

“INDEPENDENCE WITH ACCOUNTABILITY”

Ladies and Gentlemen, I am grateful to Sheriff Matthews for the invitation to speak to you this afternoon.

Colin Boyd QC
The Lord Advocate

Introduction

It seems entirely appropriate that this year’s colloque takes place within the Scottish Parliament building, here at Holyrood. The Scotland Act of 1998 constituted the most significant constitutional reform in this country for over 300 years. It has had a major impact on the political and legal systems of Scotland – most notably in the creation of the Scottish Parliament and the establishment of the Scottish Administration for the devolved Government.

In a very obvious way, devolution has brought government closer to home for the people of Scotland. This has naturally resulted in unprecedented levels of public scrutiny. Devolution brings an enhanced public understanding of the institutions of State and a corresponding need to explain ourselves better, and to listen well. The need for greater transparency from all decision makers within the Scottish Executive is now clear.

The public are also now more willing than ever to challenge those of us in the criminal justice system. People no longer feel inhibited from questioning the assumptions which we in the legal system may have founded on as unchanging and unchangeable. These changes in our political and cultural climate are to be welcomed.

Another consequence of devolution is the fundamental changes it has introduced to the constitutional framework in which the Crown Office and Procurator Fiscal Service, the sole prosecuting body in this country, operates. My position, as head of the system of prosecution in Scotland, has changed, as has the prosecution service itself.

Lord Advocate – Procurator Fiscal

The Crown Office and Procurator Fiscal Service is Scotland's independent prosecution service. As Lord Advocate, I am the chief prosecutor for Scotland responsible to the Scottish Parliament for the system of criminal prosecution and the investigation of deaths in this country.

At a local level, I am represented by Procurators Fiscal, local prosecutors acting on my behalf. I approve all appointments of Procurators Fiscal. Together with their assistants, usually known as deputes, there are 450 local prosecutors in Scotland. I also approve the appointment of Crown Counsel, or Advocate Deputes, who prosecute in my name in the High Court, our highest court of first instance and in the Court of Appeal. Crown Counsel, of whom there are currently 25, give instructions to Procurators Fiscal in the most serious cases.

In Scotland, we have a system of public, rather than private prosecution. While there is a residual right to apply to the High Court to bring a private prosecution, such cases are very rarely allowed to proceed (there were only two private prosecutions in the 20th Century).

The concept of public prosecution in Scotland was established in the 15th Century. Before that, responsibility for initiating criminal proceedings lay with victims or their family. The philosophy of the criminal court at that time was to provide victims with a remedy for the injury or loss suffered as a result of the alleged crime.

When the obvious defects of that system began to emerge – and in particular the ability of accused persons with money or influence to buy or intimidate their way out of prosecution - the concept of public prosecution began to emerge in the Justiciary Court, which later became known as the High Court. From the 15th Century an advocate was occasionally employed to represent the Crown in civil cases and, as public prosecution became more common, the King's Advocate, or Lord Advocate as he later became known, began to engage in pursuing criminal cases.

In 1587, an Act of the old Scottish Parliament formally recognised the status of the Lord Advocate as the public prosecutor in the Justiciary Court, giving him, for the first time, the statutory right to prosecute cases regardless of the wishes of the victim or family and over time private prosecutions became less common. A similar process developed in the local courts – the Sheriff Courts - and a coherent system of public prosecution began to evolve.

Up until the 16th Century, local Sheriffs had various roles. Scotland was divided into districts known as shires, and the Sheriff was the officer appointed by the King to preside over that shire. One of the many duties a Sheriff had was to hold courts with both civil and criminal jurisdiction

In the criminal Sheriff Court, the Sheriff acted not only as the judge, but also investigator and prosecutor – an approach which was no doubt economical, but might not meet modern standards of independence. Eventually, it was recognised as being inappropriate, not to say somewhat exhausting, for all these various roles to be carried out by one individual.

At this same time the benefits of the role of the Lord Advocate as the prosecutor in the High Court were becoming evident and this prompted the Sheriff to delegate certain prosecutorial duties to the Procurator Fiscal. As a result, the function of Procurator Fiscal quickly evolved and his status as public prosecutor was officially acknowledged in the Criminal Procedure Act of 1700.

During the 18th century, the power of the Lord Advocate began to grow and he assumed a degree of control over Procurators Fiscal. He instructed them in various matters relating to the prosecution of crime and ordered them to report all suspicious, sudden or accidental deaths. But the Procurator Fiscal still remained an officer of the Sheriff.

