

The Advisory Functions of the Attorney-General

K.A. Kyriakides

Lecturer in Law, University of Hertfordshire

Her Majesty's Attorney-General and Solicitor-General, jointly known as the Law Officers of the Crown for England and Wales ('the Law Officers'), have been described as "sui generis: not quite like other lawyers; not quite like other politicians; not quite like other ministers."¹ Although any function of the Attorney-General may be exercised by the Solicitor-General² in accordance with the Law Officers Act 1997,³ the Attorney-General has long been regarded as the Principal Law Officer.⁴ As such, the Attorney-General performs a number of functions, which have been depicted as falling within "four broad categories":

- (a) Legal Adviser to the Government;
- (b) Superintending Minister [with responsibility in England and Wales for the Crown Prosecution Service, the Serious Fraud Office and the Treasury Solicitor's Department];
- (c) Guardian of the public interest;
- (d) Functions in relation to (i) Parliament and (ii) the legal profession.⁵

In view of the above, the Attorney-General possesses a number of different "hats". To quote Lord Goldsmith, QC,⁶ the holder of the office since June 2001, the Attorney-General represents "an intersection point between politics and the law" who fulfils "a role as Government minister, legal adviser, prosecutor and upholder of the public interest."⁷ This

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¹ The Rt. Hon. Harriet Harman, QC, MP, the Solicitor-General, 'The Law Officers: where law and politics meet,' Transcript of a lecture delivered to the Society for Advanced Legal Studies Annual Dinner, Middle Temple, London, 7th November 2001, published by the Legal Secretariat to the Law Officers at its official website (www.lso.gov.uk). For a concise analysis of the origins and constitutional status of these offices, see The Rt. Hon. Sir Elwyn Jones, A-G, QC, MP, 'The Office of Attorney-General,' *Cambridge Law Journal*, 21 (1), April 1969. A more detailed analysis is offered by the leading academic authority in two books: J. Ll. J. 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, London, 1964) and J. Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984). For a more recent assessment, see Neil Walker, 'The Antimonies of the Law Officers,' Chapter 6 of Maurice Sunkin and Sebastian Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford, Oxford University Press, 1999), at p.p.135-169.

² As John Morris, QC, MP, the then Attorney-General, noted in July 1997: "The Solicitor-General has been regarded as the Attorney-General's deputy since the first Solicitor-General, Richard Fowler, was appointed in 1461." *Hansard, Official Report, House of Commons Debates*, 24th July 1997, column. 1107.

³ Section 1 of the Law Officers Act 1997 (1997 Chapter 60) provides that "(1) Any function of the Attorney General may be exercised by the Solicitor General. (2) Anything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the office of Attorney-General ...". It should also be noted that by virtue of the Northern Ireland Constitution Act 1973 (1973 c. 36), the Attorney-General for England and Wales is ex officio Attorney-General for Northern Ireland. However, he is not the Attorney-General for Scotland. In this respect, the Law Officer for Scotland is the Advocate-General for Scotland.

⁴ Jones, 'The Office of Attorney-General,' page 43.

⁵ 'Introduction', *Attorney-General's Review of the Year 2001/2002* (Legal Secretariat to the Law Officers, London, 2002).

⁶ Since October 1999, his full official title has been Baron Goldsmith of Allerton in the County of Merseyside. *Hansard, Official Report, House of Lords Debates*, 19th October 1999, column 929.

⁷ Transcript of an Address by the Right Hon the Lord Goldsmith QC, Her Majesty's Attorney General, '13th Annual Tom Sargent Memorial Lecture: Politics, Public Interest and Prosecution – A View by the Attorney General,' London, 20th November 2001 (published by the Legal Secretariat to the Law Officers at www.lso.gov.uk)

article focuses solely on the advisory functions of the Attorney-General. These were described in 1978 by Samuel Silkin, QC, MP, the then holder of the office, as being “little known and rarely visible to the public ... [yet] certainly the most time-consuming, probably the most important, and possibly the most interesting of his responsibilities.”⁸

The Attorney-General, often in tandem with the Solicitor-General, may offer legal advice either in writing - by submitting a formal Opinion or by writing a letter – or orally, for example during a meeting of the Cabinet. Although by convention the Attorney-General of the day does not normally serve as a member of the full Cabinet, he may be invited to attend some of its meetings. Furthermore, he may become a member of one or more of its Committees or Sub-Committees. Indeed, according to the Cabinet Office, the present incumbent has been a member of at least ten such Committees or Sub-Committees:

- The Ministerial Committee on Domestic Affairs (DA) chaired by the Deputy Prime Minister and First Secretary of State;
- The Ministerial Committee on the Nations and Regions (NR) also chaired by the Deputy Prime Minister and First Secretary of State;
- The Ministerial Committee on the Legislative Programme (LP) chaired by the President of the Council and Leader of the House of Commons;
- The Ministerial Committee on European Issues (EP) chaired by the Secretary of State for Foreign and Commonwealth Affairs;
- The Ministerial Committee on Devolution Policy (DP) chaired by the Lord Chancellor;
- The Ministerial Committee on the Criminal Justice System (CJS) chaired by the Secretary of State for the Home Department (‘the Home Secretary’);
- The Ministerial Sub-Committee on Criminal Justice System Information Technology (CJS (IT));
- The Ministerial Sub-Committee on Fraud (DA(F)) chaired by the Chief Secretary to the Treasury;
- The Ministerial Sub-Committee on Freedom of Information (CRP (FOI)) chaired by the Lord Chancellor;
- The Ministerial Sub-Committee on the Incorporation of the European Convention on Human Rights (CRP (EC)) also chaired by the Lord Chancellor.⁹

The Cabinet Office does not provide any indication as to which “hat” or “hats” are worn by the Attorney-General whenever he attends a meeting of a Cabinet Committee or Sub-Committee. Even so, it is clear that whenever he does wear his “hat” as the chief legal adviser to the Government, the Attorney-General assumes a heavy responsibility. As Lord Goldsmith points out:

The Attorney-General sits in fact at the apex of a structure of legal advice consisting of departmental lawyers and the Treasury Solicitor. It is very important that new proposals, from early on in the policy making process, are worked up and developed with the aim of ensuring that they achieve proper respect for the rule of law, for human rights and for our domestic and international legal obligations ... At any stage in the process, I might be consulted. Usually there is no need to do so. But in areas of especial sensitivity or difficulty my advice is often sought. Moreover, the system has important internal checks and failsafes which allow lawyers to have direct access to me – it is not just Ministers who have the right to come to me for advice or guidance.¹⁰

⁸ Rt. Hon. S.C. Silkin, QC, MP, ‘The Functions and Position of the Attorney-General in the United Kingdom,’ *The Parliamentarian*, Volume 59 (1978), p.p. 149-158, at p. 153.

⁹ See the list of Cabinet Committees and Sub-Committees published by the Cabinet Office on its official web-site at www.cabinet-office.gov.uk

¹⁰ Lord Goldsmith QC, ‘13th Annual Tom Sargent Memorial Lecture’.

It follows that the Attorney-General will not normally be consulted other than in exceptional circumstances or with regard to matters of the utmost importance. This is confirmed by the *Ministerial Code*, which warns ministers and their civil servants that:

- The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. It will normally be appropriate to consult the Law Officers in cases where:
- a. the legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic field;
 - b. a Departmental Legal Adviser is in doubt concerning:
 - (i) the legality or constitutional propriety of legislation which the Government proposes to introduce; or
 - (ii) the vires of proposed subordinate legislation; or
 - (iii) the legality of proposed administrative action, particularly where that action might be subject to challenge in the courts by means of application for judicial review;
 - c. Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee;
 - d. there is a particular legal difficulty which may raise political aspects of policy;
 - e. two or more Departments disagree on legal questions and wish to seek the view of the Law Officers.¹¹

It is, therefore, clear that the Law Officers will not be consulted on every issue. With reference to matters of international law, this was underlined by Sir Arthur Watts, QC, the then Legal Adviser to the Foreign and Commonwealth Office ('FCO'), in an article published in 1991:

while the FCO legal advisers are the source of legal advice to the FCO, the ultimate and authoritative source of legal advice on international law as well as English law to the British Government is the Attorney-General and his Ministerial colleagues, together known as the Law Officers of the Crown. Accordingly, on really difficult issues or on legal issues which are politically very sensitive the FCO legal advisers consult the Attorney-General through the Legal Secretariat which works for him. To put this into perspective, perhaps 99% of the FCO's legal work is done within the [Foreign and Commonwealth] Office by the Legal Adviser and this staff, while 1% is referred to the Law Officers.¹²

Not surprisingly, Sir Arthur stopped short of divulging any specific examples of matters which had been referred to the Law Officers. After all, as Mr Silkin suggested in 1978, their advisory functions are "rarely visible". One reason for this is that the courts have not been

¹¹ *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, July 2001), Section 3.22. The Attorney-General's *Annual Review* merely refers to the *Ministerial Code* but adds little by way of clarification, other than to suggest that the Law Officers will generally handle cases where "there are doubts about the constitutional propriety of proposed administrative action or legislation; the legal consequences of action by Government might have important political repercussions in the international, European Union or domestic fields; the matter raises difficult or novel legal issues; there are differences of view between Departmental lawyers. For reasons of client confidentiality and in view of the convention ... that neither the content of the Law Officers' advice nor the fact that they have been consulted may be disclosed, it is not possible to go into any detail as to the precise issues on which the Law Officers have advised over the last year. But it may be helpful to note that they have at regular intervals been called upon to advise on a very wide range of issues indeed, covering domestic law, EU law, ECHR law and international law, including, for example, the following:- Whether the proposed exercise of a statutory power in a certain way is lawful and/or proper. Whether proposed legislation is compatible with the European Convention on Human Rights and, if not, how it might be adjusted so as to make it compatible. The implementation of Community law obligations into domestic law. The interpretation and application of the United Kingdom's international obligations." *Attorney-General's Review of the Year 2001/2002*, Chapter 3.

