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Law officers: a constitutional and functional overview

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In the UK context, "law officers" are senior legal advisors to the UK Government, Scottish Government, Welsh Government and Northern Ireland Executive.

Who are the law officers?

The UK Government has four law officer posts. These are the:

- Attorney General for England and Wales (AGEW)
- Solicitor General for England and Wales (SGEW)
- Advocate General for Scotland (AGS)
- Advocate General for Northern Ireland (AGNI-UK) (held concurrently with AGEW)

The Scottish Government has two law officers, the Lord Advocate (LA) and the Solicitor General for Scotland (SGS).

The Welsh Government and Northern Ireland Executive each have one law officer: respectively the Counsel General for Wales (CGW) and the Attorney General for Northern Ireland (AGNI).

What do law officers do?

Law officers' functions vary significantly and depend on the historical and constitutional context of their posts. They typically carry out a range of advisory, litigatory and executive functions, including:

- oversight of the relevant jurisdiction's prosecution services;
- oversight of other government legal services;
- representing the relevant government or executive in litigation;

- specific statutory powers and duties, especially in relation to the devolution settlements;
- advising Cabinet and individual ministers on legal matters; and/or
- advising the relevant legislature or the Monarch on legal matters.

Are law officers independent?

The nature of the work that law officers do is different from other ministers. With the exception of the Attorney General for Northern Ireland, there is no legal bar to a law officer being a parliamentarian or otherwise politically active. However, some of their work calls for a degree of independence or separation from government and party politics.

1 Overview

1.1 What is a law officer?

The term "law officer" is used in the United Kingdom to describe a type of senior legal advisor to the UK Government, Scottish Government, Welsh Government, or Northern Ireland Executive. Law officers exercise a combination of what might be seen as "legal" and "political" functions as part of the same role, and those functions call for varying degrees of independence and partisanship depending on the context.

1.2 How many law officers are there?

There are currently eight distinct law officers. Of those, two positions are and must be held by the same person (the Attorney General for England and Wales and the Advocate General for Northern Ireland).

Since 1999, three new law offices have been created, and some of the functions of three existing law offices have been transferred to a devolved executive. Care should therefore be taken when comparing the roles of the respective law officers over time.

For an overview of when each set of changes happened and how each change structurally affected the law officers regime, see the Annex to this paper.

1.3 What do law officers do?

The precise functions of the law officers vary significantly and depend on the constitutional and historical context of their respective posts. The UK has three distinct legal systems (those of England and Wales, of Scotland, and of Northern Ireland) and the extent to which certain functions are devolved or reserved is not uniform.

Broadly speaking, however, law officers each carry out a range of different functions. These functions include:

- oversight of (the relevant) jurisdiction's prosecution services;
- oversight of other government legal services;

- representing the relevant government or executive in litigation;
- specific statutory powers and duties, especially in relation to the devolution settlements;
- advising the Monarch on certain legal matters;
- advising Cabinet and individual ministers on legal matters; and/or
- advising the relevant legislature on certain legal matters.

Box 1 Law officers of the United Kingdom

There are eight distinct positions of law officer in the United Kingdom's current constitutional arrangements. Of those, four are appointed by and accountable to the UK Government, whereas the other four are appointed in connection with the devolution settlements and advise and are accountable to devolved institutions.

UK Government law officers

- **Attorney General for England and Wales** or **AGEW** (currently Lord Hermer KC)
- **Solicitor General for England and Wales** or **SGEW** (currently Lucy Rigby KC MP)
- **Advocate General for Scotland** or **AGS** (currently Lady Smith of Cluny KC)
- **Advocate General for Northern Ireland** or **AGNI-**UK (currently Lord Hermer KC)

Scottish Government law officers

- **Lord Advocate** or **LA** (currently Dorothy Bain KC)
- **Solicitor General for Scotland** or **SGS** (currently Ruth Charteris KC)

Welsh Government law officer

- **Counsel General for Wales** or **CGW** (currently Julie James MS)

Northern Ireland Executive law officer

- **Attorney General for Northern Ireland** or **AGNI** (currently Dame Brenda King)

1.4 What relationship do law officers have with Government?

One of the areas of greatest inconsistency throughout the UK's law officer regime is the relationship between individual law officers and the Government of the day. This depends to a significant extent on convention and political practice, rather than legal constraints.

Relationship with the Cabinet (or equivalent)

Although most law officers are members of their respective Governments or Executives, none of them are, as such, members of their respective political cabinets. However, senior law officers are invited to attend meetings of the political cabinet or executive in connection with their duties, whenever it is thought necessary or desirable. Practice varies by administration and business need.

Party-political or independent?

UK Government law officers

The UK Government's law officers have invariably been party-political appointments. Because of this, the posts typically have been filled by:

- existing parliamentarians of the governing party/parties of the day; or
- senior lawyers (usually) politically sympathetic to the governing party/parties of the day.

The notable exceptions to this rule of thumb are from 1924 and 1931. When forming the 1924 minority Labour Government and the 1931 National Government, Ramsay Macdonald recruited law officers from beyond the existing Parliamentary Labour Party (and in 1924 from beyond Parliament itself).

Devolved law officers in Scotland

Following the transfer of functions of the Lord Advocate to the devolved institutions in Scotland in 1999, the position has never been held by a sitting member of the Scottish Parliament. The original Lord Advocate, Lord Hardie, continued to take the Labour whip in the House of Lords. His immediate successor, who subsequently became Lord Boyd of Duncansby, sat initially as a crossbencher, only taking the Labour whip (four months later) after stepping down as Lord Advocate.

Thereafter, no Lord Advocate or Solicitor General for Scotland has been a sitting member of any UK legislature or declared publicly a party-political affiliation while in office.

Devolved law officer in Wales

Since the post's creation, the role of Counsel General for Wales has, with two exceptions, always been held, or had its functions exercised by, a Member of the Welsh legislature.

Between May 2011 and May 2016, Theodore Huckle QC (now KC) served the Labour Government as Counsel General while remaining formally independent of party allegiance. He also had not been elected as an Assembly Member.

More recently, Elisabeth Jones (a former Chief Legal Adviser to the National Assembly for Wales) served (briefly) as "Counsel General designate" between August and September 2024. She was not a member of the Senedd and was never formally appointed as Counsel General. This interim arrangement was put in place at the start of Eluned Morgan's administration, to ensure continuity while a full Cabinet was being assembled. Jones was shortly thereafter replaced on a permanent basis by Jule James, a Labour MS.[1]

Devolved law officer in Northern Ireland

Since the transfer of justice powers to the Northern Ireland Assembly in 2010, the post of Attorney General for Northern Ireland has been held on a non-party basis. The Justice (Northern Ireland) Act 2002 provides that the appointment is a joint one to be made by agreement between the First and deputy First Ministers of Northern Ireland.

Only two individuals have held the office since 2010. Both John Larkin QC (now KC) and Dame Brenda King have served without any party-political affiliation.

1.5 Are law officers parliamentarians?

General approach to ministerial appointments

There is no explicit legal requirement that UK Government ministers must be sitting parliamentarians.[2] However, as a matter of convention ministers are generally drawn from the membership of either House, as the UK adopts a constitutional system of parliamentary government.

From time to time, life peerages have been conferred for the purpose of enabling someone to be held accountable to Parliament for their ministerial

1 The Law Society for England and Wales described the non-political appointment (even on a temporary basis) as a "retrograde step" risking "a loss of political focus" on the "justice agenda" in Wales. See Nation Cymru, Law Society calls for a return to political Counsel General in September, 15 August 2024.

2 Scottish Ministers, Welsh Ministers and Northern Ireland Ministers must be MSPs, MSs and MLAs respectively, however. See Scotland Act 1998, s47, Government of Wales Act 2006, s48 and Northern Ireland Act 1998, s18.

duties. The current Attorney General for England and Wales (Richard Hermer KC) and Advocate General for Scotland (Catherine Smith KC) were both made life peers in 2024 to this end.

UK Government law officers

The UK Government and Parliament's approach to accountability of law officers differs from that of the devolution settlements. Barring exceptional circumstances, and usually only for very short periods of time, it has been expected that UK Government law officers should each be a member of one of the Houses of Parliament.

The entitlement of UK Government law officers to participate in parliamentary proceedings is by virtue of their membership of the House of Commons or Lords and not the ministerial office that they hold.

Attorney General for England and Wales

In the 20th and 21st centuries, the Attorney General for England and Wales has typically been a sitting MP. The most notable exception to this rule of thumb was between 1999 and 2010, when the post was held successively by three Labour Peers: Lord Williams of Mostyn, Lord Goldsmith and Lady Scotland of Asthal. The current Attorney General, Richard Hermer KC, was also made a peer at the start of the 2024 Parliament.

In 1931, the Attorney General William Jowitt was briefly neither an MP nor a Peer. Having sat previously as a Liberal MP, he agreed to join Ramsay Macdonald's National Government. As a consequence, he decided to resign from the Liberal Party and as an MP. He stood in and won the resulting Preston by-election as a Labour candidate.

Solicitor General for England and Wales

As with the post of Attorney General, that of Solicitor General for England and Wales has in modern times been filled by a parliamentarian, and usually by an MP.

In 1924, Henry Slesser served as Solicitor General during Ramsay Macdonald's Labour minority Government but was neither an MP nor a Peer. He was subsequently elected as the member for Leeds South East in the 1924 General Election but ceased at that point to hold the office of Solicitor General (as Labour lost the election).

UK Government law officers for Scotland

The presumption in favour of law officers being drawn (a) from Parliament and (b) from the lower House has been less rigidly adhered to for Scottish law officers than for those of England and Wales.

All six of the Advocates General for Scotland since 1999 spent all or part of their time in that office as a Peer rather than as an MP. Only the inaugural

holder of the position, Lynda Clarke (later Lady Clarke of Calton) also served as an MP while holding the office.

Although historically the Lord Advocate was drawn from the House of Commons, every holder of the office from 1979 to 1999 was a Peer. The only notable period during which the Lord Advocate was not a parliamentarian of a governing party was in 1924. Ramsay Macdonald appointed Hugh Macmillan (a Unionist KC) in the first Labour Government as his Lord Advocate. This was done because the Labour Party had no Scottish KCs in its parliamentary party at that time.

The Solicitor General for Scotland, prior to devolution, more frequently still was not a parliamentarian. Peter Fraser (later Lord Fraser of Carmyllie) was the last Scottish Solicitor General to have held the office while an MP. He continued to hold the office for a further nineteen months despite ceasing to be an MP at the 1987 General Election.[3] Since then, the post has never been held by a sitting parliamentarian.

UK Government law officers for Northern Ireland

The Advocate General for Northern Ireland, by virtue of statute, is an office held by the Attorney General for England and Wales.[4] Since its creation in 2010 every office holder has been a UK parliamentarian and since the 2010 General Election until the 2024 General Election, were also an MP.

Prior to 2010, the Attorney General for Northern Ireland was always a sitting legislator. Between 1921 and 1972 this was always an Ulster Unionist member of the Northern Ireland House of Commons, and thereafter always a Westminster MP of the party forming the UK Government of the day. This was because the post had then been held conterminously with that of the Attorney General for England and Wales.

Devolved Government/Executive law officers

Scotland

There is no prohibition on the Lord Advocate or Solicitor General for Scotland being MSPs. However, since 1999, neither has been an elected member of the Scottish Parliament.

Both the Lord Advocate and the Solicitor General for Scotland have a statutory right to participate in the proceedings of the Scottish Parliament and on essentially the same basis as an MSP.[5] Unless he or she is also an MSP, however, neither devolved Scottish law officer can vote on any matter arising from those proceedings.

3 He was subsequently granted a Life Peerage on becoming Lord Advocate in 1989.

4 Justice (Northern Ireland) Act 2002, s27.

5 Scotland Act 1998, s27.

Wales

The Counsel General for Wales may be a Member of the Senedd Cymru/Welsh Parliament (MS) and normally has been. The only two exceptions are Theodore Huckle QC (now KC) who held the office from 2011-2016 and Elisabeth Jones, who served briefly as Counsel General designate in 2024.

The Counsel General has a statutory right to participate in the proceedings of the Senedd Cymru/Welsh Parliament and on essentially the same basis as a MS.[6] Unless he or she is also a MS, however, the Counsel General cannot vote on any matter arising from those proceedings. The CGW also has a specific power to introduce legislation even if he or she is not an MS.[7]

Northern Ireland

Since the Attorney General for Northern Ireland became a devolved law office in 2010, the holder has been disqualified from membership of the Northern Ireland Assembly, the House of Commons or any Northern Ireland district council.[8]

However, like other devolved law officers, the Attorney General for Northern Ireland has a statutory right to participate in the proceedings of the Northern Ireland Assembly, to the extent permitted by its standing orders, on a non-voting basis.

6 Government of Wales Act 2006, s34.

7 Government of Wales Act 2006, s110. No equivalent statutory power exists for the Lord Advocate or Attorney General for Northern Ireland.

8 Justice (Northern Ireland) Act 2002, s23 amending Northern Ireland Assembly Disqualification Act 1975, Schedule 1.

2 England and Wales

2.1 Attorney General for England and Wales

The Attorney General is the UK Government's senior law officer for England and Wales.

Origins

The origins of the role of Attorney General are uncertain but can be traced back at least as far back as 13th-century England. A medieval King would not appear as a litigant in royal courts to plead in a case which might affect his own interests, so he would appoint an Attorney to act on his behalf.[9]

Lawrence del Brok, a professional attorney, was paid a regular fee of £20 a year to assume certain prosecutorial functions on behalf of King Henry III as early as 1243.[10] The role came to be referred to as "attornatus regis" (attorney to the crown) in statute in subsequent decades.

While the initial role of the King's Attorney reflected the wider constitutional context in which medieval England operated, where there was less of a distinction between the monarch, executive, legislature and judiciary, it is clear that officeholders during this period were largely partisan servants of the monarch. Their primary concern was protecting the King's interests in court.[11]

It was not until the 15th century that the role came to be known as that of the Attorney General. In 1461, John Herbert's patent of appointment described him as "attornatus generalis in Anglia".[12]

It was also in the 15th century that the Attorney was first called upon to give advice to the House of Lords; a practice which continued regularly until approximately 1700.[13] After some considerable resistance in the years thereafter, the Attorney was eventually permitted to sit in the House of

9 Hartley Shawcross, 'The Office of the Attorney-General' (1953) 7 Parliamentary Affairs 380, p381.
10 John Edwards, The Law Officers of the Crown, 1964, pp15-16.
11 Gabrielle Appleby, The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest, 2016, pp20-21.
12 John Edwards, The Law Officers of the Crown, p27.
13 As above, p34.

Commons in the 17th century.[14] As Appleby has noted, the trust required to make this possible was only achieved when:

> a number of individuals of perceived high integrity took office, and demonstrated that in providing advice on points of law and legislation they acted independently.[15]

By the early 19th century, the Attorney General (together with the Solicitor General, discussed further below) was recognised as the most important person in the legal department of the state and as the head of the Bar, though this was still an outworking of his relationship with the King.[16] However, as the 19th century progressed, the parliamentary and ministerial work (and remuneration) of the Attorney increased to an extent which resulted in a fundamental shift. This shift came to a head in 1892, when the Attorney was prevented from working in private practice alongside the duties of his office.[17] In 1893, Appleby explains:

> in recognition of their increased parliamentary responsibilities and the restrictions imposed on their right to private practice, [the Attorney General and Solicitor General] were given the assistance of their own department.[18]

By the early 20th century, the Attorney General had assumed a position at the Cabinet table.[19]

Formal relationship with Cabinet

The Attorney General for England and Wales is for statutory purposes a salaried Minister of the Crown.[20] As with other salaried ministers he or she is appointed by the King on the recommendation of the Prime Minister, and holds that office until they are dismissed by the Prime Minister or they resign.

The AGEW has not, in modern times, been a voting member of the Cabinet, but has, from time to time, been recognised as having "Cabinet level membership of the Government".[21] In practice this means that he or she is often invited to attend Cabinet and to participate in its deliberations, providing advice and input as and when sought by the Prime Minister.

14 As above, pp36-37.
15 Gabrielle Appleby, The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest, p26.
16 As above, p22.
17 John Edwards, The Law Officers of the Crown, p98.
18 Gabrielle Appleby, The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest, p30.
19 As above, p32.
20 House of Commons Disqualification Act 1975, Schedule 2.
21 See, for example, Cabinet Office, List of Ministerial Responsibilities Including Executive Agencies and Non-Ministerial Departments, October 2019, p7.

Executive functions

As with other Ministers of the Crown, the Attorney General for England and Wales has specific departmental responsibilities as part of the executive branch. This includes day-to-day control of the Attorney General's Office itself, but also oversight and superintendence over several non-ministerial departments and executive agencies. In particular, the AGEW "superintends":

- the Government Legal Department (previously the Treasury Solicitor's Department);
- the Crown Prosecution Service; and
- the Serious Fraud Office.

Attorney General's Office

The policy areas in which the Attorney General's Office operates overlap with those of other Government departments, especially the Ministry of Justice and the Home Office. There is shared responsibility (especially on criminal justice matters) between the Attorney General, the Lord Chancellor and the Home Secretary.

The policy role of the Attorney General in this context has (in recent years) been confined mostly to matters affecting the prosecution services they superintend and is typically facilitative between executive agencies and the Ministry of Justice and/or the Home Office.

In 2015, the Institute for Government published the reflections of Dominic Grieve on his time as Attorney General. In that interview, he cited tri-lateral conversations with the Lord Chancellor and Home Secretary as a major part of his role. One specific example concerned talks about the positioning of the Serious Fraud Office in the machinery of government: ministers had to decide whether it should be under the law officer's superintendence or placed elsewhere.[22]

Superintendence

Superintendence is the term used to describe oversight of arm's length bodies, whereby senior civil servants ("Directors" of the respective agencies) are subject to (usually political) forms of accountability. Whereas the Director, a senior civil servant, is responsible on a day-to-day basis for operational and policy decisions of the body, they are then answerable to a minister (in this case, the Attorney General) who in turn is answerable to Parliament for the relevant public functions.

Government Legal Department

Known as the Treasury Solicitor's Department until 2015, the Government Legal Department (GLD) is both a non-ministerial department and an

[22] Institute for Government, Ministers Reflect: Dominic Grieve, 20 July 2015.

executive agency. It employs around 3,400 staff, including approximately 2,600 lawyers and paralegals, to provide legal advice and representation across the UK Government. The GLD is headed by the Treasury Solicitor subject to superintendence by the Attorney General for England and Wales.[23]

Crown Prosecution Service

The Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. It is a non-ministerial department and is headed by the Director of Public Prosecutions (DPP). The DPP is appointed by the Attorney General on the recommendation of an appointments panel.

The CPS:

- decides which cases should be prosecuted;
- determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
- prepares cases and presents them at court; and
- provides information, assistance and support to victims and prosecution witnesses.

The Attorney General "superintends" the CPS, but in its day-to-day activities it is operationally independent. The relationship is underpinned by both statute and a Framework Agreement between the Attorney General's Office and the CPS.[24]

Serious Fraud Office

Complex fraud and corruption are both investigated and prosecuted by a bespoke non-ministerial department, the Serious Fraud Office (SFO). Its remit extends to England, Wales and Northern Ireland.[25]

Like the CPS, the SFO is headed-up by a Director (appointed by the Attorney General) and is superintended by the Attorney General.[26] This relationship is also supported by a Framework Agreement.[27]

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23 See Sir Jonathan Jones KC, The Role of the Treasury Solicitor, Judicial Review, 29(2), 75–83, 29 July 2024.

24 Prosecution of Offences Act 1985, s3; Attorney General's Office, Framework Agreement between the Law Officers and the Director of Public Prosecutions, 18 December 2020.

25 In Scotland, Police Scotland's Specialist Crime Division and the Crown Office and Procurator Fiscal Service investigate and prosecute these crimes rather than the SFO.

