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CONFLICTS OF INTEREST AND THE LAW OFFICERS' CONVENTION

A Policy Exchange Research Note

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Preface by Rt Hon Lord Keen of Elie KC

Forewords by Lord Faulks KC and Rt Hon Sir Robert Buckland KBE KC



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Preface

Rt Hon the Lord Keen of Elie KC, former Advocate General for Scotland

When a leading public law barrister is appointed as a Law Officer of the Crown directly from the bar, there is bound to be a risk of a conflict of interest between their role advising the government and their previous role in private practice. The most obvious of many examples would be where their advice to government might engage, directly or indirectly, the interests of a former client or an issue that they were engaged with in private practice.

As the Ministerial Code makes clear, it is the responsibility of every Minister, including the Law Officers, to address such a conflict or the perception of any such conflict. When doing so, it is of paramount importance that the Law Officers, like other Ministers, provide accurate and truthful information to Parliament. There is no reason why the Law Officers' Convention should prevent or inhibit this responsibility to Parliament.

The Law Officers' Convention applies to the question of whether or not the Law Officers have given advice to Government and what the content of that advice may have been. Even then it is not an absolute bar to disclosure.

In this Policy Exchange research note, Dr Conor Casey makes clear that the question of whether a Law Officer has encountered a conflict of interest, or whether a Law Officer has recused themselves from advising the government on a particular matter as a consequence of a conflict, is not a matter for the Law Officers' Convention. The better view is that the Ministerial Code requires such a matter to be disclosed, unless it can be shown that such a disclosure would not be in the public interest.

Forewords

Lord Faulks KC, former Minister of State, Ministry of Justice

The relationship between the Attorney General and his client, the government, is both similar and different from the normal relationship between a client and his lawyer. For example, the privilege in a normal lawyer-client relationship belongs to the client whereas, as Dr Conor Casey explains, there is some uncertainty as to whether the privilege belongs to the Attorney General or the government.

What is clear is that there is a convention whereby the government does not disclose advice received from the Attorney General nor even the fact that he has been consulted. As Sir Jonathan Jones KC (Hon), then the Director-General of the Attorney General's Office, made clear in his evidence in *Her Majesty's Treasury v Information Commissioner* [2010] QB 563– evidence cited in this note – there are good reasons for the convention's existence, even though it has been waived on a small number of occasions.

Last week, the Attorney General, Lord Hermer KC, declined to tell Parliament whether he had been consulted over the decision to abandon an appeal against a decision of the High Court of Northern Ireland that the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 was incompatible with the European Convention on Human Rights. It is unclear whether the refusal to answer questions was Lord Hermer's own decision, or that of the government.

It is at the very least arguable that, having regard to his recent involvement in litigation involving Gerry Adams, there was a conflict of interest in his advising the government whether or not to abandon the appeal, a decision of great significance to his former client. We do not know whether Lord Hermer was consulted and, if he was, whether he recused himself on the basis of such a conflict.

It seems unlikely that a decision of this gravity was not taken with the benefit of advice from the government's senior legal adviser. Whilst the detail of any such advice is plainly covered by the convention, Dr Casey convincingly points out in this Policy Exchange note that there does not appear to be any constitutional basis for the Attorney's refusal to answer whether or not he had been recused or had recused himself from involvement on a matter where he faced a possible conflict of interest.

In private practice, Lord Hermer was involved in a number of cases where his client was suing the government or a public authority. He was, of course,

entitled to do even compelled to do so under the cab rank principle. However, it is unusual for an Attorney General to have been so extensively involved in the type of litigation in which Lord Hermer specialised.

His experience in this line of work certainly provides him with valuable experience for his work as a Law Officer. But that experience does raise potential conflicts of interest. It is likely that he and the government will have to ask themselves, on a regular basis, whether or not his prior involvement in litigation precludes him from giving advice on a particular issue.

It seems to me of considerable importance that Lord Hermer should make clear whether he recused himself, or was recused, from involvement on matters concerning the Legacy Act insofar as they may have benefited his former client. There is nothing in the Law Officers' Convention that precludes his doing so.

This government rightly sets great store by the rule of law. That includes sensitivity to actual or perceived conflicts of interest. The Attorney General should clarify his position. He can do so without being in breach of any convention, and he should do so.

Rt Hon Sir Robert Buckland KBE KC, former Solicitor General and Lord Chancellor

The Law Officers play a critical role in the constitutional order of the UK. Their main function is to serve as the principal legal advisers of the government. Their advisory functions are governed by the so-called "Law Officers' Convention". This has two parts. First, the content of any legal advice given by the Law Officers cannot be disclosed outside government. Second, the fact legal advice has been sought or given by the Law Officers cannot be disclosed. I have said previously that this convention is vital to good government, allowing the government to receive full and frank legal advice in confidence. It is "part of the glue that ensures the indivisibility of collective decision making within Cabinet and Government."

