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HOUSE OF LORDS

HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

WEDNESDAY 18 JUNE 2008

LORD LYELL OF MARKYATE, LORD MORRIS OF ABERAVON
and LORD MAYHEW OF TWYSDEN

LORD CARLILE OF BERRIEW and PROFESSOR JEREMY HORDER

Evidence heard in Public Questions 581 - 621

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Oral Evidence

Taken before the Joint Committee on the Draft Constitution Renewal Bill

on Wednesday 18 June 2008

Members present:

Michael Jabez Foster, in the Chair

Hart of Chilton, L	Martin Linton
Morgan, L	Ian Lucas
Norton of Louth, L	Fiona Mactaggart
Tyler, L	Emily Thornberry
Williamson of Horton, L	Mr Andrew Tyrie
	Sir George Young

Memorandum submitted by Lord Mayhew of Twysden, Lord Morris of Aberavon and Lord Lyell of Markyate

Examination of Witnesses

Witnesses: **Lord Lyell of Markyate**, a Member of the House of Lords, **Lord Morris of Aberavon,** a Member of the House of Lords, and **Lord Mayhew of Twysden**, a Member of the House of Lords, gave evidence.

Q581 Chairman: Good afternoon and may we welcome you to the Select Committee on the Draft Constitutional Renewal Bill. As you know, the committee is charged to look at the various aspects of the Government's proposals for constitutional renewal, an important part of which is the role of the Attorney General. You will have had the opportunity to see, and we thank you for coming today to comment on, those proposals, particularly in the light of your experiences and the learned advice that you will, no doubt, be able to give us. The Government has written a Green Paper stating that the Government is fully committed to enhancing public confidence in the office of the Attorney General. Will this set of proposals achieve that objective?

Lord Lyell of Markyate: I think the Government is right in one of the important decisions it took before this Bill was drafted; it was right to keep the Attorney General as an independent

law officer of the Crown sitting as a Minister in Parliament. I think that was a very important decision and I think that is right. There are other sensible aspects of the draft Bill. There is something to be said for having a protocol to clarify the relationship between the Attorney General and the DPP and the Director of the Serious Fraud Office and Her Majesty's Revenue and Customs Director because that is an area which, although I think we all grew up to it, has not been spelt out and could probably quite usefully be spelt out. The third thing that I think could be valuable would be to have a look at the different consents which have become a little bit of a hotchpotch over the years. A substantial number of them are, quite rightly, left with the Attorney and, just having looked at them myself, there are one or two, or three or four, which are to be handed to the Director in the draft Bill which actually I would keep with the Attorney. The third point on that is that I think that it is not generally recognised that if a consent is given for the Director currently, what that effectively means is that it is given to the Crown Prosecution Service at large. I think there is room for a category of consents which should be taken by the Director personally and that that should be spelt out. Those are the main points with which I agree in the draft Bill. I suppose the most important on which I have reservations – and I am sure you will be coming to this – is that I think it is an essential part of the role that the Director should have the power, albeit in practice it has not had to be used formally in my memory, to direct the DPP and the Director of Serious Fraud Office, and so on.

Q582 Chairman: Before I ask one of your colleagues, just on a matter of detail: the Counter-Terrorism Bill of course does provide for the Director to have a specific role in making a judgment, for example on whether to proceed in an application for holding up to 42 days. Is it that sort of power that you are suggesting would have a place more generally, that the Director in person should be able to exercise the power?

Lord Lyell of Markyate: No, I was talking about the consents. You will remember that in the draft Bill and under the present law the consent either of the Director of Public Prosecutions or of the Attorney General has to be obtained, and some can certainly be passed from the Attorney General to the Director of Public Prosecutions, and some would be perfectly satisfactorily taken by any suitable member of the Crown Prosecution Service. The power to direct is the ultimate authority of the Attorney General in a major prosecuting decision. If he and the relevant Director could not agree, it would then be the power to direct the Director to take a particular course to prosecute or not to prosecute. It would not lead to something of a constitutional crisis, but it would certainly lead to something of a crisis. That is a very valuable tension; it should be retained.

Lord Morris of Aberavon: Chairman, I am not for the moment going into the detail of the matters addressed to you by Lord Lyell because I think they arise on other questions, but may I say immediately that I welcome the Government's proposal to retain in substance the office of Attorney General. That was the key matter and there have been contrary reports in the past and I am very glad that is taken. As regards enhancing, I do not think there is a great deal in the Bill, I fear, other than on the Iraq issue, about which the legal advice is still controversial. I think the case for enhancing is overdone. There has been from time to time controversy. In my time I remember Manningham-Buller getting into very great difficulty in the House on a weekly basis at one stage. Sir John Hobson was taken before his fellow Benchers in the Middle Temple by Lady Paget and Harold Lever for professional misconduct. I was fortunate; I was never taken, but that is a halo which I put on my head. Obviously there is not a great deal in the proposals. I suspect that they will not be dancing with joy in the streets of my former constituency, or not even a little jig.

Lord Mayhew of Twysden: I agree with what has been said by both Lord Lyell and Lord Morris. I think the key to the question of public confidence in the Attorney General lies

in accountability, and I think it has to be accountability to Parliament. We will come to this, I do not doubt, if you think it right, later on. The difficulty about taking any of the present functions away from the Attorney and vesting them in the Director or some immaculate official untainted by party contamination is that you do not get the accountability to Parliament, which I believe the House of Commons at any rate will insist upon, and rightly insist upon.

Lord Morris of Aberavon: May I add to that because I think Sam Silkin spelt it out in *Edwards* on the Attorney General and adopted by Lord Rawlinson: If the office were done away, "to whom would the independent, non-political law officer be accountable? If there were no ministers to whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister be answerable for an independent law officer would in practice have to control him, else we should have a semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament." To stand at the Dispatch Box to defend the prosecuting service is a very signal thing.

Q583 Mr Tyrie: I do not want to pre-empt the thunder of someone who is about to ask questions immediately after me but I would just like to clarify one thing, first of Lords Mayhew and Morris. You both came before the committee on which I served, which was then called the Constitutional Affairs Select Committee, on this very subject about a year ago, and gave extensive evidence, which I have in front of me. We have begun to touch on exactly the same points again. I just wondered whether there was anything that you did not say in that evidence that you feel, having come away and thought about it, you would like to add now.

Lord Mayhew of Twysden: I thought that I was given a very fair run. I certainly was given plenty of opportunity to expand on my ideas about accountability, which I have just broached this afternoon, so I did not come away saying, "Gosh, I wish I had said that".

Lord Morris of Aberavon: I think I would say the same. It was a very good hearing from our point of view. The fact that we tended to agree with each other does not mean there was a conspiracy on behalf of the National Association of Ex-Law Officers.

Q584 Mr Tyrie: I would not be so bold as to suggest that, but I will ask the third one of you this afternoon, a similar question which is that he has not merely given evidence but, Lord Lyell, you have actually served on a committee which has produced a report on this subject. I have that in front of me and that was published only in April. I have looked at that reasonably carefully. I wanted to ask whether there was anything in there that you disagreed with or whether that covers most of the points you are going to be making today.

