

Written evidence submitted by The Faculty of Advocates (TLA0012)

The Faculty of Advocates is grateful for the opportunity to present evidence to the Scottish Affairs Committee on the role of the Lord Advocate, a matter of great constitutional importance that has a significant impact on the daily lives of the people of Scotland.

Ancient office kept up to date

The Office of Lord Advocate is an ancient one that has served the people of Scotland well for centuries. As with any institution, it merits assessment for current relevance and acceptability but any move for change needs stringent justification. The manner in which that assessment is conducted also needs delicate handling to avoid undermining the institution itself and, more broadly, public confidence in the rule of law in Scotland.

The McMillan Report on the Roles and Functions of the Scottish Law Officers provides helpful background summarising the history and the nature of the roles performed by the Lord Advocate and Solicitor General for Scotland. The roles underwent significant reform on devolution and further reform has taken place since. Two notable changes merit mention.

Firstly, the Lord Advocate's power to appoint judges was removed and placed with the Judicial Appointments Board, initially informally and then by the Judiciary and Courts (Scotland) Act 2008. It was inconsistent with the perception of an independent and impartial judiciary for the Lord Advocate, the head of the prosecution authority, to have influence over the appointment of judges who are required to hear the cases brought at the instance of the Lord Advocate.

Secondly, a victim's right of review of decisions not to prosecute was introduced by the Victims and Witnesses (Scotland) Act 2014. This has produced greater transparency.

Current controversies and Operation Branchform

There have been calls for a considerable period to assess the role of the Lord Advocate but great care should be taken to avoid approaching that assessment from the specific perspective of “recent controversies”. These are important constitutional questions, with far reaching ramifications, that have been asked for a considerable length of time and the circumstances of a highly politicised argument should not be thought to precipitate and to dictate the manner in which those important questions are answered.

Experience tells us that current controversies can be transient but changes have lasting effects, some unknowable and some unintended.

There is a particular danger in approaching this issue from the most immediate, present, controversy concerning Operation Branchform. There are two limbs to that controversy in public discourse. Firstly, some question whether anyone else should have been prosecuted. Secondly, there is a narrower question relating to two memoranda sent by the Lord Advocate to the First Minister. Operation Branchform concerned a crime committed against the Scottish National Party and both limbs engage party political interest.

No one questions the imperative that the prosecution of crime should be unaffected by political considerations. That cardinal principle, which goes to the heart of the independence of the prosecution system in any democratic society, is reflected in two fundamental provisions in the Scotland Act 1998. Section 48(5) provides that a decision of the Lord Advocate in her capacity as head of the system of criminal prosecution and investigation of deaths in Scotland must be taken by her independently of any other person. In addition, section 27(3) gives the Law Officers the unqualified right to decline to answer questions in the Scottish Parliament relating to any specific case if it might prejudice proceedings in that case or would otherwise be contrary to the public interest.

The first topic of discussion in relation to Operation Branchform is whether anyone else should have been prosecuted. Three observations can be made on that.

1. No one can properly express an opinion without sight of the evidence and it would be entirely inappropriate to make that evidence publicly available.

2. Even for this Committee to entertain the issue risks political interference with the judgment formed by prosecutors. It risks undermining the very ideal, prosecutorial independence, that the Committee is seeking to promote.
3. The Law Officers recused themselves in Operation Branchform and the prosecution decision was taken by Crown Counsel. Review of that decision, accordingly, does not shed any light on the role and function of the Lord Advocate.

The narrower question concerning the memoranda does more directly relate to the role of the Lord Advocate but there is a risk that it serves as no more than a surrogate for party political confrontation. Legitimate questions can be asked about the role of the Lord Advocate but that must be done in a measured way because otherwise there is a danger that irreparable harm is done needlessly to public confidence in the prosecution system in Scotland.