The scope of this convention has become a source of controversy in recent days, with the debate focusing on whether it extends to questions about whether Lord Hermer KC, the Attorney General, considers himself to face a conflict of interest between his role advising the government and his previous role in private practice. It is important that this constitutional question is clarified in a manner that makes it possible for Parliament to carry out its scrutiny functions, but without doing damage to the convention and its underlying purpose.

In this Policy Exchange research note, Dr Casey convincingly argues that the Attorney General can, consistent with the convention and its rationale, confirm whether or not in his view he has a conflict in relation to a legal matter impacting his former client. I agree with him that the Attorney General can answer this question without confirming or denying whether the Law Officers were asked to advise or of course disclosing any advice that was given.

In response to questions about the Attorney General's possible conflict of interest in respect of the Legacy Act, HM Government issued a statement stating that any decisions concerning that Act were taken by the Northern Ireland Secretary as the responsible department. While strictly true, this statement does not of course address the controversy about whether the Attorney General, in his role, himself faced a conflict of interest in respect of this matter, so that the questions over Lord Hermer's involvement remain without an answer.

The tradition of the Law Officers is that where one has a conflict of interest in respect of a particular matter, then the other stands ready to deal with it if they should be asked to provide advice. The Law Officers Act 1997 makes it clear that the Solicitor General can discharge any function normally discharged by the Attorney General, and this can be done without formal delegation, as used to be the case.

There is no constitutional basis for Lord Hermer to refuse to answer questions posed by parliamentarians or the public about whether or not he had been recused or had recused himself from involvement in relation to a matter in which he faced a possible conflict of interest. Parliament should be told immediately whether he was excluded from decisions about legal matters that posed a possible conflict of interest in view of the interests of his former client, Gerry Adams.

Introduction

Controversy has arisen this past week about whether the Attorney General has had a conflict of interest stemming from the government's decision to abandon parts of an appeal and bring forth remedial legislation that may benefit his former client, Mr Gerry Adams. Other questions about possible conflicts of interest have also been raised.

This controversy gives rise to questions about the scope of the Law Officers' convention against disclosing the fact that legal advice has been given or not given to government. A key question for many parliamentarians and commentators is what the scope of the convention is, and whether the convention can be invoked by the Attorney General to decline to answer questions put to them about whether they have recused themselves from dealing with matters that might impact former clients.

This note aims to provide clarity on the constitutional matters relevant to this controversy. It details the scope and rationale of the Law Officers' convention against disclosing the fact that legal advice has been given or not given to government. It then clarifies that the scope of the convention does not extend to asking and answering questions about whether the Law Officers feel able to advise on an issue that might benefit a recent client or if they feel conflicted about advising on a particular issue.

Law Officers' Convention

The Law Officers are the government's chief legal advisors. They include the Attorney General for England and Wales (who also occupies the role of Advocate General of Northern Ireland), the Solicitor General for England and Wales, and the Advocate General for Scotland (who advises the UK government on Scots law). Initially the Attorney General was the Sovereign's personal lawyer, an eminent counsel expected to fiercely represent their interests and defend their prerogatives in legal proceedings and provide advice where requested. Over time, as the effective exercise of executive authority shifted to the government, the Attorney General stopped acting as a personal lawyer to the Sovereign and became a salaried minister of the Crown whose work focused exclusively on government business in the courts and Parliament.

Today, the main function of the Attorney General and other Law Officers is to serve as legal advisors to the Crown via His Majesty's Prime Minister and government. The Law Officers are, by convention, members of government but not members of cabinet. Traditionally, Attorneys General attended cabinet meetings on request as a need for advice arose. However, recent Attorneys General have reported that there is now an expectation that the Attorney General will regularly attend cabinet meetings. The Law Officers handle only a very small fraction of legal questions concerning the government, namely the most difficult, pressing, and politically important ones.

The advisory work of the Law Officers is governed by several constitutional conventions. One of the most important is the "Law Officers' Convention", the core of which is that neither the fact that the Law Officers have advised (or not advised) nor the content of their advice can be disclosed outside government.¹ The convention, then, has two parts. The first is that the substance of the legal advice given to government cannot be disclosed. The second is that the *fact* that the Law Officers have advised or not advised on a certain issue cannot be disclosed.

¹ This convention has been acknowledged and outlined in documents like The Ministerial Code (i.e. the Ministerial Code of the UK Government), the Cabinet Manual and Erskine May.

