

# Lord Goldsmith and Iraq

*The Rt. Hon.  
Sir Edmund Thomas  
LLB (NZ) LL.D (VUW) KNZM QC*

*The author is a retired Judge of the Court of Appeal of New Zealand and a former Acting Judge of the Supreme Court of New Zealand. In Spokesman 95, entitled War Crimes, we published his groundbreaking article 'An indictment of Tony Blair, and the failure of the political process'. We are now pleased to publish, for the first time, his submission to the Iraq Inquiry about the role of the Attorney General, Lord Goldsmith, leading up to the war in Iraq.*

## Introduction

I welcome the inquiry into the events leading up to and relating to the war in Iraq with the objective of identifying lessons that can be learned from those events. I respectfully proffer the following submission. It is restricted to the role of the Attorney General, Lord Goldsmith, in the lead-up to the war.

I was a senior partner in New Zealand's largest law firm for 32 years and a Queen's Counsel at the independent bar for 11 years. I became a Judge of the High Court in 1990. I was appointed to the Court of Appeal of New Zealand in 1995. I retired from that Court at the mandatory retirement age of 68 in 2001. After my retirement, the Government established the Supreme Court of New Zealand and I was recalled to serve as an Acting Supreme Court Judge. I retired from that position in 2008.

For the past five years I have been a Distinguished Visiting Fellow at the Law School at the University of Auckland. I have written a manuscript entitled, 'A Return to Principle in Judicial Reasoning and an Application of Judicial Autonomy' (1993) 23 *Victoria University of Wellington Law Review Monograph* 5, and a book entitled, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005). I have published over 50 articles relating to a wide range of legal topics. I have recently been awarded the higher degree of Doctorate of Laws (LLD) from Victoria University of Wellington.

In late 2006 I was invited to give a public lecture on a topic relating to international law. Although I initially intended to write

about the Bush Administration's role in the lead-up to the war, I eventually directed my attention to the part played by the Prime Minister of Great Britain, Mr. Blair. The address was eventually published in *The Spokesman*, (2007) Vol. 95, p 12, under the title, 'An Indictment of Tony Blair, and the failure of the political process.'

As stated in the article, I sought to adhere to a judicial approach and judicial discipline in examining the various respects in which Mr. Blair might be held to have demonstrated a lack of probity in advancing the case for the invasion of Iraq. To this end, I read all the relevant books and available material. The authors' footnotes were carefully checked. I consider that my research was as thorough as it could be, short of a full inquiry of the kind the Committee is undertaking. In carrying out this research, my predisposition was to believe that Mr. Blair had been deluded, but sincere in his belief. The evidence convinced me otherwise and I was forced to conclude that Mr. Blair had repeatedly misled Cabinet, Parliament and the public in a number of respects. This conclusion led me to question how the Prime Minister's conduct could occur in a parliamentary democracy. I found that the political process had failed to constrain his actions. The shortcomings of that process quickly became the main focus of my article. (See *Spokesman 95* under the heading 'The failure of the political process', at p 42).

I appreciate that the Committee does not propose to pursue an inquiry into any possible criminal liability. To that extent it might be thought by some that the Inquiry is not intended to be a 'judicial' inquiry. Any such fine distinction, however, does not mean that the Committee will not wish to observe the characteristics that are loosely described as 'judicial', that is, exploring and undertaking a thorough examination of all relevant evidence, basing conclusions and recommendations on the evidence and observing the principles of natural justice. Hence, the Committee's approach may not be too different from the approach I sought to follow in my article.

One major difference, of course, is that the Committee will have access to vastly more evidence than is presently publicly available. The ability to demand access to critical documents and to summon and question key persons will prove invaluable. It is to be hoped that the Committee's final report will be the last word on what has been a divisive and controversial issue. To achieve that objective it will need to address a number of contentious issues that are of deep concern to many able and good people. The role of the Attorney General in the lead-up to the invasion is one of these concerns.

