Justice Committee

Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service

Written submission from Dr Stuart MacLennan

Introduction

The role of the Crown Office and Procurator Fiscal Service (COPFS) was once a fairly benign one, attracting little in the way of public attention. In recent years, however, the COPFS has become a magnet for criticism. Such criticism has included:

1. The collapse of the trial of Angus Sinclair (the “World’s End murder trial”);
2. The failed prosecution of Andy Coulson, the pursuance of which was questioned by Prof. James Chalmers, among others;\(^1\)
3. The decision not to prosecute Harry Clarke, the driver in the Glasgow bin lorry crash;
4. Poor conviction rates, in particular for sexual offences, and particularly following the decision in *Cadder v HMA*.

Less specific concerns include the length of time the service takes in both reaching decisions and in prosecuting cases, and the criticism of the Dean of the Faculty of Advocates, Gordon Jackson QC, that a lack of discretion on the part of Fiscals and Advocates Depute results in the pursuance of prosecutions that ought to have been dropped.\(^2\)

Earlier this year I was invited to contribute an article to the journal *Scottish Affairs*,\(^3\) in which I critiqued the management of justice policy in Scotland over the preceding nine years. This contribution included some consideration of the above-identified failings of the COPFS. In this piece, I suggested that one cause of these failings might well be the unsatisfactory role of the Lord Advocate in the modern governance of Scotland. In particular, I suggested that it may well be the case that the attempt to “de-politicise” the role of the Lord Advocate has resulted in the alienation of an important function of government from adequate Ministerial management or oversight. In short, the Lord Advocate wears too many hats. It is my intention with this evidence, therefore, to focus upon the role of the Lord Advocate, and to propose some reforms to the role for the Committee’s consideration.

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Functions of the Lord Advocate

The role of the Lord Advocate is steeped in a lengthy history of which the Committee will doubtless be aware. As head of the Scotland's system of criminal prosecutions, the Lord Advocate is in overall charge of the COPFS, which is the subject of the Committee's inquiry. Although the Crown Agent (discussed below) is the Chief Executive of the COPFS, the Lord Advocate provides the organisation's leadership and sets the overall direction of the service. In this respect, where the Crown Agent is the Chief Executive, the Lord Advocate is more akin to the Chairperson of a company.

The Prosecutorial Role of the Lord Advocate

The functions of the Lord Advocate are extensive, though most are, obviously, delegated. In addition to his constitutional functions (discussed below), these functions include:

1. The decision to prosecute crimes committed in Scotland.
2. Being consulted on the fixing of the time and location of High Court sittings. The Lord Advocate may also require the High Court to hold additional sittings.
3. The determination of the jurisdiction in which crimes are prosecuted.
4. Providing instructions to the police with respect to the reporting of crimes.
5. The admittance of charged persons to bail.
6. The decision to prosecute a minor.
7. Referring a point of law to the High Court for their opinion (a “Lord Advocate’s reference”).
8. The authorisation of a private prosecution.
10. The initiation or waiving of Fatal Accident Inquiries.
11. Conducting extradition proceedings.

While some of these tasks are perfunctory in nature, others resemble policymaking and high-level decision-making.

The Constitutional Role of the Lord Advocate

In addition to his functions as the head of Scotland's system of prosecution, the Lord Advocate is also the Scottish Government’s lawyer. As the Lord Advocate is de jure a member of the Scottish Government, the relationship between the Lord Advocate and the Scottish Government is much more closely akin to that of an in-house counsel than that of a lawyer and client.

The Lord Advocate is, along with the Advocate General, responsible for referring to the Supreme Court any question as to whether or not a Bill is within the legislative competence of the Scottish Parliament prior to that Bill receiving Royal Assent. The Lord Advocate may also defend such an action brought by the Advocate General. The Lord Advocate may also attend in his or her role as the Scottish Government's principal legal adviser.  

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The Crown Agent

The Crown Agent is the civil service head of the legal staff in the COPFS and legal advisor to the Lord Advocate on prosecution matters. The Crown Agent serves as Chief Executive to the COPFS and is therefore in charge of the day-to-day running of the service.

Holding the Lord Advocate to Account

Accountability to the Scottish Parliament

The Scottish Parliament has 129 members, which has remained constant since the Parliament’s inception in 1999. There is no provision for appointing or co-opting members to the Parliament. Consequently, the Lord Advocate may or may not be a Member of the Scottish Parliament. Since the transfer of the office of Lord Advocate to the Scottish Government and Parliament the office has never been occupied by a member of the Scottish Parliament.\(^5\) The Lord Advocate at the inception of devolution, Lord Hardie, was appointed in 1997 by the UK Government before moving with his office to the new Scottish Government in 1999. Lord Hardie’s successor, Colin Boyd, was elevated to the peerage six years after taking up the post of Lord Advocate. No subsequent Lord Advocate has been a member of any legislature.