Lord Lyell of Markyate: You have looked at it more recently than me, but I do not think there is anything there that I disagree with. If you have spotted something you think I might do, please draw it to my attention.

Mr Tyrie: Is there anything you would like to add?

Chairman: I think that is a bit of an open question. Do you want to put a particular point to Lord Lyell?

Q585 Mr Tyrie: It is a pretty thorough report which was completed only a few months ago. I just hope that most of the points Lord Lyell felt were important on this subject were in that report for us to take a look at. That is all.

Lord Mayhew of Twysden: Chairman, may I just add that, having had the chance to read the evidence given in the CASC report, both by Lord Goldsmith and latterly by Lord Mackay, which are of course appended to the report itself, there are things that are said there which

I would have been very glad to have said myself and probably would not have put them as well. I do not want to be led into a kind of heffalump trap: because you did not say this to CASC, it rather detracts from what you may say this afternoon. Might just read the last sentence of Lord Mackay's evidence. It is to be found on evidence page 92 of that Fifth Report of CASC. It is very short. He says: "I believe that the principles under which the office of Attorney General rest are sound, that it fits well into our system of government, that it has stood the test of time and should be retained." I respectfully agree with that.

Q586 Lord Morgan: We have had a variety of evidence, gentlemen, on the question of separating or the desirability of trying to separate the judicial from the political function. This, as I recall, has occasioned a lot of controversy in the past, including in the case of Sam Silkin, as Lord Morris mentioned, the *Gouriet* case with the trade unions. Lord Falconer argued before us that the Attorney General should be an independent figure, free from political pressure. What do you feel about the dangers here and is there not a problem about being independent if you are giving advice to a group of people of whom you yourself are one?

Lord Morris of Aberavon: May I deal with that? I have read Lord Falconer's evidence. I disagree with it. I refer to Sam Silkin here. Of course, Sam Silkin was criticised by the Court of Appeal in the *Gouriet* case, but he was upheld by the House of Lords and his office was held by the Lords to be an independent one and the decision was one that only he and he alone could take.

Lord Lyell of Markyate: If I could just add to the independence aspect, I think probably all of us have had to give advice to our political colleagues from time to time which has been unpalatable and sometimes thoroughly unpalatable. We know what we believe to be the right advice and I believe every one of us has given it and not been affected in any way by the political unpalatability, except to make doubly sure that we were sound on our position.

Q587 Lord Morgan: Do you think there is no problem at all, that it simply cannot happen?

Lord Lyell of Markyate: I do not think there is. I was seven years PPS to Michael Havers and then 10 years as a law officer, and obviously I have read the *Edwards'* books and so on and looked back on the history. There is a very strong ethos in the office, as I have emphasised in the letters which I have sent to your committee and which I have put in in answer to the consultation. There is a really very strong ethos in the office that you will be completely independent and straightforward in your advice giving. Speaking for myself, and I am sure I do for the others, you would just hate to go against that.

Q588 Chairman: Do you feel that it is not just the fact of independence but the appearance of independence, the possibility that those on the outside find it more difficult to accept an advice that is unpalatable if it comes from a political figure as opposed to one that appears independent by not being part of the team?

Lord Morris of Aberavon: May I say, if it ain't broke, why fix it? Over the years, as Lord Mackay has set out and as quoted by Lord Mayhew, the respect for the Attorney has been high. That is why I doubt whether you can enhance it. I believe the job can be better done by a political figure. He takes a holistic view. He has to take into account the whole range of issues, rather different from the high street solicitor, with respect to yourself, sir, and may well be a commercial lawyer. He has to have substantial political experience. Whatever my deficiencies as Attorney, I am sure that over the years one did build up quite a bit of, I hope, political credibility and was able, when asked to advise perhaps the Speaker, perhaps on matters like the DeLorean case for winding up the interests of the Government – and maybe other interests concerning the property of one or two rather important people – to bring a holistic approach to the whole issue. There were some issues where it was rather important to be a political animal. I had to appear at Strasbourg on one occasion to defend the issue of how far down a civil servant should be able to take part in political activity. Of course, the

greater the involvement of a civil servant in political activity, the less the appearance of impartiality. One could judge those issues. Those are some of the matters which arose, and accountability at a Dispatch Box at the end of the day to defend your decision is of paramount importance.

Q589 Lord Hart: This is a question about the advice of the Attorney General. There has been a little dispute in the evidence we have had. Should the Attorney General's legal advice ever be disclosed and, if so, in what circumstances?

Lord Mayhew of Twysden: I think that there are rare circumstances when the actual text of the advice could be disclosed, and those circumstances are limited to when the Government, which is the client in this context, actually wants it to happen. Save for those circumstances, the Government are entitled to the confidentiality of the actual text that they receive, and I think for good reasons. I do think that it is necessary and absolutely right that what I call the character of the advice should be made public. I think that is certainly right, but the actual text is a different matter. The text will very probably recite various suggestions that are put forward, or various areas of weakness to the Government's case – let us say for the purpose of argument – which have been contained in the instructions to advice which come to the Attorney. Any good counsel or solicitor asked to advise will of course rehearse the other side of the argument before coming to an analysis of where the outcome should be. I think you would get cherry-picking and you would get damage done to the Government as client which they are entitled to be spared. I do not think it would be in the public interest but, having said that, the character of the advice is certainly something which the public are entitled to know and should know.

Lord Morris of Aberavon: I would agree with Lord Mayhew. On previous occasions when I have given evidence, I have likened his role to a family solicitor, and you would not like the details of advice tendered to you, with respect, by your family solicitor, to be made public and

put in the marketplace. It is a client and lawyer relationship. It is privileged. It is the client's privilege and the client is Her Majesty's Government. As a general rule, once it is breached, they might ask a Minister why we have not consulted the Attorney on this or that or a whole host of other matters. I maintain that line throughout. Occasionally there were suggestions by government departments: please will you disclose you have been consulted? I remember one case on the compensation for Japanese prisoners of war. I knew if I gave way on that issue, which was not controversial from my point of view, whatever other people might have thought, then the floodgates might be open. The formula I devised, immodestly perhaps, was that Her Majesty's Government could say they had the advice of high legal authority. They were content and no other question was asked. Perhaps it was immodest but that is the formula. I would make one exception. Lord Mayhew and I have appeared before the Constitution Committee of the Lords, of which I am now a member, in order to proclaim our views that Parliament should take the decision on going to war. We put forward the view that it should be done on a convention and not on legislation. We did it in the face of opposition from all Her Majesty's Ministers – the then Lord Chancellor, a Minister from the Foreign Office, a Minister from the Ministry of Defence – and the committee upheld our views. In those narrow circumstances, if the responsibility is going to be on Parliament to decide we are going to war, and it is a novel situation, then Parliament should be fully informed.

Q590 Chairman: Do you see the Attorney's role as being the adviser to Parliament generally or only in those specific circumstances, as opposed to simply adviser to the Government?

