

The Law Officers and Legislative Procedure
Speech to ALBA Summer Conference 17 July 2010

May I begin by thanking Clive Lewis for asking me to address the ALBA summer conference? Whether you will thank him for doing so is another matter.

I am sorry that I am not able to talk to you today in any detail on the future of the Human Rights Act. As you will know the Coalition Government wants to look afresh at how human rights are protected in the United Kingdom, to see if things can be done better and in a way that properly reflects our traditions. There is to be a Commission appointed by the DPM, Nick Clegg. It will consider how a Bill of Rights will protect and extend our liberties.

In due course the Government intends to make a statement to Parliament setting out the Commission's terms of reference and the scope of its work so until the Commission has reported there is not much that I can say on the subject.

However one thing I can say is that we fully support our membership of the European Convention and the rights set out in the ECHR. Any Bill of Rights must incorporate and build on our obligations under the Convention and ensure that the Convention rights remain enshrined in UK law. And as one of those Conservatives who does not have a fit of the vapours every time the ECHR is mentioned I welcome that.

For the time being at least there is to be no change in relation to the Human Rights Act nor new legislation connected with it. But let me say something about the role that the Law Officers play in relation to legislative procedure.

Since my appointment I have discovered how relatively slight the formal role of the Law Officers as ministers in the legislative process actually is: as I will say later on the Law Officers get to consider each Bill as it approaches introduction. Ultimately we have the power to block a Bill if we have unresolved concerns about its legality or propriety. But our ability to ensure that Bills are legal and proper comes from our relationship with the Government lawyers who work on Bills and with the Parliamentary Counsel who draft them.

To most parliamentarians nowadays and even to some ministers the Law Officers are something of a mystery (perhaps even to some Law Officers), so I should say a few words by way of general introduction about the offices Dominic Grieve and I hold and the work we do.

The Office of Attorney General is an ancient one, though much changed over the years. Legal historians like to argue about who the first Attorney General was though given the way that the role has changed it is debatable whether the "first" Attorney was in any meaningful sense like the Attorney of today, still less the head of a growing policy-making department as it became under Peter Goldsmith. I am not even sure whether my ancestor, William de Grey, briefly MP for this university, who between 1762 and 1781 was successively Solicitor and Attorney General and then Lord Chief Justice of the Common Pleas would recognise the office today. He suffered so badly from gout in his hands and fingers that he could not hold a quill to take a note of the evidence or the arguments and yet as a judge delivered extempore judgments after lengthy civil trials that better historians and lawyers than I tell me would pass muster in today's higher courts. I have inherited his pride in being a Law Officer and gout - but not his intellect. But what history has bequeathed us is an Attorney General who is a Minister of the Crown and Chief Legal Adviser

to the Government. He also exercises a number of functions in the public interest. He superintends the Directors of Public Prosecutions and the Serious Fraud Office. He also oversees the Government Legal Service.

The Attorney is a politician, a member of the Government. He is not a member of Cabinet though he will attend when his advice is required or when matters within his responsibility come up for consideration.

The Attorney General is a politician but he is not just a jobbing political minister: he is also a senior lawyer. We say, perhaps too glibly sometimes, that the core function of the Attorney General is to make sure that Government, that Ministers, act lawfully, in accordance with the rule of law. Some of you may find it harder to accept that a politician and member of the Government is best placed to ensure that the Government acts lawfully in everything it does. Some argue that the current Office involves too many conflicts of interest. That subject is too wide and deep for me to explore today. The current arrangement, as awkward as it may look on paper, like so many of the eccentricities in our constitution, works because it puts at the heart of Government an independent lawyer who is trusted by those he advises because he is one of them. This is what Professor Edwards, a leading scholar on the subject of the Law Officers and author of two leading works on the subject¹ refers to as "The doctrine of intimate but independent involvement". As a young barrister in the mid-1970's I was involved in the criminal libel case brought by Sir James Goldsmith against Private Eye and I confess that the doctrine of intimate but independent involvement reminds me rather of his attitude towards marriage.

¹ **The Law Officers of the Crown (1964) and The Attorney General, Politics and the Public Interest (1984)**

In my approach to the role I have been much influenced by a former Solicitor and Attorney General, Peter Rawlinson. He led me in the Moonies libel action in which he, Richard Rampton and I acted for the Daily Mail. The trial before the jury and Mr Justice Comyn lasted 6 months, the hearing before the Court of Appeal some days and the application for leave to the House of Lords an hour at the most. Thanks to Peter, whose management of and advocacy in this long and complicated case set an example that I have never forgotten, we won on each occasion - but I digress.

