Report

# Risk Management

## *Government Lawyers and the Provision of Legal Advice within Whitehall*

Dr Ben Yong

THE CONSTITUTION SOCIETY

UCL The Constitution Unit

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# About the Author

Dr Ben Yong is a Lecturer in Public Law at Queen Mary University of London. Prior to joining Queen Mary, Dr Yong worked at the Ministry of Justice on the UK Cabinet Manual. He then worked as a research associate at the Constitution Unit, University College London, between 2010 and 2013. He was involved in several projects, leading on the Ministers from outside Parliament project and the Government Lawyers project; and co-led the projects on Coalition Government and Special Advisers. Dr Yong was also a teaching fellow in public law in UCL's Faculty of Law. He remains an honorary research fellow at UCL's Constitution Unit.

He has a BA, LLB (Hons) and LLM from Victoria University of Wellington, New Zealand; and a PhD in law from LSE. Dr Yong's interest lies in executive government, the civil service and non-judicial constitutional actors. He is currently writing a book with Professor Robert Hazell on special advisers, asking who they are, what they do and how can they be made more effective and more accountable.

# Executive Summary

1. Government lawyers are a powerful and influential group within Whitehall; and as such they deserve greater understanding. They have always played an important role in policy and practice within central government; that role has increased over recent years reflecting in particular the greater scope and complexity of law.
2. The dominant basis for the provision of legal advice within Whitehall remains departmental, although there is some shared service provision – primarily of litigation services through the Treasury Solicitor's Department (TSol). The current focus on departmental legal teams means the structures, relationships between clients and lawyers, the scope and approach to legal advice varies across Whitehall.
3. There are currently plans to extend the shared service model to more legal advice and litigation services. This is largely driven by efficiency considerations – efficiency here meaning the efficient allocation of resources or manpower. It is as yet unclear what impact this will have on the Government Legal Service (GLS). Many of the issues that arise when determining the appropriate organisational structures for the provision of legal advice mirror issues that face Whitehall generally: eg., the tension between departmentalism and joined-up government; the tension between specialists and generalists.
4. Although not all government lawyers are members of the GLS, most litigators and advice lawyers are. The

GLS has played a key role in maintaining standards through coordinated recruitment, training and sharing of information (eg., LION, the Legal Service's intranet), ensuring greater consistency and coherence, and arguably giving lawyers some 'clout' within Whitehall.

5. There are a number of sources of legal advice for clients within Whitehall. For instance, the Cabinet Secretary may call upon the advice of the Treasury Solicitor, the Attorney General, Parliamentary Counsel, Cabinet Office legal advisers and outside counsel. The client's choice may depend on a number of factors including the nature of the issue, and who has responsibility for that area of law, experience and expertise, personal relationships, proximity and availability.

6. There is a formal hierarchy of legal advice. The legal advice of the Law Officers on politically and legally significant issues is understood by the legal community within Whitehall as final and determinative. But below the Law Officers, there are a number of intermediary actors and bodies within the government machinery who may be consulted, and whose advice may in practice be determinative of a particular issue. That may often depend on the nature of the issue; the availability and capacity of all actors within the system; and the experience and expertise of those giving advice.

7. There are various means and mechanisms of ensuring some consistency and coherence in legal advice across Whitehall. The Law Officers have the primary role in this in exercising their function as the final arbiters on legal issues within Whitehall. But there are also a number of formal and informal groups which exist to share

experience and in some cases coordinate the government's approach (eg., European law, FOI).

8. The line between law and policy is blurring. This needs to be investigated further, but there appears to have been two gradual changes in the way legal advice has been provided within Whitehall over the past 30-odd years. The first relates to lawyers' involvement in the policy process; the second relates to how legal advice is given. These changes – which are interrelated – became increasingly dominant in the 1990s.

9. In the past government lawyers tended to enter into the policy process at a later stage; often at a point when the policy was fairly well-formed. They are now much more likely to enter the policy making process at an earlier stage; often in the very initial stages of policy formation.

10. There are a number of possible reasons for this. A key reason is the increasing number of ways in which law impacts upon, and is inextricably bound up with, policy (eg., FOI, judicial review, HRA, EU law). But it is also because of technology (email); a more proactive approach from government lawyers; and perhaps most worrying, an apparent decline in the legal literacy and/or policy capacity amongst administrators, putting pressure on lawyers.

11. Arguably, there is also a difference in the nature of the advice given. Previously lawyers tended to give advice in the nature of a quasi-'judgment'. Now, government lawyers give far fewer 'judgments' and increasingly favour calculations of legal risk.

12. That change is partly because government lawyers enter the policy process at an earlier stage, and thus they may have more scope to influence and debate, and

their advice will correspondingly take a different, more contingent form. It is also a recognition that risk cannot be entirely eliminated and is inevitable; and because of the greater complexity of 'the law' itself (HRA, EU law, judicial review), whose impact cannot be predicted with sufficient certainty.

13. Civil service reform and the relatively high rate of turnover amongst the senior civil service means that government lawyers now often act as a key repository of institutional memory for Whitehall.

14. Government lawyers do not see any tension or conflict between the requirements of the civil service code of conduct and their professional codes. In practice conflict is avoided by talking matters through or seeking alternatives with less legal risk attached. Where government lawyers did feel under pressure, there was a set of clear procedures in place in Whitehall.

15. Government lawyers do take into account different considerations to private sector lawyers in providing legal advice to government. These considerations included legal frameworks (such as European law, the HRA, judicial review), conventions (such as relationships with Parliament, and the courts) to the non-legal (questions of propriety and prudence). They cannot simply examine the immediate case at hand and engage in a cost-benefit analysis; they must take a more complex, more strategic approach, thinking about the public sector context – for example, the appropriate role of the state as a repeat player in the litigation process and the use of its resources; the broader impact that government action might have on a wider set of individuals and groups.

16. This project has been about the provision of *legal* advice. Government lawyers are both lawyers *and* officials, but ministers, confronted with a pressing issue, do not necessarily make that distinction. Government lawyers, by virtue of their status as officials, may be asked for *advice* rather than *legal* advice. And so their responses will be informed by the context of the issue, which will have both legal and non-legal elements.

17. The use of force against Iraq, and the debates within Whitehall over its legality, may be exceptional, but it does raise in sharp relief some issues covered in this report. Law is seldom black and white, and government lawyers advise about legal risks rather than in straight yes/no terms. FCO Legal Advisers generated the initial legal advice, but recognised that authoritative legal advice could come only from the Attorney General. That advice was not sought until late in the day, possibly because the Prime Minister feared it would not support his chosen course of action. The Attorney General came under intense pressure to modify his advice, and his second legal opinion of 17 March 2003 was expressed in stronger and clearer terms than his more detailed and nuanced advice of 7 March 2003.

18. Iraq also highlights the need for ministers to retain confidence in their legal advisers, so that they are willing to seek legal advice when they need it. This is the argument generally advanced for the Law Officers to be government ministers rather than 'independent' lawyers: ministers will be more likely to seek legal advice, and to accept the advice which is given if it comes from fellow ministers. But with Iraq the PM delayed asking until it was too late to change course. This does not necessarily undermine the argument for the Attorney being a member of the government; if he

had been an independent lawyer at one remove, it seems even *less* likely that the PM would have approached him for early legal advice.

19. This study has focused on the provision of legal advice, but less on its reception – what 'clients' (ministers and administrators) make of advice. Any further study must take this question seriously. Government lawyers have a responsibility to give clear advice, assessing the risks of different courses of action. But they must also answer the 'so what' question for their clients: if lawyers raise the issue of a potential legal challenge, they must explain what are the consequences are – will the Government lose, and if they do, does it matter? Equally, the recipients of that advice have a responsibility to understand and apply it intelligently; and they too must ask and answer the 'so what' question. We do not know to what extent advice about legal risk is in fact understood by the clients of government lawyers. Partly this is about legal literacy; but it is also about how legal advice is provided and transmitted.

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- Peter Waller, another retired senior civil servant and honorary research associate at the Constitution Unit, who provided often needed advice and commentary;
- All those individuals who agreed to be interviewed on the basis of anonymity.

Of course, the normal disclaimer applies: any mistakes are my own.

# Abbreviations

| Abbreviation | Full Title |
|---|---|
| **AGO** | Attorney General's Office |
| **BIS** | Department for Business, Innovation & Skills |
| **CAD** | Central Advisory Division |
| **CO** | Cabinet Office |
| **COCAD** | Cabinet Office Central Advisory Division |
| **COELA** | Cabinet Office European Legal Advisers |
| **COLA** | Cabinet Office Legal Advisers |
| **CPS** | The Crown Prosecution Service |
| **DCA** | Department of Constitutional Affairs |
| **DCLG** | Department for Communities and Local Government |
| **DCMS** | Department for Culture, Media & Sport |
| **DECC** | Department of Energy & Climate Change |
| **Defra** | Department for Environment, Food and Rural Affairs |
| **DfE** | Department for Education |
| **DfID** | Department for International Development |
| **DFT** | Department for Transport |
| **DH** | Department of Health |
| **DWP** | Department for Work and Pensions |
| **FCO** | Foreign and Commonwealth Office |

| | |
|---|---|
| **FOI** | Freedom of Information |
| **GLS** | Government Legal Service |
| **GLSS** | Government Legal Service for Scotland |
| **HMCPSI** | Her Majesty's Crown Prosecution Service Inspectorate |
| **HMRC** | Her Majesty's Revenue and Customs |
| **HMT** | HM Treasury |
| **HO** | Home Office |
| **HRA** | Human Rights Act |
| **LPP** | Legal Professional Privilege |
| **LSLO** | Legal Secretariat to the Law Officers |
| **MOD** | Ministry of Defence |
| **MOJ** | Ministry of Justice |
| **NIO** | Northern Ireland Office |
| **OAG** | Office of the Advocate General for Scotland |
| **OPC** | Office of Parliamentary Counsel |
| **SFO** | Serious Fraud Office |
| **SO** | Scotland Office |
| **TSol** | Treasury Solicitor's Department |
| **WO** | Wales Office |

# 1. Introduction

## Context

1.1 Recent years have seen an increase in the 'legalisation' of British government. There have growing clashes between government policy and the law, with the continuing rise of judicial review; the incursion of EU and international law; the impact of the Human Rights Act (HRA); and of devolution, and Freedom of Information (FOI).

1.2 Some figures may illustrate the growing importance (or at least impact) of the law on the state. The number of applications for judicial review has risen by 20 times over the last 30 years: from 491 in 1980 to 4200 in 2000, to 11200 in 2011.[1] The volume of UK legislation has also increased over time: between 1980 and 2009, the number of pages of legislation (both statutes and statutory instruments)

1 'Applications for Judicial Review Data' available from Christopher Hood and Ruth Dixon's 'Reshaping Executive Government' website: http://xgov.politics.ox.ac.uk/index.php/publications-and-datasets.html.

increased from 7550 pages to 15272 pages.[2] That should be coupled with an ever-growing framework of European Union law (directives, regulations, and case law), which the UK government must comply with, or at least are expected to be cognisant of;[3] as well as claims under the Human Rights Act 1998. Finally, there are Freedom of Information (FOI) issues, brought about by the Freedom of Information Act 2000: the number of FOI requests to Whitehall departments rose from 38000 in 2005 to 47000 in 2011.[4]

1.3 So the reach of law into government over recent decades has intensified; and with it has come a growing demand for legal advice and legislative drafting within Whitehall. Yet in determining the legal scope of executive action, commentators and legal academics have mostly concerned themselves with the role of the courts. After all, it is the courts who say what 'the law' is and determine compliance. More recently there has been interest in how Parliament

2 Note that choosing an appropriate measure to compare changes in the volume of legislation is difficult, because numbers may disguise change. For instance, in 1980, 68 statutes and 2051 statutory instruments were enacted; whereas in 2009 27 statutes and 3,468 statutory instruments were enacted. But this ignores, for instance, changes in context, such as the devolution of power to Scotland, Wales and Northern Ireland. More obviously using the number of primary acts and secondary statutory instruments passed ignores quantitative changes in legislation passed. Hence, the number of pages of legislation may be a more appropriate measure: 'Commons Library Standard Note: Acts and Statutory Instruments: Volume of UK legislation 1950 to 2012' (2012), www.parliament.uk/briefing-papers/SN02911; see also Cabinet Office, *When Laws Become Too Complex* (2013).

3 See 'Commons Library Research Paper: How much legislation comes from Europe?' (2010), at: www.parliament.uk/briefing-papers/RP10-62; and 'Commons Library Standard Note: How the UK Government deals with EU Business' (2012) at: www.parliament.uk/briefing-papers/SN06323

4 Ministry of Justice 'Statistics on implementation in central government', available at: www.justice.gov.uk/statistics/foi/implementation/implementation-editions in the series. I am grateful to Dr Ben Worthy for this information.

scrutinises the legality and constitutionality of executive action and of legislative proposals, particularly in the work of the Joint Committee on Human Rights, the Lords Constitution Committee and Delegated Powers Committee.[5]

1.4 But government lawyers also have a significant role in determining the scope of government action. Most of the work of the Executive never reaches the courts and relies on the advice given by government lawyers, such that it is in effect a form of 'law' – as the legal realist Karl Llewellyn once said, '*What officials* do about disputes is … the *law* itself'.[6] In that context, the advice of government lawyers can have far greater impact on what governments decide to do – or decide not to do – than anything the courts might decide. In short, focusing on how the conduct of the Executive is scrutinised by external actors ignores how the Executive regulates itself internally.[7] For that we need to understand what government lawyers do, and how their advice impacts on the conduct of the Executive.

1.5 Government lawyers are civil servants with a professional legal qualification. They may give advice on policy and legislation: individual casework; operational matters and implementation; and their expertise covers international, EU, military as well as domestic law. A key role of government lawyers is to help ministers ensure that they do comply with the overarching duty to act in accordance

5 Robert Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] Public Law 495 Alex Horne, Gavin Drewry and Dawn Oliver, *Parliament and the Law* (Hart Publishing 2013)

6 Karl Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* (Columbia University School of Law 1930).

7 Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999).

with the law. Ministers may not be lawyers or may not be familiar with the detail of the law in a particular area; or because the law is not black and white in all areas but may be a matter of judgment, case law and interpretation.

1.6 We know relatively little about when, why and how government lawyers are consulted; how legal advice is given, on what issues, and to what extent legal advice impacts upon the decisions of government (for instance, do ministers always accept the advice of government lawyers?). Having the government as their sole client may mean that government lawyers may take into account different considerations from lawyers in the private sector in giving legal advice and in thinking about legality. For instance, their one client is *the* repeat player in litigation: that may mean taking special care to retain the trust of the courts; but it also allows for the careful selection of which cases to fight in order to shape the law. And if litigation is unsuccessful, government lawyers can often advise legislation to reverse the defeat in the courts.

1.7 This small project is an attempt to examine one aspect of the work of government lawyers: the provision of legal advice. In the UK, legal advice is primarily provided by those in the Government Legal Service (GLS). This is the largest and most influential professional grouping within Whitehall – which now numbers close to 2000. The provision of legal advice remains fundamentally departmental: most GLS lawyers work in individual Whitehall departments, but many are brought together in the Treasury Solicitors' Department (TSol). At least two small groups of government lawyers have separate institutional status: those in the Office of Parliamentary Counsel, and the Legal

Advisers in the Foreign Office. There is a hierarchy of legal advice, rising from the departments and agencies to the Law Officers at the apex. These fragmented institutional arrangements have been subject to numerous changes in the past 30 years (including a shift emphasising delivery over policy formation). They are currently being streamlined. The Coalition Government has begun to cut civil service numbers, creating a smaller, 'leaner' civil service. There is now a push for 'shared services' – of which the provision of legal advice, through TSol, is to be a pilot study (see chapter 2).