¹² Sir Arthur Watts, KCMG, QC, 'International Law and International Relations: United Kingdom Practice,' *European Journal of International Law*, Vol. 2 (1991), No. 1, p.p. 157-165.

given an opportunity to inquire into their exercise. However, the principal reason arises from the well established convention (the 'Law Officers' Convention'¹³) whereby neither the substance of any advice tendered by the Law Officers nor even the fact that they have given any advice may be disclosed outside Government circles save in exceptional circumstances. As will be shown later on in this article, the Convention has been invoked on numerous occasions to prevent MPs (or others) from unearthing details as to any advice tendered by the Law Officers on sensitive questions of law. As a result, the academic lawyers who have written about the advisory functions of the Law Officers, including Professor J. Ll. J. Edwards, the leading authority,¹⁴ have had to confine their analysis to subjects such as the "confidential nature" of Law Officers' Opinions.¹⁵

In fairness to the Law Officers of today, it must be admitted that they are displaying far more openness than many, if not all, of their predecessors. Some of the Answers provided by them to Parliamentary Questions are rich in information. Furthermore, the official web-site of the Legal Secretariat to the Law Officers offers readers an opportunity to peruse several documents, including the transcripts of various speeches delivered by Lord Goldsmith, QC, the Attorney-General and Ms Harriet Harman, QC, MP, the Solicitor-General.¹⁶ Besides, Lord Goldsmith has taken it upon himself to publish an *Annual Review*, the inaugural edition of which appeared in 2002.¹⁷ These are laudable attempts to promote what has been described by Lord Goldsmith and Ms Harman in the Foreword to the *Annual Review* as "the openness and accountability that are key to our work." Nevertheless, this "openness" does not extend very far in respect of their advisory functions. Take the *Annual Review*. Its eleven chapters provide an overview of "the unique position" of the Law Officers and a summary of their work during 2001/2002. However, the chapters entitled "Advice to Government" and "International Relations" are the briefest of all.¹⁸ Each consists of just 26 lines covering approximately half a page. In contrast, the chapter on "Criminal Justice" is spread over five pages.¹⁹

In view of the above, detailed academic research into the contemporary nature of the advisory functions of the Attorney-General is precluded. Even so, the documentation in the public domain has enabled the author of this article to provide a preliminary analysis. This is subdivided into three parts. In the first part, the extraordinary chain of events resulting in the publication in *Hansard* on 17th March 2003 of the Attorney-General's view as to the legal basis for the use of force against Iraq is outlined. In the second part, the nature, extent and implications of the Law Officers' Convention are explored. And in the third part, the advisory functions of the Law Officers, as exercised between 1949 and 1951, are briefly considered as a means of illustrating the wide range of matters upon which the Law Officers of the day may be required to advise.

¹³ The term "the Law Officers' Convention" seems to have been coined by Edwards, *The Law Officers of the Crown*, p. 257. As Dicey observed, conventions, in common with other non-legal rules of the constitution such as understandings, habits or practices "may regulate the conduct of several members of the sovereign power ... [but] are not in reality laws at all since they are not enforced by the courts." A.V. Dicey, *The Law of the Constitution* (e.d E.C.S. Wade), (Macmillan, 10th edition, 1959), p. 24.

¹⁴ Edwards, *The Law Officers of the Crown* and Edwards, *The Attorney General*.

¹⁵ See, in particular, Edwards, *The Law Officers*, p.p.256-261. Also see Edwards, *The Attorney-General*, p.p. 218-235.

¹⁶ www.lslo.gov.uk

¹⁷ *Attorney General's Review of the Year 2001/2002* (Legal Secretariat to the Law Officers, London, 2002). In the Foreword, Lord Goldsmith and Ms Harman write that "In discharging our responsibilities, we seek to uphold the principles of fairness and independence. This is the first ever Law Officers' Review of the Year."

¹⁸ *Attorney General's Review of the Year 2001/2002*, Chapters 3 and 9 respectively.

¹⁹ *Attorney General's Review of the Year 2001/2002*, Chapter 2, 'CRIMINAL JUSTICE – general policy issues/specific initiatives and case-work'.

The Written Answer of the Attorney-General published on 17th March 2003

Perhaps inevitably, the constitutional arrangements relating to the Law Officers can often cause headaches for the Attorney-General of the day. Francis Bacon, a previous incumbent of the office, once asserted that the Attorney-General has “the painfulest [sic.] task in the realm”. In more recent times, the incumbent has sometimes discovered why, none more so than Sir Patrick Hastings, KC, MP. He served as Attorney-General in the first ever Labour administration, which was politically weak, lasting from January until November 1924. As Sir Patrick recalled in his autobiography, his tenure as Attorney-General was marked by the “immense litigation” generated by the Great War and the “devastating legal and political problems” associated with Ireland. On top of all that, it was also mired by the controversies aroused by the *Campbell* case and the “Zinoviev letter”. Such was the weight of Sir Patrick’s workload and such was the “appalling” nature of his “difficulties” as Attorney-General that:

My day began at seven o’clock in the morning and I rarely got to bed before five the next morning. The day was spent in one long rush between the Law Courts, Government departments, and the House of Commons [where he was the only Law Officer to have a seat]. The night, or rather the early morning, was needed in order to get ready for the next day. Nothing that I began was ever allowed to finish until something else was begun. Being an Attorney-General as it was in those days is my idea of hell ... I was unpopular with everyone ... By the end of the summer I had enjoyed about as much as I could stand.²⁰

If the experiences of the Attorney-General in the first Labour administration were strenuous, those of the Attorney-General serving in the current Labour administration, cannot be any less so, albeit for different reasons. Since assuming the ancient and prestigious office of Attorney-General in June 2001, Lord Goldsmith has had to attend to many of the legal problems generated by the events of 11th September 2001. In particular, it has emerged that before the Prime Minister gave the order for United Kingdom forces to take part in military action in Iraq on 18th March 2003,²¹ Lord Goldsmith advised the Government on the legality of any use of force. Whereas the Law Officers’ Convention had previously been invoked, for example on 24th September 2002²² and 14th March 2003,²³ to brush aside Parliamentary requests to reveal the content of the legal advice, if any, given by the Attorney-General in respect of this matter, a *volte face* was subsequently performed. Accordingly, on 17th March 2003, *Hansard* published a Written Answer (‘the Answer’) in which the Attorney-General provided a comparatively detailed reply to the Question: “What is the Attorney-General’s view of the legal basis for the use of force against Iraq[?]”. The Answer is reproduced in the footnote below.²⁴

²⁰ Sir Patrick Hastings, *The Autobiography of Sir Patrick Hastings* (William Heinemann Ltd, London, 1948), p. 236.

²¹ Address by the Prime Minister broadcast on television by BBC1 on the evening of 20th March 2003.

²² On 24th September 2002, Iain Duncan Smith MP, the Leader of the Conservative Party, called on the Prime Minister to “confirm the legal advice that he has received” on the matter. Mr Blair replied by saying “we do not disclose such advice.” *Hansard, Official Report, House of Commons Debates*, 24th September 2002, column 8.

²³ According to the Prime Minister’s Written Answer published in reply to a Question posed by Charles Kennedy MP: “There is a longstanding convention, followed by successive Governments and reflected in the ministerial code, that legal advice to the Government remains confidential. This enables Government to obtain frank and full legal advice in confidence, as everyone else can. We always act in accordance with international law. At the appropriate time the Government would of course explain the legal basis for any military action that may be necessary.” *Hansard, Official Report, House of Commons Debates*, 14th March 2003, column 482WA. In this Answer, the Prime Minister referred to the *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, July 2001).

²⁴ The Attorney-General’s Written Answer, as published by *Hansard* on 17th March 2003, states that: “Authority to use force against Iraq exists from the combined effect of [United Nations Security Council] resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security: “1. In Resolution 678, the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.

As one minister subsequently confirmed, the provision of such details from the Attorney-General was “almost unprecedented” as the “last time that a Law Officer’s views were disclosed concerned the Maastricht Treaty” in 1993 (an exception analysed briefly below).²⁵ As the publication of the Answer marked a departure from previous practice or, to be more precise, previous practice since 1993, it constituted an event of profound constitutional significance. Be that as it may, the significance was overshadowed by other events. On the day of the publication of the Answer, 17th March 2003, Robin Cook, MP, until then President of the Council and Leader of the House of Commons, resigned from the Cabinet and he proceeded to give a dramatic resignation speech on the floor of the House. A day later, the House of Commons debated the matter of Iraq and, although the Government succeeded in the division lobbies, Parliament witnessed the largest rebellion against a governing party for over a century. Two days later, conflict began and, shortly thereafter, “coalition forces,” including those from the United Kingdom, invaded Iraq.²⁶

Quite why the Attorney-General provided such a comparatively detailed Answer and quite why it was published on 17th March 2003 will not be known for some time, if ever. However, it is unlikely that it would have been provided but for the preceding chain of events and the concomitant build-up of pressure upon the Government to clarify the “legal basis” for any use of force against Iraq. These are now summarised.

