

T: 0300 244 4000  
E: scottish.ministers@gov.scot

Bill Kidd MSP  
Convener  
Standards, Procedures and Public Appointments  
Committee  
Room CG.07  
Scottish Parliament  
EDINBURGH  
EH99 1SP

20 March 2019

Dear Bill

## **LAW OFFICERS – ANSWERING QUESTIONS IN THE CHAMBER**

Thank you for your letter of 5 March regarding the above.

Your letter advised that the Committee had recently considered correspondence it received from Mike Rumbles MSP and Adam Tomkins MSP on the rules governing Law Officers answering oral questions in the Chamber. I was grateful for sight of that correspondence and welcome the Committee's invitation for the Government to comment on the issues raised.

The Government would firstly wish to address the proposition that the Law Officers have a duty to answer in the Chamber any question which purports to be addressed to them, or that either Standing Orders as currently cast or indeed the statutory framework provided for by the Scotland Act 1998, imply that position. The Government considers that the existing frameworks for answering questions by a specific Minister reflect the fact that, while specific functions may be conferred specifically on the First Minister or on the Lord Advocate/Law Officers, functions of the Scottish Ministers are exercised by the Scottish Ministers collectively. In cases involving functions of the Scottish Ministers collectively it is for the Government to consider which of its Ministers is best placed to answer to the Parliament on any given issue.

As Mr Rumbles highlights in his letter, the primary reason for the Law Officers being able to participate in the proceedings of Parliament is because of the Lord Advocate's responsibilities as head of the systems of criminal prosecution and investigation of deaths (and the role of the Solicitor General for Scotland in that regard under the terms of the Law Officers Act 1944). As section 48(5) of the Scotland Act makes clear, these functions continue to be exercised by the Lord Advocate independently of any other person. That constitutional position is reflected in Standing Order Rule 13.7.1:

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

*“.....An oral question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland shall normally be answered by the Lord Advocate or the Solicitor General for Scotland but may exceptionally be answered by another member of the Scottish Government. Other oral questions may be answered by any member of the Scottish Government or a junior Scottish Minister.”*

And also in Standing Order Rule 13.5 (Written Questions):

*“...A written question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland may be answered only by the Lord Advocate or the Solicitor General for Scotland.”*

The provisions relating to the answering of questions concerning the operation of the systems of criminal prosecution and investigation of deaths enable the Lord Advocate to be account to Parliament for the exercise of those functions. The flexibility offered in Rule 13.7.1. allows for instances when a Law Officer may not be available to attend proceedings in the Chamber. The Government would also wish to point out the provisions of section 27(3) of the Scotland Act which empowers the Law Officers not to answer questions which might prejudice criminal proceedings or otherwise be contrary to the public interest.

In relation to other matters, there is no procedural impediment to the Lord Advocate or the Solicitor General for Scotland, as Ministers in the Scottish Government, responding to oral or written questions. However, it is generally unlikely to be appropriate for a Law Officer to respond on such matters. It is the relevant portfolio Minister who will normally answer to Parliament for decisions falling within that Minister’s portfolio responsibilities - decisions which will have been informed by appropriate analysis of the relevant legal considerations.

The Law Officers give legal advice to the Scottish Government, not the Scottish Parliament. Legal advice is confidential for good reasons: it enables a client to consult a legal adviser fully and frankly. There is also a long-established convention, reflected in the Ministerial Code and FOI law, that the Scottish Government does not, other than in exceptional circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers or the content of any such advice. These principles have been repeatedly acknowledged by courts and tribunals; and it has been recognised that they support the Government’s collective commitment, set out in the Ministerial Code, to acting lawfully. Questions about the Lord Advocate’s view on any particular matter or legal question would tend to undermine both those principles.

Mr Tomkins refers to the Lord Advocate’s involvement in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill last year. It is a matter of public record, in terms of paragraph 3.4 of the Ministerial Code, that when the Government presents a Bill to Parliament, the Minister’s statement of legislative competence will have been cleared by the Law Officers. In that specific context, and in the exceptional circumstance that the Presiding Officer had issued a certificate to the effect that the Bill was not within competence, the Scottish Ministers considered that the Lord Advocate should make a statement to the Parliament setting out the basis upon which Ministers had nevertheless concluded that the Bill was within competence, and the Lord Advocate, for his part, agreed that this was appropriate in those exceptional circumstances.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

In conclusion, the Government considers that relevant Standing Orders are fit for purpose. They reflect accurately the constitutional responsibilities of the Scottish Law Officers and the accountability of Scottish Ministers to Parliament for the decisions that are taken in relation to their portfolios.



**GRAEME DEY**  
Minister for Parliamentary Business and Veterans

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

The Scottish Parliament, Edinburgh EH99 1SP  
[www.gov.scot](http://www.gov.scot)



Accredited  
Until 2020