1.8 There has been no systematic across-government review of how legal advice is provided within Whitehall since Sir Robert Andrew's 1989 *Review of Government Legal Services*.[8] Moreover, there have been surprisingly few academic studies on the provision of legal advice within Whitehall.[9] The most authoritative work remains that of Professors Daintith and Page.[10] Their work was written 15 years ago as devolution was just under way; the HRA and FOI had not come into force; and the transformation of the office of Lord Chancellor and his department had not yet taken place. Other works are case studies of particular

8 Sir Robert Andrew, *Review of Government Legal Services* (1989).

9 See, for instance, Gavin Drewry, 'Lawyers in the UK Civil Service' (1981) 59 Public Administration; JLJ Edwards, *The Attorney General, Politics and Public Interest* (Sweet & Maxwell 1984); Edward Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-making* (Hart 2001). There was also an ESRC funded project 'Government Lawyers: Expertise, Involvement and Professionalism' led by Professor Philip Lewis, which ran from 2001-3, but appears to have produced only one output (Lewis P, 'Aspects of Professionalism: Constructing the Lawyer-Client Relationship' in The Paradox of Professionalism: Lawyers and the Possibility of Justice (2012)). See http://www.esrc.ac.uk/my-esrc/grants/R000239565/read

10 Daintith and Page.

groups of government lawyers, such as Parliamentary Counsel[11] and Foreign Office lawyers;[12] and there is now a large literature on the legal ethics of government lawyers,[13] particularly following the 'War on Terror' and the publication of the 'torture memos'.[14]

1.9 In short, the internal and external environments of Whitehall has changed significantly, but there has been no recent evaluation of how these changes have affected Whitehall's capacity to provide legal advice to Ministers. Further, the majority of studies focus on particular groups of lawyers; or particular aspects of their work – in particular, professional ethics. Thus, this study is an attempt to give an updated overview of the provision of legal advice within Whitehall.

11 Edward Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis' [2009] Public Law 790.

12 Stephen Bouwhuis, 'The Role of an International Legal Adviser to Government' (2012) 61 International & Comparative Law Quarterly 939 Michael Scharf and Paul Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press 2010) Frank Berman, 'The Role of the International Lawyer in the Making of Foreign Policy' in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (British Institute of International and Comparative Law 2000) Harold Koh, 'The State Department's Legal Adviser's Office: Eight Decades in Peace and War' (2012) 100 Georgetown Law Journal 1747 United Nations Office of Legal Affairs, *Collection of Essays by Legal Advisers of States: Legal Advisors of International Organizations and Practitioners in the Field of International Law* (United Nations Publications 1999).

13 See for instance Allan Hutchinson, "In the Public Interest': The Responsibilities and Rights of Government Lawyers' (2008) 46 Osgoode Hall Law Journal 105 Adam Dodek, 'Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law' (2010) 33 Dalhousie Law Journal 1.

14 See, for instance Kathleen Clark, 'Ethical Issues Raised by the OLC Torture Memorandum' (2005) 1 Journal of National Security Law 455 W Bradley Wendel, 'Legal Ethics and the Separation of Law and Morals' (2005) 91 Cornell L Rev 67 David Luban, 'The Torture Lawyers of Washington' in *Legal Ethics and Human Dignity* (Cambridge University Press 2007) Harold Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas 2009).

## Research Questions

1.10 Given the increasing penetration of law into government, and the changes within Whitehall over recent decades, we ask three questions in this study:

a. What are the current institutional arrangements of the government legal service at Whitehall, and how has this changed since 1989? Are lawyers more integral to policy making, with the growth of judicial review, and the Human Rights Act?

b. What is the hierarchy of legal advice in Whitehall? How are differences of legal opinion resolved between departments; and between departments and the centre?

c. To what extent do lawyers in government see themselves as different from A. other civil servants or B. lawyers in the private sector? Do they see themselves as having additional ethical duties because of their particular profession, knowledge and skills?

## Methodology

1.11 For the purposes of this initial study, 'government lawyers' refers generally to those working within Whitehall whose job specification requires a qualified lawyer (that is, we are not looking at those officials in Whitehall who may have been legally trained but currently operate as administrators), and who provide legal advice (rather than say, those who prosecute and litigate). In this group we also include 'outside counsel': independent barristers instructed by the government to provide legal advice in certain circumstance (see chapter 4). In relation to legal

advice, we recognise, however, that policy making and litigation cannot be easily separated: legal advice is often advice about the risk and likely outcomes of litigation. 'Administrators' in this report refers to those civil servants who are not employed for their legal expertise – 'non-lawyer officials'.

1.12 We only looked at those government lawyers employed in the key line and central departments in Whitehall. That means we looked mostly at departmental legal teams (which includes such departments as BIS, the Home Office and the Foreign Office), and those in 'the centre' of government (such as Cabinet Office and the Office of Parliamentary Counsel).

1.13 This was a three month project, and so we were limited in what we were able to do. We carried out a literature review, from which we drew a series of research and later interview questions. We were able to interview 19 people in total: see Table 1.1. The purpose of the interviews was to gather information: the small sample size does not permit statistical conclusions and so we have not attempted to draw conclusions of this kind. We interviewed 13 government lawyers, half of whom had since moved on, half of whom were still working in government. All had worked in or for line departments; most had worked for a spell in a central department such as Cabinet Office, TSol or the Attorney General's Office. All were or had been members of the Senior Civil Service. The remaining interviewees included five administrators, or 'non-lawyer officials' (including three from TSol); and one former minister. Our interviewees had either contacted us when the Constitution Unit announced it was doing a small study of government lawyers; or they were suggested by

members of the Constitution Unit. We were also given the support of the Treasury Solicitor, Sir Paul Jenkins, who had shown an early interest in the project.

**Table 1.1: interviewees**

| Interviewees | No |
|---|---|
| Government lawyers | 13 |
| Administrators | 5 |
| Ministers | 1 |
| Total | 19 |

1.14 The interviews were semi-structured, with a standard set of questions for each group: government lawyer; administrator; and minister. In some of the later interviews, a copy of the interim findings was also sent to interviewees for them to comment on. Interviews were usually an hour in length, and conducted on the basis that the conversation was to be anonymised and everything said non-attributable. Dr Ben Yong carried out the majority of the interviews, with support from Hilary Jackson, a retired senior civil servant who had been (amongst other roles) Director of Corporate Strategy at TSol and Head of the Northern Ireland Office, and now honorary fellow at the Unit.

1.15 A private seminar was held on 15 March jointly with the Bingham Centre for the Rule of Law to discuss some of the interim findings. Attendees included a small number of retired and current government lawyers; Robert Hazell and Ben Yong from the Constitution Unit; Sir Jeffrey Jowell, Justine Stefanelli and Lucy Moxham from the

Bingham Centre for the Rule of Law; and Nat Le Roux from the Constitution Society.

# 2. 'Untidy and Piecemeal': The Organisation of Legal Services within Whitehall

## Introduction

2.1 Who provides legal advice within Whitehall, and how this organised? Daintith and Page's comment in 1999 that the 'first thing the enquirer notices about the structure of government legal services is how untidy and piecemeal it appears' remains as true now as it was then.[15] The growth and organisation of legal services mirrors and parallels the growth and organisation of Whitehall itself. Whitehall has often been likened to a federation of fiefdoms – that is, a set of departments, with a weak centre (No 10 and the Cabinet Office) which has struggled to ensure a joined up approach to government. In a similar way, the provision of legal advice in Whitehall has always been fundamentally departmental, although there have been various attempts – some ad hoc, some more systematic – over the years to share services and create mechanisms for greater cooperation and coordination.[16]

2.2 In this short study we are only examining the provision of legal advice within Whitehall. Thus, we are only looking at those government lawyers working in key line

15 Daintith and Page, 214.

16 Ibid.

departments or at the centre of the UK government, and broadly at those operating in England and Wales. That is an admixture of ministers (the Law Officers), government lawyers from the Government Legal Service (such as those in line departments such as BIS and the Home Office) and some smaller groups who sit outside it, but nevertheless are significant in providing legal advice in Whitehall: in particular, the legal advisers to the Foreign Office and Parliamentary Counsel. Finally, because we are only examining the provision of legal advice, we exclude the various actors and bodies which have litigation and/or prosecuting functions (such as the Serious Fraud Office and the Crown Prosecution Service).

## A Brief Historical Overview

2.3 The tension between centralisation and departmentalism is a perennial one that has marked reviews of the organisation of legal services since the nineteenth century. The Treasury Solicitor's Department (TSol) was already acting for most of the departments in some areas of the law by the nineteenth century, but various reviews were careful to ensure departmental control over legal advice.

2.4 There was a compelling logic to departmental control: since it was departments that were ultimately responsible for accepting legal advice, it made sense that they chose and retained control over the lawyers giving that advice. Lawyers from outside the department might lack understanding or give insufficient weight to departmental values and priorities. That meant, however, that the provision of legal advice and in particular responsibility for legal advice was fragmented across Whitehall as departments rose and fell,

and as remits shifted, shrunk or expanded. It has meant that Whitehall differs from those governments which have a unified legal service, which arguably may provide greater consistency and clarity in terms of the advice given and responsibility for that advice.

2.5 The most recent report on the provision of legal services within Whitehall was chaired by Sir Robert Andrew in 1987.[17] That report had recommended greater consolidation and simplification: in particular, ministerial responsibility for the main 'law' departments had long been obscure; and there was concern at the time about recruitment and retention of government lawyers. Andrew recommended that the key legal departments would be merged under an enlarged Law Officers' Department, with the Attorney General as the minister responsible. Lawyers in other departments would remain independent. Andrew also recommended that the Government Legal Service (GLS) become more formalised, dealing with personnel management across the Service, with the Treasury Solicitor (permanent secretary of TSol) as head of the GLS.

2.6 Andrew's recommendations, then, were aimed at clarifying the relationships between ministers and key legal departments; and providing a more centralised structure for recruitment and career development. The Treasury Solicitor did become head of the GLS, with the Lawyers' Management Unit (which became the GLS Secretariat in 1997) set up to assist the Treasury Solicitor in that role. However, TSol was not merged into a broader Law Officers' Department; it became an executive agency

17 Andrew.

in 1996.[18] The Law Officers were given ministerial oversight for a number of legal departments and agencies (see 'the Law Officers' Departments' below). Yet the principle that departments were in control of their legal staff and functions remained.

2.7 Thus, government lawyers remain responsible for the advice that they give to ministers; and the minister is responsible for the decision he or she takes in the light of that advice. This principle of responsibility remains the same, even where the lawyers providing advice come from another department, such as TSol. Thus, if a lawyer from TSol gives advice to the Secretary of State in Defra, then the Defra Secretary is responsible for the decisions he or she takes in light of that advice.

## The Key Providers of Legal Advice within Whitehall

### *The Government Legal Service (GLS)*

2.8 The GLS is a professional group consisting of lawyers who work in 31 government organisations – departments, agencies and public bodies. It was established as a result of the Andrew Report. In its first survey in 1990 the GLS had 800 lawyers; as of 2013 it has over 2000.[19] That does not necessarily indicate a doubling of the number of lawyers in the past twenty-odd years: it may only indicate that the GLS has continued to draw in more and more government bodies. The departments and agencies which fall under the GLS are listed on the GLS website, and below in Table 2.1.

18 TSol remained a non-ministerial department though: see paras 2.22–2.24.

19 The Government Legal Service, *The Government Legal Service: Everything You Ever Wanted to Know and Didn't Dare Ask* (2012).

**Table 2.1: Full members of the GLS[20]**

| | |
|---|---|
| Attorney General's Office (AGO) | HM Revenue & Customs (HMRC) |
| Business, Innovation & Skills (BIS) | HM Treasury (HMT) |
| Charity Commission for England and Wales | Home Office (HO) |
| Communities and Local Government (DCLG) | Law Commission |
| Competition Commission | Ministry of Defence (MOD) |
| HM Crown Prosecution Service Inspectorate (CPSI) | Ministry of Justice (MoJ) |
| Department for Culture, Media And Sport (DCMS) | Office of Fair Trading |
| Department for Education (DfE) | Office of Rail Regulation (ORR) |
| Department for Environment, Food and Rural Affairs (Defra) | The Official Solicitor and the Public Trustee (OffSol) |
| | Serious Fraud Office (SFO) |
| Department for Transport (DfT) | The Office of Gas and Electricity Markets (OFGEM) |
| Department for Work & Pensions (DWP) | Treasury Solicitor's Department (TSol) |
| Department for Health (DH) | Wales Office (WO) |
| Department of Energy and Climate Change (DECC) | Water Services Regulation Authority (Ofwat) |
| Driver and Vehicle Licensing Agency (DVLA) | The Welsh Government |
| Food Standards Agency (FSA) | |
| Health and Safety Executive (HSE) | |

20 GLS *Guide to Government Legal Service Departments* (2013), at: www.gls.gov.uk/files/Department%20Guide%20Feb%2013_v2.pdf.

2.9 At first glance such a list seems quite comprehensive, but on closer inspection some government departments are absent: for instance, the Department for International Development (DfiD), and the Cabinet Office are not listed. That is because legal advice to these departments is primarily given via TSol, the primary Whitehall department providing legal advice within government. More generally, the GLS includes many non-departmental organisations (eg., Ofwat, OFGEM), but does not include *all* government lawyers. For instance, Parliamentary Counsel, legal advisers to the Foreign and Commonwealth Office, the Land Registry, and members of the Crown Prosecution Service are not part of the GLS.[21]

2.10 The GLS is one of a number of professional groups within Whitehall. There is also the Government Economic Service,[22] the Government Finance Profession[23] and the Government Statistical Service,[24] amongst others. There was agreement amongst interviewees – albeit, mostly government lawyers – that the GLS was the strongest professional group within Whitehall. This was so for three reason.

2.11 First, the GLS, through its secretariat, shares a number of services across Whitehall – in particular, recruitment, training and career development. Indeed, it allowed greater movement of government lawyers between

21 The Serious Fraud Office and the HM Crown Prosecution Inspectorate, however, do fall under the GLS. It is worth noting that many of the government organisations not formally part of the GLS are GLS 'associate bodies', meaning they are able to use and contribute to GLS networks and facilities, as well as using GLS services (in particular, recruitment and training courses). Many of these bodies are also connected through the Heads of Legal Teams Network.

22 See www.civilservice.gov.uk/networks/ges.

23 See http://thegfp.treasury.gov.uk/.

24 See www.civilservice.gov.uk/networks/gss.

departments – prior to this there had been a 'no poaching' rule, which meant that lawyers remained within their departments for their entire career. Thus, it began to break down 'departmentalism' within the cadre of government lawyers. Second, it provided government lawyers with an infrastructure that few other professional groups in Whitehall have. For instance, LION (the legal intranet through which much information for government lawyers is shared) is supported through the GLS; and the GLS also supports various networks and share information across the GLS (eg., the Heads of Legal Teams Network; the Government Litigators' Group, the Data Issues Group and various Human Rights groups, etc). This infrastructure created a strong sense of community. Finally, the GLS had institutional support located within a key department (the Treasury Solicitor's Department) and had at its head the Treasury Solicitor, a permanent secretary in his own right. That gave the GLS greater clout or voice within Whitehall.