Against a backdrop formed by intense diplomacy at the United Nations, the deployment of British as well as American forces in the Gulf and deepening divisions within the Labour Party, a public debate ensued in the United Kingdom as to the legality of any use of force against Iraq. The debate had been on-going for quite some time.²⁷ However, it was fuelled by various developments. One was the “anti-war” demonstration staged in central London on 15th February 2003 at the instigation of the Campaign for Nuclear Disarmament (‘the CND’), the Stop the War Coalition and the Muslim Association of Britain, which reportedly attracted over one million people. A second was the dissemination of speculation suggesting that in

“2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.

“3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.

“4. In Resolution 1441, the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.

“5. The Security Council in Resolution 1441 gave Iraq “a final opportunity to comply with its disarmament obligations” and warned Iraq of the “serious consequences” if it did not.

“6. The Security Council decided in Resolution 1441 that, if Iraq failed at any time to comply with and co-operate fully in the implementation of Resolution 1441, that would constitute a further material breach.

“7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

“8. Thus, the authority to use force under Resolution 678 has revived and so continues today.

“9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to use force.

“I have lodged a copy of this Answer, together with Resolutions 678, 687 and 1441 in the Libraries of both Houses and the Vote Office of the House of Commons.”

Hansard, Official Report, House of Lords Debates, 17th March 2003, columns 2-3 *WA*. Surely not coincidentally, the publication of the Answer was accompanied by the release of a Foreign and Commonwealth Office (‘FCO’) paper, dated 17th March 2003 and entitled “Iraq: Legal Basis for the Use of Force,” which was described by the Foreign Secretary as a “detailed briefing paper summarising the legal background” to the Answer of the Attorney-General. See Rt Hon Jack Straw MP, the Secretary of State for Foreign and Commonwealth Affairs, *Hansard, House of Commons Debates*, 17th March 2003, column 704.

²⁵ Baroness Symons of Vernham Dean, Minister of State, Foreign and Commonwealth Office, *Hansard, Official Report, House of Lords Debates*, 17th March 2003, columns 117-118.

²⁶ Address by the Prime Minister broadcast on television by BBC1 on the evening of 20th March 2003.

²⁷ See, for example, the debate in the House of Commons on 22nd January 2003 and, in particular, the speech of Ross Cranston, QC, MP (who had served as Solicitor-General from 1998 to 2001). *Hansard, Official Report, House of Commons Debates*, 22nd January 2003, columns 395-397.

the event of any conflict in Iraq the Prime Minister “could face a series of ministerial resignations”²⁸ including that of Lord Goldsmith, the Attorney-General.²⁹ And the third was the publication in the *Guardian* on 7th March 2003 of a letter in which sixteen teachers of international law argued that: “On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq.”³⁰ Given that the authors included Vaughan Lowe, the Chichele Professor of International Law at the University of Oxford and James Crawford, the Whewell Professor of International Law at the University of Cambridge, the letter aroused considerable comment as well as concern.

In the continuing absence of any “second” - or, as ministers insisted, “eighteenth” - Resolution of the United Nations Security Council, lawyers and politicians appeared on television and the radio to assess whether or not any use of force against Iraq would be lawful without the unambiguous authority of the Security Council. More to the point, Opposition MPs started pressing ministers to publish the legal advice, if any, given by the Attorney-General. At Prime Minister’s Question Time on Wednesday 12th March 2003, the pressure on ministers in this respect intensified still further. Charles Kennedy, MP, the Leader of the Liberal Democrats, enquired whether the Attorney-General had advised the Prime Minister “that a war on Iraq in the absence of a second United Nations resolution authorising force would be legal”. The Prime Minister refused to be drawn: “I have said on many occasions that we would not do anything as a country that did not have a proper legal basis to it.”³¹ The evasiveness of the Prime Minister merely whetted the appetite of those MPs determined to ascertain what advice, if any, had been given to him by the Attorney-General.

On the next day, Thursday 13th March 2003, the timetable for the following week’s business in the House of Commons was discussed. This prompted Eric Forth, MP, the Shadow Leader of the House, to plead with the Leader of the House as follows:

My hon. Friend the shadow Attorney-General [William Cash, MP] has a written parliamentary question to the Prime Minister for reply tomorrow concerning the advice that the Attorney-General has given to the Prime Minister on the legality of military action in Iraq. Given that there is an increasing belief that the Attorney-General’s advice may well be against military action by this country, certainly if that takes place without any United Nations cover, may we please have a statement in the House [of Commons] by the Solicitor-General [Ms Harriet Harman, QC, MP] acting on behalf of the Attorney-General who, as we know, is in another place [the House of Lords], and ahead of any debate on Iraq, as to the position with regard to the advice being given to the Prime Minister and the Government by the Attorney-General on the legality of military action in Iraq?

I do not, please, want the Leader of the House to hide behind the argument, as the Prime Minister did yesterday, that the matter is utterly confidential and cannot possibly be in the public domain. My advice is that although such advice may well normally be confidential, “Erskine May” [*Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, the Parliamentary rulebook commonly known as the “Bible of Parliament”] states that it is always at the discretion of the Minister if he, or in this case she, considers it expedient, to share that advice with the House and with the public. My plea is that in this case it may overridingly be not just expedient but proper

²⁸ Cathy Newman and Krishna Guha, ‘Ministers may quit if war proceeds without UN,’ *Financial Times*, 5th March 2003, p. 3.

²⁹ Jean Eaglesham and James Blitz, ‘Blair fears legal battle over strike on Iraq,’ *Financial Times*, 5th March 2003, p.3.

³⁰ Letter by Prof Ulf Bernitz, Dr Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof Vaughan Lowe, Dr Ben Saul, Dr Katja Ziegler (University of Oxford), Prof James Crawford, Dr Susan Marks, Dr Roger O’Keefe (University of Cambridge), Prof Christine Chinkin, Dr Gerry Simpson, Deborah Cass (London School of Economics), Dr Matthew Craven (School of Oriental and African Studies), Prof Philippe Sands, Ralph Wilde (University College, London) and Prof Pierre-Marie Dupuy (University of Paris), *Guardian*, 7th March 2003, p. 29.

³¹ *Hansard, Official Report, House of Commons Debates*, 12th March 2003, column 283.

that that advice is put into the public domain. In any case, something must be said ahead of the debate so that our debate on Iraq is properly informed on a matter of such gravity.³²

Robin Cook, MP, the Leader of the House, did not entirely rule out the possibility:

The right hon. Gentleman asked about the Attorney-General's advice. He accurately summarised the situation. The Attorney-General's advice is, as a general rule, confidential – indeed, that is set out in the ministerial code – but there is a provision in exceptional circumstances, by agreement, for his advice to surface. I will reflect on what the right hon. Gentleman said and make sure that my colleagues are aware of what he said. These issues will, I am sure, be fully debated and explored in any debate that we have on Iraq.³³

In light of these remarks, Paul Tyler, MP, the front-bench spokesman for the Liberal Democrats, asked:

Is there not a very important constitutional principle here? I accept what he said about “exceptional circumstances”, but is it not right to say that the Law Officers are answerable and accountable to Parliament, not to the Government of the day? Surely it is an exceptional circumstance when very important issues of international law are being challenged in the way implied in the statement of the Secretary-General of the United Nations. Should there not be a second Security Council resolution, is it not absolutely essential that the Law Officers make a statement prior to any debate in this House?

I wonder whether the Leader of the House heard or read the transcript of the very important interview given by the right hon. and learned Member for Rushcliffe [Kenneth Clarke, QC, MP], now de facto leader of the Conservative Opposition, on the “Today” programme [on BBC Radio 4] yesterday when he made it absolutely clear that there are precedents, mechanisms and means by which the Law Officers have to give an answer to the House on an issue of such importance. *[Interruption.]*³⁴

A few moments after Mr Tyler had spoken, Robert N. Wareing, MP, a Labour backbencher, added his voice to these calls by asking: “Is it not imperative that we have a statement about the advice given by the Attorney-General?”³⁵ In reply, Mr Cook said cryptically:

there is not much that I can add to the many answers that I have given already. I rather suspect that, if the advice were published, it would show that the Government's actions are wholly consistent with international law. Under those circumstances, I would not expect my hon. Friend to change his view of the action.³⁶

Later on during 13th March 2003, William Cash, MP, the Shadow Attorney-General, who is a solicitor by profession and a politician known for his tenacity, proceeded to raise an intriguing point of order with the Speaker:

As you know, I tabled a written question to the Prime Minister for answer tomorrow – before the leader of the Liberal Democrats raised the matter at Prime Minister's Question time – regarding the legal basis of the war against Iraq. As was pointed out by my right hon. Friend the Member for Bromley and Chislehurst [Mr Eric Forth], the shadow Leader of the House, “Erskine May” is very clear about the question of confidentiality. Will you, at a later date, give a written ruling on the confidentiality of Law Officers' opinions? Although the Attorney-General, regrettably, is in the House of Lords, he has personal rather than collective responsibility for the legal advice that he gives to the

³² *Hansard, Official Report, House of Commons Debates*, 13th March 2003, column 430.

