

Between Law and Politics



The Future of the Law Officers in England & Wales

Dr Conor Casey

Foreword by Sir Robert Buckland KBE KC MP and
Professor Sir Ross Cranston FBA



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Dr Conor Casey is a Lecturer in Law at the University of Liverpool. In 2023 he will take up a post as Senior Lecturer in Public Law & Legal Theory at the University of Surrey School of Law. He has previously been invited to provide evidence to the House of Lords Constitution Committee and his work has been cited by the Irish Supreme Court, Court of Appeal and High Court, and by the United States Court of Appeals.

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Foreword

The Rt Hon Sir Robert Buckland KBE KC MP
Formerly Lord Chancellor 2019-2021 and Solicitor-General 2014-2019

Professor Sir Ross Cranston FBA
Professor of Law in the London School of Economics
Formerly High Court Judge, Queen's Bench Division, 2007-2017, MP for Dudley North,
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In his excellent discussion paper, Dr Casey canvasses what he rightly characterises as the law officers' critical role in the constitutional order of the UK. First, the law officers are the principal legal advisers to the government. As Dr Casey wisely observes, given the daunting set of challenges the country faces their services in this regard are crucial. Then there is the law officers' role in the legislative process, in assessing the compatibility of Bills with the European Human Rights Convention and the questions of retrospectivity and time of commencement of the Bill's provisions. Next are those areas where the law officers act in the public interest, independently of government, such as referring potentially unduly lenient sentences or devolution issues for decision by the courts. Further, the law officers 'superintend' the Crown Prosecution Service and Serious Fraud Office. As Dr Casey points out although this involves assisting with setting their priorities and funding, there are detailed framework agreements which rightly limit the law officers' ability to influence prosecutorial decisions. Finally, a traditional function of the law officers was to represent the government in court. Until relatively recently this occurred in important civil and public law cases, although it is now largely limited to appeals against unduly lenient sentences. Court appearances bear on the standing of the law officers and their relationship with the judiciary.

The main theme of Dr Casey's paper is that the current configuration of the Attorney General and Solicitor General as law officers with legal and political dimensions works well and that moving to an alternative model of, say, law officers shorn of political involvement is not worth the candle. We agree. He rightly focuses on the criticism that in some cases the public perception has been that law officers' advice has been politicised. There are various answers to the criticism. First, there are the conventions of the office: as Dr Casey puts it, at a minimum law officers pledge not to allow political concerns or pressure to taint their decisions or cause them to sign-off on government policies under flimsy legal justification. Secondly, there are procedures to prevent law officers peddling partisan advice. One

is that to inform their views they may consult with their very talented pool of government lawyers and on critical issues with leading independent counsel. Thirdly, on issues of exceptional national importance it now seems to be the practice that the Government's legal position, implicitly based on law officers' advice, should be disclosed and in some circumstances, the advice itself. That transparency aids parliamentary debate and public scrutiny.

The positive case for the continuation of the traditional arrangement for law officers as politicians is that their political background better informs them about the policy goals and priorities of the government of which they are part and the pressures it may be under. It enables them to explain to colleagues more bluntly why particular avenues for action must be varied if they are to be lawful and for that advice to be more palatable and consequently implemented by its recipients. To put it another way, the political status of the law officers lends weight to any advice given since it is coming from those who share the government's goals and aspirations and are 'on its side'. Dr Casey makes the further point that under the traditional arrangement for the law officers they are politically accountable. He highlights the risk of excessive legalization of policymaking with apolitical law officers who give conservative advice blocking government action whereas more constructive advice, attuned to the government's policy goals, would have chartered an alternative, lawful course.

There is no room for complacency. There is a delicate balance for each law officer between their commitment to the goals of the government of which they are part and to maintaining the integrity of the office and its constitutional role. At times that may require their courting unpopularity with colleagues because there is no respectable lawful way to proceed and their subordinating their own immediate political ambitions. Although the law officers have a part to play in debates about our constitutional arrangements, including the role of the courts, our view is that there should be no need for them to become embroiled in politically contentious issues where no legal advice has been given. Even where it has, it will generally be more appropriate for the relevant ministers to engage in any political debate surrounding the policy. Dr Casey suggests the worthwhile reform of codifying the law officer's role and responsibilities, to sit with the Ministerial Code, stressing the importance of independence. Further steps might be to return to the previous position that the Attorney General does not attend cabinet except when needed: what has been described as the 'expectation' that this should happen is very recent and not historically grounded or necessary. Overall, Dr Casey has produced an invaluable discussion paper about the future of an essential cog in our constitutional machinery. He makes a compelling case that it should not be abandoned.

Introduction

The House of Lords Constitution Committee is currently investigating the role of the Law Officers.¹ The Committee have outlined several questions that frame its inquiry, including whether it is “appropriate or helpful for the Law Officers, as Government legal advisers, to be politicians serving in Government?”² The inquiry may be the most thorough examination of the Law Officers since the period 2007–2009, during Prime Minister Gordon Brown’s campaign for constitutional reform.³ It was clear at that time some in the then Labour Government were open for reform, with Prime Minister Brown announcing to the House of Commons that the office of Attorney General “needs to change”.⁴ Around the same time, the House of Commons Constitutional Affairs Committee⁵ and House of Lords Select Committee on the Constitution⁶ both issued reports concerning potential reform, with the former advocating significant change. The Commons Committee recommended reform along the lines that responsibility for providing legal advice to government and superintending the prosecution services should be vested in a statutorily independent career lawyer and not a politician or member of the Government.⁷

In the end, however, Government and Parliament did not proceed with significant reform. While some recommendations made by the House of Commons Committee were received positively by the Labour Government (even if not acted upon in the end), its most consequential proposals were rejected.⁸ Although the then Government initially appeared enthusiastic about the prospect of reform, in the end they definitively rowed back from the idea. The recommendations of the current House of Lords Constitution Committee – whose members include a former Supreme Court president, Lord Chancellor, and Solicitor General – will no doubt spark renewed debate on the Attorney General and its proper role in the constitutional order.

The United Kingdom currently faces a daunting set of challenges, including navigating the complex socio-economic problems and opportunities facing Britain post-Brexit, the ongoing fallout from the Russian invasion of Ukraine, rising food and energy costs, political deadlock in the Northern Irish Assembly, potentially significant legislative reform of human rights protection, and the possibility of Scotland leaving the United Kingdom, to name just a few. These issues will raise countless thorny legal and constitutional issues, about which the Prime Minister and his Cabinet will invariably turn to the Attorney General for legal advice and guidance. The Office plays a critical role in the constitutional order and questions concerning its reform should therefore be subject to serious

1. <https://committees.parliament.uk/work/6540/role-of-the-lord-chancellor-and-the-law-officers/>. In the interest of disclosure, I was invited to contribute written and oral testimony to the inquiry. For my written evidence see ‘Written evidence of Conor Casey for House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officers’ (RLC0003), <https://committees.parliament.uk/writtenevidence/106896/pdf/>. For a transcript of my oral evidence see <https://committees.parliament.uk/oralevidence/9939/pdf/>.
2. <https://committees.parliament.uk/work/6540/role-of-the-lord-chancellor-and-the-law-officers/news/161171/constitution-committee-calls-for-evidence-on-the-role-of-the-lord-chancellor-and-the-law-officers/>.
3. Government of the United Kingdom, *The Governance of Britain* (CM 7170, July 2007).
4. Prime Minister Gordon Brown MP, House of Commons, Hansard Volume 462, 3 July 2007.
5. House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, (5th Report of Session, 2006–2007, 17 July 2007).
6. House of Lords Select Committee on the Constitution, *Reform of the Office of Attorney General* (7th Report of Session, 2007–2008, 18 April 2008).
7. House of Commons Constitutional Affairs Committee (n 5) para 18.
8. See United Kingdom Government, *The Government’s Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General* (Cm 7355, 2008).

debate and reflection.

This report aims to contribute to ongoing debates by arguing that the Labour Government under Gordon Brown acted wisely by rejecting significant constitutional reform, and that current political actors should follow suit. As such, I offer a defence of the institutional status quo of the Law Officers. I suggest that the current configuration of the Attorney General (and Solicitor General), as a law officer with legal and political dimensions, works well. I also argue that the costs of moving to an alternative model of Attorney General could be steep and not worth incurring given the overall robust health of the contemporary Office. However, my defence is qualified in that I suggest several moderate reforms would be prudent to ensure proper balance is maintained between the political and legal dimensions of the office, so that the former does not compromise the latter. I proceed in five parts.