**The Law Officers**

2.12 All three Law Officers – the Attorney General, Solicitor General and Advocate General for Scotland – are ministers of the UK government, either elected to the House of Commons or appointed from the House of Lords.[25] They are appointed by the Prime Minister. Following the enactment of the Constitutional Reform Act 2005 and the transformation of the Lord Chancellor into an 'ordinary' minister with departmental responsibilities, the Law Officers are now the only ministers in government who

25 The current office holders are: Dominic Grieve QC (Attorney General), Oliver Heald (Solicitor General) and Lord Wallace of Tankerness QC (Advocate General).

are by convention expected to have deep knowledge in the law.[26]

2.13 The Attorney General has a number of functions, including responsibility for superintending the prosecuting departments and a number of independent public interest functions. But here we are primarily interested in the Attorney's role as chief Law Officer for England and Wales; and as chief legal adviser to the Crown. The Solicitor General may exercise any of the functions of the Attorney General.[27] In practice the Attorney and Solicitor General will often take on functions depending on their respective experience and expertise, and on the importance and significance of the issues involved.

2.14 The Advocate General acts as the UK Government's senior legal adviser on Scots law. The Advocate General also has a number of statutory duties under the Scotland Act 1998 – in particular, assessing the legislative competence of bills introduced into the Scottish Parliament. The Law Officers are supported in their roles by the Attorney General's Office; and in the case of the Advocate General, by the Office of the Advocate General for Scotland in his capacity as a UK Law Officer.

2.15 For our purposes, the key function of the Law Officers is that they are collectively the chief legal advisers to the Crown, with the Attorney General as the most senior. They sit at the apex of the hierarchy of legal advice: where there is conflict within Whitehall, or there is a politically or legally significant issue on which legal advice is needed,

26 Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (2007).

27 Law Officers Act 1997, s 1 (1).

the advice of the Law Officers is understood by all to be decisive and final (for more on this, see chapter 4). That also means that the Law Officers are the primary or at least most decisive body ensuring consistency of legal advice across Whitehall.

2.16 The role of chief legal adviser to government remains controversial. Historically, the Attorney General represented the Crown in the courts and acted as the Crown's legal adviser more generally; but over the nineteenth and twentieth centuries the Attorney General and the Law Officers gradually took on a broader range of functions, shifting from their status as independent legal practitioners to servants of the state. That has led to tensions in their roles and responsibilities. It has been argued that in exercising the role of legal adviser the Attorney General is attempting to serve two masters: the Government and the law; and so it would be better to have a non-political legal adviser at the apex of the hierarchy of legal advice. Thus as Walker notes, it is unclear whether the Attorney General's duty to give the best legal advice involve[s] selecting from the range of plausible interpretations of the law that which is most conducive to the government's interests, or does it involve supplying the most authoritative interpretation of the relevant law regardless of the government's interests?[28] A non-political legal adviser would presumably be more likely to provide the latter kind of interpretation. But the key argument for having a minister as the chief legal adviser to government is that other ministers will be

28 159. Walker's comment is particularly pertinent in light of the Attorney General's opinion on the legality of using force against Iraq in 2003 (see chapter 6).

more likely to seek legal advice, and to accept the advice which is given, if it comes from a fellow minister.[29]

2.17 The Law Officers are responsible to Parliament for the 'Law Officers' Departments'. They are:

**Table 2.2: The Law Officers' Departments**

| |
|---|
| The Attorney General's Office (AGO) |
| The Crown Prosecution Service (CPS) |
| Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) |
| The Treasury Solicitor's Department (TSol) |
| The Serious Fraud Office (SFO) |

We will not be dealing with the CPS, HMCPSI, and SFO as they are prosecutorial organs. All of the Law Officers' Departments (save AGO and HMCPSI) are non-ministerial Government Departments. That means the Law Officers are responsible to Parliament for the management, efficiency and effectiveness of each department; but as Daintith and Page point out, the Law Officers are not ministerial heads of the departments in the sense that the Home Secretary is head of the Home Office.[30] For instance, they are not responsible for the development of government policy in the way that the Home Secretary is responsible for policy on the police and policing.

29 See the excellent analysis of Neil Walker, 'The Antinomies of the Law Officers' in Sunkin Maurice and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press 1999)

30 Daintith and Page, 219.

## The Attorney General's Office

2.18 The Attorney General's Office ('AGO')[31] supports the Attorney General and Solicitor General in their various roles. In this report we shall only focus on the AGO's functions in relation to the Law Officers' role as chief legal advisers for the UK government.

2.19 The AGO is a small department, consisting of approximately 40–50 officials, of whom 10–15 are lawyers.[32] AGO lawyers are usually seconded from TSol and the various Whitehall departments, as well as from various non-GLS government organisations. So, for instance, there are secondees in AGO from HM Crown Prosecution Service; and there is always a senior FCO lawyer seconded to the AGO, who primarily covers questions of international law, and to some extent EU and human rights law. These secondees are usually considered high fliers within the government legal machinery, and a stint in AGO is similar to one spent in the Cabinet Office for administrative high fliers. AGO lawyers report to the AGO Director General,[33] who is in effect the Principal Private Secretary (PPS) to the Law Officers, although unlike PPSs in ministerial private offices, the Director General may also provide legal advice. The work of AGO will be examined in more detail in chapter 4.

31 The AGO was previously known as the Legal Secretariat to the Law Officers (LSLO).

32 The Attorney General's Office website is here: www.gov.uk/government/organisations/attorney-generals-office.

33 Formerly, the Legal Secretary to the Legal Secretariat.

## The Office of the Advocate General for Scotland

2.20 The Office of the Advocate General for Scotland (OAG)[34] supports the Advocate General. Oddly, it is *not* classed as one of the Law Officers' Departments. That stems from its history: OAG originally was part of the Scotland Office, which was itself located within the Ministry of Justice (and prior to that in the Department for Constitutional Affairs).[35] That was because MOJ/DCA had overall responsibility for devolution matters. In 2011, OAG and the Scotland Office became departments separate from the MOJ.[36] The OAG and Scotland Office share a Principal Accounting Officer and Joint Management Board overseeing both bodies.

2.21 There are approximately 40 staff in OAG, three quarters of whom are lawyers.[37] Legal staff in OAG are mostly recruited from the Government Legal Service for Scotland (GLSS).[38] GLSS staff are then seconded by the Scottish Executive to the UK government for their time in post. Most OAG lawyers are based in Edinburgh; there is a tiny Secretariat in London, consisting of three to four lawyers.[39]

34 Previously three divisions of OAG were known as the Office of the Solicitor to the Advocate General (OSAG), and the London Legal Secretariat known as the Legal Secretariat to the Advocate General (LSAG).

35 See www.oag.gov.uk/oag/23.html.

36 See Scotland Office and Office of the Advocate General Annual Report 2011, available at: www.official-documents.gov.uk/document/cm81/8102/8102.pdf.

37 See http://reference.data.gov.uk/gov-structure/organogram/?dept=oags.

38 See www.oag.gov.uk/oag/26.html.

39 I am grateful to Alan Trench for explaining the history and functions of OAG.

## The Treasury Solicitor's Department (TSol)

2.22 TSol is the primary Whitehall department dealing with legal services. It is worth being precise here: there is the Treasury Solicitor's *department* and the TSol *agency*. The department includes the GLS Secretariat and is responsible for TSol as an agency.[40] In this report, when we discuss 'TSol' we are normally referring to the department, rather than just the agency. TSol has approximately 700 lawyers. It carries out the majority of civil litigation[41] and employment law matters for Whitehall, and there are divisions which correspond to these services. It has several advisory divisions, which support different individual departments (for instance, Culture, Media and Sport; Treasury; Education; and Defra). It is also the primary legal adviser to the centre of government: the Central Advisory Division (CAD)[42] provides legal advice primarily to the Cabinet Office, and to a number of smaller departments and other non-departmental bodies; and there is the Cabinet Office European Law Division (COELA), which provides and coordinates legal advice to Whitehall generally on EU issues and specifically to the Cabinet Office's EU Secretariat, including litigation before the European Court of Justice. There is also the Bona Vacantia ('ownerless goods') Division, which deals with ownerless property that passes to the Crown.

2.23 The head of TSol is the Treasury Solicitor. The Treasury Solicitor is the permanent secretary of TSol as a

40 The Treasury Solicitor's Department website is here: www.tsol.gov.uk/default.htm.

41 Criminal litigation is mostly done by the prosecuting agencies.

42 Formerly known as Cabinet Office Central Advisory Division (COCAD).

department and Chief Executive of TSol the agency. He is also the Head of the GLS. TSol (the department) houses the GLS Secretariat, which supports the Treasury Solicitor in his role as Head of the GLS; and manages GLS lawyers within the GLS. The Treasury Solicitor may, on occasion, also provide legal advice (see chapter 4), but most of his time is taken up with management of TSol (the agency) and the GLS.

2.24 As already noted, TSol is a non-ministerial department: the Law Officers are responsible for TSol in terms of management, efficiency and effectiveness, but not for the legal work done by TSol. TSol the executive agency was established in 1996, as a means to more clearly define its function as a provider of legal services. Since the 1990s, TSol the agency has charged departments for the provision of its services: it operates on a 'net recovery' basis. Litigation and advisory services provided by TSol are both 'hard charged': that is, there is an exchange of money between the 'buying department' (such as HMT) and the providing agency (TSol).[43]

## The Office of Parliamentary Counsel

2.25 The Office of Parliamentary Counsel (OPC) is the other key legal department at the centre.[44] It is responsible for drafting all primary legislation,[45] advising departments on

43 However, litigation and advisory services are calculated in different ways.

44 The Office of Parliamentary Counsel's website is here: www.gov.uk/government/organisations/office-of-the-parliamentary-counsel. See also Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis'.

45 Departmental lawyers provide instructions to Parliamentary Counsel on the drafting of legislation; they also draft most secondary legislation (ie., statutory instruments).

the rules and procedures of Parliament, reviewing orders and regulations which amend primary legislation, and for the management of parliamentary relations with the Executive. It is located within Cabinet Office. It currently has a staff of 65, of whom approximately 50 are lawyers.[46] The head of OPC is First Parliamentary Counsel, who has permanent secretary rank, and is appointed by the Prime Minister.[47] Lines of responsibility depend very much on the function being exercised.[48] In relation to the management of the legislative programme and parliamentary relations OPC is responsible to the various 'parliamentary' ministers: the Leader of the House of Commons, who chairs the Cabinet Committee on legislation; the Leader of the Lords; and the Chief Whips of the Commons and Lords. But in terms of drafting legislation, parliamentary counsel are responsible – through their instructing departmental or TSol lawyers – to the Secretary of State of the relevant department.

2.26 First Parliamentary Counsel is also an adviser on 'certain constitutional matters to the Prime Minister, the Cabinet Secretary and the officials who work to them.'[49] These include legal issues arising from ministerial appointments and reshuffles; machinery of government issues; questions of propriety and ethics; electoral law and parliamentary issues. These additional functions were either an outgrowth of the OPC's institutional role, or because of its proximity to the centre.

46 See generally Cabinet Office, *Working with Parliamentary Counsel* (2011).

47 The current First Parliamentary Counsel, Richard Heaton, was recently made Permanent Secretary of the Cabinet Office as well, but this is unlikely to signify any change in the role or status of OPC.

48 Daintith and Page, 221.

49 See Cabinet Office, *Working with Parliamentary Counsel*, para 18.

## Departmental Legal Services

2.27 Most departments have their own legal advisory teams. This has changed over the years,[50] and is currently undergoing change again (see 'Recent Changes: The Sharing Services Programme' below).

**Table 2.3: The Provision of Departmental Legal Advice**

| In-House advice | TSol-provided advice |
|---|---|
| BIS | CO |
| DCLG | DCMS |
| DECC | Defra |
| DFT | DfE |
| DWP and DH | DfID (via CO) |
| FCO | HMT |
| HMRC | |
| HO | |
| MOJ | |
| MOD | |

Table 2.3 describes only the provision of legal advice. As already noted, TSol now carries out litigation and employment services for almost all line departments.[51]

50 For instance, MOD for a period in the 1990s had TSol-provided legal advice, but it currently has its own in-house team.

51 One way to determine which government departments and agencies TSol provides litigation services for is to look at the Crown Proceedings Act 1947, ss17–18. This sets out the address for service for litigation purposes. Most departments now list TSol as the address for service; the key exceptions being DWP, DoH and HMRC. See: www.tsol.gov.uk/Publications/Scheme_Publications/crown_proceedings_act.pdf. It is worth noting that conveyancing for government departments is now carried out by private sector lawyers.

2.28 There remain oddities. For instance, legal advice to the Northern Ireland Office (NIO) is provided for by the Home Office legal team; the Department for Work and Pensions (DWP) and the Department of Health (DH) share a legal team. Much of this can be explained by history. Northern Ireland issues were historically dealt with by the Home Office; DWP and DH were originally one department (the Department of Health and Social Security) until they were split into two in 1989.

2.29 Other oddities stem from the nature or remit of the particular department. The Cabinet Office is a good example: the Prime Minister and/or the Cabinet Secretary in seeking legal advice may have a number of different resources to call upon for legal advice – the Law Officers, Cabinet Office Legal Advisers, Cabinet Office European Legal Advisers, the Treasury Solicitor or First Parliamentary Counsel. That may depend on a number of factors including the nature of the issue (and who has responsibility for that area), experience and expertise, personal relationships, proximity and availability.

2.30 The Foreign and Commonwealth Office (FCO) is another department with unusual arrangements for its legal team. As already noted, FCO lawyers do not belong to the GLS. Like all officials from FCO, FCO lawyers are not part of the Home Civil Service. In practice, however, FCO lawyers have similar functions to other departmental lawyers. They are located in the FCO legal directorate: just

over half of the directorate's 70 staff are lawyers.[52] They are responsible for providing legal advice to FCO. They also lead across Whitehall on public international law, and legal issues heading to the European Court of Human Rights in Strasbourg. They may also be consulted on European issues, but the lead department on EU law is the Cabinet Office – or more specifically, the Cabinet Office European Legal Advisers (COELA), who are in fact a co-located team from TSol – an example of the curious state of how legal advice is provided within Whitehall (these coordinating bodies are dealt with in more detail in chapter 4).

2.31 Each department organises the provision of legal advice differently, although there is a head lawyer in each department (known as the Departmental Solicitor or Legal Director) of Director or Director-General level, and who is responsible to the Secretary of State for all legal advice provided in that department. Some departments have legal teams providing legal services to the department as a whole; others work in small units or are in mixed teams of lawyers and administrators. As already noted, departments with advisory teams from TSol are almost all 'co-located': that is, the advisory teams sit in their departments rather than at TSol – that encourages early and close involvement in policy (see chapter 3).

52 FCO Legal Directorate Business Plan, 2012–3, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/32953/legal-directorate-business-plan-12.pdf. Thirty-odd lawyers seems a small number (perhaps only DCMS has a smaller legal team) in comparison to the legal teams of other countries' foreign affairs departments. The US state department, for instance, has over 170 lawyers. But it is difficult to make a proper comparison – for instance, FCO does not lead on EU law: this is coordinated by Cabinet Office.

## Recent Changes: The Sharing Services Programme

2.32 The UK civil service generally is currently undergoing reform under the current Coalition Government. There have been severe cuts in staff numbers in order to meet the Coalition Government's policy of austerity; and there has been a push within government to create a 'leaner', more efficient civil service.[53] For government lawyers, the most important reform affecting them is the current sharing services programme. This ambitious project highlights again the perennial tension between 'departmentalism' and the centralising tendencies within Whitehall.