I wish to make an observation about the Committee's stated approach. While I agree that the task of identifying the lessons that can be learned from the conflict is of paramount importance and that it is not appropriate for the

committee to make findings of guilt or innocence, I suspect that it may not be possible to avoid findings of fact that could constitute a criminal charge. I respectfully submit that this possibility is to be accepted without fear or favour. The consequences of the war have been far too traumatic for the nation, particularly the soldiers who have lost their lives and their families who now grieve and struggle with their loss, for it to be otherwise. In my own study, I would have found it difficult to identify the shortcomings in the political process and indicate reforms without first analysing the conduct of those responsible for leading the United Kingdom into the war. Similarly, I tend to think that the Committee may be impeded in arriving at the valuable lessons that can be learned from the events leading up to the conflict without first determining who was responsible for the various critical decisions that preceded the invasion. The one follows the other.

As already indicated, however, in this submission I wish to focus solely on the Attorney General's advice to the Prime Minister on the legality of the war. In an earlier article relating to the independence of the office of Attorney General in New Zealand (July (2009) *New Zealand Law Journal* 213), I repeated much of what I said in 2007 in relation to Lord Goldsmith's part in the lead up to the war. (See *Spokesman* 95 at pp 27 to 33.)

I have selected this particular aspect because I suspect it is one which the Committee may find difficult. Unless they are of a different ilk from their counterparts in this country, the judiciary and the senior members of the legal profession will not be quick to criticise the Attorney General. Yet, the office of Attorney General is of fundamental constitutional importance and Lord Goldsmith's exercise of the powers of that office in the lead up to the war was undoubtedly of pivotal assistance in obtaining political and public support for the invasion.

I recognise that it may appear presumptuous for me to suggest lines of inquiry to the Committee. The added disadvantage of coming from the antipodes has to be suffered. But the political systems of our respective countries, including the office of Attorney General, are substantially similar. Moreover, as is evident from what I have written, I have studied this topic extensively and reflected on the various aspects of it at length. What I have to say may therefore be of some assistance. At least, that is my motivation and hope.

### **Areas of inquiry**

I believe that there are a number of areas which the Committee will wish to probe.

Although at times phrased as questions, the following points are put

forward as lines of inquiry. Naturally, I cannot anticipate the follow-up questions that the Committee will wish to pursue. Nor can I anticipate the questions which will arise out of the documentary material and testimony that will be available to the Committee. I appreciate, therefore, that the following points can do no more than provide a starting point.

One further point might be considered. Although I apprehend that the Committee members propose to question witnesses themselves, it may well be that this particular aspect, impregnated as it is with constitutional and legal issues, would benefit by having counsel appointed to assist the Committee. Such an appointment would not mean, of course, that Committee members would be precluded or inhibited from asking questions themselves. Counsel assisting an inquiry invariably occupy a subsidiary role. Such an appointment would simply mean that answers given by Lord Goldsmith, and possibly others within the Attorney General's office, which might appear acceptable and even persuasive, would be fully tested. I would emphasise that I am not suggesting that counsel be appointed generally or that the suggestion implies any lack of confidence in the Committee. Rather, after a lifetime in the law, I am impressed by the ingenuity of lawyers to proffer seemingly plausible answers which, certainly at times, only other lawyers succeed in unravelling.

### **(1) Political interference**

A key question will be whether there was any 'political' interference or attempted interference with the Attorney General, or the office of the Attorney General, prior to Lord Goldsmith giving his formal opinion of 7 March 2003 and his advice given ten days later on 17 March 2003 and, if so, the nature and extent of that interference. This question strikes at the heart of the independence of the Attorney General. If that independence has been compromised, the nature and extent to which it has been compromised will need to be fully reported.

For this purpose, it will be important to ascertain whether the Attorney General had any discussions or communications relating to the legality of the war and the preparation and presentation of his opinion and advice with the Prime Minister, the Foreign Secretary, the Home Secretary, various Under-Secretaries, officials in the Prime Minister's Office or Foreign Office, and anyone purporting to represent or speak for those Ministers. If so, the timing and content of those discussions and communications will need to be examined.

This area of inquiry will be of particular importance in respect of any

discussions or communications taking place in the ten days between the Attorney General's opinion of 7 March and his later advice of 17 March. It will be significant to ascertain whether any discussions of communications which took place in this ten day period drew the Attorney General's attention to the consequences for the Prime Minister, the Government or the military if an opinion from the Attorney General that the war was legal was not forthcoming.

The Attorney General will also need to be asked when he became aware that the Prime Minister and Cabinet were considering, or were seriously considering, whether or not to join in the invasion of Iraq.