26 Criminal Justice Act 1987, s1(2).

27 Attorney General's Office, Framework Agreement between the Law Officers and the Serious Fraud Office, 24 May 2024.

HM Crown Prosecution Service Inspectorate

The Inspectorate for the CPS inspects its work and that of other prosecuting agencies. Its relationship with the Attorney General is not, strictly speaking, one of superintendence. The Chief Inspector is under a statutory duty to "report to the Attorney General on any matter connected with the operation of the Service which the Attorney General refers to him".[28] This statutory obligation is reinforced by a Protocol entered into between the Chief Inspector and the law officers.[29]

Non-statutory oversight of other prosecuting authorities

On a non-statutory basis, the Attorney General nevertheless exercises political oversight of other prosecutorial bodies. This includes government prosecutors in ministerial departments (e.g. the Prosecution Division of the Department of Work and Pensions) and the Services Prosecuting Authority (which prosecutes breaches of military protocol).[30]

Advisory functions

Advisor to the Crown

The Attorney General is well established as the chief legal adviser to the Crown. However, the full implications of this are complex: "the Crown" means different things in different contexts. The law officers can potentially advise (and where necessary, represent in litigation):

- the Sovereign/Monarch;
- the Cabinet;
- one or several Government departments;
- individual ministers (whether in an official or personal capacity and to the extent provided by the Ministerial Code); and/or
- Parliament.

That the Attorney General potentially acts for several different clients, and that the interests of those clients may come into conflict with one another, complicates the role. There are implications for the separation of powers (where duties to the executive and to the legislature come into conflict) and for collective cabinet responsibility (where different government departments have different views or priorities).

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28 Crown Prosecution Services Inspectorate Act 2000, s2(1)(b).

29 Attorney General's Office, Protocol between the Law Officers and Her Majesty's Chief Inspector of the Crown Prosecution Service, 29 January 2020.

30 See Attorney General's Office, Protocol between the Law Officers and the Service Prosecuting Authority, 23 January 2024.

Advisor to the Sovereign

The Attorney General historically having been appointed by and a representative of the King, his or her advisory role (in theory at least) includes advising the Sovereign in his or her personal capacity. However, little documentary evidence exists on the modern relationship between the law officers and the Sovereign "client". It is unclear whether the Attorney General is, in any meaningful sense, still the sovereign's legal advisor.

One limited piece of evidence for a continuing role in advising the Monarch is an article from 1992, written by the former Attorney General Sir Patrick Mayhew. He explained that the AGEW would have a "special role in peerage cases" and might (hypothetically) "act on behalf of the Sovereign in litigation… if [say] a Palace servant were to breach the confidence of the Sovereign."[31]

Advisor to the Cabinet

The Attorney General may, from time to time, provide legal advice to the Cabinet to inform and assist its decision-making. Notable public domain examples of this have included advice as to:

- the legality of military intervention in Iraq; and
- whether a proposed Protocol on Ireland/Northern Ireland in the UK's EU Withdrawal Agreement could be withdrawn from unilaterally as a matter of international law.

Advisor to government departments

Government departments can draw upon a range of different sources of legal advice. Both the Government Legal Department and in-house departmental legal teams, for instance, routinely provide advice both to other civil servants and to ministers in connection with departmental activities.

From time to time, however, the law officers' legal advice may be sought, perhaps if legal advice is uncertain or contested within or between departments. This advice sits at the top of a formal hierarchy of legal advice within the UK Government: the AGEW is a "final arbiter" where other sources of advice are inconsistent.[32] John Edwards described this relationship as one that was "analogous to that of the 'final Court of Appeal' on matters of strictly legal advice" within Government.[33]

Advisor to individual ministers

The Attorney General may additionally advise individual ministers. This can be in connection with their (departmental) responsibilities and/or in a personal

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31 Patrick Mayhew, 'The Role of the Law Officers in England and Wales' (1992) 1 Inter Alia 18, p19.

32 Ben Yong, Risk Management: Government Lawyers and the Provision of Legal Advice within Whitehall, 2013, pp86-87.

33 John Edwards, The Attorney General, Politics and the Public Interest, 1984, p185.

capacity. The Ministerial Code identifies two examples of where a minister would expect to have discussions with a law officer in relation to personal matters.

Firstly, where a minister is, or is likely to become, "involved in" civil litigation in a personal capacity they should inform the law officers and consult them as to its implications on their "official position". Particular attention is drawn to the need to do this before any litigation starts and especially in cases involving defamation.[34]

Secondly, where a minister is, or is likely to become, a defendant or witness in an action, the Code expects that the minister shall inform the law officers before instructing their own solicitors on any matter.[35]

"Rule of law" advisor on UK primary legislation

The law officers are part of the Parliamentary Business and Legislation Cabinet Committee (PBLCC). They therefore have oversight over certain aspects of the Government's legislative programme, ensuring that proper attention is drawn to the human rights implications of (especially proposed primary) legislation. They also have an interest where legislative provisions would or could have retrospective effect, or could be commenced early. These might collectively be understood as "rule of law oversight" of the Government's legislative programme.

Under the Human Rights Act 1998, the UK Government has specific obligations to ensure that primary legislation is compatible with the European Convention on Human Rights. At first instance, the preparation of Ministerial statements of compatibility are a matter for the relevant Government department and the Minister sponsoring the introduction of the bill in question. If a bill poses a "difficult question" however, the Attorney General may be asked for a "binding opinion".[36]

Thereafter, the law officers are responsible for communicating and explaining the human rights implications of proposed legislation to the Cabinet through the PBLCC.[37] Having been provided the relevant materials prepared by Government departments, they must satisfy themselves that the legal reasoning underpinning a statement of compatibility[38] (for instance) is sound, and then communicate the relevant strengths, weaknesses and risks of the legal arguments to the Government.[39] The purpose of this oversight function is

34 UK Government, Ministerial Code, November 2024, para 3.17.

35 As above, para 3.18.

36 Edward Garnier, Speech to the Constitutional and Administrative Law Bar Association: The Law Officers and Legislative Procedure, 17 July 2010.

37 Dominic Grieve, 'The Role of Human Rights in a Law Officer's Work: Challenges Facing the HRA and the ECHR' [2012] Judicial Review 101, p102.

38 Human Rights Act 1998, s19.

39 Dominic Grieve, 'The Role of Human Rights in a Law Officer's Work: Challenges Facing the HRA and the ECHR'.

to ensure that Government is less susceptible to having its legislation challenged in the courts on human rights grounds.

The Attorney General also has an oversight role where primary legislation would have retrospective effects or be subject to early commencement. In both instances, there are constitutional conventions which mean a departmental proposal of that kind should only proceed if the law officers have consented to it.[40]

When the UK was a member state of the EU, and during its post-Brexit transition period, the law officers similarly had a role in ensuring the UK's compliance with its EU and Withdrawal Agreement obligations.

Advisor on devolved legislation

Under the Scotland Act 1998, Government of Wales Act 2006 and Northern Ireland Act 1998, the Attorney General may refer a devolved bill to the UK Supreme Court prior to Royal Assent on behalf of the UK Government. The purpose of such a reference is to ascertain whether a bill is within devolved competence and/or relates to a protected subject matter under the relevant devolution settlement.

The law officers can also "intervene" in proceedings between other parties, and refer "devolution issues" to a higher court for consideration. High profile examples of the Attorney General making bill references, or referring devolution issues to the UK Supreme Court, include:

- the Local Government Byelaws (Wales) Bill 2012[41]
- the Agriculture Sector (Wales) Bill 2014[42]
- the Law Derived from the European Union (Wales) Bill 2018[43]

References relating to the Scottish devolution settlement, made on behalf of the UK Government, have (to date) been made jointly by the Advocate General for Scotland and the Attorney General for England and Wales (but it is not a statutory requirement for them to refer jointly). See, for example, references in relation to:

- the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in 2018;[44] and

40 Edward Garnier, Speech to the Constitutional and Administrative Law Bar Association: The Law Officers and Legislative Procedure.

41 *Reference Re Local Government Byelaws (Wales) Bill* [2012] UKSC 53.

42 *Reference Re Agriculture Sector (Wales) Bill* [2014] UKSC 43.

43 Senedd Research, Attorney General refers Welsh "continuity" Bill to the Supreme Court, 19 April 2018.

44 *Reference Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

- the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) Bill in 2021.[45]

Advisor to Parliament

The Attorney General for England and Wales is invariably either an MP or a member of the House of Lords. As with other ministers, the Attorney General is answerable to Parliament for the activities of his or her department. Questions to the Attorney General is a regular item of Commons (or Lords) business. Ministerial statements and responses to urgent questions, where made in the House of Commons, are repeated in the House of Lords (or vice versa if the AGEW is a peer).

Beyond those traditional forms of Parliamentary accountability, however, there has also been an expectation that the Attorney General in some sense "advises" Parliament in its own right: impartially, on a non-party basis, and independently of advising the Government.

When appointed, the Attorney General receives a writ requiring them to attend the House of Lords "to treat and give [their] advice". However, John Edwards argued these writs are purely historical artefacts that have not been "obeyed or taken seriously… since 1742".[46] The Parliamentary "client" has therefore more often been relevant to the Commons than to the Lords, with the Attorney General normally being an MP.

Parliamentary business qualifying as "legal advice" encompasses matters "in relation to the constitution of and conduct of proceedings in the House, the conduct and discipline of members, and the effect of proposed legislation".[47] For instance, recent office holders have emphasised a readiness to advise the House of Commons on the enforcement of its sub judice rule, which disallows debate, questions or motions on matters awaiting adjudication in a court of law. In a speech in 2012, Dominic Grieve (then AGEW) said:

> Were [breaches of the sub judice rule] to become more commonplace then as Attorney General and advisor to Parliament I would not shy away from advocating more stringent regulation of what members can say during parliamentary proceedings. But those would be regulations imposed and enforced by Parliament, and not by the courts. [48]

Participation in Parliamentary proceedings

The House of Commons' own Standing Orders also give the Attorney General, provided that they are an elected member of the House, a role in the deliberations of (most) general committees, including public bill committees.

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45 *References Re UNCRC (Incorporation) (Scotland) Bill and ECLSG (Incorporation) (Scotland) Bill* [2021] UKSC 42.

46 John Edwards, The Attorney General, Politics and the Public Interest, p207.

47 Sam Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978) 58 The Parliamentarian 149, p155; John Edwards, The Attorney General, Politics and the Public Interest, pp218-220.

48 Dominic Grieve, Speech to BPP Law School: Parliament and the Judiciary, 25 October 2012.

Standing Order No. 87 provides that any of the UK Government law officers "being Members of this House" may "take part in the deliberations of" those committees but "shall not vote or make any motion or move any amendment… or be counted in the quorum".[49]

From time to time a law officer may be invited to assist a committee with its deliberations, or he or she may attend on their own initiative. In the course of those sessions the Attorney General may (for instance) provide "advice" or "opinion" as to the effect of proposed legislation.

In practice, the capacity of a law officer to advise a parliamentary committee may be limited by conflicts of interest, especially where, for example, specific legal advice on similar matters has been sought by and given to the Government.

Historically, the law officers were more active in assisting public bill committees than select committees. However, in recent years the Attorney General has regularly participated in evidence sessions about his or her work before the Justice Select Committee, alongside the Solicitor General.[50]

Participation in legal proceedings on Parliament's behalf

In addition to representing the Government in litigation, the Attorney General sometimes intervenes in cases to assert the privileges of either House of Parliament. They can do so of their own motion, at the House's request, or at the request of the court itself.[51]

The most well-known example of such an intervention was in *Pepper v Hart*.[52] That case concerned whether a court could consider Parliamentary materials in its efforts to construe the meaning of a statutory provision. It therefore raised a question of Parliamentary privilege and Article 9 of the Bill of Rights Act 1689. The Attorney General participated in those proceedings, arguing "in defence of" a more expansive interpretation of Parliament's privileges.

Formally, the Attorney General appeared for "the Crown". The reality was that he was instructed by a Government department, not Parliament. The Department of Inland Revenue stood to gain from a judicial interpretation of the relevant legislation which was more likely to be handed down in the absence of reference to Hansard. The (then) Attorney General's "strategy" to assert Parliament's privileges may not, at least exclusively, have been done in aid of Parliament's interests.

49 House of Commons Standing Order No. 87.

50 See most recently Justice Committee, Oral evidence: Work of the Law Officers, HC 577, 15 January 2025.

51 House of Commons Constitutional Affairs Committee, The Constitutional Role of the Attorney General, HC 306, 19 July 2007, para 19.

52 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

It is less clear to what extent Parliament realistically can "instruct" the law officers where – and to the extent that – Parliament's (perceived) interests do not align with those of the Government of the day.

Disclosure of advice

As a matter of constitutional convention, the existence or content of the Attorney General's legal advice is not disclosed publicly except by agreement. This issue is explored more fully in **Section 6** of this paper.

Public Interest Functions

The Attorney General exercises certain statutory and prerogative or common law functions in relation to the criminal and civil legal systems in England and Wales. These go beyond the Ministerial and superintendence functions already discussed.

Criminal law functions

In the criminal law context, the Attorney General exercises (at least) four notable functions beyond superintending prosecutorial authorities.

Attorney General's consent required for certain prosecutions

Firstly, under a variety of different Acts, the consent of the Attorney General is required before prosecution for certain offences can be commenced.[53] This requirement for consent often exists as a safeguard against "inappropriate" criminal proceedings being brought.

Protecting against contempt of court or vexatious prosecution

Secondly, the Attorney General may initiate certain criminal proceedings for the purposes of protecting the administration of justice.

- Under the Contempt of Court Act 1981 the Attorney General is a "gatekeeper" of proceedings against the publisher of any material which risks damaging an unfinished trial,[54] or against a juror who discloses the content of jury deliberations while a trial is ongoing.

- Under the Senior Courts Act 1981 the Attorney General can also apply to the High Court for a "criminal proceedings order" against a person whom they allege has "habitually and persistently and without reasonable

[53] Over 60 such offences were listed by the Law Commission in 1998. See Consents to Prosecution, LC255, 20 October 1998, Annex A. A less precise but updated list is maintained on the Crown Prosecution Service Website. See Consents to Prosecute Annex 1, Part 1, December 2023.

[54] See John McGarry, The Attorney General and contempt of court – some political and constitutional concerns, Legal Studies 44(2) 2023, pp352-368.

ground… instituted vexatious prosecutions (whether against the same person or different persons)".[55]

Power to initiate certain appellate proceedings

Thirdly, the Attorney General may initiate appellate proceedings in certain circumstances.

- Under the Criminal Justice Act 1988 the Attorney General can, with the leave of the Court of Appeal, appeal a Crown Court sentence which he or she believes to be "unduly lenient". This applies to those triable "on indictment" or "either way".[56] The Court of Appeal may then substitute the sentence for a more severe one, provided that the Crown Court could itself have imposed as severe a sentence.

- Under the Criminal Justice Act 1972 the Attorney General may refer a point of law to the Court of Appeal where the Crown Court has acquitted a person tried on indictment. This allows prosecuting authorities to challenge and clarify statements of law that might otherwise set harmful precedents for future cases.[57]

Power to discontinue certain criminal trials

Fourthly, the Attorney General exercises a prerogative power to enter what is known as a nolle prosequi on an indictment. This broad discretionary power allows criminal proceedings effectively to be stayed (suspended temporarily).[58]

In modern times it is used mainly where there are compassionate grounds for discontinuing a criminal trial for an indictable offence (e.g. if the defendants fall very ill or are otherwise incapacitated).

Civil law functions

The Attorney General's functions with regard to the civil legal system also combine statutory and non-statutory roles, though more so the latter than the former.

Powers to protect against vexatious litigation

Just as the Attorney General may seek a criminal proceedings order to prevent the bringing of vexatious prosecutions, so too he or she may bring a

55 Senior Courts Act 1981, s42(1). The effect of such an order, if granted, is to prevent the person involved from bringing further proceedings without the leave of the High Court.

56 Criminal Justice Act 1988, s35.

57 Summary proceedings may, in any case, be appealed under Magistrates' Court Act 1980, s111.

58 More formally, this is "an undertaking entered on record by leave of the Attorney-General to forebear to continue proceedings wholly or partially"; Law Commission, Consents to Prosecution, LC255, 20 October 1998.

"civil proceedings order" relating to civil litigation, or an "all proceedings order" applying to both.[59]

Power of intervention in family law cases

Under the Family Law Act 1986, the Attorney General may intervene in a variety of proceedings in the family courts. This affects applications for a declaration as to:

- marital status;
- adoptions effected overseas; and
- parentage, legitimacy and legitimation.

Interventions are permitted whether or not a family court has sent relevant papers to the Attorney General for consideration. Papers can be sent either of the court's own motion or at the request of a party.[60]

Appointment of special advocates and "amici curiae"

In certain cases, usually involving counterterrorism, certain parties may wish to disclose evidence to a judge which cannot (for e.g. reasons of national security) be disclosed to other parties in the proceedings.

In these circumstances, a security vetted "special advocate" may be appointed to represent the interests of those parties deprived of "direct" access to that evidence. The UK Government law officers have a statutory power to appoint special advocates to represent defendants before the High Court.[61]

Additionally, they have a general role in appointing "Advocates to the Court", or "amici curiae", in civil cases where "there is a danger of an important and difficult point of law being decided without the court hearing relevant argument".[62]

Civil proceedings relating to charities

The role of the Attorney General in civil proceedings relating to charities is partly governed by statute and partly by prerogative power. He or she has statutory powers to intervene before the First-tier and Upper Tribunal in any charity proceedings and to refer questions involving the operation or application of charity law to the relevant Tribunal.[63]

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59 Senior Courts Act 1981, s42(1).

60 Family Law Act 1986, s59.

61 Justice and Security Act 2013, s9(1); the law officers have similar powers for the appointment of special advocates in closed material proceedings under other statutes which are not considered here.

62 James Munby, The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases (Guidance from the President of the Family Division), 26 March 2015.

63 Charities Act 2011, ss318 and 326.

Most of the functions previously exercised in this context by the Attorney General are now assumed and exercised in practice by the Charity Commission. However, the relevant statutory provisions typically frame the Commission's statutory powers with reference to the existing powers (including prerogative powers) of the office of the Attorney General.

Certain Charity Commission powers can only be exercised with the agreement of the Attorney General. The law in this area originates in the Crown's ancient "parens patriae" prerogative jurisdiction. It provides the power for an official to act where it is necessary to do so for the protection of vulnerable citizens and charitable interests.

Other powers

A related power of the Attorney General following from "parens patriae" is the ability to seek a High Court injunction to enforce public rights or the prevention of public nuisances.

This can be done either by the Attorney General in his or her own right, or on behalf of others (whether a governmental or administrative body or an individual or private company).[64]

2.2 Solicitor General for England and Wales

The Solicitor General is the UK Government's junior law officer for England and Wales. He or she functions as the deputy of, or in the absence of, the Attorney General.

Origins

The title of Solicitor General emerged in 1525, though there was a King's Solicitor carrying out similar responsibilities before then. There is disagreement among historians as to whether the title was used to express some specialist knowledge of equitable procedures (which was associated with the solicitor's profession at the time), or whether it was used because the original office holders had a similar relationship to the King's Attorney as that which existed between private solicitors and attorneys at the time.[65]

The prestige attached to the office of Solicitor General, together with the relevant experience it provided for, was such that a strong convention in favour of promotion to the post of Attorney General came into being. For many years thereafter, the post was regarded as a 'stepping stone for

64 John Edwards, The Law Officers of the Crown, pp286-287.

65 As above pp28-29 and 121-123.

advancement' in this sense,[66] though the same convention does not appear to be in operation today.[67]

Functions

Although the relationship between the Attorney General and the Solicitor General in England and Wales was well established at common law for centuries, the arrangements were formalised in the Law Officers Act 1944 and refined in the Law Officers Act 1997. The Solicitor General is the deputy of the Attorney General, and a person by whom any of the Attorney General's functions can be exercised. The UK Government describes the current role of the Solicitor General as:

- [Having] responsibility for matters delegated by the Attorney General, including deputising for the Attorney at the Parliamentary Business and Legislation Cabinet Committee
- Providing support to the Attorney General in his superintendence of the Government Legal Department, the Crown Prosecution Service, HM Crown Prosecution Service Inspectorate and the Serious Fraud Office
- Providing support to the Attorney General in his public interest functions
- Promoting the rule of law at home and internationally[68]

This functions in practice as an informal division of responsibilities, but with the Attorney General being regarded as the senior of the two roles. It is more common for the Attorney General to attend Cabinet, but both are often part of Cabinet Committees as and when thought necessary or expedient by the Prime Minister of the day.