Part I offers an overview of the Attorney General's Office and its diverse set of functions and responsibilities. This part provides an account of the dual legal-political nature of the office that I defend. Part II outlines the strongest critiques of the office and why calls for reform arise intermittently. Part III offers a defence of the office and argues that successive Attorneys General have, for the most part, maintained appropriate balance when simultaneously carrying out their role as legal advisor and guardian of the public interest and rule of law on the one hand, and their position as a member of government on the other. I also argue that when appropriately balanced, the political and legal elements of the Attorney General are complementary to each other. Part IV analyses several different constitutional systems to probe the potential political risks of alternative models of apex legal advisors. I suggest in light of the overall robust health of the office that such risks are not worth incurring. Part V outlines a slight qualification to my defence, which is that several reforms would be prudent responses to some legitimate concerns raised in part III and would help solidify appropriate balance between the dual dimensions of the Attorney General's Office. A brief conclusion follows.

I. The Role and Functions of the Attorney General

Parliament and the judiciary are the most visible actors helping ensure the executive and its officials adhere to the rule of law. The former by subjecting ministers to ongoing parliamentary scrutiny for their actions and censure where appropriate, and the latter through the mechanism of judicial review. However, within the executive it is Government lawyers who are at the front-line of ensuring the rule of law is respected. Government lawyers ensure that concern for law and legality remain “ever-present considerations” for politicians and officials by being on hand to provide legal advice in respect of policy concerns or legislative proposals.⁹

The organization of Government lawyers in England & Wales is somewhat complex but, for simplicity’s sake, can be pictured as having a pyramid-like structure. At the base of the pyramid are career civil service lawyers who provide day-to-day legal advice to ministers and officials on countless legal questions. The Government Legal Department (“GLD”) - which has a staff complement of around 2000¹⁰ and is headed by the Treasury Solicitor¹¹ - provides this function for most government departments and ministers. A minority of departments, like the Foreign Office and Cabinet Office, often rely on their in-house departmental legal advisors. These lawyers play a critical role in ensuring that the routine work of dozens of departments— from administrative decisions to the formulation of legislation both primary and secondary – remains compliant with statute, human rights law, and constitutional conventions.¹²

Atop this base, at the apex of the Government lawyer pyramid, stand the Law Officers.¹³ This group includes the Attorney General for England and Wales,¹⁴ the Solicitor General for England and Wales,¹⁵ and the Advocate General for Scotland (who advises the UK government on Scots law).

The Attorney General of England and Wales is a constitutional office ancient in origin, with roots traceable to the 13th Century.¹⁶ Initially the Attorney General was the King’s lawyer, an eminent counsel expected to fiercely represent the sovereign’s interests and defend their prerogatives in legal proceedings and provide advice where requested. Overtime, as the effective exercise of executive authority shifted to the Government, the Attorney General stopped acting as a personal lawyer to the sovereign and became a salaried minister of the Crown whose work focused exclusively on Government business in the courts and Parliament.¹⁷

Today, the main function of the Attorney General and other Law Officers remains to serve as legal advisors to the Crown via her Prime Minister and government.¹⁸ The Law Officers are, by convention, members of government but not members of cabinet.¹⁹ Traditionally, Attorneys General attended cabinet meetings on request as a need for

9. Ben Yong, *Government Lawyers and the Provision of Legal Advice within Whitehall* (The Constitution Unit, 2013) 94.
10. <https://www.gov.uk/government/publications/workforce-management-information-for-gld-ago-and-hmcpis-201819>.
11. Barry K Winetrobe, 'Legal Advice and Representation for Parliament' in Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament* (Butterworths, 1998) 95.
12. Yong (n 9) 15-17.
13. For more fulsome overviews of the Law Officers place in the constitutional order see John LJ Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell 1964); Conor McCormick, *The Constitutional Legitimacy of the Law Officers in the United Kingdom* (Hart Publishing, 2022).
14. The Attorney General of England and Wales also holds the Office of Advocate General for Northern Ireland and advises the UK government on Northern Irish law.
15. Pursuant to the Law Officers Act 1997, any function of the Attorney General may be exercised by the Solicitor General, and anything done by or in relation to the Solicitor General in the exercise of those functions is treated as if it were done by the Attorney General.
16. See W. S. Holdsworth, 'Early History of the Attorney and Solicitor General' (1918-1919) 13 *Illinois Law Review* 602.
17. Government of the United Kingdom, *The Governance of Britain: A Consultation on the Role of the Attorney General* (Cm 7192, 2007) 4-5.
18. The Attorney General is also, by convention, expected to be available to provide legal advice to Parliament in several limited instances, including the conduct of House proceedings, disciplining of members, and the effect of proposed legislation.
19. The Attorney General has not been a member of cabinet since 1928.

advice arose.²⁰ However, recent Attorneys General have reported that there is now an ‘expectation’ that the Attorney General will regularly attend cabinet meetings.²¹ The Law Officers handle only a very small fraction of legal questions concerning the Government, namely the most difficult, pressing, and politically important.²² Successive versions of the Cabinet Office’s *Ministerial Code* have referred to the importance of the Law Officers’ advice, and specified they must be consulted where: the legal consequences of action by the government have important policy repercussions; if a department legal advisor is unsure of the legality or constitutionality of legislation; if the *vires* of subordinate legislation is in dispute; or where two or more departmental legal advisors are in disagreement.²³ A request for legal advice may also be made directly to the Attorney General at cabinet level, particularly if it involves an issue on which the Prime Minister has taken a policy lead. The Law Officers’ decision is, by convention, accepted as binding, making it the last word on internal legal questions for the Government.²⁴

The Attorney General also has several important functions in the legislative process. Departmental bills submitted to the Parliamentary Business and Legislation Cabinet Committee must be accompanied by a legal memorandum drafted by GLD advisors or other in-house advisors. This memorandum includes “full and frank assessment of legal risk” arising from the issues engaged by the bill,²⁵ including *inter alia* analysis of its compatibility with the Human Rights Act 1998. This memorandum is shared with the Law Officers, who also consider its HRA compatibility and satisfy themselves with the memorandum’s cogency. The Attorney General also scrutinize bills for consistency with rule of law values by examining them for (a) potentially oppressive retrospective effect and (b) likelihood of early commencement before the typical two-month period post-royal assent elapses.²⁶ In such circumstances, the Law Officers’ consent must be given for bills proceed to Parliament.

The Attorney General has accrued a diverse range of common law and statutory responsibilities under the broad heading of defending the public interest. Examples include power to prosecute for contempt of court, to restrain vexatious litigation, to refer ‘unduly lenient’ sentences or points of law to the Court of Appeal, to appoint *amicus curiae* in certain important proceedings where an important point of law is at stake, to make or consent to an application for a new inquest, and to intervene as a party in litigation concerning charity law.²⁷ More recently, Attorneys General have been given an important responsibility in respect of devolution, and been vested with statutory authority to refer questions to the Supreme Court about whether the three devolved assemblies have exceeded their respective legislative competences.²⁸ In discharging all these responsibilities, the Attorney General is – in accordance with established and widely accepted Shawcross principles – expected to exercise her judgment independently of direction from other members of the government.²⁹

Finally, and significantly, the Attorney General has a heavily political dimension to her work. The Attorney General is a government minister

20. Elwyn Jones, ‘The Office of Attorney-General’ (1969) 27 *Cambridge Law Journal* 43, 47.

21. Conor McCormick and Graeme Cowie, ‘The Law Officers: A Constitutional and Functional Overview’ *House of Commons Library Briefing Paper* (May 2020) 49.

22. S.S.C. Silkin, ‘The Function and Position of the Attorney-General in the United Kingdom’ (1978) 12 *Bracton Law Journal* 29, 34.

23. See *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, 2001) para.22; *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (Cabinet Office, 2005) para. 6.22-6.44; *Ministerial Code* (Cabinet Office, 2018) para. 2.10-2.13.

