

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by ILEX

Role of the Attorney General and Judicial Appointments

The Institute of Legal Executives (ILEX) is the professional and regulatory body for Legal Executives lawyers and currently has a membership of 24,000 students and practitioners.

Legal Executive Lawyers are employed within solicitors' firms to conduct specialist legal work. Amongst other things, Legal Executives lawyers undertake the following work:

- Advice and representation to clients accused of serious or petty crime;
- Advice and representation to families with matrimonial problems;
- Handling various legal aspects of a property transfer;
- Assist in the formation of a company;
- Be involved in actions in the High Court and county courts;
- Draft wills;
- Undertake the administration of oaths.

Under the Tribunal, Court and Enforcement Act 2007, Legal Executive lawyers will be eligible for appointment as Deputy District Judges and in 2010 District Judges.

Executive Summary

Role of the Attorney General

- ILEX is of the view that the Attorney General (AG) needs to be at the heart of government so that he or she has a genuine understanding of the wider policy context in which the government is acting. As such, ILEX, therefore, accepts the importance of the AG being a member of, and directly accountable to, Parliament.

- A wholly independent AG might stop conflicts of interest issues from arising, but will create important issues of accountability.

- The status quo has worked reasonably well and with the extra layer of checks and balances envisaged in the Bill, the perceived conflicts might be reduced, although never entirely alleviated.

Powers of the Attorney General

- ILEX agrees with the proposal in the Bill to provide that the AG's function of superintending the prosecuting authorities does not entail an ability to give a direction in relation to individual cases, including the abolition of the power to enter a nolle prosequi.

- Provision needs to be made for an exceptional category of cases, namely those which have implications for national security. The requirement for the AG to give a report to Parliament will increase transparency in such cases.

Cabinet Meetings

- ILEX is of the view that the AG should only attend the Cabinet to give the Cabinet legal advice as required. Further, all relevant papers as a matter of course should be sent to the AG. This would also enable the AG to decide whether legal issues arise necessitating her attendance.

Attorney General Legal Advice

· There should be a general presumption against disclosure. However, there should be an exemption to this general rule in grave and serious cases, for example, where armed conflict is involved and men and women might be sent to war.

Role of the Attorney General

1. Is the Government's approach to the reform of the Attorney General's role and powers right?

1.1 The brief of the Attorney General has three traditional roles:

- i. overseeing prosecutions
- ii. imparting legal advice to the government; and
- iii. sitting in government as a minister of the Crown.

1.2 In light of the fact that the former Attorney General (AG) was subjected to continual and sustained accusations of conflicts of interests throughout his tenure in office, ILEX is of the view that it is reasonable that the AG's role is reviewed in order to maintain public confidence. That said, however, it is important for the government to bear in mind that the current role of the AG has worked reasonably well with its implied checks and balances for many years save for the recent accusations of conflict. Importantly these accusations would have been made whoever was in office at the time.

1.3 As the Constitutional Affairs Committee (now the Justice Committee) observed:

'Allegations of political bias, whether justified or not, are almost inevitable given the attorney general's seemingly contradictory positions'[1]

1.4 Given the above, ILEX recognises the difficulty in retaining public confidence whenever there is an appearance of conflict of interest, whether imagined or real. As such, putting the position of the AG under statutory footing by of Parliamentary reporting and the taking of an oath may, indeed, provide another layer of checks and balances than hitherto provided. Abolishing the power to give directions in individual cases will also help build public confidence in the role of the AG.

1.5 The important issue is striking the right balance between someone wholly independent and someone with a good grasp of policy considerations who is at the heart of government, and accountable to Parliament. ILEX is of the view that an AG with a good grasp of governmental policy issues does not necessarily mean that an AG would be susceptible to undue political influence. As the paper 'Governance of Britain - Constitutional Renewal' points out there has been no suggestion that any law officer in modern times has in fact taken a decision on the basis of political considerations has been substantiated[2].

1.6 The AG needs to be at the heart of government so that she or he has a genuine understanding of the wider policy context in which the government is acting.

1.7 ILEX, therefore, accepts the importance of the AG being a member of, and directly accountable to, Parliament. The status quo has worked reasonably well and with the extra layer of checks and balances envisaged in the Bill, the perceived conflicts might be reduced, although never entirely alleviated.

2. Compared with the current situation, are the powers of the Attorney General increased or decreased under the proposals in the Draft Bill? In particular, are the Government's proposals for a statutory power to intervene to safeguard national security appropriate? To what extent can this power be subjected to judicial review or held to account within Parliament?

2.1 ILEX recognises the difficulties that the above contradictory roles can create. For example, unless there is a public perception that the AG is a wholly independent figure detached from Executive decision making, the difficulty of the AG stopping a prosecution for national security grounds, without it appearing it is done for political reasons will continue to be problematic. Although, a wholly independent AG might resolve the conflict issue, a wholly independent AG will raise issues of accountability.

2.2 The option, as the 'Governance of Britain - Constitutional Renewal paper', together with the proposed Draft Bill makes clear, is to legislate that the superintending role of the AG does not extend to giving directions in individual cases. ILEX supports this proposal.

2.3 ILEX also notes that the power to stop a prosecution on National Security Grounds will, however, be put on a statutory footing under the proposed Bill. ILEX has no objections to this as

long as there is proportionate transparency having regard to the full circumstances of the case and for the public to know why a particular decision was taken in those exceptional cases (see below).

3. The Draft Bill requires the Attorney General to lay an annual report before Parliament. Will this increase the Attorney General's accountability to Parliament? Are additional measures needed?

