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THE ROLE OF GOVERNMENT LAWYERS: RECENT CHANGES, AND A LOOK AHEAD

**JONATHAN JONES
TREASURY SOLICITOR AND HEAD OF THE GOVERNMENT LEGAL SERVICE**

I've been asked to talk about the role of government lawyers and some major changes we have making to the Government Legal Service. I'm also going to look ahead to the general election and beyond.

A caveat first of all. One of the difficulties of talking about the role of lawyers – and government lawyers are no exception – is that much of the really interesting stuff we do is covered by legal professional privilege and is therefore confidential as between lawyers and their clients. So there are limits to some of the interesting things I can tell you, but I'll do my best to give a flavour. In looking ahead, I face the additional problem that I don't even know who my client will be after 7 May.

The one thing we do know with certainty – and have, for the first time, known ever since the enactment of the Fixed Term Parliaments Act – is that the election will indeed be on 7 May. Whether that Act itself survives until the next general election is one of many unknowns that we face.

General elections are among the times when the civil service is most tested - in our ability to manage, prepare for and respond to change; to fulfil our duty to the government of the day just at the time when that government might be changing; and then of course to respond to the new, often pressing, almost certainly pressing, programme of the new government when it comes to office. All this is of course made all the more interesting given the utter impossibility of predicting the outcome of the next election and the large number of possible permutations in the make-up of the new government.

As I am hoping to illustrate, whatever the outcome of the election, I confidently expect government lawyers to be at the heart of that work.

First, some context. The Government Legal Service, of which I am head, consists of just over 2000 lawyers – both solicitors and barristers – providing legal services to all Whitehall departments and a number of other public bodies. Most of those lawyers are now part of my

own department, the Treasury Solicitor's Department (or TSol). I will say more later about the quite major changes we have been making to create a more unified government legal function as part of a programme of sharing legal services.

To give you some idea of the scale and range of the work we do (and even I am struck by it when I remind myself of it):

Within TSol, we've got about 500 staff, including 360 lawyers, engaged in conducting almost all the government's litigation (the main exception is HMRC which conducts its own litigation). That includes public and private law litigation. In 2013/14 we handled something like 30,000 cases; it depends how you count, but that's the scale. The largest single category, by far, is immigration judicial reviews.

We have an Employment Group of over 100 lawyers providing employment law advice and litigation services to the whole of government. These are experts in every aspect of employment law, in particular as it applies to the civil service and the public sector.

Since June last year we have had a Commercial Law Group, comprising again over 100 lawyers, bringing together some of our commercial and procurement specialists. I'll say a bit more about that later.

The rest of our lawyers (about 650) are mostly in advisory teams providing legal advice to government departments on policy formulation and implementation, decision-making and casework, instructing Parliamentary Counsel on primary legislation and thousands of statutory instruments. TSol now includes the advisory teams for most Whitehall departments, that's the Cabinet Office, DCLG, Home Office, Ministry of Justice, Defra, DCMS, HM Treasury, DfE, DfT, DH, and DWP, as well as our specialist European Law Division.

The other main legal teams currently outside TSol are those in HMRC, BIS, FCO, DECC and MoD, as well as the Attorney General's Office. The aim is for some of those, at least, to join the TSol shared service as well before long.

So our clients are government departments and the ministers which head them, up to and including the Prime Minister. As government lawyers we have our own minister, the Attorney General, who among his other functions is the government's chief legal adviser, is

responsible to Parliament for TSol and has oversight of the wider GLS. Those are important relationships, including my own with the Attorney as my minister, so you can see why general elections are crucial moments for us professionally and indeed personally, as well as big moments for the country politically and nationally.

I recognise that I'm entirely biased, but I believe that government lawyers do some of the most interesting and important legal work that you can do anywhere. Much of it you can't do anywhere else. Just to give you a flavour of some live or recent topics, without giving away any privileged secrets, our lawyers have been working on: financial services reform, same sex marriages, badgers, academies, pensions and welfare reform, Ebola, big rail projects, telecoms, reforms to legal aid, immigration, national security and so on. And I could give you a different list tomorrow. We act in roughly a third of all cases in the Supreme Court – more than any other litigating organisation. We are involved in the setting up of public inquiries and provide support to witnesses – including witnesses to the Chilcot Inquiry at the moment. Among the Parliamentary Bills which we've recently handled to pick out a few are: the Counter-Terrorism and Security Bill, the Serious Crime Bill, the Modern Slavery Bill, the Protection of Charities Bill, the Recall of MPs Bill, the Courts and Sentencing Bill, and the Control of Horses Bill.

