

## Written Submission from the Lord Advocate, 25 February 2021

The Committee has invited the Crown Agent and myself to give evidence next week; and I look forward to attending to assist the Committee further with its work. The scope of that evidence session is yet to be confirmed. I write at this stage to correct certain inaccuracies contained in the "Final Submission" which Mr Salmond has lodged with the Committee.

Mr Salmond makes sweeping allegations to the effect that Crown Office is unfit for purpose, and that there has been a "complete breakdown of the necessary barriers which should exist between government, political party and indeed the prosecution authorities in any country which abides by the rule of law". Those allegations are wholly unfounded.

The system of criminal prosecution and investigation of deaths, of which, as Lord Advocate, I am head, encompasses the work of the Crown Office and Procurator Fiscal Service ("COPFS"). The work of the Service is undertaken by legally qualified professional prosecutors and the staff who support them. In all, COPFS has over 1800 staff.

The professional prosecutors who fulfil the functions of criminal prosecution and investigation of deaths include Crown Counsel, Procurators Fiscal and Procurators Fiscal Depute. They exercise their functions professionally and objectively, on the basis of the law and the evidence and in the public interest. COPFS operates independently of Government – of both the Scottish Government and the UK Government.

As Lord Advocate, I am constitutionally responsible for the work of COPFS, and accountable in that regard to the Scottish Parliament. As I explained in my letter to you of [4 August 2020](#), I exercise my functions as head of the system of criminal prosecution and investigation of deaths independently of any other person. That was the long-established position before devolution, when the Lord Advocate was a member of the UK Government, and it is now enshrined in section 48(5) of the Scotland Act 1998. The independence of prosecutorial decision-making is, has been, and continues to be, zealously guarded by Law Officers and by COPFS itself; and is fundamental to the rule of law in Scotland.

Most prosecutorial decision-making – including in many of the most serious and high profile cases – is, in practice, undertaken by professional prosecutors without the personal involvement of the Law Officers. Sometimes specific arrangements are put in place to ensure that decisions in relation to a particular case or type of case are taken without any reference to the Law Officers. That was the position in relation to the prosecution of Mr Salmond. Accordingly, as the Committee has been advised, neither the Solicitor General for Scotland nor I took any part in the decision-making in relation to that case. As is routinely the position in many serious and sensitive cases, that prosecution was entirely in the hands of senior professional prosecutors.

Any suggestion that prosecutorial decisions in that case were susceptible to political influence would not only be unfounded, but would be a serious slur on the integrity of the professional prosecutors involved, who, as part of their professional responsibilities, routinely take difficult and sometimes unpopular decisions, always independently, in the public interest.

I also reject the criticisms of the steps which the Crown has taken in respect of the evidence to the Committee. All decisions, in relation to these matters have been taken by senior professional prosecutors, exercising their professional responsibilities independently and with a view to the proper application of legal rules and restrictions which are designed to protect the integrity of the administration of justice.

The Committee is well aware of the legal restrictions which apply, but, in the interests of wider clarity, it may be helpful if I set them out here.

First, the High Court of Justiciary pronounced an order protecting the anonymity of the complainers in the criminal trial. That order was made for good and important reasons. Its breach would be a contempt of court. In any case where the Crown apprehends that a publication may be a contempt of court, it considers whether it should take any action in that regard. It may communicate its concerns to the publisher of the publication in question. It is, though, a matter for the publisher to decide, having taken its own legal advice, what it can lawfully publish.

Ultimately, only the Court can determine whether any particular publication was a contempt of court. That was the basis for the Crown's interactions with the Parliamentary authorities about the publication of Mr Salmond's written submissions. Those interactions, which as I advised Parliament on 24 February were undertaken without reference to the Law Officers, were directed to ensuring compliance with the Court's order. The decision as to what should or should not be published was ultimately one for the Parliamentary authorities.

Secondly, section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 prevents an accused person from using material disclosed by prosecutors to the accused's solicitors for any purposes other than the criminal proceedings in relation to which the information was disclosed or an appeal. Section 162 applies where a prosecutor discloses information to an accused person's solicitors in terms of the prosecutor's duty of disclosure. Section 162(2) provides: "The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3)". Subsection (3) refers to the use of the material for the purposes of the criminal proceedings in relation to which the information was disclosed, and any appeal. This section applies to material which was disclosed to Mr Salmond's solicitors by the prosecutor in the context of the criminal proceedings against him, and Mr Salmond, like anyone in the same position, is bound to observe the law.

