

HOUSE OF LORDS  
HOUSE OF COMMONS  
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TAKEN BEFORE  
JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

**DRAFT CONSTITUTIONAL RENEWAL BILL**

TUESDAY 24 JUNE 2008

BARONESS SCOTLAND OF ASTHAL, SIR KEN MACDONALD QC,  
MR RICHARD ALDERMAN and MR DAVID GREEN

LORD GOLDSMITH

Evidence heard in Public

Questions 622 - 687

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Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill

on Tuesday 24 June 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L	Martin Linton
Campbell of Alloway, L	Fiona Mactaggart
Gibson of Market Rasen, B	Emily Thornberry
Hart of Chilton, L	Sir George Young
Morgan, L	
Norton of Louth, L	
Plant of Highfield, L	
Tyler, L	
Williamson of Horton, L	

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Witnesses: **Baroness Scotland of Asthal**, a Member of the House of Lords, Attorney General, **Sir Ken Macdonald QC**, Director of Public Prosecutions, **Mr Richard Alderman**, Director, Serious Fraud Office, and **Mr David Green QC**, Director, Revenue and Customs Prosecutions Office, gave evidence.

**Q622 Chairman:** Good afternoon, Attorney, good afternoon, gentlemen, and thank you for joining us to answer questions on the role of the Attorney General in relation to the proposed changes in the Government's draft Bill. Before we start can I remind everyone that members have declared interests relevant to this inquiry and they are available today and on the Committee's web page. Are there any other declarations of interest that have not been previously declared? If not, perhaps we can start. Can I say that the first four questions are really for you, Attorney, and whilst if there is a particular point we are happy to hear from the others, it may be helpful if we generally try and contain the answers to you and then later on there will be lots of questions for your colleagues. The first question is a very obvious one. The purpose of the Government's White Paper was to enhance public confidence in the office

of the Attorney General by the changes proposed. To what extent do you think that is achieved by the draft Bill?

**Baroness Scotland of Asthal:** I think it is achieved by virtue of the fact that it now gives us a bit of clarity. One of the issues that I was very surprised and concerned about is how little anyone understood of the role of the Attorney General, what the powers were, what the restrictions were; how in fact we did business. One of the most important contributions that this consultation has therefore made is bringing that transparency and clarity and debate and discussion. I think it is something that we need to be very grateful for that there is this deliberation on the role and how it works. I think what we wanted to do is to underline and reinforce the independence of prosecutors and the way in which prosecutorial decisions are taken. We also wanted to ensure that there was proper accountability to Parliament and to the public, and providing that greater transparency and clarity is of critical importance, and I think we have done that.

**Q623 Chairman:** You have had the opportunity, I imagine, to see the Justice Committee report that was published earlier today?

**Baroness Scotland of Asthal:** Yes I have.

**Q624 Chairman:** They do not seem to think that you have. Do you have any immediate response to that?

**Baroness Scotland of Asthal:** Obviously I am going to take some time to consider the minutiae of the report, but I see very clearly that the majority of the debate is on the legal adviser role. You will have seen from the consultation that we had that we had about 50 responses and the one part of the Attorney's role that seemed to be given a lot of support was actually the role of legal adviser. We had a very open consultation, we had no prejudged view as to what the outcome would be, but what we were very clear about is that we wanted

any change to be an improvement and an enhancement as opposed to change for change's sake, and therefore we had to listen really carefully to what everyone had to say. That is parliamentarians, lawyers, members of the public, all those who could assist us in coming to a clear reformation of what the role of the Attorney should be. We thought consultation was important and the consultees were very clear, and you will have seen the evidence submitted, that they did not see major advantage in changing the legal adviser role, and so we have very much gone for that. I will of course scrutinise with great care the evidential basis upon which the Committee forms a different view and I would be very keen to see the basis of that assessment and whether it differs from the very cogent and well-argued evidence that was produced during our consultation.

**Q625 Lord Tyler:** I think it is perhaps slightly unreasonable in that we all assumed that this had been your breakfast and morning reading and it was much marked up because, of course, you gave evidence to the Committee and indeed to the previous Committee. They seemed to give more special concern to the issues of public confidence. You emphasised clarity and accountability but their conclusion was that the draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister, it gives greater power to the Executive and it does not sufficiently increase transparency. I wonder if you would give us an initial response to that.

**Baroness Scotland of Asthal:** I am afraid I do not agree with that assessment and therefore I come back to the evidential basis. I hear of course the assertion in relation to public confidence but I am afraid if you look at the evidence behind that assertion there does not appear to be a great deal. What we were looking for when we undertook our consultation is whether there was in fact evidence to show that the role lacked public confidence and lacked the sort of resonance that we wanted to see. There was no evidence produced that, firstly, any Attorney in recent times had given advice that was politically or otherwise tarnished. There

was no evidence that public confidence in the role itself was markedly diminished. Therefore I say we do look for the evidential premise upon which these issues were made. We asked some very clear questions in terms of the force that advice would have in relation to the Government and we just did not see that this would add value. Transparency is possible in the way in which we have tried to suggest an annual report for the Attorney. You know that the Attorney at the moment has no committee. It is not a matter for me and I am not suggesting that we could dictate what Parliament wished to do in terms of scrutinising the role, and every Attorney in recent history has always attended any committee that they have been invited to, but is it appropriate for the Attorney to give a better account of what the Attorney's role is? I think it is and that is why we are suggesting an annual report and that is why we are throwing open the suggestion that the Attorney could come under a specific committee which would be able to ask pertinent questions. I hear what is said. I regret to tell you that I was in New York at the UN and only came back yesterday morning and was then in meetings throughout the whole day and have had limited time to enjoy the full fruit of this report, but I am sure I will be able to digest it in great detail in due course. I know that others have had a little more opportunity than I.

**Q626 Lord Tyler:** So, in short, you think Members of Parliament on this Committee and a Government majority may have misread the issue of public confidence in your office?

**Baroness Scotland of Asthal:** I understand absolutely why questions of confidence in the office arose; I think we all do. It is against the backcloth of advice that was given in relation to Iraq, questions in relation to BAE and indeed we have to remember the cash for honours issue. What I do say is that whoever makes those decisions they are going to be controversial. I do not want to be pejorative but you could name any individual you like and say they will then become the final arbiter and that decision will still have with it a great deal of controversy. For example, if you were to separate the legal advice out and say another

individual will be given the task of undertaking that advice, one can imagine similar aspersions on confidence being made. For example, I have heard people say of any lawyer employed by us, “Well, they would say that, wouldn’t they, because the Government is paying the piper and he who pays the piper calls the tune.” That is fundamentally to misunderstand the nature of legal advice. If you have a lawyer who tells you what you want you want to hear, you have a fool for a lawyer. A lawyer’s job is to give a client the evidence and the advice they need, not the advice they want to hear. One has to remember that every piece of advice that is given can end up being tested in court because if you give advice to the Government and the Government goes to court and puts those arguments before a court, then it will be tested, and you will soon find out whether you have a fool for a lawyer or not.

**Q627 Baroness Gibson of Market Rasen:** I think the Attorney General has answered the question about her views on being chief legal adviser, but could I just clarify totally the position that legal and political functions should be separated. You are basically saying to us that you do not think that that is necessary?