Some of the work we do can be controversial, contentious or even unpopular. If I'm honest, for some of us that is part of the buzz of the job. In my career to give you a flavour I have been involved in projects ranging from rail privatisation, banking and financial services, the Iraq war, freedom of information, counter-terrorism and so on. Working for the government on issues like that doesn't necessarily make you universally popular at parties. But in their way they have all been fascinating and rewarding to deal with.

We also recognise that part of our role of advising the government of the day may entail reversing decisions or repealing legislation made by a previous government – even undoing work we have personally being involved in. Look for example at all the work which went into the Identity Cards Act 2006 – which was never brought into force.

The first Bill I ever worked on was the Bill to privatise the railways which became the Railways Act 1993. That was controversial enough at the time and, as I sat on a stationary train outside King's Cross between Christmas and New Year, I don't need any reminding how controversial the system of running, funding and regulating the railways is still. I thought I would have a look to see how much of my legal handiwork on the 1993 Act

survives twelve years later. The answer is not very much although (rather depressingly) some elements of the provisions on rail closures, bus replacement services and insolvency of rail companies remain in place. I was though proud to see that the shortest section of the Act, section 123, remains unscathed. It says “No person shall be regarded as a common carrier by railway”. From memory, this was virtually the only provision of the Bill which survived unamended throughout its entire passage – possibly because nobody knew what it meant. But I have mixed feelings about the fact that the Railways (Penalty Fares) Regulations 1994 also remain substantially in force – mixed feelings because I drafted them and then was promptly “done” for a penalty fare on the day they came into force. To make matters worse, the ticket collector then offered me a leaflet to explain!

Enough of such personal reminiscences. You can tell that we government lawyers remain proud of (or at least attached to) our work, however obscure or even unpopular it may have been.

Before I say more about the prospect of a change of government, I want to say something about the changes we have been making in the organisation of the Government Legal Service. The GLS has historically been a federation of government legal teams, comprising some shared services (for example TSol has always done most of the government’s litigation), and a number of free-standing advisory teams. We joined together on some things – some recruitment, some training, some aspects of knowledge sharing such as the LION legal intranet, and some aspects of career and talent management, especially at the most senior levels. Those arrangements have worked well for the most part and have made lawyers probably the strongest professional grouping in Whitehall.

But the federal model has only taken us so far. The current government’s policy has been for greater sharing and centralisation of common services – in a bid to improve both efficiency and effectiveness. Inevitably, with a number of more or less separate legal teams, some (to put it bluntly) will be better than others. Inevitably there have been some inconsistencies in approach. Inevitably too there has been some duplication as different teams strive to tackle similar issues. Our systems for sharing expertise and best practice have been pretty good, but not always as good as they could be. Nor have we always been as nimble as we could be at deploying our people to respond to changing legal priorities of the government as a whole.

So over the past couple of years we have gone through a process of bringing more and more government legal teams into TSol, ultimately under my line management, with the aim of creating a stronger, more united legal function. As I've said, TSol now comprises most of the main Whitehall legal teams. This was always planned to be a staged process rather than a big bang. I've mentioned the teams that have already joined. We are in active discussion with DECC and MoD. But you can see the direction of travel. In the process TSol has grown to over 1800 people, including over 1300 lawyers. As I've said we are due to expand further. On any view we are a substantial legal organisation.

Indeed we believe we've created a government legal department which is sufficiently new and different to deserve a new name. So we're planning to rename TSol as the Government Legal Department. It won't win any prizes for innovation or imagination but we do think it describes clearly what we do. For those who care about history, I will remain Treasury Solicitor.

We haven't implemented the change yet so for the rest of this talk I'll continue to refer to TSol.