The Scotland Act 1998 permits the Lord Advocate to participate in the proceedings of Parliament, but not vote. Rule 4.5 of the Scottish Parliament Standing Orders provides for the extent to which the Lord Advocate can participate.

Accountability to Ministers

Government Ministers are not only accountable to Parliament, through their collective accountability as ministers; they are also accountable to each other. Where ministers are required to stand-by not only the decisions that have taken individually, but also those of all their colleagues, those ministers naturally have more than a passing interest in ensuring that those decisions of their colleagues are sound. This is one of the key purposes of holding cabinet meetings. In this respect, however, the role of the Lord Advocate is unique.

The Lord Advocate is bound by collective responsibility, except insofar as the Lord Advocates reserved functions are concerned, as head of the systems of criminal prosecution and investigation of deaths in Scotland. This produces the somewhat anomalous situation whereby some decisions the Lord Advocate takes are, effectively, decisions of the Scottish Government, while the Lord Advocate takes other decisions alone.

\(^5\) The more recently created office of Counsel General for Wales, which performs many of the constitutional functions of the Lord Advocate but has no prosecutorial functions has, since its inception, been held by a Member of the Welsh Assembly.
The Lord Advocate as a Political Office

Though the Law Officers are seldom overtly political offices, their appointment is usually a political one. Until 1979 it was common for the Lord Advocate to be a Member of the House of Commons. The Lord Advocate would cease to hold office when the Government that appointed him left office and a new Lord Advocate reflecting the political hue of the new Government was appointed.

This, however, changed in 2007. Lord Boyd’s successor as Lord Advocate, Elish Angiolini, was appointed at the tail end of the last Labour Executive (as it then was) in January 2007. Angiolini was, undoubtedly, a less overtly political appointment than any of her predecessors. Confirming the newly de-politicised status of the office, Angiolini was retained as Lord Advocate by the new SNP Executive in May 2007, although she would no longer attend meetings of the Scottish Cabinet as of right.

It is obviously desirable that prosecution decisions are not political decisions, and it therefore makes sense that such decisions should not be taken by a political actor. However, it remains the case that the COPFS is a large government agency performing one of the essential functions of the state. To that extent, it is therefore desirable that such a service should be subject to political oversight. Where there are failings in the service, Ministers, Parliament, and the public should be able to identify a responsible political figure to take the blame.6

Yet insofar as the Lord Advocate exercises that executive function, he is not subject to oversight by an individual Government minister, nor is he subject to the inevitable scrutiny by his colleagues through their all being bound to each other.

It is submitted that it was never the intention that the Lord Advocate should be an entirely non-political role. Given that the Scottish Parliament has only 129 members and it is not possible to co-opt members, it was always highly likely that the number of members who could hold office as law officers would be extremely limited.7 It was logical to provide that the law officers could be drawn from outwith the Parliament’s membership.

However, the fact that the law officers can and do participate in the business of the Parliament that provides the most conclusive evidence of the political nature of the Lord Advocate’s role. If the Lord Advocate was intended to be an apolitical appointment to head an arm’s length government body or provide advice to the cabinet he would never have needed to participate in the proceedings of the Parliament. The role of the Lord Advocate is to provide Ministerial oversight of, inter alia, the COPFS, and to answer in Parliament in his role as overseer.

While one solution would be to bring the Lord Advocate back into the political fold, and appoint a Lord Advocate of a more political hue. However, this does nothing to address the rightly held concern about decisions as to whether or not to prosecute in

6 Of course, the same should also be said of successes, although members of the Committee will appreciate that such instances are significantly more rare.
7 At present, only one government MSP, Roseanna Cunningham, is an Advocate.
Scotland being taken by a politician, and not an independent figure. In this respect, it is arguable that England and Wales have found a more suitable balance.

**Comparison with the Attorney General of England and Wales**

The role of the Lord Advocate differs quite considerably from that of his counterpart in England and Wales, the Attorney General. While the Attorney General of England and Wales is the UK Government’s principal legal advisor and representative (with the Advocate General for Scotland performing a similar role with respect to Scotland), the Attorney General's role with respect to the prosecution of criminal offences is somewhat more ambiguous. While it is clear that the Lord Advocate is the head of Scotland’s system of criminal prosecution, it is decidedly unclear who, in fact, is the head of the systems of criminal prosecution in England and Wales.

In England and Wales, the Director of Public Prosecutions (DPP) heads up the Crown Prosecution Service, and has overall responsibility for prosecutions and prosecution policy in England and Wales, however, there exist one fairly substantial caveat. The Prosecution of Offences Act 1879, which created the office of DPP, provides that

> It shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney General, to institute [...] such criminal proceedings [...] as may be [...] prescribed by regulations [...] or may be directed in a special case by the Attorney General.