Lord Morris of Aberavon: Generally, I would say in those circumstances I would single out, but of course the Attorney is also the adviser to the Speaker; I believe he is adviser to the Queen. He can be called upon before the committee. Again, and this is why I think the formula suggested by Lord Mayhew is a very happy one, the character of the advice can be

given without the details. You would know a good lawyer advising his client would rehearse the pros and cons. You might not want to put the cons before the whole of the public.

Q591 Chairman: Lord Lyell, do you have anything to add to that?

Lord Lyell of Markyate: No, I think that has been very well put by Lord Mayhew and Lord Morris. I do not think there is anything that I need to add.

Q592 Lord Hart: On the point that Lord Morris has just made, on that single point as to advice in relation to war, if the convention route was chosen, what do you say to that, Lord Mayhew?

Lord Mayhew of Twysden: The convention would be that Parliament has to authorise in advance, save for emergency situations, which everybody understands may arise. Parliament has to authorise under the convention that we propose the action that is being taken, and they would have to be told certainly the character of the advice that had been given. That ought to be sufficient without seeing the precise terms that it was expressed in to the Government.

Q593 Lord Hart: So is there a difference between you? Lord Morris, were you suggesting that there was more than the character of the opinion?

Lord Morris of Aberavon: I would not dissent. I think we are in a new situation and we have to work at it. I think events would resolve how much has to be revealed, but I think Parliament is in a new situation here and it would be rightly claiming to have the maximum information. How much has to be worked out.

Chairman: Before I call Lord Tyler, I did forget to say at the beginning that I should tell you that the interests of members of this committee have been declared in advance and are on the web page for everyone to see. Are there any other declarations that need to be made today? If not, that gets that out of the way.

Q594 Lord Tyler: All three of you have laid great emphasis on accountability to Parliament. Does it follow that you think it is therefore essential to be a member of one of the Houses, because, after all, the Comptroller and Auditor General is accountable to Parliament, by a different mechanism? Do you believe that if he or she, the Attorney, has to be a Parliamentarian, he should necessarily always be a Minister? Do you think that if a Minister, it is appropriate for the Attorney General to attend Cabinet and in what circumstances?

Lord Mayhew of Twysden: The last one first; I think that the Attorney should attend Cabinet by invitation. It may his own invitation in pursuance of his duty to uphold the rule of law, which means that of course that amongst other things the Government has to comply with the law. I do not think he should come as of right, as I understand is the practice at the moment. It never was in my day, nor in the days of my predecessors. The reason for that is a practical one. I think that if he gets drawn into controversies of a political character which are being argued out in Cabinet when he is there and it then falls to him to give legal advice, those who found his legal advice adverse to their political interests will be tempted to think: well, he would say that, would he not, because of the line he has just been taking in the row we have been conducting? I do not think it is conducive to belief in his detachment from government that he should go as of right. That is the first thing. As for whether he should be a Minister or not, I find myself really agreeing very much with what Lord Goldsmith had said at page 59 of the evidence of the CASC report, if I might read it. He says: "I consider that I have been best placed to give frank, well-informed and constructive advice to my colleagues in government precisely because as a Minister I am in a position to understand the system of government, the process of policy formulation and the overall context in which the advice is sought." He goes on to say: "Such advice tends to be more heeded by Ministers because it comes from one of their colleagues." He cites Professor Jowell who has recently put it: Surely Ministers are

more likely to accept such advice because it comes from 'one of them', someone essentially on their side, rather than from some externally contracted technocrat. By the same token, a Minister receiving unwelcome advice is perhaps less likely to sweep it aside when it comes from a ministerial colleague rather than a civil servant or some external lawyer. So that is my answer to the last two questions. I am sorry but I have forgotten the first?

Q595 Lord Tyler: A parliamentarian always?

Lord Mayhew of Twysden: I think so, yes. I have always found it very difficult to see how the ideal degree of accountability can be achieved unless you are a member of one House or the other. It is an absolutely unique situation to stand at the Dispatch Box and defend your decision or the decision of somebody who is a contender for whom you are in other ways responsible. As I have said before and as Mr Tyrie will no doubt remember, the sharpest darts come from behind you, and it is quite unique. I am afraid I am not as clear as I should be on the accountability of the Auditor General but I am quite certain it does not extend to standing at the Dispatch Box in the Chamber.

Lord Lyell of Markyate: I think it is very important to be a Minister. First of all, as Lord Mayhew has said, you can cross-examine effectively or question a Minister at the Dispatch Box far more effectively than even the best select committee can do, and you do it much more frequently. One of the problems in recent years has been that the Attorney General has been in the House of Lords, and there are not regular questions to the Attorney General in the House of Lords. I think that is one of the things that might be considered. It would not only apply to the Attorney. If there are other Ministers – after all Lord Carrington was Foreign Secretary in the House of Lords – who head departments, the House of Lords might consider having questions in the same way as the Commons on a regular basis. I think that is extremely healthy, but to be standing at the Dispatch Box, as Lord Mayhew has said, is highly effective. The other point of being a parliamentarian is that you do day-to-day, year-

by-year, build up that very political background experience which helps you to put your advice into context; you build up a trust and a feeling amongst your colleagues as to what you are like and it is tested in the fire of Parliament. I think that is very valuable. So I strongly support the continuance of the Attorney General and the Solicitor General as being Ministers in Parliament.

Lord Morris of Aberavon: May I add that I agree entirely that they should be in either House, and I would say preferably and very strongly in the House of Commons, but unless you have people who can be appointed at any particular time, then we are exceedingly fortunate to be able to put lawyers of eminence in the House of Lords. I think it is a very unhappy practice that has developed recently of Ministers being members of Cabinet. They have not been so since 1928. I never went to a Cabinet. I went to innumerable Cabinet committees. I was on the War Cabinet because actions on Kosovo were fast moving. Indeed, I had to approve on the 68 of the 69 days each and every air target every day of every week. They came to me at my home, to my constituency, wherever I was; I had to deal because we had to ensure and give positive advice to the forces that we adhered to the Geneva Convention. But to be involved in Cabinet – I tell you, you should be too busy to be in Cabinet to prepare for matters involving foreign policy, economic affairs and a whole host of things. There is a point in being a little distance from political colleagues. It was Lord Rawlinson who said in *Edwards* again: An English Attorney General – he means there English or Welsh I emphasise – ought to be aloof from his colleagues in the ministry to a quite formidable extent. That was his opinion and I think it stands. If he is involved in political decision-making, the less he is involved, the better. There is one other aspect. Under the Ministerial Code of Conduct, which with respect is worth looking at, any ministerial colleague who wants to litigate has to consult the Attorney General. In my first few months I had a whole host of colleagues who wanted to consult me. I invariably gave them excellent advice, if I may say so: do not

litigate. I think they all accepted it in due course, but in the first flush of excitement they all wanted to litigate. It is much easier to do that if you are down a mile or so away in Buckingham Gate or wherever you happen to be than with your office near or in the Cabinet Office or something of that kind. It is important to be slightly apart and to give legal advice, and I do not think you would want to be too close to your family solicitor either.

Q596 Lord Williamson of Horton: I want to ask about the Attorney's role in the formulation of criminal justice policy. We have had different views expressed to us. Lady Scotland cited cases where she thought it was very beneficial and some others, which I will not quote, thought that it tended to obliterate or confuse the independent role of the Attorney General. What do you yourselves think of the retention of the role of the Attorney General in relation to the formulation of criminal justice policy?