While, increasingly in practice, Fiscals were coming under the command of the Lord Advocate, the Sheriff continued to be responsible for their selection, appointment and dismissal until 1907. The Sheriff Courts (Scotland) Act of that year transferred the right to appoint Procurators Fiscal from the Sheriff to the Lord Advocate. This approach was much favoured as it granted the prosecutor a degree of independence from the court.

The Sheriff Courts and Legal Officers (Scotland) Act of 1927 constitutes the foundation on which the modern Crown Office and Procurator Fiscal Service is based. The Act conferred further powers upon the Lord Advocate, including the authority to remove, as well as appoint, Procurators Fiscal (although removal was, and is, subject to a judicial enquiry process).

To this day, all Procurators Fiscal remain directly accountable to the Lord Advocate on legal matters, holding a commission to act as my representatives in their districts.

French/Scots criminal justice systems

The system of public prosecution in which they act is an ancient and integral part of the fabric of this country. The right of the individual to choose to prosecute has effectively been removed over the years and that right has been vested in the public prosecutor on behalf of the wider public interest. It is a system which demands a huge investment of public trust.

Prosecution in the public interest must be conducted in a manner which attracts public confidence. As a result, we demand much from our prosecutors in this country. They must possess fundamental qualities; competence in law, evidence and advocacy, as well as honesty and integrity and a strong sense of fairness and justice.

Although both derive from Roman Codes, the French and Scottish Criminal Justice Systems differ when it comes to matters of criminal procedure. While France continues to draw on the civil law tradition of inquisitorial justice, Scotland preferred to borrow the adversarial approach of our English neighbours.

Thus our prosecutors must operate in an adversarial system of law which does not rely upon the interrogative power of the judge, rather on the diligence of their own investigation and skill of their advocacy.

The French investigating magistrate continues to play an active role in the most serious and complex cases. Independent from any political power, and the prosecution for that matter, his or her aim is to elicit all relevant information, both incriminatory and exculpatory. If the magistrate is satisfied there is a valid case, the matter will proceed to a tribunal or court where the proceedings pitch the prosecution and defence against each other in a manner more in keeping with the adversarial approach taken in this country.

In Scotland, the precognition process carried out by the Crown in serious cases has, in itself, certain inquisitorial qualities. Consequent to, and separate from, the police investigation, this thorough investigation by prosecutors supports an independent assessment of not only sufficiency of evidence but strengths and weaknesses of the Crown case.

Lord Advocate - Advocate Deputes

The most serious and complex cases in this country are prosecuted in the High Court by Crown Counsel. It has often been said that the independence of the Lord Advocate and indeed the system as a whole is underwritten by the involvement of Crown Counsel in the system of Scottish prosecution.

Crown Counsel is the collective and alternative term for Advocate Deputes, the independent practitioners appointed personally by the Lord Advocate to act as his Deputes in serious cases. They are responsible for deciding and recording what proceedings, if any, should be taken in relation to the most serious cases (those raised by way of what we call solemn procedure – that is prosecuted before a Jury), which are reported to Crown Office by Procurators Fiscal. Crown Counsel provide advice and instruction to Procurators Fiscal on general or particular issues. They act as an independent check of the decision making of Procurators Fiscal at district and local level. They also conduct all prosecutions in the High Court of Justiciary and represent the Crown in the Appeal Court.

They are part of a long tradition of service – deputies to the Lord Advocate have been appointed for many centuries. Traditionally, all Advocate Deputes were chosen from members of the Scottish Bar, or Faculty of Advocates, who had exclusive rights of audience before the Supreme Courts. They were self employed independent practitioners with a broad range of legal knowledge and the Scottish public prosecution system has benefited from that independent involvement.

Nowadays, our High Court prosecutors are a mixed economy. Legislation in 1990 allowed other lawyers – solicitors – also to appear in the higher courts if they satisfied certain requirements, including examination and practical testing. Procurators Fiscal are typically solicitors, although some are advocates. As a result of the 1990 reform, it became possible for solicitors, including full time career prosecutors in the Crown Office and Procurator Fiscal

Service, to be appointed as Advocate Deputes on the same basis as members of the Faculty of Advocates.

In a consultation paper on the appointment and role of Advocate Deputes in 2002, I recognised and appreciated the concerns that such appointments could compromise the independence of the system of prosecution in Scotland. Of course, a solicitor in partnership or employment in a firm which carries out criminal defence work would have a potential conflict of interest in any case which an accused was, or had been, represented by that individual's firm. That is why appropriate arrangements have been put in place to ensure this cannot happen.

