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## **Honey, we shrunk the Lord Advocate**

LORD McCLUSKEY

AFTER the Union of 1707 and the end of Jacobite rebellions, the Westminster Government, having secured its northern Border, largely left the Scots to govern their own domestic affairs. This unspoken devolution reflected the fact that, in the vital fields of religion, law and education, the Treaty of Union left the Scottish domestic inheritance and institutions essentially intact. The government was less socially intrusive then: it was the law that mattered. The Lord Advocate was at heart of the Executive. Henry Dundas, as Lord Advocate, was "the uncrowned king of Scotland", like his predecessor, Duncan Forbes of Culloden - "King Duncan" in the Highlands.

When the ancient office of Secretary for Scotland was revived in 1885, the Lord Advocate's political role diminished. However, as a "Great Officer of State", he remained a power in the land. His power over legal affairs was decisive. Successive Lord Advocates ensured that, when it came to matters of justice, the courts and prosecution service, they kept their distance from the politicians and behaved as ministers of justice. Justice was too important to be left to politicians. The Lord Advocate was the watchdog, keeping the administration of justice out of the maelstrom of politics.

The 1978 devolution legislation preserved the clear separation of the Law Officers from the Executive. The Law Officers were not to be devolved: they were to remain at Westminster. In the Scotland Act 1998, that was reversed, though some parliamentarians expressed fears for the future independence of the Lord Advocate. The Law Officers entered the Executive; the Lord Advocate sat in cabinet with the politicians.

In the view of many, the great office of Lord Advocate suffered. No-one doubts decision-making in relation to criminal cases is still entirely free from pressure by politicians: the Lord Advocate's independence in that respect is not doubted. Alas, however, in other respects, the fears expressed in 1998 are seen to have substance: the Lord Advocate has got uncomfortably close to the politicians.

Consider the handling of the Shirley McKie case. The Lord Advocate ordered her prosecution for perjury, alleging she lied at a murder trial in asserting she had not entered the house of the victim, Marion Ross. The prosecution at the perjury trial maintained she must have done, saying she had left a fingerprint in the house. The jury, having heard defence expert evidence that the fingerprint was not hers, acquitted her. She sued the Executive for damages.

Lord Wheatley ruled her action could not succeed unless she proved the work of the prosecution's fingerprint team was actuated by malice. Despite that, the Executive settled on the first day, paying out nearly £1 million in damages and expenses. Ministers claimed "all concerned" now accepted "an honest mistake" had been made, but they have never explained how that view of the case could be reconciled with the legal requirement for McKie to prove malice. If there was no malice, McKie was bound to lose.

The man convicted of Ross's murder, David Asbury, appealed his conviction, relying on the confusion affecting the fingerprint evidence. The Lord Advocate did not oppose the appeal. Asbury was then acquitted. The murder remains "unsolved".

Ministers, including the Lord Advocate, have refused an independent judicial inquiry. The Lord Advocate refuses to disclose material on which vital decisions were based. He has - astonishingly - told the Justice 1 Committee there was "other evidence supportive" of the Crown's perjury case against McKie, but "the evidence did not come out as expected". He did not disclose what it was. Was he suggesting, despite her acquittal and success in the civil action, she was guilty after all? The Crown's experts still strongly maintain they were neither mistaken nor malicious, but their careers are in limbo and they will not be used as fingerprint experts in future. They were denied any public opportunity to justify their expert evidence.

This is a picture of confusion, contradiction, injustice, mystery and rumour. Justice has not been seen to be done. There is no transparency. The public purse has paid out huge sums; we still do not know why.

The reputation of the Scottish Criminal Records Office, fundamental to criminal prosecution work, is tarnished. The case for an independent inquiry is overwhelming, yet the Lord Advocate has joined other ministers in refusing one.

Another bizarre example is the new Legal Profession and Legal Aid (Scotland) Bill. It was so shot through with errors, including provisions contravening the European Convention on Human Rights, that when the bill was read in Parliament for the first time, the government announced 300 amendments. Where was the Lord Advocate when these errors found their way into the Bill? Did he not tell fellow ministers that the Royal Commission under Lord Hughes and distinguished colleagues (mostly non-lawyers), after three and a half years collecting and studying evidence, had come to quite different conclusions about the future regulation of the profession?

In February the Lord Advocate joined the Minister for Justice to promote hasty, ill-considered and far-reaching proposals for reorganising the judiciary, proposals that caused disquiet among many, with fears about threats to the independence of the Judiciary, based on lifelong experience of the administration of justice. The proposals are temporarily shelved for administrative reasons, but the Executive is drafting a bill to implement them anyway.

If the Lord Advocate cannot find real ways to vindicate his independence on matters traditionally within his domain, especially those affecting the administration of justice and the independence of the judiciary, he will lose the confidence of those whose lives are spent in the courts. The Lord Advocate is traditionally the watchdog for justice; he is the only one we have. We don't want him barking - but the occasional growl would be reassuring. It is late - but not too late - to start.