

The Commonwealth principles of the relationship between the three branches of government*

The developing role of the Justice Minister in the light of challenges facing the rule of law in the Commonwealth

*A series of recommendations incorporating Commonwealth Best Practice which member states can use as a tool either for change or as bench marking indicators when meeting the challenges facing the rule of Law in the Commonwealth.*¹

Paper delivered by Colin Nicholls QC, honorary life president of the Commonwealth Lawyers Association² at the 17th Commonwealth Law Conference, Hong Kong, on 8 April 2009.

Introduction

The office of justice minister in the Commonwealth, unlike that of attorney general, is a comparatively recent development. Its existence normally depends on the size and complexity of the jurisdiction involved and except in the few cases where it is combined with the role of attorney general, it is dependent like other ministries on the executive discretion of chief ministers when forming their governments.³

Whereas the office of attorney general is expressly recognised in most Commonwealth constitutions, there is normally no similar recognition of justice ministers. The remit of justice ministers is determined by the government of the day and tends to include functions which appear to belong more appropriately to other ministries, particularly home office and interior ministries. Unlike attorneys general, justice ministers are not normally required to be legally qualified, although they are increasingly required to swear an oath to uphold the rule of law.⁴

The justice minister's primary role is to provide access to justice by providing an adequately resourced judiciary and efficient court service.

His secondary role is to implement and develop legal policy with the assistance of the law reform and similar agencies. The breadth of this latter role varies widely and often includes law reform, immigration, human rights, the punishment and rehabilitation of offenders, prisons, mutual legal assistance, elections, public order issues and occasionally policing.

Where the justice minister is also attorney general his role also includes advising the government on legal matters and making the final decision whether to prosecute or not to prosecute.

*Editorial note: The paper has not been edited according to Advocate's house style. It is published in the format in which it was presented at the conference.

ecute criminal offences.

The distribution of these functions is open to abuse and is highly relevant to the separation of powers.

The purpose of this paper is to examine the position and role of the justice minister, in the light of challenges facing the rule of law in the Commonwealth in the light of the Commonwealth (Latimer House) Principles and to make a series of recommendations as to how best to avoid abuse and achieve a proper separation of powers. It examines the justice minister's relationship with the judiciary, the attorney general and other law ministers, the challenges in implementing and developing legal policy including access to justice, the independence of public prosecutors and the involvement of the executive in criminal proceedings.

The Minister of Justice

1. Constitutional position (Gane1):

RECOMMENDATION 1: In those countries where there is a Ministry of Justice the Minister of Justice should enjoy the same constitutional position as other ministers. The Minister should be a member of the executive appointed in the same manner as any other minister.

RECOMMENDATION 2: On taking office he or she should be required to take an oath to uphold the rule of law and the independence of the judiciary.

RECOMMENDATION 3: The office and functions of Minister of Justice should be distinguished from the office of Law Officer. Although Law Officers such as the Attorney and Solicitor General whose main function is to advise the government on legal including criminal legal matters may be political appointees, those persons whose function is to exercise prosecutorial discretion should be non-political appointees (see below at para 5).

2. Responsibilities

RECOMMENDATION 1: The Minister's responsibility should be to improve the administration of justice, to ensure the provision of resources for the efficient and effective support of the court system, equitable access to the courts for all citizens on a timely basis and the provision of legal aid that will ensure that all citizens receive their basic human rights.

RECOMMENDATION 2: The Minister's responsibility should include the development, formulation and implementation of legal policy and law reform and procuring the provision of adequate resources for judicial training and a career structure for public sector lawyers. (LHP IV)(c), NPA 2.2.2).⁵

3. Interaction between the Minister of Justice and other stakeholders (Comsec 5)

RECOMMENDATION: The Minister of Justice should consult and communicate with other stakeholders including other government departments and agencies, law commissions, national oversight institutions, professional organisations and civil society in accordance with the principles laid down in the Commonwealth Fundamental Values⁶ and LHP VIII. (LHP IV)(d), LHP VIII)).⁷

4. Interaction between the Minister of Justice and the Chief Justice (Comsec 7)

RECOMMENDATION 1: While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue interfere or be perceived to interfere with parliament's constitutional or legislative functions or compromise or be perceived to compromise judicial independence (LHP III), IV)(d)).⁸

RECOMMENDATION 2: The judiciary should have an input into parliamentary decisions relating to judicial issues in accordance with established means of consultation.