Lord Lyell of Markyate: Speaking for myself, I think the way it was done in earlier years was better. The Attorney General did not have formal responsibility; it nearly always resided with the Home Secretary, but the Attorney General was consulted about it and therefore had some input. I do not think it sits particularly easily with the role in general to find yourself actually formally a part of tripartite ministerial responsibility.

Lord Morris of Aberavon: I sat on the tripartite committee which was set up. It was helpful but I think it is only worth doing up to a point. There is a danger of being too mixed up with policy, which is rather different from informing colleagues what is happening. They may want to prosecute more drug dealers in Brixton; they may want to prosecute more sheep stealers in north Wales, which I have done myself on one occasion; but there is a limit. It is a very dangerous situation. I remember, Lord Mayhew may remember as well, there was a proposal by the Government to send junior Ministers, I think from the Home Office and some other department, and the Solicitor General round the country chivvying up prosecutions. I let it be known to Lord Goldsmith that I did not find this agreeable at all

because the Solicitor General had no role in whatever it was, and I do not remember the details, that was being proposed, and the proposal was quietly dropped. Do you remember it, Lord Mayhew?

Lord Mayhew of Twysden: Actually, I am trying to remember it as you described it. It did not register with me, perhaps because they thought that my response would be rather foreseeable and along the lines of yours. I think this could easily be dropped. I do not feel terribly strongly about it, but I do think there is a risk that has been well expressed by Nick Lyell. I think that you can get yourself into a position where your independence does seem to be rather diminished in consequence. It could easily be dropped. I would not put it at the head and forefront of my criticisms.

Q597 Fiona Mactaggart: In the joint comments which you gave to us you said very clearly that you felt that the Attorney General's function of superintendence and power to direct should be retained. I think it would be helpful if you point out that there has been no public example of it being used since the Second World War. I get the impression from your evidence that there have been examples where there have been trenchant discussions and carefully advice in which each of you have probably been involved. I wonder if you could tell the committee something from that experience about why you feel so clearly that the proposal to drop this is a mistaken one.

Lord Morris of Aberavon: I feel very strongly it is the ultimate nuclear weapon because unless you have the power, how can the director in each department be made to listen to your decision? It is not your decision in practice. What happens is this: you have regular meetings with the DPP maybe once a week; he or she will come along with a whole list of very serious cases and seek your advice. He or she will go away and take the decision. It is their decision, not your decision, having heard your advice. The Director of the SFO might come along on a monthly basis. You might go and see the Attorney General for Northern

Ireland or he might come and see you. I well recall on one occasion the Director for Northern Ireland, because one held the office of AG here and AG in Northern Ireland, and he had a case on which he wanted advice and had reached a tentative view on a prosecution. I was a criminal lawyer and I said, "Let us see the film of what happened". He and I sat down for an hour or so and watched and discussed and read all the evidence. I doubted very much; I could see as a criminal defence lawyer all the chinks that would be exposed in the prosecution. He listened, did not say very much, went back and the prosecution was dropped, but it was his decision. How on earth, if you do not have the ultimate power, even though it has never been exercised, can you ensure that he does listen, and he does listen. That is my experience.

Lord Lyell of Markyate: I think the potential tension is very valuable. After all, the Director of Public Prosecutions is a very important independent public official in his own right, but it is the Attorney General who has to answer to Parliament. You cannot have responsibility without power. I think of one particularly sensitive prosecuting decision. I was much less of a criminal lawyer than Lord Morris but I had had some reasonable criminal experience. This was a case where the evidence had to be weighed very carefully. One had to consider whether what one was told initially on the face of it, which all seemed very black and white, was likely to come out in that sort of way were the matter to be tried in court. What we agreed to do, as one quite frequently did in very difficult criminal cases, was to get Senior Treasury Counsel at the Old Bailey to go away and give a really careful, well argued opinion and then come back to it. In that particular case Senior Treasury Counsel went away and said that in his opinion there was not a realistic prospect of conviction for reasons which he explained. What had been a difficult decision resolved itself through careful discussion on both sides and the seeking of independent and carefully thought out advice.

Lord Mayhew of Twysden: In four years as Attorney and five before that, often having to do both jobs because Michael Havers was away seriously ill for a great deal of time, I never had an occasion when I thought to myself 'gosh it is a bit of luck that we have got the power to direct' because we always arrived at a decision which was the decision of the Director, whether of Northern Ireland or for England and Wales by discussion. I very much agree, and you would expect me to do so because this is a joint paper we put in, with what has been said about the importance of the ultimate ability to direct. I am sorry to be a bore about this, but it comes back to the desirability for accountability. The prosecuting arm of the state is immensely invasive; it has a huge effect upon people's lives and wellbeing. You only have to ask yourself how people behave when they get a summons to appear in a magistrates' court or a country court and there is a great fuss. It is very important that that arm of the state should be exercised in a way in which the ultimately responsible person is accountable and is accountable to Parliament. How can that happen if the director is entitled to say, "Well, I am sorry, but it is my decision, as you rightly remind me, and it is going to be this", and you happen to disagree with it? You have to stand up in the House of Commons and you have to say, "This is a decision with which I disagree". That is not going to do much for public confidence in the criminal justice system, I suggest.

Q598 Fiona Mactaggart: Why do you think the Government did this?

Lord Mayhew of Twysden: I think that the Government is seeking to feed an asserted perception that anybody holding the present functions and responsibilities of the Attorney General cannot be trusted to exercise them fairly and with integrity. I say it is an assertive perception that nobody can really be expected to do this with integrity because I have not come across any evidence myself of lack of confidence in the system. Where this has all arisen has been in the events of recent controversy, notably the advice about the Iraq War, latterly about British Aerospace but, as Lord Morris has said to you this afternoon, there have

always been controversial decisions from time to time, a tiny proportion of those that are taken week-in and week-out. It would be a great mistake greatly to change and in my view to diminish an office which, as Lord Mackay has said in the passage I have cited, has stood this test of time and is sound. I think you would end up with something much less accountable and much less satisfactory.

Lord Morris of Aberavon: Could I supplement that, in view of the question by Fiona Mactaggart? I do not think the Prime Minister, with respect, was adequately briefed on this issue in the White Paper which was issued when he said the Attorney General would withdraw from making decisions on matters where he or she were not statutorily bound and would no longer take decisions. He was not adequately briefed because they never do take decisions unless they are bound by statute. I think the whole thing flows from the limited information which was given to him when he made the sonorous claim that she would withdraw from decision-making other than where she was statutorily bound. I think it flows from that.

Q599 Emily Thornberry: I would like to ask you about the proposed Clauses 12 to 15 that have been fairly controversial, which are the ones that will allow the Attorney General to stop a criminal investigation or prosecution on the grounds of national security. The concern is that that decision could be made without any meaningful accountability to Parliament, to the courts or to any international bodies and that, given the AG is appointed by the Prime Minister and is a member of the Government, it would be very unfortunate if it was ever seen that any decision that they made may have been made on political grounds. I wonder if you have any comments about that?