24. McCormick (n 133) 52.

25. *Guide to Making Legislation* (Cabinet Office 2022) 11.11.

26. *Id.*, 3.10.

27. McCormick (n 133) 62-70.

28. Christopher McCorkindale and Aileen McHarg ‘Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part II)’; UK Constitutional Law Blog, 7 March 2018, <https://ukconstitutionallaw.org/2018/03/07/christopher-mccorkindale-and-aileen-mcharg-continuity-and-confusion-legislating-for-brexit-in-scotland-and-wales-part-ii/>.

29. McCormick (n 13) 66-67. Named after former Attorney General Sir Hartley Shawcross, the basic thrust of the principle is that while Attorneys General may consult with their colleagues when discharging their public interest functions, ultimate responsibility for the eventual decision rests with the Attorney-General alone, and she is not to be put under pressure by her colleagues.

and typically a senior politician of the governing party drawn from the Commons as an elected MP or Lords as an appointed peer. She is subject to dismissal by the Prime Minister, subject to collective responsibility, and takes the whip in Parliament. The Attorney General superintends the Crown Prosecution Service and Serious Fraud Office and has an important role in helping set its priorities and broad policy objectives and ensuring the offices are adequately resourced. The Attorney General also has a right to make representations to the DPP in a small sub-set of national security cases, and an obligation to inform Parliament after doing so. But day to day operations and individual prosecutorial decisions are left to statutorily independent civil servants and the Director of Public Prosecutions. The superintendence functions of the Attorney are now subject to detailed framework agreements, both of which make vanishingly small the former's ability to influence the latter's prosecutorial decisions.³⁰ The division of responsibility between the Attorney General and the Directors of the prosecution agencies is, suggests McCormick, "clearer than it has ever been before...it could scarcely be much clearer to my mind."³¹

Attorneys General will also tend to share the basic normative goals and political philosophy of their party and ministerial colleagues. Thus, as with any minister part of their general workload will be to help advance the policy goals of the government, which may well touch upon sensitive legal issues like human rights law, criminal justice, judicial review, and the Government's conception of the correct balance of the Constitution. It is a constitutional truism that Attorneys General must avoid political partisanship in their public interest determinations, and (of course) the kind of political activity that would bring the judiciary or rule of law into contempt. But Attorneys General have never been considered apolitical actors, such that they must avoid good-faith political activity taken to advance the policy objectives and legislative agenda of the Government.³² In recent years Attorney Generals have, for example, been at the forefront of executive engagement with the jurisprudence of the senior judiciary treating the Human Rights Act 1998 and core constitutional principles. Several recent Attorneys General have engaged in these political debates by offering respectful, but often very firm, public remarks voicing disagreement with the superior courts and defending the legitimacy of the Government inviting Parliament to correct what it views as erroneous and constitutionally heterodox judgments.³³ They have also occasionally set out the executive's considered position on sensitive issues like the scope of self-defence in international law³⁴ or anti-discrimination legislation.³⁵

Simultaneously discharging this diverse range of functions requires the Law Officers, notes Appleby, to vigilantly maintain a "delicate balance between the necessary loyalty they must exhibit as executive ministers" on the one hand and the independence from "political interests that is fundamental to the provision of accurate and robust legal advice and for making decisions about where the public interest lies" on the other.³⁶ Whether they have, or even can, strike this balance is at the heart of debates over reform.

30. Attorney General's Office, *Framework Agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020); Attorney General's Office, *Framework Agreement between the Law Officers and the Director of the Serious Fraud Office* (21 January 2019).

31. Written evidence of Conor McCormick to House of Lords Constitution Committee (RLC0005 14 March 2022) 14.

32. See Conor Casey and John Larkin QC, *Crossing the Line: The Attorney General and the Law/Politics Divide* (Policy Exchange, 12 January 2022); Conor Casey and John Larkin KC, 'The Attorney General and Renewed Controversy over the Law/Politics Divide' (2022) 26 *Edinburgh Law Review* 228.

33. See Robert Wright and Jane Croft, 'UK attorney-general backs calls to curb judges' powers' (*Financial Times*, 12 February 2020). The *Financial Times* article is a report based on Geoffrey Cox KC MP's extended interview with the *Institute for Government* think-tank. The headline represents quite an unfair and lop-sided summary of what was an extensive and nuanced hour-long conversation. However, the then Attorney General did make the comments cited in the article about the appropriate balance of power between the Courts and Parliament and mentioned there were legitimate concerns that decisions where increasingly being taken by the former that ought to be reserved to the latter. The full interview is available here: <https://www.youtube.com/watch?v=N5TzdkGu2k>. See also Jeremy Wright KC MP, 'The Attorney General on who should decide what the public interest is' (8 February, 2016), <https://www.gov.uk/government/speeches/the-attorney-general-on-who-should-decide-what-the-public-interest-is>; Dominic Grieve QC MP, 'European Convention on Human Rights: current challenges' (24 October 2011), <https://www.gov.uk/government/speeches/european-convention-on-human-rights-current-challenges>.

34. Jeremy Wright QC MP, 'The modern law of self-defence' *Attorney General's Speech at International Institute for Strategic Studies* (11 January, 2017), <https://www.gov.uk/government/news/legal-basis-for-striking-terror-targets-set-out>.

35. Suella Braverman QC MP, 'Equalities and rights: Conflict and the need for clarity' *Attorney General's Speech at Policy Exchange* (10 August, 2022), <https://www.gov.uk/government/speeches/equalities-and-rights-conflict-and-the-need-for-clarity>.

36. Gabrielle Appleby, 'The evolution of a public sentinel: Australia's Solicitor General' (2012) 63 *Northern Ireland Legal Quarterly* 397, 398.

II. Controversy and Arguments for Reform

At the heart of intermittent calls to fundamentally reform the Law Officers is the belief that the present dual legal-political model of government chief legal advisor is unwise and should be swapped in favour of a more apolitical model. Behind this conviction is an implicit scepticism that striking a sound balance between the different constitutional dimensions of the Attorney General's current role is a realistic possibility.³⁷

These kinds of critiques frequently equivocate between two very distinct risks associated with the Attorney's political dimension. One is that there is a risk the Attorney General will substantively allow partisan considerations to colour, or "slant", their legal advice.³⁸ The other is that there is a risk the public may perceive advice to be politicised, which will undermine faith in the Office itself, the Government's dedication to the rule of law;³⁹ perhaps breeding cynicism toward the notion of the rule of law itself.

There is a stronger evidential basis for the latter concern than the former. To be sure, in the last several decades there have been several allegations of improper political influence being brought to bear on the Attorney General while discharging their independent functions. However, this has mostly occurred in the realm of prosecutorial decision-making,⁴⁰ final say over which is now near exclusively in the hands of the independent Director of Public Prosecution, save for a sub-set of exceptional cases implicating national security or which justify a *nolle prosequi*.⁴¹ When it comes to the provision of legal advice however, there are only rare occasions where concerns about actual politicisation have been explicitly raised. The most prominent and well-trodden controversy being the long-running debate over whether political pressure was brought to bear on Lord Goldsmith when, as Attorney General, he gave legal advice in the run up to the Iraq war.⁴²

This (very hotly contested) outlier aside, no commentator of which I am aware maintains that successive Attorneys General have allowed partisan bias to substantively affect their legal advice-giving work. For example, although the House of Commons Constitution Committee ultimately recommended reform of the Office back in 2007, neither it, nor the respondents who supplied evidence to the Committee, suggested it was a live concern.⁴³ To be sure, the legal positions adopted by the Attorney General in their advice sometimes spark very heated critique. Former Attorney General Suella Braverman KC MP's advice on the Internal

37. The then Labour Government's 2007 consultation document on reform, for instance, outlined that the current multi-faceted nature of the Attorney's role had given rise to a debate about whether there is unacceptable tension between the Attorney's political status as a government minister and their functions as the Government's chief legal adviser. See Government of the United Kingdom, *The Governance of Britain: A Consultation on the Role of the Attorney General* (Cm 7192, 2007) 12.

38. Neil Walker, 'The Antinomies of the Law Officers' in (eds.) Maurice Sunkin and Sebastian Payne, *The Nature of the Crown* (Oxford University Press 1999) 161.

