

Chapter 11 The Solicitor's Office

- 11.1 My terms of reference require me to examine the parts that should be played by solicitors and counsel in the preparation for and the presentation of cases for court and in the disclosure process. Again, I have interpreted those terms in the widest sense. I have examined the perceptions of others within the criminal justice system of what is now the Customs and Excise Prosecutions Office (Prosecutions Office) formerly known as the Prosecutions Group, to which reference is made at the end of Chapter Nine. I have also reached my own conclusions on the present position.

Structure of the Prosecutions Office

- 11.2 The Gower/Hammond Review recommended that the Solicitor's Office should remain part of HMCE but in relation to his prosecution function the Solicitor should be accountable to the Attorney General and not to the Commissioners or their Chairman. The review further recommended that the solicitor/client relationship between the Solicitor and the Commissioners of Customs should cease in relation to the Solicitor's prosecution function, and in respect of that function he should not be funded by the Commissioners. The recommendations have been accepted and implemented.
- 11.3 The purpose lying behind those recommendations was to increase the independence of the Prosecutions Office. I entirely endorse that objective. True independence from the Commissioners of those charged with the responsibility of prosecuting cases for HMCE is vital if the prosecutors are to fulfil their role effectively. The prosecutors must be free from any authority or control or taint of control from the Commissioners. Independence is a state of mind, and is not necessarily dependent on physical or even organisational and structural separation, but it must be patent, clear and obvious.
- 11.4 There is nothing new about that proposition. In 1996, Sir Richard Scott observed in his Report that lawyers in the HMCE Solicitor's Office had been insufficiently pro-active in asserting and exercising control over the conduct of the prosecution. He recommended that the relationship between the Solicitor's Office and the Investigation Division (ID) (as it then was, before the creation of the NIS) be reviewed, that positive responsibility be accepted by the Solicitor's Office for giving directions to the ID in regard to the testing or the gathering of evidence or documents necessary either for the prosecution case or for responding to a defendant's requests for information or documents, and that the

ID accept the discipline of referring to the Solicitor's Office for approval all decisions relating to the conduct of a pending prosecution.

- 11.5 The recommended review was conducted by Mr Pickup and Mr Byrne in 1997: they made recommendations as to how the role of the Solicitor's Office in prosecutions should be increased. In consequence of those recommendations and the Scott Report additional staff were engaged. The measures taken within the Solicitor's Office do not appear to have been sufficiently effective to address the problems that beset the London City Bond cases. There is little evidence that in the course of those prosecutions the solicitors asserted and exercised control over the conduct of them. It must have been a further disappointment for the Solicitor's Office that despite the internal review and the increase in resources the Office found itself heavily criticised in the Gower/Hammond Review in relation to criminal prosecutions as falling far short of the standards expected of it.
- 11.6 The existing Prosecutions Office within HMCE has been revitalised in consequence of further additional resources and improved involvement with the investigators in the prosecution process following Gower/Hammond. The increase in resources and the determination to be more involved in the cases prosecuted have resulted in a palpable and detectable improvement in morale within the Prosecutions Office. The tendency of investigators to bypass prosecuting lawyers and the perceived culture of secrecy amongst investigators has been reduced – though not eliminated. The lawyers generally feel they are more the owners of their cases and there has been a significant improvement in their level of job satisfaction.
- 11.7 All that is to the good and much to be welcomed. However, during the course of my Review I have detected a cultural defensiveness within the Solicitor's Office which is worrying. There appears to be an attitude that to acknowledge a mistake is a sign of weakness. I make clear that many HMCE lawyers to whom I spoke were helpful and open but that was not my universal experience. Perhaps they are battered by the events of the past, the criticisms made of them in earlier Reviews, and feel beleaguered and misunderstood. I recognise that things have not been easy for them and they may think they have been harshly judged.
- 11.8 Nonetheless I have found in my dealings with some of the Prosecutions Office over an intensive five months in the course of

my Review a reluctance to acknowledge the mistakes of the past, attempts to defend systems and procedures which were inadequate, and a tendency to blame others when things go wrong – the judges, the defence lawyers, the criminal justice system. Some of the Prosecutions Office identify strongly with Law Enforcement and have found it very difficult to shake off decades of their solicitor/client relationship with investigators. All this suggests to me that whilst there has been a significant improvement in the Prosecutions Office there is more to be done if HMCE prosecutions are to regain their reputation for excellence. The cultural change identified by Gower/Hammond as essential has only partially been achieved and in my view at the heart of the difficulty lies the issue of independence.

- 11.9 After examining the existing arrangements and listening with care to the many representations I have received in respect of the present operation of the Prosecutions Office at HMCE I have serious concerns about the extent to which the objectives of the Gower/Hammond recommendations have been achieved by the measures implemented in consequence of those recommendations. Just as it is not possible to be a little bit pregnant, it is not possible to be a little bit independent. The prosecutors either are independent or they are not.
- 11.10 The difficulty, in my view, starts at the very top of the organisation. The Solicitor, whilst now reporting directly to the Attorney General and being financially independent of HMCE so far as the Prosecutions Office is concerned, is a member of the Board and a member of the Management Committee. It is right that he should be so. The Board of HMCE plainly requires one of its number to be the Solicitor, to be party to and jointly responsible for the decisions which may have considerable legal importance on the operations of HMCE. The Solicitor and the legal team under him must conduct civil litigation, advise on the legal effect of policy, identify the primary and secondary legislation required to implement those policies and provide the whole range of legal services required by the Department. He and the other members of the Board also have a corporate responsibility for all Customs officers.
- 11.11 There is the potential for significant conflict of interest in such a position. The Solicitor's duty extends at present not only to the conduct of prosecutions but he also shares responsibility with other Board members for the Customs officers who investigate the offences leading to prosecutions. As a member of the Board he is party to all the decisions taken in connection with law

enforcement generally. It is as if the Director of Public Prosecutions was also a member of the Board of the Police Authorities whose investigations he was responsible for prosecuting.

