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Prosecution in the Public Interest

The Rt. Hon. James Wolffe QC
Lord Advocate

Apex Scotland Annual Lecture

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Foreword

Pierre Trudeau once stated that "the essential ingredient of politics is timing", and we at Apex Scotland intentionally try to align the lecture topic with key issues and moments in the political/justice environment of Scotland.

Rarely have we managed to co-ordinate things quite as well as this, our thirtieth year of operation, slotting the lecture just hours after the Scottish Government laid out its plan for the year including significant modernisation plans for justice. Lord Advocate, The Rt. Hon. James Wolffe QC gave this year's lecture titled "Prosecution in the Public Interest" outlining the role of the prosecutor as arbiter of fairness and justice, but also to some extent an interpreter of public opinion and Government policy. His explanation of the tension between the need for consistency in sentencing versus the responsibility to ensure that the action taken will produce good, not bad, results was very well received by a packed Signet Library who clearly appreciated the chance to hear from the most senior prosecutor in Scotland how he viewed the reform agenda.

Just hours before, the Scottish Government had announced its intention to extend the presumption against short sentences to a year. The Lord Advocate's insights into the challenges and opportunities that this presents offer food for thought, not least in the need to ensure that if there is to be an alternative to traditional sentences these options must be available everywhere and not just for those from certain post codes.

I hope you enjoy the lecture. Please also take the opportunity to check out this year's 30th Anniversary special edition Annual Report which you can find on our website.

Alan Staff
Chief Executive
Apex Scotland

Four hundred and thirty years ago, in 1587, the Scottish Parliament enacted a significant programme of criminal justice reform[1]. The legislation of that Parliament established certain principles which endure today – that the accused is entitled to legal representation; that evidence should be led in the presence of the accused; that steps should be taken to ensure the integrity of the jury verdict; that the Justiciary Court should go on circuit.

And among the measures of that Parliament was the Act[2] which established the title of the Lord Advocate to prosecute any crime in Scotland – which, accordingly, established the Lord Advocate as the public prosecutor. It might therefore be said, at the risk of some over-simplification, that my predecessors in office and I have, together, accumulated 430 years of experience of prosecution in the public interest.

I am grateful to Apex Scotland for inviting me to give this lecture on the topic of prosecution in the public interest. Preparing it has given me the opportunity to reflect on certain fundamental features of our prosecution system, and to think about prosecution systems elsewhere in Europe. My purpose tonight is descriptive – to explain some of the basic features of our system, and to set them in a broader, to some extent a comparative, context.

My starting point is that the effective, rigorous, fair and independent investigation and prosecution of crime satisfies some of the basic responsibilities of the state. It vindicates the interest of the community at large in the enforcement of the criminal law. It fulfils the state's responsibility to establish mechanisms which seek to protect individuals and communities from crime. It meets the expectations of victims of crime that the state will respond to the injustice done to them.

And at the same time, it provides assurance that prosecutorial action will be taken only where there is a proper basis for doing so.

An effective, rigorous and fair prosecution service, acting independently in the public interest, is, accordingly, a central component in a criminal justice system which aims to deal fairly with persons who are suspected and accused of crime, to respond effectively and proportionately to offending behaviour, to secure justice for the victims of crime, and to punish people who are convicted of crime.

I was pleased that, following its inquiry into the Role and Purpose of the Crown Office and Procurator Fiscal Service, earlier this year, the Justice Committee of the Scottish Parliament agreed that the Service is, overall, effective, rigorous, fair and independent in the prosecution of crime. That is a tribute to the skilled and dedicated staff of the Service, whom it is my privilege to lead. It is the individual prosecutors, and the staff who support them, who, day in and day out across Scotland, make real the commitment of the Service to serve the public interest in the effective enforcement of the criminal law.

Lord Hope described our system in this way[3]:

> "… the entire system for the investigation and prosecution of crime in Scotland is in the hands of the public prosecutor. Overall responsibility for the investigation and prosecution of crime rests with the Lord Advocate. He presides over a system which is operated on his behalf in the sheriff and district courts by the procurator fiscal. The functions and powers of the procurator fiscal long pre-dated the inception of police forces in Scotland. So, while there is a close working relationship between the prosecutor and the police, the police remain subject to the control of the procurator fiscal."

Let me draw your attention to some fundamental features of the system which Lord Hope described.