Further, was the Attorney General aware that the Prime Minister had, contrary to the Ministerial Code of Conduct, advised Cabinet that '[T]he time to debate the legal basis for our action should be when we take that action' (Robin Cook, *The Point of Departure: Diaries from the Front Bench*, Pocket Books 2004, p 135). The Attorney General should be pressed as to whether he considers that he, as the Attorney General, had a responsibility to object to, or protest against, this delay or to otherwise draw attention to the fact that the Prime Minister's statement was contrary to the Ministerial Code of Conduct.

## **(2) The preparation of the Attorney General's opinion and advice**

It will need to be ascertained whether and to what extent the Attorney General's advice of 17 March as to the legality of the war differed from opinions given from within the Attorney General's office and the Foreign Office and, if there were differences, how those differences were resolved (if they were resolved) and whether any such differences were made known to the Prime Minister and Cabinet.

The Foreign Office Deputy Legal Adviser, Ms Elizabeth Wilmshurst, sought early retirement or resignation in protest against the Attorney General's advice of 17 March. Was the Attorney General aware of her action and was he involved in any discussions about her decision?

It will also need to be known whether the Attorney General referred to outside sources for opinions as to the legality of the war and, if so, who were the sources and what were the opinions or advice received? My long experience in practice has revealed the unpalatable fact that persons seeking an 'independent' opinion are sometimes prone to select a barrister or legal academic whose disposition or approach are known in advance. I am not suggesting that the resulting opinion will not be overtly independent. It is likely, however, to reflect the known disposition or approach of the person providing the opinion. Much can also depend on

how the question or instructions are framed. The opinion may be constrained or directed by the terms of the question posed or the instructions given.

The Attorney General might also be asked whether he resiles from his opinion given in his formal opinion of 7 March that ‘aggression is a crime recognised by the common law which can be prosecuted in the UK courts’. (See memorandum from the Attorney General to the Prime Minister, 7 March, 2003, para 34). If, as is to be expected, the Attorney General does not resile from that opinion, he may properly be asked whether he considered his advice of 17 March exposed the Prime Minister and members of Cabinet to a prosecution should the war be held illegal. Further, did he advise the Prime Minister or Cabinet of this possibility when giving his advice of 17 March endorsing the legality of the war?

Under section 1 of the Law Officers Act 1997 the duties of the Attorney General can be delegated to the Solicitor General. The question therefore arises whether, having regard to the conflict of interest inherent in the office of Attorney General, Lord Goldsmith considered requesting an opinion from the Solicitor General as to the legality of the proposed invasion of Iraq. If not, the Attorney General could be asked why he did not do so.

### **(3) The critical ten days**

Although judicial experience mandates an almost continuous state of uncertainty, I entertain not a scrap of doubt that some discussion or communication or event occurred after the Attorney General’s opinion dated 7 March and before his subsequent advice of 17 March to change his opinion. I cannot accept, and I do not believe any judge would accept, that Lord Goldsmith’s change of heart reached in ten short days was simply the outcome of further reflection or research. It defies belief. (See also Lord Lester QC’s comment reported in the *Guardian* on 28 April 2005 under the heading, ‘The Document and What it Means’ quoted in *Spokesman* 95 at p 31.)

It is to be recognized that the possible ramifications of an adverse opinion from the Attorney General just days before the planned invasion would have led to an almost unimaginable situation. I wish to quote a paragraph from my article on the independence of the Attorney General (July (2009) *New Zealand Law Journal*, at p 215):

What would the military’s response have been if it had not received the unequivocal assurance it sought that the war would be legal? Would it have been prepared to join the invasion set to take place just a few days later? Would

some Cabinet Ministers have resigned if the legality of the war had not been verified? Would there have been a second and more effective rebellion of Labour back-benchers without that advice? Would public opinion in the United Kingdom, already lukewarm if not opposed to the war, have become inflammably hostile? Even though the Bush Administration had made it clear that the United States would, if necessary, go it alone, what effect would an opinion from the Attorney General of Great Britain that the war would be in violation of international law have had on public support for the invasion in that country? What effect would it have had on one or more countries in the so-called coalition of the willing? The pressure on the Attorney General not to throw a spoke in the wheel must have been unimaginably enormous.

