

## THE PROCESSES FOR GIVING AND RECEIVING LEGAL ADVICE

1. I preface these remarks by recalling that I have no first hand knowledge of any kind of what went on within Government at the time, so that, like the Inquiry itself, I come to the matter retrospectively in the light of the written and oral evidence, with I hope a fresh mind. What follows deals with general questions, not the role of individuals.
2. May I also be allowed a further prefatory remark? There is always a temptation, in the face of policy or other decisions of questionable quality, to assume that the fault lies in the process. But good process, important though it is, doesn't make good decisions, it facilitates them. Decisions, whether autocratic or collective, are the responsibility of those who take them, and that includes the decision whether or not to seek or accept legal advice, and how to implement it.
3. There is by now quite a body of literature on legal advice and foreign policy. A good deal of it comes from (and deals with) this country, but a fair amount from abroad. Its overall effect reflects sound working experience, and can be summarized roughly as follows:-
  - (a) Close working relationships (in both directions) between the lawyers and their policy clients are crucial; they make for mutual trust, for ready understanding (without the need for repeated elaborate explanation), and for advice that corresponds to the operational need. Close relationships also make it easier, on the one hand, for the policy officer to seek advice whenever it would be useful, and, on the other, for the lawyer to intervene without generating resentment, as soon as a looming problem is spotted.
  - (b) Equally crucial to the working relationship is openness and honesty – again, on both sides: the policy client has to be open about the facts (so far as they are known) and about the policy objectives being pursued; the legal adviser's independence has to be preserved to state the law as it is (including its uncertainties), not as the policy maker might like it to be. Apart from being the lawyer's professional duty, this is also crucial to the usefulness of the advice given. As Sir Gerald Fitzmaurice once said, objectivity and impartiality are different things, and what a client needs and

deserves from his in-house lawyer is above all accurate legal advice.

(c) Legal advice is best when sought early and often. To wait until a legal problem has built up can prove too late; moreover it undermines the role of the legal adviser as constructive partner, reducing it to defensiveness or damage limitation. Advocacy, while it may be a legal role, is not the same as advice.

(d) Legal advice should not be thought of as a formalistic once-and-for-all operation. Especially in the international field, and in crisis situations, circumstances constantly change and develop, and facts emerge sequentially. The legal advice may have to be restated and reinterpreted to keep in step. Close relationships as under (a) above foster this without any loss of operational efficiency, and much gain in operational outcomes.

(e) What happens after advice is given can be as important as what happens beforehand. It is perilous for non-lawyers to paraphrase or translate the effect of the legal advice they have been given. Only an informed lawyer can say with authority and accuracy how established legal principles relate to a changing context.

4. From what I have been able to read, I see no sign that these important precepts were not reflected at the time in the working arrangements within the FCO, and within diplomatic Missions abroad, notably UKMIS New York. If the earlier basic nexus of one legal adviser allocated to the work of each FCO policy department has now been replaced by small legal teams, the principle remains intact, and is well adapted to meet the five points above, so long as the lawyer or legal team maintain their independence by reporting upwards, to the Legal Adviser, not sideways, to the policy hierarchy. Points (c)-(e), in particular, used to be guaranteed by Ministers or senior officials refusing to take policy submissions having legal implications unless there was an express indication that the relevant legal adviser concurred. This was a sound working practice, and I hope it still operates.
5. The system above replicates itself in overseas Missions like UKMIS New York or UKREP Brussels, but *mutatis mutandis*. The resident legal adviser may have even closer working relationships with his colleagues, and may carry a greater degree of direct operational

responsibility than in London, but on the crucial issues of high policy will be working as part of a close-knit team, albeit a distinctive part.

6. The picture so far can be visualized as two sides of a square. To complete the figure requires two further elements. One is the internal relationships within the legal cadre. It is obviously in the interests of all concerned that the FCO's lawyers are able to, and do in practice, consult easily and efficiently among themselves, and where necessary put important questions to the Legal Adviser for approval. It avoids the danger of inconsistent legal advice, and gives confidence to junior lawyers and senior policy makers alike that they are purveying and acting on the best legal view, especially in areas of particular difficulty or importance. The fourth element in the figure, by the same token, is that Ministers and senior officials must have direct access to the Legal Adviser whenever the need is felt, and likewise he to them. All the signs I have seen are that these final two sides of the figure were equally in good working order in 2002 and 2003. I might add that I never remember encountering, in all my FCO experience, a departmental head or senior official who did anything but welcome this close intercommunication within the Legal Advisers cadre, even though some of them on occasion chafed under the legal advice it produced.
7. To apply the same principles to the legal adviser to a Mission abroad requires a little more *mutatis mutandis*. As at home, the Mission legal adviser is both in the fullest sense a member of the Mission staff and at the same time a representative of the legal cadre abroad; that is the purpose of the posting in the first place. The difference resides in the fact that, unlike at home, as a member of the Mission the legal adviser answers to and takes instructions from the Head of Mission. If the dual role contains within itself a latent tension, that is more hypothetical than actual. Although there may well be on particular politico-legal issues a 'Mission view', which the Mission's legal adviser would be expected to advance to legal colleagues in London with the same fluent persuasiveness as his policy colleagues are doing with their own counterparts, it is axiomatic that the instructions come from London, on both the policy and the legal aspects. I have never known a Head of Mission take umbrage at separate, parallel, correspondence between the Mission legal adviser and the FCO legal advisers, (initiated in either direction), if only because it offers the best guarantee both that the Mission's concerns will be properly understood in the legal advisory process, and that the Mission will not find itself out on a limb through failure to understand the detailed