Lord Morris of Aberavon: May I comment very briefly that I think that the clause basically rehearses and restates what does happen now because the Attorney General, if he is informed by his fellow Ministers, may take a decision whether it is right in the pubic interest to take

such a decision. I certainly believe there should be that reserve power because he has to take into account a wider remit than perhaps would otherwise be. I think the doctrine comes back to what Shawcross said many years ago, that the Attorney may consult – this is again from *Edwards* – his colleagues and in some instances he would be a fool not to do so, and ultimately the decision is his. I would maintain that position and this is the kind of situation where somebody with a political slant can take a better decision than perhaps somebody whose experience is strictly limited to the ordinary law.

Q600 Emily Thornberry: They would have a better understanding of national security?

Lord Morris of Aberavon: Yes, because he would have been briefed by colleagues. According to Shawcross, he should consult colleagues if he needs that kind of advice and, being a political Minister, the Attorney's job is not to put a sprag into the Government's coach but to ensure that all considerations are there to ensure that they keep on the right road, on the right side of the road, and not to divert. He gives that advice as a political animal, knowing quite a bit about national security. He is cleared at a very high level and he is able to give the kind of advice at the end of the day which ensures that on the one hand the public interest is safeguarded and on the other national security is taken into account.

Lord Lyell of Markyate: I agree with everything Lord Morris has said on that. It is essentially part of the overall power to direct. I think, so to speak, it has been put back into the Bill because it was recognised that it is one but very important aspect of that general power to direct, but it is not fundamentally different. It is certainly true that the Attorney, who is cleared to a very high level, is the repository of information which is sometimes so sensitive that he just will not tell anybody about it, and possibly his most senior civil servant will be party to it but has to take it into account. Also, I would like to reinforce what I remember about Lord Mayhew saying about the very formal way in which I recall that representations from Ministers would take. I was deeply struck when the first time it was the

Minister of Defence, George Younger, and he came to consult the Attorney, and I was a fairly new Solicitor. It was done in the most formal and careful and scrupulous way and in no sense was there any suggestion than that the Secretary of State for Defence was putting forward important matters for consideration, but the decision was that of the Attorney.

Lord Mayhew of Twysden: I very much agree that it is important to see what is dealt with in Clause 12 as part of the overall duty to uphold the public interest. One of my criticisms of the Bill is that there is no reference to the traditional role of the Attorney General as the guardian of the public interest; it is merely a facet of it. It is right than it should remain because since every state has to have a prosecuting arm, it would be absurd if in a case where there was plain damage to national security, there was no provision to take that into account in deciding whether or not there should be a prosecution. Just on the latter point, Ms Thornberry has drawn attention to the risk that great damage would be done and it would be very wrong were the Attorney to take party political or partisan considerations into account, and of course it would be terribly wrong. If I can reassure her from personal experience – I remember the case, and there is more than one, that Lord Lyell has just mentioned – that in one case I was adjured in the most fervent terms not to permit a prosecution of somebody in Northern Ireland because great damage would be done. It was the decision of the Director of Public Prosecutions for Northern Ireland with which I agreed that we could not taint the upholding of the rule of law, so serious was the matter, were we to act upon those representations, and he was prosecuted. In the event, he pleaded guilty to enough counts to enable the matter to be dealt with without the risk of cross-examination giving rise to all sorts of matters of intelligence. The point I would just like to end with is that not once was there the slightest cheep of criticism from any of my colleagues that I had gone against their wishes, not once.

Lord Morris of Aberavon: Chairman, it is a very longstanding convention. It was Viscount Simmons when he was Lord Chancellor who explained and set out the need for the

formality of the approach which Lord Lyell has mentioned and that it is done on a very proper basis. If there is such information, it should be done formally. I think that supports my view that the Attorney should not be too close to ministerial colleagues and not sit in Cabinet.

Chairman: I am terribly sorry, we are going way past our time, not because of the answers, because they are extremely illuminating, but we are just asking so many questions. We are going to ask one other question – Martin Linton has a question – and then the other matters that we intended to ask, which may arise out of your paper and so on, perhaps we can put further in writing and get a response in that way, if that would be acceptable.

Q601 Martin Linton: This is a fairly short question coming back to Clause 11, which abolishes the power of the Attorney General to stop a prosecution, the so-called *nolle prosequi*. This is an issue where all three of you disagree with the Government and indeed, according to this, with a majority of government consultees. I thought maybe you could explain why you hold that view.

Lord Morris of Aberavon: I feel very strongly on this, Chairman. It is again an ultimate power not often used these days. The courts now in the case of illness and unfitness to be tried tend to reach their own decision on this, but there is the ultimate power to withdraw the prosecution. I found it very important in two particular cases. There was an elderly lady, well into her eighties, who used allegedly to write anti-Semitic literature of the most appalling kind and she was prosecuted time after time and had enormous publicity for a long period of time. She was now in her late eighties and obviously getting frailer and frailer. I took the decision that enough was enough. We were fuelling the publicity which she craved for, and that was the end of her and nobody saw her or heard anything more about her. I also had an unfortunate case of a circuit judge who had been allegedly involved in a mortgage fraud. The jury had been out I think for 15 days and there was a question of a re-trial. The Crown came to me and said, "This man is collapsing. Every day when we wait for the jury, the 15 days, it

is getting worse and worse". I took the decision. The point was this: I would have to defend it in Parliament. I would have to defend it at the Dispatch Box. Not a murmur was raised. Had he been an official, how could Parliament question an apparently irrational decision not to proceed with the prosecution? I had adequate material, took the decision, and I knew there was a possibility that I would have to defend it. Hence, it is important to maintain it, and I think the Government are going down the wrong way completely.

Q602 Chairman: Is that a view that is shared?

Lord Lyell of Markyate: Yes, I share that view. I had a difficult one involving illness. In fact I issued the *nolle prosequi* but I was fully ready to defend it. Had it come into the public domain in a major way, which it did not, it would have been much better defended at the Dispatch Box, and I think public trust would have been completely maintained.

Lord Mayhew of Twysden: I absolutely agree with that. Just harking back to the last question which overlaps to some extent with this, I had another case of the character that Lord Lyell mentioned where Defence Ministers very properly, having been consulted by me as to where they consider the public interest lay, made their representations and the decision of the Director for Northern Ireland was that although there was evidence to justify an important prosecution, the public interest required that it should not take place. By reason of the fact that I was a member of the House of Commons, I was able to go to the House of Commons and make a statement of my own initiative explaining this. The consequence of that was that I was very properly grilled for something like 45 minutes and, at the end of it, the matter dropped and it never came back to the House of Commons by any of the copious means by which it could have done, with which you will all be familiar. I thought to myself and continue to think that that could only be explained on the basis that people thought that they had had an honest account of a difficult position and confidence in the integrity of the

decision had been established. That could not happen if the superintender of the decision-taker or the decision-taker himself had not been a member of the House of Commons.

Chairman: Thank you very much for those comments. We have learnt a great deal from your experience. We do have an awful lot of other questions but if we may put them in writing, and the Clerk will ensure that you receive them as soon as possible, and you do have the time to respond, we would be very grateful. Thank you very much indeed for coming.