The rationale behind both parts of the convention is to enable the government to obtain frank and full legal advice in confidence. In *Her Majesty's Treasury v Information Commissioner* [2010] QB 563, the Court was presented with a witness statement from Mr Jonathan Jones,² then director and head of the Attorney General's Office, that outlined what the office took to be the underlying point of the convention against disclosing the fact that legal advice has been given. The relevant parts of the statement provided that:

"46.to disclose, other than exceptional cases, whether the Law Officers have advised or not...could lead to their advice being sought for the wrong reasons (for example, in order to provide a minister or department with political 'cover', rather than because of the nature of the issue itself): this in turn would risk unduly politicising the role of the law officers and lead to their being held responsible for essentially political decisions. On the other hand it could lead to the Law Officers' advice not being sought (e.g. because of the fear this would imply that a department was uncertain about the strength of its legal position and possibly invite legal challenge), even though this would be justified by the issue in question.

47. I consider such consequences would risk seriously undermining the processes by which the government obtains legal advice, and in particular the Law Officers' role as the government's chief legal advisers. This would, in my view, be inimical to the public interest in good governance and the maintenance of the rule of law within government, which the convention against disclosure against Law Officers' advice is designed to protect."

In a recent essay on the convention in the *Modern Law Review*, Mitchell and Stockdale understand the justificatory rationale of the convention in similar terms. They note that with:

"Law Officers' advice being a scarce resource, requiring disclosure of whether or not Law Officer advice was provided would distort the process via which that scarce resource is allocated. Government might have political reasons for patently instructing Law Officers even though the issues to be resolved do not

² Now Sir Jonathan Jones KC (Hon).

justify this or might decline to instruct where appropriate to do so if instructing Law Officers might be seen as a sign of weakness.”³

The convention is not absolute, and can be waived for compelling reasons. There is some debate about who is entitled to waive it. The Ministerial Code⁴ and Cabinet Manual⁵ record the convention as requiring the consent of the Law Officer in question. In contrast, *Erskine May*⁶ and J LJ Edward’s classic work *The Law Officers of the Crown* suggest ministerial consent is sufficient to waive it.⁷ But what is clear is that the convention *can* be waived.

The convention has been waived quite frequently in recent years, often in response to political pressure. For example, the fact the Attorney General has provided legal advice has been disclosed in respect of matters like the legality of the Iraq war,⁸ drone strikes against British citizens fighting for Islamic State,⁹ use of armed force against Syrian government forces,¹⁰ the legal effects of the Northern Irish backstop contained in then Prime Minister Theresa May’s Withdrawal Agreement,¹¹ and the legality of the Internal Market Bill.¹²

³ Rebecca Mitchell and Andrew Stockdale, ‘A Privileged and Conventional Relationship: Legal Professional Privilege and the Law Officers’ Convention’ (2024) 87 *Modern Law Review* 111, 124.

⁴ HM Government, ‘Ministerial Code’ (November 2024), para 5.14. The passage reads: ‘The fact that the Law Officers have advised or have not advised, and the content of their advice must not be disclosed outside Government without their authority’. [Ministerial Code - GOV.UK](#)

⁵ HM Government, ‘Cabinet Manual’, (2010) para 6.9, [Cabinet Manual - GOV.UK](#).

⁶ Erskine May (2025), para 21.27. The passage reads: “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, the Speaker has ruled that the rules of the House are in no way involved.”

⁷ J LJ Edwards, *Law Officers of the Crown* (Sweet & Maxwell, 1964) 259-260.

⁸ [Iraq inquiry publishes legal advice to Blair on war - BBC News](#)

⁹ [Jeremy Wright QC: The man who advised David Cameron on the legality of Syria drone strikes | The Independent | The Independent](#)

¹⁰ [Syria - Hansard - UK Parliament](#)

¹¹ [Exiting the EU: Publication of Legal Advice - GOV.UK](#)

¹² [committees.parliament.uk/publications/2625/documents/26207/default/](#)

The Limits of the Convention

This week has seen debate about whether there is a conflict of interest in the Attorney General being involved in two separate legal matters that could impact on the affairs of his former client Mr Gerry Adams. These include the decision of HM Government to abandon its appeal in respect of a declaration of incompatibility issued by the High Court of Northern Ireland against sections 46 and 47 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, and the Secretary of State for Northern Ireland's decision to bring in a proposed Remedial Order to repeal those sections. Key to this debate is a constitutional question: can the Attorney General rely on the Law Officers' convention to decline to answer questions about whether he has recused himself in respect of matters that could impact former clients? Some of the lines of questioning advanced this week clearly come within the scope of the Convention, and the Attorney General is entitled to decline to answer them (but remains free to waive the convention with the consent of the government).

