



December 2011

Dear Assembly Members,

The purpose of this letter is to help to clarify my rôle as Counsel General and the relationship of that office with the Assembly.

The First Minister and I have agreed that it would also be helpful to set out for all Assembly Members the particular factors which affect my ability to answer Assembly Questions about my rôle as Counsel General. A copy of this letter will be placed in the Assembly Library.

The section of the Ministerial Responsibilities document which relates to the Counsel General has now been amended to clarify the position and I enclose a copy. The intention is that this will be updated if my areas of responsibility change. Even within my agreed areas of responsibility there are limits on what I can disclose.

It may be useful to remind Members that questions about policy areas (including the development or effects of legislation in that area) that are the responsibility of particular Ministers or Deputy Ministers should be directed to that Minister or Deputy Minister. The Ministerial Responsibilities document will identify matters that I am taking forward, such as improving the accessibility of devolved legislation in Wales, and which I may be asked questions about.

Role as Legal Adviser and Legal Professional Privilege

The Counsel General is the senior legal adviser to the Welsh Government, whose primary rôle is to provide objective legal advice without fear or favour, not subject to political interest or influence.

As I am their legal adviser, communications which pass between myself and Welsh Ministers, where I am advising or representing them in respect of their functions, are subject to ordinary legal professional privilege. There is also a long established convention in the UK that the advice of Law Officers, and even the fact of whether they have been asked for or given legal advice, is not disclosed outside Government other than in exceptional circumstances. This convention has been applied to the Counsel General, who is the Law Officer to the Welsh Government, and is reflected in paragraph 6.36 of the Ministerial Code.

At my Oral Assembly Question session on 5 October 2011, I drew the attention of Members to the distinction between my rôle when advising or representing Welsh Ministers, and my rôle in respect of the statutory functions conferred only upon the Counsel General which are exercisable independently of Government. I explained that I am accountable to the Assembly in respect of the latter in the sense that it is perfectly proper that I be asked questions about that part of my rôle.

I also made the point that with regard to matters subject to legal professional privilege, waiver of privilege is ultimately for Ministers to decide. Whilst the material remains privileged, I will not be able to answer questions as to it. This was recognised by the former Presiding Officer's ruling at the Counsel General's OAQ session on 7 November 2007, that questions about the Counsel General's legal advice would be ruled out of order.

Discussions with Law Officers

As I mention above, the Counsel General fulfils the rôle of Law Officer to the Welsh Government, and has meetings and discussions with the other Law Officers in the United Kingdom. The content of discussions between Law Officers is by convention not disclosed, nor is confirmation given as to whether a particular matter has been discussed. Law Officers discuss issues on the basis of a mutual understanding that the content of discussions will remain confidential.

This guarantee of confidentiality enables Law Officers to have a free and frank exchange of views and information, much of which would be likely to be legally privileged as it would relate to matters on which they were advising their respective governments. If I were to disclose the contents of discussions without the consent of the other Law Officers, it may mean that I and future Counsels General are no longer able to participate in such discussions, or the discussions become less useful.

I am able to tell the Assembly that planned meetings have taken place or are going to take place with other Law Officers. However, without the consent of other Law Officers, I am not able to answer more specific questions about meetings or discussions.

At my Oral Assembly Question session on 5 October 2011, Mark Drakeford AM asked me to advise how many times the Counsel General had been consulted by the Law Officers to the UK Government about the potential implications for Wales of forthcoming UK legislation.

I'm afraid that disclosing even this information would breach the mutual understanding of confidentiality on the basis of which Law Officer discussions take place. Disclosing such information may give an indication of the level or frequency of the Attorney General's involvement in legal issues relating to Wales and lead to inappropriate speculation as to the nature of advice based upon actions taken by portfolio Ministers.

Communications about the implications for Wales of UK legislation normally take place between the UK Minister for the policy area involved and the relevant Minister in the Welsh Government, or between their respective policy officials. If I were to disclose that I had been involved in a discussion with the Attorney General about the implications for Wales of UK legislation, it may give an indication that a significant legal issue had arisen in this area. It would be more difficult for us as the Law Officers to have a productive discussion about the issue in an atmosphere of press or

publication speculation about what the issue might be, and that may lessen the chances of the issue being resolved in favour of Wales.

I hope that this letter helps to explain the particular factors which constrain my ability to answer Assembly Questions about the work I do in providing advice and representation to the Welsh Government, and in holding meetings and discussions with other Law Officers.

The revised section of the Ministerial Responsibilities document includes a number of matters on which I am currently leading for the Welsh Government. These are improving the accessibility of devolved legislation in Wales and facilitating public debate on a separate Welsh legal jurisdiction. I may, as appropriate, also take the lead for the Welsh Government in responding to particular consultations about, for example, proposed changes to the law.

Where I am taking the lead for the Welsh Government on a particular issue, I will be able to provide information to the Assembly (including by answering Assembly Questions) to the extent that it is proper to do so, while respecting the responsibility of Ministers for matters falling within their respective portfolios.

As I mention above, I am accountable to the Assembly in respect of the exercise of my independent statutory functions, in the sense that I may be asked questions about those aspects of my rôle by Members. However, it needs to be recognised that I may have previously given legal advice to Ministers, and/or consulted confidentially with other Law Officers about a matter in respect of which I subsequently exercise one of my independent functions. The usual constraints on disclosure would apply to information about legal advice or Law Officers' discussions.

I would like to reassure Members that I do not intend to avoid proper questions and consider it very important that the "public-facing" or "independent" elements of the statutory role of Counsel General are subject to appropriate scrutiny by the legislature.

Yours sincerely

A handwritten signature in black ink, appearing to be 'T. Huckle', written in a cursive style.

Theodore Huckle QC
Cwmsler Cyffredinol
Counsel General

Counsel General

The Counsel General's statutory responsibilities under Government of Wales Act 2006. The main ones are:

(a) Like the Welsh Ministers and the First Minister, the Counsel General may make appropriate representations about any matter affecting Wales. (s 62)

(b) If the Counsel General considers it appropriate to promote or protect the public interest, he may bring, defend or appear in legal proceedings, in the name of the Counsel General. However, the proceedings must relate to matters in respect of which Welsh Ministers or the Counsel General have functions (s 67).

(c) The Counsel General may refer to the Supreme Court a question of whether a provision of an Assembly Bill is within the Assembly's legislative competence (s 112).

(d) The Counsel General may bring legal proceedings to have a "devolution issue" decided, or may defend any such proceedings brought by other Law Officers in the UK. "Devolution issue" is defined in paragraph 1(1) of Schedule 9 to GOWA 2006. It includes (among other things) questions of whether an Assembly Act is within competence or whether the Welsh Ministers have particular functions. The Counsel General can also require devolution issues to be referred to the Supreme Court for a decision.

Providing legal advice to, representing and overseeing the representation of the Welsh Government in legal proceedings.

Holding meetings and discussions with other Law Officers.

Holding meetings and discussions with the judiciary, members of the legal profession and others involved in the administration of justice.

Improving the accessibility of devolved legislation in Wales for the legal profession and other members of the public, including considering the future consolidation of existing legislation.

Responding to Law Commission and other (for example, UK Government) proposals or consultations where appropriate.

Facilitating public debate on whether there should be a separate Welsh legal Jurisdiction.

Statutory Responsibilities

It should be noted that the Counsel General also has functions under other legislation.

Legal advice and representation to the Welsh Government, and Discussions with Law Officers

There are constraints on the Counsel General's ability to answer questions about these matters.

Consultations about proposed changes to the law

In many cases these will be considered and responded to by the Minister with portfolio responsibility for the subject area to which the law relates.