The Role of Government Lawyers: Legal Guardians or Executive Agents?
Research Proposal by Dr Ben Yong, Constitution Unit, School of Public Policy, UCL

In determining the appropriate and legal scope of executive action, lawyers and academics have mostly concerned themselves with what the courts say and do. After all, it is the courts who say what the law is. But there are a group of actors within the Executive who may also have a significant role in determining the scope and legality of government action: government lawyers.

In the US, for instance, there has been an ongoing controversy about the Office of Legal Counsel (OLC), who provides legal advice to the President, and a number of legal memoranda the OLC drafted in 2002. These memos (the ‘torture memos’) were used to legitimize the use of ‘waterboarding’ and other forms of physical coercion. The publication of the memos has raised issues about the particular roles and responsibilities of government lawyers in maintaining the rule of law and ensuring the government adheres to minimum standards of legality.

In the UK, lawyers in government now number over 2000: as a single entity they constitute the largest single British law firm. They carry out a variety of roles, both in the public law and private law fields. What is it that government lawyers do, and how do they understand and manage their roles within the peculiar institutional context of government?

Most lawyers work in departments, particularly the Treasury Solicitors’ Department; a small number have separate institutional status (for instance, those in the Office of Parliamentary Counsel and those in the Foreign Office). How do the institutional arrangements of Whitehall impact upon the role of government lawyers? Do lawyers in departments experience tensions between departmental loyalties and pressures from the centre? There has been no recent systematic study of how legal advice is provided within government since Sir Robert Andrew’s Review of Government Legal Services in 1989.

Are government lawyers simply professional lawyers who happen to be working for the state? They are also civil servants, and as such are expected to serve the government of the day. Perhaps they differ from both ‘ordinary’ officials and private sector lawyers: perhaps, as some have suggested, as government lawyers they are the executive’s internal guardians of values integral to the legal order.

Methodology and Research Questions
This is a scoping project: it is done in anticipation of submitting a broader proposal to one of the UK research councils. It aims to answer four questions:

1. What are the current institutional arrangements of the government legal service at Westminster and 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?
2. What is the hierarchy of legal advice in Whitehall? How are differences of legal opinion resolved between departments; and between departments and the centre?
3. What are the pros and cons of departments having in-house lawyers, as they do in the HO, FCO, DH, DWP? Should No 10 and Cabinet Office have in-house lawyers?
4. To what extent do lawyers in government see themselves as different from 1. other civil servants or 2. lawyers in private practice? Do they see themselves as having additional ethical duties because of their particular profession, knowledge and skills?

There are three main research methods. The first is an examination of publicly available government documents on the GLS; and the existing literature, both in the UK and overseas, on government lawyers, their institutional roles and functions. In addition a small number of interviews (5-10) will be carried out with government lawyers and their clients to explore the research questions in more detail. Finally, a private seminar, consisting of academics, government lawyers, civil servants and former government ministers, will be held in February 2013 to discuss some of the interim findings and tentative conclusions.

In addition, there may be a possible case study illustrating the tensions inherent in the roles of government lawyers: for instance, the decision to go to war in Iraq. There is an unusual amount of published evidence available, in the form of the published legal opinions of the Attorney-General on the legality of the 2003 invasion; and the testimony of three government lawyers (one of whom—Elizabeth Wilmshurst—later resigned) at the Chilcot Inquiry in which all three discussed their roles as both civil servants and as lawyers.

Outputs
There are three key outputs for this project: an interim paper, a final report, and a broader research proposal. A short interim paper will be drafted after 3 months, setting out initial findings and tentative conclusions. This will then be discussed in the private seminar. The final report will be approximately 10000 words, to be published jointly by the Constitution Society and the Constitution Unit. Running alongside this, a broader research proposal using the report as a basis will be submitted to a UK funding body.

Timetable
The project will run for approximately five months, from December 2012 to April 2013, at 60% FTE (equivalent to three months at 100% FTE). The lead researcher, Dr Ben Yong, has commitments to teaching (20% FTE) and another long-term research project (20% FTE).

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