2.33 Under the sharing services programme, TSol will absorb the majority of line department advisory legal teams by the end of 2014.[54] By the end of 2013, DCLG and MOJ's legal teams will become part of TSol; by the end of 2014, DFT, DECC, MOD, DWP and DH will follow (see Table 2.4 below). This means TSol staff will grow from 750 to 1500. In practice, most teams will remain physically located within their client departments, but will be paid, contracted and managed by TSol. A number of departments and agencies will remain outside: notably,

53 http://resources.civilservice.gov.uk/wp-content/uploads/2012/06/Civil-Service-Reform-Plan-acc-final.pdf.

54 Mark Rowe 'A new way to share' Civil Service World (20 February 2013), p 21. See also Cabinet Office *Next Generation Shared Services: The Strategic Plan*, at: https://update.cabinetoffice.gov.uk/sites/default/files/resources/next-generation-shared-services-strategic-plan-december-2012.pdf. Note an initial document was published in July 2011: *Government Shared Services: A Strategic Vision*, at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/61166/government-shared-services-july2011.pdf.

BIS, HO[55] and HMRC – traditionally departments with a very strong organisational culture.

**Table 2.4: The Provision of Departmental Advice and the Impact of the Sharing Services Programme**

| 2012 | | 2015 | |
|---|---|---|---|
| In-House advice | TSol-provided advice | In-House advice | TSol-provided advice |
| BIS | CO | BIS | CO |
| DCLG | DCMS | FCO | DCMS |
| DECC | Defra | HMRC | Defra |
| DFT | DfE | HO | DCLG |
| DWP and DH | DfID (via CO) | | DECC |
| FCO | HMT | | DfE |
| HMRC | | | DfID |
| HO | | | DFT |
| MOD | | | DWP and DH |
| MOJ | | | HMT |
| | | | MOD |
| | | | MOJ |

2.34 The justification for the current amalgamation of services is twofold. First, the arrangement is argued to be more efficient: not necessarily in the sense of lowering cost, but rather that it will allow for the more 'efficient allocation of scarce resources' – it will allow TSol to shift advisory lawyers where they are most needed. Second, it will provide TSol with greater capacity to manage the careers of

55 At the time of writing (May 2013) it is understood that the Home Office team has also agreed to move to TSol.

the majority of lawyers within the GLS. Interestingly, the current sharing services programme has *not* been justified in terms of creating a more unified legal service.

2.35 All government lawyers interviewed agreed that the sharing services programme would be beneficial from a management or career development perspective. Most interviewed thought that 'clients' – that is, ministers and administrators – would see little change at all. Indeed, one interviewee said: 'most administrators currently presume that the lawyers in their department are their department's lawyers, even when those lawyers technically belong to TSol.'

2.36 But some interviewees were concerned about the possible implications of bringing almost all the departments' advisory teams within TSol. There were two key problems. The first was that greater integration might mean that departmental teams would lose lawyers who were experts in their field as they were shifted around to meet new circumstances. It was important to have a mixture of experts and generalists in legal teams – and stability, perhaps particularly given the problem of heavy administrator turnover (see chapter 3).

2.37 The second problem was about governance, and in particular the potential impact greater integration could have on the line management of government lawyers. Senior lawyers will now be managed by TSol and the Treasury Solicitor rather than the permanent secretary of the department they worked in. Greater integration, then, may change the dynamic and priorities of senior lawyers. The worry of some government lawyers was how this integration might affect their relationship with their

minister and their department. There may be a ministerial perception that lawyers who technically came from outside the department may view priorities and issues differently: they were not 'one of us'. One government lawyer said:

> *It must be clear that the chief legal adviser [in the department] works for the minister, not the Treasury Solicitor. It is vital that the departmental legal adviser maintains the trust of his minister. Going to the Attorney General is different, because it's formal, and the Attorney General is a ministerial colleague.*

This may be a theoretical issue: departmental lawyers in the Treasury, for instance, have long been a team seconded from TSol. It is not clear that those lawyers have ever felt concern about accountability; nor is it clear that any Chancellor has ever evinced concern about their responsibility to him.

## Conclusion

2.38 The mechanisms and organisation for the provision of legal advice within Whitehall are not easy to understand. But at its most basic, legal advice is primarily provided to departments, rather than to 'government' as a whole. There are various mechanisms in place for sharing particular legal services (for instance, TSol provides litigation and employment law across Whitehall). Coordinating bodies are few, although they have been growing in number (eg., COELA, the Senior Devolution Lawyers Group—on this, see chapter 4). The key coordinating mechanism – which also attempts to provide coherence and consistency across Whitehall – is the Law Officers. But the majority of government lawyers in advisory teams still see themselves

primarily as civil servants of departments, rather than as 'government' lawyers.[56] It remains to be seen whether or not recent reforms will have any impact on government lawyers' perception of their work.

56 Daintith and Page, 231.

# 3. Proactive Risk Managers: Government Lawyers in the Policy Making Process (I)

## Introduction

3.1 This chapter explains what government lawyers do in providing legal advice; and their role in the policy making process. Government lawyers may give advice on policy and legislation: individual casework; operational matters and implementation; and their expertise covers international and military as well as domestic law.

3.2 Both government lawyers and administrators interviewed were questioned on when and why lawyers might become involved in the policy making or decision making process. This was surprisingly difficult to pin down: there were no set rules. Administrators were naturally 'in the lead' on policy, but both they and government lawyers understood that at a certain point the latter would need to be involved.

3.3 Part of the problem, perhaps, is that it is somewhat artificial to draw a distinction between administrators and government lawyers. Government lawyers are part of the civil service, and as such may be drawn into issues which are not strictly or purely 'legal'. So of course government lawyers were expected to comment and give their opinion on cases, operational matters, implementation (legislative

or non-legislative), and the legal implications of proposed government action, because they were lawyers. But they were also asked to give 'advice' more generally: this might cover matters of legality but also issues of practicality, prudence and 'handling' (see chapter 6).

3.4 More generally, there is great variation across departments in lawyer-administrator relationships, which makes it difficult to generalise: FCO, for instance, may be very different to (say) DECC. But there was broad agreement by those interviewed that there had been two gradual changes in the way legal advice has been provided within Whitehall over the past thirty-odd years. The first relates to lawyers' involvement in the policy and decision making process; the second relates to how legal advice is given. These changes – which are interrelated – took place in the 1990s.

**Earlier Involvement in Policy and Decision Making**

3.5 In the past government lawyers tended to enter into the policy or decision making process at a later stage; often at a point when the policy was fairly well-formed.[57] This is something that requires more investigation, but it appears that they are now more likely to enter the policy making process at an earlier stage; often in the very initial stages of policy formation.

3.6 There are a number of reasons why lawyers might be involved at an earlier stage. A key reason is the increasing number of ways in which law impacts upon, and is

57 For one view of how the policy making process worked in the past, see C Foster, 'The Encroachment of the Law on Politics' (2000) 53 Parliamentary Affairs 328

inextricably bound up with, policy (eg., FOI, judicial review, HRA, EU law). Judicial review requires, for instance, careful attention to relevant considerations and the relevant statutory framework, which lawyers are best placed to advise on.

3.7 Changing technology has had an impact. In the past, papers were produced on typewriters or word processors, photocopied and distributed by internal post. So a policy would often be worked up by a team of administrators within a department: various documents would be accumulated and eventually consolidated as the direction of policy became clearer. Finally the policy team would formally consult the government lawyers by sending them a file in the form of a bundle of papers asking for comments. Government lawyers would then take receipt of the file, work their way through the policy, and then send the file back to the administrators in charge with their comments. Since the late 1990s, however, technology – particularly in the form of email and linked intranets – has meant that government lawyers could be involved from a much earlier stage. Government lawyers are now regularly copied into emails and contribute to ongoing discussions in policy development.

3.8 There was also a decline in formality. Whitehall is known to be hierarchical, but this has loosened over time. One administrator told of how she started work on her first bill in the early 1990s, she was told not to communicate directly with Parliamentary Counsel in meetings with them: communication with Parliamentary Counsel would be done through the departmental lawyers. Relationships were now far more informal.

3.9 Government lawyers also became more proactive. Some interviewees saw a gradual shift within the GLS from the mid-1990s onwards to encourage government lawyers to work jointly with administrators.[58] There had been a gradual recognition that the later the involvement of government lawyers in policy making, the more difficult it would be for government to row back from a mostly-formed policy.[59] More importantly, late involvement created difficulties for government lawyers, putting them in the awkward position where they might have to say 'no', and strengthening their administrative colleagues' view that lawyers were risk-averse, stick-in-the-mud types. The 'new' emphasis was on greater teamwork between lawyers and administrators, with lawyers 'not waiting to be asked'.[60] More government lawyers were 'co-located' in departments: that is, physically situated in their client departments.

3.10 This corporate approach had its benefits. Most obviously, it encouraged greater teamwork and earlier involvement in policy from government lawyers and potentially gave lawyers greater influence over the policy and decision

58 Of course, how this played out in practice depended on departments and personalities: some departments' legal teams, for instance, already were closely integrated into administration.

59 See Cabinet Office, *When Laws Become Too Complex*, 27.

60 See the comments of Sir Michael Wood in the Iraq Inquiry ('The Chilcot Inquiry'), at: www.iraqinquiry.org www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf.uk/media/44205/20100126am-wood-final.pdf, 7–8. Government lawyers are also expected to encourage greater 'legal awareness' amongst their administrative colleagues: LION – the legal intranet – even provides best practice notes on increasing the legal awareness of administrators.

making process. But there remain some concerns. Government lawyers have risked becoming overstretched; and the lack of distance from clients could lead to a blurring of responsibilities.

3.11 A final reason why government lawyers have become involved at an earlier stage in policy making may be because of changes on the administrative side. These changes took many forms. In some cases, there have simply been fewer administrators, and they were overworked; so policy work was then shunted onto government lawyers as a second pair of hands. An interviewee gave an example of three senior civil servants, one of whom was a government lawyer, who were asked by their minister to come up with a submission on a particular policy by the end of the day:

> *The two administrators had back-to-back meetings all day, so it was agreed the lawyer would write up the submission. Now technically he should have said no, because that was a policy matter. But he was part of a team, and he was expected to pitch in. So he did.*

3.12 Leaving aside the issue of shrinking resources, a majority of those government lawyers interviewed suggested that there had been a noticeable decline in the legal literacy and/ or policy capacity amongst administrators. The legal literacy and skills of past administrators was a contrast with current administrators. According to one departmental lawyer the decline of administrators' skill in formulating policy was an 'almost universal message' coming from his legal team.[61]

61 To be clear, this did not suggest a decline in the *quality* of administrators, but rather a shift in the set of skills they possessed.

3.13 There are two reasons for this perceived decline. One is time in post. Time in post (either within departments, or in the civil service generally)for senior civil servants in Whitehall is relatively low, leading to a lack of institutional memory.[62] One government lawyer commented that 'in developing policies, companies outside had a better idea of what had happened in the past than departments themselves did.' But it may also be that 'traditional skills' such as policy development are now only a small subset of a much broader set of skills required of administrators within Whitehall: delivery and implementation, and maintaining relations with external stakeholders are now equally as important. Government lawyers may have become involved at an earlier stage, then, out of necessity, as the number of administrators who are particularly skilled in policy and legislative development has shrunk.

**Legal Advice is now an Assessment of Legal Risk**

3.14 The other key change in relation to government lawyers and the policy making process is how legal advice is given. Previously lawyers tended to give advice in the nature of a quasi-'judgment', setting out preferred options and providing definitive answers to those options. Now, government lawyers give fewer 'judgments' and increasingly favour calculations of legal risk.

3.15 This is a caricatured image of the past, but there is some truth to it. As we have already noted, the process of obtaining legal advice to departments in the past was very similar to obtaining legal advice from a barrister: relations between

62 Christopher Pollitt, 'Bureaucracies Remember, Post-bureaucratic Organisations Forget?' (2009) 87 Public Administration 198

client and lawyer were formal; there was the geographical separation of client and lawyer; the lawyers were very much involved at the end of the process; and the 'definitive' advice of lawyers was then returned to the client.

3.16 All government lawyers interviewed thought such a picture exaggerated how legal advice was provided in the past, although they acknowledged that there certainly had been a change. All government lawyers interviewed were adamant that it would be rare to see the provision of advice in terms of whether something was 'legal' or not, unless the law was clear cut; it was more about understanding and managing legal risk. Managing legal risk meant setting out a range of options open to a minister and then evaluating each in terms of the likelihood of legal challenge, and the likelihood of success.

3.17 There were two key reasons for this shift towards risk management. Being involved at an earlier stage and in close contact with administrators (rather than being geographically separate) has meant the role of lawyers and the nature of their advice has changed – they may have more scope to influence and debate issues. Conversely, administrators – being in a closer, less formal relationship with lawyers – may feel more able to question legal advice. Thus, the 'advice' of lawyers now takes a different, less final form: it is often informal and iterative (eg., taking place through phone calls, chats or in email chains), contingent rather than being formal and conclusive.

3.18 More importantly, however, a risk-based approach has become necessary because the greater complexity of law itself has meant that its impact could not be predicted with sufficient certainty. Legal advice could not be definitive.

'Law is everywhere. It makes no sense to talk of a 'yes/no' approach. There are always legal risks' (government lawyer). An example is the question of whether a proposed course of action is 'proportionate' under the Human Rights Act 1998. And it should be noted that it is rare for a minister to receive a submission which is purely legal advice.[63] The legal considerations are woven into the submission along with other considerations – political, economic and social. It would then be for the minister to determine what weight she would give to all these considerations: that was a policy rather than legal matter. As one government lawyer said:

Ministers are 'risk takers'. They are not worried about legal risks and they are not intimidated by the possibility of losing in the courts. They do not see things in terms of legal outcomes – and nor should they.

## Conclusion

3.19 In recent times the line between 'law' and 'policy' has become blurred – although it has never been that clear. This is a matter which requires more investigation, but it appears that lawyers are now involved at an earlier stage in the process of policy making, and arguably have greater influence. These transformations have taken place for various reasons. The non-legal reasons include changes in technology and social norms within Whitehall; administrator time in post and an apparent decline of administrator expertise in policy making. But law is

63 See the comments of Sir Michael Wood in the Iraq Inquiry ('The Chilcot Inquiry'), at: www.iraqinquiry.org www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf.uk/media/44205/20100126am-wood-final.pdf.

now so much a part of the business of government that lawyers *must* be involved. However, the pervasiveness of law also means that – perhaps paradoxically – government business becomes more problematic and uncertain; and so government lawyers in advising clients now see themselves as managing risk.

# 4. Conflict, Cohesion and Consistency: The Hierarchy of Legal Advice and Intermediate Actors in Whitehall

## Introduction

4.1 As noted in the previous chapters, the provision of legal advice within Whitehall is fundamentally departmental. But important legal issues can arise which require wider consideration. This chapter examines the hierarchy of legal advice, the various actors involved, and the mechanisms employed to ensure consistency and coherence across government.

### The Formal Hierarchy of Legal Advice

4.2 The formal hierarchy of legal advice is well understood by the legal community within Whitehall. This process, or hierarchy, is set out in two documents, the *Guidance Note for Government Lawyers*;[64] and the *Cabinet Manual*.[65] Roughly speaking there is a set procedure to follow where there is a lack of consensus on a legal issue, or where a legal issue appears particularly significant to government as a whole. The issue is escalated up through a department where it may reach the departmental legal adviser (the

64 This will be dealt with in more detail in chapter 5. It is curiously not available online, but can be found on the GLS intranet, LION.

65 Cabinet Office, *Cabinet Manual* (2011).

head of the department's legal team), senior administrators and the minister herself. Where there is still disagreement, the department may seek the advice of the Law Officers. Departments may also seek external legal advice from Treasury Counsel (see below).