The constitution of the UK is built on the separation of powers but that is more than a matter of form concerning the manner in which institutions are structured. Institutions must afford each other due respect and co-operate constructively. We live in a democratic society and it is entirely necessary that decisions of the Lord Advocate, as much as those of the Courts, be open to public debate and, if appropriate, criticism but that discussion must be conducted responsibly. It would be wholly inappropriate for an elected politician in a public session of the Scottish Parliament to accuse any public official of corruption without cogent evidence to substantiate such a serious accusation. It was particularly irresponsible for that charge to be levelled at the Lord Advocate in relation to Operation Branchform. Few members of the public know how our system of prosecution operates but an elected politician accusing the head of that system of corruption can only risk undermining public confidence.

Communication of confidential information

The call for evidence asks if it was appropriate for the Lord Advocate to provide confidential case updates to the First Minister.

The Faculty is not privy to the circumstances in which communications take place between the Lord Advocate and the governments in Scotland and the UK but it cannot be wrong in principle for the

Lord Advocate to communicate confidential information to either government. If, for example, the Lord Advocate, in her role as prosecutor, becomes aware of a risk to public safety, it would be justifiable for her to alert the responsible Minister and, indeed, she may have a duty to do so. Equally, if the Lord Advocate becomes aware of a risk to national security, it would be necessary and appropriate for her to draw that to the attention of the responsible authority, which may include the Prime Minister.

In the case of Operation Branchform, the Lord Advocate is understood to have provided two updates in memoranda. The first was dated 20 March 2025 and informed the First Minister that Peter Murrell had, that day, appeared on petition. The second update was on 19 January 2026 and informed the First Minister that an indictment had been served. These updates do not call into question the independence of the Lord Advocate. The updates were factual. The Lord Advocate had recused herself. She was only giving the First Minister notice of decisions that had been taken and acted upon by independent Crown Counsel. The fact that the decisions had been acted upon – the petition appearance had taken place and the indictment had been served – meant that there was no risk of the memoranda leading to any political interference. In each case the memoranda gave a reminder that care had to be taken in statements that might be made because of the risk of contempt of court. That was entirely proper.

The constitutional question and conflict of interest

The important constitutional questions, with far reaching ramifications, relating to the role of the Lord Advocate are best considered in an apolitical manner free from the passing distractions of any current controversy.

Successive Law Officers have served the people of Scotland well. In the not too distant past they could be elected politicians but in recent times they are apolitical professional lawyers chosen for their legal acumen and width of experience. They command the respect of the legal profession and the judiciary. Their judgment is implicitly trusted, a trust that they continuously earn by the selfless and independent manner in which they perform their exceptionally onerous duties. No one takes on either office as a sinecure and both operate under considerable pressure. In a small jurisdiction like Scotland with a small legal profession it is inevitable that conflicts of interest can and do arise. It is innate to any practising member of the legal profession to be alert to even the risk of a conflict of interest and to recuse themselves where that exists. To fail to do so could be serious professional misconduct for

which disciplinary proceedings could be brought by the Faculty of Advocates and the Law Society, depending on whether the Law Officer is an advocate or a solicitor. One of the benefits of having two Law Officers is that one can step in if the other is conflicted. Of course, occasionally both may be conflicted. Where that arises in the criminal context the solution is for the matter to be dealt with independently by Crown Counsel (one of the team of almost eighty independent professional lawyers known as Advocates Depute employed in Crown Office who take most prosecution decisions on a day to day basis). The Faculty is not aware of any situation in which the central requirement to avoid a conflict of interest has been breached.

In addition to avoiding conflict of interest the Law Officers must guard against political interference. Sections 27(3) and 48(5) of the Scotland Act 1998 are strong statutory protections. The fact that the Law Officers are simultaneously Scottish Ministers exposes them at least to the perception of bias when any branch of the Scottish Administration is under investigation for suspected criminality but the expectation (and experience) is that the Law Officers will recuse themselves and be replaced by Crown Counsel.