In April 2019, Robert Buckland became the first Solicitor General to give evidence to the Justice Committee of the House of Commons accounting for the role and his work, as distinct from that of the Attorney General.[69] In that evidence session, he explained the perceived practical advantages of having two law officers capable of carrying out the same functions:

> The convenience of having two Law Officers means that in times when there is perhaps a constituency conflict of interest he can conduct a particular case, or look at a case that clearly has a constituency conflict, and vice versa. It means that when Members of Parliament write in, and particularly if I write in, in my capacity as a constituency member, about the work of the Law Officers, I can write to him and he can deal with it independently. More importantly, the sheer

66 As above p29.

67 See James Hand, The Attorney-General, politics and logistics – a fork in the road?, Legal Studies 43(2) 2022, p431, Figure 2.

68 Cabinet Office, List of Ministerial Responsibilities, November 2024.

69 Justice Committee, Oral Evidence: The work of the Solicitor General, HC1837, 2 April 2019, Q2.

> volume of work means that two Law Officers are very necessary in order to carry out the considerable box work that we both have day to day.[70]

2.3 Counsel General for Wales (since 2007)

The Counsel General for Wales is the law officer for the Welsh Government. This role has existed since 2007, with the coming into force of the relevant provisions of the Government of Wales Act 2006.

Origins

In Scotland and Northern Ireland, devolution entailed (albeit at different points) the transfer of key justice powers to Holyrood and Stormont. Both Scotland and (Northern) Ireland also had distinct legal systems from the rest of the UK, which predated their respective Unions, and distinct law officers predating the current devolution settlements.

By contrast, Wales shared a legal system with England, both before and following devolution, and (to a far greater extent) justice matters remained reserved under its model of devolution. There was no distinctly Welsh law officer whose functions could be devolved to Cardiff Bay. Whereas the UK Government "replaced" the Lord Advocate and Attorney General for Northern Ireland with Advocates General for the purposes of their reserved functions, the Attorney General for England and Wales continued to advise it on Welsh matters.

When the Welsh Assembly was first created, there was no formal distinction between its legislative and governmental functions, and it did not have a law officer. Instead, a non-statutory civil service role of "Chief Legal Adviser to the Assembly" was created. An experienced barrister, Winston Roddick QC (now KC), held this post until 2003.[71]

The Government of Wales Act 2006 substantially overhauled Welsh devolution, creating a formal separation between the executive and legislative branches and providing primary law-making powers for the latter. At the same time, the post of Counsel General for Wales, a Welsh Government law officer, was created by statute. This post would be the "legal adviser to, and representative in the courts of, the Welsh Assembly Government".[72]

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70 As above. See also Robert Buckland, Guest Paper: UK government law officers Understanding the role of the attorney and solicitor general, Institute for Government, June 2022, pp4-5.

71 Russell Deacon, Alison Denton and Robert Southall, The Government and Politics of Wales, 2018, p87.

72 Explanatory Notes, Government of Wales Act 2006, para 230.

Formal relationship with Welsh Cabinet

The role of Counsel General is described as "a member of the Welsh Government" and having "ministerial status" but not as such being "a Welsh Minister".[73] This means that office holders technically only attend the Welsh Cabinet by invitation of the First Minister, and cannot exercise the powers and functions of "the Welsh Ministers".

Process of appointment and external appointments

As with Welsh Ministers, the Counsel General is appointed or removed by the King on the recommendation of the First Minister and may resign from office at any time (though the resignation only takes effect when accepted by the King).

Unlike with his or her colleagues, however, the Counsel General does not have to be appointed from the pool of elected members of the Senedd. They can instead be selected via a "recruitment process" which places a premium on professional legal qualifications and expertise that might not be available from within the Welsh Parliament's elected membership.[74]

Once these procedures have been satisfied in respect of a proposed appointment, the "Counsel General designate" is thereafter formally sworn into office at a ceremony undertaken by the Presiding Judge of the Wales Circuit on behalf of the King.

Concurrent roles within the Welsh Government

Section 49(9) Government of Wales Act 2006 prohibits the Counsel General from holding concurrently the office of First Minister, Welsh Minister or Deputy Welsh Minister. It also prohibits any of the Counsel General's powers being delegated to another such office-holder in the Welsh Government.

In practice, the spirit of this statutory restriction has arguably not been followed since 2018. Firstly, Jeremy Miles, who was already Counsel General from 2017, also became known as the Welsh Government's "Minister for European Transition" in late 2018, serving in both posts until May 2021. Opposition parties in the Senedd raised concerns about this proposition, questioning whether it was compatible with the Government of Wales Act 2006. The Welsh Government insisted that, since Jeremy Miles had not formally been appointed as a "Welsh Minister" under section 48 of the Act,

73 As above, para 231.

74 Russell Deacon, Alison Denton and Robert Southall, The Government and Politics of Wales, p88. Theodore Huckle QC (now KC) served as Counsel General between 2011 and 2016 despite not being a member of the Senedd and Elisabeth Jones (similarly) served between August and September 2024 as Counsel General designate "on an interim basis", but was not formally appointed by the time a permanent successor had been chosen.

and had no formal ministerial powers and functions, his dual role was constitutionally permissible.[75]

Jeremy Miles' successor, Mick Antoniw, similarly held a concurrent "ministerial" title: that of "Minister for the Constitution" between 2021 and 2024. The current Counsel General, Julie James, holds the additional title of "Minister for Delivery". These subsequent dual appointments attracted less controversy.[76]

Following resignations from his Government, Vaughan Gething announced on 17 July 2024 interim arrangements to cover the portfolios of the vacated offices. It was indicated that he personally would "perform the role of Counsel General" while the Welsh Labour leadership contest took place.[77] No motion was ever put to the Senedd to appoint Gething as Counsel General. It is not clear what legal basis, if any, existed to "designate" any powers or functions of the Counsel General to him, while he remained First Minister.

Executive functions

The Counsel General has four clearly identifiable roles as member of the Welsh Government, aside from his or her obligations to comply with the requirements of the Ministerial Code to the same extent as ordinary ministers.[78]

Departmental oversight

The Counsel General for Wales is expected to oversee the work of the Legal Services Department, which provides legal services to the Welsh Government. This is an analogous role to that of the Attorney General in relation to the UK's Government Legal Department.[79]

The Counsel General must also oversee prosecutions on behalf of the Welsh Ministers, though the vast majority of prosecutions in Wales are carried out by the CPS for England and Wales, superintended by the Attorney General. This means that the demands of this function are relatively limited compared to the CGW's counterparts.

Development of Welsh Government policy on legal matters

The Welsh Government's Law Wales website once described the Counsel General as also exercising a role in developing the Welsh Government's policy

75 BBC News, Key cabinet appointment is legal, says Mark Drakeford, 8 January 2019. Plaid Cymru voted against the re-appointment of Jeremy Miles as Counsel General and the Welsh Conservatives abstained when it was put to a vote in the Senedd. See National Assembly for Wales (Official Report), 8 January 2019, paras 341-360.

76 See Conor McCormick, The Constitutional Legitimacy of Law Officers in the United Kingdom, 2022, pp177-179.

77 The Standard, Vaughan Gething reshuffles Welsh Labour top team after resignations, 17 July 2024.

78 Welsh Government, Ministerial Code, June 2024, para 1.8.

79 National Assembly for Wales Research Service, The Counsel General – A Quick Constitutional Guide, 12 March 2018.

on "legal matters". This policy role differs from the policy role of the Attorney General in criminal justice policy, which he or she shares on a "tripartite" basis with the Lord Chancellor and the Home Secretary.

For instance, the former Counsel General, Jeremy Miles, conducted a "rapid review of the Welsh Government's gender and equality policies" in conjunction with another Welsh Minister, Julie James. The objective of this review was to advance issues in that policy area using devolved powers available to the Welsh Government.[80] Having additionally been appointed as a Brexit Minister in January 2019, Miles held a further role in the development of policy in that area.

Power to introduce bills

The Counsel General is unique among the law officers in that he or she has a statutory right to introduce a bill even if he or she is not a member of the relevant legislature (in this case, the Senedd Cymru/Welsh Parliament). By contrast, the UK and Scottish law officers would also have to be a member of their respective legislature to introduce a bill.[81] The Attorney General for Northern Ireland, being prohibited from sitting as an MLA, cannot propose primary legislation at all.[82]

Making representations on matters affecting Wales

In the same vein as the First Minister and other Welsh Ministers, the Counsel General has a statutory function to "make representations about any matter affecting Wales".[83]

Advisory functions

Mostly analogous to UK law officers, but no "sovereign client"

The advisory functions of the Counsel General are similar to those of the Attorney General, save for the "client" he or she advises. The Counsel General advises the Welsh Government, Welsh Ministers and devolved part of the civil service, rather than the UK Government, ministers and civil service. There is no analogous role for the Counsel General in advising the monarch.

The Welsh Ministerial Code treats the Director of Legal Services in the Welsh Government as a de facto gatekeeper for legal advice, anticipating that

80 Jeremy Miles, Discrimination and Public Law: Promoting equalities for a fairer and more equal Wales, 26 March 2018.

81 The Scotland Act 1998 does not specify who may introduce a Bill before the Scottish Parliament, but the legislature's Standing Orders (Rule 9.2.1) provide that "any member" may do so.

82 The Northern Ireland Act 1998 does not specify who may introduce a Bill before the Northern Ireland Assembly, but the legislature's Standing Orders (No. 30) operate on the basis that a minister or a member introduces a Bill. The Attorney General for Northern Ireland cannot be either a minister or an MLA.

83 Government of Wales Act, s62.

requests should not be sought "directly" from the Counsel General save for in "exceptional situations".[84]

Similar "hierarchy" of legal advice

Similar principles as to the status and authority of advice apply to the Counsel General as they do for UK law officers: law officers' advice is "final and authoritative", taking precedence over other sources of government legal advice when given.[85]

Similar principles on disclosure of legal advice

As with the UK law officers, a convention exists that both the existence and substance of legal advice must not be disclosed outside of the Welsh Government without the authority of the Counsel General.[86]

Advising on legislation and legislative competence

Like the UK Government's law officers, the Counsel General advises as to the human rights, rule of law and international law implications of the Government's legislative programme. These take on an added significance given that the "competence" of devolved institutions is defined with reference to (among other things) the European Convention on Human Rights. Legislative competence is also limited by reference to reserved subject matters and protected enactments.

The Welsh Government must, when introducing a bill, make a statement to the effect that, in its view, the provisions would be within the devolved legislative competence.[87] Although that statement does not itself have to state the reasons for concluding the provisions are within competence, that assessment is in practice made by the Counsel General on the Welsh Government's behalf. The Counsel General may make a statement to the Senedd/Parliament if, for instance, the legality of a government bill was in dispute. The Wales Act 2017 also imposes a new requirement for Senedd/Parliament bills to be accompanied by a "justice impact assessment".[88]

A 2015 Law Commission Consultation paper described the Counsel General as having "general responsibility to consider the justice provisions [of a bill] and would expect to be consulted" if there were any concerns about such a question within a bill team.[89]

84 Welsh Government, Ministerial Code, June 2024, para 6.18.
85 As above, para 6.17.
86 As above, para 6.19.
87 Government of Wales Act 2006, s110(2).
88 As above, s110A.
89 Law Commission, Form and Accessibility of the Law Applicable in Wales: A Consultation Paper, LC223, 9 October 2015, para 3.42.

Advising the Senedd Cymru/Welsh Parliament

Whereas the original Legal Advisor to the Assembly (the post from which the Counsel General emerged) was accountable to and advised Assembly Members collectively, the Counsel General does not, as such, provide legal advice to the Welsh legislature. However, the Counsel General must answer oral and written questions asked of him or her and may make written and oral statements in the same way as any Welsh Minister might do so.

The Government of Wales Act 2006 states that the CGW may "decline to answer any question or produce any document concerning the operation of the system of criminal prosecution in any particular case" if doing so "would otherwise be contrary to the public interest".[90] Given that the prosecutorial functions of the Counsel General are relatively narrow (compared to those of the Attorney General for England and Wales) this limitation on accountability is of less significance at present.

The Counsel General may attend Senedd/Parliamentary Committee proceedings by invitation (under Standing Order No. 17.50) but – unlike the UK Government law officers – cannot attend and participate in deliberations "as of right".

Public interest functions

Prosecutorial functions to be exercised independently

The role of the Counsel General in the criminal law of Wales is relatively limited. However, insofar as a prosecutorial function is vested in him or her, the Welsh Ministerial Code provides that "that function should be exercised… independently of the Welsh Government". Other members of the Welsh Government "must not interfere in, or be involved in any way with, the exercise of such a function".[91]

General power to participate in legal proceedings

The Counsel General has a general statutory power to institute, defend or appear in any legal proceedings – civil or criminal – "relating to matters with respect to which any functions of the Welsh Ministers, the First Minister, or the Counsel General are exercisable" so long as the Counsel General considers it appropriate to do so "for the promotion or protection of the public interest".[92]

The Counsel General relied on this power, for example, to intervene in the *Miller* case about Article 50.[93] That case originally did not involve the Welsh Government at all, being as it was a judicial review between Gina Miller (and others) and the UK Government. The Counsel General similarly initiated

90 Government of Wales Act 2006, s34(3).

91 Welsh Government, Ministerial Code, June 2024, para 6.20.

92 Government of Wales Act 2006, s67.

93 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

(unsuccessful) litigation against the United Kingdom Internal Market Act 2020.[94]

The Counsel General for Wales also has a power to refer Senedd/Parliamentary bills to the UK Supreme Court to test their legislative competence or to secure a declaration as to whether a protected subject matter is engaged. This power also exists for the Attorney General for England and Wales. In addition, he or she may also raise, through the courts, "devolution issues" in the same way as other law officers.

The Counsel General was the first devolved law officer across Wales, Scotland and Northern Ireland to refer a bill on grounds of legislative competence.[95] The *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* was referred to the Supreme Court in 2014.[96] That bill was introduced by Mick Antoniw, who was at the time a Welsh Assembly backbencher. Antoniw later became Counsel General, a year after the Bill had been declared to be beyond the legislative competence of the Assembly.

New functions on accessibility of Welsh law

The Legislation (Wales) Act 2019 confers new functions on the Counsel General. These include a duty to keep under review the accessibility of Welsh law and to prepare a programme which sets out the Welsh Government's plans to advance the accessibility of Welsh law.[97] This programme must include proposed activities that are intended to contribute to an ongoing process of consolidating and codifying Welsh law, among other things.

94 See *Counsel General for Wales v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin) and [2022] EWCA Civ 118; Gareth Evans, Devolution and declaratory judgments: the Counsel General's legal challenge to the UK Internal Market Act 2020, NILQ 75(1), 2024, pp140-153.

95 Until 2022, no Holyrood or Stormont bills (in whatever form) had been referred to the UK Supreme Court by a devolved law officer to test matters of legislative competence.

96 *Reference Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.

97 Legislation (Wales) Act 2019, ss1-2.

3 Scotland

3.1 Lord Advocate

Origins

Most commentary suggests that there was a "King's Advocate" pleading in Scottish civil suits on behalf of the Crown and as a representative "of the King's interest in Parliament at the trial of certain persons for resisting the King's forces" as long ago as 1478 and 1479 respectively.[98]

During the 16th and 17th centuries, prior to the parliamentary union of Scotland and England at the beginning of the 18th, the Scottish King's Advocate came to assume a mixture of so-called legal and political functions. Alongside those court and prosecutorial duties mentioned above, access to the Royal presence meant he was able to take "a leading part in the general business of government" for some time before becoming a member of the King's Privy Council in Scotland.[99]

Then, as a member of the pre-Union Scottish government – along with the Chancellor, High Treasurer, Justice-General, Privy Seal, Treasurer-Depute, Clerk-Register and Secretary of State[100] – the King's Advocate was given the title 'Lord'.[101] By virtue of being a senior member of the government, the Lord Advocate sat and voted in the Estates (i.e. the Scottish Parliament) during this period.[102]

After the parliamentary union of 1707, the Lord Advocate briefly competed for governmental authority with incumbents of the offices of Secretaries of State in Scotland,[103] but from the mid 18th century those offices fell into abeyance and the Lord Advocate became 'de facto the only minister for Scotland' in the UK Government.[104] Daintith and Page note that this period was one of remarkable contrast between the roles of Lord Advocate and Attorney General for England and Wales.[105] While the former did at this time hold "real

98 Lord Clyde, 'Memorandum on the Law Officers of Scotland' The Times, 7 February 1924, reproduced in James Casey, 'The First Labour Government and Office of Lord Advocate' (1975) 26 NILQ 18, pp26-29.

99 David Milne, The Scottish Office and Other Scottish Government Departments, 1957, pp8-9.

100 John Edwards, The Attorney General, Politics and the Public Interest, p277.

101 George Omond, 'The Lord Advocates of Scotland: Second Series: 1834-1880', 1914, v-vi.

102 David Milne, The Scottish Office and Other Scottish Government Departments, p9.

103 As above.

104 The Laws of Scotland: Stair Memorial Encyclopaedia, Constitutional Law Reissue, para 427.

105 Terence Daintith and Alan Page, The Executive in the Constitution: Structure, Autonomy, and Internal Control, 1999, p237.

executive power", the latter has never held a similarly sweeping level of authority.[106]

Eventually, however, the extent of the legal and political powers of the Lord Advocate began to attract criticism.[107] Some Scottish Members of the UK Parliament, for example, were dissatisfied because the legal duties of the Lord Advocate "often required him to be in Edinburgh when Parliament was sitting [in London] and as a result Scottish business in the House [of Commons] was neglected."[108] Such critics called for "a greater sense of accountability through the devolution of power" to a dedicated Secretary for Scotland;[109] a reform proposal which was eventually acceded to in 1885.[110] After this office was elevated to the status of a Principal Secretary of State in 1926, the office of Lord Advocate ceased to have such a high degree of political power and reverted its "original, predominantly legal character".[111]

Prior to the devolution reforms of 1998, however, the Lord Advocate had once again assumed ministerial responsibility for quite a number of Scottish affairs. A particularly large inflation to his ministerial work occurred in 1973, for instance, when a range of functions were transferred from the then over-burdened Secretary of State for Scotland.[112]

The Lord Advocate had to discharge these functions alongside a significant set of legal responsibilities. These included a role as the chief adviser to the UK Government on Scots law issues; a role in Scottish litigation against the Crown, and an oversight role in connection with the systems for criminal prosecution and investigation of deaths.[113]

Transfer of functions to Scottish Government

As part of Scotland's devolution settlement, the offices of Lord Advocate and Solicitor General for Scotland were transferred from the UK Government to the newly created Scottish Executive (later Scottish Government). This approach differed from that taken in Wales, where a new devolved law officer was created after the fact.

This difference of approach reflects three key differences between the Scottish and Welsh systems of devolution: the prior existence of a distinct Scottish

106 As above.
107 David Milne, The Scottish Office and Other Scottish Government Departments, 1957, p12.
108 As above, p13.
109 John Edwards, The Attorney General, Politics and the Public Interest, p278; James Mitchell, Governing Scotland: The Invention of Administrative Devolution, 2003, chapter 2.
110 Secretary for Scotland Act 1885.
111 John Edwards, The Attorney General, Politics and the Public Interest, p280.
112 Transfer of Functions (Secretary of State and Lord Advocate) Order 1972.
113 See Conor McCormick, The Constitutional Legitimacy of Law Officers in the United Kingdom, 2022, pp100-108.

legal system, the devolution of criminal justice powers to Scotland, and the fact that Holyrood assumed, from the outset, primary law-making powers.

