

# Quick guide

## The Constitution – The Counsel General

April 2007

### The Counsel General

Section 49 of the *Government of Wales Act 2006* ("the Act") provides for the appointment of a Counsel General to the Welsh Assembly Government who will act as its legal adviser and its representative in the courts.<sup>1</sup> This role is analogous with the role of the Attorney-General and Solicitor General in the UK Government.

### What has changed?

The previous position of the Counsel General was non-statutory and it was a senior civil service post.<sup>2</sup> In 2003 the Office of the Counsel General (OCG) was replaced by a Directorate of Legal Services within the Welsh Assembly Government and headed up by a Director. The new Counsel General under the 2006 Act is a new role and will be a political appointment

### Terms of Appointment

The Counsel General will be appointed by the Monarch on the recommendation of the First Minister but the recommendation for the appointment must be approved by the Assembly. The person appointed need not be a Member of the Assembly, although an Assembly Member could serve as Counsel General (the First Minister, Ministers and Deputy Ministers are expressly forbidden to do so in the Act). The Explanatory Notes to the Act describe the office as "of 'ministerial' status" but the holder is not one of the 'Welsh Ministers'.<sup>3</sup>

The First Minister may, with the agreement of the Assembly, recommend to the Monarch at any time the removal of the Counsel General; the Counsel General may tender resignation to the Monarch at any time. Unlike Welsh Ministers and Deputy Welsh Ministers, the Counsel General does not have to resign after a vote of no confidence in the Welsh

<sup>1</sup> *Government of Wales Act 2006* (Chapter 32), s. 49.

<sup>2</sup> The change in arrangements followed an unsuccessful recruitment exercise for a Counsel General to replace the first incumbent, Winston Roddick QC, when he retired in 2003. Details of this can be seen in a Decision Report issued by the First Minister on 26 February 2004.

<http://www.information.wales.gov.uk/archive/content/decisionreports/opengovt/appointment%20of%20counsel%20general.rtf>

<sup>3</sup> *Government of Wales Act 2006* (Chapter 32), Explanatory Notes, paras. 230-234.

Ministers. However, he or she ceases to hold office on the nomination of a First Minister under section 47 (but could be re-appointed by the in-coming First Minister).

If the office of Counsel General is vacant, or if the Counsel General is for any reason unable to act, the functions of the office can be exercised by a person designated by the First Minister. There is no requirement for the approval of the Monarch or the agreement of the Assembly to this designation. However, the period during which Counsel General functions can be exercised by virtue of a designation is limited to a maximum of six months and a designation comes to an end if a person is nominated for appointment as First Minister

## Participation of the Counsel General in Assembly Proceedings

The new Standing Orders make it clear that the Counsel General will be treated the same as Welsh Ministers in Assembly Proceedings.<sup>4</sup> The one exception is that a Counsel General who is not an AM will not be able to vote. SO5.4 states:

If the Counsel General is not a Member, the Standing Orders apply to the Counsel General as they apply to Members and the Counsel General may participate in Assembly proceedings but may not vote.<sup>5</sup>

The Counsel General, whether an AM or not, will be expected to answer oral and written questions and to make oral or written statements.<sup>6</sup>

Section 34 of the Act deals with the participation of the Counsel General in the proceedings of the Assembly and includes a provision enabling the Counsel General to refuse to provide documents or to answer questions about particular criminal cases (the Counsel General may be conducting criminal proceedings on behalf of the Welsh Assembly Government) if he or she considers that doing so might prejudice the proceedings in that case or would otherwise be contrary to the public interest.

## Legal Proceedings

Under section 67 of the Act, the Counsel General, as the representative of the Welsh Ministers in the courts, will be able to institute, defend or appear in any legal proceedings relating to matters with respect to which any functions exercisable by the Welsh Assembly Government, provided the Counsel General considers it appropriate to do so for the promotion or protection of the public interest.

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<sup>4</sup> Committee on Standing Orders, Report, January 2007, SO5.

<http://www.wales.gov.uk/documents/cms/2/DocumentsLaid/37B1A026000BF4FD0000436C0000000/23869e1c4a8e1c80d44933cac4bc6115.pdf>

<sup>5</sup> Ibid. SO5.4.

<sup>6</sup> Ibid., SOs 6,7, 9.

## Scrutiny of Proposed Assembly Measures by Supreme Court

Section 99 provides a mechanism through which either the Counsel General or the Attorney-General can obtain a decision by the Supreme Court as to whether proposed Assembly Measures or particular provisions of proposed Assembly Measures are within the Assembly's legislative competence. This may only be done within the four week period starting with the date the Measure was passed by the Assembly.

## Further information

For further information on the Constitution Series, please contact **Dr. Alys Thomas** ([Alys.Thomas@Wales.gsi.Gov.UK](mailto:Alys.Thomas@Wales.gsi.Gov.UK)), Members' Research Service.

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