39. House of Lords Constitution Committee, 'Reform of the Office of Attorney General: Appendix 3 Written Evidence by Professor Sir Jeffrey Jowell KC (7th Report of Session 2007-2008) 29.

40. McCormick (n 311) 12-13.

41. Alexander Horne, 'The Law Officers: Standard Note' House of Commons Library (August 2014) 8.

42. It should be noted that the Report of the Iraq Inquiry (popularly known as the Chilcott Inquiry Report) made no suggestion that Lord Goldsmith was in fact pressured over the direction of his legal advice, still less that he succumbed to any. Sir John Chilcot, *The Iraq Inquiry: Volume 5*, <https://webarchive.nationalarchives.gov.uk/uk-gwa/20171123122743/http://www.iraqinquiry.org.uk/the-report/>.

43. Government of the United Kingdom, 'The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General' (April 2008) para 44; Ministry of Justice, 'The Governance of Britain - Constitutional Renewal' (March 2008) para 53.

Market Bill, for instance, became a flashpoint for intensive debate.⁴⁴ But in that case debate did not turn on whether the Attorney's advice was tainted by partisanship, but on the more morally and philosophically charged question of whether the advice's strong endorsement of Parliament's constitutional entitlement - as a matter of domestic law - to legislate in breach of the UK's international law obligations was contrary to the rule of law or not.

The more well-grounded critique of the status quo concerns the risks of *perceived* politicization. This is a concern advanced by several prominent commentators. Professor Sir Jeffrey Jowell KC, for example, argued that "where legal advice is proffered to the Government by a serving politician who is also a member of that government, that advice is vulnerable to being construed as influenced by partisan political considerations."⁴⁵ This concern has a point. If one were to ask a reasonably informed observer - the proverbial person on the street - they would likely agree that it should be more difficult in principle for a politician-lawyer to give objective detached legal advice to a party colleague - including their political boss - relative to an entirely apolitical official with civil service tenure protections.

Such concerns must be weighed with several other considerations before they should be used to undergird calls for wide-reaching reform. For a start, if one thinks the Office is otherwise largely functioning well and that there is no evidence of *actual* partisanship in its advice-giving work, then one may reasonably ask: is an ultimately mistaken *perception* about the Law Officers a strong enough foundation on which to justify significant change to a long-standing constitutional institution? For some critics of the status quo, the risk of perceived bias or politicisation - whether factually misplaced or not - is itself sufficient to justify reform.⁴⁶

But absent tangible evidence of the damaging impact mere perceptions of political bias is actually having - such as demonstrating erosion of public or parliamentary faith in the Government's commitment to the rule of law - I suggest a more measured response would be to pursue less radical change to meet such concerns. A more measured response, for example, would be a codified restatement of the Attorney's role and responsibilities to accompany (or be contained in) the Ministerial Code which stresses the importance of independence in the role. In other words, the kind of targeted reform that would address any perceived citizen concerns but without involving substantial constitutional surgery.

Proponents of reform might also suggest that arguments in favour of the status quo based on the proposition the Attorney General is democratically accountable to Parliament for their advice-giving role, are naively overstated. They are ostensibly overstated because parliamentarians cannot truly assess, for example, whether there actually has been politicisation of legal advice because of the intense levels of confidentiality pervading the Law Officer's work. There may be some basis for this concern given the constitutional conventions against both revealing that advice was sought from or given by the Officers and disclosing the content of any advice given. The latter convention is quite rigorously (though not absolutely)

44. Jane Croft, 'Internal market bill fuels anger within UK legal profession' (14 October 2020), <https://www.ft.com/content/37c8d9ab-e0de-49ad-b3e8-4ed-f343adfb3>.

45. Jowell (n 39) 28. See also Walker, (n388) 149.

46. Professor Jowell argued that the "tradition of actual independence is not the only point here. The appearance of lack of independence is what matters. Justice must not only be done, but also seen to be done." Id., 29.

enforced, and it may be said to impair the ability of Parliament to hold the Law Officers accountable for the cogency of their legal advice.

Two points can be made about this. First, the extent of possible impairment of Parliamentary scrutiny of the quality of legal advice should not be exaggerated. On any significant issue, members of Parliament will be aware of – indeed will themselves articulate – the competing arguments. It will be known what course Government has decided to take. This course can be subject to more or less critical legal analysis in Parliament and elsewhere. If there is no plausible legal defence of the Government position inferences adverse to the quality of the Attorney General’s work can always be drawn. Second, and in any event, this concern can also be addressed without altering the fundamentals of the status quo. For example, by consciously examining the parameters of the convention against the disclosure of the fact or content advice. The last two decades have demonstrated that the convention against disclosing the fact legal advice has been taken is effectively moribund. It has also demonstrated that the convention against disclosure of the content of legal advice is simply not understood by anyone to be absolute, as advice has been disclosed in full or precis form on several occasions. This includes advice concerning the legality of the Iraq war,⁴⁷ use of armed force against Islamic State forces,⁴⁸ drone strikes against British citizens fighting for Islamic State,⁴⁹ use of armed force against Syrian government forces,⁵⁰ the legal effects of the Northern Irish backstop contained in Prime Minister May’s doomed Withdrawal agreement⁵¹ and the legality of the Internal Market Bill.⁵²

Indeed, it is worth noting that in its 2009 response to the House of Commons Justice Committee Report on potential reform of the Office, the then Labour Government itself suggested that “in exceptional cases” it would be “prepared to waive legal professional privilege and disclose the advice that it has received.”⁵³ Explicit recognition by Government that voluntary disclosure of legal advice – in full or in precis form – may be constitutionally proper, in limited and exceptional circumstances, to aid parliamentary debate and scrutiny when it concerns issues of national importance, may take much of the sting from the critique the Attorney is not truly accountable to parliament for their advice-giving function.

47. Sir John Chilcot, *The Iraq Inquiry: Volume 5*, <https://webarchive.nationalarchives.gov.uk/ukgwa/20171123122743/http://www.iraqinquiry.org.uk/the-report/>.

48. Prime Minister’s Office, ‘Memorandum to the Foreign Affairs Select Committee Prime Minister’s Response to the Foreign Affairs Select Committee’s Second Report of Session 2015–16: The Extension of Offensive British Military Operations to Syria’, <https://www.parliament.uk/globalassets/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf>.

49. UK Parliament Joint Committee on Human Rights, ‘The Government’s policy on the use of drones for targeted killing’ (2nd Report of Session 2015–16), <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

50. Prime Minister’s Office, ‘Syria action – UK government legal position’, 14 April 2018, <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

51. Geoffrey Cox QC MP, ‘Legal Effect of the Protocol on Ireland/Northern Ireland’, Attorney General’s Office, 13 November 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761852/05_December_-_EU_Exit_Attorney_General_s_legal_advice_to_Cabinet_on_the_Withdrawal_Agreement_and_the_Protocol_on_Ireland-Northern_Ireland.pdf.

52. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf.

53. UK Government, ‘The Government’s Response to the Justice Committee Report on the Draft Constitutional Renewal Bill (provisions relating to the Attorney General)’ (July 2009) 9.

III. Defence of the Status Quo

The strongest positive argument for maintaining the status quo is that the Law Officers have, for most of their contemporary history, maintained a reasonable balance when simultaneously carrying out their role as legal advisor and guardian of the public interest on the one hand, and their position as a highly political animal and member of government on the other. They have been able to do so because of a combination of several features of the UK constitutional order. Namely, a supportive constitutional culture, a dedication by successive holders of the Office to constitutional norms of independence in functions concerning the public interest and rule of law, and adherence to legal professional ethics and expertise.⁵⁴

Respecting the values of legality and the rule of law – central to the UK’s constitutional culture, legal professionalism, and the Office’s own traditions – all require an Attorney General, at a minimum, to not allow partisan bias, party political concerns, or pressure from colleagues, to obscure good faith attempts to offer proper legal advice, or to taint a conclusion that a particular decision is in the public interest, or cause them to sign-off on the legality of government policies under flimsy legal justification.⁵⁵ Instead, when responding to legal queries Attorneys properly try to offer advice in the manner of a professional lawyer’s advice to any client: to give a reasonable analysis of the law as they see it using their legal expertise and judgment.⁵⁶ Law Officers have expressed strong commitment to, in the words of former Advocate General Lord Keen KC, not sanctioning the legality of a course of action unless they can advise “government that there is a respectable argument for the implementation of a policy and that it can, therefore, in theory fall within the bounds of the rule of law”.⁵⁷ Where no respectable argument that could be put before a Court can be found for a policy, they have a duty to inform the government it is unlawful.⁵⁸

The Law Officer’s institutional commitment to offering rigorous legal analysis is partly reflected in the common practice of Attorney’s availing of an impressive range of additional legal expertise to inform their own deliberations.⁵⁹ While they are under no obligation to do so,⁶⁰ it is common for Attorneys to seek preliminary analysis and advice on difficult legal questions from the lawyers in their Office, the GLD, the First Treasury Counsel⁶¹ or other external counsel. Attorneys General have also occasionally been known to seek specialised legal advice from academic experts.⁶²

The willingness of the Law Officer’s to offer forthright, politically detached, advice - even if it might have unwelcome consequences for the

54. Conor Casey and John Larkin QC, *Crossing the Line: The Attorney General and the Law/Politics Divide* (Policy Exchange, 12 January 2022) 12.