I do not believe that I am going too far or stepping out of line to say that the Committee's final report will be met with widespread scepticism if it cannot provide a plausible explanation for the shift in the Attorney General's opinion in these ten days. Political expediency is a credible explanation, but political expediency is incompatible with the role and responsibility of the Attorney General. Indeed, political expediency is the antithesis of that office.

Finally, Hans Blix's third and final report was published on 7 March (ten days before the Attorney General's advice of 17 March). In essence, the Report denied that it could be said Iraq was in substantial non-compliance with the resolutions of the United Nations and claimed that there was no evidence to the contrary. Was the Attorney General aware of this Report? If so, why did he not have regard to it in giving his advice of 17 March? Did he not consider that it contradicted the Prime Minister's view? If the Attorney General was not aware of the Report it is difficult to see how he could explain why it was not drawn to his attention or why he did not ask for and seek the most up to date evidence available.

#### **(4) The publication of the advice of 17 March**

The Attorney General's formal opinion of 7 March remained confidential for about 18 months before part of it was leaked. The Prime Minister then released the whole of the opinion a week before polling day. It is relevant to ask whether the Attorney General had any part in (1) the decision to retain confidentiality for his formal opinion until part of it was leaked, (2) the decision to leak part of the opinion 18 months later and, if so, what part was to be leaked, and (3) the subsequent decision to publish the full opinion.

The Prime Minister repeatedly claimed that the advice of 17 March was a précis or 'fair summary' of the Attorney General's opinion of 7 March.

He claimed that any suggestion ‘that the legal opinion of the Attorney General was different from the Attorney General’s statement to the House’ was ‘patently absurd’, or words to that effect. The Committee could usefully explore whether the Attorney General accepts that his advice of 17 March was a ‘*précis*’ or ‘fair summary’ of his earlier opinion. Follow up questions, if the Attorney General makes that claim, would be to inquire of the respects in which his advice of 17 March is such a ‘*précis*’ or ‘fair summary’. It is difficult to see how under moderate questioning the Attorney General would be able to maintain that position.

Questions might also be put to the Attorney General seeking to ascertain whether he thought that, as the Attorney General, he had an obligation or responsibility to clarify to the Cabinet and Parliament, and to the public, that his advice of 17 March was not a ‘*précis*’ or ‘fair summary’ of his opinion of 7 March.

A related inquiry would be to ascertain the Attorney General’s knowledge of what material was put before Cabinet. At the very least it needs to be known whether the Attorney General was aware that Cabinet had not been informed of the reservations and qualifications in his formal opinion of 7 March. If he knew this to be the case, did he not accept that, as Attorney General, he had a responsibility to assure that his full opinion was put before Cabinet?

It is certain that the advice of 17 March was either put before Cabinet or known to Ministers. It is therefore relevant to ascertain whether Lord Goldsmith considered that he had a responsibility to ensure Cabinet was informed that his advice of 17 March had been preceded by a formal opinion just ten days earlier to a different effect.

Further, was the Attorney General aware that having his advice of 17 March only put before Cabinet was in breach of the Ministerial Code of Conduct which stipulates that full legal advice must be disclosed to Ministers whenever they are presented with a summarized version of the advice? (Ministerial Code of Conduct, para. 23)

### **(5) Validity of the Attorney General’s advice**

Particular attention will need to be given to the view of the Attorney General that it was open to the United Kingdom to undertake an invasion of Iraq in order to unilaterally enforce resolutions of the United Nations. In other words, what is the legal basis for the Attorney General’s opinion that the United Kingdom could take military action in respect of a perceived breach of resolutions of the United Nations? Does the Attorney General consider that it would have been lawful for another country, say,



Iran or Turkey, to take military action against Iraq to enforce a resolution of the United Nations?

In particular, having said in his opinion dated 7 March that the United Kingdom's view of the revival argument was that only the Security Council could decide if a violation was sufficiently serious to revive the authorisation to use force, what occurred to lead the Attorney General to accept ten days later that this argument could be met by permitting the Prime Minister *alone* to decide that critical question?

The Prime Minister is recorded as having informed the Attorney General in writing that it was his 'unequivocal view' that Iraq was 'in further material breach' of its obligations to the United Nations. Did this letter include any supporting evidence? Did the Attorney General discuss the issue with the Prime Minister either before or after that letter? Did the Attorney General seek confirmation from the Prime Minister in writing that Iraq was in material breach of the resolutions of the Security Council? Did the Attorney General take any steps to institute a procedure or process to verify the Prime Minister's view? Did the Attorney General have any reservations about relying on the Prime Minister's view without further or official verification, particularly having unequivocally said in his opinion of 7 March that 'strong factual grounds' and 'hard evidence' would be required to justify military intervention? Why, too, did he not persist with the claim that legal authority would be contingent on the existence of weapons of mass destruction?