On Wednesday 15th January 2025, the Attorney General and Solicitor General appeared before the Justice Select Committee. During the proceedings, Sir Ashley Fox MP asked several questions about the decision of the government to pursue repeal of section 46 and 47 of the Troubles Act 2023. One effect of these provisions is that they prevent actions being brought by figures like Adams for damages for unlawful imprisonment and claims for compensation for wrongful conviction. Repeal of the provisions by remedial order, which is what the government is proposing to do, would enable such cases to continue.

Sir Ashley asked the Attorney General whether he had “advised on” the “repeal of section 46 and 47 of the Northern Ireland Troubles Act”.¹³ The Attorney General declined to answer by reference to the Law Officer's convention, stating that the “law officers' convention, which is enshrined in the ministerial code, precludes any minister from saying whether the law officers have been asked to advise on any given issue, let alone what we have advised.”¹⁴ Several newspaper articles similarly called for the Attorney General to confirm whether they provided legal advice in respect of these sections. This kind of question – which explicitly asks whether advice had been given on a particular issue – is, however,

¹³ Justice Select Committee, 15th January 2024.

¹⁴ Ibid.

caught squarely within the scope of the convention, and the Attorney General was entitled to rely on it. The Attorney General could waive the convention with the consent of the government, if they considered there were good reasons in the public interest to do so, but they are not obliged to.

Other questions that have been advanced by parliamentarians do not, however, come within the scope of the convention. There is clearly no constitutional block on the Attorney General or government responding to the questions, nor does it threaten the force and rationale of the convention to pose them. On the same day Attorney General was before the Justice Select Committee, the Shadow Justice Secretary Robert Jenrick MP criticized the fact the Attorney General had not clarified “whether he recused himself from decisions which may benefit his former client.”¹⁵ In a similar vein, on 17th January Lord Caine tabled a written question in the House of Lords asking “whether it is the policy of the Advocate General for Northern Ireland [the Attorney General] to recuse himself from discussions of any issue in Northern Ireland which may directly or indirectly involve any of his former clients.”¹⁶ On the same day, Janet Eastham in the *Telegraph* wrote that “Lord Hermer is facing mounting pressure over his work as a barrister and accusations of conflicts of interest with his current role” and that the criticism is linked to his refusal to “declare whether or not he recused himself from advising ministers on issues relating to his former clients”.¹⁷

In response to these questions, on 17th January a spokesperson for the Prime Minister said that there is an “established and rigorous system in place within the Attorney General’s office” to ensure that “law officers will not be consulted on any cases that could give rise to a potential conflict of interest”.¹⁸ This response did not, however, directly respond to the questions posed, which ask whether the Attorney *in fact* considers himself to be conflicted in respect of matters that may benefit his former client.

In contrast to the questions asked at the Justice Committee, these kinds of questions would not seem to engage the Law Officers’ convention. Asking the Attorney General if he would be *able* to advise on an issue that might impact a

¹⁵ [The Attorney General has serious questions to answer on Gerry Adams](#)

¹⁶ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

¹⁷ [Attorney General fought Home Office to help migrants stay in UK](#)

¹⁸ ["https://www.telegraph.co.uk/news/2025/01/17/hilary-benn-gerry-adams-compensation-decision-troubles-no10/"](https://www.telegraph.co.uk/news/2025/01/17/hilary-benn-gerry-adams-compensation-decision-troubles-no10/) Hilary Benn was behind Gerry Adams compensation decision, says No 10

recent former client and as such possibly involve a conflict of interest, is distinct from asking whether legal advice has *in fact* been sought or given. Asking and answering the former question would not contravene the convention, nor would asking the Attorney General specifically if they were conflicted about advising on a particular topic and have taken steps to recuse themselves. This kind of question, too, is not the same as asking if legal advice on a given issue has *in fact* been given or not.

That such questions would fall outside the scope of the convention makes sense having regard to its rationale, as discussed above. For the Attorney General to confirm they were conflicted on a particular issue would not inhibit the government from feeling it can obtain frank and full legal advice in confidence by, for instance, inviting speculation on the whether a “*department was uncertain about the strength of its legal position and possibly invite legal challenge*” by feeling it needed the advice of the Law Officers. Confirming that one might be conflicted in respect of a certain matter does not, and need not, involve disclosing whether advice has been sought by government from the Law Officers, nor which of the Law Officers might have or have not provided advice in respect of a particular question.

Constitutionally speaking then, the bottom line is that parliamentarians are entitled to ask, and the Attorney General is free to answer, questions about whether he would feel *able* to advise on an issue that might impact a recent client or if he feels *conflicted* about advising on a particular issue. The Law Officers’ convention does not provide grounds for the Attorney General to refuse to answer a question about whether he takes himself to face a conflict of interest.