Section 162 is not limited or qualified in the way Mr Salmond suggests in his "Final Submission". The section is designed to protect the integrity of the administration of justice, and to secure the confidence of those who provide evidence that it will not be used by the accused or his agents for any collateral purpose. There are no relevant exceptions. Indeed, when the Bill which became the 2010 Act was first introduced into the Parliament, it contained a provision which would have allowed for an accused

person to apply to the court for permission to use in other ways material to which section 162 applies, but that provision was removed from the Bill at stage 2 by a Government amendment moved by the then Cabinet Secretary for Justice and agreed to unanimously by the Bill Committee.

Finally, as the Committee is aware, COPFS itself is subject to legal restrictions which prevent it from disclosing information to the Committee or to any other person unless there is a proper legal basis for such disclosure. That was explained in detail in Mr. Donnelly's [letter to the Convener of 10 November 2020](#). That letter identified to the Committee that a notice under section 23 of the Scotland Act 1998 could, subject to the application of section 23(10), provide such a legal basis. The Committee, of course, exercised its power to serve a section 23 notice on COPFS, and COPFS responded to that notice. I understand that the Committee intends to serve a further notice on COPFS; any such notice would be addressed in light of the relevant legal rules.

As I explained in my letter to you of [4 August 2020](#), in addition to, and separately from, the functions of the Lord Advocate as head of the system of criminal prosecution and investigation of deaths, the Lord Advocate has functions as the Scottish Government's senior Law Officer. The Lord Advocate is supported in respect of the latter functions by professional lawyers within the Scottish Government Legal Directorate, the Parliamentary Counsel Office and the Legal Secretariat to the Lord Advocate. Those organisations are entirely separate from COPFS.

Against that background, let me turn to address briefly some specific comments contained in Mr. Salmond's "Final Submission" which relate to my responsibilities as the Scottish Government's senior Law Officer.

It is incorrect to suggest that, as Lord Advocate, I could choose to publish the Scottish Government's legal advice. The Lord Advocate, like other legal advisers, is bound by legal professional privilege. The Government has not waived that privilege for reasons which have been explained to the Committee.

It is incorrect to state that documents were "concealed" from the court during the judicial review. It was, and is, deeply regrettable that all the relevant documents were not identified at an earlier stage in the process. The process of document recovery and disclosure has been explained in evidence to the Committee.

Mr Salmond appears to suggest that the consideration which the Government gave to the question of whether the judicial review proceedings should be sisted (i.e. suspended) pending the criminal investigation was inappropriate. Any such suggestion would be incorrect. Whenever there are civil proceedings which may involve public disclosure of material which could be relevant to an ongoing criminal investigation, it is entirely appropriate to consider whether steps need to be taken to protect the integrity of the criminal process.

In this case, the Scottish Government considered whether a sist of the judicial review was necessary to that end, but was satisfied that reporting restrictions would suffice. Those reporting restrictions were a matter of agreement between the parties, and it was, accordingly, unnecessary for the Scottish Government to appear at the hearing

at which the Court imposed them. At no time did the Government ask the Court to sist the judicial review.

Mr Salmond comments: “I believe that the Committee should ask the Lord Advocate directly whether he instructed two unwilling complainants to make police statements.” I did not direct any complainer to make a police statement; indeed, I have no power which would enable me to issue such a direction.

Mr Salmond comments adversely on the way in which the Scottish Government passed the matter to the police. The particular approach chosen was adopted precisely because of the sensitivity of the case and with a view to enabling the police to put in place, from the outset, appropriate arrangements for handling the case.

Finally, I observe that there was no failure on my part to answer the question [in the Convener’s letter to me of 3 February](#), about the provision of records to the Committee. As [my letter of 8 February](#) made clear, and as was envisaged in the Convener’s letter, [a separate response](#) was issued to the Committee on those issues. I addressed in my own response those issues which it was appropriate for me, rather than a senior Scottish Government official, to address.

Yours sincerely

**W. JAMES WOLFFE, QC**