3.1 ILEX favours accountability and transparency as being in the public interest in central government decision making. To this end, ILEX sees the requirement to lay an annual report to Parliament as increasing transparency in the role of the AG. However, the government must bear in mind that it is not the legal advisor that is normally accountable for the giving of that advice but the people who act on it.

3.2 As Lord Falconer rightly observed:

"In every other area the person who is accountable is not the person who gives the advice but the person who takes and acts on the advice"[3]

3.3 In view of the above, there must be a clear framework as to the purpose and objectives of the annual report. Draft clause 16 of the Bill does not make it clear, for example, whether the purpose is to increase accountability in the role of the AG.

4. Do the proposals strike the right balance between accountability of the Attorney General to Parliament for prosecutions and the independence of prosecutors?

4.1 ILEX accepts the difficult balancing act that needs to be performed in allowing the relevant prosecuting authorities the power to make decisions in individual cases, but retaining the legitimate ministerial input in the overall objectives and priorities applied by the prosecuting authorities in taking these decisions.

4.2 ILEX can see the advantages of maintaining the status quo vis-a-vis the prosecuting authorities in order to prevent, among other things, the risk of the Directors of the prosecuting authorities being drawn into the political arena.

4.3 In view of the above, ILEX recognises that the AG is in the best position to ensure that prosecution decisions are fully informed by relevant considerations without being subjected to improper pressures political or otherwise.

5. When is it appropriate for the Attorney General to attend cabinet?

5.1 ILEX is of the view that the AG should only attend the Cabinet to give the Cabinet legal advice as required. Further, all relevant papers as a matter of course should be sent to the AG. This would also enable the AG to decide whether legal issues arise necessitating her attendance.

5.2 ILEX feels that this is important because of the need for the AG giving the advice to make it clear that she or he is not part of that group, that the AG is somebody advising that group. As such, the advice imparted by the AG can be and seen to be objective by the public, which can only enhance the role of the AG and transparency in the role.

6. Is the Government's proposed model of a statutory protocol between the Attorney and the prosecuting authorities a good one? Is the content of the proposed protocol right?

6.1 As the 'Governance of Britain - Constitutional Renewal' paper rightly identifies the role of the AG vis-à-vis the prosecuting authorities is largely based on implied checks and balances. Although, a statutory protocol will expressly make clear the relationship, ILEX is of the view it will not make a huge difference to the role of the AG.

7. Should the oath of office of the Attorney General be a statutory requirement like that of the Lord Chancellor?

7.1 ILEX accepts this as a reasonable proposition and an extra safeguard against accusations of conflicts of interests

8. Should the Attorney General's power to stop a prosecution by way of a nolle prosequi be abolished?

8.1 ILEX views the above as being consistent with the approach being taken in relation to the extent of the powers of the AG as regards individual cases.

9. Are the provisions of the Draft Bill setting out the tenure of office of the Prosecutorial Directors appropriate?

9.1 No comment.

10. Should the Attorney General's legal advice be disclosed?

10.1 ILEX is of the view that there should be a general presumption against disclosure, which is akin to the lawyer and client relationship notwithstanding pressure from certain aspects of media intervention.

10.2 However, the above rule should be open to exceptions in grave and serious cases, for example where international law; commercial; or moral cases are concerned. The idea that the public is not being told the basis on which men and women are being sent to war risking their lives is morally repugnant. It is also now a matter of basic transparency in the public interest. As the evidence to the Joint Committee made clear:

"The three things we all want before we use force is parliamentary support, public support and it is clear that it is accordance with international law".[4]

10.4 It would be difficult to see how advice in respect of the use of armed force can remain confidential bearing in mind our commitment to international obligations and upholding the rule of law. The United Kingdom, together with its international Allies, must lead in this area by example.

Judicial Appointments

In terms of the proposals relating to Judicial Appointments, ILEX makes the following general observations:

The Constitutional Reform Act 2005 (hereinafter the 2005 Act) made significant constitutional changes to the system of judicial appointments. Essentially, it took away the Lord Chancellor's power to appoint judges and placed the power in the Judicial Appointments Commission but with proper accountability. This involved a detailed process with proper consultation, together with the setting up of a unique Select Committee in the House of Lords.

The new system under the 2005 Act has only been in place for 18 months and has not had time to 'bed in' or, indeed, develop. As such, ILEX is of the view that to propose further constitutional changes so soon after the implementation of the 2005 Act appears to be a little premature in the absence of any evidence to suggest the following:

- That there are problems with the new system;
- Change is needed to reduce bureaucracy; or
- There is a need to streamline the appointments system.

ILEX is also mindful of the danger that ministerial accountability may be lost by the reduction of the checks and balances in the current system of judicial appointments. In terms of the proposal for the setting of targets, for example, the government needs to be clear about what targets they have in mind. This is not made clear in the paper 'Governance of Britain- Constitutional Renewal Bill or the Draft Bill.

ILEX understands that the Lord Chancellor can already set non-statutory criteria covering experience and expertise for judicial posts below the High Court. For example, this is often the case for appointments for the post of District Judges. The post of District Judge will normally require an applicant to have sat as a deputy district judge for 2 years or a minimum of sittings.

Given the above, it seems to ILEX that most of the proposals as envisaged in the Bill can be achieved by closer partnership working and, more importantly, without the need for further legislation.

June 2008

[1] Constitutional Affairs Committee - Constitutional Role of the Attorney General HC 306.

[2] The Governance Of Britain - Constitutional Renewal - Policy Proposals p20

[3] 21st May per Lord Falconer - Joint Committee on the Draft Constitutional Renewal Bill
questions 141-216

[4] Ibid question 203.