reforms led or championed by the Law Officers in their role as Criminal Justice Ministers. A report on outcomes of partnership work to reduce crime and to deliver a more effective, transparent and responsive Criminal Justice System for victims and the public.

International activities: A summary of the Attorney's role including activities to promote the rule of law overseas and overseas visits.

Parliamentary activities: A summary of the Attorney's role in Parliament. Likely to include:

- detail of statements made by the Law Officers to the House;
- details of appearances of the Law Officers before Parliamentary Committees;
- role of the Law Officers in taking Government legislation through Parliament;
- overview of PQs dealt with by the Law Officers;
- overview of correspondence from Parliamentarians handled by the Law Officers (not to include substantive content of correspondence except in appropriate cases).

Functions in relation to Northern Ireland A summary of the exercise of the functions of the Attorney General in capacity as Attorney General for Northern Ireland including:

- exercise of functions in relation to the Public Prosecution Service;
- exercise of functions in relation criminal prosecutions;

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- exercise of other functions in the public interest;
- exercise of functions in relation to litigation.

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