55. Casey and Larkin (n54) 12.

56. Conor Casey, ‘The Law Officers: The Relationship between Executive Lawyers and Executive Power in Ireland and the United Kingdom’, in Oran Doyle, Aileen McHarg and Jo Murkens eds., *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge University Press 2021) 296; Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press 1999) 297.

57. Oral evidence of The Rt Hon the Lord Keen of Elie QC, former Advocate-General for Scotland (2015-20) to the House of Lords Constitution Committee (Wednesday 27 April 2022) 2.

58. Attorney General’s Guidance on Legal Risk, Office of the Attorney General (2 August 2022), <https://www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk>.

59. James Hand, ‘The Attorney-General, politics and logistics– a fork in the road?’ (2022) 42 *Legal Studies* 425, 433.

60. See Sir Stephen Laws KCB QC (Hon), ‘The Treasury Devil and the scandal that never was’ (Policy Exchange, 20 June 2022) <https://policyexchange.org.uk/blogs/the-treasury-devil-and-the-scandal-that-never-was/>. As Laws puts it, this is because: “The constitutional position so far as legal advice to government is concerned is clear. The government’s only legal advisers are the Law Officers of the Crown...It is the Law Officers of the Crown who are responsible and politically accountable for all legal advice to government. All other legal advice (whether from civil service lawyers or from lawyers commissioned from “standing counsel” or private practice) is provided by them to government in their capacity as delegates of the Law Officers, or so far only as it is expressly or impliedly adopted by the Law Officers.”

61. The First Treasury Counsel is a barrister nominated by the Government to provide legal advice and representation in the most sensitive and impactful public law matters. It is invariably a senior barrister of considerable esteem. See Yong (n 9) at paras 4.7 & 4.20.

62. Paul Lewis and Owen Bowcott, ‘Government’s top legal advisers divided over move to override Brexit deal’ (10 September 2020), <https://www.theguardian.com/politics/2020/sep/10/governments-top-legal-advisers-divided-over-move-to-override-brexit-deal>.

Government - is not merely hypothetical. A recent concrete example is Attorney General Sir Geoffrey Cox KC MP's advice on the legal effects of the so-called Northern Irish 'backstop' element of the EU-UK Withdrawal Agreement; advice which undoubtedly proved a serious political thorn in then Prime Minister May's attempt to secure parliamentary approval for her deal.⁶³ The then Attorney General's advice on the backstop, and its international law implications, proved a major obstacle to May's ability to gain support for the agreement. Parliamentarians from the opposition benches, her confidence and supply partners, and her own party all explicitly cited the legal risk identified in the advice as a reason to reject the agreement.⁶⁴ This episode is a vivid case study of the Attorney General's capacity to withstand political pressure to slant legal advice in order to make it more favourable to the executive, even in issues of high political salience.

It is fair to say, however, that while Attorneys General strive for professional detachment when giving advice, they do not regard themselves only as legal technocrats. They instead seek to combine their professional expertise as trained lawyers, with a desire to assist their ministerial colleagues in a common goal of implementing the Government's policy agenda.⁶⁵ In many respects, the political dimensions of the office are complementary to the Attorney's role as legal advisor. The political aspect of the role provides the Attorney General with tacit and intimate knowledge of the policy goals and priorities of her ministerial and party colleagues and the political pressures they are under. Immersion in the political waters their colleagues swim in makes them well placed to act as a "buffer between politicians and the lawyers" translating "purist legal thinking into something that ministers could understand."⁶⁶ It also aids her task of offering constructive advice which not only speaks to the constraints her colleagues are bound by, but also any possible lawful and proper alternatives they can avail of so they might still advance their policy agenda for the common good.⁶⁷ Government lawyers are expected to go beyond pointing out relevant legal constraints, but to suggest solutions and practical proposals for tailoring policy to minimize legal risk that a Court may determine a policy is unlawful.⁶⁸ Deep familiarity with the policy environments and concerns of their ministerial colleagues make the Law Officers structurally well placed to perform this role.

The argument the political and ministerial dimensions of the Attorney General's work compliments their legal work has been endorsed (perhaps unsurprisingly) by several previous incumbents. Sir Geoffrey Cox MP KC stated that one of the advantages of having a political element is the Law Officer is better attuned to "which issues his colleagues are struggling with, which issues have to be accentuated and emphasised to drive home the point, and which points are not necessarily so important."⁶⁹ Sir Jeremy Wright MP KC, another recent Attorney General, maintained that while the legal advice they gave was not coloured by party politics, it was also "important that all lawyers have the ability to give advice to their clients in ways that their clients find most useful. And it seems to me that having

63. The Rt. Hon Geoffrey Cox QC MP, Attorney General, 'Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement', Attorney General's Office, 12 March 2019.

64. Rowena Mason and Rajeev Syal, 'ERG signals it could back May's Brexit deal if legal advice is clearer', Guardian, 13 March 2019, www.theguardian.com/politics/2019/mar/13/erg-signals-itcould-back-may-brexit-deal-legal-advice-is-clearer.

65. J.L.J. Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell 1984) 70; Oliver Heald, 'The Role of the Law Officers' (A Speech by the Solicitor General to Kent Law School, 18 October 2012). Available at: www.gov.uk/government/speeches/the-role-of-the-law-officers.

66. Yong (n 9) para 4.8.

67. Yong, (n 9) 61.

68. Attorney General's Guidance on Legal Risk, Office of the Attorney General (2 August 2022).

69. Evidence of Geoffrey Cox QC MP to House of Commons Justice Select Committee HC1887 Wednesday 23 January 2019.

somebody who also has a political background enables the Law Officers to do that”.⁷⁰ Yet another former Attorney General said his ability to give good legal advice was aided by his getting to know his colleagues “policies, their intentions, their methods, indeed their very temperaments and characters.”⁷¹ This former Law Officer added that the better an Attorney General is able to understand the “stresses and the strains” of the policymaking process, the better able they are to “assist in ensuring that if there is a lawful and a proper way of achieving its objectives, that way will be found.”⁷²

Several academic commentators have equally observed how the political status of the Attorney General helps lend their advice weight. Professors Daintith and Page write that, as politically responsible lawyers, the work of the Law Officers has a “special quality and status” amongst both their ministerial peers and other civil servant Government lawyers.⁷³ In a similar vein, in written evidence supplied to the House of Lords Constitution Committee in 2007, the late distinguished Professor Anthony Bradley QC doubted “whether an ‘independent’ lawyer outside the structure of central government and not holding ministerial office would command the authority that at present goes with the office of Attorney General.”⁷⁴ Professor Yong’s 2013 study of Government lawyers commissioned by UCL’s Constitution Unit, demonstrated this sentiment was shared by many senior career civil service lawyers then working in the GLD. All those interviewed suggested the dual legal-political dimensions of the Attorney’s role were complementary.⁷⁵ Yong documents that those interviewed:

“[S]aw no need for reform. The key benefit, they argued, in having the chief legal adviser as a minister, was that he – or she – had knowledge of the political pressures on ministers, which in turn aided the Attorney General in carrying out the act of ‘translation’; but it also helped from the point of view of the Attorney General’s colleagues – it gave his or her advice more weight.”⁷⁶