³³ *Hansard, Official Report, House of Commons Debates*, 13th March 2003, column 431.

³⁴ *Hansard, Official Report, House of Commons Debates*, 13th March 2003, columns 431-432.

³⁵ *Hansard, Official Report, House of Commons Debates*, 13th March 2003, column 440.

³⁶ *Hansard, Official Report, House of Commons Debates*, 13th March 2003, column 440.

Government. He gives advice not only to the Government, but to the nation and to the House. It is a matter for the Prime Minister to give a proper answer to the question that I tabled the day before yesterday and to reply to my request for the basis of the legal advice regarding war with Iraq, but he cannot do that by hiding behind an improper use of the so-called “doctrine of confidentiality.”³⁷

The Speaker replied by making “no commitment” other than to “think about that matter”. On the following morning, Friday 14th March 2003, *The Times* reported, in an article entitled ‘Breach of international law feared if war starts,’ that Mr Cash was in no mood to give up:

As Lord Goldsmith’s legal opinion remained confidential, William Cash, the Shadow Attorney-General, said there was no reason in law why the Prime Minister should not publish it. “It is entirely down to his discretion,” he said. “And the more that he resists doing so, the more suspicions must be aroused that perhaps there is a divergence of view. Yesterday, the Attorney-General’s office remained true to the convention of neither confirming nor denying even that legal advice had been given.”³⁸

On that same morning, Friday 14th March, Mr Cash appeared on the *Today* programme of BBC Radio 4:

It is certainly true to say it is not normal for the Attorney-General’s advice to me made available. But there are special circumstances and, indeed, there are quite a lot of precedents ... if the Attorney-General does agree with the prime minister then in these very special and important circumstances in order to clarify the position I don’t see any reason why the prime minister shouldn’t make the Attorney-General’s advice available. Of course, if the Attorney-General did not agree with the prime minister we would be in a very serious constitutional crisis.³⁹

Later on that Friday, the Prime Minister duly replied to Mr Cash’s Question with a Written Answer published by *Hansard*. However, this amounted to just four sentences and, in common with the verbal response of the Prime Minister to Mr Kennedy two days earlier, it added little to what was already known:

There is a longstanding convention, followed by successive Governments and reflected in the ministerial code, that legal advice to the Government remains confidential. This enables Government to obtain frank and full legal advice in confidence, as everyone else can.

We always act in accordance with international law. At the appropriate time the Government would of course explain the legal basis for any military action that may be necessary.⁴⁰

It transpired that the “appropriate time” was just three days later. For on Monday 17th March 2003 the Attorney-General provided his Answer (quoted in full at footnote 24 of this article).⁴¹

Not surprisingly given the political divisions across the country, the Answer provoked contrasting responses in Parliament and elsewhere. More to the point, its publication thrust Lord Goldsmith into the eye of a political storm over a delicate question of international law. In part, this was because of the very fact that the Answer was published. Yet it was also

³⁷ *Hansard, Official Report, House of Commons Debates*, 13th March 2003, columns 444-445.

³⁸ Frances Gibb, ‘Breach of international law feared if war starts,’ *The Times*, 14th March 2003.

³⁹ Remarks made by William Cash, MP to BBC Radio 4’s *Today* programme. See ‘Publish legal advice on war,’ BBC News online report, 14th March 2003 published at http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/2851405.stm

⁴⁰ *Hansard, Official Report, House of Commons Debates*, 14th March 2003, column 482 *WA*.

⁴¹ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, columns 2-3 *WA*.

because the Motion moved by the Prime Minister in the House of Commons on 18th March 2003, and subsequently adopted by 412 votes to 149, made express reference to the Attorney-General. For it provided inter alia:

That this House ... notes the opinion of the Attorney-General that, Iraq having failed to comply and Iraq being at the time of [United Nations Security Council] Resolution 1441 [2002] and continuing to be in material breach, the authority to use force under Resolution 678 has revived and continues to this day ...⁴²

Incidentally, after putting so much pressure on ministers to disclose the “legal basis” for any use of force in Iraq, the Official Opposition welcomed the publication of the Answer. Its position was summed up by Michael Ancram, QC, MP, the Shadow Foreign Secretary, who told the House of Commons:

I accept the Attorney-General advice. It is not the advice of an individual lawyer or legal expert but the considered advice of the person who is charged with the constitutional duty of advising the Government on the legality or otherwise of [its] actions. The House should give exceptional weight to that advice.⁴³

Others disagreed. Alex Salmond, Leader of the Scottish National Party at Westminster, observed:

We are told that the Attorney-General has described the war as legal. We could go into the legalities and quote professor after professor who has said the opposite, but one thing is certain: when the Secretary-General of the United Nations doubts the authorisation of military action without a second resolution, people can say many things about that action, but they cannot say that it is being taken in the name of the United Nations.⁴⁴

As for the Liberal Democrats, their position was outlined by Lord Goodhart, QC, their Legal Affairs spokesman in the House of Lords, who stated that: “The Attorney-General’s opinion reaches a highly questionable conclusion, which is based on a dubious interpretation of deliberately ambiguous wording.”⁴⁵

By sheltering behind the Law Officers’ Convention, few, if any, of Lord Goldsmith’s immediate predecessors had ever been pitchforked so publicly into a political crisis of this kind. Previous holders of the office, including Samuel Silkin, QC, MP and Sir Michael Havers, QC, MP, found themselves entangled in domestic political crises arising out of their duties as Attorney-General. Moreover, Sir Nicholas Lyell, QC, MP, (Attorney-General from 1992 to 1997) became embroiled in two controversies with international legal implications, namely those arising from the Matrix-Churchill case⁴⁶ and the European Communities (Amendment) Bill. However, none of Lord Goldsmith’s immediate predecessors were ever drawn so publicly into a political crisis involving a matter of international law vis-à-vis the use of military force. After all, on those occasions upon which the United Kingdom has intervened militarily overseas since 1974 – notably in the South Atlantic, Lebanon, Kuwait, Bosnia-Herzegovina, Sierra Leone, Kosovo and Afghanistan - the legal advice, if any, given by the Law Officers was not published.

⁴² *Hansard, Official Report, House of Commons Debates*, 18th March 2003, column 760.

⁴³ *Hansard, Official Report, House of Commons Debates*, 18th March 2003, column 893.

⁴⁴ *Hansard, Official Report, House of Commons Debates*, 18th March 2003, column 821.

⁴⁵ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, column 70.

⁴⁶ In addition to the Scott report on the affair, see A.W. Bradley, ‘The Attorney-General and the Scott Report,’ *Public Law* [1996], p.p. 373-383.

The nature and extent of the Law Officers' Convention

The Attorney-General's Answer published on 17th March 2003 received a mixed reception from lawyers and politicians, partly because of its limited length. Many suspected that it did not amount to a fully-fledged Opinion but rather the gist of one. Indeed, some did not hesitate to call upon the Attorney-General to provide further details. On 18th March 2003, for example, Lord Lester, QC, a Legal Affairs spokesman for the Liberal Democrats, stated that "Having waived privilege in respect of the Attorney-General's conclusions, I hope that in fairness to the Attorney-General the Government will publish his full reasons so that we can see more than the one-page summary ..."⁴⁷ Others, including Lord Lloyd of Berwick, a former Law Lord, expressed a hope that the Attorney-General "will come to support his arguments in this House [of Lords]".⁴⁸ This view was echoed by Lord Howell of Guildford, a Shadow spokesman of foreign and commonwealth affairs, who asked.

[W]here is the Attorney-General? We admire him and are rather proud that he is a Member of your Lordship's House. On such an occasion such as this, I would have hoped that he would be able to join us. We know that he is a vastly able person, and fully able – I am sure – to prevent having wormed out of him any properly confidential advice that he has given to the Government. But it is a disappointment.⁴⁹

These calls have not, to the time of writing (on 31st March 2003), resulted in either of the Law Officers providing any further details. Indeed, they have rebuffed at least one request to do so.⁵⁰ However, it bears emphasising that that by providing the Answer, the Attorney-General departed from normal practice, ostensibly in view of the exceptional circumstances which had arisen. As Baroness Symons of Vernham Dean, a Minister of State at the Foreign and Commonwealth Office ('the FCO'), commented in the House of Lords debate on 18th March 2003:

Last Thursday [13th March], in answering a Question posed by the noble Lord, Lord Roberts of Conwy, I reminded your Lordships that, by long-standing convention, followed by successive governments and reflected in the ministerial code, legal advice to the Government remains confidential. That convention is confirmed by page 389 of Erskine May.

I am sorry that the noble Lords, Lord Goodhart and Lord Howell, were somewhat niggardly in their appropriation of my noble and learned friend's Statement. The Attorney-General has been more open-handed than any of his predecessors in publishing his advice in the way that he has. Furthermore, my right honourable friend the Foreign Secretary has also tried to help your Lordships by circulating a further paper. In recognition of the enormous importance of this issue, my noble and learned friend [the Attorney-General] has decided to disclose his view of the legal basis for the use of military force. As I said this is almost unprecedented. The last time that a Law Officer's views were disclosed concerned the Maastricht Treaty in 1992 [sic: in actual fact the year was 1993]. It is right that what has happened today remains the exception rather than the rule.⁵¹

As Baroness Symons indicated, the previous occasion upon which the substance of the Law Officers' advice was presented to Parliament arose out of the controversy generated by the European Communities (Amendment) Bill. More particularly, it arose out of the confusion caused by ministerial statements regarding amendment No. 27 of the Bill, under which the protocol on social policy of the Maastricht Treaty would have been excluded from the scope

⁴⁷ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, columns 85-86.