4.3 The Law Officers sit at the apex of the legal hierarchy. The circumstances in which their advice should be sought have long been set down in writing. In the past, these circumstances were to be found in the *Ministerial Code* (formerly, *Questions of Procedure for Ministers*).[66] This detailed guidance was removed in the 2007 version of the *Ministerial Code*, leaving the malnourished statement: 'The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations.'[67] However, these circumstances can now be found in the 2011 *Cabinet Manual*. The Law Officers should be consulted:

- Where the legal consequences of government action may have important repercussions in the foreign, EU and domestic fields;
- Where a departmental legal adviser is in doubt concerning:
  - the legality or constitutional propriety of proposed primary or subordinate legislation which the Government proposes to introduce;[68]

66 The current version of the *Guidance Note* also states that details of when the Law Officers should be consulted can be found in the *Ministerial Code*, which suggests that the *Guidance Note* has not been updated in some time.

67 Cabinet Office, *Cabinet Manual*, para 2.10.

68 Para 6.7 also states that the 'Law Officers' consent is required for legislative provisions that have a retrospective effect or where it is proposed that legislation is commenced within two months of Royal Assent.'

- the powers necessary to make proposed subordinate legislation; or
- the legality of proposed administrative action, particularly where that action might be subject to challenge in the courts;

- Where ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations that are likely to come before Cabinet or a Cabinet committee;
- Where there is a particular legal difficulty (including one that arises in the context of litigation) that may raise sensitive policy issues; or
- Where two or more government departments disagree on legal questions and wish to seek the view of the Law Officers.[69]

4.4 The guidance above is replete with ambiguous standards: what constitutes 'important repercussions', or 'a particular legal difficulty'? In practice, these standards appear well-understood by those within Whitehall: crudely, the advice of the Law Officers should be sought where the legal issue is of particular political and legal significance, and/or has a potentially important impact across government. In any case, the guidance makes clear that the Law Officers not only provide legal advice which is final and determinative, but are also the key body ensuring consistency across Whitehall.

69 Cabinet Office, *Cabinet Manual*, para 6.6.

4.5 The procedure for consulting the Law Officers is somewhat fluid.[70] The usual practice is that a lawyer in the government department responsible for the issue in question makes a detailed submission to the Director General or the relevant lawyer in the Attorney General's Office (AGO) requesting advice, similar similar to how a solicitor might go to a barrister. This submission sets out the background and the department's analysis: where the issue involves a number of departments, several drafts may have bounced back and forth, with the key departmental players agreeing between themselves on the key issues before submission of a request for advice from the Law Officers. Sometimes, a minister may write directly to the Law Officers seeking advice (although in practice this will then lead to the AGO asking the department legal adviser for further instructions).

4.6 Once a request is received, any number of things might happen depending on the circumstances. More information and analysis may be needed. Advice may take an informal or formal form: informal advice is very common, and might take the form of phone calls, conversations or emails – but this 'advice' is provisional at best (even though a note is always written up): it is more like a discussion. Final advice is usually in written form, but would be preceded by discussions between the requester, AGO lawyers and in some cases the Law Officers. There might be various drafts. Written advice tends to be fairly short, although this will depend on the legal issue raised. Advice might take the form of 'yes/no', but it was far more likely that a number of options would be set out for the minister to consider.

70 This draws upon the discussion in the Butler Report: Lord Butler of Brockwell, *Review of Intelligence on Weapons of Mass Destruction* (HC 898, 2004) paras 366–372.

4.7 AGO lawyers assist the Law Officers in coming to a decision by analysing the issues, setting out the arguments and preparing draft advice for the Law Officers' scrutiny. On significant cases, it might be all three Law Officers who would examine the issue. In difficult cases it was not unusual for the Law Officers to first ask instructing departments to commission advice from a silk, and in particular from First Treasury Counsel (who we shall examine shortly). It is important to note that legal advice issuing from the AGO is not given by AGO lawyers, but rather from the Law Officers themselves. It is the Law Officers who are ultimately responsible for the legal advice provided.[71] Advice is then sent back to the lead department, who will record the Law Officers' advice; in some cases the Law Officers will communicate directly with the relevant minister or ministers.

4.8 In relation to their role as legal advisers, the Law Officers have two key functions. They are the final arbiter on any legal question confronting the UK government, thus providing finality and coherence within Whitehall; and in advising they bring their political expertise or judgement to bear on the question at hand. Talking of the Attorney General, one government lawyer said that the Attorney was 'a buffer between politicians and the lawyers. His job was really to translate purist legal thinking into something that ministers could understand.'

4.9 All government lawyers interviewed thought the present status of the Attorney General as both chief legal adviser to the Crown and minister of the Crown was perfectly acceptable: the two roles complemented, rather than

71 Daintith and Page.

conflicted with, each other. They saw no need for reform.[72] The key benefit, they argued, in having the chief legal adviser as a minister, was that he – or she – had knowledge of the political pressures on ministers, which in turn aided the Attorney General in carrying out the act of 'translation'; but it also helped from the point of view of the Attorney General's colleagues – it gave his or her advice more weight.

4.10 In relation to recourse to the Law Officers, there was great variation between departments. One government lawyer interviewed said seeking the advice of the Law Officers was uncommon in his department – but if recourse was made, it was because policy administrators were getting stubborn and refusing to accept the advice of the department's lawyers. This was a means of telling administrators that a particular policy option was simply not an acceptable route. But it is important to note that seeking the advice of the Law Officers does not necessarily indicate conflict, either within a department or between departments, or between lawyers, administrators and ministers. It may be that clarification on a point is needed, or a second opinion; sometimes it is a form of insurance or assurance.

4.11 There are no publicly available statistics on seeking advice from the Law Officers.[73] Generally speaking, legal advice is protected by legal professional privilege unless waived by the client. The position is no different in government;[74] and indeed to some extent is even more strict. There is a 'long

72 Interviewees were asked mostly about the Attorney General; but the analysis would appear to apply equally to the other two Law Officers, the Solicitor General and the Advocate General.

73 But see Daintith and Page, 302–309.

74 Note that the Freedom of Information Act 2000 also recognises LPP as exempt information: see FOIA, s42.

standing'[75] convention of non-disclosure not just on the substance of advice, but whether or not the Law Officers have been requested to give legal advice on a particular matter.[76] The 2004 *Butler Report* noted that there have only been three occasions in recent years when the Attorney General's advice has been disclosed publicly: the *Factortame* litigation; the Scott Inquiry; and the Westland Affair.[77] There is now a fourth occasion: the disclosure of advice of the then Attorney General, Lord Goldsmith on the legal basis for the use of force against Iraq.[78]

4.12 The result of this convention is that we do not know the kinds of situations or issues that the Law Officers are most commonly asked to give advice on; which departments make the most requests; the threshold at which the Law Officers will respond (ie., what counts as significant); who makes the requests; or why such requests are made.[79] Interviewees suggested, however, that there were some obvious 'repeat customers'. The Home Office and the

75 But note some are critical of this convention: Daintith and Page, 309–315.

76 Cabinet Manual, para 6.9; see also the 2010 Ministerial Code, para 2.13. Note that the convention only applies to the advice of the Law Officers. Most recently, the Coalition Government published legal advice part of the Scotland analysis programme, aimed at informing the current Scottish referendum debate. The Foreign Office, Cabinet Office and the Office of the Advocate General for Scotland commissioned external legal advice from Professors James Crawford and Alan Boyle of Cambridge and Edinburgh Universities to examine the international law aspects of Scottish independence. See Annex A: referendum on the independence of Scotland – international law aspects, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/79368/Scotland_analysis_Devolution_and_the_implications_of_Scottish_Independance-annexA_acc.pdf.

77 Lord Butler of Brockwell, para 373.

78 Lord Goldsmith, 'Attorney General's Advice on the Iraq War Iraq: Resolution 1441' (2005) 54 International & Comparative Law Quarterly 767.

79 But see Daintith and Page, 302–309.

Ministry of Justice often had recourse to the Law Officers, because of their respective departmental remits – justice, prisons, crime and security. The Ministry of Defence, the Foreign Office and the security agencies were also repeat customers. Interviewees agreed that the majority of requests involved criminal law issues, but that was about volume rather than significance. Many of the issues coming before the Law Officers probably involved the Human Rights Act, European and international law.

**Intermediary Actors**

4.13 We have described the formal hierarchy, but departments and government lawyers have a number of additional resources that they may draw upon formally or informally in seeking legal advice. These include various coordinating bodies and actors, the Treasury Solicitor, First Treasury Counsel, the Attorney General's panel counsel, QCs and non-panel specialist counsel (with the Law Officers' prior consent). Under certain circumstances, the legal advice of these actors may be authoritative. Moreover, by virtue of their intermediary, often interdepartmental status, they will often act to ensure consistency across government in terms of the provision of legal advice.

4.14 First, there are the various coordinating bodies. Many of these have already been discussed in chapter 2. Advice on legislation and the legislative process from Parliamentary Counsel, by virtue of their role at the centre and their expertise on drafting, may be determinative on such matters. There is also TSol, which has various units which ensure coherence and consistency across government:

in particular, the Central Advisory Division (CAD)[80] which provides legal advice primarily to the Cabinet Office; and the Cabinet Office European Law Division, which provides and coordinates legal advice to Whitehall generally on EU issues (and in particular, Cabinet Office European Legal Advisers – COELA). There are also various formalised and informal groupings supported by the GLS within TSol: the Human Rights Group, the Heads of Legal Teams Network and so on. The FCO also provides coordination on European Court of Human Rights issues; and international law issues such as treaty making. These formal and informal groups may provide consistency across government, although it is understood that ultimately consistency must be determined by the Law Officers.

4.15 The Treasury Solicitor may be consulted in certain cases. In some cases, of course, the chief legal adviser in a department will be the Treasury Solicitor – for instance, in Cabinet Office (for whom TSol provides all legal advice). In practice, tricky legal issues would be dealt with by the most senior advisory lawyer (eg., the Director of Central Advisory Division in Cabinet Office), although there might be occasions when the Treasury Solicitor might become involved – particularly where the Cabinet Secretary or Prime Minister's Office had an interest.

4.16 But there are other circumstances where the Treasury Solicitor may have a more noteworthy role. The Treasury Solicitor as head of profession might also be consulted on issues of professional ethics (see chapter 5). Recourse of this sort tended to be informal, and was more a case

80 Formerly known as Cabinet Office Central Advisory Division (COCAD).

of one lawyer seeking the advice of a more experienced colleague than a formal avenue for escalation. Moreover, as is well known to Whitehall insiders, there is a meeting of all permanent secretaries – of which the Treasury Solicitor is one – on Wednesday mornings. Before and after the formal meeting there are 'bilateral meetings in the margins', where one permanent secretary might corner the Treasury Solicitor about a particular legal issue. Here the Treasury Solicitor constitutes a convenient, alternative source of advice rather being than being a formal 'tier' in the hierarchy of legal advice. However, depending on the nature of the issue the Treasury Solicitor might wish to take this further – for instance, where an issue had implications for more than one department.

4.17 Then there is First Treasury Counsel, the Attorney General's panel counsel, QCs and non-panel specialist counsel: all independent barristers. Generally speaking all are used for litigation: this falls under the remit of TSol, as the provider of litigation services for Whitehall. But all may be called upon to give advice, since advice and litigation are not always separable: legal advice is often about the risk of potential litigation. TSol maintains four panels of Treasury Counsel (three for London – A, B and C, the 'A' panel being the most senior and experienced; and a regional panel).[81] There are also Standing Counsel for particular departments – individual barristers with whom departments may have a longstanding arrangement. And on occasion, departments may call upon those who are not on the Panels of Counsel, with the Law Officers' prior consent.

81 See www.tsol.gov.uk/PanelCounsel/introduction_to_panel.htm.

4.18 The advice of such counsel may be sought for a number of reasons – as with recourse to the Law Officers, it may be about getting a second opinion; clarification; wanting to test advice; quality control; sometimes because of capacity issues; even as a source of assurance and comfort for the minister. Again, while it may be the department's lawyers who formally seek the advice of outside counsel, it may be at the request of ministers and administrators – for instance, Lord Goldsmith as Attorney General commissioned Sir Christopher Greenwood, a well-known QC and legal academic in the field of international law, for his opinion on legal issues relating to Iraq.[82] However, unlike the advice of the Law Officers, it was emphasised by interviewees that the advice of outside counsel was not necessarily determinative.

4.19 Finally, there are First Treasury Counsel, who work solely for the government.[83] First Treasury Counsel are the government's most senior litigators, but they also have a role in providing advice – in particular for difficult legal issues.[84] There are First Treasury Counsel appointed to deal with criminal law, but for our purposes the most important First Treasury Counsel are the two counsel who deal with

82 See Lord Goldsmith transcript (27 January 2010) at: www.iraqinquiry.org.uk/media/45317/20100127goldsmith-final.pdf, 193–4.

83 Stephen Richards, 'The Role of the Treasury Devil' (1997) 2 Judicial Review 244; see also www.oxfordreference.com/view/10.1093/oi/authority.20111016175939147. Upon appointment, First Treasury Counsel are expected to end all work with other clients and work solely on government issues.

84 This is made clear in First Treasury Counsel's job specifications, which are set out here: www.docstoc.com/docs/17685394/FIRST-TREASURY-COUNSEL-%28CHANCERY%29.

civil litigation.[85] In the past, First Treasury Counsel were known as 'the Treasury Devils': that was because they 'devilled', or substituted for, the Attorney General as the government's legal representative in the courts. This has all changed: they are no longer called the Treasury Devils because they have become the government's primary and most significant litigators (rather than the Attorney General).[86]

4.20 First Treasury Counsel may act as an intermediate clearing house for departments on legal issues which are significant, but not so significant that they should be examined by the Law Officers – after all, the Law Officers are a scarce resource. First Treasury Counsel are formidable lawyers in their own right, and so their advice carries great weight and authority – it was far less likely to be questioned. Indeed in some cases the Law Officers themselves have referred questions to First Treasury Counsel for preliminary legal analysis.

4.21 More generally, First Treasury Counsel have an across-government function: they maintain a strategic view about the law and government litigation. It is their role to see how the overall litigation landscape is changing, and

85 In the past one of the two First Treasury Counsel dealt with Chancery matters, the other with Common Law matters. It was the First Treasury Counsel (Common Law) who dealt mostly with public law issues. This distinction is now no longer made.

86 They were also known at First Junior Treasury Counsel, because traditionally they did not take silk (ie., become Queen's Counsel) while representing the government. This is no longer so because they are able to take silk while still acting for the government. It was also well-understood that when First Treasury Counsel stood down from their posts, they would in due course be appointed to the High Court bench. That has now changed because of the Constitution Reform Act 2005 and the establishment of a more transparent and competitive appointment process: appointment to the bench can no longer be – if it ever was – assumed.

where possible give direction to government action in so far as it relates to the law. In the past, First Treasury Counsel conducted all significant government litigation and so necessarily had this function. That has become impossible: there are simply too many cases – hence the need for Panels of Counsel. But First Treasury Counsel remain at the apex of government litigation, and so are still the best placed actor to ensure a coherent or at least strategic approach to the law. They are meant to ensure and disseminate 'best practices' for government lawyers and litigators. Following the enactment of the Human Rights Act (HRA), for instance, the then First Treasury Counsel (Common Law) Philip Sales set out a number of model legal arguments that government lawyers should be making in relation to the HRA.