More recently, in oral evidence presented to the House of Lord’s ongoing inquiry into the Law Officers, former Director of the Government Legal Department Sir Johnathan Jones KC conceded that there was a hypothetically greater risk a more politically oriented Attorney General would be more “willing...to give convenient advice”⁷⁷ than a civil servant lawyer. But Sir Johnathan proceeded to maintain that there were very significant countervailing advantages in the “Government’s senior legal adviser being a politician who is regarded as an equal...is trusted to be part of the inner circle, attends Cabinet...and is seen to be on the Government’s side”.⁷⁸ These kinds of Attorneys General are, suggested Sir Johnathan, the “best placed to give the best advice” to the Government, advice informed by legal expertise and political acumen.⁷⁹

Whatever may be the mere perceptions of the effects of the Attorney General’s political dimension, there appears to be a consensus amongst all stripes of government lawyer that it has had a largely benign impact - adding greater weight to the advice and making it more constructive and politically attuned. In his testimony to the House of Lord’s Constitution

70. Evidence of Jeremy Wright QC MP to the House of Commons Justice Select Committee, 15 September 2015.

71. Silkin, (n 222) 37.

72. Id.

73. Page and Daintith (n 56) 297.

74. House of Lords Constitution Committee, ‘Reform of the Office of Attorney General: Appendix 2 Written Evidence by Professor Anthony Bradley’ (7th Report of Session 2007-2008) 25.

75. Yong (n 9) 4.9.

76. Id.

77. Testimony of Sir Johnathan Jones QC (Hon) to House of Lords Constitution Committee, (Wednesday 23 March 2022).

78. Id.

79. Id.

Committee's inquiry, Lord Keen KC gave an interesting insight into just how seriously the weight of Attorney General's legal advice is held by the executive. He noted he could not think of an instance during his five-year tenure where the Government "decided to proceed in the face of express advice that there was no respectable argument to support a particular policy proposal."⁸⁰ In contrast, there appears to be a concern amongst former Law Officers, government lawyers, and some academic commentators that the advice of a technocratic apolitical principal legal advisor may not command the same level of weight, or be as politically attuned as that from a Law Officer with dual legal-political dimensions.

Another advantage in favour of the status quo concerns political accountability. As noted above, the Law Officers do not handle the routine legal questions faced by Government. Instead, they handle the most controversial and politically salient legal questions. They also settle the most contested questions, for example where advice given by government lawyers advising different departments conflicts. In these scenarios, it is rarely the case there will be one clear-cut legal answer, and a measure of political and moral judgment will be required to choose how to proceed. Is it not best in a constitutional democracy that these kinds of sensitive legal questions – which can have wide policy and political repercussions – be determined, in the last, by a legal figure who is ultimately politically accountable to Parliament? As a minister and member of Government, the Law Officers are ultimately accountable for their decisions and quality of advice in a way that a career civil servant cannot be. One former Attorney General stressed the fact that "[E]very decision which the Attorney-General takes, every piece of advice which he gives, every statement which he makes, is one for which in some form or other he may ultimately be held accountable in Parliament."⁸¹ An alternative apolitical model, whatever its merits, involves vesting enormous influence over the direction of sensitive policy decisions in officials who would by deliberate design be highly insulated from political accountability.

This formal accountability walks hand in hand with willingness by political actors to sanction perceived misuse of authority. An Attorney General who is perceived to have descended into partisan decision-making, or succumbed to political pressure, not only risks breaching the constitutional and professional norms⁸² that underpin the work of the Office (and, more broadly, those that underpin the legal profession generally), but the public and parliamentary confidence and credibility on which the office depends.⁸³ Where such norms are breached (or perceived to be breached) serious political controversy and critique tends to follow. For example, the decision of then Attorney General Suella Braverman KC MP to publicly defend Mr Dominic Cummings, the Prime Minister's former Special Adviser, following allegations he breached Covid-19 lockdown guidelines, was viewed by many as an ill-judged political intervention into a matter that could have been subject to police investigation, and generated significant political scrutiny.⁸⁴ Several years earlier, the (highly contested) suggestion that former Attorney General Lord Goldsmith KC

80. *Id.*

81. Silkin (n222) 38.

82. As McCormick points out, as professional lawyers the Law Officers are subject to professional forums like the Bar Standards Board with respect to matters of professional legal ethics and duties not to bring the legal profession into disrepute. McCormick (n 133) 199.

83. Casey, (n 56).

84. <https://www.theguardian.com/politics/2020/may/25/attorney-general-faces-calls-to-resign-defends-dominic-cummings-suella-braverman>.

was subject to political pressure to alter his initial advice over the legality of the UK's involvement in the Iraq War was examined in the long-running Chilcot Inquiry, and continues to generate deep controversy nearly two decades later.⁸⁵ Perhaps even more politically explosive in its day was the controversy that brought down the first Labour Government of Ramsay MacDonald in 1926. A large factor in that Government's collapse was the allegation that Attorney General Patrick Hastings KC had acceded to political pressure from Cabinet colleagues in discontinuing a prosecution which had been initiated against a communist newspaper editor for incitement to mutiny.⁸⁶ The decision caused a storm of political controversy and allegations of inappropriate political influence. To be clear: I am not taking a position on these controversies. Rather, I highlight them to suggest that the seriousness of these previous controversies is a measure of how entrenched the constitutional norms and expectations surrounding Attorneys General are, and how those who might be perceived as overstepping their boundaries may be held to account by parliamentary or public censure. If an Attorney General acts in a manner Parliament considers inappropriate, the latter can inflict sanctions; a recent prominent example being the House of Commons' resolution in 2018 holding the government in contempt for the Attorney General's refusal to disclose a copy of their advice to the House for scrutiny.⁸⁷

To recap the arguments made thus far, for proponents of the status quo there is no convincing evidence that contemporary Attorneys General have actually failed (indeed, there is only a handful of *allegedly* documented instances which are discussed below) to successfully balance the political and legal elements of their role in a manner justifying broad reform. On the contrary, they consider there is good reason to think having a democratically accountable politician-lawyer at the heart of Government decision making has been beneficial to upholding the rule of law and the provision of independent, yet politically attuned and usefully constructive, legal advice.

85. See Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' (29 April 2005) *The Independent*, <https://www.independent.co.uk/news/uk/crime/goldsmith-under-pressure-from-legal-profession-over-impartiality-3903.html>.

86. Jones, 'Office of Attorney General' (n200) 50.

87. UK Parliament, 'Contempt motion' on publishing of legal advice' (4th December 2018), <https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>. Once again, I am not commenting on whether the Government or Geoffrey Cox QC MP acted inappropriately in initially refusing to publicly disclose the advice. I am merely stating that Parliament clearly took the view their refusal to disclose advice was unacceptable behaviour and after forming such a view was able to inflict a sanction it deemed necessary.

IV. Potential Risks of Alternative Models of Legal Advisor

It is worth reflecting seriously on the kinds of potential costs that might accompany replacing the UK's current model with a more apolitical model where chief legal advisers would be drawn from the civil service or private practice. Models of apex legal advisors come in all shapes and sizes and decisions about how to structure them involves difficult normative trade-offs;⁸⁸ between values and principles like legal expertise, concern for the rule of law, independence from partisanship, concern for the government's ability to vigorously implement policy for the common good, and democratic accountability; and there is good reason to believe – based on comparative experience – an apolitical model could affect a worse balancing of these important considerations than the status quo.

I illustrate this with some comparative constitutional examples I have treated elsewhere. The examples I focus on share the common feature of having apex legal advisors who, while appointed by the executive, are not political actors in the same way the Law Officers are. Each has a model where its apex lawyers are unelected and appointed either from within the civil service or from private practice. I suggest that comparative experience shows a highly technocratic model presents two distinct risks, both of which are undesirable should they manifest.