Why are we making these changes? For me this is not just about organisational neatness and certainly not about building my personal power base. These changes will only be worthwhile if they enable us to improve the quality and efficiency of the legal service we provide to government as a whole. My ambition is to build a consistently excellent, efficient legal organisation, building on the good practice which already exists around the GLS.

I believe we are already making good progress with this. We have a well-established expert Litigation Group, which in recent years has taken on more and more of the government's litigation, and where we have invested for example in a successful electronic case management system. More recently we've created a specialist Employment Group and specialist Commercial Law Group which have brought together specialist knowledge, expertise and capacity which was previously quite fragmented across the GLS, sometimes with lawyers working more or less in isolation or in very small groups. In our advisory teams, the new structure is enabling us to identify good practice and share it more effectively across team boundaries, and to eliminate duplication and overlap.

Let me give you a couple of examples. Virtually all GLS legal teams handle legal issues relating to information law – freedom of information and data protection. Most of them have

one or more local experts in that topic. Lots of work goes into keeping up to date with recent case law and decisions of the Information Commissioner, providing guidance to lawyers and clients and so on. This is valuable and important work. But we don't need to do it 15 times in 15 separate legal teams: we need to do it once, do it well, and then share the relevant knowledge around the rest of the system. It's a relatively small but practical example of how we can get more efficient. The same is true of all the good work which goes on in different teams to create knowledge banks on judicial review, to devise legal awareness training for clients, or develop ways of managing and advising on legal risk. In a really unified, joined-up legal organisation we should be doing it once, to a really high standard in a co-ordinated way – and then applying it, and adapting it if need be, to meet the needs of all our client departments.

The new structures are also enabling us to think more imaginatively about how we work and organise ourselves as lawyers across government. For example, how do litigators and advisory lawyers work together? I've mentioned that immigration cases form a large proportion of our litigation casework. We have expert immigration lawyers in both our Home Office advisory team and in our Litigation Group. You might be surprised to learn how bringing these teams together within a single legal organisation – acting of course for the same client – has unlocked the way to much closer working, much better sharing of the huge base of knowledge and expertise that exists in those teams, and the elimination of unnecessary duplication. The same can be said of lawyers working on planning cases in our Litigation Group and in our DCLG advisory team.

Another important area of specialism for GLS lawyers is the drafting of secondary legislation. We draft thousands of statutory instruments. There is much drafting expertise around our legal teams. It is an important skill and the product is highly visible – to Parliament, users and the courts. Unfortunately so are our mistakes. For example, Parliament has recently expressed concern about the numbers of SIs which have to be made to correct mistakes in previous instruments. Not all of those are legal or drafting errors, but we know we have work to do to drive the quality of our drafting up to the standard of the best. We are therefore piloting a specialist team of statutory instrument drafters, again to drive up quality and effectiveness in that area and to bring together and refine the multiple sources of guidance which already exist around Whitehall legal teams.

A more unified legal structure also means that we can take a more coherent, consistent approach to the way we recruit, train and develop our people, the way we manage and bring

on talent, and help people to plan their careers and manage moves around the system. This has always been possible, but we can be better at how we manage it.

My experience over my first 10 or 11 months as Treasury Solicitor has convinced me that this model is the right one and that the case for even more sharing, even more joining-up and even closer working is stronger than ever.

Why do I say that? First of all we have seen many examples of topics where the legal issues span a number of departments and where it is essential for lawyers to work together across team boundaries. EU law and human rights are obvious examples but I would include also devolution and constitutional reform more generally, countering the threat from extremism, and the response to ebola. Just to take the last example – this has raised legal issues spanning health law, EU, human rights and international law, immigration and border control, commercial and contract law and no doubt others I haven't mentioned. So we need a system that joins up legal resource across government and deploys it in a flexible way.

Secondly, we are of course having to deal with this fascinating but challenging range of legal issues in a period of continuing – and increasing – financial constraint. So I'm afraid I have to say something about money.

