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Oh Lord, please don't let me be misunderstood

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IF OPPOSITION parties are planning to make political capital out of promises to reform the role of the Lord Advocate ahead of May's elections, then they might want to check a few facts with the current incumbent first.

While the Right Honourable Elish Angiolini, QC, recognises there are those who want to see a formal separation of the Lord Advocate's powers - as chief prosecutor and chief legal adviser to the Scottish Executive - she is keen to explode some myths about the role of Scotland's most senior law officer.

She points out, for example, that the Scottish Parliament doesn't actually have the power to alter the Lord Advocate's position as a Scottish minister or as chief prosecutor: nor can she resign from the Executive and still remain Lord Advocate. As these are statutory responsibilities, set out in the Scotland Act 1998, it would require primary legislation at Westminster to change them. Reform is possible, of course, but it is not in the gift of the parties seeking election to Holyrood - they would have to lobby for it in London. This was one of the misconceptions about her job that Angiolini sought to clarify when she delivered the inaugural KPMG Annual Law Lecture - "The Lord Advocate in the 21st Century" - in Edinburgh.

Perhaps more controversially, her speech was a robust argument in favour of the Lord Advocate remaining part of the Scottish government - and maintaining close links with the cabinet. She argued that the Lord Advocate is better placed to provide legal advice and to ensure that consideration of the law is a consistent thread running through all policy decisions as a result. Yet the timing of her lecture, so close to the May elections, may attract criticism: it could be interpreted as a bid to head off any attempts to downgrade her position if Labour loses the election, a mere seven months after her promotion from Solicitor-General.

Speaking exclusively to The Scotsman after the lecture, this is something Angiolini vigorously denies - insisting she only wants to encourage a debate about the role and had accepted the invitation to speak many months ago. "It is certainly not intended to be anything even remotely political," she says. "I think it is important for the debate to be had. I like to think of myself as a moderniser - of looking at institutions and looking at the system with a view to see if they can be improved.

"It would be somewhat churlish of me to do that to other parts of the system, but be very precious about the role of the Lord Advocate. My sole concern is that the role is understood, so that if others - and it's not for me - consider that there should be change, that those changes are based on an informed approach, that they know what the factual situation is, they know the legal responsibilities and they can know the practical realities of it and the consequences."

From Angiolini's perspective at least, the Lord Advocate has already been stripped of "extraneous" responsibilities, such as a role in appointing judges, and she believes the perception of her job is sometimes out of step with the reality. "The whole purpose of devolution was to bring government closer to people, so the institutions were more visible and more responsive to them," she says. "I think that is really what has happened with the Lord Advocate - because before the law officers were hidden away down south, the presumption has been, I think wrongly, that the emphasis has been on greater politicisation of the law officers' activities when in fact it has been the reverse."

"The Lord Advocate has been stripped of those extraneous policy responsibilities that he had before - he was responsible for the law of evidence, for instance, and would take legislation through parliament and had a function in appointing judges. All of that's gone and what you are left with are the retained functions - the advice and prosecution."

"The question now is, is there further debate about whether or not that role should change further? I think that's a debate that should be taking place because it's such a powerful position."

There are powerful arguments in favour of change: it has been suggested that the dual role of the Lord Advocate as prosecutor and legal adviser - highlighted in the controversy surrounding the Shirley McKie case - may contravene the European Convention on Human Rights.

Angiolini accepts there are "alternative models" to use in appointing law officers to head prosecutions and to deliver legal advice to governments. She says: "You would have to be very insular to say there is no other way that you can devise your system. Of course there are other models around the world."

"But they tend to be extremes of a DPP [Director of Public Prosecutions] figure with not much in terms of accountability to the parliament, to the American model where the DA [District Attorney] is elected, so your Lord Advocate would be someone who would put themselves up for election."

"I do think it is a precious commodity to have independence for the prosecution service, that you are not acting to please the clamour that may arise momentarily from a lobby or the media or politicians, but you are actually looking at the job on a clinical, thorough and objective basis, which is your duty."

Yet in recognising there are alternatives, Angiolini agrees she has sought to defend the advantages of the status quo and of the Lord Advocate remaining part of the Scottish government.

"Yes, that is my perspective from my experience as a law officer. I haven't got experience of another system to say the other system wouldn't work better or in another way. But these are the practical realities of the situation at the moment. I think [for] most people, for instance, it still comes as a surprise when I say that I am not actually a member of the cabinet - I attend the cabinet for the provision of legal advice.

"It has been suggested, 'Well you could come in and out and do that, and be invited to come in and do that.' But what I was trying to convey is how much the law permeates everything that they do - because it is a subordinate legislature, they are constrained by law, so even a subtle amendment or change requires someone to indicate whether or not that may be within their competence, or contrary to the European Convention on Human Rights, or contrary to European law.

"It is difficult separate it out. You could get a QC on any area and just bring them in, but if they have not been there while the bill was at its earlier stages or its later stages, or if they are not familiar with the issues that may have come up in another bill that are similar to them, then there is a practical disadvantage.

"So I can only speak from my experience as a law officer, but that is not to say that there aren't equally legitimate and proper ways of approaching it."

Whether the role of Lord Advocate survives in the future or not, Angiolini says, the Executive will of course need a legal adviser and there are benefits in using the head of prosecutions.

"Does it have to be the same person who is head of the prosecution service?" she asks. "Not necessarily - it doesn't have to be. But one of the benefits is if you assume that the chief prosecutor is a person of integrity and competence in that area, [and] has that specific constitutional role, then you hopefully will get sound legal advice that you can trust.

"Ultimately in the government you want to ensure you are able to rely on it, because if it is wrong, your legal adviser will have left you high and dry. So there is an incentive to ensure that you don't simply appoint someone who is in some way pleasing but someone who is competent."

In the post-devolution age, whoever advises the Executive will also be required to handle an increased level of parliamentary and public scrutiny.

"The role certainly is much more visible and much more accountable, but that is a good development," she says. "If it comes from a position of understanding, then it's good that questions are asked."

- What do you think? Is it time to reform the office of the Lord Advocate? E-mail your views - along with your name and address - to law@scotsman.com

Rising Star

ELISH Angiolini graduated with a law degree from Strathclyde University in 1982. She immediately joined the Crown Office and Procurator Fiscal Service and spent eight years as a depute procurator fiscal in Airdrie.

Angiolini moved to the Lord Advocate's Secretariat in 1992. She moved back to the Procurator Fiscal Service as senior depute procurator fiscal at Glasgow before becoming assistant procurator fiscal at Glasgow.

She switched back to the Crown Office in 1997 when she was appointed as its head of policy.

In 2000, Angiolini served as regional procurator fiscal for Grampian and the Highlands and Islands before being appointed as Solicitor General in 2001: she was the first woman and the first solicitor to hold the role. Angiolini became Lord Advocate last October.