**Baroness Scotland of Asthal:** I think one has to really understand what the role of the Attorney is (because of course we have three separate functions) but the function in relation to giving legal advice to Government, to Parliament and to Her Majesty is similar to any other legal adviser. You have to be able to give cogent advice to your client and sometimes in a really robust way. One of the questions that was asked during our consultation is that if you have a Secretary of State who has to be given some trenchant and robust advice which they should take because that would enure to their advantage, is it easier to hear that advice from a person of similar rank and accept it, particularly if it is going to bind you, or is it easier to accept that advice from an official who does not share the same rank and who may not therefore be seen in quite the same way? I think lawyers’ experience is quite often you have to give your client advice and information that they find painful and difficult to accept but

they need to hear because the law is the law is the law. I think that the role therefore of an Attorney is very important because it is not just the individual advice on the individual occasion. The Attorney General sits at the apex of all the legal advice which is given by the Government Legal Service to all departments and from time to time Government Legal Service officers - civil servants - have to give their departments robust advice. It is, I have been made to understand, of great comfort to those lawyers if they can say to the department, “Well, if you do not like my advice, you could of course always ask the Attorney.” I am told that has a very salutary effect! That must not be underestimated because it is not just the controversial things; the Attorney is there as the guardian of the rule of law throughout what government does on a day-to-day basis, not just the sexy stuff that hits the headlines and is really important but the things that people think are mundane, the things that people never hear about. The Attorney is there to support and enable the Government Legal Service to know that they can challenge where appropriate on the law and that they have a specific government minister who is of Cabinet rank who will be there to support their independent assessment of the law if they need it. The Government Legal Service has two tracks: one of course is they have an accountability to the Secretary of State for the department in which they work; but they also have a separate accountability as lawyers to the Attorney, and upholding the rule of law on a day-to-day basis is something of real importance the Government Legal Service has to do. Whatever Government of whatever political complexion needs to have right at its heart that rule of law embedded in everything it does on a day-to-day basis. The question is if you uproot and pull out the Attorney General and replace that with someone else, will it have the same force, the same resonance, the same efficacy, the same potency as it has now. We were very clear in this analytical assessment that we were determined to improve and enhance accountability and to improve and enhance the ability to support the rule of law and not diminish it. Any change or reform had to follow

that test. Does it improve accountability? Does it improve the support of the rule of law? Does it make it more fundamentally rooted in what we do? If it does, we will do it, but if it does not, then we cannot and we will not. I need to be really clear with the Committee that my own commitment was to burnish not tarnish the rule of law. We really have to be strong on that. Reform has to be for improvement's sake, not for reform's sake, and if we are not going to make it better then at least we should not make it worse.

**Q628 Lord Hart of Chilton:** These two questions are about the disclosure of the Attorney General's legal advice. The first is a general one. How can public confidence in the legal advice that the Attorney gives be retained if, as the Government proposes, such legal advice should not in general be disclosed? The second question is an aspect of that on advice of the legality of going to war on which there has been much controversy recently, and it is this: what do you make of Lord Falconer's assessment that it is inconceivable that the Attorney's advice in relation to the use of force could remain confidential in the current view of the world?

**Baroness Scotland of Asthal:** I think I need to say straight away that I do not share Lord Falconer's view. I think we have explained that there may well be serious difficulties about disclosing the Attorney General's advice. For example, it may include reference to sensitive intelligence, military or diplomatic material and, like any proper legal advice, it will include an analysis of the competing arguments and risks. Any proper legal advice will do that and in the end it comes down to a balance whether you advise your client to do A, B or C. Sometimes of course in any good legal advice you will spend quite a long time disaggregating the arguments that might be put in your favour or against you and giving your client what one would hope to be cogent advice as to where the balance lies. I think more generally there is a serious risk that publication of legal advice will mean that the advice will be less full than it would have been, that the lawyers and clients will have been less frank with each other and



that, as a result, the quality of that legal advice may be undermined. If people are going to make an informed choice I have certainly found in my experience that you need sometimes to be brutally frank with your client and there are sometimes no good choices, just the least bad ones, and you have got to enable your client to understand the reality of the position that they stand in. I am also very conscious of the fact that there seems almost to be an unwillingness to treat the Government, Parliament or Her Majesty, in giving advice to her, as a normal client. A normal client has to be given the privilege of that frankness and I am worried that if one were to change the basis upon which that advice is given it would end up being less frank and, frankly, if a Government has to make a decision as important as this they do need sometimes very brutally frank information and advice so they can make a truly informed choice. I would be very loath to see the day when lawyers are going to hedge about what they say to their clients for fear that what they may have written might be disclosed to the opposition who take adventitious advantage of it for their own courses. You will see in the White Paper the provisions that we are suggesting to deal with advice when it comes to the question of law. We do think that they are sensible measures. We absolutely understand that parliamentarians generally want to know the basis upon which opinions and advice is given, and therefore one will see the memorandum that quite often attaches to legislation which sets out the legal argument but does not necessarily give the fine detail of the advice itself. I think there is an appropriate honourable compromise that one can arrive at which enables people to know the basis upon which you have made the decision and does not trespass against the sort of client/adviser confidentiality that enables people to make the most of the advice they are given so they can really make the best decisions. We are, I hope, looking at putting in place reforms that hone the ability of a government to make a good decision as opposed to hamper them in such a way that it ends up assisting them to make bad decisions. I know that this Committee wants the former not the latter.

**Chairman:** I know both Lord Norton and Lord Morgan want to ask a quick question on that issue.

**Q629 Lord Norton of Louth:** It is just a very quick postscript, as I think you have been making clear in terms of the relationship between the Attorney and Government, the Government is the client?

**Baroness Scotland of Asthal:** Yes.

**Q630 Lord Norton of Louth:** Would you therefore accept as the client it is at the discretion of the Government as to whether the advice should be made public? Would you accept therefore that it is at the exclusive discretion of Government or do you think the Attorney in some circumstances should have the opportunity to prevent disclosure?

**Baroness Scotland of Asthal:** The first thing of course to say is that I do believe that the tradition that you do not say whether the Attorney has or has not advised should be maintained; I do say that. Secondly, of course it is always open to the client to waive professional privilege. I would just put a note of caution on that. One would hate to arrive at the position where the Government waived privilege when it was convenient and did not waive privilege when it was not. There are a number of occasions where - and I am going to talk historically now not necessarily in terms since I have been Attorney because that would be inappropriate - where the Government has taken the view that notwithstanding the fact that it would be incredibly helpful for the privilege to be waived that the Government should not waive the privilege because we would be left with this "pick and mix". You cannot be a fair-weather friend and you cannot say, "Well, it suits me today to waive it but it does not suit me tomorrow," because that undermines the whole premise upon which it is granted. However, there are occasions when all clients will say because of the specific importance and nature of this one special issue that it is appropriate to waive it, so, yes, clients can waive it but I would

caution against a suggestion that it could be a pick and mix because I think the general rule should be that it should not be disclosed and that the Government of the day - and I am thinking about any Government now - should be encouraged to follow that rule which will mean that in bad weather they will not disclose but in good weather they will not disclose either because that is the only way that you preserve it.

**Q631 Lord Norton of Louth:** Should the Attorney be completely distanced from that particular decision, in other words it would be at their discretion?

*Baroness Scotland of Asthal:* I think it would be important for an Attorney to assist in that regard because of what I have just said. Sometimes the Government of the day may well wish to do a pick and mix and you will find the Attorney saying, “Actually that is inappropriate because you may choose to disclose today but you may not wish to disclose tomorrow,” and sometimes there has to be a balance overall as to what will enure to the best of the system. That again brings you to the fact that the Attorney sits slightly outside of this because on so many of these decisions the Attorney will be the minister who will have to consider what is in the public interest, not necessarily just what is in the Government’s interest but overall what is in the public interest, and so I think it is quite a helpful thing for the Attorney to be involved in that regard.

**Chairman:** Perhaps we could call on Lord Campbell.

**Q632 Lord Campbell of Alloway:** I will be very brief because as I think you know, Attorney General, I happen to agree with everything you have said, but I just want to take one point towards the public perception of the role of the Attorney. Surely the Attorney General is answerable not to the public but to Parliament and that is the fundamental distinction between, say, myself as a lawyer and the Attorney? There is that fundamental distinction. If

you tinker with that you are bound to get into the sort of trouble, surely, to which you have referred?

**Baroness Scotland of Asthal:** I hear very clearly the voices that say the role of the Attorney General has served us well. It has accrued to itself the various functions over time because those functions were necessary and pertinent, and the balance between the role that the Attorney currently holds is so delicately held that really one should not tinker with it at all. I absolutely understand that view. And therefore we looked very carefully, and that is why I say it has been very important for us as we looked at every single reform to think very carefully as to what impact those changes will have and so, for example, we think it is extremely important that the Attorney continues to be a minister of Cabinet rank in order to carry out those functions at the highest possible level and to enhance the accountability before Parliament because, you are absolutely right, it is the ability of both Houses to hold the Attorney and the solicitor of the day to account for the issues with which they have been entrusted. Therefore it was very important to see during all the troubled times, whether it was in relation to BAE or Iraq or all those issues, that the Attorney and the Solicitor had to go to the House and were held very very forcefully to account both in the Commons and in the House of Lords, and we have understood the value of that accountability and have not sought to diminish it inappropriately.