RECOMMENDATION 3: The Minister of Justice should consult and cooperate with

the Chief Justice and senior judges when decisions are taken on resources, infrastructure and training in order to ensure that the administration of justice is adequately protected and structural safeguards should be put in place accordingly. In any decision making the Minister of Justice should treat the judiciary as partners not as subjects of change.⁹ (*LHP IV*). *NPA 2/2/2*¹⁰

The investigation and prosecution of crime

5. Should Law Officers who have responsibility for criminal prosecutions be non-political appointees? (Gane 2).

RECOMMENDATION 1: Ideally Law Officers who have responsibility for criminal prosecutions should be non-political appointees.¹¹

RECOMMENDATION 2: The independence of Law Officers who have responsibility for criminal prosecutions should be enshrined in the constitution or by statute.¹²

RECOMMENDATION 3: The provisions for their appointment and removal should be independent of the executive and specifically provided for in the constitution or by statute.

RECOMMENDATION 4: They should be required to swear a statutory oath which requires them to uphold the rule of law and to act independently of government in exercising their functions in so far as they relate to the investigation and prosecution of criminal offences.

6. The challenges and possible solutions where an Attorney General is also an elected Minister or a political appointment? (Comsec 4)

RECOMMENDATION 1: Ideally in jurisdictions where the Attorney General is a government minister or Member of Parliament the constitution or legislation should provide for his or her responsibility for criminal prosecutions to be transferred to a Director of Public Prosecutions.

RECOMMENDATION 2: In jurisdictions where he or she remains a government minister or Member of Parliament and is required to advise on policy matters he or she should be entitled to attend cabinet meetings to give legal advice on ministerial request. Such advice should not include advice on specific criminal investigations or prosecutions.¹³

7. Should Law Officers who have responsibility for criminal prosecutions have guarantees of independence similar to those enjoyed, for example, by the Judiciary? (Gane 3)

RECOMMENDATION 1: Law Officers who

have responsibility for criminal prosecutions should have guarantees of independence similar to those enjoyed, for example, by the Judiciary.

RECOMMENDATION 2: Ideally they should have exclusive power to institute and terminate criminal proceedings and the exercise of their powers should not be subject to the direction or control of any other person other than in relation to matters of national security.

8. What are the most appropriate mechanisms of accountability for prosecution decisions? (Gane 4)

RECOMMENDATION 1: Law Officers who have responsibility for prosecutions should be removable from office for inability to perform their duties and for serious misconduct by an independent process similar to the process whereby judges may be removed from office.

RECOMMENDATION 2: They should be accountable to the courts by judicial review in order to ensure that decisions which they have taken comply with the Constitution, relevant statutes and other law, including the law relating to the principles of international justice.

RECOMMENDATION 3: They should be accountable to the courts by civil process such as malicious prosecution for their prosecutorial decisions (*LHP VII(a)*, *LHP VII(c)*)¹⁴

RECOMMENDATION 4: They should be accountable to Parliamentary Committees for their prosecuting policy thereby enabling their role and proper concerns to be better understood by the public at large.

RECOMMENDATION 5: The protocol for running prosecution services should be subject to parliamentary debate and should be regularly monitored by a Parliamentary Select Committee, which should take evidence from both the Attorney General and the Director of Public Prosecutions on its implementation and effectiveness. *LHP VII (a)*, *NPA 2.2.1*, *LHP IX(a)*.¹⁵

9. The challenges and possible solutions in jurisdictions where the Director of Public Prosecutions has a duty to consult the Attorney General/Minister of Justice before deciding to prosecute or not to prosecute and in some cases to stop an investigation (Comsec 3).