1 See GWT Omond, *The Lord Advocates of Scotland*, 1883, vol. I, pp. 45-60.

2 APS 1587, c. 77.

3 *R v. Manchester Stipendiary Magistrate ex parte Granada Television* [2001] 1 AC 300, 305B-F.

The first is that, in Scotland, we have a unified public prosecution system. That system includes advocate deputes, procurators fiscal and their deputes and all the staff of the Crown Office and Procurator Fiscal Service. But they operate within a single system, which deals with all crimes subject to the jurisdiction of the Scottish courts. No public authority outside that system has title to prosecute crime in the Scottish courts.

The Dutch call this the monopoly principle – the principle that there should be a single public prosecution authority responsible for the prosecution of all crime. In Scotland, the monopoly principle is modified only by the continuing competence of private prosecution; but private prosecutions are, in our system, extremely rare. A private prosecution may be brought only with the consent of the Lord Advocate or the approval of the Court – and the Court's approval will be granted only in exceptional circumstances[4]. So, for practical purposes, the prosecution of all crime subject to the jurisdiction of the Scottish courts is in the hands of a single, public prosecution system.

The second feature of the system which Lord Hope described is the role of the prosecutor in relation to the investigation of crime. Lord Gill summarised this in the following terms[5]:

"In the Scottish system of criminal investigation, the procurator fiscal directs the investigation and not the police. In the early stages of an investigation, the police almost always act on their own initiative; but it is their duty to report on their investigation to the procurator fiscal and to act upon his further instructions."

This principle is reflected in the statutory regime under which Police Scotland operates[6]. That regime requires the police to comply with any lawful instructions given by the appropriate prosecutor in relation to the investigation of offences; and gives the Lord Advocate power to give directions to the police about the reporting of crime. Prosecutors, of course, rely heavily on the professional skill of the police in the investigation of crime; but that legal regime underpins the working arrangements under which police and prosecutors, together, seek to address criminality in Scotland.

As many here will know, the two features of our system which I have just described contrast with the position in England & Wales. But they reflect the European norm, as I understand it. In particular, although the details may vary, in the major continental systems, the investigation of crime by the police is, as in our system, generally subject to direction by the prosecutor[7]. These are features which facilitate a coherent approach to the investigation and prosecution of crime both horizontally across all types of criminality and vertically, at different stages of the system.

A third feature of the system to which Lord Hope referred is the overall responsibility for the system which rests, in our system, with the Lord Advocate. The functions which, as Lord Advocate, I exercise as head of the system of prosecution in Scotland are known as "retained functions".

They are functions which were exercised by the Lord Advocate before devolution; and which have been retained by the Lord Advocate since devolution. I am required by the Scotland Act

4 *Stewart v. Payne* 2017 SLT 159.

5 *Johnston v. HM Advocate* 2006 SCCR 236, para. 117.

6 Criminal Procedure (Scotland) Act 1995, s. 12; Police and Fire Reform (Scotland) Act 2012, s. 17(3).

7 Useful comparative information is to be found in J-M Jehle and M Wade, *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe*, 2010 (Germany, France, England & Wales, Poland, Sweden); and G Gillieron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France and Germany*, 2013. Specific information about particular jurisdictions may be found in G di Federico, "Prosecutorial Independence and the Democratic Requirement of Proportionality: Analysis of a Deviant Case in a Comparative Perspective" (1998) 38 Journal of Criminology, 371; J Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, 2005; K Krajewski, "Prosecution and Prosecutors in Poland: In Quest of Independence" (2012) 41 Crime and Justice 75; H van de Bunt and J-L van Gelder, "The Dutch Prosecution Service" (2012) 41 Crime and Justice 117; SM Boyle, *The German Prosecution Service: Guardians of the Law?* 2014.

1998 to exercise those functions independently of any other person; and that statutory requirement, in any event, reflects sound and well-established constitutional principle.

The importance of the principle of prosecutorial independence goes, I hope, without saying. Few things are more serious for the individual than to be charged by the state with a crime; and few things more important to society than the effective enforcement of the criminal law. As the Appeal Court has recently observed, it is important, in the public interest, "that prosecutors exercise their judgment independently, robustly, forensically and objectively on the whole evidence available"[8].

Regardless of the public attention which a case may excite, prosecutors must not be influenced in their decisionmaking, whether in relation to the investigation or the prosecution of crime, by extraneous and irrelevant considerations. Like judges, prosecutors must decide without fear or favour, affection or ill-will - objectively and professionally, on the basis of an assessment of the available evidence; and it is one of my constitutional responsibilities to promote the integrity and independence of prosecutorial decisionmaking.