**Q633 Lord Campbell of Alloway:** Just one thing, I think you agree with me, but you did not say, so, I will ask the question: the Attorney is of Cabinet rank but he does not attend Cabinet other than on invitation; is that right?

**Baroness Scotland of Asthal:** That is correct.

**Chairman:** Fiona Mactaggart, would you like to follow that one up?

**Q634 Fiona Mactaggart:** There have been suggestions that the frequent and almost usual attendance of the Attorney at Cabinet has in some way created an assessment that this is now a political role and confidence by the public has been diminished by it. Do you think that is the case? What is your attitude to attendance at Cabinet?

**Baroness Scotland of Asthal:** Firstly, I do not think that is the case. Attendance at Cabinet is very much a matter for the Prime Minister and a Prime Minister will invite an Attorney to attend if he or she believes that that attendance is merited. The Prime Minister of the day has indicated that he wants me as Attorney to attend Cabinet and I do attend whenever I am able so to do, but it would be true to say that I am not always able to attend, for example if I am, as I was just recently, out of the country or doing matters of government business elsewhere. I cannot always attend but of course I will attend on each and every occasion that I am specifically asked to attend by the Prime Minister. I do think we need to be very wary of this almost assertion or slur that if you are part of a political machinery you are somehow besmirched and incapable of giving independent and individual advice. I do not think that that is true. I also think that a number of Prime Ministers have taken the view that it is best to get your legal adviser early. It is not always possible to know exactly what will come up at Cabinet at any given time and therefore for an Attorney to be able to listen to and inwardly digest some of those issues early and sometimes give just the gentlest indication that a certain course may not be totally the best way of dealing with it early can be extremely helpful. I would be very unhappy about suggesting that a Prime Minister of the day could not make their own decision as to who to invite around the Cabinet table. Some Prime Ministers take one view; another Prime Minister may take another, and I think it is a prime ministerial preference and I am content certainly for it to continue on that basis.

**Q635 Fiona Mactaggart:** In your consultations about public confidence in the independence of the role was this featured as one of the things which influenced people's sense of confidence or not?

**Baroness Scotland of Asthal:** I think it featured to the extent that people looked at what historically has happened. There has been an ebb and flow in practice. Sometimes Attorneys in the past have only attended when called upon and they would wait outside and come in and deal with legal aspects, sometimes they would not, but I think there were comments made about the perception issue that if the Attorney attended Cabinet on each and every occasion whether there was a perception. I think also there is a need to understand the change that has taken place in part of the Attorney's function in terms of policy development. Prosecutors now play a very different role to that which they did five or ten years ago. For instance, the Crown Prosecution Service is now very much the gatekeeper to the criminal justice system in that prosecutors now are responsible for charging. Prosecutors are also intimately involved in the development and creation of operational criminal justice policy and since 2003, through the National Criminal Justice Board, the Attorney has been part of the tripartite relationship which delivers criminal justice policy. When I was Minister of State at the Home Office I very much valued the contribution that Peter Goldsmith made as Attorney and therefore as spokesman on behalf of the prosecutors to the development of prosecutorial and criminal justice policy. So in many ways in the last few years the Attorney has become an equal partner in that tripartite relationship to develop criminal justice policy. As one of the people responsible for that delivery it has become increasingly important for the Attorney also to play that role and to be the spokesperson for the development of that prosecutorial policy within the criminal justice framework.

**Chairman:** Thank you for those answers. We are now going to move to the second part of our session. Your colleagues will get a speaking part now! I am going to ask Lord Williamson to ask the first question.

**Q636 Lord Williamson of Horton:** This is a question about the Attorney's role in the formulation of criminal justice policy. First of all, do you think that the Attorney General's involvement in the formulation of this policy has made the office too politicised? Some people think that. Do the Directors think that the Attorney's criminal justice policy function gives the Directors a better voice in the formulation of government policy?

**Sir Ken Macdonald:** It is certainly true, as Baroness Scotland said, that the role of prosecutors in our system has developed very considerably in recent years and that has been a deliberate result of policy decisions. We felt that prosecutors had too limited a role and they should be more influential, they should become the gatekeepers into criminal justice through taking over control for charging decisions from the police, they should have much more engagement with local communities, they should be much more public and visible and they should have a voice. We have deliberately driven a process in which prosecutors have some influence on the development of criminal justice policy. That has been a conscious decision. It is absolutely critical from our point of view that in those circumstances we have a minister who is able to fulfil that role for us. I will give you one example of this. Most proposed criminal justice legislation comes to us now for us to look at and comment upon because we have a pretty good idea from our perspective what will work and what will not. Being able to bring influence to bear on other government departments, to have proposed legislation adapted or changed or not proceeded with is another matter. It is very important for us to have, through the Attorney, a seat at the top table when criminal justice discussions are taking place. I think the absence of prosecutors from those discussions in the past has led to a fundamental imbalance in the system which, not least, has led the public to conclude in the

past that no one looks out for them in that process. That is part of what we see our job being. We find the Attorney's presence in those discussions very reassuring from our point of view.

**Q637 Chairman:** Is that a view that would be shared by David Green or Richard Alderman?

**Mr Green:** I agree with all that Sir Ken has said. The Attorney Superintendent is the prosecuting authority. She understands the prosecution process, which is crucial, and she ensures that the interests of prosecutors are taken into account at the top table. Without it, of course, the criminal justice policy would not be fully joined up unless the prosecutors were represented at that level.

**Mr Alderman:** I agree. I would like to give one example. Over the last couple of years there has been a fraud review dealing with how, as investigative prosecuting agencies, we deal with fraud, what is the best way of being joined up and dealing with fraud issues as a whole. That was launched by the Attorney and Chief Secretary. It has produced some excellent results which are really pointing the way forward in how we deal with this. My view is that this is not something that the agencies like the Serious Fraud Office could have done by themselves. It is very much something where the Attorney and Chief Secretary were leading. As a result of that they have been able to give it the impetus and the involvement by everybody that was needed in order to produce the success that we have.

**Q638 Emily Thornberry:** I want to ask you some questions about the Attorney's role in prosecutions. Does the Government's proposal to remove the powers to give directions in any individual case mark any real change from the longstanding practice?

**Sir Ken Macdonald:** I was always something of an agnostic in this debate about whether there was power to direct, although most people believed that there was. In the sense that it has never been exercised so far as anyone can discover there may not be a dramatic change of practice or any change at all, although stating a withdrawal from the bulk of casework



obviously has an importance of its own. I must say that during the five years that I have been DPP no one has ever sought to direct me either to prosecute a case or not to prosecute a case and I have never come under any political pressure at all in relation to individual prosecutions. Sometimes there have been disagreements, but I have made the decision as best I could as an independent public prosecutor and then justified that decision later. I think the answer is that there will not be an enormous difference in my day-to-day life as a result of the Attorney General withdrawing from the bulk of prosecuting decision-making because in my experience, if there is such a power, it has not been exercised.

**Q639 Emily Thornberry:** The other question is about the other side of the coin, which is the new clauses 12, 13 and 15 which give the Attorney the power to stop a prosecution on the grounds of national security. Is that going to increase the Attorney's powers?

**Sir Ken Macdonald:** It depends whether you think there is a power to direct. At the moment if you do not think there is I suppose the answer is yes. Most people say there is and, therefore, the answer is that by withdrawing from the bulk of casework the Attorney's powers will reduce. My own view about this is that I really cannot imagine a situation realistically in which that direction would be given because it seems to me that in a clear case where national security is engaged it is inevitable that the Attorney General and the Director would agree about this.