Need to avoid politicisation

Maintaining that independence does not depend on the Law Officers alone. No one should seek to exert political pressure on a Law Officer in relation to any criminal prosecution. That is an accepted part of civic society in Scotland but politicians (and members of the public) need actively to maintain that personal and cultural discipline. That is why Operation Branchform gives rise to such concern. It cannot serve as a precedent encouraging politicians or the wider public to seek to promote partisan prosecutorial decisions.

Strengths and weaknesses of the system

The strength of the Law Officers is that there is an undisturbed track record of independence having been, and being consistently, maintained. It is a positive strength that few people probably know that they even exist, let alone what they do. They do not have a high personal profile and do not court publicity. They quietly get on with the job. It is beyond doubt that there have been failings in the criminal prosecution system from time to time but this is a field of human endeavour and mistakes

will be made. Mistakes will occur irrespective of the structure of the system. That is not to say that mistakes are acceptable. Quite the reverse. Any mistake merits anxious scrutiny but past mistakes do not necessarily demonstrate a flaw in the role of the Lord Advocate.

On the negative side, the legal system works on the principle that justice should not only be done but should be seen to be done. A reasonable appearance of bias, even if there is no actual bias, is as concerning as the existence of actual bias. The weakness of the fact that the Law Officers have a dual role as independent prosecutors and Scottish Ministers is that, to some at least, it can give rise to the perception of an appearance of bias. Perceptions rightly matter.

There are examples in practice where there is a conflict of interest between the role of the Law Officers and the Scottish Ministers. One example can be given. It relates to extradition, a less well-known area of legal practice but none the less it provides a practical example of a conflict of interest.

The governing legislation is a Westminster statute, the Extradition Act 2003. For category 2 territories there is a careful division of decision-making responsibility between the judiciary and the executive. The Act is primarily framed in terms of English administration, where the executive function sits with the Secretary of State. As applied to Scotland, references to the 'Secretary of State' have to be read as references to the Scottish Ministers (section 141). The process begins if the Ministers certify the validity of the request (section 70) whereupon it is sent to the Sheriff Court for the judicial phase. It is the Lord Advocate who conducts the proceedings on behalf of the requesting State (section 191). The Sheriff has certain specific questions to determine and if they are determined in favour of the request it is sent to Scottish Ministers for them to determine. The making of an order for extradition is an executive act and section 101(2) specifies those who may take the decision. They include "a member of the Scottish Executive", the original term applied to what is now the "Scottish Government" including the Lord Advocate and Solicitor General (Scotland Act 1998, section 44(1)). The order can be appealed to the High Court of Justiciary and it will be the Lord Advocate who will represent the requesting State. Scottish Ministers may appear to defend the order made by them. Whilst the Lord Advocate is conflicted by being both the agent of the requesting State and a member of the Scottish Government, which has its own decision-making function as part of the process, that conflict will be handled in the usual way by ethical walls. Again, an independent Advocate Depute will deal with the extradition proceedings.

It is significant that this example is rooted in the explicit legislative choice of Parliament. It has not come about casually as a result of custom and practice. It reflects the long-standing implicit trust placed in the Lord Advocate's ability to discharge her functions independently and, where it is necessary for her to recuse herself, implicit trust that she will do so and put in place measures that ensure the function is discharged effectively by another person on an independent basis.

A second example may be given of overlap in functions, as opposed to an overt conflict of interest. It again relates to Westminster legislation, the Proceeds of Crime Act 2002 and, more specifically, unexplained wealth orders. It is the Scottish Ministers who may apply to the Court of Session for an unexplained wealth order (section 396A). A number of options exist for further action after an order is granted and complied with. Section 396D provides that the Scottish Ministers must consider giving the Lord Advocate an opportunity to determine whether she should take any action open to her as opposed to the Scottish Ministers taking any action open to them. This was the subject of a judicial review in the Court of Session in the case of *Avaaz v Scottish Ministers* 2022 SLT 334. The Lord Advocate is the Scottish Government Minister given portfolio responsibility for unexplained wealth orders, so at a practical level the exercise under section 396D effectively involves her speaking to herself. The judgment of the Court was that the entire process might run more efficiently with the decision making resting with one person (see paragraph 51 of the judgment).