Peter Rawlinson was appointed Solicitor General by Harold Macmillan in 1962. He describes in his autobiography, "A Price Too High", how he was invited to become Solicitor General. The Prime Minister honoured him with a "scholarly review of mediaeval office holders, a review which flowed into the sixteenth and seventeenth centuries, embraced approvingly the career of Samuel Pepys, and concluded with the admonition that the loyalties of a Law Officer must be first to the Crown, second to Parliament, and only thirdly, almost incidentally, to the administration." I have always been struck by the order of loyalties that Macmillan described and regard it as one which I, now a Law Officer, will honour for so long as I hold this office. I was appointed during a five minute telephone call so I will have to wait until another time for the scholarly conversation about medieval office holders with the current Prime Minister, something he is entirely capable of conducting.

The Attorney General does not of course act alone. He is one Law Officer with a role in relation to legislative procedure, but there are others.

Writing in 1819, J.P. Collier² published a book impertinently called 'Criticisms of the Bar'. He said, "If, as was shown when speaking of the Attorney

² JP Collier, *Criticisms of the Bar* (1819) pp 95-96

General, '... of all the officers in the gift of the Crown that of the Attorney General is least to be coveted', that of the Solicitor General is perhaps most to be desired. In point of rank the latter is but just inferior to the former and the Solicitor General is relieved from a great part of the weight of public odium which his co-adjudicator is under the necessity of sustaining."

Over the two hundred years since that was written much has changed though I daresay some recent Attorneys must have felt they have had their share of public odium. The Solicitor General is still essentially the Attorney's deputy, but since the Law Officers Act of 1997 any function of the Attorney General may be exercised by the Solicitor General, so in law at least we are equals, and indeed we share much of the work that falls to be done in the name of the Attorney General. So when I talk of the functions of the Attorney General I mean my own too.

The Advocate General for Scotland is Lord Wallace of Tankerness QC. Jim Wallace is the UK Law Officer responsible for advising the UK Government on matters of Scots law. He also plays a key role in relation to legislative procedure, as I shall explain later.

And I should for the sake of completeness mention the similar role played in relation to the devolved administrations by the Lord Advocate in Scotland, the Attorney General for Northern Ireland and the Counsel General in Wales.

Although neither the Attorney General or the Advocate General are members of Cabinet, both are members of Cabinet's Parliamentary Business and Legislation Committee which considers the readiness for introduction of most Government Bills and authorises their introduction. In that, the Law Officers

assist the Government in its search for a lawful and proper way to achieve its policy objectives.

As Professor Edwards reminds us, the Law Officers were not always so closely involved in legislative procedure. In 1872 the then Attorney General, Sir John Coleridge, said that "Law Bills are generally, not always, initiated by the Lord Chancellor, and the Law Officers are by no means, as a rule, consulted upon them." And he reported that one of the very greatest and most powerful Attorneys General of modern times told him that "he often knew nothing whatever of law bills till he was asked to support them in the House of Commons".

By the 1940s however, with the establishment of Legislation Committee, the predecessor of the Parliamentary Business Committee, the Law Officers' role in relation to legislative procedure was secured: the Law Officers were members of the Legislation Committee. In 1964 Edwards wrote that their membership "is no mere formality so far as the Attorney and Solicitor General are concerned. In so far as the work of the Committee is taken up with consideration of the drafts of all Bills, the Law Officers must exert great influence both because of their positions and the expectation that the contents of proposed measures will have already been subjected to careful scrutiny within the Law Officers' Department."

In the years since he wrote that the lawyers in our office are no longer so closely engaged in the minute drafting of clauses or in subjecting Bills to detailed scrutiny in advance. But there has been no diminution in the influence that the Law Officers exert in relation to legislation; indeed I would say that it is as strong as ever, albeit perhaps exerted in less direct ways.

The influence of the Law Officers starts long before policy has been turned into a Bill: the Ministerial Code requires that the Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations and departments will often come to us for advice on how policy can be achieved in a lawful or proper way. By longstanding convention, also recorded in the Ministerial Code, neither the fact that the Law Officers have advised or not, nor the advice that the Law Officers have given, may be disclosed. I cannot give you examples of how, in the few weeks we have been in office, we have, if at all, discharged that role but let me say that we are not short of things to do.

Even if I were able to say what legislative matters we had advised on and what advice we had given, that would only give a tiny picture of all the legal work that goes in to the development of a piece of legislation. Many of the tricky legal issues that policy development and Bill drafting give rise to never come to the Law Officers. The day to day guardians of legality and propriety in all that the Government does are the lawyers of the Government Legal Service.