Terms of appointment

The post-devolution arrangements are set-out in Part 2 of the Scotland Act. The Lord Advocate (and his or her deputy the Solicitor General for Scotland) is a "member" of the Scottish Government[114] and is appointed on the nomination of the First Minister, with the Scottish Parliament's agreement.[115] The Lord President of the Court of Session carries out the swearing-in ceremony for each post at Parliament House in Edinburgh on behalf of the Sovereign.[116] As with other members of the Scottish Government, the devolved Scottish law officers cannot at the same time hold ministerial office in the UK Government.[117]

The Lord Advocate or Solicitor General for Scotland may resign at any time and must do so if the Scottish Parliament resolves that it has lost confidence in the Scottish Government. For the purposes of the Lord Advocate's "retained functions" he or she is deemed to continue to hold office despite resignation until a new Lord Advocate is appointed.

Member of the Scottish Government

The Lord Advocate, as a member of the Scottish Government, legally may exercise any function of the Scottish Ministers (though not those of the First Minister).[118] This arrangement notably differs from that concerning the Counsel General for Wales, who cannot exercise functions of the Welsh Ministers.[119]

However, the reverse is not true: Scottish Ministers cannot exercise the functions of the devolved Scottish law officers. The Scotland Act 1998 carves out the "retained functions" of the Lord Advocate. These include the functions previously exercised by the Lord Advocate before devolution and any new functions conferred solely upon him or her thereafter. These "retained functions" may only be exercised by a Scottish law officer.[120]

Formal Relationship with Cabinet

The Lord Advocate is a member of the Scottish Government and attends the Scottish Cabinet by invitation. This relationship is therefore similar legally to that of the Counsel General for Wales in relation to the Welsh Government.

However, the Scottish devolved law officers have had a different political relationship with their administration than their Welsh counterpart. None of

114 Scotland Act 1998, s44.
115 Scotland Act 1998, s48(1).
116 Faculty of Advocates, Swearing-in of Lord Advocate and Solicitor General, 7 June 2016.
117 Scotland Act 1998, s44(3-4).
118 Scotland Act 1998, s52(3).
119 Government of Wales Act 2006, ss49(9) and 57(3).
120 Scotland Act 1998, s52(5-6).

the holders of the office of Lord Advocate since 1999 has sat as an MSP and the post has mostly been held without explicit party-political allegiance. For example, Elish Angiolini continued to serve as Lord Advocate in 2007 despite a change from a Labour-Liberal Democrat coalition Government to an SNP minority Government following the 2007 Holyrood elections.

The frequency with which the Lord Advocate attends meetings of the Scottish Cabinet is ultimately a matter of political expediency. In particularly legally sensitive periods for the Scottish Government, the trend has seen more than half of Cabinet meetings attended by the Lord Advocate.[121]

Executive functions

The Lord Advocate is the head of the Crown Office and Procurator Fiscal Service, the main body responsible for the prosecution of criminal offences in Scotland. He or she therefore has more extensive prosecutorial responsibilities than (for example) the Attorney General for England and Wales. The Scotland Act includes an explicit requirement that:

> Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.[122]

The equivalent function in the rest of the UK is fulfilled (for the most part) by Directors of prosecuting authorities, subject only to law officers' superintendence.

The Lord Advocate and Solicitor General for Scotland are operationally responsible for what was originally called the Office of the Solicitor to the Scottish Executive, now known as the Scottish Government Legal Directorate. It is the primary source of legal advice for the Scottish Government.[123]

Advisory functions

The Scottish Ministerial Code explains that the devolved Scottish law officers have a responsibility for ensuring "that the [Scottish] Government acts lawfully at all times". This means that:

> Ministers and officials should therefore ensure that their decisions are informed by appropriate analysis of the legal considerations and that the legal implications of any course of action are considered at the earliest opportunity.[124]

This advisory role is therefore broadly similar to that of other law officers in the UK. The Code also confirms that the Scottish Government has adopted a

121

122 Scotland Act 1998, s48(5).

123 Scottish Government, Ministerial Code, 17 December 2024, para 6.28.

124 As above.

variation of the law officers' convention (which long pertained at Westminster). Therefore ministers:

> may acknowledge publicly that they have received legal advice on a particular topic, but must not divulge either who provided the advice or its contents (whether it is from the Law Officers or from anyone else).[125]

The existence of law officers' advice is generally only acknowledged if the minister who sought it and the Lord Advocate both agree that it is in the public interest to disclose it.[126] However, the Scottish Government freely admits the existence of law officers' advice on the legislative competence of bills. This is because advice of that kind is routinely sought and informs the statutory statement that accompanies any government bill.[127]

The written opinions of the Lord Advocate are expected to be passed to the new administration if there is a change of Scottish Government. This expectation differs from other ministerial correspondence, which generally is not passed to succeeding administrations.[128]

If the Lord Advocate is acting in a "ministerial capacity", rather than providing the Government with "legal advice", their correspondence is not protected by a presumption against the disclosure of its existence and content.[129]

Litigation functions

The Scottish Ministerial Code distinguishes between:

> proceedings in which the Law Officers are involved in a representative capacity on behalf of the Government

and

> action undertaken by them on behalf of the general community to enforce the law as an end in itself.[130]

Moreover, the Code emphasises that the Lord Advocate and Solicitor General for Scotland act "wholly independently of the Government" in criminal proceedings. This is an explicit attempt to clarify the role of the law officers where there might otherwise be uncertainty as to the "client" they notionally represent.

As with the Attorney General in the UK Government, there is an expectation that Scottish Ministers will consult the law officers if they become involved in

125 As above, para 6.36.
126 As above, para 6.38.
127 As above, para 6.39.
128 As above, para 6.35.
129 As above, para 6.39.
130 As above, para 6.40.

civil litigation in their personal capacities and to do so before they consult their own solicitors. The purpose of this is to:

> allow the Law Officers to express a view on the handling of the case so far as the public interest is concerned or, if necessary, to take charge of the proceedings from the outset.[131]

In practice, the Lord Advocate and Solicitor General for Scotland have a limited role in civil litigation. It usually concerns cases where he or she is joined as a party or possesses a specific statutory or common law right to be involved. There is, for instance, no equivalent to "relator actions" in Scotland and no general right to intervene in court proceedings to represent the public interest.

Some evidence suggests that the senior judiciary may be willing to recognise a more open-ended approach towards the right of the Lord Advocate and Solicitor General for Scotland to intervene in litigation representing the public interest. In the 2008 House of Lords case of *Helow*, Lord Rodger (himself a former Lord Advocate) stated that the court had heard from counsel representing the Lord Advocate "not only as a Scottish minister with responsibility for the courts but also acting in the public interest".[132]

Like other law officers, the Lord Advocate has specific powers under the Scotland Act 1998 in connection with the devolution settlement. This includes the power to refer devolved bills before royal assent for the purposes of ascertaining whether it is within legislative competence (section 33), and the power to address "devolution issues" in the courts (Schedule 6).

Unlike the Counsel General for Wales in relation to Senedd bills, the Lord Advocate has never referred a Scottish Parliamentary bill under the section 33 powers. However, in 2022, the Lord Advocate referred the draft Scottish Independence Referendum Bill to the UK Supreme Court, raising a "devolution issue" under Schedule 6.[133] The Lord Advocate has also appeared on behalf of the Scottish Government in order to defend bills against references made by UK Government law officers.[134]

Prosecutorial functions

The Lord Advocate and Solicitor General for Scotland are assisted by a hierarchy of deputies ranging from Procurators Fiscal to the Crown Agent when discharging a wide range of prosecutorial functions flowing from their

131 As above, para 3.18.

132 *Helow v Secretary of State for Scotland* [2008] UKHL 62, para 10.

133 Scottish Parliamentary Information Centre, UK Supreme Court: Reference by the Lord Advocate of devolution issues, 22 November 2022.

134 *Reference Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 and *References Re UNCRC (Incorporation) (Scotland) Bill) and ECLSG (Incorporation) (Scotland) Bill* [2021] UKSC 42.

unique position at the head of the systems of prosecution and investigation of deaths in Scotland.

This more direct involvement in criminal prosecutions means that the Scotland Act is more demanding of the Lord Advocate's independence in the exercise of certain of his functions than is the case for other law officers. In addition to the requirement that these functions must be exercised "independently of any other person" the following safeguards apply:

- the powers of the Scottish Ministers explicitly exclude the functions of the Lord Advocate (the "retained" functions)
- Ministerial responsibility expressly does not apply to the exercise of retained functions
- the Scottish Parliament cannot legislate to remove the Lord Advocate from her position as head of the systems of criminal prosecution and investigation of deaths

The Criminal Justice Committee of the Scottish Parliament routinely questions the devolved Scottish law officers on their prosecutorial and investigatory functions.

The Lord Advocate sets prosecution policy in Scotland, and will sometimes issue statements setting out changes in approach. For example, in 2023 Dorothy Bain made a policy statement clarifying the COPFS's approach to pilot safer drug consumption facilities. That statement made clear that prosecution of individuals for "simple possession offences in such a facility" would "not be in the public interest".[135]

Splitting the "dual role"?

In recent years, there has been increased debate, in both the UK and Scottish Parliaments, about the "dual role" of the Lord Advocate (as both the head of Scotland's public prosecutions service and as the Scottish Government's chief legal adviser).[136] During the 2021 Scottish Parliamentary election, several political parties, including the governing Scottish National Party, pledged either to end, or to consult on ending, the dual role.[137]

In May 2023, the Scottish Government appointed Malcolm McMillan, former Chief Executive of the Scottish Law Commission, to undertake research into alternative models to the existing one. At the time of writing, that research has yet to be published.

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135 Crown Office and Procurator Fiscal Service, Statement on pilot safer drug consumption facility, 11 September 2023.

136 BBC News, What are the roles of Scotland's lord advocate, and do they clash?, 24 May 2021.

137 Scottish National Party, Scotland's Future, Scotland's Choice, March 2021, p36; Scottish Labour Party, Scottish Labour's National Recovery Plan, 19 April 2023, p104; Scottish Liberal Democrats, Put Recovery First, 16 April 2021, p32.

Key aspects of the Lord Advocate's role, both as the Scottish Government's principal legal adviser and as the independent head of the prosecutions service, are set out in "protected" provisions of the Scotland Act 1998. This means that the Scottish Parliament cannot pass legislation to modify them. This has been identified as a potential legal obstacle to splitting the role. It is likely that UK Parliamentary legislation would be needed.

3.2 Solicitor General for Scotland

Origins

Scottish sovereigns went without a Solicitor General until 1587.[138] Until that time, the services of the Church's Solicitor – an appointment made by the General Assembly of the Church of Scotland subject to confirmation by the sovereign – sufficed to meet their needs.[139]

For some time thereafter, the "King's Solicitor" and the "Church's Solicitor" acted independently,[140] though they were both concerned with the same business of protecting the sovereign's financial interests (the sovereign being "entitled to a surplus of dues" payable to Church ministers).[141] Over time some of the King's Solicitors would become highly protective of their remit.[142] Their powers expanded in due course.

During the 17th century the King's Solicitors were "authorised to prosecute exactly as did the King's Advocate".[143] Indeed, like the Solicitor General for England and Wales in respect of promotion to the post of Attorney General, the Scottish Solicitor's office eventually came to be recognised as "the natural stepping stone to the senior position of the Lord Advocate".[144]

Functions

The Solicitor General for Scotland, much like the Solicitor General for England and Wales, functions as a deputy for the senior law officer (in this case the Lord Advocate). The nature of the appointment is like that of Lord Advocate: the officeholder is a member of the Scottish Government but need not be and never has been an MSP.

Under section 2 of the Law Officers Act 1944 the Solicitor General for Scotland may exercise any function of the Lord Advocate if any of the following applies:

138 CA Malcolm, 'The Solicitor General for Scotland (Part I)' (1942) Juridical Review 67, p68.
139 John Edwards, The Attorney General, Politics and the Public Interest, p287.
140 CA Malcolm, 'The Solicitor General for Scotland (Part I)', p69.
141 John Edwards, The Attorney General, Politics and the Public Interest, p287.
142 CA Malcolm, 'The Solicitor General for Scotland (Part I), p78.
143 As above, p77.
144 John Edwards, The Attorney General, Politics and the Public Interest, p289.

- the position of Lord Advocate is vacant
- the Lord Advocate cannot act by reason of absence or illness
- the Lord Advocate decides in a particular situation to delegate his or her powers to the Solicitor General

This arrangement is slightly different than that which exists for the Solicitor General for England and Wales, to whom no specific delegation of functions is required. In practice, however, the powers are exercised by the junior law officer whenever it is necessary or desirable that they should be exercised otherwise than by the senior law officer. This can help to avoid, for example, conflicts of interest.

3.3 Advocate General (from 1999)

Origins

The office of Advocate General for Scotland was created as a consequence of devolution to Scotland. The transfer of the office of Lord Advocate (and most of its functions) and the Solicitor General for Scotland to the (then) Scottish Executive meant the UK Government would no longer have a law officer with expertise or experience in Scots law. Such a role remained desirable for at least two main reasons:

- not all matters with Scots law implications are devolved; and
- it may be thought inappropriate for the Attorney General for England and Wales exclusively to represent the UK Government on legal matters concerned with Scotland and Scottish devolution.

Like the Attorney General and Solicitor General for England and Wales, the Advocate General for Scotland is a Minister of the Crown. Though not a member of the UK Cabinet, he or she may be invited, from time to time, to attend meetings of it. Whereas normally at least one of the England and Wales law officers is recruited from the membership of the House of Commons, since 2005 the Advocate General for Scotland has always been or – shortly following their appointment – become a life peer.

Executive functions

Departmental

The Advocate General heads up the Office of the Advocate General (OAG). This department exists parallel to that of the Attorney General, and in practice works very closely with the Scotland Office and bilaterally with the Scottish Government.

UK Government Legislation

Additionally, the Advocate General is a member of the Parliamentary Business and Legislation Cabinet Committee, and therefore advises Cabinet on certain aspects of the Government's legislative programme, mainly from a legal perspective. In contrast to the Attorney General for England and Wales, however, the Advocate General brings expertise in Scots law and is therefore better placed to speak to the uniquely Scottish implications of current and future legislation.

Additional ministerial duties

It is not unusual for the Advocate General for Scotland to combine that role with being a spokesperson for the Government in other capacities especially when the Advocate General sits in the House of Lords. The former Advocate General, Lord Keen of Elie, was appointed as spokesperson for the Ministry of Justice in the House of Lords and sponsored several UK Government bills in the Lords on behalf of the Ministry of Justice. These included bills concerned only with the English and Welsh justice system.[145]

Accountability to Parliament

The Advocate General for Scotland can be held to account in much the same way as any other UK minister: through the established mechanisms of UK parliamentary scrutiny. However (as with other UK law officers) a convention exists that he or she will not normally provide a response to questions pertaining to matters over which the devolved institutions have competence.[146] The convention on non-disclosure of legal advice (or of the fact that it was sought) applies equally to the Advocate General for Scotland as it does to other UK Government law officers.

Advisory functions

The Advocate General's role in giving legal advice to the UK Government is substantially the same as the role of the Attorney General for England and Wales. The main difference is that advice is typically offered in relation to Scots law, Scottish devolution and matters arising in the Scottish courts and tribunals.

OAG's main "client" on a day-to-day basis is the Scotland Office. The two UK Government departments work very closely together and publish a joint Annual Report. The OAG is now divided into four divisions which advise parts of the UK Government on matters to do with Scots law and Scottish devolution. Its four named divisions are:

- the Legal Secretariat;

[145] See, for example, the Courts and Tribunals (Judiciary and Functions of Staff) Bill 2017-19.

[146] Lynda Clark, 'The Role of the Advocate General for Scotland in the New Constitutional Settlement' in Alan Boyle et al (eds), Human Rights and Scots Law, 2002, p41.

- the HMRC Division;
- the Advisory and Legislative Division; and
- the Litigation Division.[147]

The Legal Secretariat

The Legal Secretariat to the Advocate General provides general support, including with respect to the exercise of statutory functions and as regards various ministerial responsibilities.[148]

The HMRC Division

The HMRC Division deals with HM Revenue & Customs' legal work in Scotland. This covers tax appeals through the tribunal system and on appeal to the higher courts, as well as other litigation. The HMRC Division also provides advisory services to HMRC in relation to Scottish matters, and undertakes some legislative work in connection with the annual Finance Bill.[149]

The Advisory and Legislative Division (ALD)

At first instance, OAG provides advice to the Office of the Secretary of State for Scotland. If the Secretary of State intends to make Orders under the Scotland Act for example (such as a Section 30 Order modifying devolved competence) the main legal and drafting advice will come from the ALD.

More broadly, however, the ALD provides legal services to other Government departments, such as the Department for Work and Pensions, where those departments' work is affected by Scottish devolution. This ensures that UK legislation, policymaking and implementation takes account of Scots law and Scottish devolution.

The ALD also assesses the impact of Scottish Government legislation going through the Scottish Parliament. The purpose of this is to identify, for example:

- issues concerned with devolved competence or protected subject matters;
- rule of law issues (including proposed retrospectivity/early commencement);
- implications for existing UK Government activity or law that presently applies in more than one part of the UK.[150]

147 Scotland Office and the Office for the Advocate General, Annual Report and Accounts 2011-12, HC 70, 16 July 2012, p20.

148 Office of the Advocate General, About us.

149 As above.

150 Lord Keen of Elie, Keynote Speech: The Rule of Law and the role of the Law Officers, Scottish Public Law Group Conference, 11 June 2018.

The Litigation Division

Any UK Government department can receive advice on Scots law from the Litigation Division. Support is also given in respect of any action raised by or against a UK Government department in Scotland. This includes, for example, Home Office litigation in the Scottish courts. [151] This Division advises on litigation strategy and handling, including risk management.

Litigation functions

The Advocate General represents the UK Government in the Scottish courts, in much the same way as the Attorney General represents it in the English and Welsh courts. This can be done either in person, or by instructing other advocates to appear on the Government's behalf.

Most relevant disputes directly involving the AGS are either intergovernmental (between the UK and Scottish Governments) or may occasionally involve the UK Government and third parties.

Interventions in proceedings involving the Scottish Government

Occasionally, the Advocate General might "intervene" in a case involving the Scottish Government and a third party, where the issues raised in a case have wider implications for, say, the devolution settlements. For example, the Advocate General intervened in *Imperial Tobacco v Lord Advocate* in the UK Supreme Court in 2012.[152] On that occasion, the UK Government wished broadly to support the Scottish Government's interpretation of the law on reserved matters.

Defending action taken against the UK Government in Scottish courts

A recent example of the Advocate General representing the UK Government in a Scottish court is the *Cherry* case on prorogation. Joanna Cherry, an SNP MP, had challenged the UK Government's decision to prorogue the UK Parliament by way of a judicial review in the Court of Session.[153] The named respondent in that case was the Advocate General. This case was later joined with the *Miller II* case in the English courts when appealed to the UK Supreme Court.[154]

Representing UK Government departments in Scottish litigation

As noted above, since 2011 UK tax appeals, when brought through the Scottish tribunals and courts, have been overseen by the Advocate General.[155]

151 See Office of the Advocate General, Involvement in Cases, 2 November 2023.

152 *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.

153 *Cherry v Advocate General for Scotland* [2019] UKSC 41 (on appeal from *Cherry v Advocate General for Scotland* [2019] CSIH 49).

154 *R (Miller) v Prime Minister* [2019] UKSC 41.