Witnesses: **Lord Carlile of Berriew**, a Member of the House of Lords, and **Professor Jeremy Horder,** Criminal Commissioner, Law Commission, and Member, Criminal Justice Council, gave evidence.

Q603 Chairman: Good afternoon. Can we thank you for coming to our Committee. As you know, we are looking at a whole series of issues but in particular this afternoon we are looking at a number of issues on which we would welcome your comments, particularly with regard to the Attorney General's powers. Can I also at the very beginning say that members have declared interests relevant to this inquiry and they are available today and on the Committee's website. The second thing I need to say is by way of an apology. It is possible that there will be votes at 5.30 and there is a risk that a quorum will not be maintained after that, so it may be we will need to go as far as we can up until 5.30 and ask that other questions be dealt with by correspondence. I do apologise for that in advance. If I can ask colleagues to be as brief as possible in questions we may indeed make some progress before then. Can I open by asking, the Government is fully committed to enhancing public confidence in the office of the Attorney General, do you think the proposals that have been set out achieve that objective?

Lord Carlile of Berriew: No, in a word. I think we have a problem about conflict between perception of the integrity of the office and the integrity of the officeholder. I believe that if one can remove questions about the integrity of the officeholder which may arise from time to time, and of course I am not talking about the present incumbent, then I think one will enhance the credibility of the role of the Attorney General. My view, therefore, is that it would be far better if one had an Attorney General who was independent of the government whose term of office spanned the period of a General Election. I think that would enhance confidence in the office. The only other thing I would add is there is some kind of template for this. The Lord Advocate in Scotland is not a member of the Scottish Parliament but

appears in the Scottish Parliament, answers questions and deals with any issues that might arise, so that there is availability and transparency through the Scottish Parliament. I think this could be done through membership of the Attorney General of the House of Lords.

Q604 Chairman: Professor Horder?

Professor Horder: I take a slightly different view. The Government is on the right lines in the broad sense that it has tried to focus attention on the importance of the Attorney's role in relation to the rule of law, and that is important in the present context where the Lord Chancellor's role has changed a great deal over the last few years making the Attorney's role in relation to upholding the rule of law very important, particularly so. The Government has also proposed that the Attorney should have a role in relation to national security and that also, it seems to me, is right and in my view inclines me to the view that the Attorney should be a parliamentarian at the very least. Let us not anticipate that particular question. What I would say is where I think there is a weakness is that the commitment of the Attorney General under these new proposals to the rule of law is perhaps half-hearted, it is to be there in the oath, that is fine, but there is only so much you can do by way of an oath, it seems to me, and I believe there is scope for making the commitment to the rule of law of the Attorney General much more explicit in the Bill and making a better effort to distinguish between that role and the role of just giving legal advice on whatever it may be on a lawyer/client basis to Government. I think that is a very important distinction.

Mr Tyrie: You have heard and no doubt read the evidence from the Attorney General trade union representations which we have just been listening to.

Chairman: That is the retired section!

Q605 Mr Tyrie: The retired section. They were saying in a nutshell that the accountability aspects of the role require an Attorney General to be able to be called before Parliament and

in particular to the floor of the House of Commons. Do you think that a select committee can do the job adequately or do you think there is something to the points made by the troika?

Lord Carlile of Berriew: I think there is something to the point that is made by the troika and that is why I say an independent Attorney General should be given membership of the House of Lords, or whatever it becomes. I suppose there is no reason why the Attorney General should not be given a slot at Question Time in the House of Commons, though I always fear that the House of Commons, if you will forgive me for saying so, evolves at about the same rate as the species, so one cannot be optimistic about a change like that. We have had successive Attorneys General in the House of Lords now and in their different ways they have shown the sort of accountability that I think is necessary. I have absolutely no problem about it being accountability to the House of Commons, of course.

Q606 Chairman: You share that view, professor Horder?

Professor Horder: I do share that view. Contrary to the troika, I think that there are advantages in having a member of the House of Lords as the Attorney General, there is perhaps a little bit of distance in the public eye, at any rate, from the hurly-burly of party political politics, but there is also, as Lord Mayhew was keen to point out, the possibility of a dart coming from behind, there is accountability at the Despatch Box, and that is very important. I do agree with your terms.

Lord Carlile of Berriew: If I can revert to the question about a select committee, I think select committees are extremely useful. I have served on select committees and given evidence to many select committees now and they carry out a very important role, but it is often historic in its analysis and lacks the immediacy of accountability before a House of Parliament. I would like to retain that immediacy, albeit by transferring it to an independent person.

Q607 Lord Morgan: This follows from the very interesting answers we have just heard. We have had a variety of views on the problems of the 'legal' and 'political' aspects of the Attorney General being separated. In terms of the answer we have just heard, would that not be a problem also if the Attorney General were in the House of Lords? Lord Goldsmith has had a few problems.

Lord Carlile of Berriew: I do not think so. If you look at the judgment of Lord Justice Moses in the BAe case, the innuendoes or implications behind that very strong judgment ---

Q608 Chairman: I do apologise. Because that issue is *sub judice*, we have got to avoid discussing the actual merits.

Lord Carlile of Berriew: Thank you very much. I do not propose to deal with the merits, but the innuendo is of a generally political kind and I believe that an independent Attorney General would be distanced from such inference or innuendo. The case is, of course, subject to appeal and it would not be right to mention any more about it.

Q609 Lord Morgan: Could I move on to my other question which is relevant to it, namely the disclosure of the legal advice of the Attorney General. Do you think such advice should be disclosed and in what circumstances?

Professor Horder: We are familiar with the point that the Government is the client and the Attorney General is the lawyer, but the Government is not just any client and the Attorney General is not just any lawyer, they are there to represent public interest and, of course, legal professional privilege can be waived and there may be public interest dimensions to that. Lord Mayhew is right that of course the general character of advice should be disclosed, that seems to me to be the right thing in the interests of openness, but before I can answer that question with a "yes" or "no" I would need to know what sort of advice the Attorney was being asked for. There is a tricky point here about the rule of law. There are two sorts of

advice that you can give. One is, "The rule of law requires this answer or perhaps one of these two answers". There is a second kind of question that a Government might want to ask and that is, "Okay, but legally speaking what can we actually get away with? Is there a third and fourth answer that just slips through the legal net? That is the one we politically would most like to see going ahead." If one gives advice on that, one is beginning to slip away slightly from a guardian of the rule of law to being just a straightforward government legal adviser. If the straightforward government legal adviser model is retained, I think it follows almost automatically that that kind of advice will not be disclosed and probably should not be because it will inhibit discussions between Government and their legal advisers about that sort of issue.