⁴⁸ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, column 108.

⁴⁹ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, columns 114-115.

⁵⁰ See the Written Answer by Harriet Harman, QC, MP, the Solicitor-General, *Hansard, Official Report, House of Lords Debates*, 17th March 2003, column 21WA.

⁵¹ *Hansard, Official Report, House of Lords Debates*, 17th March 2003, columns 117-118.

of clause 1 of the Bill. On this occasion, Parliament was originally informed by Tristan Garel-Jones, MP, the Minister of State at the FCO on 20th and 27th January 1993, that if the amendment was carried, “United Kingdom law would not conform” to the provisions of the said Treaty and that “the United Kingdom would therefore be unable to ratify” it. However, as Douglas Hurd, MP, the Foreign Secretary, revealed to the House of Commons on 15th February 1993:

in light of discussion in this House and elsewhere, further careful and detailed consideration was given to the matter, and the Attorney-General and the Lord Advocate [for Scotland] were asked for their advice. I think it right, with the agreement and on the authority of the Law Officers, to inform the House of that advice, at the earliest practicable opportunity, and to explain the Government’s position in light of that advice ... The Law Officers advise that, if the amendment were carried, acts adopted under the protocol would still not apply to the United Kingdom ... In summary, the Law Officers consider that, while incorporation of the protocol in domestic law is desirable, it is not necessary for ratification or implementation of the Maastricht treaty. In other words, there would be no impediment to ratification if the amendment were carried because acts adopted under the protocol would still not apply to the United Kingdom.⁵²

After giving his statement, Mr Hurd faced Questions from MPs and, in reply to one concerning the Law Officers, he explained that:

What my right hon. Friend the Minister of State said on 20 and 27 January [1993] was said on advice not from the Law Officers but from legal advisers within the Department ... There are lessons to be learnt from this. My conclusion, and the error for which I have expressed regret and for which I take responsibility, is that we should have put the matter to the Law Officers of the Crown earlier. If the House wishes further advice on the meaning and effect of the proposed legislation, Law Officers are willing to be present when the Committee stage of the Bill resumes.⁵³

When Sir Nicholas Lyell, QC, MP, the Attorney-General of the day, duly appeared at the Committee stage on 22nd February 1993, he offered some further clarification but he refused to disclose any additional details as to the legal advice, which may have been tendered. Even so, he recognised the historic importance of the fact that disclosures had already been made:

Drawing on the years that I have been a Law Officer and the six years or more that I spent as Parliamentary Private Secretary to Sir Michael Havers when he was Attorney-General, I am not aware of any precedent for the publication of Law Officers’ advice to the Government, although I stand to be corrected.⁵⁴

Accordingly, on the last occasion prior to 17th March 2003 that the substance of the Law Officers’ advice was disclosed to Parliament, it was likewise done in “extraordinary circumstances” and, thus, in accordance with the Law Officers’ Convention.

Professor Edwards, in his authoritative study of the offices of Attorney-General and Solicitor-General of England published in 1964, cites *Erskine May* and traces the origins of “the Law Officers’ Convention” to “the Cagliari case” of 1858. This resulted in the opinions of the Law Officers being laid before Parliament “under peculiar and exceptional circumstances”.⁵⁵ Professor Edwards suspects that Lord Palmerston, the then Prime Minister, may have “had in mind” this precedent when, on 17th February 1865, he sought to justify the disclosure of the

⁵² *Hansard, Official Report, House of Commons Debates*, 15th February 1993, columns 27-28.

⁵³ *Hansard, Official Report, House of Commons Debates*, 15th February 1993, column 32. In a Written Answer subsequently published on 22nd February, Tristan Garel-Jones, MP, Minister of State at the FCO, revealed that in connection with amendment No. 27, “the Law Officers were formally consulted on 9 February [1993].” *Hansard, Official Report, House of Commons Debates*, 22nd February 1993, column 409 WA.

⁵⁴ *Hansard, Official Report, House of Commons Debates*, 22nd February 1993, column 735.

⁵⁵ Edwards, *The Law Officers of the Crown*, p. 257.

opinion of the Attorney-General in connection with the Belfast riots of 1865 with reference to such a convention. According to Lord Palmerston:

I do not apprehend that there is anything contrary to the Rules of this House in reading or quoting any opinion of the Law Officers. It is a question of discretion on the part of the government, not one bearing on the Orders of this House. There may be occasions when they may be properly read. As a general rule, no doubt, they are not laid before Parliament, and for this reason, not because it would be against any Order of the House, but because the Law Officers would be more cautious in expressing an opinion if they knew that it was to be laid before Parliament and the public. But as I have said, there may be occasions, like the present, when it is convenient and proper for the convenience of the House that such opinions should be made known.⁵⁶

The general rule embodied in the convention, as it has evolved since 1865, is that any legal advice tendered by the Law Officers must remain confidential. Thus, according to Professor Edwards's book on the Law Officers published in 1964:

The better constitutional convention is the flexible rule expressed in Erskine May: "The opinions of the Law Officers of the Crown, being confidential, are not usually laid before Parliament or cited in debate."⁵⁷

In common with other conventions, the Law Officers' Convention is open to interpretation, if not adaptation. For example, in 1969, Sir Elwyn Jones, QC, MP, the then Attorney-General, asserted that:

There is a further protection to the law officers in that there is a convention of the House of Commons that a Minister who faces criticism must defend his policy or action himself without attempting to hide behind the law officers' opinion. This means that the Minister who is advised by the law officers that he cannot do something simply has to say "I just can not do this." He is not allowed to say, "I cannot do it because the Attorney-General tells me that I cannot."⁵⁸

The Convention also seems to dictate how and when Law Officers' Opinions may be circulated. Although it is not possible for the author to assess the position today in any detail, declassified documents at the National Archives (formerly known as the Public Record Office⁵⁹) provide an insight into how reluctant the Attorney-General of the day may be to allow any widespread dissemination of Law Officers' Opinions. Thus, in 1950, on being pressed to allow the Colonial Office "to communicate the Opinions of the Law Officers of the Crown to other Government Departments and to Colonial Governors," Sir Hartley Shawcross, KC, MP, the Attorney-General, gave his consent subject to a number of conditions

The Law Officers agree that the actual Opinions given by them to the Colonial Office may be communicated to other Departments and to Colonial Governors who may show them to their Law Officers, but not to their Executive Councils, provided that proper precautions are taken to ensure that the Opinions are treated as confidential.⁶⁰

⁵⁶ Lord Palmerston's statement to the House of Lords on 17th February 1865 quoted by Edwards, *The Law Officers of the Crown*, p. 257.

⁵⁷ Edwards, *The Law Officers of the Crown*, p. 259-260.

⁵⁸ Jones, 'The Office of Attorney-General,' p. 48.

⁵⁹ In April 2003, the Public Record Office and the Historical Manuscripts Commission were "brought together" to form a new organisation, The National Archives of the United Kingdom. Crown copyright material at the National Archives of the United Kingdom has been reproduced in this article by permission of the Controller of Her Majesty's Stationery Office.

⁶⁰ Formerly 'restricted' now declassified memo entitled 'Law Officers' Opinions' and drafted by the Establishment and Organisation Department, 23rd May 1950, The National Archives of the UK ('PRO') CO 1026/141. The memo suggested that the Attorney-General would not be prepared to consider any request to disclose an Opinion to an Executive Council save "in exceptional circumstances."

In his book on the Attorney-General published in 1984, twenty years after his earlier book, Professor Edwards built upon his earlier analysis and illustrated how the Convention had operated in the intervening years. He did so with reference to various examples. One related to the controversy which arose in December 1979 when Samuel Silkin, QC, MP, by now a former Attorney-General, and Merlyn Rees, MP, a former Home Secretary, highlighted the possibility that proposed new immigration rules might fall foul of the European Convention on Human Rights. Against this background, both Mr Silkin and Mr Rees requested the presentation to Parliament of a Law Officer's considered opinion. However, they were disappointed as William Whitelaw, MP, the Home Secretary, invoked "the tradition that the Government do not disclose any advice they may receive from the Law Officers".⁶¹

As already noted, the legal advice tendered by the Law Officers of the day has only been disclosed in exceptional circumstances since 1865. Besides the examples dating from 1993 and 2003 referred to above, an earlier example cited by Professor Edwards dates from 1971. In this year, the substance of the advice tendered to the Government on the international obligations of the United Kingdom in respect of the export of arms to South Africa was published. Significantly, on this occasion, the command paper containing the advice bore the signatures of the Attorney-General (Sir Peter Rawlinson, QC, MP) and of the Solicitor-General (Sir Geoffrey Howe, QC, MP).⁶² This suggested that the Law Officers had given their consent to its publication. In contrast, when a letter written by one of the Law Officers, marked "strictly private and confidential" and addressed to Michael Heseltine, MP, the Defence Secretary, was "leaked" to the media at the height of the Westland affair in 1985-86, it was reportedly done so without the consent of its author, Sir Patrick Mayhew, QC, MP, the then Solicitor-General. It was subsequently alleged that the "leak" took place at the instigation of Leon Brittan, MP, the Secretary of State for Trade and Industry, who promptly resigned. Although his resignation was widely put down to his alleged failure to observe the doctrine of individual ministerial responsibility,⁶³ his alleged contravention of the Law Officers' Convention hardly helped his cause. In another letter, this time published by 10 Downing Street an hour or so before the start of an emergency House of Commons debate on the Westland affair on 27th January 1986, Sir Patrick Mayhew notified Mr Heseltine, the "target" of the original "leak", that:

I want to express my dismay that a letter containing confidential legal advice from a Law Officer to one of his colleagues should have been leaked, and apparently leaked moreover in a highly selective way. Quite apart from the breach of confidentiality that is involved, the rule is very clearly established that even the fact that the Law Officers have tendered advice in a particular case may not be disclosed without their consent, let alone the content of such advice. It is plain in this instance this important rule was immediately and flagrantly violated.⁶⁴

The Westland affair had a significant bearing on Parliament's understanding of the Law Officers' Convention. More particularly, the affair confirmed that two slight adjustments had been made to it. The first, noted by Sir Patrick in his letter to Mr Heseltine, related to the question of consent. Before 1986 – as *Erskine May* and Professor Edwards indicate⁶⁵ – it was widely believed that the advice of the Law Officers could not be disclosed without the consent of the minister receiving the advice. The Westland affair confirmed that such advice could not be disclosed without the consent of the Law Officer (or Law Officers) giving it.

⁶¹ Edwards, *The Attorney General*, p.p. 212-213.

⁶² Cmnd. 4589 (1971), referred to by Edwards, *The Attorney General*, p. 223.

⁶³ Geoffrey Marshall, 'Cabinet Government and the Westland Affair,' *Public Law* (1986), p.p. 184-192.

⁶⁴ The letter was reproduced in 'Exchange of letters over Westland: Statement by Solicitor-General Mayhew on the Westland helicopters affair,' *Guardian*, 28th January 1986.

⁶⁵ According to Professor Edwards, "if a minister deems it expedient that such opinions should be made known for the information of the House, he is entitled to cite them in debate." Edwards, *The Law Officers of the Crown*, p. 259-260.

Accordingly, subsequent Parliamentary Answers as well as the latest edition of the *Ministerial Code* reflect this adjustment. To quote the *Ministerial Code*:

The fact and content of opinions or advice given by the Law Officers, including the Scottish Law Officers, either individually or collectively, must not be disclosed outside Government without their authority.⁶⁶

Be that as it may, the passages on “Law officers’ opinions” within post-1986 editions of *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* have not reflected the adjustment. The twenty-second and latest edition of *Erskine May’s Treatise*, which was published in 1997 and referred to in the House of Commons by Mr Forth and Mr Cash prior on 13th March 2003, is virtually identical to the passage to be found in earlier editions. The twenty-second edition provides that:

The opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate *or provided in evidence before a select committee*, and their production has frequently been refused; but if a Minister deems it expedient that such opinions should be made known for the information of the House, he is entitled to cite them in debate. [The words in *italics* appear in the twenty-second (1997) edition⁶⁷ but do not appear in pre-1979 editions, such as the eighteenth (1971) edition.⁶⁸]

The second adjustment concerned the relationship between the Law Officers and Select Committees. Thus, when the Attorney-General was asked if “the Solicitor-General will accept an invitation to give evidence to the Select Committee on Defence” in the aftermath of the Westland affair, Sir Michael Havers, QC, MP (the Attorney-General from 1979 until 1987) offered the following Written Answer:

The Solicitor-General has indicated to the Chairman of the Select Committee on Defence that it will not be possible for him to accept the Committee’s invitation to appear before them. The Law Officers are not answerable to Parliament for the legal advice which they give to the Government and the established convention is that neither they nor anybody else should be asked to disclose whether, and if so in what circumstances, they have given such advice, let alone what such advice may have been. It was for this reason among others that it was agreed, when the present system of Select Committees was being established, that no Committee would be empowered to monitor the Law Officers or their Department.⁶⁹

The immediate significance of Sir Michael’s Answer was that it removed any uncertainty as to whether a Law Officer could be compelled to appear before a Select Committee. The uncertainty had existed since the Select Committee system was re-structured in 1979. At the time, the Law Officers were excluded from the scrutiny of the Home Affairs Select Committee and indeed no Select Committee was set up with the specific duty of overseeing their activities.⁷⁰

A perusal of recent editions of *Hansard* confirms how regularly the Law Officers’ Convention has been used to brush aside Parliamentary requests for the legal advice, if any,

⁶⁶ Section 3.24, *The Ministerial Code*.

⁶⁷ Sir Donald Limon and W.R. McKay (eds.), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (Butterworths, London, twenty-second edition, 1997), p.389.

⁶⁸ Sir Barnett Cocks (ed.), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. (Publishers) Ltd, London, eighteenth edition, 1971), p.422.

⁶⁹ *Hansard, Official Report, House of Commons Debates*, 20th February 1986, column 279 WA. The Question was posed by Tam Dalyell, MP.

⁷⁰ See Edwards, *The Attorney General*, p.p. 227-235. At page 229 Edwards writes that “This deliberate exclusion of the Law Officers’ Department from the functions of the Select Committee on Home Affairs has provided a haven of refuge into which the Attorney General has retreated in the face of vociferous demands that the committee be allowed to examine the Director of Public Prosecutions and the policies that govern his exercise of procedural discretion.”

given by the Law Officers to be divulged. Indeed, since the General Election of May 1997 but prior to 17th March 2003, all such requests were rebuffed. For example, in 1998, following the Sandline affair in Sierra Leone, the Attorney-General was asked “whether advice was sought from himself or his officials before the FCO on 10 March formally advised Her Majesty’s Customs and Excise of the allegations regarding Sandline[?]” His reply was as follows:

As a matter of convention, neither the substance of the Law Officers’ advice, nor the fact that they have been consulted, is disclosed outside Government other than in exceptional circumstances. I see no reason to depart from this convention in this case.⁷¹

During the Kosovo campaign of 1999, Tam Dalyell, MP – one of the most inquisitive of Parliamentarians, who became Father of the House of Commons in 2001 - raised two Questions concerning the legal advice, if any, tendered in connection with the reported dropping of cluster bombs on Nis and Belgrade.⁷² On 20th May 1999, the Attorney-General, John Morris, QC, MP, replied:

The matters that my hon. Friend raises are matters for my hon. Friend the Secretary of State for Defence. I confirm that I have offered advice to colleagues in relation to some of the legal issues that have arisen during the process of approving targets for attack by UK forces. I am unwilling to be drawn further. I am confident that the Government and UK forces act in accordance with international law. Legal advice is available at every level of the process of approving targets for attack.⁷³

In 2000, Lord Lester of Herne Hill, QC, asked “Whether they [Her Majesty’s Government] will in practice consult the Law Officers before making statements of compatibility under Section 19 of the Human Rights Act 1998; and, if not, why not[?]”. In a Written Answer published on 28th June, Lord Bassam of Brighton, for the Government, stated:

Ministers making Section 19 statements will do so in light of legal advice they have received. That advice may, in appropriate cases, come from the Law Officers. However, by long-standing convention, adhered to by successive Governments, neither the fact that the Law Officers have been consulted on a particular issue, nor the substance of any advice they have given on that issue, is disclosed outside government other than in exceptional circumstances.⁷⁴

On 29th June 2000, in reply to a Question concerning “what discussions he [the Solicitor-General] has had with the Foreign Secretary regarding the status of the proposed EU charter of Fundamental rights [?]”, Ross Cranston, QC, MP, the Solicitor-General, replied:

The Attorney-General and I regularly meet with the Foreign Secretary and other ministerial colleagues to discuss matters of mutual interest. However, by long-standing convention, adhered to by successive Governments, neither the fact that the Law Officers

⁷¹ *Hansard, Official Report, House of Commons Debates*, 20th May 1998, column 401 WA.

⁷² Mr Dalyell had asked: “Was either the Solicitor-General or the Attorney-General consulted about the dropping of cluster bombs on the centre of the city of Nis? Was either of them told of the proximity of a hospital in Belgrade to a target before permission was given, on the legal basis on which I understand they were consulted, for the attack to go ahead, with the tragic resulting death of patients?” *Hansard, Official Report, House of Commons Debates*, 20th May 1999, column 1211.

⁷³ *Hansard, Official Report, House of Commons Debates*, 20th May 1999, column 1211. Later on in 1999, Mr Dalyell had another stab at extracting details of the advice given by the Attorney-General in relation to Kosovo. On this occasion, he asked the Foreign Secretary to confirm “what legal advice he has obtained since the Kosovo campaign on the legality of the NATO intervention in Kosovo”. However, he was no less successful for on 29th November 1999, Keith Vaz, MP, the Minister of State at the FCO, offered a written answer stating merely that: “Throughout the Kosovo crisis, the Government took legal advice in accordance with standing procedures. They continue to do so as necessary.” *Hansard, Official Report, House of Commons Debates*, 29th November 1999, column 31 WA.