RECOMMENDATION 1: Where the Director of Public Prosecutions has a duty to consult the Attorney General/Minister of Justice before deciding to prosecute or not to prosecute and in some cases to stop an investigation or prosecution a clearly defined protocol should be established including judicial review and parliamentary oversight.¹⁶

RECOMMENDATION 2: Except for the purpose of safeguarding national security the Attorney General/Minister of Justice should not have power to instruct the Director of Public Prosecutions to commence or halt a criminal investigation or prosecution.¹⁷

RECOMMENDATION 3: Where, as is proposed in England and Wales,¹⁸ the Attorney General, being a government minister and Member of Parliament, has power to 'direct' or instruct the Director of Public Prosecutions to halt an investigation or prosecution on grounds of national security, his direction must:

(1) be in accordance with the rule of law and in accordance with domestic and international law;

(2) be subject to proper scrutiny as to its lawfulness, both under domestic and international law;

RECOMMENDATION 4: The lawfulness of his direction should be subject to judicial review and the exercise of his discretion should be subject to parliamentary oversight.

(1) It is doubtful whether the power to issue a 'conclusive certificate' halting an investigation or prosecution, or the power to require information on penalty relevant to determine whether to give a direction,¹⁹ would be in accordance with the rule of law as denying access to justice,²⁰ or in accordance with domestic and international law principles including treaty obligations, or the International Standards for Prosecutors.²¹ (*LHG VIII*, *VII(c)*).

(2) The issue whether there are grounds for concluding whether it is necessary to stop an investigation/prosecution; and (2) whether it is in fact necessary to stop an investigation/prosecution are matters properly within the jurisdiction of the courts and subject to parliamentary oversight respectively.²²

RECOMMENDATION 5: Any provision providing for an Attorney General who is a minister or Member of Parliament to commence or terminate an investigation or prosecution should be rare, for specific reasons and should include clear mechanisms for accountability.

International cooperation

10. Improving the arrangements for criminal justice in the light of different legal systems and different Ministry structures and responsibilities in jurisdictions having regard to the role of the Attorney General/Minister of Justice before deciding whether to prosecute or not to prosecute and in some cases to discontinue a prosecution. (Gane 6, Comsec 2).

RECOMMENDATION: Consideration should be given to establishing an appropriate protocol in order to ensure that assistance is not (particularly in corruption cases) improperly influenced by the executive²³ in light of the matters referred to above and

(1) the fact that the Article 2(a) of the proposed up-dated Harare Scheme retains the right of Requested States to refuse mutual assistance on inter alia political grounds and because 'compliance would be contrary to [their constitution] or would prejudice [their]

security, international relations or other essential public interests'; and

(2) that the decision whether to grant assistance or to delay it is in many States within the control of the executive

11. Is the time ripe for greater agency to agency cooperation along the lines of, for example, the European Arrest Warrant and the European Evidence Warrant? (Gane 6):

RECOMMENDATION: Given the diversity of Commonwealth jurisdictions it may be

inappropriate at this time to introduce agency to agency cooperation along the lines of the European Arrest Warrant and European Evidence Warrant. Since the scheme under the United Kingdom's Extradition Act 2003 contains different schemes for different countries according to the discretion of the United Kingdom government, there may an argument for establishing a 'European Arrest Warrant Scheme' and 'European Evidence Warrant Scheme' where an appropriate protocol can be agreed.

ENDNOTES

¹ References to the questions posed by the Commonwealth Secretariat are referred to as 'Comsec 1' et seq. References to questions posed by Professor Gane are referred to as 'Gane 1' et seq. References to the Commonwealth (Latimer House) Colloquiums and the Nairobi Plan of Action are abbreviated as "LHP 1) et seq. and NPA 1. et seq. respectively.

² The author is a barrister practising at 3 Raymond Buildings, Gray's Inn, London WC1R 5BH. He participated in the Commonwealth (Latimer House) Colloquiums in June 1998 and July 2008 and presented this paper prior to its amendment at the Commonwealth Law Ministers Meeting in Edinburgh on 7 July 2008. E-mail: colin.nicholls@3raymondbuildings.com

The views expressed represent solely the views of the author. The recommendations were drafted in response to a series of questions posed by the Commonwealth Secretariat and by Professor Christopher Gane, Professor of Scots Law and Vice Principal King's College Aberdeen at the Meeting.

The author is grateful to the Commonwealth Secretariat for its permission to re-present the paper in its amended form at the Commonwealth Law Conference and to refer to the paper presented by Professor Gane.