The statutory requirement to exercise my retained functions independently of any other person applies equally to the formulation of prosecution policy. That does not, of course, mean that I should ignore broader considerations of criminal justice policy. Many of the criminal justice systems of which I am aware have mechanisms whereby the prosecution of crime may be aligned with the relevant national criminal justice policy; and that is appropriate and sensible. Criminal justice policy is, after all, the policy of the democratically accountable government, and in our system that is a government of which I am a member.

But the question of how criminal justice policy should be reflected in prosecution policy is, in our system, a matter for me, as Lord Advocate.

The principle of prosecutorial independence does not prevent prosecutors from contributing to the development and implementation of an effective criminal justice policy, or, indeed, to the maintenance and reform of an effective and fair criminal justice system. That may be illustrated by my participation in the Scottish Government's Serious and Organised Crime Task Force, the Crown Agent's role in the Justice Board, and by the participation and contribution of COPFS in a variety of policy initiatives, such as the Equally Safe Strategy for Preventing and Eradicating Violence against Women and Girls; and the SCTS Evidence and Procedure Review. Our interest, as prosecutors, in contributing to the wider public good is reflected too in initiatives such as the Solicitor General's education summit on sexual offending by and against children and young people which will take place next week.

Nor, for that matter, is the principle of prosecutorial independence incompatible with appropriate mechanisms of accountability. Every decision to prosecute is tested in court; and the conduct of prosecutors in court is subject to judicial and public scrutiny. Under the Victims and Witnesses (Scotland) Act 2014, victims of crime have the right to have a decision not to prosecute reviewed in accordance with the Guidelines made under the Act. And I am, of course, accountable through the normal processes of Parliamentary scrutiny, for my oversight of the system – as we have seen in the past year in the Justice Committee's Inquiry.

Let me turn from structural matters to prosecutorial decision making. When the procurator fiscal receives a report from the police or from another reporting agency, the fiscal may instruct or undertake further investigation. But once the investigation is complete, the prosecutor must decide what to do with the case. I want to identify the role which public interest considerations may have in decision making, and the options for prosecutorial action which are available.

The first question which the prosecutor must address is whether or not there is sufficient admissible evidence to justify commencing

8 *Stewart v. Payne* 2017 SLT 159, para. 97.

proceedings. In assessing sufficiency in this context, prosecutors may properly take into account concerns about the reliability and credibility of evidence. If – but only if - the prosecutor is satisfied that there is sufficient admissible, credible and reliable evidence that a crime has been committed by the accused, the prosecutor must go on to consider what action is in the public interest.

The Prosecution Code sets out factors which may, depending on the circumstances of the particular case, be relevant in determining what action is in the public interest. These include, among other things, the nature and gravity of the offence; the impact of the offence on the victim and witnesses; the age, background and circumstances of the accused; the attitude of the victim; the motive for the crime; and the risk of further offending. The weight to be attached to any particular consideration will depend, of course, on the circumstances.

In many cases, where there is sufficient evidence to justify proceedings, a prosecution will be appropriate, and, in that event, the prosecutor will commence and pursue proceedings in the appropriate forum. The Prosecution Code articulates a general rule that cases should be taken in the lowest competent court unless there is some good reason for prosecuting in a higher court. This proposition reflects an underlying principle – that the response of the criminal justice system should be proportionate. It invites the prosecutor to focus on the likely outcome of the case; and the Crown is engaged in a review of prosecution policies which seeks to implement that principle more systematically, on the basis of evidence about the sentencing practices of our courts.

But our system recognises that the effective enforcement of the criminal law does not always require criminal proceedings. The Prosecution Code recognises that prosecutors have other options – in particular the use of direct measures and diversion - which, in particular circumstances, and especially in relation to the less serious offending behaviour, may effectively and proportionately reflect the public interest. In the context of a lecture sponsored by Apex Scotland, perhaps I should say a little more about these.

First, diversion. Diversion, in the context of a prosecutorial decision, involves the referral of the accused for support, treatment or other action, either as an alternative to prosecution – or on the basis that the Crown reserves the option of prosecuting the accused if the diversion is unsuccessful and prosecution is considered appropriate at that time. Where diversion is justified, it may represent an effective intervention.