- 11.12 In my view the position of the Solicitor is an anomalous consequence of the implementation of the Gower/Hammond recommendations and impossible to justify if true independence is to be achieved by the Prosecutions Office. Whatever structure and reporting lines are put in place, the position at present is that the same Solicitor remains ultimately responsible, along with other members of the Board, for both those who investigate and those who prosecute. No Chinese wall can be built high enough to conceal that reality.
- 11.13 A repeated refrain from those within the existing Prosecutions Office and those outside the Department with experience of HMCE prosecutions was the need for independence. The prosecution solicitors want independence to give them added authority and control over the prosecution process. Judges, barristers and solicitors outside HMCE universally identified real independence as the essential ingredient absent from the Prosecutions Office. It is particularly important that the Prosecutions Office is not only actually independent but transparently seen to be so. There must be clear blue water between the investigators and those responsible for prosecuting. The deep mistrust and suspicion in which HMCE are presently held, something which has been clearly evident from the observations of many judges and lawyers to whom I have spoken, can only be effectively addressed by urgent and radical change. A vital element in restoring confidence in HMCE within the criminal justice system is the assurance that prosecutions are conducted by lawyers who are wholly independent. I have no doubt that such a change will also give considerable impetus to the continuing cultural change required.
- 11.14 *I recommend that the Solicitor should no longer retain any responsibility for prosecutions brought by HMCE. All prosecuting functions should be removed from HMCE Solicitor's Office and prosecutions conducted by a separate prosecuting authority.*
- 11.15 I recognise that in making that recommendation I am differing from the conclusions reached in the careful, thorough, thoughtful and well-reasoned Gower/Hammond Review. However, I have the advantage first of examining how the new system has worked

in practice in addressing the problems Gower/Hammond identified and second considering the position against the perception of HMCE following the London City Bond cases.

- 11.16 If my recommendation is accepted the question arises as to whether an existing prosecuting authority or some other body should conduct prosecutions. This topic was examined extensively in the Gower/Hammond Review and a number of possibilities were considered and rejected. I have considered the arguments afresh and have reached the same conclusions in respect of the transfer of “ordinary” crime to the CPS, and the transfer of serious VAT and other HMCE frauds to the SFO. It is accordingly unnecessary to rehearse the arguments on those possibilities.
- 11.17 One possibility that requires more detailed analysis is the transfer of the prosecuting function of HMCE to the CPS. Considering that, Gower/Hammond observed that the CPS was set up as a national prosecuting authority with independence as its corner stone. It prosecutes a wide variety of offences, including some of great complexity and cases with an international element requiring a high degree of legal expertise. Thus it could be said that the CPS is obviously the agency best suited to take on HMCE prosecutions. At the time of the Gower/Hammond Review the Director of Public Prosecutions was reluctant to contemplate accepting such additional burdens. He no longer maintains that approach. In his view the CPS could now absorb HMCE prosecutions given an appropriate increase in resources and he points out that his department has developed a culture, structure and expertise which would enable it to carry out that task effectively. If HMCE prosecutions are to be transferred to an existing agency, in my view the CPS is the obvious candidate to take on that role.
- 11.18 However, I am not in the end persuaded that it would be appropriate for the CPS to take over the prosecuting functions of HMCE. The CPS has recently emerged from a lengthy period of upheaval and change following the implementation of the Glidewell proposals. The necessary period of acclimatising to the new systems and regimes now put in place would be seriously disrupted by a requirement that they absorbed a very considerable increase in their work. Nor can I ignore the fact that there will be a new DPP appointed this year, who may have his or her own views on any increase in work and the capacity of the CPS satisfactorily to absorb it. Further, the existence and use of the powers available to HMCE outwith the normal prosecuting

process do not sit comfortably with the normal work of the CPS. There must also be a danger that if the prosecuting function of HMCE was absorbed into the CPS some at least of the improvements which have taken place over the past two years, identified in paragraph 11.6, would be diminished. Further, the body of expertise built up in relation to HMCE cases might well be diluted.

- 11.19 In my view the solution lies in creating a new authority solely responsible for prosecutions of all cases brought by HMCE. But it is vitally important that the experience and expertise of those working within the existing Prosecutions Office should not be lost. I visualise that all lawyers and support staff within the existing Prosecutions Office will transfer to the new authority. In that way the new authority will be built on and be an extension of the existing system, experience will not be lost and continuity will be maintained. The new authority should be headed by a Chief Prosecutor who would be responsible directly to the Attorney General. The new Director of HMCE Prosecutions (or whatever title was thought appropriate) would fulfil a similar role in relation to HMCE prosecutions to that fulfilled by the Director of Public Prosecutions in respect of the CPS and the Director of the Serious Fraud Office in respect of that Department.
- 11.20 After the CPS was established pursuant to the Prosecution of Offences Act 1985, there followed a period during which relationships between the police and the new prosecuting authority suffered greatly. Such was the desire of the new agency to demonstrate its independence that it seemed that the prosecutors and the police were pulling in different directions. There was antipathy and resentment and the prosecution process undoubtedly suffered in consequence. It is a legitimate concern that if my recommendations were implemented the same problems might recur between Law Enforcement and the new prosecuting authority.
- 11.21 There are however a number of important distinctions.
- a. The experience of the difficult relationship between police and the CPS, and the regrettable consequences flowing from it, is there to be recognised from the outset in informing the way the new agency relates to HMCE.
 - b. The HMCE authority will be prosecuting the cases of one Department, not 43 separate and effectively autonomous police forces.