## Conclusion

4.22 There is a formal hierarchy of legal advice, which appears straightforward but becomes increasingly opaque upon examination by the external observer. The legal advice of the Law Officers on politically and legally significant issues is understood by the legal community within Whitehall as final and determinative. But below the Law Officers, matters are somewhat more fluid. There are a number of intermediary actors and bodies within the government machinery who may be consulted, and whose advice may in practice be determinative of a particular issue. That may often depend on the nature of the issue (legal advice from an intermediary actor may be determinative on a less important matter); the availability and capacity of all actors within the system; and the experience and expertise of those giving advice.

# 5. Legality and Legitimacy: Government Lawyers in the Policy Making Process (II)

## Introduction

5.1 Government lawyers are an unusual breed, in that they are lawyers with only one client; but they are also civil servants. Wearing both hats they work for 'the Crown', but each hat may come with different expectations and duties. The role of the legal profession within a polity has often been understood to be in opposition to 'the state', acting as guardians of legality.[87] But government lawyers are also servants of the state – who are expected to be independent of party politics. Given their peculiar position, what extent do lawyers in government see themselves as different from other civil servants and from lawyers in private practice? Do they see themselves as having additional ethical duties because of their particular profession, knowledge and skills?

### The Professional Codes

5.2 Government lawyers are subject to a number of professional codes, being both civil servants and legal professionals.

87 Terence Charles Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Clarendon Press Oxford 1997).

As legal professionals, there are several codes applicable to government lawyers. For solicitors in England and Wales, there is the Solicitors Regulation Authority *Code of Conduct*.[88] For solicitors in Scotland, there is the Law Society of Scotland *Practice Rules*.[89] For English and Welsh barristers, there is the *Code of Conduct of the Bar of England and Wales*;[90] for Scottish Advocates, there is the *Guide to the Professional Conduct of Advocates*.[91]

5.3 We will not examine these professional codes in detail, but there is little reference in them to the peculiar status of government lawyers. For instance, there is no recognition, in the *Code of Conduct of the Bar of England and Wales* that First Treasury Counsel are required upon appointment to give up their private practice and work solely for the government. That requirement ensures that there is no conflict of interest for First Treasury Counsel – but it also violates the cab rank rule, which requires barristers to accept any work or instructions in a field in which they profess to practice.[92]

5.4 As civil servants acting for the Crown, the two key documents governing the conduct of government lawyers are the *Civil Service Code* and the *Guidance Note for Government Lawyers*. There are other documents, such as the *Guidance on Discharging the Duty of Candour and*

88 This can be found in the Solicitors Regulation Authority Handbook (5 ed, 2012) at: www.sra.org.uk/handbook/.

89 The most recent version is available at: www.lawscot.org.uk/media/292853/consolrules2011%28final%29.pdf.

90 This is available at: www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/.

91 This is available at: www.advocates.org.uk/downloads/guidetoconduct_5thedition.pdf.

92 *Code of Conduct of the Bar of England and Wales*, paras 601–610.

*Disclosure in Judicial Review Proceedings*,[93] and the *Code for Crown Prosecutors*,[94] but these are more partial, applying only to a specific situation or to a subset of government lawyers, and will not be dealt with here.

5.5 The *Civil Service Code* (CSC) was introduced in 1996 and was revised in 2006 and 2010.[95] It is currently issued under the Constitutional Reform and Governance Act 2010. The CSC applies to almost all UK civil servants: those in the devolved regions and in the Diplomatic Service have very similar codes. The CSC sets out standards of behaviour expected of civil servants using four core values: honesty, integrity, impartiality and objectivity. Integrity includes the requirements to 'always act in a way that is professional' (which specifically includes ethical standards governing professions) and to 'comply with the law and uphold the administration of justice.' Where an official is asked to do something which conflicts with the CSC, or is aware that the actions of someone else conflict with the CSC, she should raise the matter within her department. The department must investigate, and where the official is dissatisfied with the outcome, she may report the matter to the Civil Service Commission. Ultimately, the CSC states that an official may resign if they feel that they cannot carry out their instructions.

5.6 The *Guidance Note for Government Lawyers* was drafted in the late 1990s. It is given to lawyers joining the GLS,

93 This is available at: www.tsol.gov.uk/Publications/Scheme_Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf.

94 This is available at: www.cps.gov.uk/publications/docs/code2013english_v2.pdf.

95 This is available at: www.civilservice.gov.uk/wp-content/uploads/2011/09/civil-service-code-2010.pdf.

and is available via LION, the GLS intranet. It is not publicly available, and so this is set out in an appendix to this report. It is a short, three-page document, providing guidance on four matters:

1. the government lawyer as civil servant;
2. the government lawyer as adviser to other civil servants, ministers or office holders
3. the government lawyer as prosecutor
4. the relationship between legal advisers and the Law Officers.

5.7 Section one of the *Guidance Note* states that the *Civil Service Code* and the professional codes are complementary: compliance with the CSC should not bring government lawyers into conflict with their professional norms. Where ethical issues do arise, there are two avenues of consultation: on matters of professional codes and ethics, the Treasury Solicitor may be consulted; the Law Officers where there are doubts about the propriety of any proposed course of conduct.

5.8 Section two sets out the responsibilities of government lawyers as advisers to their 'clients': administrators, ministers and office holders. Government lawyers are expected to give impartial, objective and frank advice, and they must always have regard to the government's fundamental obligation that it should act in accordance with the law.

5.9 The *Guidance Note* recognises that in practice legal advice will generally be given to a delegate of the minister or office holder, but that does not alter the duties or accountability

of the government lawyer. Where there is disagreement over legal advice, the government lawyer is expected to resolve this by seeking the views of someone more senior; or ultimately making the minister or office holder aware that there is a difference in view. It may even be necessary to seek the advice of the Law Officers.

5.10 Section three deals with the responsibilities of lawyers as prosecutors. Ministers and officials are often charged with taking decisions on prosecutions. They must arrive at their prosecution decisions independently. Government lawyers must ensure that they must act with professional independence in giving legal advice regarding this process. All Government prosecutors are expected to comply with the *Code for Crown Prosecutors*, which includes ensuring that cases are conducted fairly and independently, that there is a realistic prospect of a conviction and that it is in the public interest to continue the case.

5.11 Finally, section four of the *Guidance Note* sets out the relationship between legal advisers and the Law Officers. Legal advisers have a personal entitlement to consult the Law Officers 'on any matter': this is one safeguard to ensure the professional independence and standards of government lawyers. In practice, it will almost certainly be the head lawyer in the department who would seek out the Law Officers: any significant issue would first be dealt with within the department, and then escalated upwards.

**Government Lawyers and State Legality**

5.12 A common response from government lawyers in interviews was to begin by noting that both the *Civil Service Code* and the professional codes stated that they

were expected to comply with the law and uphold the administration of justice (as is stated in the *Guidance Note for Government Lawyers*). If a suggested course of action was unlawful, they would say so. The *Ministerial Code*, of course, also states that there is an 'overarching duty on Ministers to comply with the law, including international law…'[96] A key role of government lawyers is to help ministers ensure that they do comply with this overarching duty, as the latter may not be lawyers or familiar with the detail of the law, and because the law is not always certain. There were no specific examples of ministers given suggesting an illegal course of action, but a number of government lawyers said that it was often necessary to point out that European law was a barrier to a particular course of action.

5.13 In practice, a minister will want advice on how to handle a particular problem or how to achieve a particular outcome. A scenario in which lawyers would be presented with a single course of action was unlikely to happen. That was an unrealistic representation of the policy and decision making process and lawyers' involvement in that process – as we have already seen in chapter 3. Government lawyers are now involved at an earlier stage in decision making: the process is iterative; there are usually a number of suggested courses of action, with government lawyers asked to evaluate the legal risks of each.

5.14 If a proposed course of action was illegal or borderline, then a government lawyer would raise this. But a good lawyer would also probe her client, asking 'what is it the client wants to achieve?' and provide alternatives with

96 *Ministerial Code* (2010), para 1.2. Note that the wording is the same as previous versions of the Ministerial Code, going back to 2001.

sturdier legal foundations. The government lawyers we interviewed did not think it was their role to tie the hands of government, but rather to find means by which the government could legally pursue its objectives.

> *Government lawyers must give advice, even unwelcome advice. But … ideally you set out the risks; the range of options open to the minister. You say to your minister, 'if you want to do this, why not do Y and Z', rather than 'you can't do X'. (government lawyer)*

5.15 So in practice ethical dilemmas for government lawyers have often been avoided by pre-emptive action. In this respect, government lawyers are much like their administrative colleagues. Administrators must also act in the best interests of their ministers: they must maintain their minister's trust. There may be occasions when administrators too are faced with unpalatable choices: that is often dealt with by talking the matter through, looking for alternatives – or referring an issue up through the administrative hierarchy.[97]

5.16 If there is a serious issue involving questions of propriety (on which, more later) and/or legality for a government lawyer, then the matter could always be escalated (see chapter 4) – in the first instance to a more senior lawyer (the head of a team or the head lawyer of the department), then to outside counsel, the Treasury Solicitor, First Treasury Counsel, or the Law Officers. The existence of this procedure ensured that junior lawyers unsure of themselves could pass significant issues up the line to be determined

97 Anthony Barker and Graham Wilson, 'Whitehall's Disobedient Servants? Senior Officials' Potential Resistance to Ministers in British Government Departments' (1997) 27 British Journal of Political Science 223.

by lawyers of appropriate authority and experience. It was a useful avenue for government lawyers, particularly if their advice was likely to be something a minister did not want to hear.

5.17 Escalation partly depended on the nature of the problem. If it involved proposed legislation, then where pressed departmental lawyers might leave the matter to Parliamentary Counsel.[98] To some extent, Parliamentary Counsel are more able to raise issues of propriety and legality because of their particular expertise in drafting legislation (and on a bigger Bill are likely to outrank the administrator in charge), but also because of their institutional distance from departments. Where the matter involved an issue of professional standards or ethics, a senior government lawyer might consult the Treasury Solicitor as head of profession. This was done in an informal manner: as already noted, seeking the advice of the Treasury Solicitor was more a case of a colleague seeking the advice of a more experienced colleague than a formal avenue for escalation.

5.18 Where the matter involved an issue of law, then the advice of the Law Officers might be sought. As set out in the *Guidance Note*, government lawyers have a personal right to seek the advice of the Law Officers. While asking for the opinion of the Law Officers was common, it was rare that this was exercised as a personal right by a government lawyer. One government lawyer interviewed thought to do so was 'the nuclear option'. In practice, a senior lawyer or departmental lawyer wanting to seek the advice of the Law Officers would tell their minister first:

98 Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis'.

to do otherwise would be to undermine the relationship between the lawyer-official and the minister.

**Government and Private Sector Lawyers Compared**

5.19 It was common ground amongst those government lawyers interviewed that they did take into account different considerations to lawyers in the private sector. Where they appeared to differ was on the nature of those considerations. The majority thought that such considerations simply formed part of the public sector context in which they worked. That is, such considerations stemmed from their client's working context; it was no different from (say) a lawyer working for BP taking into account the oil industry. A minority thought that such considerations amounted to something more; that government lawyers were under particular and specific duties as government lawyers.

5.20 Whatever the source of these considerations, they were different from those taken into account by private sector lawyers. There were obvious matters: *vires* (ie., legal authority for any government action); 'public law' such as the Human Rights Act, the Freedom of Information Act, European Law and devolution; and the reasonableness of a decision, because of the potential for judicial review. These legal frameworks may not loom as large in the minds of private sector lawyers as they do for government lawyers.

5.21 But there were also a set of less explicit considerations which derived from the nature of the client that they worked for. Although this is not a study about litigation, many of the particular public sector considerations suggested by interviewees arose from a litigation context.

The state is *the* repeat player in the courts.[99] That gives it benefits, but in appearing before the courts time and time again government lawyers must also maintain the trust of the courts. That means, for instance, always providing complete disclosure; not being opportunistic; not taking advantage of legal loopholes; perhaps conceding points that private lawyers would not.

5.22 At the same time, because the state is a repeat player in litigation there is a greater incentive for government lawyers to get the law right. Whereas for private sector lawyers what may matter is the immediate case, for government lawyers a more strategic approach may be necessary. So for instance, a decision may be made not to appeal because on the facts the government did not have the right case to argue the issues: 'You might win badly, or lose well' (government lawyer). Thought must be given to the impact that government action has on a wider set of individuals and groups. And ultimately, unlike private sector lawyers, government lawyers can often recommend legislation to change the law if they were unsuccessful in other fora.[100] These are all options that would be discussed with senior administrators or even the minister responsible.

5.23 One government lawyer suggested the overarching consideration was that of propriety. That covered all the considerations noted so far, but was something broader. Propriety covered a situation where a suggested course of action may be legal, but not the best approach to take: a

99 Marc Galanter, 'Why the" Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.

100 Of course, this option is not available for international law or European law, which is possibly one reason for the frustration of successive British ministers from the 1970s onwards.

good lawyer will make clear to their client that sometimes just because something is legal does not mean it should be done (and it was just as likely to be a minister or officials who judge that lawful or not, it was not an appropriate course of action). Another interviewee suggested that the government should not exploit the law it has made, or the greater financial power it had in relation to individuals. Another example of propriety is the conventions concerning the relationship between Parliament and the Executive: for instance, the 1932 Public Accounts Committee Concordat obliges the Government to legislate if it is assuming functions which will run beyond a single financial year.[101] As one interviewee said:

> *I've seen dozens of young lawyers join the GLS from the private sector and trip up because they think only as a private sector lawyer might. They're taken aback when a senior official says: 'Parliament won't accept that, so we just wouldn't do it, and I'm surprised that you mentioned it'.*

5.24 This may be viewed from another angle. This study has been about the provision of *legal* advice. Government lawyers are both lawyers *and* officials, but ministers, confronted with a pressing issue, do not necessarily make that distinction. Government lawyers, by virtue of their status as officials, may be asked for advice rather than *legal* advice. And so their responses will be informed by the context of the issue, which will have both legal and non-legal elements.

101 This goes back to the issue of *vires* – but it is also about maintaining an appropriate relationship with Parliament. A useful discussion of the 1932 Concordat can be found in HM Treasury, *Managing Public Money* (2007), annex 2.1. See also T. C. Daintith, 'The Legal Effects of the Appropriation Act' [1998] Public Law 552. See also now Constitution Committee, *The Pre-emption of Parliament* (2013).

5.25 A minister might insist on a particular course of action which was at least on the face of it lawful, but not prudent. 'But it was ultimately up to the minister' (government lawyer). There might be good reasons why the minister had chosen to go ahead: to signal to the public that she was tough in making decisions, or that she genuinely thought she was right. Interviewees raised a number of examples where government lawyers had advised against a particular course of action, but ministers had gone ahead anyway: this in turn had led to litigation, and the courts had held that state action was ultimately lawful.

**Conclusion**

5.26 Government lawyers are subject to a number of professional codes, both as lawyers (eg., the *Codes of Conduct*) and as civil servants (eg., the *Civil Service Code*). Those interviewed downplayed possible conflict between the two sets of professional codes: indeed the primary government code – the *Guidance Note for Government Lawyers* – insists that there should be no conflict at all. In practice ethical issues appear to be avoided by talking matters through or seeking alternatives with less legal risk attached. Where government lawyers did feel under pressure, there was a set of clear procedures in place in Whitehall.

5.27 Interviewees did think that government lawyers took into account different considerations from lawyers in the private sector. These considerations included legal frameworks (such as European law, the HRA, judicial review), conventions (such as relationships with Parliament, and the courts) to the non-legal (questions of propriety and prudence).