³ In New Zealand the offices of minister of justice and attorney general are separate but have sometimes been held by the same person.

⁴ See in England and Wales the Constitutional Reform Act 2005, s 17.

⁵ **LHP IV (c)** 'Adequate resources should be provided for the judicial system to operate effectively without any undue restraints which may hamper the independence sought'. (Emphasis added.)

NPA '2.2.2 Judicial accountability and confidence building. The independence of the judiciary is a vital guarantee of a democratic society, and is built on the foundation of public confidence. As such, it was essential that there be adequate observance of principles of accountability in its processes, professional ethics and conduct among judicial officers as well as court officials. The institution of peer review mechanisms by members of the profession, appropriate criticism through the media, legislative reversal of judicial precedent and case law should be considered. For accountability to be effective there must be judicial independence and security of tenure. The judiciary should be well resourced and there must be an effective system for the dissemination and evaluation of judicial decisions. There is a particular need to provide security of tenure for judicial officers serving in the lower courts as provided for in the Principles in order to build public confidence in the judicial system'. *Proposed action. Judiciaries are encouraged to:* • adopt Codes of Ethics and Conduct for Judicial Officers; • embark on judicial outreach programmes to communicate to the general public the role and functions of the Judiciary'. (Emphasis added.)

⁶ **Fundamental Commonwealth Values 4**, 'We believe in ...the individual's inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives.' (Emphasis added.)

⁷ **LHP IV (d)** 'Interaction, if any, between the executive and the judiciary should not compromise judicial independence.' (Emphasis added.)

'Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit for discharge of their duties.'

LHP VIII) 'The law-making process. In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

There should be adequate parliamentary examination of proposed legislation;

Where appropriate, opportunity should be given for public input into the legislative process;

Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments' (Emphasis added.)

⁸ **LHP III)** 'Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.'

⁹ Report of the House of Lords Select Committee on the Constitution *Relations between the executive, the judiciary and Parliament*, referred to by Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, *Judicial Independence*, Commonwealth Law Conference 2007, Nairobi, Kenya.

¹⁰ **LHP IV)** 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.'

NPA'2.2.2 Judicial accountability and confidence building. The independence of the judiciary is a vital guarantee of a democratic society, and is built on the foundation of public confidence. As such, it was essential that there be adequate observance of principles of accountability in its processes, professional ethics and conduct among judicial officers as well as court officials. The institution of peer review mechanisms by members of the profession, appropriate criticism through the media, legislative reversal of judicial precedent and case law should be considered. For accountability to be effective there must be judicial independence and security of tenure. The judiciary should be well resourced and there must be an effective system for the dissemination and evaluation of judicial decisions. There is a particular need to provide security of tenure for judicial officers serving in the lower courts as provided for in the Principles in order to build public confidence in the judicial system'. *Proposed action. Judiciaries are encouraged to:* • adopt Codes of Ethics and Conduct for Judicial Officers; • embark on judicial outreach programmes to communicate to the general public the role and functions of the Judiciary.' See also 2.3.2 on Codes.

¹¹ **UN Guidelines for Prosecutors, Havana 1990:** "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability". **Standards of the Independent Association of Prosecutors: 2. Independence.** 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction should be

exercised independently and be free from political interference. 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence. 2.3 Any right of non prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

Director of Public Prosecutions, England and Wales 2004, Statement of Independence. 'Our independence is of fundamental constitutional importance. It is a force for human rights and justice in society.' Lord Goldsmith QC: 'You simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this.' 13th Tom Sargent Memorial Lecture, 'Politics, Public Interest and Prosecutions - a view by the Attorney General,' London, 20 November 2001. The Corner House, Submissions on the Constitutional Renewal Bill 2008. 'Actual and perceived independence of the prosecuting bodies is essential to a functioning constitutional democracy.'