The Law Officers have a special relationship with the Legal Advisers to Government departments which entitles them to consult us on any matter. This ensures the professional independence and standards of the advice given by them and their staff. Government lawyers may consult the Law Officers if they have doubts about the propriety of any proposed course of conduct in a matter for which they have responsibility. This means that they can discharge a role in their respective departments that reflects ours at their head, not as politicians of course but as Civil Servants who are also independent professionals. And from this position of strength they advise Ministers on the legality of what they want to do, and they work up solutions when what is

proposed collides with the constraints imposed by, say, the Human Rights Act, or by our obligations under EU law. And, as we shall see, it is ultimately they who will advise their Minister on the compatibility of legislation with the Convention rights.

The Law Officers do not become directly involved in that process, unless invited to do so. But I believe that our presence and the support that we offer to all Government lawyers enables them to ensure that the need for legality and propriety is woven in to the fabric of Bill development right from the very start. And in this way is our influence exerted from the outset.

The role of Parliamentary Counsel as the drafters of legislation is central to this process. They too are guardians of the rule of law. While the Attorney General does not supervise the Office of Parliamentary Counsel, they can and often do look to the Law Officers for support. Parliamentary Counsel advise departmental lawyers on matters of legal propriety as they draft a Bill, and refer matters of concern to the Law Officers if they cannot be resolved. Crucially in advance of each Parliamentary Business Committee meeting at Parliamentary Counsel will brief the Law Officers on points of legal policy and on any rule of law points to which a Bill gives rise. That is very much at the end of the process so the briefing from Parliamentary Counsel by then only confirms what the Law Officers ought already to know; there should be no surprises at that stage, not least because short of seeking to block the Bill there is little scope at that stage for further detailed work by the Law Officers to address any concerns. But it is a way of ensuring that the main legal players in the Bill process cooperate, and provides confirmation from Parliamentary Counsel that in the process of drafting the Bill matters of interest to the Law Officers can be considered and satisfactorily resolved.

These briefings also serve as a useful guide to the Law Officers to new trends in drafting and legislation, for Bill work is not immune from innovation, if not fashion. The art of both drafting and legislating is not set in stone, and we do not pursue these activities in a vacuum though you might be forgiven for thinking that; Governments legislate to meet or influence events, which throw up their own and new challenges that have to be met. However, we need to ensure that the legislative responses to those challenges are appropriate and that the Government's understandable desire to act does not lead to ill considered or inept legislation. Parliamentary Counsel and Government lawyers enable us to check this and to offer a guiding hand if we feel that an excitable and excited minister has been touched by a bout of unlawful enthusiasm. The volume of legislation over the last 13 years has been relentless; whether it has been of any public benefit is a matter for you to consider. If we are to legislate we should make good law.

The Law Officers have a more direct role in relation to three aspects of proposed legislation, namely compatibility with the European Convention on Human Rights, retrospectation and early commencement.

You will all know that when a Bill is introduced the Minister in charge in each House is required by section 19 of the Human Rights Act 1998 to make a statement that in his or her view the Bill's provisions are compatible with the Convention rights. Alternatively, if the Minister is not able to provide that personal assurance, the he or she must state that nevertheless the Government wishes the House to proceed with the Bill.

It is for the departmental lawyers to advise their Minister on the section 19 statement. Neither we nor the lawyers in our office scrutinise a Bill and certify its compatibility with the Convention Rights. Where there is a difficult

question about the compatibility of a Bill that cannot be resolved at departmental level then it can be referred to the Law Officers for a binding opinion. These issues will arise, and be resolved, as the Bill is drafted and should not be last minute surprises; there should be no serious questions of compatibility by the time the Bill is on the verge of introduction.

The Law Officers will consider and clear the Human Rights memorandum that Departments are required to produce for the Parliamentary Business Committee. The memorandum sets out an analysis of the convention rights that are engaged by a Bill and an assessment of any interferences and justification for them in ECHR terms. The Department demonstrates its human rights law reasoning with a view to satisfying the Law Officers, and so the Committee and the Government, that the route by which the Department has come to the conclusion that the Bill is compatible is correct.

The system is not infallible, though the instances of primary legislation being found incompatible by the courts are few. It works on the whole because the requirement and the determination to get legislation right is there from the start of the process, and we as Law Officers are part of that process also from the start. Having said that, as the Shadow Attorney and Shadow Minister for Justice I often used to think that the last Government got its ministers to rubber stamp Section 19 statements on laundry lists because some of the legislation appeared to have little regard for the ECHR – but now of course I take a more charitable view of the process and anyway there has so far been very little legislation. One thing is certain though: this Government, if I have anything to do with it, will legislate a good deal less than the last one, particularly in the area of criminal justice.