155 Office of the Advocate General, About us.

Power to refer Scottish Parliamentary Bills to the Supreme Court

Like the Lord Advocate, the Advocate General for Scotland has a statutory power to refer bills of the Scottish Parliament to the Supreme Court. The purpose of a reference is to ascertain whether a bill is beyond the Scottish Parliament's competence or engages a protected subject matter. This power has been exercised in relation to three bills:

- the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in 2018;
- the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill in 2021; and
- the European Charter on Local Self-Government (Incorporation) (Scotland) Bill in 2021.

In each case the reference was made jointly by the Advocate General and the Attorney General, though a joint reference was not necessary; the Advocate General possesses the power to do this alone.

Acting directly as counsel

The Advocate General has sometimes personally appeared before the UK Supreme Court, as counsel, on behalf of the UK Government. This happened several times between 2012 and 2020, during the tenures of Lord Wallace of Tankerness (under the Coalition Government) and Lord Keen of Elie (under the Conservative Government) including in:

- the *Imperial Tobacco* case (as an intervener);
- the first *Miller* case (responding to the arguments on devolution);
- the *Scottish Continuity Bill* reference (having referred a Bill of the Scottish Parliament to the Supreme Court); and
- the *Cherry* case (representing the Government in its appeal against the decision of the Court of Session on prorogation).

This approach, of "direct representation" had contrasted with that adopted by the UK Government to cases originating in the courts of England and Wales. It is unusual for the Attorney General to appear personally on behalf of the Government, even if a matter reaches the Supreme Court. Instead the Government Legal Department typically instructs a senior barrister (often First Treasury Counsel) to appear on its behalf.[156]

[156] In both *Miller* Supreme Court cases, for example, First Treasury Counsel Sir James Eadie represented the UK Government. In 2017 Jeremy Wright QC (now KC) briefly appeared in person on behalf of the Government but Geoffrey Cox QC (now KC) was not instructed by the Government to defend personally the prorogation case in 2019.

Since 2020 the Advocate General for Scotland has not participated directly as counsel in UK Supreme Court proceedings.[157]

[157] Sir James Eadie, First Treasury Counsel, was the UK Government's lead counsel in both the UNCRC (Incorporation) (Scotland) Bill reference in 2021 and the draft Scottish Independence Referendum Bill reference in 2022.

4 Northern Ireland

4.1 Attorney General for Northern Ireland

Origin

The post of Attorney General for Northern Ireland was created at the same time as Northern Ireland itself and its original Parliament (i.e. in 1921). The post was an historical successor to that of the Attorney General for Ireland (as a whole). Prior to partition, the all-Ireland role had shared many similarities with the historic role of Lord Advocate in Scotland. Its role in prosecutions and in day-to-day governance of Ireland was far greater than that of the Attorney General for England and Wales in its respective part of the UK.

The functions of the original Attorney General for Northern Ireland were largely inherited from its all-Ireland predecessor. Initially the post was a non-departmental ministerial office, but it was typically filled by an Ulster Unionist member of the Parliament of Northern Ireland.

Prior to the prorogation and abolition of that devolved parliament, the issue of the independence of the Attorney General for Northern Ireland was a persistent matter of controversy. Attempts had been made at that time to introduce an independent Director of Public Prosecutions but it had not come to fruition when Direct Rule was imposed in 1972.[158]

During that period of Direct Rule, the office of Attorney General for Northern Ireland was then held conterminously with the role of Attorney General for England and Wales, and therefore effectively became a UK Government, not a devolved, office. One of the first changes made was to create a Director of Public Prosecutions for Northern Ireland (DPP NI), thereby relieving the Attorney General of primary responsibility for the system of criminal prosecutions. A relationship of "superintendence" was created as in England and Wales, with the DPP NI's activities being overseen by the Attorney General.

Belfast/Good Friday Agreement

The Belfast/Good Friday Agreement in 1998 brought about a new system of devolution to Northern Ireland, with power shared on a cross-community basis. Initially the role of Attorney General for Northern Ireland continued to

[158] NI Deb 13 May 1971, vol 80, col 1872-1873; see also John Edwards, The Attorney General, Politics and the Public Interest, p261–262.

be held conterminously with the role of Attorney General for England and Wales as a UK Government role.

A 2000 review into the criminal justice system in Northern Ireland recommended, among other things, the return of political responsibility for prosecutions in Northern Ireland to Stormont.[159] The current statutory basis for the law officers in Northern Ireland is set-out in the Justice (Northern Ireland) Act 2002, but this only came fully into force with the transfer of policing and justice matters to Stormont in 2010.

The Devolved Attorney General

Under the new arrangements in the 2002 Act, the post of Attorney General for Northern Ireland would cease to be held by a member of the UK Government.[160]

Terms of Office

Instead, the post is now appointed by the First Minister and deputy First Minister of Northern Ireland acting jointly: it is a devolved public office. Once filled, the office is held by an individual until:

- the expiry of his or her term of office, which cannot exceed five years at any one time;[161]
- he or she resigns or dies;[162] or
- he or she is removed from office by a tribunal jointly convened by the First Minister and deputy First Minister.[163]

The Attorney General can be reappointed after the expiry of their five-year term and there is no limit to the number of terms an Attorney General may serve.

Non-political appointment

Although appointed by political figures, the Attorney General for Northern Ireland is not generally regarded as being a political appointment in the conventional sense. In April 2024, Dame Brenda King said of the role that "you might call it the political appointment of a non-political person".[164] Five notable features distinguish the role from that assumed by other law officers.

Firstly, the 2002 Act stipulates a minimum level of professional legal experience for someone to be eligible to be appointed as the Attorney

159 Criminal Justice Review, Report of the Criminal Justice Review in Northern Ireland, 2000.
160 Justice (Northern Ireland) Act 2002, s22.
161 As above, s23(2).
162 As above, s23(3).
163 As above, s24; the tribunal would be convened to establish whether removal was warranted "on the ground of misbehaviour or inability to perform the functions of the office".
164 NI Assembly Committee for Justice, Official Report: Minutes of Evidence, 11 April 2024.

General. They must either have been a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature for at least ten years.[165] These criteria closely resemble those required for appointments to judicial office. No such statutory eligibility criteria apply to any other UK law officer.

Secondly, all of the functions of the Attorney General are to be exercised "independently of any other person". Although a similar safeguard exists for the Lord Advocate's **prosecutorial** functions in Scotland, the statutory independence provision in section 22(5) of the Justice (Northern Ireland) Act 2002 is considerably wider. Its purpose also must be seen not simply as ensuring these functions are exercised independently of the Northern Ireland Executive but also of the Northern Ireland Assembly including its non-Executive members.[166]

Thirdly, the Attorney General, while holding that office, is barred from becoming an MP, an MLA or a district councillor in Northern Ireland.[167] No equivalent restriction applies to any other UK law officer.

Fourthly, although certain of the Attorney General's functions include advising and representing the Northern Ireland Executive and Departments, the officeholder is not a member of the Executive. This relationship is therefore different from the role of Lord Advocate or Counsel General, each of which are "members" of the Scottish and Welsh Governments respectively.

Fifthly, in December 2024 the office of the Attorney General for Northern Ireland (OAGNI) entered into a formal "partnership agreement" with The Executive Office (TEO). This agreement delineates how the OAGNI and TEO "will work together to ensure that effective corporate governance arrangements are in place and that the statutory remit to ensure the OAGNI's independence is fulfilled".[168]

Accountability

The Attorney General for Northern Ireland is under a statutory duty to submit an annual report to the First Minister and deputy First Minister on how his or her functions have been exercised. This report may, however, be redacted if its publication would, in the Attorney General's opinion, be against the public interest or jeopardise the safety of any person. If information has been redacted, a statement must be published indicating that information has been excluded.[169]

The Attorney General may participate in the proceedings of the Northern Ireland Assembly despite not being a member, though he or she cannot vote.

165 As above, s22(6).

166 Conor McCormick, 'Reviewing the Reviewability of the Attorney General for Northern Ireland' [2018] Public Law 22, p29.

167 Justice (Northern Ireland) Act 2002, s23(6)-(8).

168 Attorney General for Northern Ireland, OAGNI-TEO Partnership Agreement, 22 January 2025.

169 As above, s26.

This enables there to be at least "a modicum of political accountability".[170] When participating in Assembly Proceedings, the Attorney General may decline to answer questions concerning the operation of the system of prosecution of offences in any particular case which could, in his or her view, prejudice criminal proceedings or which are otherwise against the public interest. This is similar to the statutory rights of the Lord Advocate and Counsel General in Scotland and Wales.

Functions of the AGNI

The Attorney General for Northern Ireland exercises similar functions to those of law officers elsewhere in the UK. In her first annual report, Dame Brenda King included an appendix setting out the range of duties and responsibilities of the role.[171]

Prosecutorial Functions

The Attorney General for Northern Ireland is responsible for appointing the Director of Public Prosecutions for Northern Ireland (DPP NI). He or she also instigates the process by which the DPP NI can be removed from office or suspended (having convened a tribunal to investigate the circumstances at hand).

However, the Attorney General's powers of superintendence over the DPP NI lapsed when the AGNI became a devolved office in 2010.[172] There are still duties on the DPP NI to consult with the AGNI, for example before preparing his or her annual report.[173]

Whereas in England and Wales decisions about referring unduly lenient sentences to the Court of Appeal rests with the law officers, in Northern Ireland this function is vested in the DPP NI.

Advisory Functions

As with other senior law officers, the Attorney General for Northern Ireland is the chief legal adviser to a government: in this case, the Northern Ireland Executive. This means he or she provides legal advice to the Executive Committee and to Northern Ireland Departments and ministers. Because of the unique way in which departmental/ministerial portfolios are allocated in Northern Ireland, this means that the Attorney General can be called upon to

170 Seamus Mulholland, 'An Interview with the Attorney General for Northern Ireland' [2010] The Verdict 5, p6.

171 Attorney General for Northern Ireland, Duties and Responsibilities of the Attorney General, 16 September 2022.

172 Justice (Northern Ireland) Act 2002, s40. See also Department of Justice for Northern Ireland, Governance and Accountability of the Public Prosecution Service, 8 February 2012.

173 Justice (Northern Ireland) Act 2002, s42(2).

advise one Department which wishes to challenge the legality of actions taken by another Department.

Advice may relate to the Executive's own activities or legislative programme, to legislation originating in the UK Government or Parliament, or wider legal issues potentially having an impact on the devolution settlements. Similar principles on the disclosure of legal advice apply in this context as they do with other law officers.

The legal advisory function includes providing advice to the Northern Ireland Executive and Departments on Assembly bills and legislative competence. There are unique considerations in the Northern Ireland devolution settlement, which the Attorney General has to take into account. For example, the legislative competence of the Northern Ireland Assembly is limited by Article 2 of the Protocol on Ireland/Northern Ireland (now known as the Windsor Framework).[174] The same is not true of the Scottish Parliament or the Senedd.

Litigation Functions

Related to his or her function as a legal advisor to the Northern Ireland Executive, the Attorney General also represents it (and where relevant, the Northern Ireland Departments and ministers) in litigation. It has been far more common, however, for the officeholder to initiate or intervene in litigation in his or her own right.[175]

The litigation with which the AGNI may become concerned is of a similar kind as for other law officers. It includes, but is not limited to, cases emerging in the Northern Ireland courts. It includes actions involving Northern Ireland's devolved authorities, but equally cases may result from an intervention into proceedings involving other parties.

For example, in 2018 Attorney General John Larkin QC (now KC) intervened in the Scottish Continuity Bill reference.[176] This was a dispute between the UK and Scottish Governments about legislative competence. His intervention was particularly notable because it happened at a time when there was no functioning Northern Ireland Executive.

More recently in 2022, Attorney General Dame Brenda King referred the Abortion Services (Safe Access Zones) (Northern Ireland) Bill to the UK

174 Northern Ireland Act 1998, s6(2)(ca).

175 For a comprehensive analysis of the ways in which the Attorney General for Northern Ireland has influenced the UK Supreme Court, see Brice Dickson and Conor McCormick, 'Northern Ireland Dimensions to the First Decade of the United Kingdom Supreme Court' (2020) 83(6) Modern Law Review 1133-1167.

176 *Reference Re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

Supreme Court, asking it to rule on whether the proposed legislation would breach the European Convention on Human Rights.[177]

Public Interest Functions

The AGNI also carries out a range of public interest functions. Some of these are like those carried out by law officers in other parts of the UK (such as to do with charities, and general rule of law oversight). Others are specific to Northern Ireland and reflect the unique conditions in which its system of devolution operates.

Human rights guidance

A Joint Declaration by the British and Irish Governments in April 2003 promised, among other things, to "make further provision to promote a human rights culture in the criminal justice system in Northern Ireland".[178] To that end the UK Parliament passed section 8 of the Justice (Northern Ireland) Act 2004.

This provision is regarded as being without parallel in any other jurisdiction globally.[179] It confers on the Attorney General for Northern Ireland a power to issue and revise human rights guidance, which applies to criminal justice organisations in Northern Ireland. The guidance is to be "consistent with international human rights standards relevant to the criminal justice system".

The effect of guidance is to require the relevant public bodies to "have regard to" it when carrying on their functions. This is supplementary to, and therefore does not in any way replace, the obligations of public authorities under the Human Rights Act 1998 (HRA) itself, which applies throughout the UK. The guidance may be seen as having several potential effects including:

- encouraging public bodies to adopt policies and practices less susceptible to legal challenge on human rights grounds;
- providing supportive context for those wishing to challenge criminal justice organisations under the HRA; and
- providing a distinct ground of challenge against the conduct or decisions of criminal justice organisations.

The Attorney General may change the list of organisations to which relevant guidance applies subject to Assembly approval.[180] Guidance issued is of no

177 The UK Supreme Court ruled that it did not, and it became an Act. See *Reference Re the Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

178 Joint Declaration by the British and Irish Governments, April 2003, para 24.

179 NIA Research Briefing Paper, Speaking Rights of Attorneys General/Law Officers in Legislatures, 154-13, 19 February 2013, p2.

180 Justice (Northern Ireland) Act 2004, s8(5).

effect so far as it is inconsistent with the Code of Practice for the Public Prosecution Service.[181]

Before issuing or revising guidance, the Attorney General for Northern Ireland must consult the Advocate General for Northern Ireland (i.e. the Attorney General for England and Wales).[182]

At the time this provision was enacted, there was uncertainty as to the meaning of "international" human rights standards. Dominic Grieve, later Attorney General for England and Wales, said of the provision:

> I have simply no idea what such standards may be. They are infinitely flexible, they may change, and they are not subject to any legislation passed by [the UK] Parliament: they are meaningless. The human rights standards that this Parliament has chosen to apply, before the incorporation of the Human Rights Act, could be referred to by reference to the human rights convention, to which we are a signatory, and must now be derived from the Act. I would hope that the Human Rights Act is seen to be compatible with nebulous international human rights standards. However the insertion of the word 'international' is meaningless. It is gobbledegook.[183]

The 2004 Act provides that the guidance comes into effect once it has been published, laid before the Assembly, and then commenced by order of the Attorney General. In theory the Assembly could annul the guidance, as it is made under the negative resolution procedure, but this has never happened.

Since 2010, the Attorney General has issued fifteen guidance documents under the 2004 Act.[184] Prior to 2010 (when the Attorney General was still effectively a UK Government office) the power was not used. The guidance documents have typically drawn on a broad range of sources of international human rights law, said to "encapsulate the international consensus on human rights standards", including many of which are otherwise non-binding in domestic law.[185]

Rule of law guardian

One of the broader functions the Attorney General has assumed has been as a "guardian of the rule of law" in Northern Ireland. In September 2010, John Larkin QC (now KC) said of his new role:

> Chief and foremost of my responsibilities is that of guardian of the rule of law. In my view, the Attorney must set the interests of the rule of law above those of government on any occasion that a conflict between them ever comes into being.[186]

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181 As above, s8(8).

182 As above, s8(1A).

183 HC Standing Committee D, Justice (Northern Ireland) Bill, 1 April 2004, c91.

184 Attorney General for Northern Ireland, Human Rights Guidance.

185 James Fraser, Section 8 "Human Rights" Guidance and its Relevance to Practitioners, The Writ: The Journal of the Law Society of Northern Ireland, Issue 222, 2014, p10.

186 NIA Committee on Procedures, Standing Orders in Respect of the Attorney General for Northern Ireland, 28 September 2010.

Although this reflects the Attorney General's various statutory powers, including those concerned with human rights guidance, these remarks point to a broader conception of the role of the law officer as a rule of law guarantor: working for but independently of the Executive.

This explains in part why the Attorney General continued to play an active role in matters of public interest even when no Northern Ireland Executive was in place between 2017-2020 and 2022-2024.

Inquests

In Northern Ireland, inquests can be held where someone has died in unexpected, unexplained or suspicious circumstances. These are carried out by a coroner, under a similar system to that in place in England and Wales. Normally the decision whether to initiate an inquest is taken by the relevant local coroner.

However, the Attorney General for Northern Ireland has a statutory power, under section 14 of the Coroners Act (Northern Ireland) 1959, to direct a coroner to conduct an inquest in a specific case. In certain cases with national security implications, however, those powers are exercisable instead by the Advocate General for Northern Ireland.

Dame Brenda King has indicated that as Attorney General she received "a large number of applications" to exercise this power in relation to so-called "legacy inquests" immediately prior to the commencement of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.[187] That Act has prohibited coroners from progressing the conduct of any such inquests and curtailed the power of the Attorney General to order them.[188]

Charities

The Attorney General for Northern Ireland has a power to intervene "to represent the wider public interest" where a matter is before the Northern Ireland Charity Tribunal.

Other functions exercised by the Attorney General in this area include:

- deciding whether to consent to references to the Charity Tribunal by the Charity Commission;
- giving directions to the Charities Commission on authorising ex gratia payments by charities; and
- presenting petitions for the winding-up of charities; and
- having a right to be consulted on a range of other matters.

187 NI Assembly Committee for Justice, Official Report: Minutes of Evidence, 11 April 2024.

188 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s44.

Mental Capacity Act

Under section 47 of the Mental Capacity Act (Northern Ireland) 2016 the Attorney General for Northern Ireland decides whether to refer to the Review Tribunal the question on whether the authorisation of a deprivation of liberty is appropriate.

Exercising Functions without an Executive

One of the notable features of the office of Attorney General for Northern Ireland is its ability to function independently of the existence or otherwise of a functioning Northern Ireland Executive and Assembly. Between January 2017 and January 2020 the Attorney General clearly could no longer advise Northern Ireland Ministers or the Executive Committee since no one held those associated posts. However, many of his other statutory functions continued to be exercised. For example, the Attorney General:

- appointed a new Director of Public Prosecutions in January 2018;
- continued to consider authorisation for ex gratia payments by charities;
- ran the "It's Your Law" programme (an initiative designed to build trust between communities impacted by paramilitarism and the legal system in Northern Ireland); and
- brought three new pieces of Section 8 guidance into effect under the Justice (Northern Ireland) Act 2004.

Similarly, the Attorney General continued to exercise her functions between February 2022 and January 2024 despite the absence of a functioning Northern Ireland Executive. For example, the Attorney General's decision to refer the Abortion Services (Safe Access Zones) (Northern Ireland) Bill to the UK Supreme Court (on competence grounds) was taken in March 2022 and litigated later in 2022.

Continued participation in devolution litigation

Additionally, the Attorney General has engaged in several pieces of high-profile litigation concerned with the devolution settlement, despite there being (and indeed in some instances precisely because there was) no Northern Ireland Executive. This included, as previously mentioned, intervening in the Scottish Continuity Bill Reference before the UK Supreme Court.

Litigation about the Northern Ireland Civil Service

One of the most notable of the Attorney General's cases was concerned directly with Northern Ireland's devolution settlement. *Buick* was

fundamentally about whether civil servants in Northern Ireland could take certain decisions in the absence of Ministerial oversight.[189]

Although the Department for Infrastructure (at the centre of the case) announced that it did not intend to appeal a judgment handed down by the Court of Appeal in July 2018, and although legislation had since been passed at Westminster effectively annulling the effect of the *Buick* ruling, the AGNI made a reference to the UK Supreme Court (and did so of his own initiative).[190]

The reference asked questions about the applicability of the Ministerial Code to civil servants. The Attorney General believed section 28A of the Northern Ireland Act 1998 (concerning the Ministerial Code) had been wrongly interpreted.