The current act, the Prosecution of Offences Act 1985 s.3(1) provides that

> The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.

Although the 1985 removed the specific power of the Attorney General to direct the DPP, the DPP nonetheless remains under the Attorney General’s superintendence. The former DPP of England and Wales described this relationship of superintendence as one in which the DPP “must have regard to the overall prosecution policy which [the Attorney General] pursues.” It is unlikely, as Joshua Rozenberg intimates, that a DPP would ever proceed with a prosecution where the Attorney General explicitly wished him not to, and vice versa. Nonetheless, the role of the Attorney General is, as both a matter of fact and as a matter of law, much more detached from England and Wales’ system of criminal prosecution than his Scottish counterpart.

Despite the detachment that the Attorney General has from prosecutions in England and Wales, his continuous superintendence remains the subject of some criticism. In 2007, the House of Commons’ constitutional Affairs Select Committee concluded that

> we accept that there has to be some ministerial policy direction for the prosecution services, the lack of transparency in the Attorney General’s role in decision making in prosecutorial decisions is unsatisfactory. We

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need to consider whether responsibility for both types of function should remain the responsibility of the Attorney General.\footnote{House of Commons Constitutional Affairs Committee, ‘Constitutional Role of the Attorney General’ (TSO, 2007) HC 306.}

The other functions of the Attorney General include providing legal advice to the UK Government and representing the UK Government in Court (at least one recent Attorney General has made a habit of personally litigating actions on behalf of the Government); superintendence of the Serious Fraud Office, HM CPS Inspectorate, and the Government Legal Service; answering questions in Parliament on behalf of the organisations he superintends and his own office; providing consents to prosecute in certain limited cases; and reviewing unduly lenient sentences. This division reserves high-level decision making about prosecutions to the Attorney General, while removing him from the decision to prosecute in almost all individual cases. The Attorney General is responsible for overseeing England and Wales’ system of prosecutions, but not running it; and exercises his constitutional role as the UK Government’s principal legal advisor and advocate. However, while it is arguable that the role of the Attorney General of England and Wales is more satisfactory than that of his Scottish counterpart, there remain some lingering concerns.

Conflicts of Interest

The Lord Advocate, like the Attorney General, is the guardian of the public interest. However, both officers are also the government’s legal advisors and advocates. As such, it may well be the case that the public interest and the government’s interest do not always align.

The “cash for honours” scandal in the mid-2000s drew attention to the conflict of interest that could potentially arise where members of the Government (of which the Attorney General is also a member) are under criminal investigation. A conflict of interest surely arises where a decision has to be taken, under the superintendence of a member of the Government, as to whether or not to prosecute another member of that same Government. The then-Attorney General Lord Goldsmith sought to resolve this conflict by way of Chinese walls, by recusing himself from any involvement in the decision and agreeing to publish in full the advice and decision of the DPP as to whether or not to prosecute. If the Attorney General of England and Wales can find himself in such a conflicted position despite his relative detachment from criminal prosecutions, the potential for such a conflict arising where the Lord Advocate is concerned is manifold.

Options for Reform

s.29 of the Scotland Act 1998 provides that it is not within the legislative competence of the Scottish Parliament to ‘remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.’ This would, therefore, preclude the adoption of a system that is an exact mirror of England and Wales, where the Director of Public Prosecutions is the head of their respective systems of criminal prosecutions. However, this does not necessarily mean that the Lord Advocate must be responsible for the day-to-day management
and administration of the COPFS. It is, arguably, entirely possible for Scotland to adopt a system not entirely dissimilar to that of England and Wales.

My own favoured option is, therefore, be that the role of the Crown Agent is enhanced to one not dissimilar from that of the Director of Public Prosecutions in England and Wales (with the appointment of a separate Chief Executive of the COPFS), with the Lord Advocate providing Ministerial-level oversight of the service while remaining its titular head. This would mean that the primary function of the Lord Advocate is as a constitutional office, and not a prosecutorial one. The Crown Agent would no longer be the Lord Advocate’s principal advisor on prosecutions, but would instead be the primary decision maker, subject only to intervention by the Lord Advocate.

A further option might be to seek the legislative competence to remove the Lord Advocate as the head of Scotland’s system of criminal prosecutions and replace the office of that with Director of Public Prosecutions. This would require an order to be made by the Secretary of State under s.30 of the Scotland Act 1998. It is arguable that the reservation has little logical basis in the first place, and that devolution in Scotland is old enough and mature enough for the Parliament to take responsibility for a matter such as this.

A political, rather than legal, solution might be to simply subject to the Lord Advocate to the political oversight of another minister (most likely the Cabinet Secretary for Justice). This solution has the advantage of not requiring legislation. Rather, it would simply require a declaration by the Scottish Government that a minister will bear political responsibility for the COPFS. This solution would probably be somewhat messy, however, with a minister taking responsibility for something that they have no power to control.

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