Clause 3 of the Constitutional Renewal Bill 2008 (England and Wales) provides that the Attorney General's function of superintendence of the directors of public prosecutions does not include power to give directions in relation to individual cases. Clause 6 proposes that the Director of Public Prosecutions shall be a civil servant appointed by the Attorney General (a political appointee), and that he shall only be removed from office if unable, unfit or unwilling to carry out his functions. Clause 12 provides that the Attorney General may if satisfied it is necessary to do so for the purpose of safeguarding national security direct the Director of Public Prosecutions that no investigation of specified matters may take place in England and Wales, or that no proceedings be instituted for an offence in respect of those matters or that proceedings for a specified offence are not to be continued. Clause 13 proposes that where the Attorney General has directed that proceedings for an offence are not to be continued the Director is required to take steps to ensure they are brought to an end. If a question arises in any proceedings whether it was necessary for the purpose of safeguarding national security a certificate signed by a Minister of the Crown certifying the direction was necessary for that purpose is conclusive evidence of that fact. The Attorney General is required to lay before Parliament a report on the giving or withdrawal of any such direction. Clause 15 proposes that the Attorney General may require the person to whom a direction may be given to provide information which may assist him in deciding whether to give a direction and that any such person who fails to provide the information without lawful excuse shall be liable to summary conviction.

¹² The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, section 5, stipulates that:

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the South African legal community, that this work was compiled and published.

There is strong feeling too, in some of the ‘unapologetically muscular argument’. It comes starkly to the fore in the passion with which the pre-publication censorship to be introduced by the Publications and Entertainment Bill is excoriated in his 1960 lecture on the topic (189ff). It stands unabashed in his commitment to a theory of natural law - he is adamant that the authority of law stems from its truth, rather than from its conventional purity, and he would declare that the ‘only satisfactory answer’ to the problem of fostering the internalisation of the values of the Constitution is ‘a committal to the natural law’ (30). His faith in this regard was clear and one sees it in the following forceful expression to the reader who repudiates the notion that might is right and finds it hateful: ‘there is, believe, me, only one alternative; and that is to recognise that the people’s will can never make wrong right. It is sometimes said that the voice of the people is the voice of God. If this is meant to convey that the people can nullify God’s law, there never was a more damnable heresy. There are rules which stem from a higher source

than the people’s will, and which are always binding on the people. And these rules are contained in what has long been known as the natural law’ (32). He was, at the same time, aware of the danger of dogmatism, and spoke ironically of ‘room for a brace of instructive essays, entitled respectively, *Saving Natural Law from its Friends* and *Saving Realism from the Realists*’ (167).

For one whose contribution was so eclectic, the final portion of the book, titled ‘Fleece on the Hedges’ is a fitting finish - here one finds the flotsam of a mind ever in contemplation, that had been collected in a file bearing the name of the title of the chapter. Some personal favourites include ‘A plea for Civility as Essential to the Success of South Africa’s Democracy’ (370), characteristically entailing the identification of three essential elements for the success of this plea, and ‘The Courage to Choose and Take Moral Decisions on Principle’ (379).

I am very happy to have had the pleasure of reading this book. May many others share it.

Frank Snyckers, Johannesburg Bar 

The Commonwealth principles: Endnotes Continued from page 24

‘States should take measures to ensure that:

a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures ...

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review.’

¹³ Under the Gibraltar Constitution Order 2004: Appointment is by a Judicial and Senior Appointments Commission. In the event that the Attorney General (a public officer appointed by a Committee) is a Member of Parliament, his prosecutorial duties pass to a Director of Public Prosecutions who has like the Attorney General exclusive control over prosecutions and investigations. See also Falklands Islands Constitution (Amendment) Order 1997, Canada, Federal Accountability Act, Canada 2006; the Attorney General’s power to institute and terminate criminal proceedings is vested in him to the exclusion of any other person or authority and is not subject to the direction or control of any other person. As previously stated (footnote 11) under the UK’s Constitutional Renewal Bill 2008, the Attorney General is not to have power to terminate a criminal investigation or proceedings other than where it is necessary on grounds of national emergency.

¹⁴ **LHPVII(a)** ‘Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of public business.’

‘Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.’

Clause 14 of the Constitutional Renewal Bill 2008 (England and Wales) proposes that the Attorney General must lay before Parliament annually a report on the giving or withdrawal of any direction terminating an investigation of prosecution on grounds of national emergency and Clause 16 provides that the Attorney General must lay before Parliament a report on the exercise of his function.