Lord Carlile of Berriew: I agree entirely with Professor Horder that the Attorney General must be the guardian of the rule of law, in which case the direct answer to Lord Morgan's question which, if I may say so, oversimplifies the issue, is yes, but not necessarily routinely and subject to appropriate redaction. To put a little flesh on this, what I would foresee if we were to have, as I suggest, an independent Attorney General would be for that person to report, say monthly or quarterly, very broadly on the issues that they had been asked to advise upon and, if appropriate and necessary, the conclusions they had reached. There is a problem though. Both Houses of Parliament, and I have been a member of both, and especially the House of Commons, suffer from an enormous amount of curiosity, some of which is somewhere approaching the idle. I do not mean that the people who ask the questions are idle but they are very interested in the answers to all kinds of questions and there are 600 and something-odd potential questioners just in the House of Commons. I do not think it would be right for every word of every piece of advice to be published. There are going to be matters of public interest on which certainly there should be publication, possibly subject to redaction. Equally, there are going to be matters about which the public interest, particularly

on grounds of national security, requires that very little should be published. I think it has to be a merits based judgment, therefore, subject to the assumption that a proper and transparent account is given by the officeholder of the role he or she performs.

Q610 Lord Tyler: I think I can anticipate Lord Carlile's answer to this, but can I just clarify that clearly from what he has already said he does not believe that the Attorney General should be a minister, should not attend Cabinet at all, or perhaps in some circumstances, and perhaps, Professor Horder, you could also give us a response on that also.

Lord Carlile of Berriew: I believe the Attorney General should not be a minister. In my view, the Attorney General should attend Cabinet when an appropriate issue arises. I should mention in this context that I foresee a situation in which there is inserted an additional person or group of people, which for shorthand I would call "Downing Street counsel". The Prime Minister is perfectly entitled to obtain confidential legal advice if he wishes to, but if there is to be formal legal advice to the Government then it should be transparent and, as I suggest, given by an independent person. If such formal legal advice is required, then I think it would be expected that the Attorney General would attend Cabinet, give their independent advice on the issue arising and that advice should be properly recorded and minuted.

Professor Horder: The most controversial role, difficult role, under these provisions for the Attorney General is in relation to national security matters. I find it difficult, I have to say, although I am sure it is not impossible, to imagine someone wholly independent being entrusted with that function by Government. I would be happier in my own mind seeing a parliamentarian, and probably a minister as well, with responsibility of that sort in this reformed role, I have to say, which is not to say that there could not be a completely different model with an independent Attorney General. Other countries seem to manage perfectly well with that. If so much importance in an interventionist sense is going to be placed on the

national security card, if I can put it that way, then I think there needs to be quite a close relationship between the Attorney and Parliament itself, in my view through membership.

Q611 Lord Williamson of Horton: I want to ask about the formulation of criminal justice policy. Do you think the Attorney General should retain her role in relation to the formulation of criminal justice policy? Some people who have given evidence to us think it might confuse the independent role of the Attorney General.

Professor Horder: I can see the point that was being made by the troika about the awkwardness in some respects of having the prosecuting authorities under the authority of the Attorney General. We all accept that the responsibilities of the Attorney General are a bit of a mixture of things that have grown up over a period of time. One wonders, for example, under the protocol is it really the job of the Attorney General to talk about what the DPP's media policy should be and so on. There are some odd things in there that one would think it more appropriate to be performed by the Ministry of Justice and so on. However, I hope no-one could deny that there is an important role to be played in relation to the co-ordination between the prosecuting authorities, and there are quite a lot of them now - DPP, SFO, Revenue and Customs, not to mention the military prosecuting authorities - in the interests of the rule of law to make sure that if there are common interests in regard to prosecution policy they are settled by the Attorney General in consultation and that he or she is responsible for that policy to Parliament. So there is a dimension of prosecution policy, I believe very strongly, that is there where the Attorney General has a strong interest.

Lord Carlile of Berriew: Yes, and I agree. Particularly if one were to have an independent Attorney General then their independent advice, I am not sure about the formulation in the question, on criminal justice policy and its consistency with the rule of law of which the Attorney General is guardian seems to me to be a reasonable requirement of the office.

Q612 Fiona Mactaggart: I am uneasy, if I can be honest, Lord Carlile, about the independent Attorney General as having responsibility for the public interest in relation to justice, which is a critical part of this role you would agree. In my experience those people who have not had the kind of experience of a political relationship with the public often find it hard, not impossible but find it hard, to put the public interest in its broader sense first. I wondered if you could unpick that a little.

Lord Carlile of Berriew: The first thing I would say is that if you go and look at the performance of Eilish Angiolini as Lord Advocate in Scotland, and the Solicitor General for Scotland ---

Q613 Fiona Mactaggart: It is a very small country.

Lord Carlile of Berriew: It has the same legal issues. It has a criminal justice system and there have been some extremely controversial cases there. They had to handle Lockerbie, for example, which was at least as difficult as any Attorney General has had to handle in England and Wales. The experience in Scotland is entirely good. I have discussed this with the Lord Advocate as to how comfortable she feels in that role. She would have to answer for herself, but my impression is that it is functioning very well. Also, the way in which the person is selected and who is selected is very important. I would favour a sort of parliamentary approval system as was mooted in the original consultation paper in relation to the choice of Attorney General. My own view is that this could be achieved without too much difficulty. I do not know what the evidence is that someone who has been a member of the House of Commons or a member of the House of Lords is going to be any better. There is a sort of given that because they have been a Member of Parliament they understand the place better, but that sometimes leads to rather negative results.

Q614 Fiona Mactaggart: To get to the point that I am most concerned about, which is the powers of the Attorney General and the authority of the Attorney to decide on whether a prosecution should proceed or not, I wonder if you would both give us your views on the pros and cons of the situation as it presently exists and the situation as is proposed in the Bill.

Professor Horder: I broadly agree with the structure that is put forward in the Bill. The contrary argument was put by the troika that it is valuable to have the Attorney General involved in some individual cases, giving consent or issuing a *nolle prosequi* because of illness and so on in particular cases, but, with respect, I did not find that the strongest of arguments because in relation to the *nolle prosequi* there is abuse of process doctrine which has developed in recent years which is meant to deal with that. Also, such things could be dealt with through the protocol that is to be drawn up between the Attorney General and the prosecution authorities. I did not find that a terribly strong reason for going against what was actually ---

Q615 Fiona Mactaggart: Their fundamental reason was the reason about accountability.

Professor Horder: That is right, but I am uneasy about the idea of accountability in relation to individual prosecution decision-making that does not relate to national security, if you like, that just involves ethical or other issues in individual cases. It seems to me that it is right, broadly speaking, that prosecution authorities take those decisions and they can, of course, seek the advice of the Attorney in individual cases. You do not need to go so far as to say that actual consent has to be given. There is nothing to stop the prosecuting authorities going to the Attorney General and saying, "We have got a real problem here, what would you advise?"

Q616 Fiona Mactaggart: Would you mind it if it was automatically public if an Attorney was to say, "No"? Would that deal with your problem of feeling that it is too much interference?

Professor Horder: When I was drafting the response to the Criminal Justice Council I said that, indeed, whenever advice was given on that sort of basis it should certainly be published, yes, because it does not involve a national security issue and why would you not do that.