- c. The Investigation Legal Advisors will provide a bridge between investigators and prosecutors: there was no such equivalent within the CPS.
- d. The Prosecutions Office is already partially severed from HMCE, separately funded and with a different line of reporting. Most of those to whom we spoke in HMCE – both investigators and lawyers – welcomed the changes already made. Thus there is unlikely to be any significant resentment or opposition within the Department.

11.22 Those factors make it unlikely that the problems born out of the creation of the CPS would be replicated if my recommendation was implemented. It is also to be noted that the size of the Prosecutions Office is slightly larger than the Serious Fraud Office at present, and may be expanded further if recommendations about staffing found elsewhere are accepted. Experience therefore shows that it is of a size which can satisfactorily stand alone.

11.23 If my proposals are accepted in principle there are, I accept, a number of practical issues to resolve. It may be that ultimately it will not prove possible to implement the recommendation in its present form. In that case, and very much as a second best, I consider that at the very least the Solicitor should no longer retain any responsibility for criminal prosecutions for all the reasons set out in paragraphs 11.10-11.12 of this section. In his place there would be a Head of Prosecutions who would be directly accountable to the Attorney General in the same way as the Solicitor presently is.

11.24 That alternative is the soft option and in my view will be wholly insufficient to address either the cultural changes which are required within the Prosecutions Office or, even more importantly, the pressing and urgent need to improve public confidence in HMCE prosecutions.

11.25 The Prosecutions Office in London is presently accommodated in New King's Beam House. In the near future HMCE will cease to use those offices and are to relocate. It so happens that, irrespective of whether my recommendations are accepted, it is planned that the Prosecutions Office will be housed in office accommodation separate from other HMCE staff. But my recommendations should not be seen as necessarily requiring a physical separation. If the new prosecuting authority is set up, it will be a matter for the Director of HMCE Prosecutions to consider where and how to deploy the resources available to him.

What is needed is not separate accommodation but leadership and a culture that fosters the vigorous objective independence that the new authority must demonstrate from the outset.

Staffing in the Prosecutions Office

- 11.26 During the review I received mixed messages about staffing within the Prosecutions Office. All acknowledged that staffing levels had greatly improved but some, including the Solicitor himself, felt that caseloads were still unacceptably large and that more resources were needed. From my own observations I have some concern about the resources available to handle the caseload given the size, complexity and importance of many of those cases.
- 11.27 There are a number of objective indications that present resources are not sufficient. The Gower/Hammond recommendations have not been fully implemented. Indeed, HMCE accept that it is simply not possible to implement them all given existing resources: a specific example is the lack of full coverage of hearings at both Magistrates' and Crown Courts. This is not for lack of will but lack of lawyers and Case Managers. The more realistic approach to handling multiple linked cases in which a number of lawyers are assigned to the prosecution of a single operation (*see below*) is obviously resource-hungry. In London approximately a quarter of the lawyers are handling special projects, which puts greater pressure on the remaining lawyers to deal with the 'normal' caseload. This cannot be acceptable.
- 11.28 Because the situation is undoubtedly much better than it was, there is a temptation to conclude that there are adequate resources in place. I do not believe this to be the case. In my view more must be done to overcome the impression that cases are processed rather than actively managed. If HMCE are to regain their reputation then the prosecutors must be clearly seen to exercise direct control of the cases once the prosecution has commenced. I believe that this will not be possible with the resource currently available and that additional resource is necessary.
- 11.29 I have been unable to undertake any empirical assessment of the necessary resource for the current caseload and it would be inappropriate for me to recommend specific figures without further research. If my recommendation that a new prosecuting authority be created is accepted, the Head of this new authority will wish to consider this issue at the earliest opportunity. Such consideration should be informed by discussions with HMCE Law Enforcement as to the types of case they are likely to be pursuing and the resource consequences of those cases. For

example, an increase in prosecutions of MTIC or carousel frauds will require a different type of resource to that for other less complicated cases.

Investigation Legal Advisers

- 11.30 Many investigations conducted by HMCE into criminal offences are intelligence-led and are “live”, in the sense that the crime is being committed during the investigation process. This in itself creates considerable challenges and often results in situations where critical decisions have to be taken quickly and where such decisions can have a crucial impact on the investigation and any subsequent prosecution.
- 11.31 The course of an investigation conducted by HMCE can be complex and difficult and beset with unexpected hazards. There may be issues involving the use of covert human resources, access to bank accounts, freezing orders on assets, international dimensions, surveillance and telephone intercepts. If the investigation results in a prosecution the integrity of the investigation process itself is likely to be the subject of a sustained and searching attack on behalf of the defence. Statutes, Regulations, guidelines and protocols must be followed scrupulously and if a failure to do so is demonstrated the whole investigation may founder. There will undoubtedly be issues arising over disclosure, sensitive material, and the methods deployed to obtain evidence. In this increasingly complex law enforcement landscape there is a paramount need for the assistance and advice of lawyers who understand the potential problems and can offer guidance and help to the investigators from the outset of their enquiries.
- 11.32 One of the recommendations in the Butler Report was the formation of a specialist team of advisors to the NIS. Consequent upon that recommendation a team of two specialist legal advisors was established to provide legal advice to NIS operational teams during the course of enquiries before any proceedings were commenced. The advisors reported to the head of the EU and UK Revenue Group and thence to the Economic Secretary to the Treasury and were co-located with the NIS senior managers. The advisory lawyers were intended to deal with the full range of NIS investigations but were specifically tasked with responsibility for undercover operations and participating informants, marine operations outside the territorial sea and sensitive exports. The purpose of the advisers was to improve the quality of NIS investigations. The decision to prosecute and the handling of

prosecutions once that decision had been reached was conducted independently by lawyers in the then Prosecutions Group.