The court adjourned its proceedings arising from the reference because the issues had become moot and as such would be "better determined against the backdrop of a clear factual matrix". In reaching this view the Court also ruled that the Attorney General would be entitled to apply to intervene in a relevant lower court proceeding which had been stayed pending the outcome of his reference, despite the fact that he had not been served with a devolution notice in those proceedings.

4.2 Advocate General for Northern Ireland (from 2010)

Origin

The post of Advocate General for Northern Ireland emerged as a direct consequence of the Attorney General for Northern Ireland becoming a devolved office in 2010. This followed the transfer of policing and justice powers to the Northern Ireland Assembly.

The Advocate General for Northern Ireland serves a similar role to the Advocate General for Scotland, in that he or she is the UK Government's chief legal advisor on matters concerning a devolved nation and its legal system.

The main difference is that the post is not standalone in the same way the Advocate General for Scotland is. The position of Advocate General for Northern Ireland is held concurrently with that of Attorney General for England and Wales. This preserves the arrangement that was in place for its predecessor UK Government post, that of Attorney General for Northern Ireland, from 1972-2010.

189 *Re Buick's Application* [2018] NIQB 43; *Re Buick's Application* [2018] NICA 26.

190 *Reference by the Attorney General for Northern Ireland of Devolution Issues to the Supreme Court (No 2)* [2019] UKSC 1.

Functions

The Advocate General for Northern Ireland is an unusual law office in that its functions have been described by the UK Government as "solely statutory".[191] They concern essentially:

- excepted matters (i.e. those that are not at all exercisable by the devolved Northern Ireland institutions); and
- consultation arrangements between the UK Government and devolved institutions.

On excepted matters, for example, it is the Advocate General for Northern Ireland – not the Attorney General for Northern Ireland – who designates that an offence is not a scheduled offence under the Terrorism Act 2000.[192]

On consultation, for instance, the First Minister and deputy First Minister must consult the Advocate General before appointing a new Attorney General for Northern Ireland.

When issuing Section 8 guidance (on international human rights standards) or changing the list of organisations to which that guidance applies, the Attorney General for Northern Ireland must consult the Advocate General, though he or she does not need his or her consent.

In practice, it is difficult to delineate non-statutory functions of the Advocate General for Northern Ireland, since the post must be held by another, more prominent law officer in the Attorney General for England and Wales. It is not practical, for example, to draw a distinction between legal advice given to the government by the Advocate General for Northern Ireland as opposed to the Attorney General for England and Wales. However, in litigation originating in the Northern Ireland courts, the "hat worn" by the dual-office holder will be that of the Advocate General for Northern Ireland.

Inquests and national security considerations

Normally, the power to direct that a coroner should conduct an inquest vests in the Attorney General for Northern Ireland (the devolved law officer). In practice, the Attorney General will first ask various public bodies to disclose relevant information before deciding whether to direct a coroner to conduct an inquest (in most cases).

Sometimes information requested by the Attorney General will be refused by one or more public bodies, citing national security concerns if the information were to be disclosed. Section 14(2) of the Coroners Act (Northern Ireland) 1959 provides a "certification" process by which the Secretary of State for Northern Ireland must intervene if disclosure of information "may be against the interests of national security".

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191 HL 3 June 2010 vol 719 c WA9.

192 Justice (Northern Ireland) Act 2002, Schedule 7 para 23.

If the Secretary of State intervenes, the power to order an inquest passes from the Attorney General (the devolved law officer) to the Advocate General for Northern Ireland (the UK government law officer).

In 2023, the High Court of Northern Ireland heard (and rejected) a challenge to the validity of a Secretary of State's certificate.[193]

[193] *Re Bunting's Application* [2023] NIKB 43.

5 Political independence

One of the characteristics that distinguishes the law officers from other ministerial posts in the UK, Scottish and Welsh Governments is the expectation that they will exercise a degree of "independence" from the political executive branch of which they form a part.

The expectation and extent of independence arises because of the nature of the functions that an office carries on. In certain instances, the function of a law officer might be described as quasi-judicial or might otherwise require that they be insulated from political influence.

Except for the (post-2010) Attorney General for Northern Ireland, however, any of the UK's law officers can be active party-politicians and parliamentarians. In this context "independence" does not make the same demands of law officers as it does of, say, judges or the civil service. What independence means will depend (in most cases) on constitutional convention and political and administrative practice rather than a specific legal standard.

5.1 Relationship with Cabinet

The relationship between the law officers and their Cabinet is the most obvious example of different degrees of and approaches to, independence. Two relevant factors might be thought to apply:

- whether the post is filled by a party politician; and
- whether the post's holder is routinely invited to attend Cabinet and/or is bound by conventions of collective responsibility.

Broad generalisations are difficult to make in this regard because constitutional, legal, and political practice has varied between:

- different law officers in the same executive branch;
- analogous law officers in different executive branches; and
- different holders of the same law office in the same executive branch, but at a different point in time.

Differences within the UK's executive branch

In the UK Government the Attorney General for England and Wales holds Cabinet rank, but his or her junior, the Solicitor General, does not (though any "functions" of the AGEW can be exercised by the SGEW as and when required). Neither does the Advocate General for Scotland formally hold Cabinet rank.[194] Of the three, only the AGEW is declared by the Government routinely to be invited to attend Cabinet.

Although the Attorney General's attendance at Cabinet has, in theory, been wholly by invitation, in practice he or she attends routinely. In 2015, in evidence to the House of Commons Justice Select Committee, the then AGEW Jeremy Wright said the post's invitation to attend Cabinet was effectively a standing one.[195] To the best of his awareness, he and his predecessor, Dominic Grieve, had been invited to, and accepted all invitations to attend, every Cabinet meeting since May 2010. All of Wright's successors have indicated that they attended every, or almost every, Cabinet meeting during their tenure.

The Attorney General is a member of several Cabinet committees, currently including (as of February 2025):

- the National Security Council
- the Europe committee
- the Union and Constitution committee
- the Parliamentary Business and Legislation committee

Although the Advocate General for Scotland does not routinely attend Cabinet, he or she is a member of the Parliamentary Business and Legislation Cabinet Committee.[196]

Differences between executive branches

Other differences have existed between the executive branches of different parts of the United Kingdom.

For example, although the Counsel General for Wales only attends the Welsh Cabinet by invitation, recent holders of that office have also attended the Welsh Cabinet in another capacity, holding (informally at least) another ministerial title (whilst not formally being "a Welsh Minister"). This has included:

194 The Advocate General for Northern Ireland attends Cabinet by virtue of being the same person as the Attorney General for England and Wales.

195 Justice Select Committee, Oral Evidence by the Rt Hon Jeremy Wright QC MP on the Work of the Attorney General, HC 409, 15 September 2015.

196 Cabinet Office, List of Cabinet Committees, 21 October 2024; Lord Keen of Elie, Keynote Speech: The Rule of Law and the role of the Law Officers, Scottish Public Law Group Conference, 11 June 2018.

- Jeremy Miles (from December 2018 to May 2021) as "Minister for European Transition"
- Mick Antoniw (from May 2021 to July 2024) as "Minister for the Constitution"
- Julie James (since September 2024) as "Minister for Delivery"

The devolved law officers of Scotland and Northern Ireland have never held their office at the same time as another Cabinet or junior Ministerial post. This might be regarded as a deliberate safeguard of independence in relation to certain of their functions.

By contrast, it is not uncommon for UK Government law officers to hold other Government posts at the same time. For example, the former Advocate General for Scotland, Lord Keen of Elie, was also the Ministry of Justice's spokesperson in the House of Lords. It is also common for UK Government law officers to participate in a range of Cabinet committees.

Different treatment of the same office over time

The approach to political independence of law officers has varied with the same office at different points in the history of devolution. The roles of Lord Advocate and Counsel General for Wales, in particular, have seen varied approaches to political independence, with it being emphasised more strongly in some periods than in others.

The Lord Advocate and the Scottish Cabinet

Originally, the Lord Advocate was described as a "full member" of the Scottish Cabinet despite the holder not being an elected MSP.[197] Shortly after, the post was described as being "not formally a member" of the Scottish Cabinet owing to concerns raised about the office's independence.[198]

When the SNP formed a minority administration (after the 2007 Scottish Parliamentary elections), steps were taken to reduce the frequency with which the Lord Advocate was invited to attend Cabinet meetings. Then First Minister Alex Salmond said:

> The involvement of the law officers in the political operations of Government is, in my view, unnecessary and inappropriate, so I have decided that the Lord Advocate will not be a member of the Cabinet and will not normally attend meetings... That will emphasise the apolitical and professional role that the Lord Advocate and I have agreed is appropriate in the provision of legal advice to Government.[199]

197 Executive Secretariat, Guide to Collective Decision Making, August 1999, para 4.2.

198 Scottish Executive, Guide to Collective Decision Making, August 2003, para 4.2.

199 The Herald, SNP Government in row over presence of Lord Advocate at Cabinet meetings, 5 August 2018.

Although this policy signalled an intention to involve the devolved law officers less routinely in Cabinet deliberations, the limited available evidence suggests the opposite trend occurred from 2011 onwards.

In August 2018, an investigation by The Herald newspaper suggested that there had been a significant increase in attendance by devolved law officers at Scottish cabinet meetings, especially between 2011 and 2018.[200]

- Elish Angiolini had only attended 28 meetings of the Scottish Cabinet between 2007 and 2011
- Angiloni's successor Frank Mulholland had attended 81 of 191 meetings between 2011 and 2016 (42%)
- Mulholland's successor James Wolffe had attended 59 of 78 meetings (75%) between 2016 and 2018

One plausible explanation for this increase could be the nature of the legislative business being transacted by the Scottish Government during that period. Between 2011 and 2016 the legislative programme engaged two major statutes for further devolution and the Scottish independence referendum legislation. The period from 2016 onwards included a wide range of complex legislative preparations for Brexit, following the UK's vote to leave the EU.

More recent figures, obtained via a freedom of information request, suggest that the participation rate of the Lord Advocate in Scottish Cabinet meetings has decreased since 2021, and has reverted to the levels seen under Frank Mulholland's tenure as Lord Advocate. Dorothy Bain attended 17 of the 24 Cabinet meetings in 2021 (71%) following her appointment. But in 2022 she attended only 18 of 41 Cabinet meetings (44%).[201]

The Counsel General and the Welsh Cabinet

In the case of the Counsel General for Wales, different attitudes towards political independence have been prevalent at different points in time.

The third, and the longest serving, Counsel General, Theodore Huckle QC (now KC), served while not being a member of the Senedd and without party-political affiliation. His appointment was generally welcomed at the time across the political spectrum in Wales as bringing outside expertise and experience to the role.

However, Plaid Cymru did raise some concerns about whether the role of Counsel General could be effectively discharged by someone continuing to work, simultaneously, as a barrister in private practice.[202]

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200 The Herald, SNP Government in row over presence of Lord Advocate at Cabinet meetings, 5 August 2018.

201 The Daily Record, Lord Advocate attended 40 Cabinet meetings during police probe into SNP finances, 30 May 2023.

202 National Assembly for Wales (Official Report), 8 June 2011.

In the summer of 2024, a non-political Counsel General designate, Elisabeth Jones, was selected to provide cover on a short-term basis, while new First Minister Eluned Morgan assembled a full Cabinet.

The Law Society for England and Wales took the unusual step of publicly urging that this non-political appointment should only be a short-term arrangement. Jonathan Davies, Head of Wales for the Law Society, said:

> Whilst Elisabeth Jones is both a skilled and highly capable legal professional, the appointment of a Counsel General that is not an elected Senedd member is a retrograde step that presents a real risk of loss of political focus around the justice agenda in Wales.
>
> We understand that the First Minister will be reshuffling the Cabinet in September and our members across Wales have been very clear in their desire to see a return to a Senedd Member as Counsel General, operating at cabinet level, when the expected reshuffle takes place in September.[203]

The Law Society subsequently publicly welcomed the Welsh Government's decision to appoint Julie James as being one that provided "a dedicated political advocate at the cabinet table".[204]

5.2 Independence and prosecutorial functions

England, Wales and Northern Ireland

The role of law officers in prosecutions varies in the different jurisdictions of the United Kingdom. In England and Wales and in Northern Ireland, most prosecutorial functions are carried out on a day-to-day basis by arm's length bodies, subject to law officer superintendence in the former case and to certain obligations to consult in the latter.

Prosecutions themselves (mostly) are brought by non-political actors (e.g. a Director of Public Prosecutions) rather than by the respective law officer. The purpose of these arrangements is to shield prosecutions from actual or perceived politicisation.

Scotland

By contrast in Scotland the Crown Office and Procurator Fiscal Service is run by the Lord Advocate. He or she has responsibility for and ultimately directs the prosecution of more serious criminal cases in the High Court of Justiciary.

The heightened sensitivity of a "dual role" may explain, in part, why successive Scottish Executives and Governments have chosen not to appoint

[203] Legal News Wales, The Law Society calls for a return to political Counsel General in September, 15 August 2024.

[204] Legal News Wales, First Minister nominates lawyer as next Counsel General, 11 September 2024.

an MSP or party politician as Lord Advocate, preferring instead to recruit from senior figures in the legal profession outside of Parliament.

Statutory safeguards of independent prosecutions

The "dual role" also explains why the Scotland Act includes additional safeguards regarding the independent exercise of the Lord Advocate's prosecutorial functions. Section 48(5) provides that:

> Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.

The statutory safeguards in the Scotland Act are also supported by long-established prosecutorial practice, whereby both devolved law officers are recused from prosecution decisions if and when a conflict of interest could arise. For example, when the Crown Office and Procurator Fiscal Service carried out investigations into complaints about:

- alleged sexual misconduct by Alex Salmond during his time as First Minister (of which he was acquitted in a jury trial in March 2020) and
- Operation Branchform (the ongoing investigation into the financial arrangements of the Scottish National Party)

responsibility for the cases was handed over to the Crown Agent, the Lord Advocate's principal legal advisor on prosecution matters and the Chief Executive of the COPFS. The law officers were not involved in prosecution decisions in those cases.

Calls for reform

Despite these existing safeguards, concerns have been raised about the "dual role" of the Lord Advocate and "perceptions" of a lack of prosecutorial independence.

In its March 2021 report, a Holyrood Committee investigating the Scottish Government's handling of sexual harassment complaints reflected that:

> [There is] a long-standing tension in the Lord Advocate's dual roles [...] public perceptions are important in this regard and [the Committee] seeks reassurance that the existing arrangements continue to command confidence in the independent exercise of these two important roles.[205]

Manifesto commitments and consultation

In the 2021 Scottish Parliamentary elections, manifesto commitments were made by several of the political parties either to commit to review, or outright

[205] Scottish Parliament, Report of the Committee on the Scottish Government Handling of Harassment Complaints, SP 997, 23 March 2021.

to split, the "dual role" of the Lord Advocate.[206] The post-election Programme for Government, published by the (then) SNP-Green Coalition in September 2021, said:

> The Scottish Government's law officers, amongst other roles, act as the head of the independent prosecution service and as members of the Scottish Government. We will consult on whether the prosecution and government functions of the law officers should be separated.[207]

In May 2023, the Scottish Government commissioned Malcolm McMillan, the former Chief Executive of the Scottish Law Commission, to carry out a review of the role of Lord Advocate, with a view to presenting options for an alternative model to the existing role. This review has still not reported as of the end of 2024.

Legislative competence issues

The Scottish Parliament has limited powers to change the role of the Lord Advocate. This is because aspects of both the prosecutorial function and the legal advisory function are "protected provisions" of the Scotland Act, which only the UK Parliament can amend. It has therefore been suggested that any move to "split" the dual role by the Scottish Parliament would require supporting legislation from the UK Parliament.

In early 2024, Joanna Cherry, the then SNP MP for Edinburgh South West, sought to introduce a bill to devolve the power to split the role of Lord Advocate to the Scottish Parliament.[208] Although the Scottish Law Officers (Devolution) Bill attracted cross party support, and no objecting voices in debate, it did not progress to a full second reading debate before the 2024 General Election and fell on dissolution.

206 Scottish National Party, Scotland's Future, Scotland's Choice, March 2021, p36; Scottish Labour Party, Scottish Labour's National Recovery Plan, 19 April 2023, p104; Scottish Liberal Democrats, Put Recovery First, 16 April 2021, p32; the Scottish Conservatives did not mention the "dual role" in their manifesto but were supportive of splitting it in other public remarks. See SP OR 17 June 2021 col 47.

207 Scottish Government, A fairer, greener Scotland, 7 September 2021, p103.

208 HC Deb 10 January 2024 cc329-332.

6 Legal advice in government

6.1 The law officers' convention

The Cabinet Office's Ministerial Code states that:

> The fact that the law officers have advised or have not advised and the content of their advice must not be disclosed outside government without their authority.[209]

This reflects a long-standing constitutional convention that has been observed by successive Governments. Erskine May's Parliamentary Practice, a guide on parliamentary practice and procedure and British constitutional law, explains:

> The purpose of this convention is to enable the Government to obtain frank and full legal advice in confidence. Therefore, the opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused; but if a Minister deems it expedient that such opinions should be made known for the information of the House, the Speaker has ruled that the rules of the House are in no way involved.[210]

In evidence to the House of Commons Justice Select Committee, the Attorney General Lord Hermer said of the law officers' convention that it:

> effectively provides the same legal privilege protection to an Attorney General and the Government as any lay person would have with their lawyer. It is a form of legal professional privilege. That is an important principle to apply, because we as Law Officers must feel that we are able to impart confidential advice to our clients. It is essential for the good running of government, and for the discharge of our duties.[211]

The Welsh and Scottish Ministerial Codes for the devolved administrations embody a similar description of expected constitutional practice.[212] However, the Scottish Ministerial Code, more explicitly than the other two, acknowledges that there will be some circumstances when at least the existence and sometimes the substance of legal advice should be disclosed:

> Where, in exceptional circumstances, Ministers come to the view that the balance of public interest lies in disclosing either the source or the contents of

209 Cabinet Office, Ministerial Code, 6 November 2024, para 5.14.
210 Erskine May, para 21.27.
211 Justice Committee, Oral evidence: Work of the Law Officers, HC 577, 15 January 2025, Q5.
212 Welsh Government, Ministerial Code, 20 June 2024, para 6.19; Scottish Government, Ministerial Code, 17 December 2024, para 6.36.

> legal advice on a particular matter, the Law Officers must then be consulted and their prior consent obtained before any disclosure takes place. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances.[213]

The Scottish Ministerial Code also carves-out an exception for Government bills introduced at Holyrood. It is "acknowledged publicly" that advice is given by the Lord Advocate on the legislative competence of such bills.[214]

6.2 The convention in practice

Refusal to answer (parliamentary) questions

All ministers, not just law officers, will routinely decline to answer questions, including in parliamentary proceedings, where – and to the extent that – they believe their response would risk a breach the law officers' convention.

For example, in evidence to the Justice Select Committee in January 2025, the Attorney General (Lord Hermer) declined to answer questions about whether:

- the ICC's warrant for the arrest of Benjamin Netanyahu (the Prime Minister of Israel) would be enforceable in UK courts;[215]
- he had advised the government on its policy response to the ruling in *Dillon and others v Secretary of State for Northern Ireland*.[216]

He also declined to answer a similar written question from Lord Caine on whether he had:

> recuse[d] himself from discussions of any issue in Northern Ireland which may directly or indirectly involve any of his former clients.[217]

The refusal of ministers to answer questions in this context has been a source of frustration for parliamentarians from time to time. As Andrew Slaughter, Chair of the House of Commons Justice Select Committee put it to the Attorney General in the same evidence session:

> How are we supposed to join up the dots between the principles that you follow [such as the rule of law] and the practical effects of that on Government? If we ask you, you will say, "It's not something I can discuss," and if we ask

213 As above, para 6.38.

214 As above, para 6.39.

215 Justice Committee, Oral evidence: Work of the Law Officers, HC 577, 15 January 2025, QQ21-23.

216 [2024] NICA 59. The Northern Ireland Court of Appeal concluded that several provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 were incompatible with the European Convention on Human Rights. The Secretary of State for Northern Ireland subsequently brought forward proposals to repeal the incompatible provisions using a remedial order under section 10(2) of the Human Rights Act 1998.