Lord Carlile of Berriew: I was simply going to say in answer to Ms Mactaggart, so far as the Commons are concerned I suppose the most obvious one is that there are, for example, three perfectly good senior officials, the DPP, the Director of Revenue and Customs Prosecutions and now the new Director of Military Prosecutions, who are very experienced and well capable of making these decisions themselves. I come down on balance with the troika on this because I think the accountability point is an extremely important one. There are, as we heard, very few decisions of this kind. We heard a couple of anecdotes from each of them from their time as Attorney General, and that is probably about the average strike rate. I think that there are some cases which are so important that the public interest should be exercised by the most senior person on the piste, and that is the Attorney General. Having said that, where such decisions are made they should be reported. One should not have to rely on the good fortune of nobody raising them in Parliament, and I would see them being reported as a rule in the monthly or quarterly reports to which I referred earlier.

Q617 Chairman: If the Government's proposal that the power to give directions should be removed, is it right that there should be an exception in relation to cases affecting national security?

Lord Carlile of Berriew: In my view, yes, for this quite straightforward reason: decisions on the grounds of national security may have to be considered urgently and should be considered on the floor of one or other House of Parliament. I do not think an *ex post facto* explanation before a select committee is accountable enough.

Professor Horder: I completely agree with that. There is just one query which I might raise in my capacity as Law Commissioner and looking at reform of the bribery laws and our

international commitments on this issue, and that is in clause 14(3) where it is talking about the withholding of information from Parliament and it talks about the inclusion of information being prejudicial to national security or seriously prejudicing international relations. That is a much broader category. There is going to have to be some further thought on how broad or narrow we understand this question of national security. You will all be aware that is a slippery concept. I am sure that all international bodies would accept that individual prosecuting authorities can intervene in prosecutions on the grounds of national security, they would all accept that, but they would be rather more sceptical, I think, about a broader concept of intervening on the grounds of prejudicing international relations unless that was set down with a great deal of clarity to make sure it is consistent with our international obligations.

Q618 Lord Norton of Louth: Just very briefly on clause 16, and I know you have already touched upon it, the Attorney making an annual report before Parliament. To some extent the clause itself stipulates what should not be in it, but how appropriate is that and how far would you go beyond it in terms of accountability to Parliament? You have already indicated some of the ways in which you think the Attorney should be accountable, is there more that we should be looking at?

Lord Carlile of Berriew: In my role as independent reviewer of terrorism legislation, I have now got more experience than I would wish, I think, of writing reports which are published either as parliamentary papers or as Stationary Office papers. My experience is that there is a great deal of scrutiny of those reports by people who are interested and it is very telling scrutiny. The production of an annual report, which is what I do, though I do it for three different functions as independent reviewer of terrorism legislation, is a useful discipline and it gives Parliament something to debate or get its teeth into in some other way if it wishes to do so. I do not think an annual report is the subject for a more ongoing and dynamic

relationship between Parliament and the officeholder of Attorney General. I would indeed see the annual report as a compilation and expansion on those more frequent periodic reports that I have already referred to. I can give you an example actually from the terrorism field. The Home Secretary is required to report to Parliament quarterly on the progress of the Prevention of Terrorism Act 2005 Control Orders and I have consistently encouraged Home Secretaries to put more detail into these reports, and they are doing so. I think that kind of principle that you give a quarterly report and then build it into something bigger is a very sound principle. It would enable select committees, sometimes numerous and overlapping, to look at different aspects of the work.

Q619 Lord Norton of Louth: So you feel that the existing parliamentary means for examining that report are sufficient in terms of extant select committees?

Lord Carlile of Berriew: No. In an ideal world I would like to see select committees, particularly joint committees like this, having far more influence than they have. I hesitate to use the word "power" because I do not mean it, but I think you will understand what I am getting at. All too often select committee reports, if they are deemed inconvenient, particularly by a government with a large majority, are simply an exercise in occupational therapy for the members.

Professor Horder: I have nothing to add.

Q620 Lord Hart of Chilton: The White Paper suggests that the oath of the office of the Attorney General should be reformed by an inclusion to the rule of law, which you referred to earlier, but did not seem to think that it was important to legislate for that. What are your views?

Professor Horder: I do not think I have a very strong view except that it seems to me, as I said earlier on, that the Government proposes to do quite a lot of the commitment to the rule

of law on the part of the Attorney General through the oath, in which case I think there might well be a case for putting it on a statutory footing, I think that might be important. However, if you look at oaths generally that are sworn by the Attorney General in the United States, for example, or by European Court judges, they tend not to go into the detail of what the duties of the person actually are, what they tend to say is, "In performing my duties I will be independent, I will be discreet, I will not be swayed by such and such a factor" and so on, whereas here what is happening is that some of the duties are being included in the oath and if you are going to do that you probably need to put them on a statutory footing but, as I have already said, I would prefer to see a commitment to the rule of law a little bit more integrated into the role of the Attorney him or herself.

Lord Carlile of Berriew: I take the rather old-fashioned view that oaths of office have an importance in two ways. First of all, most importantly, for the officeholder. If you were to ask a judge to recite the oath of office which he or she has taken, and only once, most of them will remember every single word of it. Secondly, I think it is very important for public accountability that the oath should be seen to be taken and that it should cover the principles underlying the office in question. I think my preference, though I would not pretend that I regard this as the most important issue under debate, is that the oath should be incorporated in statute in an appropriate form.

Q621 Chairman: Clause 3 of the draft Bill sets out a proposed model of a statutory protocol between the Attorney and the three Prosecution Directors. Do you think the protocol that is proposed is adequate or, indeed, should the Attorney General continue to have superintendence responsibilities in any event?

Professor Horder: I have already said a little bit about it in that there are some slightly curious things in there: H&I, for example, the Attorney General dealing with the press and media relations that the Directors have to have, and also dealing with complaints against them

and so on. That seems slightly odd. In general terms I am in favour of having such a protocol. First of all, it has the advantage of being a published basis on which the Attorney General and the Prosecution Services will jointly operate but, secondly, it takes the form of so-called 'soft law' which means that it can be adapted, updated, as circumstances dictate. That is also an important feature of it which we do not use enough of, in my view, generally speaking. Where I would perhaps put a query is 3(1) says that the Attorney General must, in consultation with the Directors, prepare a statement. Consultation with the Directors, yes, but one would hope, if not exactly by statute but by other means, there would be consultation over the protocol with other important bodies like the police, for example, who will have an input to make, I think a very important one here. I am not quite sure why, if the consultation with the Directors is in statute, one might not want to add perhaps one or two other bodies which should be consulted.

Lord Carlile of Berriew: I agree. Protocols are good as long as they do not become a proxy for decision-making. There is certainly no objection to protocols. I agree with Professor Horder that consultation should not appear to be limited by the statute. There should be the opportunity and, indeed, the requirement to consult across a broad spectrum, including those who live outside the London and Westminster village and legal London, which is rather too close to us than perhaps is good for us sometimes.

Chairman: Can we thank you very much for coming and giving evidence. We are going to call it a day there only because we are conscious that the Lords are going to vote very shortly and rather than even risk having to adjourn and come back this would be an opportune moment to end. We do have just one or two questions more that would have been asked and if we can send them to you in writing it would be extremely helpful if you could respond. For now, can we thank you for offering your expertise to the Committee and our grateful thanks for attending.