11.33 The Gower/Hammond Review tacitly acknowledged the value of lawyers advising the NIS before arrest. However it recommended that lawyers seconded from the HMCE Solicitor's Office Prosecutions Group to give legal advice to the NIS should remain or become members of that group and responsible to its Head. The Review reasoned that placing the NIS lawyers within the Prosecutions Group would help avoid the risk of inconsistent advice. Moreover, such an arrangement would be more likely to ensure they retained the ethos of independence and objectivity which was vital to the effective performance of the prosecuting function. Gower/Hammond further recommended that the length of the period which lawyers spent on secondment advising investigators should be kept under review and consideration given to whether the two-year period might be reduced.

11.34 The advisory lawyers are now known as Investigation Legal Advisers (ILAs), a title which is intended accurately to describe their role and activities. There are seven posts for ILAs, two in Manchester and five in London. The head of the ILA unit is John Tester. He has split the team into three groups of two. The Manchester group is responsible for the provision of legal advice and support to the Northern region of investigations, including Scotland and Northern Ireland. Of the two teams in London one is responsible for the Midlands Region, one for the Southern Region and they share responsibility for the operational teams in Custom House in London equally. In addition to managing the ILAs under him Mr Tester is the principal legal adviser to investigations on general issues relating to handling covert sources of intelligence, intercepts, undercover operations, witness protection, and the handling of HMCE's responsibilities to other intelligence agencies where those agencies have provided material in support of an HMCE investigation. At the time of my review two of the posts were vacant, one in each centre.

11.35 I got the impression that the posts were not regarded as particularly attractive by the lawyers within the Prosecutions Office. There may have been a lack of clarity about the role of the ILA in the advertisements advertising the vacancies and perhaps some concern that the job did not live up to its promises. It is also clear that the degree of exposure of the ILAs when required to give immediate and potentially critical advice on operational legal issues within tight time constraints is such that the position will

not appeal to everyone. However, it is potentially challenging and fulfilling work, and for the right lawyer very rewarding.

11.36 The anticipated use to which the ILAs were to be put has not in the event yet been achieved, though the situation is markedly different in Manchester and London. The intention was that in cases falling within specific criteria it was to be mandatory that an ILA should be appointed at the outset of an investigation. The criteria identified the more sensitive and difficult cases as those to which the policy was to apply. Mandatory appointments were to be made in:

- Sensitive cases
- Maritime A – boarding of vessels in international waters
- Undercover operations
- Operations using participating, dangerous or high-risk sources
- Strategic export cases

Discretionary appointments of ILA were to be made in

- Operations likely to involve substantial investigation or prosecution resource
- Operations likely to involve a high level of legal risk or complex legal issues.

11.37 Thus in all but the simplest cases it was anticipated that an ILA would be appointed. The theory was that the ILA would take part in a planning meeting held to decide whether the case should be investigated at all. The input of the ILA would be to identify the potential legal risks and how those legal risks could best be managed. That would involve, amongst other things, conducting a review of the material that Intelligence hold, not just the package presented to the investigators but the material underlying that package.

11.38 Once the investigation is under way the ILA is intended to provide any legal services the investigators require in the course of the operation. Such services may include the preparation or the vetting of applications for access orders to bank accounts or telephone details, search warrants, Commissions Rogatoires, advice on the sufficiency of evidence as the operation unfolds, advice on any legal issues that they see arising, and suggestions from the lawyer's perspective of useful lines of enquiry or, equally valuable, lines of enquiry which are unlikely ultimately to

assist the prosecution process. He would further identify legal opportunities which might assist the investigation.

- 11.39 The team of ILAs is small when set against the volume of investigations and a relatively recent development. In my view they undoubtedly have the potential to contribute much to the quality of investigations and subsequently to prosecutions. At present however they are not being used properly. Whilst the theory of their role and involvement is as set out above, the reality at present is very different. Part of the problem is the very small number of ILAs in post, but also and more importantly there is a lack of trust and appreciation by the majority of the investigators of what the lawyers can do.
- 11.40 It has proved difficult to persuade the investigators, particularly in the south and the Midlands, to engage effectively with the ILAs. There is a marked reluctance to involve them in investigations, and the theory at present remains largely that – theory not practice. My clear impression is that the Chief Investigation Officer, Paul Evans, and most of those under him in senior management in Law Enforcement, are supportive and encouraging of the ILAs and accept and recognise the considerable value of them. That same attitude is also generally to be found down to the level of ACIO. It is in the ranks of the SIOs and Investigating Officers that there is a measure of resistance and sometimes unwillingness to engage with them. Of course not all investigators are resistant to the idea, but it is not an attitude confined only to a handful of them.
- 11.41 This problem is recognised and has sought to be addressed by the ILAs themselves. They have visited the regional offices of LE (Investigation) throughout the country, announcing and advertising their existence, the way in which they can assist and the circumstances under which they should become involved. The ILAs are to be commended for the efforts made to give themselves a higher profile within the Department. It is disappointing that the result of their efforts has not been more productive.
- 11.42 At present the ILAs in London are entirely reactive to requests made of them by the investigators. They are located within the Prosecution Office and respond to telephone requests for assistance, often of a relatively mundane kind. Advice is sometime sought on issues which do not in reality require the input of a lawyer at all. Perhaps one third of their time is taken up drafting Commission Rogatoires, documents addressed to foreign

states seeking assistance in investigations. They are important documents, but it is a routine task which could easily be carried out by a legal assistant under proper supervision. There is real frustration felt amongst the ILAs in London that their services are not being used effectively and that they are not taking part as they should and as was envisaged in the investigatory process.