Indeed, the question could be usefully explored as to why the Attorney General thought that the question whether there had been a material breach of the resolutions of the United Nations was a matter that could be determined by 'evidence' from the Prime Minister at all. What, for example, would the Attorney General have said if the Security Council had concurrently expressly ruled that Iraq was not in material breach of the earlier resolutions? Would he have accepted the 'evidence' of the Prime Minister ahead of the Security Council? In fact, the Attorney General was correct in the first place. The decision was one for the Security Council to make, but if (as is denied) that decision could be made by an individual state it could only be made on the basis of a complete and objective analysis of all the available evidence.

The question is also pertinent as to why, in accepting the Prime Minister's view that Iraq was in further material breach of the resolutions of the United Nations, the Attorney General did not have regard to, or sufficient regard to, the reports of Hans Blix, the head of the United Nations Monitoring, Verification and Inspection Commission, or

Mohammed ElBaradei, the Director-General of the International Atomic Energy Agency.

Again, did the Attorney General take any steps to ascertain the views of the Joint Intelligence Committee before accepting that Iraq was in further material breach of the resolutions of the United Nations?

In a statement on September 2004 Mr Kofi Annan, the Secretary-General of the United Nations, publicly stated that the war was illegal. Did this opinion cause the Attorney General to reconsider his advice of 17 March or take any steps to apprise the Prime Minister or Cabinet of the Secretary-General's opinion?

Finally, under this heading, I believe that it would be relevant to ask the Attorney General whether he is aware of the recently expressed view of Lord Bingham of Cornhill in his Grotius lecture to the British Institute of International and Comparative Law that the invasion of Iraq was 'a serious violation of international law and of the rule of law', (July (2009) *New Zealand Law Review*, at pp 214 and 216). Does he accept that this view is correct? If not, in what respects does he assert that Lord Bingham is in error?

Lord Bingham's lecture highlights the significance of various Articles in the Charter of the United Nations. I referred to a number of these in my article relating to the independence of the Attorney General in New Zealand (See July (2009) *New Zealand Law Review*, at pp 214-215). The Attorney General could be usefully asked whether he had regard to these Articles, or the effect of these Articles, in arriving at his view as to the legality of the war and, if so, why there is no reference to them in either his formal opinion of 7 March or his advice of 17 March. In this regard it may be noted by the Committee that in Library Research Paper 65/09 ((May 2009) entitled 'The Attorney General for England and Wales' Lord Goldsmith is reported to have identified, as the first of three specific elements in upholding the rule of law, 'compliance with the law ... that means domestic and international obligations'. (See *ibid*, under the heading, 'A Guardian of the Rule of Law' at p 2).

### **The assembling of evidence – some comments**

The answers to many of these questions will be clarified when the Committee obtains access to the relevant Cabinet papers and minutes, minutes or notes of Cabinet Ministers at the relevant meetings, and minutes or notes of meetings between the Prime Minister or the Prime Minister's advisers and the Attorney General, internal notes in the possession of the office of Attorney General and minutes or notes in the possession of the Foreign Secretary and the Foreign Office. This written record will, of course, be supplemented by the evidence given by the Prime

Minister, the Attorney General, the Foreign Secretary, the Foreign Office, key advisers, and other government officials to the Committee. I can add little to what I anticipate will be an exhaustive search and analysis of all the documentary material that will be available.

I would reiterate, however, that it would be of interest to establish in detail the occasions, both formal and informal, when the Attorney General met with the Prime Minister or the Prime Minister's advisers in the lead up to the war. As indicated above, specific attention would need to be given to any meetings or communications on or about 7 March and up to 17 March.