**Baroness Scotland of Asthal:** I think it is really important to look at the relationship that Attorneys and Directors have had over time. One of the things that are quite interesting is that in the Glidewell Report he made clear that in the event there was a disagreement between an Attorney and a Director the Attorney would prevail and that is the understanding between Directors and Attorneys that has gone on for a number of years. It is a bit like the nuclear missile, you never have to use it because you have got it there and the question is what will happen when you take it away. That is why a number of people have been very anxious about

what will happen if the Attorney does not have the power to direct, as we believe the Attorney currently has, in all cases. Will diminishing the power to direct and restricting it simply to issues in relation to national security so diminish the Attorney's power that it makes the Attorney impotent to supervise and superintend in any meaningful way? That is a concern that I know that at least three previous Attorneys, who may have given evidence before this Committee, will have had. That is why we think that the protocol setting out with clarity the relationship between an Attorney General and a Director will be of importance, because then it will not be dependent on the nature and the character of the officeholder, which may change the balance from time to time, it will be encapsulated in a document which can be open and available and which will clearly set out what the nature of that relationship will be. I do think that what we are proposing - and I have to accept this because I know how uncomfortable it has made a number of people - is a diminution in the power of the Attorney General and it is quite a significant one. However, we hope that with the protocol we will announce with clarity the nature of the relationship between an Attorney and the Directors which will be transparent, fair and efficacious. I would not suggest for one moment that on one side you will not be told that the world has come to an end because we are suggesting that we remove the direction and on the other side that we are not going far enough. I think it is a balanced response.

**Q640 Sir George Young:** That brings us neatly onto this protocol which defines the relationship between the Attorney and the prosecuting authorities. We have seen the letter which you wrote to the Chairman of the Constitutional Affairs Committee which set out some of the detail, but I see the Constitutional Affairs Committee regretted that the protocol was not ready and they say, "The protocol should be published well before the Bill is introduced in the autumn". Will that be the case?

**Baroness Scotland of Asthal:** I really cannot give you a definitive answer. One of the things that we were absolutely clear about was that this is a document which would not simply be crafted by me and imposed upon the Directors. We wanted it to be a living document, a document which the Directors together with our office would be able to craft in a way that accurately and fairly set out the nature of the relationship and how it would work. I cannot guarantee to you that it will be ready. What I will say is that this document will have to be a living document. It is not necessarily going to be one which will be permanently set in stone because it may have to change and adapt. Let me just give you one example. We are going to try to rationalise the consent function. You will know that the Attorney currently has more than 100 consents. Some of those consents are clearly no longer relevant and they are outdated. Some can easily be transferred to Directors and that is clear, but some, particularly those who very recently been given by the Attorney to Parliament, will have to be looked through. That sort of detail is going to take a little time.

**Q641 Sir George Young:** Could I invite your colleagues to take up the invitation which you extended to them a few minutes ago, which is to contribute to this living document rather than have it imposed on them, and ask them what they would like to see enshrined in this document and whether they would like to see it put on a statutory basis?

**Sir Ken Macdonald:** The document has to find a balance between reassuring the public that prosecutors make decisions free from political pressure and from an independent position at the same time as maintaining a level of appropriate accountability to Parliament. This is the document that for the first time will define what superintendence means, so it is a critical document. As Baroness Scotland has said, it has to be capable of change and adaptation in light of experience. I am not quite sure what you mean by it having a statutory basis. Clearly it is intended to have it alluded to on the face of the Bill. I would not myself want it set out as a Bill so that any change to any particular provision had to be as a result of parliamentary

action, I would leave some element of flexibility. I would say its primary purpose is to reassure the public that prosecutors act independently in their decision making.

**Q642 Sir George Young:** Is that a view shared?

*Mr Alderman:* This is something that very much involves all of us. We are involved in the drafting and the discussion about that. It is something that we have reached as a result of a process of discussion and consensus. What I am looking for is clarity and transparency, details of the different roles and what can be expected from different parties to the protocol.

*Baroness Scotland of Asthal:* I can assure the Committee that the Directors and I will be working very hard on this and it will be a partnership piece of work.

**Q643 Lord Campbell of Alloway:** It is a fascinating situation to hear how this is developing. Some of you will remember that the Trooper Williams case was only disposed of in this House on the basis of an undertaking given by the Attorney General. I do not know how that undertaking affects the prosecuting service. The undertaking was that he would not exercise his right of retrial without giving a full opportunity of representation by the accused. It was in connection with military affairs but it was a supervisory jurisdiction. I wonder if this could be taken into account sometime.

*Sir Ken Macdonald:* I do need to respond to that, with respect, Lord Campbell, because I think we are talking about the same case. The Trooper Williams case was stopped when the prosecutors decided not to proceed with it and we went to court on that basis.

**Q644 Lord Campbell of Alloway:** That is not the point, sir. It started with the Attorney's consent. The whole point you have missed, sir, is how it started and whether the undertaking given by the Attorney will affect the prosecution, not how it stops but how it starts.

**Sir Ken Macdonald:** I am sorry to respond again. Trooper Williams was charged with murder and the Attorney General's consent was not required for that prosecution.

**Q645 Lord Campbell of Alloway:** It was sought and granted.

**Baroness Scotland of Asthal:** I think what I can certainly do is undertake to provide an answer to Lord Campbell. I understand the import of this question which is to the effect of will the Attorney still be able to give undertakings in relation to prosecutorial decisions to Parliament in a way that hitherto the Attorney has been able to. Either the Attorney had the power to direct or had the power in a given case to consent and that is certainly an issue which we will turn our minds to. In relation to consents where the Attorney retains the role and power to consent, that will clearly be the case. Where it is given to a Director, we will need to think as to how any assurance that Parliament may need can be given because I should imagine that the conduit through which such assurances will be given to Parliament would still end up being the Attorney or the Solicitor General. In regard to a number of the delicate cases, it is right that there will still be provided for in the document of the protocol what we hope to be appropriate avenues for consultation and information between the Attorney General of the day and the Director of the day. We are not seeking to craft a document which will be specific to the current policy-holders but will be capable of application whoever happens to sit in our respective chairs. I will certainly take on board the import of Lord Campbell's question and make sure that there is some conduit through which assurances can be given to the different Houses, the Solicitor currently in the other place and to the House of Lords through me as Attorney General.

**Q646 Lord Norton of Louth:** I want to come back to something you touched on at the beginning which is clearly very important in the context of the Government's White Paper and that is the whole issue of parliamentary accountability. In the draft Bill there is the

proposal of the annual report. The Bar Council in its evidence to us very much welcomes that. The Justice Committee queries whether it would add much to the existing arrangements. Just on the annual report itself, there is provision for it, but there is also provision in the Bill for certain information to be excluded. It is really about the justification for that. More generally, from your perspective, you are on the receiving end of parliamentary scrutiny, is there anything else over and above that that you think would actually enhance scrutiny? You have alluded to the possibility of a committee. The Justice Committee says it is the committee already. Is there anything over and above an annual report that you think would make the Attorney more accountable to Parliament?

**Baroness Scotland of Asthal:** I think the attendance before a committee does. I really want to say to the Committee how important I think the annual report is and that we should not underestimate it. The thing that quite perplexed me was that there was no one place where what the Attorney did and how the Attorney did it was collated. It is not to be wondered at that nobody understood what the Attorney did because there was not anywhere where that could really collectively be discovered. I think there is also a certain synergy between what the different Directors do that are superintended and supervised by the Attorney. There is some added value in one document saying what is the prosecutorial offer that is made for and on behalf of the people of our country. There is a huge interest in the unduly lenient sentences, the work that the Attorney does in relation to charities, intervening, et cetera. Lots of people do not understand what the guardian of the public interest role is. Let me just say very honestly to this Committee that in what I now see as my arrogance I believed that I really and truly did understand what the Attorney did. After all, I have been a Minister since 1999, I have had the privilege of being number two in the Lord Chancellor's Department for two years, I spent four years in the Home Office and I have worked with the Attorney General. If anyone should know what an Attorney General does it should be me. I tell this Committee

absolutely honestly that I did not understand the depth and the complexity and the importance of some of the key roles discharged by the Attorney. What has really struck me is the importance of the Attorney as the apex of the Government Legal Service and also the importance of the Attorney for the informal non-statutory supervision of other prosecutors across Government, for instance, the MoD, BERR, DWP, the role that the Attorney has in the panels, making sure that gender and equality issues are fairly represented. Of course I knew that the Attorney was the head of the Bar, but I mean how that interlinked with some of the work we are doing internationally in *pro bono*. So there is a depth and an importance to the different aspects of the Attorney's role that I had not actually fully appreciated, the synergy between the three roles. When I first started to look at this I thought that there might have been a better way of constructing this so that you could have added value and I came away with a very clear understanding every time I tried to pull something away as to what happened when I did that. That is why we have come to the conclusion we did in the White Paper, not because we lacked courage and boldness because we did want to be bold, but we did not want to be foolhardy.