TSol receives almost no directly funded money from Parliament. Our budget (of about £160m per annum) is comprised almost entirely of fees we charge to our clients – other government departments – for the work we do for them. We are required to meet our costs (primarily staff and accommodation costs): I'm in trouble if I make a loss, but we do not aim to make a profit – and there's not a lot of point as any surplus goes back to the Treasury anyway. This is a challenging funding model. But it is highly transparent and imposes a lot of discipline. Our clients, who are all strapped for cash themselves, can see clearly what they are paying, and what they are getting from us in return. Our charges are highly competitive when compared to the private sector – a combination of hourly rates (mainly for our litigation work) and fixed fees (for our advisory work). Where we do put out work to the private sector – whether the self-employed bar or private sector solicitors – it is part of our job to get the best possible value for clients. This is a time when they themselves are under severe financial constraints, and many are of course having to make major cuts themselves, there is a clear imperative on me and on the GLS to demonstrate that we are providing the government's legal needs as efficiently and as economically as possible. It absolutely

cannot be right that when so much of the rest of the civil service is facing cuts, lawyers are somehow exempt.

TSol has a good record of delivering better value to clients. Over recent years we've reduced our litigation fees by a total of 7%, and our advisory fees by 8%. In the last year we have made substantial rebates, reflecting yet further improvements in productivity and efficiency. We have frozen our hourly fees and fixed fees for 2015/16. We will achieve that by being rigorous in the way we work and organise ourselves, including looking carefully at the grade at which work is done, the mixture of seniority and experience within teams, and whether lawyers need to be replaced when they move on or when particular projects are complete; by continuing to eliminate unnecessary overlap and duplication.

I don't believe these challenges can be met by individual legal teams on their own. There needs to be a collective effort to ensure that our scarce resources are deployed and used as efficiently and as flexibly as possible, across the GLS as a whole.

That is especially true as we look ahead to the general election and the big demands for legal services which any new government is bound to make.

So what will the election mean for government lawyers?

The first point to make is that it is the job of government lawyers, like all civil servants, to support the incumbent government right up until the election. So we remain focussed on delivering the priorities of the Coalition Government. Actually quite a lot of legal work still remains to be done, not least completion of the large number of statutory instruments necessary to deliver the government's deregulatory agenda, the "red tape challenge". So lots of my legal teams are working very hard to achieve that.

Secondly, although Parliament will be dissolved at the end of March and, in accordance with practice and convention, the government does not generally initiate new policies in the run-up to the election. Nonetheless, the essential business of running the country does not stop, and government Ministers remain in office unless and until they are sacked after the election. There may be, there are, specific legal questions about whether and how legal powers can be exercised during that period, and what difference it makes that there is no Parliament in existence.

The process of putting together a new government may itself raise legal or constitutional issues on which I, my specialist Constitutional Law team in the Cabinet Office and the experts in Parliamentary Counsel Office will be called on to advise.

Lawyers advising particular departments will be working with other officials, and they are now, as far as possible, to plan for the particular outcomes which may require early legislation or other legal responses. I'm not going to run through all the proposals that we currently know about and that may or not become clearer as the election approaches.

But whatever the outcome of the election it is pretty clear that the big topics confronting *any* new government are going to include some of the following:

- The economy - inevitably
- Europe
- Immigration
- The international security situation and our response to it
- Devolution, including implementation of the post-Smith clauses on Scotland and possible changes to the Welsh devolution model
- Wider constitutional reforms, including the unresolved question of what to do about "England" and "EVEL" or English votes for English laws.

We also know that human rights – including our membership of the ECHR and the future of the HRA – will be on the agenda (at least) of any new Conservative government.

That is an addition to what will no doubt be a wide ranging agenda of reform in individual policy areas like health, education, welfare, housing and so on.

Most of the topics I've mentioned have a very high legal content and will inevitably require heavy legal input – including legislation of course and in some cases renegotiation of international treaties. Most of them are not the province of any one department but span the whole of government and will therefore need a joined-up, co-ordinated legal response. We may need to establish new joint teams or other structures to meet that demand.

I hope I've given you a reasonable flavour. For government lawyers this is a challenging but also an enticing prospect. As I've said, it will involve legal work of unrivalled importance, variety and interest. It will require the highest levels of legal expertise and ingenuity. It will

require a legal service which is flexible, efficient, lean, responsive, and well co-ordinated across government. I believe the changes we have been making to the GLS and TSol put us in a very strong place to respond to those challenges.

Ends.