⁷⁴ *Hansard, Official Report, House of Lords Debates*, 28th June 2000, column 80 WA.

have been consulted on an issue, nor the substance of the advice they have given, is disclosed outside Government ... other than in exceptional circumstances. I therefore am not prepared to say whether the Foreign Secretary has consulted the Law Officers about the proposed Charter.⁷⁵

When the Royal Air Force began its air campaign over Afghanistan in October 2001, Mr Dalyell asked Ms Harman, the Solicitor-General, whether “she has provided advice on the legality of each target in Afghanistan which has been bombed since 7 October 2001.” On 18th October 2001, she replied:

As chief legal advisers to Her Majesty’s Government, the Attorney-General and the Solicitor-General are available to advise the Government on all questions of international and domestic law. In this capacity the Law Officers have been asked to advise, from time to time, on legal issues relating to the use of force. This has included the right of self-defence as recognised in Article 51 of the UN Charter and international humanitarian law. There is a long-standing convention that neither the substance of the Law Officers’ advice, nor the fact that they have been consulted, is disclosed outside Government.⁷⁶

The parliamentary exchanges cited above demonstrate how the Law Officers’ Convention can be used to stifle any endeavours by individual MPs to extract information with a view to holding the executive to account. In this respect, the Law Officers’ Convention has likewise been invoked to brush aside a request from at least one Select Committee Chairman. In the aftermath of the Kosovo campaign, the House of Commons Foreign Affairs Committee carried out an inquiry into “the foreign policy lessons of the Kosovo crisis and how the Foreign and Commonwealth Office might best promote peace and stability in region”. Evidently bearing in mind the Law Officers’ Convention, the Committee attempted to skirt around it by seeking to gain access “on a classified basis” to any advice given by the Law Officers. Accordingly, on 8th February 2000, the Chairman of the Committee wrote as follows to Lord Williams of Mostyn, QC, the successor of Mr Morris as Attorney-General:

The Committee has asked that I should seek from you access (on a classified basis) to the advice which your predecessor gave to FCO ministers on the legality of the military campaign, together with any additional advice which you might wish to give to the Committee.

I am sure that you realise how important it will be for our inquiry to have the authoritative view of the Law Officers on these important questions.⁷⁷

Ingenious though this attempt undoubtedly was, it did not prise the information required from the Law Officers. After all, Lord Williams wrote back to say that:

It is a long standing convention, adhered to by successive Governments and enshrined in the Ministerial Code, that neither the fact that the Law Officers have advised on a matter, nor the content of any advice which they may have given, is disclosed outside Government other than in exceptional circumstances.

I have considered carefully whether an exception to this convention should be made in relation to the events which are being investigated by your committee. I have also discussed the matter with John Morris. Our view, however, is that Ministerial colleagues are entitled to the benefit of confidential legal advice, especially on a matter as sensitive

⁷⁵ *Hansard, Official Report, House of Commons Debates*, 29th June 2000, column 616 *WA*.

⁷⁶ *Hansard, Official Report, House of Commons Debates*, 18th October 2001, column 1285 *WA*.

⁷⁷ Letter to the Rt Hon The Lord Williams of Mostyn, QC from the Chairman of the Committee, Appendix 31, Select Committee on Foreign Affairs, Appendices to the Minutes of Evidence, which were ordered to be printed by the House of Commons to be printed on 23rd May 2000.

as this. I am therefore afraid that neither of us sees any reason to make an exception to the convention, on this occasion.⁷⁸

In view of the above, it remains to be seen whether the publication of the Attorney-General's Written Answer of 17th March 2003 will have any long-term bearing upon how the Law Officers respond to Parliamentary Questions requesting them to disclose any advice they may have given. On the one hand, it may well presage a new dawn of "openness". Indeed, back in November 2001, when speculation was rife as to whether Lord Goldsmith had given any advice in connection with British military operations in Afghanistan, he offered a refreshing insight into the implications of the Convention (albeit during a memorial lecture rather than during proceedings of Parliament). According to Lord Goldsmith:

neither the substance nor the fact that there has been Law Officers' advice can be communicated without our consent, which is not often given. Whilst I am sure that Ministers and therefore the public interest are best served by a rule of non-disclosure on the substance of our advice – which promotes candid and full legal advice, examining the weaknesses as well as the strengths of the proposed course of action – there is an air of unreality in some areas in denying that advice has been given when it appears to be common knowledge, as for example, the fact that I have at least some involvement in legal advice relating to the fact and the conduct of the present armed conflict. It is therefore not surprising that there is some pressure to give some further consideration to this latter part of the convention.⁷⁹

If these remarks, seen in the light of the publication of the Answer on 17th March 2003, suggest that Lord Goldsmith may open the door towards greater openness, the Freedom of Information Act 2000 may not do so when it comes into force. After all, it will effectively place the Law Officers' Convention on a statutory footing. Section 35 provides that:

- (1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –
- (a) the formulation or development of government policy,
 - (b) Ministerial communications,
 - (c) The provision of advice by any of the Law Officers or any request for the provision of such advice,
 - (d) The operation of any Ministerial private office.
- ... (5) In this section - ... "the Law Officers" means the Attorney-General, the Solicitor-General, the Advocate-General for Scotland, the Lord Advocate, the Solicitor-General for Scotland and the Attorney-General for Northern Ireland.⁸⁰

Ironically, therefore, when the Freedom of Information Act comes into force it may not necessarily result in any more "openness," at least in respect of the legal advice given by the Law Officers.

There are two further reasons to believe that the publication of the Answer will not give rise to greater openness. One is that the publication of the Answer by the Attorney-General on 17th March 2003 has clearly not heralded any extension of his duties as the Legal Adviser to Parliament.⁸¹ These duties are strictly limited and, in any event, these do not encompass the provision of legal advice in relation to matters of international law, notwithstanding the

⁷⁸ Letter from the Rt Hon The Lord Williams of Mostyn, QC to the Chairman of the Committee, Appendix 31, Select Committee on Foreign Affairs, Appendices to the Minutes of Evidence, which were ordered to be printed by the House of Commons to be printed on 23rd May 2000

⁷⁹ Lord Goldsmith, '13th Annual Tom Sargent Memorial Lecture'.

⁸⁰ Freedom of Information Act 2000, 2000, Chapter 36.

⁸¹ The Attorney-General is the Legal Adviser to Parliament as well as the Legal Adviser to the Government. However, as Professor Edwards writes: "The mandatory enjoinder embodied in the Attorney General and the Solicitor General along with the patents of their respective offices, to attend upon the House of Lords "to treat and give your advice – and this you may in no wise omit ..." has not been obeyed or taken seriously by any Law Officer since 1742." Edwards, *The Attorney General*, p. 207.

publication of the Answer. So much was effectively confirmed by Ms Harman in a Written Answer published on 24th March 2003. When asked “if she will make a statement on her role and responsibilities for providing legal advice to the House,” she averred that:

The Law Officers’ role as legal advisers to Parliament covers three areas. First, the constitution and conduct of proceedings in the House, including questions of parliamentary privilege. Secondly, the conduct and discipline of Members. Thirdly, the meaning and effect of proposed legislation.

However, by a longstanding convention, observed by successive Governments and reflected in the Ministerial Code, the Law Officers’ legal advice to the Government remains confidential. This enables Government to obtain frank and full legal advice in confidence. To express a view independently to Parliament on matters which may be consulted by the Government would undermine the confidentiality of the lawyer/client relationship between the Law Officers and the Government.⁸²

Ms Harman’s Written Answer draws attention to the other matter suggesting that greater openness may not arise in future. For it appears that in rebuffing requests for details of any advice they may have given, the Law Officers have recently decided to claim “reasons of client confidentiality,” in addition to the Law Officers’ Convention. Client confidentiality did not appear in any of the pre-2003 Answers cited above. It is, therefore, interesting to note that client confidentiality appeared in the aforementioned Written Answer submitted by Ms Harman as well as in the *Attorney General’s Review of the Year 2001/2002*.⁸³

How, when and why will the Law Officers be consulted? A preliminary analysis with reference to the Opinions tendered between 1948 and 1950

For the reasons already explained, it has not been possible for the author of this article to conduct any detailed research into how the advisory functions of the Attorney-General have been exercised in recent years. However, it has been possible for the author to conduct research into how the advisory functions of the Law Officers were fulfilled in the past, particularly prior to 1973. To begin with, a number of politicians who have served as either Attorney-General or Solicitor-General (or both) have published their memoirs. Examples from the post-1945 era include the memoirs of Sir Hartley Shawcross (Attorney-General from 1945 to 1951),⁸⁴ Sir Elwyn Jones (Attorney-General from 1964 to 1970)⁸⁵ and Sir Peter Rawlinson (Solicitor-General from 1962 to 1964 and Attorney-General from 1970 to 1974).⁸⁶ Furthermore, the “thirty-year rule” embodied in the Public Record Act 1958 (as amended) has resulted in the declassification of millions of official records, including those relating to the Law Officers. These may be perused at the National Archives of the United Kingdom at Kew Gardens in Surrey. The declassified records include many Opinions, letters and other documents written by the Law Officers prior to 1973.⁸⁷ They also include the minutes and memoranda of the Cabinet and Cabinet Committee meetings attended by the Attorney-General.

It is hoped that in due course the author will be able to publish the detailed findings of his research. In the meantime, as a means of illustrating the extraordinary range of legal issues which may be referred to the Attorney-General of the day, this part of the article briefly lists some of the legal issues upon which the Law Officers had to advise between 1948 and 1950.