# 6. Iraq and the Role of Government Lawyers

## Introduction

6.1 The 2003 Iraq War remains controversial, with many remaining highly critical over its necessity and legality. There is now a large academic literature on the legality of the 2003 use of force against Iraq.[102] The debate within government over the legality and legitimacy of the Iraq War may be exceptional and not representative of most interactions between UK government lawyers and their clients, but it is unusual in that much of the material has been made public as a result of two major inquiries,[103] and it is mainly for this latter reason that we have chosen Iraq as a case study. Our focus will not be on the war itself, but rather the process by which legal advice on the use of force was provided, and the role of government lawyers.

102 Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 International and Comparative Law Quarterly 859 Sean Murphy, 'Assessing the Legality of Invading Iraq ' (2004) 92 Georgetown Law Journal 173 Sia Spildopoulou Akermark, 'Storms, Foxes, and Nebulous Legal Arguments: Twelve Years of Force against Iraq, 1991–2003' (2005) 54 International & Comparative Law Quarterly 221; Phil Shiner and Andrew Williams, *The Iraq War and International Law* (Hart Publishing 2008); Marc Weller, *Iraq and the Use of Force in International Law* (Oxford University Press 2010).

103 Lord Butler of Brockwell; and currently the Iraq Inquiry (informally the 'Chilcot Inquiry'), whose findings are to be released in 2014, at: www.iraqinquiry.org.uk/.

## Iraq: The Basic Legal Issues

6.2 In international law, the legal framework for the use of force is determined primarily by the UN Charter. Article 2(4) declares that states will refrain from the threat or use of force against any other state; and Chapter VII makes clear that it is for the Security Council to determine threats to or breaches of the peace, acts of aggression, and decide what measures should be taken. There are two exceptions to the prohibition against the use of force: self defence (under Article 51 of the Charter); and authorisation to use force by the Security Council under Chapter VII.[104]

6.3 Following the invasion of Kuwait by Iraq in August 1990, Resolution 678 was adopted by the UN Security Council in November 1990. It demanded the withdrawal of Iraqi forces from Kuwait, and authorised 'all necessary means' to restore international peace and security in the area. Following the expulsion of Iraqi forces from Kuwait, the Security Council passed Resolution 687 in April 1991. This set out the terms for the ceasefire, and imposed obligations on Iraq to destroy its weapons of mass destruction.

6.4 Over the next decade various resolutions were passed, with Iraq found in breach of UN-imposed obligations on a number of occasions. By the early 2000s, the US and its key ally, the UK, began to seriously consider the possibility of the use of military force against Iraq to ensure compliance – which in turn would result in the removal of Saddam Hussein from office. Plans to use military force in Iraq gathered momentum, but questions began

104 There is a possible third exception to the general prohibition on the use of force: intervention to avert a humanitarian catastrophe – but this is controversial.

to be asked about the legality of any use of force against Iraq under international law. Adherence to international law was considered of particular importance to the UK Government.

## The Government's Initial Legal Advice

6.5 Both FCO legal advisers and the Attorney General Lord Goldsmith offered legal advice throughout this period, and in spite of later criticism, did have some impact on the conduct of the UK Government. In July 2002, the Attorney General ruled out the use of self defence or humanitarian intervention as possible legal grounds for the use of force against Iraq; FCO legal advisers had taken a similar line as well. The result of this was that the primary justification for the use of force against Iraq shifted towards Security Council authorisation under Chapter VII of the Charter.

6.6 In what was known as the 'revival argument', it was argued that Resolution 687 (1991) which set out the terms of the ceasefire had only suspended Resolution 678 (the 1990 Security Council authorisation to use force against Iraq), not terminated it – that is, authorisation could be revived. What was needed was a 'material breach' by Iraq of its obligations and a fresh resolution by the UN Security Council. To this end, both the US and UK pushed for the adoption of a new Security Council resolution. Following lengthy negotiations, Resolution 1441 was passed in November 2002 by the Security Council, stating that Iraq was in 'material breach' of its obligations once again, and that it had one final opportunity to rectify the situation.

6.7 FCO legal advisers had made a number of submissions to the Foreign Secretary and to the Legal Secretariat to

the Law Officers (LSLO)[105] both prior to and following the adoption of Resolution 1441. The substance of their advice was that the revival argument required both a second resolution *in addition to* Resolution 1441 and a further finding of material breach by the Security Council. The Foreign Secretary, Jack Straw, took the view that Resolution 1441 meant that no further decision from the Security Council was necessary – and indeed he later rejected the advice of his chief legal adviser, Sir Michael Wood: 'I note your advice but I do not accept it.' [106] At this point, Lord Goldsmith had not yet been formally requested to give authoritative legal advice (as we saw in chapter 4, the general process of obtaining the advice of the Law Officers begins with a submission from the lead department). Moreover, there have been strong suggestions that the Attorney General's authoritative advice was deliberately not sought.[107]

## Legal Advice in the Run-up to the Invasion

6.8 It was only in early December 2002 – four months before the invasion of Iraq – that Sir Michael Wood set out a long submission to the LSLO on the legality of the use of force in Iraq. The FCO submission was curious in stating that 'No advice is required now',[108] but it was, however, interpreted

105 Now the Attorney General's Office (AGO).

106 See '29 January 2003 – note from Foreign Secretary Jack Straw to Michael Wood (FCO Legal Adviser) re Iraq: legal basis for use of force', available at: www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf.

107 See generally Weller.

108 See '9 December 2002 – note from Michael Wood (FCO Legal Adviser) to Catherine Adams (Legal Secretariat to the Law Officers) re UNSCR 1441', available at: www.iraqinquiry.org.uk/media/43707/document2010-01-27-100553.pdf.

as a request for the advice of the Law Officers.[109] On 28 February 2003, Lord Goldsmith set out his view on the legality of the use of force against Iraq in a discussion with the Prime Minister.[110] It was a cautious opinion. Goldsmith concluded that Resolution 1441 was unclear, and that the 'safest legal course' would be another Resolution finding material breach by Iraq. However, he also said in his opinion that there was a 'reasonable case' that Resolution 1441 was enough in itself to revive the authorisation in Resolution 678, provided that there was strong factual evidence of non-compliance. Non-compliance could be determined by the Prime Minister, rather than the Security Council. Goldsmith later submitted this advice in written form on 7 March 2003.

6.9 Following pressure from both the civil service and the military to provide a simple, clear statement of the UK Government's legal position, Goldsmith revised his opinion ten days later on 17 March 2003. This advice, or statement,[111] was far less equivocal about the legality of the use of force, stating that 'Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441.'[112] Goldsmith had also at this point sought the advice of Sir Christopher Greenwood, a well-known QC and legal academic who specialised in international law – who had

109 See testimony of Cathy Adams (30 June 2010) at: www.iraqinquiry.org.uk/media/46654/20100630pm-adams.pdf, 17–18.

110 This is available online: see Lord Goldsmith.

111 There remains some controversy over the status of this statement – with key actors calling it a view and others referring to it as advice: see Adams.

112 The Attorney General's public advice on 18 March 2003 on the legality of the use of force can be found in Colin Warbrick and Dominic McGoldrick, 'The Use of Force Against Iraq' (2003) 52 International & Comparative Law Quarterly 811.

publicly taken a different view to that of the FCO.[113] On 19 March 2003, a coalition of countries, including the UK, invaded Iraq and toppled the regime of Saddam Hussein.

## The Suez Crisis

6.10 A comparison with the 1956 Suez Crisis is apposite. The facts were similar to Iraq: it involved a British government intent on the use of force, but was faced with legal authority which strongly suggested that the proposed use of force under international law would be illegal.[114] Briefly, in July 1956 the Egyptian Government nationalised the Suez Canal, regarded as a vital strategic route linking the Indian Ocean to the Mediterranean. The British Government were prepared to use military action to force the Egyptians' retreat. Viscount Kilmuir, the Lord Chancellor, argued that the British Government were entitled to use force under the UN Charter, primarily on the basis of self-defence.

6.11 The Legal Adviser to the Foreign Office, Sir Gerald Fitzmaurice, disagreed. The use of force would only be justified by a previous illegal act by the Egyptians; but the Egyptian actions were an internal affair which did not involve an attack on foreign territory, forces or lives. Thus, any use of force by the British would be illegal under international law. The Law Officers were in agreement with Fitzmaurice. Their advice was ignored.

113 See Sir Christopher Greenwood's *Memorandum on the Legality of Using Force against Iraq* before the Foreign Affairs Select Committee in October 2002, at: www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm.

114 Geoffrey Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government' (1988) 37 ICLQ 1988. This section draws heavily on Geoffrey Marston's article.

6.12 Plans for military intervention continued, and both Fitzmaurice and the Law Officers (particularly the Attorney General Sir Reginald Manningham-Buller) complained of not having been adequately consulted. By mid-October 1956 a plan had been agreed upon between the British and the French for joint armed intervention, following an Israeli military offensive. Fitzmaurice and the Law Officers were not told of this plan. Cabinet continued to rely on the Lord Chancellor's view of the legality of their proposed action. Ultimately in early November Israel attacked Egypt; Britain and France issued ultimatums to Egypt, and later had their military forces land there. However, there was an international outcry, and a lack of support from the US. Britain and France were forced to withdraw from Suez, suffering humiliation both home and abroad.

6.13 As Marston noted, the Suez crisis raised the issue of the appropriate procedure for obtaining legal advice within government. Cabinet had chosen to follow the advice of the Lord Chancellor over the advice of the Attorney General and the Foreign Office legal adviser. By early November 1956 the Law Officers had to remind both the Foreign Secretary and the Prime Minister of the Law Officers' constitutional role as the legal advisers to the Government. Separately, Fitzmaurice insisted in a memo to the Foreign Secretary that aside from himself as Legal Adviser to the Foreign Office, only the Law Officers had an official function as legal advisers to the Government. The Lord Chancellor did not sit in Cabinet in the capacity of being its general legal adviser: he was there to represent the judiciary. Both Fitzmaurice and Manningham-Buller threatened resignation, though neither ultimately did so.

## The Process of Forming Legal Advice within Whitehall

6.14 Since the 2003 invasion of Iraq there have been various criticisms of the legal advice provided by the Attorney General. Many criticisms focus on the content of the legal advice provided: that the revival argument was not persuasive, because the use of force could only be explicitly authorised by the Security Council itself; that the meaning of Resolution 1441 had to be interpreted using the text but also public statements about it rather than reliance on private understandings; that a material breach had to be interpreted by the Security Council; or about the standard of what was a 'reasonable' argument.

6.15 But the comparison of Iraq with Suez points to a number of issues which have already arisen in this report – issues of process. In both cases, ministers were slow to seek the authoritative advice of the Law Officers, either being unaware of the hierarchy of legal advice or choosing to ignore it. In the case of Iraq, what is clear is the somewhat ad hoc involvement of the Attorney General in the lead up to the invasion. It is true that FCO legal advisers often provided the Attorney General with updates via submissions (both formal and informal) to the LSLO, but there were also at least three significant occasions on which the Attorney General was either brought in at a very late stage or not formally at all: in the first half of 2002, when policy on the use of military force was being formulated; in the period prior to and during the negotiation over the drafting of Resolution 1441 (November 2002); and the period following the adoption of the Resolution (November 2002–January 2003).

6.16 A number of government lawyers, including the Attorney General himself, expressed concern to the Chilcot Inquiry over the timing of legal advice.[115] As noted in chapter 3, there has been a move towards much earlier involvement in the policy making process by government lawyers, and for good reason: early involvement may provide more scope for action or at least prepare the ground for a more legally defensible approach. Moreover, the surprisingly late request for formal legal advice from the Attorney General in late 2002 meant that Lord Goldsmith came under intense pressure to provide legal grounds to legitimate impending military action. The later legal advice is sought, the more difficult it is from a practical perspective to 'row back' to a more legally defensible position.

6.17 A second process question relates to the hierarchy of legal advice. It is now known that two key lawyers from the FCO, the legal adviser Sir Michael Wood and the deputy legal adviser Elizabeth Wilmshurst, had strong reservations about the legality of the proposed use of force against Iraq.[116] Indeed, Wilmshurst would later resign as a result of the legal advice finally provided by the Attorney General.[117] Both Wilmshurst and Wood thought that the

115 See the testimony of Cathy Adams (30 June 2010) at: www.iraqinquiry.org.uk/media/46654/20100630pm-adams.pdf, 9, 58; Iain Macleod (30 June 2010) at: www.iraqinquiry.org.uk/media/46908/20100630-macleod-final.pdf, 21; Lord Goldsmith (27 January 2010) at: www.iraqinquiry.org.uk/media/45317/20100127goldsmith-final.pdf, 245.

116 See the testimony of Sir Michael Wood (26 January 2010) at: www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf; and Elizabeth Wilmshurst (26 January 2010) at: www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf.

117 See the testimony of Elizabeth Wilmshurst (26 January 2010) before the Iraq Inquiry at: www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf.

uncertainty of international law meant that the UK should be more cautious about keeping within the boundaries of (international) legality. The Foreign Secretary Jack Straw rejected their advice: he argued that exactly because international law was relatively uncertain there was greater scope for state action.

6.18 The FCO legal advisers recognised, however, that ultimately the Attorney General would be the final authority on the legality of the use of force against Iraq. Goldsmith had expressed agreement with the view of the FCO legal advisers until the end of 2002, only to change his view in February and March 2003, following discussions with both the US and UK negotiators of Resolution 1441. The key departmental legal advisers – experts in their field – had been consistent in their legal advice on the issue in question; it was only when it went to the Attorney General that the Government obtained legal advice more supportive of their position. The Attorney General's advice was also affirmed by outside counsel – Sir Christopher Greenwood QC. As we have already seen, seeking the outside advice of outside counsel is not unusual in Whitehall, particularly on politically and legally significant issues.

6.19 Professor Marc Weller has also noted the similarities between the 1956 Suez crisis and the 2003 Iraq War.[118] Weller notes that in Suez, it would have been better to insist upon the 'unipolar authority' of the Attorney General; whereas in the case of Iraq, exclusive reliance on the Attorney General was problematic – the Attorney was exposed to a persistent campaign to encourage him

118 Weller, chapter 7.

to take a particular view, while FCO lawyers remained, on the whole 'entirely resistant to such pressures'.[119] The two incidents raised questions about both the procedure by which legal advice was obtained; and the appropriate weight to be given to the advice of the FCO lawyers and to that of the Attorney General.

6.20 Weller suggests three possible models of legal advice.[120] The first model would require the Attorney General to take account of the advice given by governmental lawyers by the lead department; if his advice conflicted with theirs, then their advice could be appended to his; and he would need to give reasons for deciding differently. The second model would require a joint view of both the lead department's legal advisers and the Attorney General. The third model would require the establishment of small bodies of top international law experts, whose opinion would be required on highly contested issues. Their opinions would need to be fed into the decision making process of the Attorney General and/or the government.

6.21 Ultimately, Weller argues that legal advice should reflect plural opinions in government. Insisting that final legal advice should issue from one source only has the advantage of producing a clear result; but in cases where the law is unclear or conflicts with the government's proposed conduct, it would be better for legal advice to reflect this. But Weller's suggested reforms for the provision of legal advice do not sit well with the current hierarchy of legal advice within Whitehall. That hierarchy exists to provide a means to resolve tensions faced by government lawyers,

119 Ibid, 252.

120 Ibid, 252.

as well as finality; and to ensure that responsibility for politically and legally significant decisions rests with a politically accountable minister.

## Conclusion

6.22 The invasion of Iraq, and the controversy which has raged ever since about its legality, raise in sharp relief many of the issues covered in this report.

6.23 First, law is seldom black and white: the result is thatgovernment lawyers advise about legal risks rather than in straight yes/no terms. International law is relatively uncertain; and the uncertainty is compounded by the shortage of legal fora in which to test advice on international law. When government lawyers advise on domestic law, the UK domestic courts can deliver quick judgements to settle the question. With international law there may be no suitable fora, so important questions may be left unresolved.