**Q647 Lord Norton of Louth:** From what you are saying, it seems you envisage quite a substantial document, perhaps a similar one to the Lord Chief Justice's Annual Report which is a very thorough and helpful document, something of that nature.

**Baroness Scotland of Asthal:** I do want to have a full report. I would also like to make it clear what the Attorney does for members of the public. I would like to answer the question of why the Attorney is important to the ordinary man and woman on the street. What do we do for them? Why is what we do with the prosecutors important? We are changing the way the prosecutors respond to the public generally. Together with Sir Ken we are looking at the concept of the community prosecutor, what does that mean and how do we make it more intelligible to the ordinary person. I do not criticise those who say they do not have a clue

what the Attorney does and what the Solicitor does and why they are important. The Solicitor told me that she was asked how much conveyancing she did! We have really got to make sure that people better understand what this job is for and why we think it has an opportunity to add value. I would like us to add greater value in terms of being the voice of the guardians, of the rule of law and the public interest and I think that is a very important part of my role as Attorney.

**Q648 Lord Plant of Highfield:** I would like to pick up the last point that you made and take you back to the rule of law which you emphasised very much in a welcome way in the early part of your evidence. One would hope that ministers of the Crown always act within the rule of law, but the fact is there are two members of Cabinet rank, one officially a Cabinet minister, the Lord Chancellor and the Attorney General, who have a special responsibility for the rule of law. The Lord Chancellor's position in respect of that has a statutory basis and yours as Attorney is based on an oath rather than on statute. There has been a proposal to turn it into a statutory duty. The Government seems to have rejected that view. I just wonder what the rationale is for not putting the Attorney's duty in respect of the rule of law into statute and whether you see any possible stresses and strains between two ministers of equal rank who have a similar duty, whether statutory or non-statutory. What the rule of law requires is not necessarily all that obvious in every case and there could be an honest disagreement about what the requirement is. In those circumstances whose authority is the highest?

**Baroness Scotland of Asthal:** There have always been two ministers of Cabinet rank in relation to the rule of law issues, so to that extent it has not changed. I think we need to be very clear, the Lord Chancellor has never been the law officer. The law officers in Government are the Solicitor General and the Attorney General, and when it comes to determination of what the law is then that is the Attorney's role. If we look at the ministerial



code, it provides that where any department is troubled by an issue of law then the Attorney has to be (a) told about it and (b) given good time to express a view. The role of determining an issue of law remains the Attorney's as opposed to the Lord Chancellor's. Of course, the Lord Chancellor has made a specific oath to uphold the judicial independence because of the change that was made to the role of the Lord Chancellor. That is why the very specific statutory oath was made, to preserve the importance of that part of the Secretary of State's job. We now have the possibility that the Lord Chancellor and Secretary of State for Justice need not necessarily be a lawyer, whereas the law officers remain a post where a senior lawyer has to fulfil that role, not least because quite often the Attorney may have to be the arbiter of reasonable disagreement where different lawyers, sometimes in different departments, come to different conclusions all within the ambit of the reasonable disagreement as to what the law is and it is the Attorney who will then be responsible in effect for declaring what the Government's view of the law actually is. Those two roles are separate and distinct. The reason why we have not thought to put the oath into a statutory form is simply because indeed to change the oath we do not need to have a piece of legislation to do that. I do not think it is any more complex than that. I tend to take the view - and it may be because I have done four years of legislation in the Home Office on the front bench - that if you do not need legislation then we should not have it. I think legislation is there when we need to implement things that cannot otherwise be done in any other way. My oath is a quaint one. I love the antiquity of my oath because it tells me that I must use my "cunning", but I have difficulty in finding my cunning. A more modern oath would probably be easier for the next Attorney to take.

**Q649 Lord Plant of Highfield:** There is a commitment to reform it.

**Baroness Scotland of Asthal:** Yes, and we provide it. We are going to make it clear what the oath is and it will be changed so that it is more up-to-date and a bit more pertinent. If anyone wants to read my oath, it is a thing of beauty to behold!

**Q650 Chairman:** We will do that. Thank you very much for the evidence. We do have several other questions we wanted to ask you but time has defeated us. For example, your predecessors told us that *nolle prosequi* is a valuable ultimate power that you would be unwise to get rid of. We would very much welcome some comment on that. We would also particularly like some comment on clauses 4 to 6 of the draft Bill that sets out the tenure of office of the Prosecutorial Directors and how their independence is affected by that. I wonder whether we could write you a note and have that in writing?

**Baroness Scotland of Asthal:** I am very happy to do that. I am very sorry that I have not been able to have the opportunity to answer all those today.

**Chairman:** Thank you very much.

Witness: **Lord Goldsmith**, a Member of the House of Lords, gave evidence.

**Q651 Chairman:** Lord Goldsmith, may we thank you very much indeed for coming to give evidence to the joint committee. I said at the beginning and must repeat that members have declared interests relevant to this inquiry and they are available today on the web and on the Committee's website and indeed in writing if anyone should wish to see them. The White Paper, indeed the draft Bill itself and the notes accompanying it say that it is enhancing public confidence in the office of the Attorney General is the purpose of the legislation proposed. Do you think the proposals do achieve that and, if not, could you say what the gaps may be?

**Lord Goldsmith:** May I just thank the Committee for fitting me in this afternoon. I know you dealt with other returning Attorneys General on a previous occasion and I could not come. I wanted to try and assist the Committee if I could. Does it assist? Yes, I think that certain elements will help to reinforce, establish or maintain public confidence and I welcome that.

**Q652 Lord Tyler:** I wonder if you have had a chance of looking yet at the Justice Select Committee's Report on this issue, and I think you may have given evidence previously to them on the role of the Attorney General.

**Lord Goldsmith:** I did. I discovered that there was a report when I listened to the *Today* programme this morning, and I was given a copy when I arrived and I have obviously had a little bit of a look, but I cannot say I have studied it completely which is perhaps a pity.

**Q653 Lord Tyler:** Well, it may be slightly unfair, but you know what this building is like! One of their conclusions is that the draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister, it gives greater power to the Executive and it does not sufficiently increase transparency, and they give examples of that. You may also

have noted that your previous colleague in the Government, Lord Falconer, described the draft Bill as the “constitutional retreat Bill”. Both these comments are a great deal more negative, pessimistic than was implied in your initial reply just now. Can you justify your optimism?

**Lord Goldsmith:** Well, I certainly can. I was rather surprised to read the remarks of my very, very good friend and longstanding colleague, Lord Falconer, but there we are, that is his point of view and he has expressed it. I do not agree with what I have seen of the Justice Committee’s Report, forgive me for saying that, and I did not agree with the Report that was produced by the then Constitutional Affairs Committee. I was critical of it publicly, I think it failed to have regard particularly to the evidence that they had, not from me, but the evidence that they had from previous Attorneys General, from people like Lord Mackay of Clashfern, from other law officers, judges, Lord Woolf, for example, and I do not see any reflection in the present Justice Committee Report of discussion of that evidence, so, I am sorry, I am unrepentant, I disagree with them.

**Q654 Lord Tyler:** The Chairman referred particularly to public confidence in the role and office of Attorney General. Do you think the proposals in the draft Bill are likely to increase perceptions that are positive of the role and office?