- 11.43 As indicated above an additional factor is the modest size of the present ILA resource. With only four lawyers covering the Midlands and the south of the country they would in fact not be able to achieve what was intended of them if the investigators responded enthusiastically. That in turn has held back the effective development of the ILAs. To fulfil what is expected of them requires a considerable increase in their numbers.
- 11.44 In the north of the country and in Northern Ireland the position is more encouraging. There is presently only one ILA in post, but it is clear that he is able to fulfil the role allocated to him more effectively than his colleagues in London, helped first by his own background – he was himself an Investigator before qualifying as a solicitor – and second by the attitude of the Investigators in the Northern region, who are more ready to accept the assistance available from the ILA. That said, two ILAs for the whole of the north of Britain is simply inadequate.
- 11.45 The Review team were told of a recent operation in which the ILA had played a vital role and which illustrates the value of them. There was a difficult, sensitive and delicate inquiry into allegations of corruption in Northern Ireland. As soon as the SIO for that investigation was told he was taking on the case he informed John Tester and the Manchester ILAs. They held a lengthy conference in which the lawyers and investigators considered together how they might go about gathering the evidence they needed, where the pitfalls were, and what sort of authorisations they were going to need. The ILAs assisted in drafting the applications for RIPA authorisations to ensure they were properly drawn. They provided advice on obtaining consents for intercepts and covert surveillance, and ongoing advice throughout the course of the investigation. One of the Manchester ILA was in the operations room in Belfast on the day the arrests were made, able to provide immediate legal advice and assist in drafting search warrants that were executed in Northern Ireland following the arrests.
- 11.46 If guidance from lawyers had been available and involved during the investigations into excise diversion fraud at London City Bond

and elsewhere, ILAs might well have identified the drift of Alf Allington from a source of information into a confidential informant and a participating informant, and the drift of Ed Allington into a participating informant. Lawyers would have been able to draw up clear parameters to ensure that the activities of the Allingtons in facilitating the frauds could not be considered to be entrapment. They could have ensured that the proper provenance of documents used to prove the fraud was clearly established. In particular they could have advised the investigators on the extent of the evidence required before the perpetrators of a particular fraud could safely be arrested, secure in the knowledge that there was sufficient evidence to bring a successful prosecution against them yet without letting frauds run on excessively.

- 11.47 Properly to discharge those and similar functions require, in my view, that the ILAs are used as a resource forming part of the investigating process. It is not sufficient for them to be sitting in offices distant from the investigations and responding to requests for assistance. They should be involved as part of the progression of an investigation. A parallel in this respect can be drawn with lawyers involved in other prosecuting agencies. Both the Serious Fraud Office and the Inland Revenue use lawyers to advise investigators from the inception of an inquiry, and both consider their input to be of great assistance.
- 11.48 At present the ILA resource is too small. To achieve the objectives identified above there should be a substantial increase in the numbers of ILAs. However, in the light of the need not only for independence of the lawyers from HMCE but for obvious and apparent independence the ILAs should continue to have no part in the subsequent prosecution of any offences arising out of the investigations in which they advise.
- 11.49 A discrete issue relates to the record keeping by the ILAs. The procedures for recording the requests for advice made by the Investigators and the advice given by the ILAs is presently not wholly satisfactory. There is insufficient clarity about the process for recording such advice. On occasion advice is sought by investigators and not always recorded in such a way that prosecutors will later be aware of the advice given. However, I am satisfied that the ILAs are fully alive to the problem and are taking appropriate steps to ensure that any request for advice and the advice given is recorded and retained, and will thereafter be available for any prosecution lawyer involved in the case. I am told that monitoring of the consistency and quality of the advice

given by ILAs is being addressed, but there must be a demonstrable system of assurance put in place.

- 11.50 The further question arises as to whether the ILAs should remain a part of the Prosecutions Office and responsible to the new Director of HMCE Prosecutions and thence to the Attorney General (the line of responsibility presently in place following the recommendation of the Gower/Hammond Review) or whether they should be responsible to the Commissioners and thence to the Economic Secretary to the Treasury (as they were when first established following the Butler Report) There are arguments both ways.
- 11.51 The arguments in favour of retaining the present line of responsibility to the Attorney General are those advanced by Gower/Hammond and summarised at paragraph 11.33. Gower/Hammond emphasised the need for an ethos of independence and consistency between advice given by lawyers before and after arrest. Further, the present arrangement helps to ensure that ILAs do not get too close to investigators, ensures an independent oversight of investigations as well as prosecutions, and provides, for the ILAs as part of a larger group of lawyers, more stability of employment and greater career development opportunities. Inspection of the work of the ILAs by Her Majesty's Crown Prosecution Service Inspectorate (*see below*) could be readily achieved if the *status quo* were retained.
- 11.52 The ILAs themselves, however, consider that they sit more comfortably within Investigations rather than as part of the Prosecutions Office. That view is shared by all the senior managers in the Solicitor's Office, including the Solicitor, the Head of the Prosecutions Office, and Head of Departmental Legal Services; and by the Commissioners. There are certainly arguments in favour of transferring Ministerial responsibility for the ILAs to the Economic Secretary for the Treasury. First, there are the negatives: there is plainly scope for confusion on the issue of accountability. If the ILAs have advised on an investigation, responsibility lies in part with the Attorney; if they have not, responsibility lies wholly with the Economic Secretary. A significant proportion of investigations in which the ILAs may have contributed a legal input do not in the event lead to prosecution at all: the Attorney is not responsible for such investigations, yet under the present scheme would be responsible for advice given by the ILAs.

