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The Lord Advocate: a suspicion of bias lingers

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THERE has been a great deal of comment on the appointment of the new Lord Advocate. Some has been praiseworthy (the glass-ceiling factor, the fact she is independent of the Faculty of Advocates and personally is someone of proven competence and diligence). However, much of this serves to obscure the central issue - the office of the Lord Advocate itself, and the question of bias.

When raised, the question of bias is often met with an indignant reply that the Lord Advocate in question would never actually be biased. That misses the point. It is one of the most important public offices and the holder is charged with heading our prosecution system, taking crucial decisions which may affect us all. That person must be above all suspicion of bias.

However the suspicion start on appointment. Lord Advocates, to all intents and purposes, owes their position to the First Minister, by definition a politician - with a political agenda.

Next, the Lord Advocate is a member of the Scottish Executive and sits not only with the First Minister but ministers who personally fall under the Lord Advocate's jurisdiction. These members of the Executive also fall under the jurisdiction of the Lord Advocate for any criminal proceedings involving their ministerial responsibilities. If an investigation is not carried out and/or a prosecution not pursued, would there not be suspicion of bias? What about the justice minister, with whom there is a substantial overlap of responsibilities? Will there not be suspicion the Lord Advocate may be influenced by the political agenda of the justice minister to the detriment of other matters? It might go further. The justice minister has been fully involved with the Shirley McKie case, and made a decision to settle her court action. The Interim Chief Executive of the new Scottish Police Service Authority, accountable to the Justice Minister, offered retirement or redeployment to the fingerprint officers who had given evidence to the justice committee. On the same day, the Justice Minister and the then Lord Advocate, Colin Boyd, gave evidence to the committee. The Lord Advocate, in the course of his evidence, said he would not be putting back on the list of expert witnesses the fingerprint officers as they were "notorious". He said he did not mean that pejoratively, although it is hard to imagine what he otherwise meant. Are we to believe this was all coincidence, that there was no liaison between them - or do we have a strong suspicion bias was operating here to discredit and undermine these fingerprint officers?

There is also the Hepatitis C case. The health minister has been pursued regarding an inquiry by the health committee. They heard his evidence and that of others, and concluded there were disturbing questions arising out of these infections, in particular what had been done or not done after the initial infection. They called upon the health minister to hold an inquiry. The Lord Advocate had, two years previously, been asked for an inquiry - but only refused after the health minister made his position clear to the health committee that there should be no inquiry. Suspicion of bias arises because the Lord Advocate's decision appeared to follow (perhaps await?) the lead of the health minister.

Then there is the fact the Lord Advocate is the Executive's legal adviser. Boyd recently said the Scottish Parliament could not competently pass a law on corporate culpable homicide (CCH). One of his concerns was a challenge to a prosecution in the future on the basis that it was not legally competent. Which hat did he have on - that of an independent prosecutor or a government

adviser? The Lord Advocate pointed out the potential effect for health and safety of workers of a CCH offence: health and safety of workers is reserved to Westminster, and CCH might have the effect of improving health and safety.

Scots criminal law is not reserved. In any event, much Scots legislation, unless it was to be useless, covers reserved matters. The Anti-Smoking Bill dealt with the health and safety of workers, the Emergency Workers Bill dealt with the health and safety of workers. The Lord Advocate had no problem with the competence of these bills.

Would an independent Lord Advocate have been so inconsistent in his advice or are we left with a suspicion that such advice would be helpful to the political objectives of his clients?

There is then the Executive's desire to have a role in the appointment of judges and to involve our top judge, the Lord President, in the policy and legislation of the Executive. How it can even contemplate such a step baffles not only all those involved in the provision of legal services but anyone who has the least understanding of the fundamental principles of a democratic society, one of which is the separation of the judiciary from the executive.

One would have thought the Lord Advocate would have something to say on that subject too, as the person responsible for the prosecution of cases and the holding and conducting of Fatal Accident Inquiries in front of judges. Is there again a suspicion of not wanting to act contrary to fellow members of the Executive?

Should a Lord Advocate not stand up and support the principle of independence? If they do not do so is that because it would highlight their own lack of independence - glasshouses rather than glass ceilings?

Where does all this leave the office of Lord Advocate as head of our prosecution system? It is fundamentally flawed by the method of appointment, by being both a member of the Executive and its legal adviser. A strong suspicion of bias is further borne out by the conduct of the Lord Advocate on the issues of the day. Some may say that it would be impossible for a Lord Advocate to extricate themselves from any suspicion of bias. It is time the independence of the Lord Advocate was retrieved. We should put in hand appropriate legislation here and in Westminster to achieve that. England itself separates the role of prosecutor on the one hand and legal adviser on the other. This should be done quickly. Meanwhile, Elish Angiolini should reassert the independent role of the Lord Advocate.

The first step she should take is to immediately exclude herself from the Executive - or if she must attend, reduce that to a mere formality. As for the Executive, it can go and obtain its own legal advice. Perhaps we can then begin to restore that keystone of public interest that is justice and fairness which should not in any way be tainted by suspicion of bias.

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