I imagine that Ms Elisabeth Wilmschurst will be called as a witness. A retirement or resignation of this kind over the advice given to the Government by the Attorney General was a remarkable development. Differences of opinion on legal issues are not uncommon but do not ordinarily give rise to a person resigning or threatening to resign. Ms Wilmschurst's stand is an indication that the Attorney General's advice was outside the bounds of legitimate differences of opinion. I think it highly probable that Ms Wilmschurst's views were shared by a number of other officials in the Foreign Office. It will be important to inspect the internal documents of the Office, more particularly as those officials who shared her view, but did not resign, may unconsciously and understandably defend their decision by crediting the Attorney General's advice with greater validity than they were prepared to concede at the time.

It is commonplace in an inquiry of this kind for the commission or committee of inquiry to concentrate on senior officials. But I suspect that a more complete picture of the background to the Attorney General's advice and the tension it must have created could be obtained by interviewing the more junior officials in the Attorney General's office and the Foreign Office who would have been caught up in the day to day events as they unfolded.

Although many of the areas of inquiry suggested above would tend to confirm that the invasion of Iraq was illegal, I am not certain that the Committee will be prepared to advance a definitive opinion as to the legality of the war. If it is of a mind to address that question, I would suggest that the view of Lord Bingham of Cornhill in his Grotius Lecture referred to above is an authoritative statement with which all or most judges and lawyers would agree. Although it is entirely a matter for the Committee, my own inclination would be to find that some issues are beyond doubt, such as the question whether it was open to the United Kingdom to seek to enforce a resolution of the United Nations and whether

it was sufficient for the Attorney General to rely on the advice of the Prime Minister alone that Iraq was in material breach of the resolutions of that body. Other points may be said, perhaps, to be arguable. But I acknowledge that this suggestion may be regarded as unduly cautious.

In any event, the process by which the Attorney General arrived at his opinion of 7 March and advice of 17 March will still require attention. Apart from establishing the essential facts I would suggest, for example, that any competent judge or senior counsel would be able to advise the Committee on the legal differences between the Attorney General's opinion of 7 March and his advice of 17 March. The differences need to be tabulated.

Before leaving this topic I wish to emphasise the important distinction which exists between the question of the validity of the so-called revival argument and the question of the legality of the United Kingdom's action in seeking to take advantage of that argument. The question whether a breach of Resolution 1441 revived the earlier resolutions so that it was open to the Security Council to determine that action was required to enforce the earlier resolutions is logically distinct from the question whether it was open to the United Kingdom to lawfully determine that the earlier resolutions were revived and itself take action based on those resolutions. It may be acknowledged that there are lawyers who hold that the authority to use force contained in resolutions relating to the first Gulf War were revived if Iraq was in material breach of those resolutions. But I am not aware of any legal opinion, and certainly not any respectable legal opinion, where the determination that there had been a material breach could be taken by any body other than the Security Council or acted upon by any body other than the United Nations.

### **Possible reforms**

I do not know how far the Committee will wish to go in recommending changes in the system to ensure that the advice a government receives from the Attorney General relating to possible military action is independent, and seen to be independent. The office of Attorney General is inherently political. It occupies a schizophrenic constitutional role as I have stressed in my article relating to the independence of that office as referred to above (July (2009) *New Zealand Law Review*).

The office of Attorney General dates back to the 13<sup>th</sup> century. Until late in the 19<sup>th</sup> century, the Attorney General's function was to represent the Crown in the courts. In 1673 the Attorney General officially became the Crown's adviser, but the Attorney General nevertheless continued to focus

on litigation involving the Crown rather than giving advice to the Crown or government. It was only in the beginning of the 20<sup>th</sup> century that the focus of the Attorney General's role shifted to legal advice. Litigation involving the Crown was delegated to the Treasury Solicitors and Crown Prosecution Service.

It will at once be apparent that having responsibility for the conduct of litigation did not burden the Attorney General or his or her office with the same dual loyalties that attached to that office when the Attorney General became responsible for providing the government with legal advice. Consequently, the conflict between the Attorney General's function of advising the government and his or her obligation to be strictly independent has only become acute in the last century. It is probable that the problems inherent in this schizophrenic situation are only now being manifest.

Because of this long history and its constitutional importance, however, I anticipate that the Committee may wish to be circumspect in making recommendations relating to the status, office and role of the Attorney General. If, however, the Committee's findings confirm my own conclusions, the Committee may wish to consider a number of possible reforms. Again, I do not claim that the following suggestions are exhaustive. Further, some may overlap and become unnecessary if other suggestions are to find favour.