Our other specified roles in relation to legislation concern retrospection and early commencement. Both of these touch on human rights issues, though they are founded on principles of propriety and fairness.

There is a long standing convention that legislation does not come into effect until two months after an Act has received Royal Assent. One can see how in the past, before the internet at least, this convention was needed to allow those affected by a change in the law to know of it and to adjust their behaviour in light of the change. In ECHR terms the convention ensures legal certainty, but I think the need for the convention goes further than that, to meet a basic requirement of fairness. In exceptional cases legislation may be commenced on Royal Assent or within two months but only with the consent of the Law Officers. In considering whether to grant our consent we will want to know the reason for early commencement, who will be affected by it, and whether the justification outweighs the unfairness caused to those affected.

The consent of the Law Officers is also required where a department proposes to include a provision that would have retrospective effect. As with early commencement, the requirement for Law Officers' consent is based in fairness, although the ECHR can also be engaged, particularly where there may be an interference with property rights under Article 1 of Protocol 1. We look to establish whether the public interest in legislating retrospectively outweighs the competing public interest.

In both cases Departments' requests are subjected to the closest scrutiny and it is by no means unheard of for us to withhold our consent.

For my part, doing a job in Government so closely associated with the law and the profession which has been such a big part of my life for the last 35 years is a reward, not a bore or a missed opportunity. I have never been a very political politician – unlike William Hague or Harold Wilson who were clear in their early childhood, I did not want to be an MP or even join the political party of my choice until I was 30. Oxford was a time for books certainly, but also for parties, cricket, rugby and fun, not the earnest pursuit of student politics. My twenties were spent in passing my exams, starting my career at the defamation Bar in Brick Court and getting married, not politics. The life of the Law Officers, although circumscribed by limitations that a real politician would not tolerate, brings one to the very centre of power even if those at the centre do not realise it. It is not the dry and fusty world of the Dickensian lawyer's office, still less the Office of Circumlocution. Of course the public only see the capital ships, dressed fore and aft, steaming full steam ahead on the high seas, occasionally firing their guns, but below the surface and silently, and known only to a few in the law and in Whitehall, are the two submarines, HM Attorney and Solicitor. When we go on manoeuvres we do so to have an effect as the Iraq War story perhaps unfortunately reveals but there are happier examples of activities carried out in confidence for Governments of both colours where the advice and restraining hand of the Law Officers has been both sensible and well received. When we surface it is usually to resign (or not), to apply to the courts in a contempt case, or to complain of an unduly lenient sentence. But so much of our time is not spent just saying "No", but "Have you thought about doing it this way?" which is what all good lawyers should do for their clients.

I swore before the Lord Chief Justice that I would "truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. For any matter against the Queen where the Queen is a party I will

take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the law against the Queen, as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to the Queen's matters when I shall be called there to."

That is the oath Peter Rawlinson took, and that is the oath that Geoffrey Howe, Patrick Mayhew and Nick Lyell took on becoming Solicitor General. As Macmillan told Peter Rawlinson my first duty is to the Crown, secondly to Parliament, and thirdly, to the administration, but if in discharging those duties I can also rebuild the now attenuated links that used to join Parliament and Government to the institutions of the Law, I will have achieved something of value.

From Westminster to the Temple is just two stops on the Tube but there have been times over the last few years when they might have been on different planets. Parliamentarians must understand the role and rule of law and recognise that our constitution has reserved a place for the courts. One of my jobs is to help them do that. Government must also not always stand on its rights when there are better and cheaper ways of achieving an outcome. Let me give you an example: you may or may not recall that a few years ago a case was brought by a prisoner who claimed that his human rights had been infringed by the Prison Service for keeping him in a cell where the lavatory was blocked. Rather than allowing the claim to develop, rather than defending the claim at huge public expense, would it not have been more sensible to call a plumber to unblock it? The plumber's hourly rate of course would have been higher than Treasury Counsel's but the hours a good deal fewer.

I appreciate that this has been a somewhat stolid survey of the role that the Law Officers play in the legislative procedure. I am also conscious of the fact that I have not been able to explore with you issues relating to Human Rights as fully as I might have liked despite my excursion in to the world of prison lavatories. But I hope that I can reassure you that Dominic Grieve and I take Human Rights seriously and that we will play an active part in ensuring that this Government achieves its objectives in a lawful and proper way.