implications of the authoritative legal view when it arrives from London. It would, I think, be the common expectation that the legal adviser abroad and the FCO lawyers dealing with the Mission's work should be free to have direct contact with one another whenever necessary, and that the Legal Adviser himself should take a continuing interest (as he would at home) in both the welfare and the work of members of his cadre posted abroad.

8. It seems to me that it is not possible to codify these sorts of working arrangements more prescriptively. Once you have as your starting point a basis of cooperation and trust, against the accepted background that London makes the policy (with the benefit of advice from all relevant sources), and Missions carry it out, all that remains is to foster free and efficient communication. This applies on the legal plane as much as it does on the policy plane. It seems obvious that, just as different policy prescriptions may jostle in competition with one another until the line is laid down by London, so also the various legal arguments and considerations are ultimately reconciled in the authoritative legal view, which then becomes the operative position for all parts of the diplomatic machine. So I have to confess (once again) to some astonishment at seeing a former Foreign Secretary implying in recent evidence to the Inquiry that he was not bound by legal advice given to him at the highest level, but was entitled to weigh it off against other legal views as the basis for policy formation. If Ministers begin to think that they can shop around until they discover the most convenient legal view, without regard to its authority, that is a recipe for chaos; I refer once more to Sir Gerald Fitzmaurice's aphorism cited above.
9. That may provide a convenient transition to the aspect that proves most difficult of all to describe adequately, namely the role of the Law Officers.<sup>1</sup> As David Brummell pointed out in his written evidence to the Inquiry, the established practices in that regard were set out in some detail in the version of the Ministerial Code that was current at the time,<sup>2</sup> which are intended to be read against the overarching duty of Ministers to comply with the law including international law and treaty obligations.<sup>3</sup> For reasons that are not clear to me, the current version of the Ministerial Code (while retaining the overarching duty)

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<sup>1</sup> I use the plural term for pure convenience, although it appears to be a matter of discretion whether the Attorney General advises jointly with the Solicitor General or on his own.

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[http://tna.europarchive.org/20070101092835/http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/ministerial\\_code\\_2001.PDF](http://tna.europarchive.org/20070101092835/http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ministerial_code_2001.PDF), at paragraphs 22-23 (attached).

<sup>3</sup> See Part 1 of the Code, at p.1.

has dropped much of the specific useful detail about the Law Officers. That seems to me regrettable, and to court future misunderstandings. I can see no good grounds, for example, not to spell out the requirement to consult the Law Officers when the legal consequences of proposed action might have important repercussions in the foreign, EU or domestic field, or where a Departmental Legal Adviser is in doubt as to the legality of the action proposed.

10. I should say at this point that I remain a firm supporter of the longstanding arrangement under which the Law Officers are members of the Government with Ministerial rank, but recognized as being independent in their legal roles; it offers great advantages, including in the international legal field. Rather than go into detail, I append a copy of my joint submission to the consultation in 2007 on the role of the Attorney General. That said, it is most unlikely that any Attorney and Solicitor General will come to their posts with the same knowledge of and feel for international law as they have for the other areas of law covered by their functions. That means that the relationship between the Law Officers and the FCO Legal Adviser takes on a special importance. The Law Officers will rely heavily on the Legal Adviser to submit with any request for advice a full case identifying, analyzing, and applying the relevant legal principles and materials, and setting out where necessary the relevant considerations of legal policy in the international field; the Legal Adviser for his part will be able to count on the Law Officers to draw on his knowledge and expertise, and to back him up in defending the integrity of the legal function within the FCO. It follows that on issues of exceptional importance, or where the phrasing of advice is especially sensitive, or in the rare cases where the Law Officers intend to take a different view to that put forward to them, they will want to take particular care to discuss the question at length with the Legal Adviser, and if appropriate to seek his help over the drafting of their Opinion; that is the way things have regularly been done in the past. Whether it is done face to face or through the legal officials seconded to the Law Officers is a matter of detail, and inevitably each successive Attorney General will have his or her own preferred working methods.
11. More difficult is however to describe exactly how and when the decision is or should be taken to consult the Law Officers. The Legal Adviser will want to make sure that the policy branch – or in some cases the Foreign Secretary or other Ministers personally – know and agree that advice is being sought, and will invite a policy input to the formulation of the issue being submitted for advice, and in particular

to the description of the policy context. There is no reason to believe, in the light of experience, that any of this ought to raise difficulties, though there is clearly a degree of judgement involved in identifying the best moment to consult. Should there on particular occasions be tension, however, between the policy and legal approaches, it has to remain the Legal Adviser's professional duty to insist that the Law Officers be consulted, and to use his direct access to the Attorney General for that purpose if need be. That would be expressly in accordance with the Ministerial Code (in its 2001 version), and its unstated implications for the conduct of civil servants. It may be questioned, though, why the Diplomatic and Civil Service Codes of Ethics don't themselves mirror explicitly the Ministerial duty to comply with the law, including international law and treaty obligations – as I believe they once did.