- 11.53 Moreover, if responsibility lies with the Attorney there is a fear that this might of itself inhibit the ILAs in their task and particularly affect the degree of trust and acceptance from investigators. The ILAs consider that they cannot be as positive and helpful to the investigators as they would wish if the Attorney is to be accountable for what goes on in the course of an investigation. The present lack of confidence about the role and involvement of the ILAs in the investigation process could be addressed in part by the ILAs being seen to be part of the Department, and not, as one consultee put it to us, “the Attorney’s spies”.
- 11.54 The concern that the ILAs must not only be independent, but be seen to be independent, is not a decisive factor. If the present arrangements continue so that the ILAs have no part in the prosecution process there will be demonstrable independence at that stage, an independence reinforced by the establishment of a completely separate prosecuting authority. Demonstrable independence of the ILAs is not in such circumstances necessary at the investigation stage. It may be that on occasion the reviewing prosecuting lawyer will differ from the advice given by the ILA, but such differences should be seen as healthy, and an indication of the independence of the prosecutors.
- 11.55 If there is a perceived danger that ILAs might “go native” and become too close to investigators, that possibility can be addressed by a requirement that ILAs remain in post for a limited period only, thereafter returning to the Prosecutions Office. Such a structure would ensure that ILA lawyers would bring to their work an understanding of developing prosecution issues.
- 11.56 A further valuable safeguard in this respect would be provided if the ILAs were inspected by the CPS Inspectorate in the same way as the prosecuting lawyers to ensure an independent assurance of quality. If the numbers of ILAs grew sufficiently they could additionally have their own independent quality assurance from within HMCE. Against that, it could be said that the HMCPSI would find it difficult to conduct meaningful inspections of a body which was separate from the new Prosecution authority.
- 11.57 I recognise that the ultimate question of responsibility for the ILAs is for Government and that the arguments are finely balanced. There may be departmental issues which I have failed to appreciate and which provide compelling reasons why the *status quo* should be preserved. On this question in particular I would

hope that careful consideration will be given to the alternative options and the competing arguments.

11.58

I recommend that:

- a. The number of ILAs should be substantially increased to enable the objectives of HMCE identified in Paragraph 11.36 to be achieved;*
- b. ILAs should continue to have no part in the prosecution process;*
- c. The CPS Inspectorate inspect and report on the ILAs to give an assurance as to the quality of their work;*
- d. Consideration is given to the transfer of responsibility for the ILAs to the Economic Secretary to the Treasury;*
- e. A review is conducted of the procedures for the recording and retention of advice given by the ILAs in the course of investigations, and the assurance of the quality of the advice given.*

Disclosure

11.59

In Chapter Eight I identified the failures in relation to the disclosure process in the London City Bond cases. In Chapter 10 I set out the initiatives already put in place by Law Enforcement and the further steps they propose to take to address those failures.

11.60

The Prosecutions Office has also responded positively to the challenge and now recognizes that in very large cases one lawyer simply cannot hope to deal with the issue of disclosure on their own. The task is too much for any single individual. Where the head of a prosecution unit identifies such a case, consideration is now given to establishing a team of lawyers to deal with disclosure and related issues. The team might consist only of a lead lawyer and a second lawyer, but in some circumstances might be extended much further.

11.61

By way of illustration, my attention was drawn to the approach taken to disclosure in an operation arising from which a number of prosecutions have been brought, all of them to a greater or lesser extent linked. In that operation a core team of four case lawyers was set up to take the lead in relation to cross-cutting disclosure, assisted by three junior counsel and a silk specifically instructed for the purpose. This team has become known informally within HMCE as the Disclosure Committee. The establishment of the Committee and the wider arrangements now put in place to co-ordinate disclosure in large operations involving

a number of linked prosecutions demonstrates that important lessons have indeed been learned.

11.62 The role of the Disclosure Committee is to advise generally and, in particular, on how prosecutors can ensure that proper disclosure is made in all linked cases arising out of the operation. I have been provided with extensive details on how the Committee is discharging the role assigned to it. Because the prosecutions have yet to come to trial it would be inappropriate for me to comment on the detail of the work being undertaken. It is sufficient for me to acknowledge that the process is focused and clear, and should be of considerable assistance to the prosecution of each of the linked cases. The Prosecutions Office is to be commended on this initiative, which directly addresses one of the weaknesses leading to disclosure problems in the London City Bond cases.

11.63 I also identified a failure within the Prosecutions Office at the time of the London City Bond cases to provide a cohesive strategy generally, leading to counsel in one case not knowing what was going on in other trials. Elsewhere I have referred to the current major attack on the Revenue posed by the so-called carousel or MTIC frauds. In response to that threat the MTIC Case Handling Co-ordination Group has been established, the purpose of which is to ensure that a strategic and coherent approach is taken to handling both civil and criminal aspects of MTIC cases across the Solicitor's Office as a whole and across the Department. Again, the setting up of the Group is to be welcomed, demonstrating as it does that lessons have been learned.