⁸² *Hansard, Official Report, House of Commons Debates*, 24th March 2003, column 21WA.

⁸³ *Attorney General’s Review of the Year 2001/2002*, ‘Foreword’ and Chapter 3.

⁸⁴ Hartley Shawcross, *Life Sentence: The Memoirs of Lord Shawcross* (Constable, London, 1995).

⁸⁵ Lord Elwyn-Jones, *In My Time: An Autobiography* (Futura Publications paperback edition, London, 1988).

⁸⁶ Peter Rawlinson, *A Price Too High: An Autobiography* (Weidenfeld and Nicolson, London, 1989).

⁸⁷ Thanks to Clive Parry, the Professor of International Law in the University of Cambridge who undertook the arduous task of preparing and editing ninety-seven volumes of *Law Officers’ Opinions to the Foreign Office 1793-1860*: Clive Parry (ed.), *Law Officers’ Opinions to the Foreign Office 1793-1860*, Volumes 1-97, (Gregg International Publishers Ltd, London, 1970-73).

During this period, the Attorney-General was Sir Hartley Shawcross, KC, MP and the Solicitor-General was Sir Frank Soskice, KC, MP. As such they were members of the Labour administration of Clement Attlee (which stretched from 1945 to 1951). Accordingly, they had to confront a vast array of legal problems including those generated by the surrender of Germany and the other Axis Powers, the end of British rule in India, the onset of the Cold War and the Communist take-over of China.

To begin with, the Law Officers were often called upon to attend meetings of the full Cabinet. For example, the declassified Cabinet minutes for the year 1948 reveal that the Attorney-General (and/or the Solicitor-General) attended at least eight of the Cabinet's eighty two meetings held that year:

- On 27th May 1948, the Attorney-General was present at a Cabinet meeting on "Capital punishment: Disciplinary Codes of [the] Armed Forces"⁸⁸
- On 28th June 1948, the Attorney-General was present when the Cabinet discussed the Dock Workers' Strike with a view to assessing whether an emergency should be proclaimed under the Emergency Powers Act 1920.⁸⁹
- On 29th June 1948, the Attorney-General attended a meeting during which the Cabinet "gave general approval to the draft Emergency Regulations".⁹⁰
- On 5th July 1948, the Attorney-General participated in a Cabinet discussion about War Crimes, having previously submitted a memo on "the disposal of Field Marshals von Brauchitsch, von Runstedt and von Manstein, and Colonel-General Strauss, who had been in British custody since 1945". On the same day, the Attorney-General also attended a Cabinet discussion on the Criminal Justice Bill as it related to Capital punishment.⁹¹
- On 28th October 1948, the Attorney-General and the Solicitor-General attended a Cabinet meeting to discuss "Constitutional development in India and Eire" and also "Commonwealth relations: Title of the Commonwealth".⁹²
- On 12th November 1948, the Attorney-General attending a meeting on "Commonwealth Relations: Developments in India and Eire".⁹³
- On 13th November 1948, the Solicitor-General attended a Cabinet meeting on "Commonwealth Relations: Constitutional Developments in Eire".⁹⁴
- On 22nd December 1948, the Attorney-General attended a Cabinet meeting on "Germany: International Authority for the Ruhr".⁹⁵

In addition to attending Cabinet meetings on an occasional basis between 1948 and 1950, the Law Officers tendered legal advice in formal Opinions and Reports or alternatively in letters. Here are some examples:

- On 18th May 1949, the Law Officers submitted a Report "on certain questions relating to the diplomatic immunity of the clerical personnel of the Soviet Embassy [in London] and the domestic servants of the Soviet Ambassador" and how those questions were affected by the decision of the House of Lords in *Engelke v Musmann* [1928] AC 433.⁹⁶

⁸⁸ CM (48) 33rd Conclusions, 27th May 1948, item 5, The National Archives of the UK ('PRO') CAB 128/12.

⁸⁹ CM (48) 44th Conclusions, 28th June 1948, item 2, PRO CAB 128/13.

⁹⁰ CM (48) 45th Conclusions, 29th June 1948, item 1, PRO CAB 128/13.

⁹¹ CM (48) 47th Conclusions, 5th July 1948, items 3 and 4, PRO CAB 128/13.

⁹² CM (48) 67th Conclusions, 28th October 1948, items 3 and 4 (the Solicitor-General had also attended the meeting on item 2, "Tribunals of Inquiry (Evidence) Act 1921"), PRO CAB 128/13.

⁹³ CM (48) 71st Conclusions, 12th November 1948, items 2, PRO CAB 128/13

⁹⁴ CM (48) 72nd Conclusions, 13th November 1948, item 1, PRO CAB 128/13.

⁹⁵ CM (48) 82nd Conclusions, 22nd December 1948, item 3, PRO CAB 128/13

⁹⁶ Report by the Law Officers, 18th May 1949, PRO LO 2/950.

- On 28th July 1949, the Law Officers submitted an Opinion on “whether a Mr Thivy, stated to be the representative of the Government of India in Malaya [then a British colony] enjoys there any immunity from suit.”⁹⁷
- On 5th September 1949, the Law Officers submitted an Opinion assessing inter alia the “difficult question” of “whether or not there may be vested in the Chinese Nationalist Government ... a right to prevent access to Shanghai by [the] interception of British vessels within Chinese territorial waters”.⁹⁸
- On 19th February 1950, the Law Officers submitted an Opinion on the “Responsibility of [the] Imperial War Graves Commission for the care of War Graves in India and Pakistan”.⁹⁹
- On 4th April 1950, the Attorney-General submitted an Opinion on “certain questions that have arisen in connection with the Treaty of Alliance with the Kingdom of Jordan”.¹⁰⁰
- On 17th April 1950, the Attorney-General submitted an Opinion in response to a request for advice from the Legal Adviser of the Foreign Office on “certain questions that have arisen consequent on the presence at Hong Kong of civil aircraft”.¹⁰¹
- On 9th May 1950, the Law Officers approved the terms of a draft Order-in-Council “declaring the Bishopric of St Albans to be vacant”.¹⁰²
- In a letter dated 11th May 1950, the Attorney-General provided advice to Mr James Griffiths, MP, the Colonial Secretary, on various matters relating to “the Report of the Commission of Inquiry into the disorder in the Eastern Provinces of Nigeria.”¹⁰³
- On 1st November 1950, the Law Officers approved the terms of a draft Order-in-Council “declaring the Bishopric of Chelmsford to be vacant”.¹⁰⁴
- On 17th November 1950, the Law Officers submitted an Opinion on the “Powers of ministers under Section 68 of the Education Act 1944”.¹⁰⁵

Conclusion

The foregoing analysis has drawn attention to the fact that the Attorney-General of the day may be called upon to advise the Government on an extraordinary range of subjects. Yet it has also drawn attention to the conundrum lying at the heart of the arrangements relating to his advisory functions. On the one hand, prior to taking decisions, ministers are entitled to confidential legal advice from the Attorney-General. By the same token, the Attorney-General is entitled to give such advice, safe in the knowledge that his views will not be subjected to scrutiny by Parliament or otherwise paraded in public for at least thirty years. Yet on the other hand, Parliament is under a duty to hold – or try to hold – the executive to account and to scrutinise its decisions. Be that as it may, the existence of the Law Officers’ Convention serves to ensure that MPs will rarely, if ever, gain sight of such advice.

The Law Officers may claim that “openness and accountability” are “key” to their work.¹⁰⁶ However, there has been little sign of any “openness” in connection with the exercise of their advisory functions, notwithstanding the details contained in the Attorney-General’s Answer to a Question on Iraq, which was published in exceptional circumstances on 17th March 2003. Perhaps this state of affairs is understandable for the reasons already cited. Then again, the suspicion persists that it is merely a manifestation of the culture of secrecy, which has

⁹⁷ Opinion of the Law Officers of the Crown, 28th July 1950, PRO LO 2/885.

⁹⁸ Opinion of the Law Officers of the Crown, 5th September 1949, PRO LO 2/942

⁹⁹ Opinion of the Law Officers of the Crown, 19th September 1950, PRO LO 2/891.

¹⁰⁰ Opinion of the Attorney-General, 4th April 1950, PRO LO 2/887.

¹⁰¹ Opinion of the Attorney-General, 17th April 1950, PRO LO 2/898.

¹⁰² Opinion of the Law Officers of the Crown, 9th May 1950, PRO LO 2/924.

¹⁰³ Letter from Sir Hartley Shawcross, KC, MP, to James Griffiths, MP, 11th May 1950, PRO LO 2/863.

¹⁰⁴ Opinion of the Law Officers of the Crown, 1st November 1950, PRO LO 2/925.

¹⁰⁵ Opinion of the Law Officers of the Crown, 17th November 1950, PRO LO 2/229.

¹⁰⁶ ‘Foreword,’ *Attorney General’s Review of the Year 2001/2002*.

traditionally pervaded the Government. All of which brings to mind the immortal remarks of the fictional Cabinet Secretary in the first ever episode of the *Yes Minister* series broadcast on BBC television. “Open Government is a contradiction in terms,” he proclaimed. “You can be open or you can have government.”¹⁰⁷

¹⁰⁷ *The Complete Yes Minister: The Diaries of a Cabinet Minister by the Right Hon. James Hacker MP*, (edited by Jonathan Lynn and Antony Jay (BBC Books, London, revised omnibus edition, 1984), p. 21.