**Lord Goldsmith:** Well, I have answered that question to the Chairman, yes, I do. I think that there are elements there that are important, although I would want to sort of underline some aspects of those. Lord Norton was asking about an annual report and I think that is a helpful thing to do. Indeed, in my first year of office we produced an annual report. It was not delivered to Parliament because there was not a parliamentary framework for doing that. I think the people who read it found it helpful to understand what the Attorney General did and I very much agree with the remark I just heard from Baroness Scotland, that it would be good if people knew more about the things that the law officers do actually which are beneficial to

the public and, if those of us who have held this office did not do enough, though we often talked often enough about it to make that clear, then it is our fault. I suspect the problem was that we tended to talk to lawyers and judges who understood it and to parliamentarians rather than to the public, so I think an annual report would be a good thing. I also think that some form of more regular scrutiny by a select committee is valuable. Now, there are difficulties about how one achieves that, and I give, if I may, one instance where the normal problem is that some of the information that one has and on which one has relied is simply something that you cannot just reveal publicly. It relates to perhaps national security or it relates to some aspect of an individual's behaviour. I was able on one occasion to go to the ISC with a prosecution case which concerned a former member of one of the security services whom we were not prosecuting and I knew that was going to give rise to sort of public interest questions and perhaps parliamentary questions. I thought the best way of explaining the reason was to go to the ISC, which I did, I laid it all out before them and actually took, I think, counsel with me to explain the reasoning for the decision, and I thought that was helpful because they saw what the reasoning was and, as far as I could see afterwards, there was not any particular criticism or any criticism of that decision, so I think that that sort of committee structure for handling those problems could well be helpful.

**Q655 Lord Morgan:** One of the issues, Lord Goldsmith, that the Justice Committee focussed on was the well-known theme of the apparent blurring between the legal and political aspects of the Attorney General as a member of the Government, but giving independent advice, and I was wondering what your view was of that please and whether your own experience, as Attorney General, has shown any difficulty or complications in distinguishing between the legal and the political.

**Lord Goldsmith:** I do not believe there was any difficulty. All law officers know that it is their responsibility to give independent legal advice, to take decisions which are based on the

evidence and the law. Indeed I have told the story before that one former law officer was told within 24 hours of coming into the building of the salutary tale of Patrick Hastings and the *Campbell* case and how, if an Attorney General appears to be influenced by political considerations, it can lead to the fall of a government, and it was actually the first Labour Government, so that had particular resonance with certain former law officers.

**Q656 Lord Morgan:** He talked to Jimmy Maxton, I think.

**Lord Goldsmith:** Yes, absolutely. If I may say so, again listening just now, you had some enormously important evidence from the present Director of Public Prosecutions who said that over the course of five years he had never, if I took his words right, had any political pressure. The former Director of the Serious Fraud Office in relation to the BAE case, when he was asked to explain, made it absolutely plain that he had had no political pressure, that the conversations he had had with me were perfectly proper. When I stood down, I was quite touched by the number of letters I got from people within the legal departments of government and also from counsel used by government, saying, “We just want to make it clear”, and I paraphrase, “that in none of the dealings that we have had with you have you been anything other than professional as a lawyer, looking at the evidence and the facts and not bringing political issues to bear”, and I just hope that something which would help public confidence, which would be the sort of remark that the Directors have been making there from their experience, actually got wider publicity because people would then say, “Well, actually perhaps there is for some reason a misconception about how these decisions are taken”.

**Q657 Martin Linton:** Lord Goldsmith, can I take you on to the question of publication of the Attorney General’s advice which, I know, has been a matter of controversy for you.

**Lord Goldsmith:** Yes.

**Q658 Martin Linton:** Obviously all the evidence we have had so far has been in terms of published in certain cases or remaining privileged or rare circumstances, et cetera, but can I throw the words of Lord Falconer at you again, and feel free to disagree. He said, “It is inconceivable that the Attorney General’s legal advice in relation to the use of force can remain confidential in the current view of the world”.

**Lord Goldsmith:** I saw that and I just wondered whether he was saying that, as a matter of pragmatism, that is what is going to happen or whether he was saying it was desirable because, if he was saying it is desirable, it certainly was not what he said in government.

**Q659 Martin Linton:** And you are saying it is pragmatically true?

**Lord Goldsmith:** Pragmatically. I think there is a very important distinction to be drawn between the publication of legal advice and indeed all those things which lead up to legal advice and a very good explanation of the legal basis on which the Government is acting. I think the latter is very important and it needs to be there and, if it were put forward in a way with which a law officer disagreed, one would hear about that, but I remain nervous about the publication of legal advice for the reason I have always given: if government knows that the legal advice it gets is going to be published, it will be much more hesitant about seeking that legal advice and it will be much more hesitant about the facts that it puts before the law officers for that advice and the law officers will be more hesitant about the way they express the advice, and there are occasions when it is necessary to express caveats, qualifications, ifs and buts and those are difficult things if they are going to be published on the front pages of newspapers, so I think that is the ultimate reason why generally the advice itself ought not to be published. There will be exceptional cases and it is always open to a Prime Minister to say, “I want this advice published”.

**Q660 Martin Linton:** Well, without disagreeing with you, can I just press you on how that plays both in Parliament and with the public because, as Lord (?) said, if we are going to put war powers into this Bill so that Parliament automatically decides whether to go to war or not, then, he said, Parliament should be fully informed. Is there a case for giving Parliament the legal advice on which the Government has taken a decision?

**Lord Goldsmith:** He speaks for himself, but I understand that and I have seen it also as a problem about putting war powers into a statutory form with approvals because I do understand the argument, that it is difficult to ask parliamentarians to make a decision on certain things if they do not have the full information on which to make it, and that may be a reason for saying that one needs to have a somewhat narrower approach to what you are asking Parliament to approve. However, there are ways of doing it, I suppose, the first and most important of which is to say that the legal basis upon which the Government intends to act, that should be explained, set out in some detail and Parliament can then judge that and no doubt there will be no want of other commentators who will be happy to express the view that that is right or wrong.

**Q661 Martin Linton:** With the public, it has been suggested that public confidence in the legal advice that the Attorney General supplies to the Government cannot be retained if that advice is never disclosed. Do you feel that there has been, because of this conflict, a diminution of the public confidence in the role of the Attorney General?

**Lord Goldsmith:** I think the whole issue plainly of the Iraq war was very difficult in many different ways, in terms of confidence in different ways, confidence in statements about intelligence, confidence in how the Government reached the decision that it did. It is interesting that, despite that, I still found that I got a lot of correspondence from people, saying that they saw the Attorney General as someone who could help them with their problems, not the same issue. Courts continue to call on the Attorney General to undertake



particular roles, and the Northern Ireland Court specifically asked me to undertake a review into what one of the public authorities had done which they thought might have been contrary to good administration and good administration of justice, and Parliament itself has continued to give roles to the Attorney General, so I hope the answer is that ultimately no, it has not diminished confidence, but the possibility of getting the degree of greater transparency through report, through a select committee perhaps with special arrangements so that particular things could be looked at which are difficult to reveal, that might help too.

**Q662 Chairman:** Have you any knowledge as to whether other jurisdictions deal with the publication of advice differently than within our jurisdiction?

**Lord Goldsmith:** Yes, but there are sorts of different models. I do not, I am afraid, have the detail in mind. I did for the purposes of the evidence I gave to the Constitutional Affairs Select Committee when it was that, and we appended a list of the other jurisdictions, but sometimes I think it depends what you are asking the law officer to do. One of the difficulties, I think, about putting the present Attorney General in a different position is that you will probably end up with the Government taking legal advice from somebody else. It may be that at the end of the day Parliament says, “Well, we want to know from the official Attorney General, as it were, what happens”, and I think you will get a lot of advice given actually much more secretly, and I think some people have suggested that one saw that with the White House, that within the White House there were other secret legal, but it was not a public department which provided legal advice and that never really saw the light of day at all until long after the event when people perhaps criticised certain decisions.

**Q663 Lord Norton of Louth:** On the issue of the relationship between the Attorney and Parliament, you will probably be aware, or certainly not surprised here, that we have had very different opinions about whether the Attorney should remain both a Minister and sit in the

Commons or the Lords, and, perhaps not surprisingly, Lord Falconer was taking one view and the other former Attorneys were taking a somewhat different view. What would be your view? Do you find it useful to be both a Minister and be sitting in the Lords and, if it is the case that you believe the Attorney should remain a Minister, what are the circumstances in which it is appropriate that the Attorney should attend Cabinet? Should it be a regular feature or simply when invited because there is a very specific issue on which the advice of the Attorney is required?