Case Handling System

11.64 At the time of the London City Bond cases, prosecutions were managed on a case-by-case basis by the allocated lawyer, each lawyer using his own personal system. There was thus no standard procedure, making it difficult for anyone other than the case lawyer to deal with issues arising in the course of preparation for trial. That difficulty was compounded by a comparative lack of expertise amongst the lawyers in case management and administration. The lack of a co-ordinated case handling system played its part in the difficulties arising in the London City Bond cases: lawyers were required to devote some of their time to routine paperwork and management and had even less time available to discharge their principal responsibilities.

11.65 In March 2002 the Solicitor's Office introduced a new case management system. Cases are now managed not by the lawyers but by Band 5 Legal Executives – known as Case Managers -

under the supervision of the lawyers. All cases are managed under a standard procedure in accordance with a Manual for case management. The Manual, or 'prosecution bible' as it was described by one Case Manager, comprises a comprehensive document covering every aspect of case preparation and management from reception of the investigation file to the conclusion of court proceedings. Both lawyers and support staff broadly welcome this development and recognise the clear advantages it has over the old arrangements.

11.66 The advantages of a standard approach to case management are obvious. Lawyers and Case Managers are able to deal with any case within their unit much more effectively. Given the pressure of work within the prosecution units and the resources available, the ability to pick up a case and deal effectively with issues arising when staff familiar with a prosecution are unavailable is essential. The new system also facilitates management of casework by senior staff and to a greater degree than was previously possible.

11.67 The physical size of the Manual and the mass of detail contained within it make it an unwieldy document and cumbersome in use. That problem has now been addressed through the commendable work of two junior staff in the London prosecution unit, Brett Wilkinson and Peter Hiscutt. They recognised the problems identified above. Working in their own time and on their own initiative they transferred all the data in the Case Management Manual onto a CD ROM and produced a navigation system so that the user is guided through the necessary steps at any stage within the prosecution process. The on-screen Manual is much more user-friendly and ensures that Case Managers have all the necessary information readily available in an easily digestible format.

11.68 Once the new document handling system used by the investigators is fully aligned with the new case management system introduced in the Prosecutions Office many of the problems that arose in the London City Bond cases in relation to disclosure will be avoidable or the issues identified at a very much earlier stage.

Instructions to Counsel

11.69 I have already identified and commented upon the regrettable absence of written instructions to counsel in the London City Bond cases and the adverse effect of such a situation. The Prosecutions Office has now remedied a situation which should never have been allowed to develop in the first place. The

importance of providing written instructions directed to the specific problems disclosed in a particular case is now recognised. Such instructions are now routinely provided, and systems are in place to ensure that the quality of the instructions is satisfactory.

Inspection

11.70 The Crown Prosecution Service Inspectorate Act 2000 created for the first time an independent Inspectorate for the CPS: Her Majesty's Crown Prosecution Service Inspectorate (HMCPPI). The aims of the Inspectorate are:

- To inspect and evaluate the quality of casework decisions and the quality of casework decision-making process in the Crown Prosecution Service.
- To report on how casework is dealt with in the Crown Prosecution Service in a way which encourages improvements in the quality of that casework.
- To carry out separate reviews of particular topics which affect casework or the casework process.
- To give advice to the Director of Public Prosecutions on the quality of casework decisions and casework decision-making processes of the Crown Prosecution Service.
- To recommend how to improve the quality of casework in the Crown Prosecution Service.
- To identify and promote good practice.
- To work with other inspectorates to improve the efficiency and effectiveness of the criminal justice system.
- To promote awareness of the Inspectorate throughout the criminal justice system.

11.71 Both the Butler Report and the Gower/Hammond Report (see Chapter Nine) made recommendations about inspection of the Prosecutions Office of the HMCE Solicitor's office. Recommendation 27 of the Butler Report said:

If Customs are to continue as a prosecuting authority, there should be an independent inspectorate established. This might be an extension of the powers and duties of the current CPS Inspectorate.

11.72 The Gower/Hammond review was invited to look at this and recommendation five of their report said:

In the interests of promoting quality assurance, best practice and consistency in applying the code for Crown Prosecutors, we recommend that inspections of the prosecution function of the Solicitor's office be carried out by the CPS Inspectorate.

This recommendation was accepted and HMCPSI started working with HMCE to develop an approach to these inspections. At present they are being conducted on a non-statutory basis.

- 11.73 A pilot inspection covering the Manchester office of the Prosecutions Group took place between August 2001 and July 2002; and the Inspectorate's report was submitted to senior managers in November 2002. I have discussed the approach taken by HMCPSI, and the report itself with the HMCPSI Chief Inspector and one of his Inspectors who worked on the report. The prime purpose of the inspection was to review the quality of casework and casework processes in the Manchester unit of the Prosecutions Group; but additionally the pilot was used by HMCPSI to determine the most effective way to conduct future inspections. The inspection also included consideration of operational and human resources issues and assessed the progress made towards the implementation of the Gower/Hammond recommendations. The inspectorate team concluded that generally the quality of casework was sound; that there was a drive to learn from experience; and that considerable efforts had been made to implement the Gower/Hammond report recommendations. The Executive Summary of the report can be found at Appendix Nine.
- 11.74 I welcome the steps that have been taken to give effect to this important recommendation of the Gower/Hammond report. Whilst independent inspection can sometimes be uncomfortable, it is undoubtedly a spur both to improve performance and increase public confidence. In my interviews with staff in the Manchester office they told me that the fact that HMCPSI was coming to inspect them gave a real impetus to work they were doing to improve systems and processes and helped determine their priorities for management changes.
- 11.75 HMCPSI have made clear to me that the inspection of the Manchester office was a genuine pilot from which they are learning lessons about how they should approach inspection of HMCE prosecution activity. They cannot apply the same approach as they do to the CPS. They have also been keen to explore the possibility of some joint inspection work with the Internal Audit Division of HMCE. There are, however, resource