LHPVII(c) ‘Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the constitution, with relevant statutes and other law, including the law relating to the principles of natural justice’ ‘The Rule of Law (not best democratic principles) requires that the courts have jurisdiction to scrutinize government actions to ensure they are lawful: Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, *Judicial Independence*, Commonwealth Law Conference, Nairobi, Kenya 2007.

¹⁵ Clause 3 of the Constitutional Renewal Bill 2008

(England and Wales) proposes that the Attorney General with the directors of public prosecutions shall prepare a protocol to be laid before Parliament of how they are to exercise their functions including the circumstances in which the Attorney General is to be consulted or provided with information.

¹⁶ See footnote 15.

¹⁷ Clause 3 of the Constitutional Renewal Bill 2008 (England and Wales) proposes that the Attorney General’s function of superintendence of the directors of public prosecutions should not include power to give a direction in relation to individual cases except in so far as is provided in Clause 12 in relation to matters of national security.

¹⁸ The Constitutional Reform Bill 2008, clauses 12-15.

¹⁹ Ibid, Clauses 15 and 15(4). The exclusion of the courts’ jurisdiction on grounds of national security was severely criticised by Lord Atkin, dissenting in *Liversidge v Anderson* [1942] AC 206, 244 (‘In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace....’). In the Commonwealth many jurisdictions, particularly in the Caribbean (A-G of *St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637) have tended to follow Lord Atkin’s judgment. Others such as Singapore (Re Ong Yew Teck) and Malaysia (*Karam Singh v Menteri Hal Ehwal Dalam Negeri* 1969) have tended to follow the majority. See also *Johnston v Chief Constable of The Royal Ulster Constabulary* [1987] 1 QB 129, 147; *Tinelly and McElduff v UK* ECHR 10 July 1998 paras 72-73; David Pannick QC *No Government should award itself unreviewable powers*; *The Times*, 3 July 2008.

In *R (Corner House Research) v Director of the Serious Office* [2008] 3 WLR 568 the House of Lords over-ruled a decision of the Administrative Court that submission to a threat was lawful only where there was no alternative course open to the decision maker and held that the Director of the Serious Fraud Office was entitled to exercise his discretion to discontinue the corruption investigation into the al-Yamamah contract between the UK and the Kingdom of Saudi Arabia involving BAE where he took the view that protecting the lives of British citizens outweighed the public interest in pursuing an investigation into an allegation of corruption. Authority made it plain that only in exceptional cases would the court disturb the decisions of an independent prosecutor and investigator.

²⁰ House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, *Reform of the Office of Attorney General*, 18th April 2008.

²¹ The Council of Europe’s Recommendation (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, section 5 f, ‘instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case,

such instructions must remain exceptional and subjected not only to requirements indicated in paragraphs d and e above but also to an appropriate specific control with a view in particular to guaranteeing transparency” (emphasis added). Any such instruction, which must be in writing and published in an adequate way, must carry, “5d, adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example: to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;- duly to explain its written instructions, especially when they deviate from the public prosecutor’s advice and to transmit them through the hierarchical channels...; 5e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received.’

The International Association of Prosecutors Statement of Standards of Professional Conduct for all prosecutors and of their essential duties and rights states in section 2 that where non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, ‘such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.’

No exception for national security cases is envisaged in either document.

²² Commonwealth Westminster constitutions appear to give the power without restriction eg Bahamas Constitution 1973 (incl 2003 Review) and Gibraltar Const 2004. The issue has been considered extensively in Australia and Canada in efforts to avoid political interference. In Canada the Federal Accountability Act 2006 passed the power to prosecute to the DPP with discretion of the Attorney to intervene, but it was thought it is unlikely ever to be exercised. If the power is exercised there must be written notice and it must be published in the Gazette. In British Columbia a special independent prosecutor can be appointed in certain cases. In some other jurisdictions, notably Ireland under the 1937 Constitution the Attorney General does not have power to stop prosecutions. The DPP is accountable to the Oireachtas through the Public Accounts Committee (see page 34, House of Commons Constitutional Affairs Committee 5th Report.).

²³ Article 2 of the European Convention on Mutual Assistance contains a similar provision, but in European States the prosecutor and investigating judge are judicial officers. 