Similarly, some have argued that solicitor advocates employed as civil servants within the Crown Office and Procurator Fiscal Service may lack the institutional independence traditionally enjoyed by the Faculty of Advocates. My response to that is simple. Members of the Crown Office and Procurator Fiscal Service are trained to undertake prosecution independently in the public interest. They are subject both to Crown Office and Civil Service codes of conduct. The vast majority of cases in this country (including serious matters tried before a jury on indictment in the Sheriff Court) are prosecuted by members of the Crown Office and Procurator Fiscal Service without concern over their integrity and impartiality.

As an additional safeguard, full time Advocate Deputes appointed from within the Crown Office and Procurator Fiscal Service are seconded to that position, rather than employed. They are placed completely outwith the management and appraisal system of the Department for the period of their tenure.

In any event, the proof has been in the implementation: the current team of advocate deputes includes members drawn from the Faculty of Advocates, the private solicitors' profession and from full time prosecutors in the prosecution service. All adhere to the same standard of independence, while they hold my appointment.

We are fortunate to have in our prosecution service, a wealth of talent in our permanent staff, and team of Crown Counsel. We get it right in the vast majority of cases under strenuous rules of evidence and extremely tight custody time limits. That said, there is a constant need to

modernise our service to ensure it meets the needs of our society and secures the confidence of our communities.

Lord Advocate - Government

Some who have observed the media over the last 12 months may be forgiven for thinking that my job is onerous and thankless. It is true to say that my role is perhaps as important and demanding as it has ever been. That said, it is also a post I have enjoyed immensely.

The Scottish Law Officers are the Lord Advocate and the Solicitor General for Scotland. We are appointed by the Queen on the recommendation of the First Minister of the Scottish Parliament. The First Minister, in turn, must have the agreement of the Scottish Parliament in making any recommendation as to our appointment. The appointment continues until there is a change of Executive, a resignation or removal from office by the Queen. History tells us that this is not a job for life.

The Ministerial role of Lord Advocate post devolution

In addition to having duties as the head of the system of public prosecution in Scotland, the role of Lord Advocate also carries ministerial responsibilities for certain legal functions and in particular for legal advice to the Scottish Executive.

Traditionally, the Lord Advocate was a Minister of the Crown and member of the United Kingdom Government, accountable to the Westminster Parliament for the conduct of public prosecution in Scotland. As such, Law Officers have participated in Westminster cabinet sub-committees and taken ministerial responsibility for the passage of legislation through Parliament.

The Scotland Act 1998 transferred the ministerial offices of Lord Advocate and Solicitor General for Scotland from the UK Government to the Scottish Executive.

Section 44 of the Act provides that the Scottish Executive shall be comprised of a First Minister, such ministers as he or she appoints, plus the Lord Advocate and Solicitor General for Scotland.

Where the Law Officers are not elected Members of the Scottish Parliament – as is the case with the current Solicitor General, Elish Angiolini and me – we are entitled to attend and participate in debates in the Parliament, but not to vote.

As Lord Advocate I attend the Scottish Cabinet to advise Cabinet on legal matters and represent my departmental interest as the senior Law Officer.

Earlier this year, I had the great honour of being conferred a life peerage in the House of Lords. I see this appointment as a natural extension of my duties as Lord Advocate, and a development which will allow me to represent Scotland's interests at home and at UK level.

Recent criticisms of Lord Advocate's role

I am aware that this recent appointment, as well as my position with within the Scottish Executive, has attracted a degree of recent criticism. Some say that my role has become increasingly politicised and others suggest that my positions within the Scottish Executive and House of Lords are incompatible with being the head of the system of prosecution in this country. It has even been suggested that one of the most fundamental principles of prosecution in this country, that prosecution decisions are taken independently of Government, is under threat.

I am happy to reaffirm not only the independence of prosecution decisions from any form of Governmental intervention, but also my own ability to act as Lord Advocate, independently of any person.

Independence– pre devolution

The principle that prosecution decisions should be taken independently of Government is both fundamental and long-standing. In the whole modern period, the Lord Advocate has jealously guarded the independence of his role as public prosecutor. Prosecutors are accountable for their decisions to the Lord Advocate only.

History shows us that attempts have been made over the years to interfere with this independence. In 1959, there was a motion before the United Kingdom House of Commons

that a Select Committee should inquire into a specific case and the circumstances in which it had been decided that no criminal proceedings were appropriate. As is often the case with incidents which attract great political or constitutional interest, the actual case was a fairly minor one of alleged assault by the police on a young boy. Harold McMillan, the Prime Minister of the day, explained the position of the Lord Advocate, and public prosecutors in general, to the House of Commons.