### **(1) Ensuring contestability**

The fact that, constitutionally, the Attorney General is the legal adviser to the government of the day does not mean that his or her legal advice should necessarily prevail or that it should not be questioned. Few other institutions would be prepared to rest a major and serious decision on one legal opinion. Apart from the practice of obtaining second opinions on difficult questions, a basic feature of the legal system is that legal arguments are contested. Commerce has its own imperative, certainly at board level, in requiring executive decisions and recommendations to be contestable. In the medical profession second opinions are obtained as a matter of good medical practice in any difficult or serious case and, although at times a medical case may give rise to a question of life or death, the decision cannot be equated with a decision to take a country to war. The process should be no less rigorous in the governmental or political sphere.

Indeed, it is odd that, while the rest of the community take appropriate steps to ensure that they act upon the best legal advice when confronted with a difficult, serious or costly issue, a government may feel competent to undertake a war in which lives will be lost and many people will endure

irreparable harm and suffering on the basis of one opinion as to its legality. It is nothing short of bizarre when the advice that the country is legally justified in going to war takes up little more than one side of a piece of A4 paper. No barrister or lawyer worth his or her salt would ever consider that such abrupt and skimpy treatment of an issue as serious as military action came close to meeting the long-standing standards the legal profession has set in providing opinions as to the law or to the public's expectation of the profession in that regard.

It is my respectful submission that the Committee should seek to ensure that nothing as cursory as the process followed on this occasion, accepted by the Attorney General as adequate, will ever happen again. On such matters as the legality of an invasion the Attorney General's advice should be tested. There is no reason why the issue, together with the Attorney General's opinion or advice, should not be referred to the Solicitor General for an opinion. Alternatively, there are any numbers of competent barristers and legal academics specialised in the field of law in question who could provide an independent opinion. Other means of ensuring that the Attorney General's advice is tested no doubt exist.

In summary, the United Kingdom undertook a war on the basis of advice from the Attorney General which was obtained and given far too late; which was astonishingly skimpy; which was substantively defective; which was inconsistent with a more formal opinion given only ten days earlier; which rested on the view of the Prime Minister that Iraq was in material breach of resolutions of the Security Council; which was contrary to the Report of the United Nation's own Inspector and the later opinion of the Secretary General; which followed a formal opinion that was not made known to the Cabinet or Parliament and which was kept confidential from the public; which was then misrepresented as a 'précis' or 'fair summary' of the earlier formal opinion; and which did not accord with the Ministerial Code of Conduct. Bluntly put, it was a charade, and I respectfully urge that the Committee ensure that its like never happens again.

## **(2) Separation of the office of Attorney General from the political process**

Because of its historical and traditional role, it is unlikely that there will be much support for abolishing the office of Attorney General altogether. The office of Attorney General, however, could be divorced from the political and parliamentary process. This separation between the political process and officers exercising a legal function has occurred in other areas of government. The Committee will be aware that in 2005, as a result of the

Constitutional Reform Act of that year, the Lord Chancellor's dual roles as member of the government and the head of the judiciary in England and Wales and presiding officer of the House of Lords when exercising its judicial function as Lords of Appeal in Ordinary were brought to an end. The Lord Chancellor remains responsible for the functioning of the judiciary and the independence of the courts, but the notion that a serving politician appointed by the Sovereign on the advice of the Prime Minister should also hold a high judicial post and exercise a judicial function was rejected. The judicial functions were transferred to the Lord Chief Justice and Lord Speaker respectively.

By virtue of the same Act, the judicial function of the House of Lords was terminated and became the responsibility of the new Supreme Court of the United Kingdom. As the Committee will be aware, the Supreme Court commenced its work on 1 October 2009 in premises separate from the Houses of Parliament. Although their Lordships sitting as Lords of Appeal in Ordinary have never been influenced by their position as peers located in Westminster, that position was seen to be constitutionally unsound.

The separation of the office of Attorney General from the political and parliamentary process would be in line with these reforms. The Attorney General would remain the nominal head of the profession with responsibility for the judicial and legal process, but he or she would not be a member of the Houses of Parliament. He or she would advise the government of the day if and when consulted. They would attend Cabinet meetings only by invitation in respect of particular matters on which their advice is sought.