217 PQHL4171. The context was that Lord Hermer had, as a barrister, recently represented Gerry Adams and the family of a British Army soldier in Troubles-related litigation.

> Ministers about it, whom you may or may not be advising, they will say, "That's a matter for the Law Officers.[218]

Lord Hermer acknowledged that "the room for scrutiny of the legal advice [given by law officers] is limited" but insisted that this was "justified".

He also insisted that there were plenty other public "yardsticks" against which the work and impact of the law officers could be judged. For instance, it would be open to the committee and others to:

- reach their own, independent, view about whether Government policy was compliant with the rule of law and constitutional standards; and
- reflect on the responses of domestic and international courts to Government policies and legislation.[219]

Disclosure of conflicts of interest and recusal

From time to time, law officers can encounter conflicts of interest, when asked to provide government legal advice. This may arise because of their previous work as a barrister, advocate or solicitor, and the clients they represented, or, as with any minister, because of a personal interest.

Identifying potential and preventing actual conflicts of interest

In January 2025, and in answer to an urgent question in the House of Commons, the Solicitor General, Lucy Rigby, described the general approach of the Attorney General's office to conflicts of interest:

> In identifying conflicts or potential conflicts, the Attorney General's Office adopts a cautious and "beyond reproach" threshold to any conflicts or potential conflicts. My Department works with the Government Legal Department, the Foreign, Commonwealth and Development Office, which oversees international litigation on behalf of the Government, the Crown Prosecution Service and the Serious Fraud Office to revise and augment the list of conflicts identified.
>
> Once the conflicts have been ascertained and a set of actions identified for each conflict, the Attorney General's Office takes steps to ensure that the Law Officer is appropriately limited in their involvement on matters related to the relevant area of Government policy or related litigation. The list is kept under review and amended—for example, when new Government policies or litigation emerge. In situations where one Law Officer is conflicted, another Law Officer is asked to act in their place.[220]

Non-disclosure of "specific" conflicts and recusals

Lord Hermer, who was appointed Attorney General in July 2024, confirmed to Parliament in January 2025 that he had been recused on "certain matters"

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218 Justice Committee, Oral evidence: Work of the Law Officers, HC 577, 15 January 2025, Q5.

219 As above.

220 HC Deb 23 January 2025 c1114 [Attorney General's Office: Conflicts of Interest].

but declined to disclose which specific matters, citing the law officers' convention.[221]

He had previously set-out two practical obstacles to a law officer confirming or denying that they have been recused in relation to a specific matter. Firstly he noted that:

> If a Law Officer publicly confirmed specific matters where they were recused, this would likely disclose that the other Law Officer was therefore giving advice or infer that legal advice had been requested by the Government on a specific matter, which would risk a breach of the Law Officers' Convention.[222]

And secondly that:

> a lawyer cannot breach a client's confidentiality in relation to advisory work that had previously not been made public so this would limit the ability of a Law Officer to publish in full their previous caseload and conflicts schedule.[223]

Criticism of non-disclosure

The rationale for not commenting on specific conflicts or recusals has been criticised by Dr Conor Casey, a Senior Fellow at Policy Exchange's Judicial Power Project (JPP). Casey has argued, in a briefing note for the JPP, that:

> parliamentarians are entitled to ask, and the Attorney General is free to answer, questions about whether he would feel able to advise on an issue that might impact a recent client or if he feels conflicted about advising on a particular issue

and that, in particular:

> The Law Officers' convention does not provide grounds for the Attorney General to refuse to answer a question about whether he takes himself to face a conflict of interest.[224]

This position was endorsed by three former Conservative ministers: Lord Keen of Elie (former Advocate General for Scotland), Lord Faulks (former Justice Minister) and Sir Robert Buckland (former Solicitor General and Lord Chancellor).[225]

However, others have criticised attempts to get the Attorney General to disclose specific conflicts.

- Lord Falconer of Thoroton, former Labour Lord Chancellor, described it as "seeking to undermine the convention by scraping the bottom of the barrel".[226]

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221 HL Deb 27 January 2025 c19 [Attorney General's Office: Conflicts of Interest].

222 PQ HL4171 [on Attorney General: Northern Ireland], 21 January 2025.

223 As above.

224 Conor Casey, Conflicts of interest and the law officers' convention, 20 January 2025, p12.

225 As above pp2-5.

226 HL Deb 27 January 2025 c21 [Attorney General's Office: Conflicts of Interest].

- The Chair of the House of Commons Justice Select Committee, Andrew Slaughter, argued that it would "breach the Law Officers' convention by the back door" and "undermine the rule of law".[227]

6.3 Publication of legal advice/positions

There have been notable instances in the last twenty years in which a Government has published a law officer's legal advice or legal position, or at least acknowledged whether relevant law officers' advice exists. This has typically happened where one of the following situations applies:

- the government has acknowledged, in the relevant context, that a public interest justifies disclosure;
- under Freedom of Information legislation an Information Commissioner has insisted on disclosure; or
- a legislature has (repeatedly) insisted that relevant Government legal advice be made available to MPs.

Legality of the Iraq War

In March 2003, the Attorney General, Lord Goldsmith, set out in answer to a written question the Government's position on the legality of the use of military force in Iraq.[228] This was not itself "legal advice".

However, in April 2005, the Government (in the face of continued political pressure and media scrutiny) published the Attorney General's "final advice to the cabinet" (issued to it on 7 March 2005) on the legality of war with Iraq.[229]

Other draft legal advice given to the Labour Government, between 2002 and 2003, was declassified as part of the Iraq Inquiry. In justifying the disclosure in that case, the then Secretary of the Cabinet and Head of the Home Civil Service, Sir Gus O'Donnell, stated:

> I have considered the matter carefully and believe that given the very exceptional nature of the Iraq Inquiry, this particular material can be declassified without prejudice to the general principles of legal professional privilege (LPP) and the convention in relation to the law officers' advice.[230]

227 HC Deb 23 January 2025 c1114 [Attorney General's Office: Conflicts of Interest].

228 'Written Question: Iraq: Legality of Armed Force', HL2172, 17 March 2003.

229 BBC News, 'Iraq War Legality', 28 April 2005.

230 Iraq Inquiry, Letter of the Secretary of the Cabinet and Head of the Home Civil Service, Sir Gus O'Donnell: Declassification of Draft Legal Advice, 25 June 2010.

More information about the disclosure of legal advice in the context of armed conflict can be found in the House of Lords Library's December 2018 Briefing, Publishing Government Legal Advice.[231]

Scottish independence and EU membership

During the Scottish independence referendum a matter of prominent debate was Scotland's legal relationship with the EU following any secession from the rest of the UK. In an interview with the BBC's Andrew Neil in March 2012, First Minister Alex Salmond appeared to confirm that legal advice had been sought from the Lord Advocate on this matter but declined to disclose the content of that advice. He said:

> I can't give you the legal advice of law officers... but what you can say is that everything that we publish is consistent with the legal advice that we receive.[232]

In the summer of 2012, the Scottish Information Commissioner (SIC) upheld an appeal by Catherine Stihler, the then Labour MEP, in relation to a Freedom of Information request. The Scottish Government had decided not to disclose whether it had any legal advice on the status of an independent Scotland's future relationship with the European Union.

The SIC ruled that although the Scottish Government could rely on exemptions under Freedom of Information laws to avoid disclosing **the content** of any relevant legal advice, it still had to disclose **whether** that advice existed. This was because the public interest did not protect against that disclosure.

The Scottish Government initially appealed the SIC's decision in the Courts, but subsequently dropped the case after it decided to disclose to the Scottish Parliament that no such advice existed (but that it was about to seek it).[233]

Brexit and the Northern Ireland Backstop

An agreement in principle to a UK-EU Withdrawal Agreement was first reached in late November 2018. That draft treaty text included the original Protocol on Ireland/Northern Ireland, which also came to be known as "the Northern Ireland backstop".

The Backstop and MPs' desire for legal advice

Under the backstop the whole of the UK would have entered into a customs arrangement with the EU after the transition period had ended. The stated intention was that this arrangement would be "temporary" and that it could be superseded by alternative arrangements subsequently agreed by the UK and EU. However, nothing in the text of the draft Protocol explicitly stated

231 House of Lords Library, Publishing Government Legal Advice, LLN-2018-0115, 6 December 2018.
232 BBC Sunday Politics, Alex Salmond interview with Andrew Neil, 4 March 2012.
233 Scottish Information Commissioner, Press statement: Commissioner welcomes Government's decision to abandon appeal, 23 October 2012.

that the arrangement was time-limited, or that it could be terminated unilaterally by the UK.

Many opposition and backbench MPs were apprehensive about or opposed to this anticipated arrangement. They sought greater clarity as to the legal consequences of agreeing to the backstop.

Press reports suggested that Geoffrey Cox (the then Attorney General for England and Wales and Advocate General for Northern Ireland) had advised the Cabinet on legal aspects of the Withdrawal Agreement, including on the backstop.[234] The Conservative Party's then confidence and supply partners, the DUP, also indicated they had received Government assurances that legal advice would be shared with them.[235]

No such commitment had been made, however, for MPs generally.

Motion for return

Parliamentary pressure on disclosure culminated in the official opposition moving a "motion for a return" in the House of Commons on 13 November 2018. This procedural device can be used to requisition information from the Government.[236] The motion sought that the following be laid before Parliament:

> any legal advice in full, including that provided by the Attorney General, on the proposed withdrawal agreement on the terms of the UK's departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the United Kingdom and the European Union.[237]

The Government argued that the motion should not be passed because:

> there would be an adverse impact on the quality of discussions within government and of the government's collective decision-making, which would not be in the interests of any government of any political party.[238]

The Government committed instead to publish a "reasoned position statement" on the legal implications of the deal, rather than "full and final advice" given to ministers. A further commitment was also made to the effect that the Attorney General would make an oral statement and then take questions from the House about the matter.[239] The Government did not press the motion to a division, however, meaning in effect that it passed unanimously.

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234 James Forsyth, 'From Dante's First Circle of Hell to Black Wednesday. This Week's Cabinet Meeting', The Spectator, 23 October 2018.

235 Peter Walker, 'Cross-Party Calls Grow for Brexit Legal Advice to be Published in Full', The Guardian, 7 November 2018.

236 Procedure Committee, The House's power to call for papers: procedure and practice, HC 1904, 20 May 2019, paras 28-32.

237 HC Deb 13 November 2018, Vol 649 c189.

238 As above c205.

239 As above c202.

Government response

The Speaker of the House stated of the motion that it was "effective" and that

> it is not just an expression of opinion; it is an expression of will – and the Government should regard the motion as effective and respond swiftly to it.[240]

After a draft agreement had been published, however, the Government only re-iterated its existing commitments: to make a reasoned statement and to make the Attorney General available for oral questioning in the House of Commons. On 3 December the Government published EU Exit – Legal Position on the Withdrawal Agreement (a command paper).[241] The Attorney General stated that this document:

> sets out the Government's legal position on the proposed withdrawal agreement and provides a legal commentary, covering each part of the withdrawal agreement and the three protocols.[242]

The Attorney General acknowledged in the debate that he had:

> a solemn and constitutional duty to [the House of Commons] to advise it on these legal questions objectively and impartially, and to place such legal expertise as I have at its disposal.[243]

Moreover, he acknowledged that "historical precedents" supported this view. However, he argued that (unlike in the case of the Iraq War advice) to publish full legal advice at this point in time:

> would be contrary to the national interest in the course of a negotiation that might involve discussions about strength, weaknesses and future strategies.[244]

adding that

> although the House says that I should disclose, I believe that the public interest compels me not to.[245]

Contempt of Parliament and eventual publication

The House of Commons rejected the Attorney General's assessment that the Government had:

> sought to comply with the spirit of it to the maximum possible degree... [having among other things] put their legal adviser at the disposal of the House and instructed him to give full, frank, complete answers to any questions asked on the matters of law that any legal advice would have been likely to cover.[246]

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240 As above c236.
241 EU Exit – Legal Position on the Withdrawal Agreement, Cm 9747, 3 December 2018.
242 Exiting the European Union: publications, HCWS1131, 3 December 2018.
243 HC Deb 3 December 2018 c546.
244 As above, c564.
245 As above.
246 As above c567.

Instead the House adopted a resolution, on 4 December 2018, holding ministers in contempt of Parliament for their "failure" to abide by the motion of 13 November 2018. Immediately after that resolution was adopted, the Leader of the House announced that the Government would comply with its terms.

The following day, the Government published a six-page letter from the Attorney General addressed to the Prime Minister, dated 13 November 2018. It set out the Attorney General's response to the question:

> What is the legal effect of the UK agreeing to the Protocol to the Withdrawal Agreement on Ireland and Northern Ireland in particular its effect in conjunction with Articles 5 and 184 of the main Withdrawal Agreement?[247]

In a written statement accompanying the document's publication, the Attorney General confirmed that it was:

> a copy, in full, of the final legal advice that I provided to Cabinet on 14 November on the legal effects of the Withdrawal Agreement.[248]

The written statement set out the exceptional reasons for publication, but also argued that it should not be seen to set a precedent. The Government also sought to refer the matter to the Committee of Privileges.

Procedure Committee consideration of calls for papers

However, the matter was instead considered by the Procedure Committee. It published a report into the House's powers to call for papers in May 2019. It concluded that:

> Since the Law Officers' convention is simply that—a convention—and may be disapplied at the discretion of the Attorney General, it was in our view entirely in order for Members to seek the exercise of that discretion, and the release of the Attorney General's advice, through a motion for return. It was an orderly motion put before the House for decision, and the Government chose not to oppose it. The Government's subsequent difficulties arose from the failure of Ministers to engage with the direction the House had given.
>
> This is not to say that the House ought not to respect the convention. We recognise the importance of the Law Officers' convention to the good functioning of Government.[249]

247 Department for Exiting the European Union, Exiting the EU: publication of legal advice, 5 December 2018.

248 Exiting the EU: Publication of Legal Advice, HCWS1142, 5 December 2018.

249 Procedure Committee, The House's power to call for papers: procedure and practice, HC 1904, 20 May 2019, paras 60-61.

The Scottish Government's handling of harassment complaints

In February 2019, the Scottish Parliament set up a committee with the following remit:

> To consider and report on the actions of the First Minister, Scottish Government officials and special advisers in dealing with complaints about Alex Salmond, former First Minister, consider under the Scottish Government's "Handling of harassment complaints involving current or former ministers" procedure and actions in relation to the Scottish Ministerial code.[250]

During the course of its inquiries, the committee requested legal advice given by the Lord Advocate, among others, concerning the Scottish Government's response to a judicial review initiated by former First Minister Alex Salmond. However, relying on the law officers' convention, the committee's requests for disclosure of the Lord Advocate's legal advice were refused by the Scottish Government notwithstanding several motions having been passed by the Scottish Parliament, insisting on its release.[251]

It was not until a motion of no confidence in the deputy First Minister had been tabled before the Scottish Parliament that the Scottish Government relented and published (most of) the legal advice that had been requested by the committee. An associated press release emphasised the exceptionality of the circumstances which had led to this disclosure:

> In normal circumstances, government legal advice is not released. Such is the importance of Ministers being able to receive frank, private advice, it is almost unheard of for such legal advice to be released.
>
> However, we acknowledge that the issues in the SGHHC Inquiry are not normal. During the course of the inquiry, the integrity of the legal system has been questioned and serious allegations have been made. This material allows people to confirm that these allegations are false.
>
> It is important to note that in any legal case a range of opinions are expressed. The concluded legal position of the Scottish Government is therefore a result of a range of views being considered. It is not the case that the opinion of external counsel alone constitutes the legal advice to Ministers. The Ministerial Code is clear that the primary role lies with the Scottish Government's Legal Department (SGLD) and, ultimately, with the Law Officers.[252]

250 Report of the Committee on the Scottish Government Handling of Harassment Complaints, SP 997, 23 March 2021, para 12.

251 See SP OR 4 November 2020 col 83 and SP OR 25 November 2020 col 97.

252 Scottish Government, Legal advice related to the Parliamentary Inquiry into the Scottish Government's Handling of Harassment Complaints (SGHHC), 15 March 2021.

6.4 Non-statutory Guidance on legal risk

Most legal advice within government is not provided by the law officers. Within the UK Government, it is provided by government lawyers, through the Government Legal Department (GLD). Law officers advice is only sought when an issue is particularly sensitive or contentious or is otherwise escalated.

The 2015 GLD Guidance note

In 2015 the GLD issued a Guidance Note on Legal Risk to help government lawyers with their communication of legal risk in submissions to ministers and other civil servants. Sir Jonathan Jones KC, who was at that time the Treasury Solicitor, has identified two main objectives of the guidance (as then developed):

- Firstly, to help address the often-held perception that lawyers were "risk averse", along with the "tendency to blame legal advice" as a reason for not proceeding with policies.
- Secondly, to "bring some consistency in the way that legal risk is described and conveyed to clients" – making ways of describing levels of legal risk "more readily quantifiable and understood" by its recipients.[253]

The guidance formalised a "red, amber, green" system with associated percentage-based legal risks and language. Advice was expected to highlight the:

- likelihood of a legal challenge being brought
- likelihood of a legal challenge succeeding
- likely impact of a challenge on policy delivery

The guidance also set out a principle that, if "no respectable legal argument" could be put to a court that a particular course of action was lawful, civil servants should advise that the policy would be "unlawful". The guidance expected that situations as clear-cut as this would be "highly exceptional".[254]

The 2022 Attorney General's Guidance on Legal Risk

In 2022, the then Attorney General, Suella Braverman KC MP, decided to issue Attorney General's Guidance on legal risk, to supersede the GLD guidance.

253 Sir Jonathan Jones KC, What does the new legal risk guidance for the government mean?, Institute for Government, 7 November 2024.

254 Government Legal Department, Guidance Note on Legal Risk, July 2015.

She argued at the time that government lawyers were "too cautious in their advice" and were often "proven wrong in court" having "advised negatively". This "hampered ministerial policy objectives needlessly".

Her new guidance, she said, would "instil a private-sector approach to client service" and encourage a "solutions-based approach encouraging innovative legal thinking".[255]

Variable risk appetite and mitigation strategies

The 2022 guidance emphasised that not all ministers have the same "risk appetite" and that this should be taken into account when presenting legal risks.[256]

It also emphasised the importance of presenting a "mitigation strategy" where there was high legal risk, so that policy goals could still be achieved in the face of successful legal challenge.[257]

When to describe a course of action as "unlawful"

Compared with the 2015 guidance, there was an apparent shift of emphasis on the circumstances in which civil servants should describe a course of action as "unlawful".

The 2022 guidance stated that this characterisation should "only" be used if there is no respectable legal argument capable of being put before a court. This suggested that the term "unlawful" should not be used where the risk of defeat in a court case was merely "high" (above 70%).[258]

In its 2023 report into the role of the Lord Chancellor and law officers, the House of Lords Constitution Committee described the "respectable legal argument" threshold as an "uncertain" one and expressed concern that:

> the threshold as currently set out in the guidance could sometimes be used purely for the convenience of the Government.

It further emphasised that decisions to act by ministers "must not be based solely on a calculation of legal inconvenience".[259]

The 2024 Attorney General's Guidance on Legal Risk

The current Guidance on Legal Risk was issued by Lord Hermer in November 2024, superseding the 2022 version.

