

Carwyn Jones AC/AM
Y Cwnsler Cyffredinol ac Arweinydd y Tŷ
Counsel General and Leader of the House



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref

William Graham AM
National Assembly for Wales
Cardiff Bay
CARDIFF CF99 1NA

25th January 2008

Deu Wilhiam

Publication of Welsh Assembly Government consultation responses

I am writing to clarify the situation regarding the publication of consultation responses made by the Welsh Assembly Government, as I undertook to do in plenary on 5 December 2007.

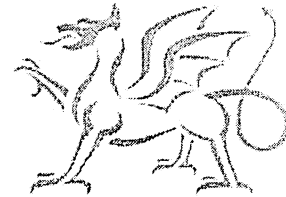
I can confirm that responses by the Welsh Assembly Government to formal national consultations by UK Government departments are treated as public documents unless an exemption under the Freedom of Information Act applies, as are all other responses to such consultations, in line with the Cabinet Office's Code of Practice.

The publication of such responses is normally a matter for the department conducting the consultation; however the Welsh Assembly Government does consider publishing the responses it makes to such consultations on a case by case basis. I enclose the responses I have sent on behalf of the Welsh Assembly Government on non-devolved legal issues.

A copy of this letter will be placed in the Assembly Library.

Yours sincerely

Carwyn Jones AC/AM
Y Cwnsler Cyffredinol ac Arweinydd y Tŷ
Counsel General and Leader of the House



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref MB-CJ-5258-707

The Rt Hon the Baroness
Scotland QC
20 Victoria Street
LONDON
SW1H 0NF

30 November 2007

The Governance of Britain: A Consultation on the Role of the Attorney General

On behalf of the Welsh Assembly Government, I welcome the opportunity to consider and comment on the consultation paper on possible reform of the office of Attorney General. The views of the Welsh Assembly Government in relation to the consultation questions contained in the paper are set out below:

Q1 Do consultees consider that the role of the chief legal adviser to the Government should be separated from that of a political Government Minister? If so, who should exercise the role?

Whilst the statutory post of Counsel General is relatively new to the devolution settlement in Wales, having been created by the Government of Wales Act 2006, the Welsh Assembly Government feels that there is great value in having its final and authoritative legal adviser closely involved in the processes of government at Cabinet level. We are committed to ensuring that our policy decisions are properly informed by sound legal advice and are of the view that having a Ministerial level colleague advising on the possible legal implications of a course of action is a sensible and effective way of achieving this. The need to operate within the law runs throughout the whole range of government activities. Having the ultimate source of legal advice within government supports and enhances its fundamental responsibility for the lawful development of policy.

However, the Government of Wales Act 2006 makes explicit provision that although the Counsel General is able to be involved in, and advise on, the decision making process, he cannot be a portfolio Minister and therefore does not personally take decisions on policy issues. Whilst it is not for the Welsh Assembly Government to advise on the structures which the UK Government should adopt, we feel that this separation of functions is helpful in underlining the distinction between legal advice and actual decision taking. Any transfer of the Attorney General's current

responsibilities for criminal justice policy is, of course, a matter for the UK government.

Q3 Do consultees consider that legal advice to the Government should be published (and if so in what circumstances), or that the legal basis for key Government decisions should be made publicly available?

We have grave reservations about any suggestion that the Attorney General's legal advice should be published. We would not wish to see any relaxation of the current convention of non disclosure, save in the exceptional circumstances currently recognised. The long-standing convention that neither the content nor the existence of Law Officers' advice is disclosed outside Government is a valuable one, expressly recognised by section 35 of the Freedom of Information Act 2000, which we have adopted in relation to the Counsel General. The fundamental importance of the principle of Legal Professional Privilege and the rule of law that legal advice should normally be absolutely confidential has been acknowledged in successive Court decisions as strongly in the public interest.

In our view, that Ministers are able to seek and receive legal advice in confidence is a fundamental principle on which the business of Government rests as it ensures open and honest debate within Government. If this principle is abandoned, even in limited circumstances, there would be major implications as it would then be extremely difficult for the convention to be maintained in other situations. Once published, any advice would form the basis of public debate which has the potential to diminish the role of the courts in deciding on the legality of government action. It would also put the Government at a grave disadvantage in any legal proceedings.

In the context of the devolution settlement in Wales, the Counsel General's role is clearly to advise the Welsh Assembly Government, the executive, rather than the National Assembly for Wales, the legislature. The Assembly, its committees and Presiding Officer have a separate source of legal advice. Again, we would point to this as a useful example and would suggest that in the event of any decision to give Parliament a formal or statutory role in key decisions such as whether to go to war, then consideration should be given to having a similarly separate source of legal advice for Parliament.

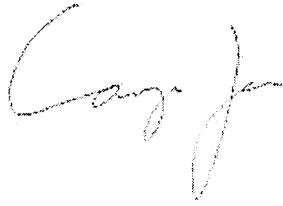
Q4 Do consultees consider that changes to the role of the Attorney General in relation to criminal proceedings (including the role as superintending Minister for the prosecuting authorities) are needed?

Q5 what if any changes do consultees consider are necessary to the Attorney General's public interest functions (other than those functions which relate to individual criminal prosecutions)?

The Welsh Assembly Government's view, as outlined in our response to question 1, is that there is a case for separating the legal functions of the Attorney General and those of a policy decision making nature, as this would reduce the perceived potential for decisions to be inappropriately influenced by political concerns. Were such a distinction to be drawn, then we would consider that it would be appropriate for the Attorney General to retain her current role of taking decisions on matters of

public interest, such as prosecution decisions, and referring unduly lenient sentences or points of law to the Court of Appeal.

I hope that this response is helpful to you.

A handwritten signature in cursive script, appearing to read "Cayle".