issues to be considered: at present no specific resources have been made available to HMCPSI to undertake this role. Notwithstanding that the Chief Inspector has told me that further inspection activity would have taken place in 2003/04 if it had not been for the establishment of this Review.

11.76 If my recommendations elsewhere in this report are accepted, and the Prosecutions Office becomes an independent prosecuting authority, the need for independent inspection and assurance will be at least as important as it is now, whatever shape the Prosecutions Office has in the future, I recommend that:

- a. *HMCPSI be given a clear and defined role in inspecting and assuring the new Prosecution organisation.*
- b. *This relationship should ideally be placed on a statutory basis.*
- c. *Specific and adequate resources are made available to HMCPSI for this purpose.*
- d. *If appropriate (and this will depend on whether the Prosecutions Office remains part of HMCE) joint inspection should be undertaken involving HMCE internal assurance division and HMCPSI.*
- e. *As part of the further definition of HMCPSI's role, it should specifically have the function of quality assuring the work of and advice given by the Investigation Legal Advisers (see preceding section).*

Engagement with the Criminal Justice System

11.77 HMCE is a major Crown Court prosecutor probably second only to the CPS and additionally prosecutes a significant number of cases in the Magistrates' Court. Given those facts I have been struck by the apparent lack of systematic engagement between HMCE and other agencies involved in the criminal justice system, both at a policy and practical level. One lawyer I spoke to thought that HMCE was isolated from other agencies and was "happy in its isolation". Another HMCE lawyer illustrated the isolation by explaining that before the CPIA was introduced in 1997 the CPS and ACPO developed a package of training for lawyers and police officers. HMCE only became aware of this, and were invited to join, at a relatively late stage.

11.78 That is not to say there is no contact between HMCE and others within the criminal justice system: there is, but such contact tends to be somewhat happenstance and directed to specific initiatives.

In part this may be due to pressure on resources within the Solicitor's Office. But there should be more contact, and more structured contact, for the mutual benefit of HMCE and other players in the system. HMCE should probably be represented on User Groups for the Crown Court centres where they most frequently prosecute. HMCE staff need to be at the table when potential changes to criminal justice systems and processes are being discussed. HMCE has a vital role to play in the fight against serious and organised crime and it can bring perspectives to a debate which others may not have. It is not that HMCE are being excluded from the discussions: they have simply failed to engage effectively in it. This may have contributed to the negative perceptions I refer to in Chapter eight of this Report.

11.79 On a practical level I have seen the benefits that can be secured through, for example, a dialogue with the Court Service and the CPS. At an early stage in this Review one of the HMCE lawyers to whom I spoke told me about the practical difficulties HMCE encounter when they appear at courts distant from London or Manchester where there is no dedicated accommodation available for them in the court. This makes the administration of the trial considerably more difficult for the prosecution team: simple things like photocopying, preparation of new documents for the jury or the drafting of admissions become disproportionate problems. I was pleased therefore to be shown a copy of a joint protocol agreed between HMCE, the Court Service and the CPS giving guidance on the use of CPS accommodation in Crown Court Centres by staff from the Prosecutions Office.

11.80 *I consider that more regular and systematic dialogue between, for example, HMCE and the Court Service on practical issues, and HMCE and the Home Office on policy issues, would be a profitable and fruitful development for all involved. I recommend that the head of the new prosecuting authority takes the lead in putting suitable arrangements in place.*

Costs of recommendations

11.81 As with the previous chapter I have considered the costs of the recommendations I am making about the Solicitor's Office.

11.82 If my first recommendation is accepted, and a separate prosecuting authority established, there will be some additional costs, but the precise amount will depend on the model chosen. The Solicitor currently has a completely separate budget for the Prosecutions Office and this includes an element for accommodation and other services provided by HMCE. I have no

doubt that some additional costs would be incurred in order to establish a self-standing office which would be completely responsible for all administration and support services, and some additional staff would be required. Additionally I recommend that further increases in staffing within the Prosecutions Office are considered. As well as dealing with casework, this should help the issue of HMCE engagement with the criminal justice system. This obviously carries expenditure implications which would depend on the additional numbers recruited.

11.83 There are costs attached to my recommendation that the complement of Investigation Legal Advisers be increased. HMCE has costed a model of an Investigation Legal Advisory Division based on a lawyer complement of 25 and 13 support staff. I do not consider it unreasonable that HMCE should work towards a division of this size. The potential costs of such a division are in the range of £2.5 to £2.9million when fully up and running. Against that cost has to be offset the costs of the current allocation of seven lawyers and no administrative staff.

11.84 Of my other recommendations, the only one which is likely to incur costs of any significance is the confirmation of the role of HMCPSI in providing independent inspection services. I understand that the cost of the pilot inspection of the Manchester office was in the region of £280,000. It would not be unreasonable to assume an annual cost of around that amount, although it is by no means certain that HMCPSI would wish to conduct an inspection every year.