6.24 Second, the FCO Legal Advisers generated the initial legal advice, which was submitted by the Chief Legal Adviser to the Foreign Secretary. It was recognised that authoritative legal advice could come only from the Attorney General. That advice was not sought until late in the day, possibly because the Prime Minister feared it would not support his chosen course of action. Most unusually, one version of the Attorney General's advice was also published in the period prior to the invasion of Iraq.

6.25 Third, the Attorney General came under intense pressure to modify his advice, and his second legal opinion of 17 March 2003 was expressed in stronger and clearer terms

than his more detailed and nuanced advice of 7 March 2003. We only know this because both sets of advice were published. We do not know how often government lawyers are asked to clarify their advice when it is uncertain or unwelcome; nor do we know how legal advisers then respond.

6.26 Finally, Iraq highlights the need for ministers to retain confidence in their legal advisers, so that they are willing to seek legal advice when they need it. This is the argument generally advanced for the Law Officers being government ministers rather than purely 'independent' lawyers: other ministers will be more likely to seek legal advice, and to accept the advice which is given, if it comes from a fellow minister. But with Suez, the Prime Minister and Cabinet deliberately avoided seeking advice from the Attorney General; and with Iraq the PM delayed asking until it was too late to change course. This does not necessarily undermine the argument for the Attorney being a member of the government; if he had been an independent lawyer at one remove, it seems even *less* likely that the PM would have approached him for early legal advice.

# 7. Conclusion

7.1 This has been a short study, and so the amount of research has been limited. Many of the conclusions reached must be tentative, because we were only able to interview a small number of people, and with limited resources. But with these caveats in mind, there are a number of themes which have emerged from the research.

7.2 Law and legality are now ever-present considerations in the policy and decision making process. Government cannot escape from the reach of the law – if it ever could. That state of affairs, however, has a number of implications. We have seen that government lawyers have now become intimately involved in the policy and decision making process, and at an earlier stage than before. But because law is inescapable, and its effect uncertain, lawyers talk of legal risk rather than legality and illegality. Government lawyers see themselves not as 'guardians' but as risk managers.

7.3 There is a formal hierarchy of legal advice that is well-understood within Whitehall, although upon examination becomes increasingly opaque to the outside observer. That hierarchy begins with the departments themselves and has at its apex the Law Officers, who by virtue of their status as ministers are understood to be the final authority on significant legal issues facing the government. But there are also intermediary actors within the machinery of Whitehall who may be consulted for various reasons:

convenience, as an alternative or additional source of advice; for their expertise and experience; for insurance; for clarity. These intermediary actors include the Treasury Solicitor, First Treasury Counsel, the Attorney General's panel counsel, QCs and non-panel specialist counsel. What is less acknowledged is the role of these intermediary actors: that their advice on a legal issue may be in some circumstances considered authoritative and even determinative; and their function in ensuring consistency and cohesion in legal advice across government.

7.4 The experience of examining government lawyers, and the themes which have emerged, echo the experience of examining Whitehall in general. In determining patterns or routine behaviour amongst government lawyers and their clients, it was common to be told that much depended on the personalities involved; and/or on the department one was examining; or that there was nothing written down, but a particular process was simply 'understood' by the relevant parties.

7.5 Government lawyers are a powerful and influential group within Whitehall; and as such they deserve greater understanding. Their work cannot be understood without reference to changes in Whitehall more generally. Lawyers have become more integrated into the policy and decision making process in Whitehall because of the increasing penetration of law into government. This short study suggests that broader shifts in British government have also led to changes in way that government lawyers work. There is an emphasis on faster responses as the result of 24/7 media, email and the internet; and greater informality within Whitehall has led to less rigid boundaries between lawyers and administrators.

7.6 A more tentative finding is the impact of the shorter times in post of many senior civil servants in Whitehall departments and an apparent decline of 'traditional' civil service skills such as policy making.[121] It was common for government lawyers to comment on the worrying lack of institutional memory within departments. This has been noted by others. Most recently, Lord Butler, a former Cabinet Secretary, suggested the appointment of a historical adviser in each department – since all departments save the Foreign Office have disbanded their historical sections.[122] In comparison to administrators it appears that government lawyers tend to join at the beginning or in the middle of their careers, and remain in government till the end: that makes them unusual as a group within Whitehall.[123] Does this have an impact on their relations with administrators and ministers? Do they really function as one source of institutional memory in departments? These matters deserve further investigation.

7.7 If government lawyers represent a microcosm of Whitehall it is because – to state the obvious – they are also civil servants. So there are some benefits in examining the work of government lawyers through the perspective of the civil service, and the common values, tensions and experiences the civil service has as a collective group. We take two: departmentalism and trust.

121 Scott Greer and Holly Jarman, 'What Whitehall?' (2010) 25 Public Policy and Administration 251.

122 'Every department should have a historical adviser, argues Lord Butler of Brockwell' *Civil Service World* (13 March 2013), at: www.civilserviceworld.com/every-department-should-have-a-historical-adviser-argues-lord-butler-of-brockwell/.

123 Greer and Jarman.

7.8 Departmentalism is a bugbear of Whitehall. There have long been debates about narrow departmental interests dominating at the expense of joined up government.[124] In this respect debates about restructuring and reorganising the mechanisms for the provision of legal services are another example of this tension. Sharing services, and absorbing departmental legal teams into the Treasury Solicitor's Department has led to concerns about how a more unified legal advisory group might impact upon departmental interests and priorities.

7.9 Fans of *Yes Minister* have presumed that civil servants will often act to obstruct ministers. But for a civil servant there are few things more important than maintaining the minister's trust and delivering on the government's policy and legislative programme. Those considerations can sometimes conflict with the need to speak 'truth to power'.[125] This tension – between maintaining the minister's trust and ensuring good government – find their analogue in the tension that lawyers sometimes face – between acting in the best interests of one's client, and being an officer of the court. This tension is for the most part been resolved by a proactive, 'can do' approach to problems faced by ministers: the focus is on finding lawful solutions rather than being a guardian of legal values.

7.10 We have looked very broadly at the process of providing legal advice but there are various lacuna. For instance, we do not know how often government lawyers are asked to clarify their advice when it is uncertain or unwelcome; nor do we know how legal advisers then respond. A

124 Peter Hennessy, *Whitehall* (Fontana 1990).

125 Lorne Sossin, 'Speaking Truth to Power? The Search for Bureaucratic Independence in Canada' (2005) 55 University of Toronto Law Journal 1.

number of government lawyers have suggested changes in their role and function have been caused by changes on the administrative side: this relationship deserves further investigation. In short, we have focused on supply (lawyers) but not on demand (administrators).

7.11 Put another way, we have focused on the provision of advice, but less on its reception. Any further study must take this question seriously. Government lawyers have a responsibility to give clear advice, assessing the risks of different courses of action. But they must also answer the 'so what' question for their clients – that is, if lawyers raise the issue of a potential legal challenge, they must explain what are the consequences are – will the Government lose, and if they do, does it matter? Equally, the recipients of that advice have a responsibility to understand and apply it intelligently; and they too must ask and answer the 'so what' question. We do not know to what extent advice about legal risk is in fact understood by the clients of government lawyers. Partly this is about legal literacy; but it is also about how legal advice is provided and transmitted.

7.12 This raises a final point. Almost every major actor in Whitehall has a chief legal adviser who can help them answer the 'so what?' question. Does the Prime Minister need his own legal adviser? Former Legal Adviser to the FCO Sir Daniel Bethlehem thought so.[126] Of course, the Prime Minister can ask the Treasury Solicitor or the Attorney General for legal advice, but they are arguably

126 'No 10 needs its own lawyer, says leading QC', *BBC News* (5 June 2012), at: www.bbc.co.uk/news/uk-politics-18297876.

there generally to provide legal advice to Cabinet.[127] This leads into matters which are outside the ambit of this report – such as whether or not there is, or should be, a Prime Minister's department.[128] But it is worth noting that Prime Ministers in the past have appointed individuals as advisers to help them in areas of great importance – for instance, Margaret Thatcher appointed Alan Walters as her chief economic adviser; Tony Blair had Sir Stephen Wall as his EU adviser. Given the ever-growing frameworks of accountability and potential for legal challenge, perhaps the Prime Minister needs his own adviser to understand the significance of the advice he is getting.

127 One question arising from the Iraq Inquiry is to what extent the Attorney General sees himself or herself as the legal adviser to Cabinet or to the Prime Minister.

128 Constitution Committee, *The Cabinet Office and the Centre of Government* (2010).

# Appendix

## Guidance Note for Government Lawyers

This note provides guidance to Government lawyers in the Home Civil Service on their role in England and Wales. In particular, it provides guidance as to:

1. the inter-relationship between their obligations as civil servants and as members of the legal profession;
2. their role regarding other civil servants and the Ministers or office holders to whom they are accountable;
3. the special position of prosecutors in the decision-making process;
4. the inter-relationship between the role of Legal Advisers to departments and that of the Law Officers in the provision of legal advice to the Government.

This guidance does not apply to the lawyers serving the National Assembly for Wales who are subject to separate arrangements.

### 1. The lawyer as a civil servant

Government lawyers are civil servants and are, therefore, bound by the Civil Service Code ("the code") which sets out the constitutional framework within which civil servants work and governs the responsibilities of civil servants. A copy of the Code is attached to this note. Equally, as members of the legal profession,

Government lawyers are independent professionals bound by the codes of conduct applicable to their branch of the profession and, where they are involved in civil or criminal litigation, owing duties to the courts. These obligations are complementary; indeed the duty to comply with the law, to uphold the administration of justice and to act in accordance with professional standards is expressly reaffirmed in the Civil Service Code. This means that compliance with their professional obligations will not bring Government lawyers into conflict with the standards set out in the Code.

The management structure, lines of accountability and organisation of work of Government lawyers are such as to respect their status as independent professionals and to allow for the proper exercise of independent professional judgement. In circumstances in which a Government lawyer believes it is appropriate to report a matter covered in paragraph 11 of the Code, departmental guidance or rules of conduct set out the procedures which should be followed. As regards any matters involving professional codes and ethical standards, the Treasury Solicitor as Head of Profession may be consulted by the department or the lawyer concerned. Additionally, Government lawyers are entitled ultimately to consult the Law Officers if they have doubts about the propriety of any proposed course of conduct in a matter for which they have responsibility.

Government lawyers qualified to exercise rights of audience in the higher courts will not be given the conduct of such advocacy in any litigation where they have had responsibility for making executive decisions in relation to actions which are the subject matter of litigation.[129]

129 Solicitors and barristers are entitled to ask a court of competent jurisdiction, and additionally solicitors are entitled to ask the Law Society, for a decision on the interpretation of the Employed Solicitors Code as it applies to extend rights of audience and the Government will accept that decision as binding upon it.

Government lawyers are fundamentally in the same position as all other lawyers providing legal services. They are subject to the same duties to their client, to the court and to others with whom they have dealings, must uphold the same standards of honour and ethics, must respect the same confidences and they and their client have the same privileges. It is important, however, that Government lawyers understand the special nature of Government work. This is explained further in paragraphs 2 and 3 below.

## 2. The Lawyer as adviser to other civil servants, Ministers or office holders

Government lawyers have a professional obligation to give impartial, objective and frank advise. In providing such advice, they must have particular regard to the fact that it is a fundamental obligation of Government that it should itself act in accordance with, and subject to, the law. If the law is considered to be defective it may be changed, but it should be obeyed.

As civil servants, Government lawyers owe their loyalty to the duly constituted Government and are accountable to the Minister or, as the case may be, the office holder in charge of their department or organisation. The nature of much of the work of Government lawyers is that, in practice, they provide legal advise to other civil servants to whom the responsibilities of a Minister or office holder have been delegated, rather than direct to the Minister or office holder. Nevertheless, this does not alter the nature of Government lawyers' duties, or remove or diminish their accountability to the Minister or office holder. Three consequences flow from this position.

a. advise should always be given in the context of the duties and responsibilities of the Minister or office holder to whom accountability is owed. In some instances, Ministers or office holders exercise a quasi-judicial function and their decisions must be taken independently. In other cases, they may have policy objectives to deliver for which the Government has a collective responsibility;

b. if a fellow civil servant to whom legal advice is given disagrees with the content of the legal advice or the appropriateness of following the advice then it is the responsibility of the lawyer to endeavour to ensure that

    i. the difference of view is resolved, usually through consideration at a more senior level, before advice is given to or action taken on behalf of the Minister or office holder; or, failing that

    ii. the Minister or office holder is made aware of the difference of view before the decision is taken. In some circumstances it will be appropriate for an issue to be considered by the Law Officers. This is dealt with below.

c. lawyers should ensure that their legal advice, where relevant for the purposes of any written or oral submission, is correctly relayed to the Minister or office holder.

### 3. The lawyer as a prosecutor

The role of the lawyer as prosecutor derives from the special constitutional position of Ministers and office holders who have a responsibility for taking decisions on prosecutions, as explained below.

Ministers and office holders must arrive at their prosecution decisions independently, informing themselves of all relevant facts and public policy considerations but being the sole judge of those considerations and not subject to pressure from their fellow Ministers or others. In practice, almost all decision-making concerning prosecutions is delegated to civil servants. Civil servants in this position must apply the same principles.

The role of the Government lawyer in this process is crucial. It involves advising on the sufficiency of evidence and, depending on the arrangements for prosecuting within departments, may extend to taking the decision whether or not to prosecute and the subsequent conduct of the proceedings. Whatever the extent of the role of the Government lawyer in the prosecution process, he or she must discharge the role with professional independence.

All Government prosecutors are expected to comply with the principles set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions and with any other guidance issued by the Attorney General from time to time on prosecution issues. The duties imposed by the Code of Crown Prosecutors include ensuring that cases are conducted fairly, independently, objectively and effectively, that there is a realistic prospect of a conviction and that it is in the public interest to continue the case.

## 4. Department legal advisers and the Law Officers

The Law Officers are the chief legal advisers to the Government. They have a special relationship with the Legal Advisers to departments which entitles Legal Advisers to consult the Law Officers on any matter. This entitlement is one means of ensuring the professional independence and standards of the advice given by them and their staff. Guidance is contained in the Ministerial

Code as to particular circumstances in which the advice of the Law Officers may appropriately be sought.

The Attorney General has an import role in respect of prosecutions. He is the ultimate prosecuting authority. This role makes it appropriate to consult him in cases of difficulty, for example, those raising particularly difficult public interest considerations or issues of propriety or important issues of law of general importance.

Moreover, it is always open to Legal Advisers of prosecuting departments to seek guidance from the Attorney General in relation to particular problems or issues.

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Report

# Risk Management

*Government Lawyers and the Provision of Legal Advice within Whitehall*

Dr Ben Yong

Government lawyers are a powerful and influential group within Whitehall, and as such they deserve greater understanding. Law and legality are now ever-present considerations in the policy and decision making process. Government cannot escape from the reach of the law – if it ever could. The result is that lawyers have become more integrated into the policy and decision making process in Whitehall because of the increasing penetration of law into government. But because law is inescapable, and its effect uncertain, lawyers talk of legal risk rather than legality and illegality. Government lawyers see themselves not as 'guardians' but as managers of legal risk.

This short study examines the work of government lawyers in Whitehall, looking at the changes over the past thirty years in the way that legal advice has been provided. It examines the role of lawyers in the policy and decision making process, the hierarchy of legal advice and the professional norms that government lawyers adhere to. Finally, there is a case study of the role of government lawyers in the decision to use military force against Iraq in 2002–2003.

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