He made it clear that decisions as to whether any citizen should be prosecuted, or any prosecution discontinued, should be for the prosecuting authorities to determine on the merits of the case, without political or other pressure. He said it would be a “most dangerous deviation from this sound principle if a prosecution were to be instituted or abandoned as a result of political pressure or popular clamour”.

In the 1961 case of *McBain v Crichton*, (which was a failed private prosecution arising from the belated publication of D H Lawrence’s “Lady Chatterley’s Lover”) the Lord Justice General of Scotland stated that it would also be inappropriate for the courts to examine the reasons which have affected the Lord Advocate in deciding how to exercise his discretion. He described as “absurd”, the notion that the Court could then go on to review that soundness. Of course, I pass over the fact that “Lady Chatterley’s Lover” had been published decades earlier in France without any legal difficulty.

Independence from government – post devolution

So what has changed in more recent times? Devolution, more than any other single factor, has been the catalyst for renewed debate over prosecutorial independence.

The debate may have resurfaced in recent months but, in truth, discussions over the positions of the Lord Advocate and Solicitor General in relation to the government of Scotland, the Scottish Executive, go back several years. Following, the ‘yes’ vote in favour of a devolved Scottish government in 1997, the Scotland Bill made its way through the Houses of Parliament.

The position of the Scottish Law Officers was much discussed, particularly in the House of Lords. My three immediate predecessors, Lord Rodger of Earlsferry, Lord Mackay of Drumadoon and Lord Hardie, debated the matter with predictable vigour.

Lord Mackay, in arguing for the absolute separation of the Law Officers from Government, was of the view that they should not be members of the Scottish Executive. In favour of this proposition, he put forward a number of reasons. One of these was his belief that it would be inappropriate for the Lord Advocate and Solicitor General to be members of the Scottish Executive while the Lord Advocate continued to discharge the role of independent public prosecutor.

Lord Hardie, the Lord Advocate at the time, stressed the importance of drafting legislation which would strike the right balance between the independence of the Lord Advocate in exercising his prosecutorial functions (which both the courts and Parliament recognise) and his **accountability**.

In truth, the Scotland Act actually contains a number of provisions designed to safeguard the independence of the Lord Advocate in discharging prosecutorial duties in the public interest. The tenure of the post is protected by section 29(2)(e) of the Act which states that it is outside the legislative competence of the Scottish Parliament to remove the Lord Advocate from being head of the systems of criminal prosecution and investigation of deaths in Scotland.

Of equal importance is section 48(5) of the Act. This section expressly confirms that the historical independence and discretion of the Lord Advocate will continue after devolution. It reads

“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.”

Together, these provisions have put in place explicit and robust protection of the Lord Advocate’s traditional independence.

This independence of decision-making also means that the Lord Advocate, as head of the prosecution system, is exempt from the principle of collective responsibility which applies to other ministers of the Executive. Section 52 of the Act provides that the functions conferred on the Scottish Ministers will be capable of being exercised by any of them, and that acts and omissions by ministers shall be treated accordingly. However, within that section, an

exception is made in relation to the Lord Advocate's duties as head of the prosecution system in Scotland.

As head of the system of public prosecution in Scotland, the Lord Advocate must exercise his discretion independently of any other person, and that includes other ministers of the Executive. The functions must be discharged by the office-holder alone and, as a result, the Lord Advocate's actions may not be ascribed to the Executive as a whole.

The simple truth is that the Law Officers have always exercised executive, administrative and policy functions, such as offering legal advice to the Government of the day. There is no inconsistency in the Lord Advocate's role as independent prosecutor and his role in performing certain executive functions. Indeed, this role post-devolution is much more politically limited than it was pre-devolution, when my predecessor had an even wider policy portfolio responsibility. The Scotland Act allows the retained functions to be exercised in a transparent fashion, while safeguarding the Lord Advocate's independence in a number of provisions.

As Lord Hardie had hoped, the Act ensures that, as a member of the Scottish Executive, the Lord Advocate is accountable to the Scottish Parliament, while ensuring that this accountability does not impact upon the independence of the post. Independence is not simply confined to independence from the Executive but also from other influences including MSPs and the Parliament.

The Parliament has the power to call any person before it to give evidence and to produce documents. However, that power is restricted in relation to the processing of prosecution cases. The intention is that the Law Officers and the Crown Office and Procurator Fiscal Service should be accountable to the Scottish Parliament for their decisions, but cannot be compelled to provide specific documents or answer questions about particular individual criminal cases if to do so might prejudice proceedings in the case or would otherwise be contrary to the public interest.