A. Risk of excessive legalization of policymaking

Some legal systems – like Ireland, Japan, and Israel – do opt for non-elected career lawyers to serve as chief legal counsel to government, with varying but usually high levels of insulation from politics.⁸⁹ In Japan, the Cabinet Legislation Bureau⁹⁰ is the key advisory organ to the government over legal and constitutional affairs. A highly autonomous⁹¹ and technocratic⁹² institution, it is staffed by career lawyers appointed for a three-year term from other ministries and agencies on the basis of academic excellence and legal expertise.⁹³ The Director of the CLB is formally nominated by the government, but by convention the latter will accede to the former's internal choice of successor, a fact which underscores its influence and autonomy. The CLB's influence on executive policymaking is very significant, and its advice generally regarded as binding by the Government.⁹⁴

In Israel, the Attorney General is formally appointed by the Government, but its choice is highly fettered. The Attorney can only be chosen from an approved list drawn up by an independent panel. This panel consists of a former Supreme Court judge appointed by the Chief Justice, a former

88. Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law' (2022) *International Journal of Constitutional Law*.

89. Michael Asimow and Yoav Dotan, 'Hired Guns And Ministers Of Justice: The Role Of Government Attorneys In The United States And Israel' (2016) 49 *Israel Law Review* 3, 12; David Kenny and Conor Casey, 'Shadow constitutional review: The dark side of pre-enactment political review in Ireland and Japan' (2020) 18 *International Journal of Constitutional Law* 51.

90. Hajime Yamamoto, 'Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?' (2017) 26 *Washington International Law Journal* 99, 109.

91. Navraj Singh Ghaleigh, 'Neither Legal Nor Political? Bureaucratic Constitutionalism in Japanese Law' (2015) 26 *Kings Law Journal*, 193, 205.

92. Mamoru Seki, 'The Drafting Process for Cabinet Bills' (1986) 19 *Law Japan* 168, 183.

93. Casey and Kenny (n 89) 59.

94. *Ibid.*, 59-60.

Attorney General appointed by the Government, and representatives appointed on behalf of the legal academy and bar association. It is also a requirement that a candidate be eligible for appointment to the Supreme Court. Upon appointment, the Attorney General serves a fixed term of 6 years and cannot be removed save in very limited circumstances.⁹⁵ The Attorney General is guardian of the public interest, in charge of State litigation, final decision-maker in respect of prosecutions, and exclusive legal counsel to the government. The Attorney General's advice on the legality of policy decisions or proposed bills is *binding* on the government, and the latter cannot seek advice from any other lawyer without the former's prior consent.⁹⁶

The Irish Constitution provides that the Attorney General is "the adviser of the Government in matters of law and legal opinion." The Attorney General is assisted in their work by an office of several hundred civil service lawyers and Attorneys have been known to also draw on the expertise of barristers in private practice when need arises. The Attorney General is appointed at the discretion of the Taoiseach and serves at their pleasure. They must also vacate their position should the Taoiseach resign. Aside from stipulating they are not to be members of Government; the Constitution says nothing else in terms of eligibility criteria. But there is a convention that the appointee must be barrister of some eminence; indeed, most who serve as Attorney General go on to join the Superior Courts and several have been appointed Chief Justice. A minority of Attorneys General have been parliamentarians, but in recent years most have had looser political affiliations with the political party in Government.

Although the Constitution says nothing on the issue, Attorney General's legal advice is, by convention, accepted as binding on the executive, and advice that some measure will likely be found unlawful will signal the end of a policy. Despite high levels of confidentiality over the content of legal advice, there is evidence that Attorney's General advice is quite conservative and risk avoidant in its tenor. For example, it frequently seems to prevent the Government from pursuing policies that were, at the very least, arguably constitutional/lawful and which the government strongly wished to pursue.⁹⁷

The model of apex government legal advisors in these systems is, compared to the UK, very apolitical and technocratic. The work of these lawyers – who are drawn from the civil service or private practice – also tends to have more detachment from the policymaking and political concerns of the government.⁹⁸ This more apolitical and technocratic model has several undoubted qualities. For example, opting for an entirely technocratic and apolitical system can appear to act as a safeguard against more lurid abuses of executive authority. They also ensure, whether by rule or convention, that the chief legal advisor will always be someone with very considerable professional expertise and seniority. They may also help ameliorate any *perception* the provision of legal advice or public interest functions have been subject the inappropriate politicisation, especially if the executive's choice of appointment is in practice highly fettered. But

95. Aviad Bakshi, 'Legal Advisers and the Government: Analysis and Recommendations' (2016) Kohelet Policy Forum 17.

96. Elyakim Rubinstein, 'The Attorney General in Israel: A Delicate Balance of Powers and Responsibilities in a Jewish and Democratic State' (2005) 11 *Israel Affairs* 417, 422.

97. Attorney's General advice has been highlighted as a very considerable obstacle to addressing Ireland's ongoing housing crisis. Successive Attorney's General have been accused of offering overly conservative interpretations of the scope of private property rights that excessively hinder Parliament's ability to regulate them for the common good. See Hilary Hogan and Finn Keyes, 'Housing Crisis and the Constitution' (2021) 65 *Irish Jurist* 87.

98. See Hajime Yamamoto, 'Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law' (2017) 22 *Washington International Law Journal* 99-125, at 111.

sometimes overlooked in debates over reform is that such qualities must be balanced against potentially serious costs.

One such cost is that highly technocratic and apolitical legal advisors can tend toward conservatism and caution when giving legal advice. Apex government lawyers who lack political experience might opt for a risk averse disposition they consider best respectful of the rule of law and constitution, approving only those policies they feel are consistent with the 'best view' of the law they think a Court might reach.⁹⁹ They may also generally be less likely to approach legal analysis with the same inclination to constructively assist the government implement its policy mandate while staying within lawful bounds, at least when compared to a lawyer whose office has dual legal-political dimensions.¹⁰⁰ Indeed, given that the officer holder will inevitably have his or her own policy preferences, there is the risk that undisclosed preferences may feed into obstructive legal advice. This kind of 'constitutionally conservative' approach to legal advice can therefore risk developing several pathologies. It might, for example, excessively legalise the policymaking process, hamstringing the political branches from testing the boundaries of the law where it is uncertain, and prevent or impede good-faith dialogue between the political branches and Courts about matters such as the content of the law, the extent of constitutionally permissible change, or how the law should be best interpreted.¹⁰¹

More generally, it cannot be overlooked that there are democratic accountability costs that accompany embracing a highly technocratic and apolitical model of apex legal advisors, given that it will inevitably allow unelected lawyers to wield considerable influence and power over the policymaking process.¹⁰² In the countries I have mentioned, apex legal advisors wield what is tantamount to a veto over policymaking and the initiation of legislation. This type of model is prone to vesting 'considerable and controversial influence over the functions of the elected branches'¹⁰³ to legal officials who will be, by deliberate design, largely unaccountable for their decisions.¹⁰⁴

None of the above warrants the conclusion an apolitical and technocratic model of apex legal advisor lacks merit. Such systems can and do work perfectly well. But the legal rules and political norms that govern a government's appointment of its leading lawyers, and the appointee's self-understanding of their constitutional role, will have serious ramifications for constitutional politics. Some may welcome the kind of cautious, legalistic, and risk minimising approach a more apolitical and technocratic apex legal advisor may bring to the executive branch. They may regard an over abundance of caution as a valuable safeguard against abuses of state power. For others – and I include myself here – a very cautious and highly risk averse approach to the provision of legal advice has the capacity to seriously hamstring the state's capacity to apply public power in order to robustly respond to socio-economic challenges for the common good.

99. Jack Goldsmith contrasts two different approaches that executive lawyers might take to legal interpretation. One, which carries an 'obligation neutrally to interpret the law as seriously as a court' would, he calls the 'best view'. This approach can be contrasted with the 'reasonable legal position' approach which requires less – that a legal argument merely be respectably plausible and taken in good faith. Jack Goldsmith, 'Executive Branch Crisis Lawyering and the "Best View" of the Law' (2018) 31 *The Georgetown Journal of Legal Ethics* 261, 263.

100. Kenny and Casey, 'Shadow Constitutional Review' (n 89).

101. Gabrielle Appleby and Anna Olijnyk, 'Executive Policy Development and Constitutional Norms: Practice and Perceptions' (2020) 18 *International Journal of Constitutional Law* 1136; ; Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17 *European Constitutional Law Review* 202, 221-224; Aviad Bakshi, 'Legal Advisers and the Government' (n 95) 34.