Volume of business

The two examples that have been given are intentionally taken from niche areas of the law because they may prompt a further pragmatic consideration. They illustrate the fact that legal practice is becoming ever more complex with regulatory regimes and the requirements of the substantive law constantly expanding. Concentrating oversight in one office-holder does have the benefit of administrative efficiency, saving cost to the public purse. However, there comes a point when the question has to be asked whether any one person, no matter how skilled and diligent, can handle the workload. The volume of criminal cases being prosecuted in Scotland has increased vastly since devolution and it continues to increase. In 1998 prosecutions in the High Court were managed by about fourteen part-time (two-thirds of their time) Advocates Depute. Today there are around eighty full-time Advocates Depute. There may, on that basis, be a case for saying that the Lord Advocate should be afforded the opportunity to concentrate exclusively on criminal prosecutions.

Splitting the roles

An answer to splitting the dual role of the Lord Advocate is not hard to see because, in reality, it is the two Law Officers (the Lord Advocate and the Solicitor General) upon whom the dual roles are conferred. The role could be split with the Lord Advocate being assigned the function of head of the prosecution service and the Solicitor General being the legal adviser to the Scottish Government.

Issues would arise about the allocation of specific functions between them. For example, should the Lord Advocate retain responsibility for the investigation of deaths? Since a suspicious death might be the result of a crime, there is a case for leaving that function with the Lord Advocate. On the other hand, part of that function relates to Fatal Accident Inquiries in relation to deaths in a variety of non-criminal circumstances such as deaths at work and deaths due to medical procedures. There is currently concern about the delays in the hearing of Fatal Accident Inquiries. If there is any reorganisation of functions there might be merit in setting up a standalone agency with responsibility for Fatal Accident Inquiries. Of course, that would simply lead to the need for additional personnel and the current benefit of economy through the concentration of functions in one administration would be lost.

Splitting the two roles does not eliminate all of the issues because some of them are inherent in the potential conflict between being an independent office-holder and serving the needs of a “client”. An example can be given. The Lord Advocate may make a reference under section 33 of the Scotland Act 1998 to the Supreme Court on the question whether any Bill is within the legislative competence of the Scottish Parliament. That was done in relation to the Scottish Independence Referendum Bill. The case is reported as *Lord Advocate’s Reference (No. 1)* 2023 SC (UKSC) 40. Under the Ministerial Code the Lord Advocate has responsibility to clear the legislative competence of proposed legislation. She lacked confidence that the Bill was competent and agreed to a request by the First Minister to make a reference. That is readily capable of justification with the Lord Advocate acting as independent officer. If she has doubt in the legal competence of legislation she can make a reference notwithstanding that the Bill may be of importance to the Government of which she is a member. It is more difficult to see how that situation would be handled if the roles were split and the Solicitor General simply became the legal adviser to the Scottish Government. To place the Solicitor General in the predicament of challenging the competence of legislation that is being promoted by the Government that he serves would appear to put the Solicitor General in a conflict of interest.

The Scottish Independence Referendum Bill case is an example of a delicate, complex system actually working well in practice. The system can be considered to be anomalous. The Lord Advocate's role is unique but it has worked for centuries and continues to do so subject to modifications as required from time to time. It should not be changed without good reason.

The alternatives

Consideration of change requires assessment of the alternatives. The McMillan Report surveys some of the alternative arrangements in other countries. The English system is a salutary lesson. It has an "independent" Director of Public Prosecutions but under the Prosecution of Offences Act 1985 the DPP is appointed by the Attorney General (section 2(1)), discharges his functions under the superintendence of the Attorney General (section 3(1)) and may be required to submit a report on any matter to the Attorney General (section 9(3)). The Attorney General is a political appointee and member of the UK Government. Following that model would not dispel any perception of political interference in the prosecution system. On the contrary, it would heighten it.

