

Iraq Inquiry - Statement of David Brummell

The role and responsibilities of the Legal Secretary to the Law Officers

Introduction

1. I thought it would be helpful by way of background to provide a statement on the role of and responsibilities of the Legal Secretary to the Law Officers in advance of my oral evidence session on 26 January.
2. I served as Legal Secretary to the Law Officers from August 2000 to November 2004. Lord Williams of Mostyn was the Attorney General during the first part of this period, having been appointed on 29 July 1999. On 8 June 2001 (following the General Election on 7 June 2001), Lord Williams was appointed Leader of the House of Lords, following which Lord Goldsmith was appointed Attorney General.

The role of the Attorney General

3. The Attorney General has a variety of important functions. These include the following
 - Acting as the chief legal adviser to Government;
 - Taking a general interest in ensuring the legal soundness and constitutional propriety of proposed legislation;
 - Maintaining general oversight of Crown litigation, and being concerned with all major international, European Union (European Court of Justice), ECHR (European Court of Human Rights) and domestic litigation in which the Government is involved;
 - Superintending the Director of Public Prosecutions in England and Wales, the Director of Public Prosecutions in Northern Ireland, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office;
 - Certain public interest functions which he/she exercises independently of Government – for example, in relation to charities, contempt of court and the referral of unduly lenient sentences to the Court of Appeal (Criminal Division).

The Government Legal Service

4. The vast bulk of day-to-day legal advice in Government is provided by the 2,000 or so lawyers who make up the Government Legal Service (“GLS”). During my time as Legal Secretary, the Ministerial Code (at paragraph 22 of the 2001 version) provided guidance as to the kinds of issues on which it would normally be appropriate to consult Law Officers. By way of illustration, these included cases where:
 - The legal consequences of action by the Government could have important repercussions, whether domestically or internationally;
 - A Departmental Legal Adviser was in doubt concerning the legality or constitutional propriety of proposed legislation;
 - There was a particular legal difficulty which had potentially sensitive policy implications.

FCO Legal Advisers and MoD Legal Advisers

5. FCO Legal Advisers advise the FCO on legal issues generally and, of course, on issues of public international law, including the use of force. (They also advise other Government Departments on public international law issues.) MoD Legal Advisers also advise the Ministry of Defence on such matters. It has long been accepted that the Attorney General has the ultimate responsibility for advice on the legal basis for the use of force overseas (the “*ius ad bellum*”), and also on the conduct of military operations in accordance with international humanitarian law (also referred to as the law of armed conflict – the “*ius in bello*”).

The role of the Legal Secretariat to the Law Officers

6. The role of the Legal Secretariat to the Law Officers (“LSLO”) - now known as the Attorney General’s Office (“AGO”) - is to provide high-quality advice and support to the Law Officers, so as to enable them to discharge their various functions. My job, as the Legal Secretary in charge of the office at the time, was to lead and manage a team of 35 officials, including between 13 and 15 lawyers, so as to ensure that this advice and support was provided to the Law Officers.

7. One point is worth emphasising. This is that the lawyers at LSLO would never purport to give legal advice to other Departments. It was only the Law Officers themselves who ever gave advice to other Departments, whether this was in the form of a letter or minute from the relevant Law Officer to his/her Ministerial colleague or in the form of a letter from me or one of my LSLO colleagues to the relevant Departmental Legal Adviser. An LSLO lawyer would only ever send out a letter containing legal advice to another Department if it had been expressly approved by the Attorney General or Solicitor General. As far as I am aware, that remains the position today.

My role and the role of others in LSLO in advising the Attorney General on international law matters during the period 2001 to 2004

8. So far as advice to the Attorney General on international law was concerned, the lead role in this was taken by one of my LSLO colleagues who was a secondee from FCO Legal Advisers with appropriate international law expertise.

9. My role was essentially to ensure that all necessary expert advice, support and relevant material was made available to the Attorney General (which included ensuring effective liaison with FCO Legal Advisers and MoD Legal Advisers), so as to enable him to advise in a way that was as fully informed as possible. Internally, as already indicated, this advice and support was primarily provided by my LSLO colleague who was the international law expert.

The relationship with FCO Legal Advisers and MoD Legal Advisers

10. Expert advice was also provided by FCO Legal Advisers as the lead Department on international law. This would not only be on use of force matters, but also in relation to other areas where international law was engaged, e.g. international litigation which the UK was involved in before the European Court of Human Rights and other international courts or tribunals. MoD Legal Advisers also had an important role in providing legal advice – in consultation, as appropriate, with FCO Legal Advisers – on the conduct of proposed military operations, that is to say in relation to the prosecution of specific military targets.

11. The basic process worked like this. On the initial issue - the *ius ad bellum* - whether it was lawful as a matter of principle to resort to force, FCO Legal Advisers would take an initial view and then consult the Attorney General - through the relevant lawyers in LSLO - with a view to obtaining the Attorney General's authoritative advice.

12. In relation to the conduct of military operations - the *ius in bello* - as a general rule, MoD Legal Advisers would take an initial view as to whether the attack on the particular target was in accordance with international humanitarian law/the law of armed conflict, and then in a similar way consult the Attorney General with a view to obtaining his authoritative advice. At the same time, the views of FCO Legal Advisers on the lawfulness of the proposed attack would also be sought in parallel, so that, before advising, the Attorney General would have had the benefit of the views of both the MoD Legal Advisers and the FCO Legal Advisers, as well as the views of LSLO lawyers. It was very much a tripartite approach, MoD/FCO/LSLO Legal Advisers working together very closely.

13. This was the process which in principle was followed in both the Afghanistan military conflict of October/November 2001 and in relation to the Iraq invasion of March/April 2003.

The use of external legal advisers

14. Departmental Legal Advisers (or the Treasury Solicitor's Department) will generally instruct external Counsel for the purpose of representing the relevant Department in domestic litigation or the Government in international litigation.

15. There is a wealth of legal expertise in the Government Legal Service, particularly in relation to public and constitutional law and legislation, and in FCO Legal Advisers, particularly in relation to public international law. So in many cases there will be no need to instruct external legal advisers in relation to a purely advisory matter. Where the matter is of particular importance or complexity, Treasury Counsel may be instructed to advise (perhaps before the Attorney General is consulted). Outside firms of solicitors may sometimes be instructed e.g. in relation to commercial procurement issues. And sometimes specialist Counsel may be instructed to advise in matters requiring particular technical expertise, e.g. copyright law.

16. When the Attorney General is called upon to advise another Department, usually the matter is unlikely to be straightforward. In some such cases, the Departmental Legal Adviser will already have instructed outside Counsel and the advice of that Counsel will be provided to the Attorney General together with the request for the Attorney's advice.

17. Where this has not been done, on occasion – especially, perhaps, where the subject-matter is technical - the Attorney General may ask the instructing Department to obtain Counsel's advice before he/she gives advice.

18. In matters of international law, the Attorney General has available to him/her expert legal advice from FCO Legal Advisers and MoD Legal Advisers and from the international lawyer on secondment from the FCO at LSLO. It is not therefore generally considered necessary for the Attorney General to seek additional external advice in this area, although there is no bar to such advice being sought.

David Brummell

14 January 2010