**Lord Goldsmith:** If I can just deal with the last question first, I think the answer to that is that it depends on how Cabinet is run. I do not know how it was run when Lord Armstrong, as it were, drew up the agenda. When you get into a situation, and this was the fact while I was Attorney, that the agenda for Cabinet gave very little away as to what was going to be discussed, and I think that it then became that there would often be matters which would arise in Cabinet perhaps which only the Minister who was going to raise them knew was going to happen. We did try for a period of time that I would only attend Cabinet when the Cabinet Secretary said that there was a specific issue of legal advice. The problem was, when you looked at the Cabinet minutes afterwards, you found that half the time something had arisen which you ought to have been there to deal with, and that is a practical issue. My policy in Cabinet was not to speak unless it was on a matter of legal advice or it was a matter relating to criminal justice, for which I had some responsibility as well, but I would not otherwise speak on other issues. Should the Attorney General be a Member of Parliament? In my view, clearly yes. That results in the enormously important accountability to Parliament which I think is a key feature and that, I know, has been well covered. Should the Attorney General be a Minister? In my view, yes, I think that that puts you in a position where it is much more difficult for your colleagues to ignore, or disagree with, your advice and, if I dare, I think there was one instance of that in relation to Guantanamo Bay where I was strongly of the

view that British nationals there should not remain, that they should be put either on trial which was fair or they should be released. Ultimately, my view was, having negotiated, that there would not be a fair trial and, therefore, they should be released, and I think it was much more difficult to resist that conclusion and, you will not be surprised to hear, there were some for whom it was not a very welcome conclusion precisely because I was a Minister and, in a sense, one of them and on their side.

**Q664 Lord Norton of Louth:** So it is the position that gives you extra clout in providing advice, and in terms then of basically the existing arrangements, you would say that, on the whole, they have worked pretty well?

*Lord Goldsmith:* Yes.

**Q665 Chairman:** I suppose we are back to the public perception of it because at least the Justice Committee seems to think that a conflict exists because the Attorney is a Minister and it may be said that it is not partial advice, but advice which is convenient to the Government of the day. That would make a proposition at least that it may be seen to be biased even though it is not.

*Lord Goldsmith:* I gave a lot of advice to the Government which was inconvenient to the Government, and all law officers have done that. The problem is, and this is a perception problem, that that is not the advice one knows about, things that the Government have not done in the field of executive action, in the field of legislation that they have not done. The one area that everyone does know I did advise about was obviously military action in Iraq, but that gives the impression that that is the way that legal advice is given; it is absolutely not.

**Q666 Chairman:** Do you share perhaps Baroness Scotland's view that, if it was a wholly independent adviser, but in the pay of the Government, it would make little difference in terms of public perception?

**Lord Goldsmith:** I did not hear that she said that, but it does seem to me to be a fair point. I would just underline that I think a career lawyer/civil servant just will not have the same respect from ministers, not because they want to disobey the law, but sometimes they have a very legitimate objective to attain and it is problematic for them that they cannot do it the way they want, but a colleague who sits with them can say no, and they know it is not being said because you are anti the Government, but it is being said no because you think it cannot be done.

**Q667 Lord Williamson of Horton:** We have had quite a bit of evidence on the Attorney's role in the formulation of criminal justice policy, including some very clear and convincing comments within the last hour from the prosecutorial directors. Do you think yourself that the Attorney General's involvement in the formulation of criminal justice policy has made the office too politicised or not?

**Lord Goldsmith:** Well, I know the criticism. I do not think it is fair criticism. I think that actually the role that law officers have played in the formulation of criminal justice policy has been actually important and beneficial both on some occasions in trying to tone down or round the edges of some policies, but also the point that I heard the Director of Public Prosecutions, Sir Ken, making about the role of the prosecutors. This, for me, was a very important part of my job, to ensure that the prosecutors who have enormous experience, so they are the only government department in one sense that have front-line experience of dealing with crime because the others supervise people who have front-line experience, but the prosecutors do it, and I think it was very important, it took a significant part of my time and I think it has been beneficial in many ways.

**Q668 Emily Thornberry:** What do you think of the Government's proposals to take away the power from the Attorney General to direct prosecutions in individual cases?

**Lord Goldsmith:** This is the bit that I am actually most worried about. Sir Ken was quite right in saying that the power to direct was not used and I certainly never used it. What I am concerned about is the framework within which there can be discussions about individual cases and let us not think that these are the highest-profile cases. I remember an occasion when it came to my attention, I think, from a piece on the radio that there was a granny who was being prosecuted for assaulting a 15- or 16-year-old boy because she had shoved him in the chest outside her house when she had been suffering for months, so she said, from young tearaways, whatever, outside her house. Now, I said, "Well, I want to see the papers", and I looked at them and they may well have been right, the prosecutor may well have been right that technically this was an assault, but it just seemed to me that there was absolutely not a case to prosecute. I did not direct anybody to do anything, but I did make it known that I would like them to reconsider that particular decision and it was reconsidered at a higher level within the CPS and the prosecution was dropped. I think if I had not had any power at all to deal with individual cases and this had all been husbanded in by the agency, by the prosecutors, if I had said, "I want to call for the file", they would probably have said, "No, you can't see what it's all about. This is for us to do", and I think that would have been a mistake, and there are other cases as well where the involvement -----

**Q669 Emily Thornberry:** But can the DPP not be trusted to do that?

**Lord Goldsmith:** On this particular occasion, he had not. I am not criticising him, but he had not. I think also that this is an area where the political antennae that come from being in Parliament, seeing what the public are concerned about, not what is going to win or lose by-elections, that is not the point, it is just what the body politic is concerned about which is broader than the narrow question of law, it is why we have a public interest test, and I think

someone who understands that because you are surrounded by it is actually in a better position than a director, however distinguished, however good a lawyer, actually sometimes to make those calls.

**Q670 Emily Thornberry:** What about the question of security and the Attorney General's power to stop a prosecution or an investigation on the grounds of national security?

**Lord Goldsmith:** Well, somebody needs to be able to stop a prosecution if the balance between national security and the particular case is such that national security would be unduly damaged by the prosecution going ahead, and that is an area where one would expect the law officer to be involved.

**Q671 Emily Thornberry:** But the new clauses are going to increase the power that the Attorney General has.

**Lord Goldsmith:** I am not sure they increase the power. I would expect that they would operate actually in the same way that things have generally operated in the past which is that there is a discussion between the Director and the Attorney and, as Sir Ken said, there were a number of cases that we discussed. I would not question decisions, but ask questions about decisions and sometimes I would be satisfied, sometimes I would still have a doubt and that would be resolved, so I would anticipate that this would still result in a discussion with the Directors and indeed an Attorney would be a fool not to take the fullest possible advice from the Directors involved as to how they saw the situation.

**Q672 Emily Thornberry:** To what extent should the exercise of this power be judicially reviewable or indeed subject to parliamentary scrutiny?

**Lord Goldsmith:** I think parliamentary scrutiny is important. I think Parliament does scrutinise individual prosecuting decisions after the event. I think there are restraints which

ought to operate as to how one expresses views in relation to it. Judicially review, well, the classic view has been that, in the exercise of public interest functions, the Attorney is accountable to the public through Parliament rather than to the public through the courts, and I think there is merit in that, but no doubt the courts will decide whether they think they should judicially review and they may well take that view.

**Q673 Lord Tyler:** In relation to the exemptions, the Justice Select Committee has a specific concern about extension to international relations which they describe as a “significant step further than national security on which the basic power to give a direction is based”. Would you agree?

**Lord Goldsmith:** No. I think I would leave this to the good sense of the Attorney of the day to see when, looking at the thing sensibly in the round, it is appropriate to stop a prosecution where you have to balance, on the one hand, the desirability of the prosecution, the nature of the alleged crime, perhaps the strength of the case as well against what the damage is actually going to be.

**Q674 Fiona Mactaggart:** One of the issues which takes up quite a lot of space in the Green Paper and which has been not discussed a lot in our evidence is the proposal to transfer, or abolish, most of the requirements for the Attorney General’s consent in relation to prosecutions. I wonder if you would tell us what your view is about that.