Accordingly, section 27(2) of the Act provides that the Law Officers may decline to answer questions or to produce documents relating to the operation of the system of criminal prosecution in any particular case if they consider that to do so might be prejudicial to

criminal proceedings in that case or otherwise contrary to the public interest, and section 23(10) confers the same right upon Procurators Fiscal where the Lord Advocate takes a similar same view.

Those exceptions aside, the Lord Advocate is accountable to the Scottish Parliament.

Undoubtedly, devolution has changed the constitutional position of the Lord Advocate, but the traditional powers, privileges and duties of the office have not been eroded as a result. On the contrary, it has crystallised many of them from historical convention to statute; and reinforced them.

Further accountability – ECHR

A particular feature of the Scotland Act was to incorporate European Convention Rights into Scots Law. This has served further to increase the accountability of the Law Officers and Crown office and Procurator Fiscal Service.

Despite the various safeguards to Lord Advocate's independence enshrined in the Scotland Act, I am not immune from challenge on the basis of incompatibility with Convention rights. The Scotland Act specifically provides that a member of the Scottish Executive has no power to act in a way that is incompatible with any of the Convention rights: such an act is *ultra vires* and therefore susceptible to challenge.

Therefore, the Lord Advocate's very membership of the Scottish Executive ensures his compliance with the Convention rights.

Indeed, the Scotland Act has had the effect of creating additional significant Convention rights-based hurdles for prosecutors in Scotland which go further than those created under the Human Rights Act 1998, which generally directly imported the Convention Rights into United Kingdom law.

Being more open and accountable

Protecting the independence of prosecutorial decisions need not preclude public prosecutors being more open and accountable. I strongly believe that if we are confident of the quality of our decision-making, we should be prepared to account for our decisions to those whose lives have been affected.

The independence of the prosecutor is crucial, but public confidence in the prosecution is also a cornerstone of any democracy. The decision to prosecute or indeed to take no criminal proceedings must involve the exercise of prosecutorial judgement and discretion. Of course, the exercise of such discretion must be principled and the existence of rules is essential to the prosecutor's accountability. In Scotland, these rules are contained in a Prosecution Code which is published on our website.

Knowing how we set about our business helps the public achieve a greater understanding of our work and makes the organisation more transparent.

Historically, the Crown's reasons for not proceeding with a prosecution were confidential and would not be divulged to any third party. So that I can exercise my prosecution functions free from political pressure and other outside influences I cannot be compelled to disclose the reasons for the decision not to proceed. This historical policy of non-disclosure was further underpinned by several public interest considerations.

However, in recognition of the difficulty that victims, witnesses and next of kin often had understanding the reasoning behind this policy I instructed a Departmental review, which resulted in a change in our policy in February last year.

As part of the modernisation of the service, victims and next of kin are now routinely able to request and receive an explanation for decisions not to proceed with a prosecution, to discontinue proceedings, to substantially change a charge or to accept a plea to a reduced charge. I believe this policy gives greater confidence to the victims of crime and to the wider public in the work of our prosecution service.

A natural extension of this commitment towards open and transparent service delivery is our publication scheme, established in anticipation of the Freedom of Information (Scotland) Act 2002. This Act fully came into force on 1 January 2005 – it aims to increase openness and

accountability in government and across the Scottish public sector by ensuring that people have the right to access information held by Scottish public authorities.

The Act promotes greater openness and accountability in two ways. Firstly, it introduces a legal right for private individuals to access information held by Scottish public authorities. Secondly, it promotes proactive release of information through publication schemes. Since 1 June 2004 the Crown Office and Procurator Fiscal Service has had a publication scheme which describes what sort of information we do and will make public. Where information is not proactively made available through the scheme, the Department responds to specific requests for information.

Conclusion

There will always be a natural tension between the vital independence of the public prosecution service and its accountability. The two concepts sometimes do not sit easily with each other. However, it would be dangerous in any democracy to regard them as mutually exclusive.

Today's prosecution service must be open, accountable and transparent while retaining the ability to resist political whim, media comment and public pressure in its decision-making.

Any prosecution must truly reflect the public interest in a considered, professional fashion. Decisions must be taken on the basis of an independent assessment of the quality of evidence and credibility of witnesses. Decisions made on the basis of expediency or to appease public clamour are unlikely to satisfy these criteria.

In any democracy, the prosecuting authority must be allowed to make decisions independently from others in the executive. A system of prosecution which does not have this freedom can rapidly become an instrument of oppression or of repression.

We in Scotland are proud of our prosecution service. It has evolved over the centuries into an organisation which balances independence with increasing accountability. I am proud of the progress we have made, particularly in recent years, but I see no reason for complacency. We must continue to examine and criticise what we do and how we do it, in order to meet the needs of the public in the 21st Century.