255 Suella Braverman (@SuellaBraverman), X (Twitter), 1 August 2022 [accessed 5 February 2025]
256 Attorney General's Guidance on Legal Risk, 2022, para 3.
257 As above, paras 10-11.
258 As above, para 2.
259 House of Lords Constitution Committee, The roles of the Lord Chancellor and the Law Officers, HL Paper 118, 18 January 2023, paras 147-148.

Primacy of the risk of legal defeat

The new guidance marks a clear shift in approach. It explicitly states that the "principal factor" in legal advice is the "likelihood of a legal challenge being successful" on the assumption that one is brought.[260]

Reversion of emphasis on "tenable legal argument"

The language on the use of the term "unlawful" has reverted more closely to the 2015 guidance's formulation by emphasising that government lawyers:

> must advise that a proposed course of action is unlawful if you assess that if the action was legally challenged, there is no tenable legal argument that could be put to a court.[261]

The "tenable" legal argument threshold (a notable change of adjective, but not, it seems, of substance) will only be met if:

> a lawyer representing the government could properly advance that argument before a court or other tribunal in accordance with their professional obligations.[262]

The guidance emphasises the importance of government receiving "full merits legal advice" wherever practicable, assessing the strength of legal argument for and against lawfulness, not just focusing on whether a "tenable legal argument" can be made.[263]

Proceeding with merely "tenable" arguments

The guidance, like its predecessor, still acknowledges that ministers may wish to proceed even if there is a high risk of successful legal challenge.

However, it says that proceeding with a merely "tenable argument" should be a "last resort and only pursued when all other options have been considered and discounted" and "may not be appropriate" at all in some cases.[264]

Escalation to line managers and the law officers

The new guidance encourages escalation to civil service line managers or Legal Directors where there is a greater than 50% estimated probability that the government would lose a legal challenge. It would then be for them to assess whether further escalation to the law officers was appropriate.[265]

This goes somewhat further than the 2022 guidance, which only suggested escalation in situations where there is "no respectable legal argument".[266]

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260 Attorney General's Guidance on Legal Risk, 6 November 2024, para 6.
261 As above, para 8.
262 As above.
263 As above, para 17.
264 As above, para 20.
265 As above, para 22.
266 Attorney General's Guidance on Legal Risk, 2022, para 15.

Guidance on compatibility of policies/decisions with international law

The guidance emphasises the "great importance" the UK places on its commitment to international law obligations, whilst acknowledging that:

> the impact or consequences of a high risk legal position or perceived breach may perhaps appear less tangible or direct for the government than those that usually follow a breach of domestic law[267]

The guidance highlights that there could be "significant consequences" of a "legal, political, diplomatic and/or reputational" nature. Those risks, the guidance states, should "be put clearly to Ministers".

It also emphasises that an assessment "of the likely response" of the actors to which the UK owes the international obligation, and the wider response of the international community, should be undertaken and communicated.[268]

Commentary on the new guidance

The new guidance has been the subject of critical commentary from Policy Exchange. In their briefing for that organisation Dr Conor Casey and Dr Yuan Yi Zhu have described the new guidelines as "constitutionally dubious" because, in their view, they encourage "civil servant lawyers" to impress on decisions that are properly the preserve of "accountable elected officials":

> Government lawyers may end up overstepping their constitutional authority by feeling empowered, on the foot of these new guidelines, to withhold their "approval" for a government proposal, policy, or even a legislative initiative underpinned by a tenable legal argument, due to their concerns that "all other options" have not "been considered and discounted", or that the "fundamental rights of individuals are significantly undermined". At the least, these new guidelines will likely generate confusion amongst Ministers and government lawyers about the proper boundaries of the latter's role.[269]

Others have welcomed the revised guidance. The barrister George Peretz KC has argued that the guidance respects the proper role of the civil service:

> The 2024 Guidelines do not claim that either government lawyers or the Law Officers have power to "instruct" Ministers to do or not to do anything. Government lawyers advise – and that is the verb consistently and correctly used in the 2024 Guidelines. But it is entirely constitutionally appropriate for the Attorney General – a government minister, accountable to Parliament – to set out the nature of the advice that he expects to be given at particular levels of legal risk.[270]

The former Treasury Solicitor, Sir Jonathan Jones KC, has similarly welcomed a "reversal" of the 2022 changes:

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267 Attorney General's Guidance on Legal Risk, 6 November 2024, para 13.

268 As above.

269 Conor Casey and Yuan Yi Zhu, From the Rule of Law to the Rule of Lawyers?, Policy Exchange, 26 November 2024, p12.

270 George Peretz KC, The Policy Exchange Paper on the Attorney General's New Legal Risk Guidelines: Excited Adjectives, Unpersuasive Analysis, UK Constitutional Law Association, 4 December 2024.

> Of course any lawyer can be wrong, and there will no doubt be disagreements in novel or complex cases. But overall the tenor of the revised guidance is to signal support from the Attorney General to government lawyers in giving their honest advice, even if that means exposing a high risk of successful challenge or indeed advising that a course is clearly unlawful. That is a world away from treating lawyers as risk-averse blockers, whose advice is to be viewed with suspicion or even ignored if it is considered to be "inconvenient".[271]

[271] Sir Jonathan Jones KC, What does the new legal risk guidance for the government mean?, Institute for Government, 7 November 2024.

7 Reference powers

7.1 Devolution issues

A "devolution issue" is a legal question that concerns whether devolved institutions are, or would be, acting or legislating within the limits of their statutory powers under the devolution statutes.

The definition of a devolution issue is set out in the three devolution statutes. For example Schedule 6 of the Scotland Act 1998 defines the term as including any of the following:

> (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
>
> (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
>
> (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,
>
> (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights,
>
> (e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights,
>
> (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

7.2 When can devolution issues arise?

The most straightforward way for a devolution issue to arise is for a private party directly to challenge the validity of something done by a devolved authority, or legislation passed by a devolved legislature. In such a situation, the Scottish Government, Welsh Government or Northern Ireland Executive (or

an NI Department) will likely already be one of the parties in the dispute and they will be represented by a devolved law officer.[272]

However, devolution issues can also arise in disputes between private parties. The case of *Salvesen v Riddell* for example began as a dispute between a landlord and a tenant over the termination of a lease.[273] A devolution issue arose because the parties disagreed about whether a provision in an Act of the Scottish Parliament was enforceable, or whether it was outwith devolved competence for being incompatible with Convention rights.

To ensure that devolved powers are interpreted consistently, law officers are given statutory powers to "refer" matters to the UK Supreme Court, and to "intervene" in court cases whenever devolution issues form part of a dispute. This guarantees that the legal arguments of both the UK Government and the devolved authorities can be taken into account if the exercise/extent of devolved powers is disputed.

7.3 What powers do the law officers have?

The law officers have a range of statutory powers to ensure that the boundaries of the devolution settlement are properly enforced and respected.

One of the better-known powers of law officers is the power to refer a devolved Bill to the UK Supreme Court before it is presented for Royal Assent. This power can be used to ascertain whether a Bill's provisions are within devolved competence, or whether they would engage a protected subject matter.[274]

Additionally, the law officers of each administration have other powers in relation to devolution issues. These powers include:

- the power to institute proceedings to determine a devolution issue (i.e. to ask a court to determine the matter);
- the power to defend devolution issue proceedings (if raised by another law officer);
- the right to be informed if a devolution issue arises in proceedings in which the law officer is not already a party;
- the right to intervene in proceedings in which a devolution issue has arisen;

272 See, for example, *Christian Institute v Lord Advocate* [2016] UKSC 51.

273 *Salvesen v Riddell* [2013] UKSC 22.

274 Scotland Act 1998, ss32A and 33; Government of Wales Act 2006, ss111b and 112; Northern Ireland Act, s11. Eight bills have been referred under bill references, including two by devolved law officers.

- the right to appeal a determination on a devolution issue (ultimately to the Supreme Court);[275] and
- the right to refer a devolution issue directly to the UK Supreme Court.

7.4 Other reference powers

Criminal law references

Some, but not all, law officers have reference powers in relation to the criminal justice system. For example:

- the Attorney General for England and Wales can refer a point of law to the Court of Appeal after someone has been acquitted on indictment in the High Court;[276] and
- the Lord Advocate in Scotland has very similar powers following a verdict in solemn proceedings, to raise a point of law in the High Court of Justiciary sitting as an appeal court.[277]

These types of reference allow the law to be clarified for future cases without overturning a jury's decision at trial.

Legacy EU caselaw

Section 6 of the Retained EU Law (Revocation and Reform) Act 2023 also conferred new statutory reference powers on both UK and devolved law officers (as well as on lower courts).

At the end of the UK's post-Brexit transition period, most (but not all) EU law (and associated CJEU and domestic caselaw) was preserved in UK domestic law. Whilst the EU (Withdrawal) Act 2018 allowed certain appellate courts to depart from "retained caselaw" first instance courts continued to be bound by it, so far as it concerned the interpretation of retained EU law.

The 2023 Act sought to change this, and to make it easier for lower courts to depart from the legacy caselaw. One of the new mechanisms available to a lower court would be the ability to refer a question on whether to depart from retained caselaw to a higher appellate court. The Act allows for these references either to be made by the lower court itself, or by a law officer.

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275 The narrower definition of a devolution issue in Scotland is, in part, designed to ensure that Convention compatibility questions in criminal proceedings are resolved in the High Court of Justiciary rather than the UK Supreme Court.

276 Criminal Justice Act 1972, s36; Crown Prosecution Service, Attorney General's Reference on a Point of Law, 14 July 2022.

277 Criminal Procedure (Scotland) Act 1995, s123.

Although these "reference powers" are on the statute book, the relevant provisions of the Act have not been commenced. Therefore, as of February 2025, no references have been made, by lower courts or by law officers.

Shortly prior to the 2024 General Election, the previous (Conservative) government made regulations to bring section 6 of the 2023 Act into force from October 2024.[278]

Those commencement regulations were revoked by the new government in September 2024, as part of its efforts to "reset" relations with the European Union.[279] The government is keeping under review the appropriate time to bring the provisions into force.

[278] The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) Regulations 2024.

[279] The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) (Revocation) Regulations 2024.

8 Law officers' oaths

Many holders of public office in the UK take an "oath" or make a "solemn affirmation" on assuming office.[280] There are broadly two types of oath, namely those that:

- pledge "true allegiance" to the monarch (eg the parliamentary oath and the oath of allegiance); or
- are specific to the holding of a specific public office (eg the official oath, the Lord Chancellor's oath, and the judicial oath).

The oaths taken by law officers differ depending on their specific constitutional context.[281]

8.1 Attorney General and Solicitor General (E&W)

Since the Attorney General and Solicitor General are, by custom, expected to be parliamentarians, they will each have sworn the "parliamentary oath" on taking their seats as an MP or Peer. The parliamentary oath is itself a variation on the oath of allegiance and states that the individual:

> will be faithful and bear true allegiance to [the Monarch], [their] heirs and successors, according to law."

Unlike other UK Government ministers of Cabinet rank (eg Secretaries of State) there is no requirement for the Attorney General or Solicitor General to swear the "official oath" at a Privy Council meeting.

Instead, it is customary, though not required by statute, that both of those law officers will swear a law officers' oath, to be administered at the Royal Courts of Justice in London, shortly following their appointment.

The text of this oath has developed over time. In a 2023 report into the role of the Lord Chancellor and the law officers, the House of Lords Constitution Committee noted the (then) current wording of the oath sworn by the Attorney General and Solicitor General for England and Wales:

280 Under section 5 of the Oaths Act 1978, anyone who objects to swearing any oath can instead make a solemn affirmation to the same effect (shorn of religious connotations). For ease of reference, this section refers hereafter only to swearing of oaths.

281 See also Commons library research briefing, CBP-7515, Oaths of allegiance.

> I do declare that well and truly I will serve the King as his [Attorney General / Solicitor-General] in all his courts of record within Great Britain and truly counsel the King in his matters when I shall be called and duly and truly minister the King's matters and sue the King's process after the course of the law and after my cunning. For any matter against the King where the King is a party, I will take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the law against the King, as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to the King's matters when I shall be called thereto.

The House of Lords Constitution Committee recommended that the law officers' oath be updated "to make reference to the primacy of their duty to uphold the rule of law and fulfil public interest functions."[282]

With the permission of the Lady Chief Justice and the Lord Chancellor,[283] changes were subsequently made to the text (in July 2024) with the appointment of Richard Hermer KC (now Lord Hermer) as Attorney General and Sarah Sackman MP (now KC) as Solicitor General. The new oath includes "an explicit promise to respect the rule of law."[284]

8.2 Scottish law officers

Advocate General for Scotland

The Advocate General for Scotland is (and pre-devolution, the Lord Advocate was) by established convention, a UK parliamentarian, and so will have sworn the parliamentary oath on taking their seat as an MP or Peer.

The office-holder is additionally required, by the Schedule to the Promissory Oaths Act 1868, to take both the statutory oath of allegiance and the official oath. These are administered by the Lord President of the Court of Session in Edinburgh. The official oath taken is to the effect that the individual:

> will well and truly serve [the Monarch] in the office of [Advocate General for Scotland][285]

Lord Advocate and Solicitor General for Scotland

The Scotland Act 1998 governs the law on oath-taking for devolved institutions. New and returning members of the Scottish Parliament must take

[282] House of Lords Constitution Committee, The roles of the Lord Chancellor and the Law Officers, HL Paper 118, 18 January 2023, para 268.

[283] Justice Committee, Oral evidence: Work of the Law Officers, HC 577, 15 January 2025, Q11.

[284] HL Deb 23 July 2024, c372 [King's Speech].

[285] Promissory Oaths Act 1868, s3.

the oath of allegiance, at a sitting of the Parliament, before they can participate in its proceedings.[286]

The devolved Scottish law officers do not have to be, and never (in practice) have been, members of the Scottish Parliament.[287] To date, therefore, none of them has sworn the oath of allegiance in that capacity.

However, as members of the Scottish Government, both office-holders are (separately) required to swear the oath of allegiance and the official oath.[288] These oaths are administered by the Lord President of the Court of Session in Edinburgh.

If a member of the Scottish Government has already sworn the oath of allegiance in Parliament by virtue of being an MSP, they need only swear the official oath in the Court of Session.[289]

8.3 Counsel General for Wales

The Government of Wales Act 2006 governs the law on oath-taking for devolved institutions. New and returning members of the Welsh Parliament must take the oath of allegiance before the Clerk of the Senedd, before they can participate in its proceedings.[290]

The Counsel General for Wales is, separately, required to take both the oath of allegiance and the official oath, on assuming office.[291] If they have already taken the oath of allegiance in the Senedd by virtue of being an elected member, they need only swear the official oath.[292] The oath ceremony is administered by a presiding judge of the Wales and Chester circuit.[293]

8.4 Northern Ireland law officers

Neither the Attorney General for Northern Ireland nor the Advocate General for Northern Ireland are required to take an oath on appointment to their

286 Scotland Act 1998, s84.
287 As above, s27.
288 Scotland Act 1998, s84.
289 As above, subsection 84(6).
290 Government of Wales Act 2006, section 23; Standing Orders of the Welsh Parliament, September 2024, Standing Order 1.1.
291 Government of Wales Act 2006, section 55.
292 As above, subsection 55(3).
293 As above, subsection 55(4).

position.[294] This reflects the unique position in Northern Ireland, where oaths of allegiance to the Monarch carry particular political sensitivity.

Whilst members of the Northern Ireland Assembly make a "written undertaking" in lieu of an oath, this does not apply to the Attorney General, who is (in any case) prohibited by statute from being elected to the body.[295]

There have been two office-holders since the position of Attorney General became an independent devolved appointment (John Larkin KC and Brenda King). Both swore a non-statutory oath to the effect that they:

> will well and faithfully serve the people of Northern Ireland and uphold and defend the rule of law in the office of Attorney General for Northern Ireland.[296]

This oath has been administered, in respect of both office-holders, at the Royal Courts of Justice in Belfast.

[294] The Advocate General will have already taken the parliamentary oath and a non-statutory law officers' oath in their capacity as Attorney General for England and Wales.

[295] Northern Ireland Act 1998, s40A; Justice (Northern Ireland) Act 2002, subsections 23(6)-(8).

[296] Attorney General for Northern Ireland Tenth Annual Report 2019/20, Attorney General for Northern Ireland, 5 February 2021, p2. See also Northern Ireland's new Attorney General sworn in, Irish Times, 18 August 2020.

Annex – Law officers timeline

Table 1 Law officers' regime 1921 to 1972

From the creation of Northern Ireland until Direct Rule in 1972, there were three distinct senior law officers in the United Kingdom and two junior law officers. The offices in England and Wales and in Scotland were UK Government posts, whereas the Northern Ireland post of Attorney General was a devolved one. All posts were party-political appointments.

England and Wales (UK)	Scotland (UK)	Northern Ireland (Devolved)
Attorney General (E&W)	Lord Advocate	Attorney General (NI) (always held by Ulster Unionist member of the Northern Ireland House of Commons)
Solicitor General (E&W)	Solicitor General (S)	

Table 2 Law officers' regime 1972 to 1999

When Direct Rule was assumed in Northern Ireland (during the period known as "The Troubles") the post of Attorney General for Northern Ireland was held by the incumbent Attorney General for England and Wales. It therefore ceased to be a devolved office and became a UK Government post.

England and Wales (UK)	Scotland (UK)	Northern Ireland (UK)
Attorney General (E&W)	Lord Advocate	Attorney General (NI) (always held by the Attorney General for England and Wales)
Solicitor General (E&W)	Solicitor General (S)	

Table 3 Law officers' regime 1999 to 2007

When the Scottish Parliament came into existence, its powers extended to the Scottish legal system and justice policy. It therefore made sense to transfer the functions of the Lord Advocate and Solicitor General for Scotland to the Scottish Executive (later Scottish Government). Since the UK Government wished to retain a Scottish law officer of its own, it created the post of Advocate General for Scotland.

England and Wales (UK)	Scotland (UK)	Scotland (Devolved)	Northern Ireland (UK)
Attorney General (E&W)	Advocate General (S)	Lord Advocate	Attorney General (NI) (always held by the Attorney General for England and Wales)
Solicitor General (E&W)		Solicitor General (S)	

Table 4 Law officers' regime 2007 to 2010

When the Government of Wales Act 2006 came into force, a formal division was created between the National Assembly for Wales and the Welsh Assembly Government (later Welsh Government). This lead to the creation of the Counsel General for Wales, a law officer for the Welsh Government.

England and Wales (UK)	Wales (Devolved)	Scotland (UK)	Scotland (Devolved)	Northern Ireland (UK)
Attorney General (E&W)	Counsel General for Wales	Advocate General (S)	Lord Advocate	Attorney General (NI) (always held by the Attorney General for England and Wales)
Solicitor General (E&W)			Solicitor General (S)	

Table 5 Law officers' regime 2010 to present

With the transfer of justice powers to the Northern Ireland Assembly, the functions of the Attorney General for Northern Ireland were also transferred to the devolved space. As with the transfer of the Lord Advocate's functions in Scotland, the UK Government created a new law officer's post for the purposes of matters concerning Northern Ireland. The new post of Advocate General for Northern Ireland has always been held by whomever was the Attorney General for England and Wales.

<table>
<tr><th>England and Wales (UK)</th><th>Wales (Devolved)</th><th>Scotland (UK)</th><th>Scotland (Devolved)</th><th>Northern Ireland (UK)</th><th>Northern Ireland (Devolved)</th></tr>
<tr><td>Attorney General (E&W)</td><td rowspan="2">Counsel General for Wales</td><td rowspan="2">Advocate General (S)</td><td>Lord Advocate</td><td rowspan="2">Advocate General (NI)

(always held by the Attorney General for England and Wales)</td><td rowspan="2">Attorney General (NI)</td></tr>
<tr><td>Solicitor General (E&W)</td><td>Solicitor General (S)</td></tr>
</table>

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