**Lord Goldsmith:** I think most Attorneys would welcome it because it was often quite a burdensome task. The Attorneys did try, the law officers did try to get rid of the consent requirement for corruption cases, but it was actually Parliament, as I recall it, at that stage which insisted on keeping it that way. As long as there are proper opportunities for consultation and, I am afraid I would say, on some individual cases between the Attorney and the Directors, then I have no difficulty at all with the idea that the formal consents should

increasingly go to the Directors. There will be some where it may remain appropriate for them to stay with the Attorney.

**Q675 Fiona Mactaggart:** Do you see a connection between dropping the formal consent and not dropping the power of the Attorney to make a direction later on?

*Lord Goldsmith:* I am sorry?

**Q676 Fiona Mactaggart:** The proposal in the Bill is that the Attorney should lose the power to direct the Director of Public Prosecutions in relation to an individual case, and I am wondering whether you saw a connection. The Bill proposes to lose both ends, if you like, and, as I understand what you said, you wanted to keep the power to direct at the other end and I was wondering if you saw a connection between the two. That is all I was asking.

*Lord Goldsmith:* I think it would be desirable to keep a framework in which the Attorney General of the day can have detailed discussions about individual cases. We always got a list of sensitive cases and they were not sensitive because they were political, they were sensitive because of the nature of what public opinion might say about them. I think it is important to have that framework. Either you are going to have some framework for being able to insist upon that discussion or, I think, one loses something. I think the consent requirement is not really it and I think that is quite separate.

**Q677 Lord Campbell of Alloway:** I quite agree with you, that there has to be some framework both ways, but can you really think of a better one than the one we have got positively that ought to be put in the form of a statute instead of left to the commonsense and the expertise of the Attorney himself? Can you really support any change to this?

*Lord Goldsmith:* Well, the benefit of the work that this Committee is doing may well include simply dispelling some of the myths, and some of the myths which maybe grew up as a result



of there being hugely political debates, indeed in the context of a general election as well, about the role that the Attorney General had. The Attorney General's role has always involved dealing with difficult cases, and that is why you have an Attorney General there and, if one goes back over history, mine was not the first time that there were controversial issues. One can go back, I have listed them elsewhere, there is *Gourier*, there is *Layla Khaled*, there are a number of cases, and it is not surprising because, whichever decision the Attorney General had taken, it probably would have been controversial either way. I am just troubled and, if it is my fault for not explaining this better in public, I am troubled that there are some misconceptions how these decisions are made and I very much hope that this Committee will at least, whatever else it says, pick up on the remarks, such as those of the Director of Public Prosecutions, as to how actually this political pressure, whatever people might say in Westminster, actually has not been present. Now, that is a way of saying gently to Lord Campbell that I think there are some improvements that can be made, but the basic structure of the role, I think, has worked far better than people sometimes credit it with.

**Q678 Chairman:** I am sure you have seen the opinion of the former Attorneys who gave evidence about the *nolle prosequi* power which, they said, it would be unwise to get rid of. Can you see any specific practical difficulties arising if indeed that was abolished?

**Lord Goldsmith:** Well, it would mean that there was a lever which is not often used, but is present so that there can be a discussion between the law officers and the prosecuting authorities about the wisdom of continuing a particular prosecution, and at the moment that is a power that is there and its presence is probably more important than its exercise.

**Q679 Baroness Gibson of Market Rasen:** I would like to ask about the Attorney General's superintendence functions in relation to the Directors. Could you tell us what the key

elements of the Attorney General's superintendence responsibilities over the Directors are and what elements, do you think, should be included in the proposed protocol?

**Lord Goldsmith:** For me, the three key elements of superintendence are: superintendence of the policy of the prosecuting authority generally, and I can explain what I mean by that; secondly, the efficiency of the prosecuting authority – it is spending taxpayer's money and it is desirable that a minister and a parliamentarian has accountability for the way that budget is spent; and yes, thirdly, superintendence involves some degree of oversight of the case decisions that are made, not in the millions of cases that are made, but in some of those cases.

**Q680 Baroness Gibson of Market Rasen:** Do you think that the provisions in clauses 4 to 6 of the draft Bill setting out the tenure of office of the Directors are appropriate?

**Lord Goldsmith:** I think it is desirable to have a fixed tenure for the Directors and that is the policy that we had, although not in fact for reasons. In the first instance of the present Director, I appointed for three years, not five, and then extended it for a further two, and there were reasons for that at the time. I do not have a particular problem with those provisions.

**Q681 Lord Norton of Louth:** Can we just very briefly come back to a point you made at the beginning about an annual report. You have made clear that you very much welcome that and, therefore, I presume you are very much in support of the provisions within the Bill itself.

**Lord Goldsmith:** Yes.

**Q682 Lord Norton of Louth:** You have indicated as well perhaps then the answerability of the Attorney to select committees. Do you think that is sufficient? From your point of view as Attorney, do you think you were sufficiently subject to scrutiny? You have indicated that you produced a report as well to assist, but do you think that would be adequate and indeed sufficient?

**Lord Goldsmith:** There were times when I felt I was subject to a great deal of scrutiny. I think the problem was, which is the real issue I came back to, that it was actually quite difficult sometimes to find a way of actually getting inside the decisions because of the difficulty about talking about them publicly, and that is why I think that for some cases a model like the ISC where one can do that would be helpful.

**Q683 Lord Norton of Louth:** And perhaps would forward itself as the basis on which the Attorney may appear before, say, the Justice Committee to actually explain the role of the Attorney and justify what he has done?

**Lord Goldsmith:** Yes, I think I was the one who first proposed that there should be a select committee for the Attorney General.

**Q684 Lord Norton of Louth:** But should it be just for the Attorney or something like the Justice Committee, in other words, it has got a much broader remit?

**Lord Goldsmith:** I have always taken the view that that really is a matter for Parliament to decide how it wants to structure its committees. It is not for me to say.

**Q685 Chairman:** I know you have not had a chance to see the Justice Committee Report in full, but one of their particular concerns was that the Attorney General has statutory powers to direct the Serious Fraud Office to stop an investigation, as opposed to a prosecution. Do you have a view on that?

**Lord Goldsmith:** Yes, I think that is a logical extension of the principle. The Serious Fraud Office is the one prosecuting authority that investigates and prosecutes. With all the others, the investigation is done by the police or some other and it may be the military police, but it is not done by the prosecutors. The way that the Serious Fraud Office does it is that the investigation and prosecution sort of goes very much hand in hand and at any particular point

in time it may well be that they are still technically in the investigation stage, but it may be plainly apparent that the case should be stopped, so it seems to be logical that it should extend to investigation as well as prosecution. In practice, of course where you have an investigation, the likelihood is that someone is going to say that it is more likely to be premature to stop it because, if you have not investigated, you do not yet know all know about it and that would be something that I am sure law officers would bear in mind.

**Q686 Lord Plant of Highfield:** Could I just ask you about the oath of office. Should it be reformed both in terms of substance, and what do you think should be in it if it is going to be, and also procedurally, should it be made into a statutory basis or can it perfectly well be done by non-legislative means, and which is preferable?

**Lord Goldsmith:** Yes, I think it should be reformed and again I think this was a proposal that I made originally because the present oath is difficult to understand. As to what it should say, I think that the important point, however it is expressed, is upholding the rule of law, making decisions in accordance with the law, however one wants to express it, it seems to me it can be done perfectly adequately without the need for putting it into statute, and I think Baroness Scotland's point that, if you do it without putting it into statute, then you do not have to find parliamentary time to amend it if you find you want to add to it.

**Q687 Chairman:** Can we thank you very much indeed for being so efficient in your evidence because we have been running over in almost all the other cases, so we are really grateful, but there is just that one final question. If you were adding amendments to the Bill, are there any other reforms to the AG's roles that are not covered by the draft Bill and that you would like to see in there?

**Lord Goldsmith:** None has occurred to me. I am very happy to reflect on it further, but none has occurred to me. My biggest difference with the Bill is the point that I discussed with Emily Thornberry about individual cases and how one deals with those.

**Chairman:** Well, if anything should occur to you within the next few days or weeks, we would be very grateful for that advice. Thank you very much indeed.