### **(3) Independent appointment of the Attorney General**

At present, the Attorney General is appointed by the Sovereign on the recommendation of the Prime Minister. When the Attorney General is called upon to advise on issues as important as the legality of military action or on matters which may be politically embarrassing to the Prime Minister or the government, this method of appointment is undesirable. The United Kingdom has recently appointed an independent Judicial Appointments Commission which selects candidates for judicial office in courts and tribunals, mainly in England and Wales. Selection of these judicial officers was taken out of the hands of the Lord Chancellor. It was intended that the appointment process would be more clearly independent, transparent and accountable.

I envisage that this body, or a similar body, could be charged with the

responsibility of appointing the Attorney General or making recommendations as to the appointment of the Attorney General.

#### **(4) Express certification of independence**

The Attorney General could be required to explicitly state at the close of his or her opinions or advice that he or she had not been subject to any outside influence or attempted influence. They could also be required to stipulate the meetings, discussions and communications which they have had in being briefed to give their opinion or advice. There is, indeed, no sound reason why the Attorney General should not be required to list the names of Ministers and officials with whom he or she has conferred prior to giving the opinion and specify the dates and times of those meetings, discussions or communications and the text of the question posed or instructions given in requesting the opinion or advice.

In short, the Attorney General could be required to append to his or her opinion or advice an express affirmation that they had acted independently and to provide sufficient information to allay any disquiet that he or she may not have been strictly independent.

#### **(5) Amendments to the Ministerial Code of Conduct**

Depending on its findings, the Committee may also consider that it would be prudent to explore the ways in which the temptation for politicians to influence the decision or opinion of the Attorney General could be inhibited. An appropriately worded amendment to the Ministerial Code of Conduct could seek to constrain the Ministers, including the Prime Minister, from attempting to influence any legal opinion or advice sought by the Minister or Cabinet.

A second amendment to the Ministerial Code of Conduct could reinforce the requirement that the Attorney General's opinion be obtained at the earliest possible time and that, other than in exceptional cases, the opinion be made immediately available to Ministers and Cabinet.

A third amendment to the Code could require that, again other than in exceptional circumstances, the Attorney General's opinion be made public within a certain time after the opinion has been given. Allowance must be made for exceptional circumstances, such as state security, where the withholding of an opinion or advice could be justified. But I would submit that, as a general rule, the principle of confidentiality should not attach to the Attorney General's legal advice. The argument that confidentiality should attach to the advice of officials to their Ministers so that their advice will be free, frank and unfettered does not apply, or apply with the same force, to the



advice of the Attorney General. That officer required to give independent and objective advice as to the legal position and uphold the rule of law.

This line of thinking finds a measure of support in the Sixth Sir David Williams Lecture, 'The Rule of Law', given by Lord Bingham of Cornhill. Lord Bingham questions whether the ordinary rules of client professional privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war. He expresses the view that it is not unrealistic to regard the public, those who are to fight and perhaps die, rather than the government, as the client. An opinion on the lawfulness of war, being the ultimate exercise of sovereign power involving the whole people, he believes, is quite different from situations where the ordinary rules of client professional privilege would apply. He adds that the case for full contemporaneous disclosure would seem to be even stronger when the Attorney General is a peer and not susceptible to direct questioning in the chamber.

An amendment requiring the Attorney General's opinion, other than in exceptional circumstances, to be a matter of public record within a fixed time would be consistent with this approach.

### **Conclusion**

I express the hope that my submission, including the fact that I am making a submission from outside the boundaries of the United Kingdom, will not be seen as presumptuous. The importance of the issues which the Committee confronts extends well beyond its borders.

The independence of the Attorney General is of critical constitutional importance. If the Attorney General is not strictly independent, and does not act independently of the government of the day, the validity and value of the legal advice given by the Attorney General is, at the very least, suspect. The policy and decision-making process is then basically flawed. Public confidence in the political and legal systems is impaired and democracy is diminished. Importantly, the rule of law, and the democratic aspiration for a world order based on that precept, is in danger of being undermined.

Nothing less, therefore, than resolute independence will preserve the integrity and legitimacy of the office of Attorney General. In my submission, the Attorney General, Lord Goldsmith, did not demonstrate the requisite independence in the lead up to the war in Iraq. I would respectfully urge that it is incumbent on the Committee to spell out the role and culpability of the Attorney General and recommend the ways in which any possible dereliction of duty can be avoided in the future.