102. A point noted by Lord Sandhurst QC, Benet Brandreth QC and Will Knatchbull in their report discussing potential reform of the Law Officers. See 'The Office of Attorney General: A Constitutional Role and Protector of the Rule of Law?' (Society of Conservative Lawyers, August 2022) 12, available here: https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_b1c1a33fba3b4c739dbb055293b2e7ff.pdf.

103. Casey and Kenny (n 898) 63.

104. Id.

Politicisation without accountability

It is also important to note that moving to a system where legal advice to the executive on the most important legal questions is provided by non-elected lawyers, may ironically do little to remove perceptions about the politicization of legal advice – the key concern for many interested in reform. I illustrate this risk with the example of the United States and the Office of Legal Counsel, whose lawyers now de facto perform the United States Attorney General’s role in providing legal advice to the President.

The Office of Legal Counsel is a small and elite group of lawyers that, like the UK Attorney General’s Office, handle only a sub-set of the most pressing legal questions facing the executive. The Office is comprised of a few dozen career civil servants and led by several attorney’s appointed by the President. The individuals chosen to fill these leadership posts are drawn from academia, private practice, and other parts of the civil service, and typically enjoy impeccable academic and professional credentials. Many have gone on to become senior judges.¹⁰⁵ The set-up is thus quite distinct from the UK Attorney General’s Office, which is led by Law Officers who are members of government and frequently elected officials.

It may be surprising to some that despite the fact the OLC lacks an elected head and is comprised of elite professional lawyers who are not politicians, it has nonetheless developed a reputation for giving advice that has a noticeable pro-executive tilt. To be sure, OLC’s internal procedures emphasize the need for its attorneys to observe robust detachment from partisan political pressure, and strong attachment to professional integrity and lawyerly craft. But many lawyers are appointed to OLC not solely because of their technocratic ability and credentials, but also their sympathy with the political and normative worldview of the incumbent president. OLC lawyers do not try to provide legal opinions in the manner a detached apolitical Court would, but with a view to constructively helping the “President find legal ways to achieve his ends, especially in connection with national security.”¹⁰⁶ Both detractors and defenders of the OLC agree it is institutionally predisposed to look hard for legal justification for executive action, and has provided opinions upholding the legality of expansive executive power in a range of sensitive and contentious contexts: including foreign affairs, national security, civil liberties, war powers, and separation of powers disputes.¹⁰⁷ The real disagreement is over the starker question of whether the OLC – as an institution - fails to balance its duty to the rule of law with its disposition to facilitate the executive achieve its policy goals.¹⁰⁸

My discussion of the OLC thus far should not be read as an outright criticism. There are some merits to the OLC model. The OLC’s approach to legal advice is in some respects similar the Attorney General for England & Wales, in that both sensibly strive to balance respect for legal constraints the executive is properly subject to, with a desire to constructively assist it achieve its policy goals for the common good. The most critical difference between the two models for the purposes of this report, is that while both groups wield considerable influence over executive policymaking

105. Casey and Kenny (n 88) 8.

106. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (WW Norton & Co. 2009) 38.

107. Rachel Ward Saltzman, Executive Power and the Office of Legal Counsel (2010) 28 Yale Law & Policy Review 439, 453.

108. For a serious critique of the OLC see Bruce Ackerman, *Decline and Fall of the American Republic* (Harvard University Press, 2010). For a defence see Trevor Morrison, ‘Constitutional Alarmism’ (2011) 124 Harvard Law Review 1688.

and specifying the scope of the executive's legal powers, the personnel of the OLC are quite unlike the Law Officers in one major respect: they are not subject to the same level of political accountability and oversight.

There is no requirement for lawyers in the OLC, for instance, to submit to things constitutionally expected of the Law Officers: to answer written and oral questions posed by parliamentarians, provide evidence to legislative committees about their remit and work, justify their legal stances in the full glare of the parliamentary and public arena, and more generally retain the confidence of the House of Commons and not only the Prime Minister that appoints them. This difference is not solely down to the United States having a more rigid form of separation of powers than the United Kingdom - with its separately elected executive and legislature. Rather, it comes from the status of the lawyers in the OLC who while appointed by politicians are not political actors themselves and are, constitutionally speaking, elite civil service appointments. If the UK were to follow an analogous path, then the senior legal advisors to the Government would, by design, similarly not be answerable to Parliament or subject to the same level of scrutiny or risk of sanction the Law Officers currently are.

Importing a similar technocratic model into the UK might then do little to end concerns about the perceived politicisation of legal advice. If lawyers were to be drawn from private practice, for example, it is likely those seeking appointment would share the same basic political commitments as the Government; and it stands to reason the Government will, if free so to do, seek this same quality in those they appoint. At the same time, moving to an OLC style model would effectively erode the political accountability of apex government lawyers, making it more difficult to identify and appropriately respond to situations where they do fail to maintain the balance between their attachment to assisting the Government meet its political objectives, with their commitment to the integrity of the rule of law and constitutional principle. This is another political risk worth careful reflection, especially if it is motivated by a desire to remove perceived politicisation of advice.

V. The Value of Moderate Reform

Given the overall robust health of the Attorney General’s Office, the costs of adopting a wholesale alternative – for instance a more technocratic model - do not seem worth risking.

However, this does not mean more moderate proposals for reform are not valuable to consider. I agree that some critiques consistently raised by advocates for reform have a reasonable basis, including concerns about perceived politicization of the advice-giving function and the fact high levels of confidentiality surrounding the advice diminishes the ability for parliament to police whether this is in fact occurring.¹⁰⁹

As I have already noted, in respect of the former concern there may be merit in a codified restatement of the Attorney’s role and responsibilities to accompany (or be contained in) the *Ministerial Code*. This codification could emphasise the importance of the values of independence and professionalism to the legal advice giving and public interest aspects of their role. I have also argued elsewhere that institutionalizing a measure of transparency over legal advice can combat some of the potentially negative consequences of both technocratic and political models of executive lawyering. For example, in the former case, transparency would help deter an executive from citing overly cautious or risk averse legal advice to defend political inaction on important issues. More relevant for the context of the UKs dual legal-political model, it could help deter an executive from attempting to leverage flimsy legal cover for their policies by putting pressure on their advisors or appointing partisan hacks. As Professor Goldsmith puts it, a measure of transparency facilitates scrutiny of the ‘accuracy, persuasion, and consistency’ of legal advice and critique of ‘self-serving or mistaken or excessive interpretations.’¹¹⁰

This transparency could come in the form of a non-statutory government policy statement that it will consider limited disclosure in exceptional circumstances on a case-by-case basis. This of course need not, and for good reasons should not, involve exhaustive disclosure of all relevant preparatory material, nor issues engaging acutely sensitive national security questions or pending litigation. It is imperative to sound, thorough, and candid policymaking that Government should be able to get the sort of advice everyone else is entitled to expect from a lawyer they engage - objective, sensitive, referable to the client’s practical needs and objectives, and *confidential*. For this reason, disclosure should be reserved for critically contentious issues of national importance, where the soundness of the legal advice in question is critically bound up with the overall legitimacy of the executive’s action, and where it is most important to involve Parliament in debate, deliberation, and scrutiny.

109. Written evidence of Conor McCormick to House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officers (RLC0005 March 2022) 3.

110. Jack Goldsmith, ‘The Irrelevance of Prerogative Power and the Evils of Secret Legal Interpretation’ in Clement Fatovic and Benjamin Kleinman (eds.), *Extralegal Power and Legitimacy: Perspectives on Prerogative* (Oxford: Oxford University Press, 2013) p. 228.

Conclusion

The biggest challenge for any constitutional order with chief legal advisors that have dual political-legal dimensions, is maintaining an apt balance between their attachment to a “particular government and its political objectives” with their commitment to a “broader set of values associated with the integrity of the legal and political order”.¹¹¹ Both facets are important aspects of the Attorney General’s constitutional framework and, when rightly balanced, each conduce to the political common good in their own way; whereas an imbalance in either dimension risks deleterious consequences. Attorneys General have largely managed to successfully tread this “constitutional tightrope”.¹¹² This fact, more than any other reason, should weigh strongly against reform of the fundamentals of the Law Officers.

111.Walker (n 388).

112.Edwards, (n 133) ix.



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