The Scotland Act 1998 is based on a sounder model. It ensures that the Lord Advocate is accountable to the Scottish Parliament without prejudicing the independence of criminal prosecutions. The appointment of the Lord Advocate has to be agreed by the Parliament (section 48(1)). The Lord Advocate can participate in proceedings of the Parliament (section 27(1)) but can decline to answer case-specific questions (section 27(3)). That is underpinned by the overarching requirement that decisions by the Lord Advocate as head of the system of criminal prosecution must be taken independently of any other person.

Sound public administration, no matter the structural controls that are in place, ultimately depends on the integrity of those involved. In relation to Scotland's Law Officers, the system depends on the personal integrity of the Law Officers but also the integrity of the officials who serve and advise them, and politicians and members of the public who come into contact with them. The recent example in England of a rape case in which the perpetrators were initially not sentenced to detention is again a salutary example. The Crown Prosecution Service issued a factually incorrect press statement and the Prime Minister and the Attorney General made political statements about the case. This prompted the Court of Appeal to issue this reminder about the role of the Attorney General in referring a case to the Court where a sentence is considered to be unduly lenient:

“Standing back, these events demonstrate the importance of separating the exercise of powers under section 36 of the Criminal Justice Act 1988 from politics. As we stated at [181] of our main judgment, the Attorney General exercised that power properly. But, as set out above, it is difficult to escape the conclusion that he associated the making of the References with government policy from the outset (see [6] above). The power to refer under section 36 is not vested in the government, but in the Attorney General who is to exercise it independently and not in pursuit of government agenda, however worthwhile.” (Lady Carr LCJ in *R v X* [2026] EWHC Crim 913 at §45)

Conclusion

Thankfully, there is no experience in Scotland of political interference in prosecutorial decisions. The McMillan report (§11.19) cautions that the debate concerning the dual role of the Lord Advocate should not be politicised.

The independence of the system of criminal prosecution in Scotland requires constant vigilance but the threat to independence does not derive from the dual role of the Lord Advocate. It stems from the potentially controversial nature of the decisions that any public prosecutor must take, irrespective of the narrower or broader range of any other functions that the prosecutor must discharge. Maintaining that independence is not solely the responsibility of the office-holders. It is the civic duty of all to act as required to ensure the maintenance of that independence. That extends to the Parliaments, Scottish and United Kingdom.

Public perceptions of the independence of the prosecution system matter greatly and ultimately public perception is a matter for elected politicians but at least one option is that recommended in §11.21 of the McMillan report and is to enhance the level of public awareness and understanding that the Scottish public has of the system.

The Scottish Government has commissioned a report on the dual role by Lord Boyd of Duncansby. He is a former Solicitor General and Lord Advocate who held office in a Labour Administration before and after devolution. He subsequently served as a judge in the Court of Session and High Court. His report will at least provide further material to enhance public awareness of the role of the

Lord Advocate and the practical issues arising from it. He has unparalleled experience to address the constitutional issue and to do so on an apolitical basis. There is much to be said for allowing him to carry out his task before any definitive conclusion is reached.

Whatever else is said, three points must be emphasised.

Firstly, the model in the Scotland Act 1998 should be retained. The Head of the Prosecution Service in Scotland should remain answerable to the Scottish Parliament but with express statutory safeguards to ensure that that office-holder takes prosecution decisions independently of any other person and cannot be questioned on decisions relating to a specific case if that might prejudice that case or otherwise be contrary to the public interest.

Secondly, the Head of the Prosecution Service in Scotland should not become simply an administrative or civil service head of COPFS. He or she must remain a senior, independent lawyer who, as at present and with previous holders of the role, already commands the respect of the legal profession and the judiciary. The current convention that the Lord Advocate serves for a single term of five years has a great deal to commend it. It may be that, if the role changes or any separation of the roles occurs, that convention should continue.

Thirdly, it must be recognised that the independence of the prosecution system does not depend on prosecutors alone. The public, politicians and both Parliaments must not seek to politicise the prosecution system.

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