12. The other side of the coin is, of course, that the Law Officers, although they will normally wait to be asked, should also be understood to have the right to intervene at their own initiative where they judge it necessary, perhaps by asking the FCO Legal Adviser to put a case to them for advice, or by speaking or writing to their Ministerial colleagues. While the Law Officers can't be compelled to advise, they can't be forbidden to do so either. Any attempt to do so on grounds of unripe time would be spurious and suspect; the Law Officers are by definition lawyers of experience and sophistication, who are perfectly capable of conditioning their advice to the state of the known facts, or making it contingent on further reference back to them. That is something that regularly happens in legal practice, and in the present context the Legal Adviser can in any case be relied upon to draw the Law Officers' specific attention to the contingencies in the situation. Conversely, if an Attorney General feels that his advice is needed on an issue of consequence, it seems to me, by inference from the Ministerial Code, that it is his duty to offer it, without regard to whether the advice will be popular when it comes.
13. It is clearly not my place to pronounce on the performance by the Law Officers of their Ministerial role, but it does seem to me that the suggestions in paragraphs 11 & 12 above are not much more than the transposition upwards and outwards of the working principles sketched out in paragraph 4 for the giving of legal advice within a Government Department, with the exception perhaps of (d); one would expect, in regard to the Law Officers, that the set-piece formal Opinion would be the norm rather than less formal running advice. The free and efficient communication mentioned in paragraph 8 above

is of course greatly facilitated by the presence on the Law Officers' staff of a senior and experienced lawyer seconded from the FCO, which experience has shown to be essential.<sup>4</sup> The one item whose reflection may need particular attention, though, is point 4(e). I note that the version of the Ministerial Code in force in 2002/03 lays down categorically that when advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached.<sup>5</sup> That seems to me plainly right, for the reasons given in point (e). I would imagine that the policing of this rule lies jointly with the Cabinet Secretary, the Legal Secretary to the Law Officers and the Departmental Legal Adviser concerned. For my part, I would however go further than the Code and say (on the basis again of established convention) that the Attorney General ought always to be invited to attend any meeting of Cabinet or Cabinet Committee which has his or her advice before it, and should indeed, if the advice is central to the issue under discussion, be asked to present the advice to the meeting in full, and to join the subsequent discussion, which will often focus on the precise question of what action should be taken to give effect to the advice.

14. I have not lost sight of the fact that the Inquiry's request referred specifically to legal advice to UKMIS New York on the negotiation of SCR 1441. Having noted this, I am not sure that there is anything much I can add to paragraphs 4-8 above, which are of general application; there is nothing special about the negotiation of a Security Council Resolution that makes the legal advice on it any different in kind from the legal advice on other important questions or decisions, except perhaps (though purely relatively) in the gravity of its consequences. If the Inquiry's question were recast so as to focus directly on a possible role for the Law Officers, my answer would have to be that it depends on the circumstances; and by 'circumstances' would have to be understood: whether the Resolution was to be a binding one adopted under Chapter VII of the UN Charter, what the nature was of the obligations it would impose, what actions by HMG it was likely to entail, and so forth. In any given year the Security Council now adopts 50 or more Resolutions (far more than in my time), only some of which are under Chapter VII, and only some of those have direct operational consequences for the United Kingdom.

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<sup>4</sup> The Inquiry has had ample evidence on this point from Cathy Adams, David Brummell, Sir Michael Wood, Lord Goldsmith and others, together with examples of its apparently vigorous operation throughout the period in question.

<sup>5</sup> In paragraph 23.

It would be absurd – not to mention inefficient – to imagine the Law Officers being consulted on them all, let alone during their negotiation as opposed to after adoption. In other words, it is a matter of combined legal and political judgement whether the Law Officers ought to be involved in the negotiation of a Security Council Resolution, but a judgement not greatly different in kind from the general question discussed in paragraphs 12 & 13 above. If the question became, on the other hand, how feasible it would be from a practical point of view for the Law Officers in fact to be involved at the negotiating stage, the answer is very dependent once again on the circumstances, notably the intensity of the negotiating process, which varies enormously from case to case. As I point out above, each Attorney General has his or her own style and working preferences; my own experience has encountered everything from positive eagerness to be closely involved, to weary, resigned or even cheerful acceptance that part of the burden of office may be a willingness to be woken at 2 in the morning to settle urgent instructions to UKMIS, to anything between or beyond those poles.

15. It goes without saying that I have no way of telling whether what I have just tried to describe represents accepted current practice. Whether it does or not, it will be for the Inquiry to consider the desirability of having some of it written down in one place as authoritative guidance for future cases.

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