From a prosecutorial perspective, the suitability of a case for diversion is likely to depend on the nature and gravity of the offence, and an assessment of whether, in the particular circumstances – both of the case and of the accused – the accused's offending can appropriately and effectively be addressed by diversion – in particular, whether the diversion opportunity is likely to prevent or deter the accused from committing further offences.

But it goes without saying that whether a case can be marked for diversion depends on the availability of an appropriate and effective scheme in the relevant locality. It follows that the use of diversion by prosecutors is constrained by the availability of appropriate and effective schemes. It also follows that the ability of prosecutors to use diversion as a prosecutorial response consistently is constrained by the diversity of provision in different parts of the country.

The new community justice regime provides an opportunity, which I welcome, for enhancing the availability of appropriate and effective diversion schemes across the country; and prosecutors are working with Community Justice partners, both nationally and locally, to that end.

Turning to direct measures. The prosecutor may issue a written or face-to-face warning. Or the prosecutor may offer the accused one of the disposals provided for under sections

302, 302A and 303ZA of the Criminal Procedure (Scotland) Act 1995. There are four of these. First, a fixed penalty – the so-called "fiscal fine" – the maximum amount of which was fixed in 2008 at £300[9]. Secondly, a payment of compensation to the victim of up to £5000[10]. Thirdly, a combined fixed penalty and compensation. And, fourthly, a work offer which offers the alleged offender the opportunity of performing between 10 and 50 hours of unpaid work.

A direct measure faces the accused up with the consequences of offending more swiftly than court proceedings. It secures early resolution for the victim. A successful direct measure necessarily avoids victims and witnesses being required to attend at court to give evidence. A direct measure is not a conviction; and the range of disposals available by direct measure is more limited than those available on conviction. There may be good reasons, in relation to particular offending behaviour or in particular circumstances, for taking the view that a conviction is the outcome which the public interest demands. But used appropriately, direct measures, may represent an effective and proportionate prosecutorial response.

The features of our system which I have just been describing may usefully be seen in a wider European context. Prosecution systems, internationally, fall into two broad camps[11].

Some jurisdictions start from the proposition that if there is sufficient evidence to justify a prosecution, the prosecutor is obliged to initiate proceedings. Germany[12] is, perhaps, the leading example of such a system, but others have the same starting point. Other jurisdictions, including France[13], the Netherlands[14] and England & Wales, take a different approach. These systems, like our own, acknowledge that the public interest in prosecuting an alleged crime to trial may be outweighed, in particular circumstances, by other considerations, and, accordingly proceed on the basis that prosecutors are not obliged to initiate criminal proceedings in every case where there is an evidential sufficiency.

In fact, this historic divide between two broad types of prosecutorial system, today, no longer reflects reality, at least in Europe. European criminal justice systems, including those which started from a position of mandatory prosecution, have, in recent decades, adopted various alternative mechanisms for disposing of cases[15].

So, for example, in Germany, prosecutors no longer proceed on the basis that every crime must be prosecuted to trial, or, indeed at all[16]. German prosecutors have been given express power to dismiss minor cases where the guilt of the accused is minimal and there is no public interest in prosecution. They have been given the power to dismiss lower level cases on condition that the accused agrees to pay a fine, perform community service, compensate the victim or

9 Criminal Procedure (Scotland) Act 1995 Fixed Penalty Order 2008, SSI 2008/108

10 Criminal Procedure (Scotland) Act 1995 Compensation Offer (Maximum Amount) Order 2008, SSI 2008/7.

11 M. Tonry, "Prosecutors and Politics in Comparative Perspective" (2012) 41 Crime and Justice 1, 9-12; see also G Gillieron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France and Germany*, 2013, pp. 320-2.

12 On the German prosecution system, see generally SM Boyle, *The German Prosecution Service: Guardians of the Law?* 2014; and Gillieron, op. cit., Ch. 7.

13 On the French prosecution system, see generally J Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, 2005; and Gillieron, op. cit., Ch. 8.

14 H van de Bunt and J-L van Gelder, "The Dutch Prosecution Service" (2012) 41 Crime and Justice 117, 118; CH Brants-Langeraar, "Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure" (2007) 11.1 EJCL 3.

15 See J-M Jehle and M Wade, op. cit. (England & Wales; France; Germany; the Netherlands; Poland; Sweden); Gillieron, op. cit., pp. 188-200 (Switzerland); G di Federico, "Prosecutorial Independence and the Democratic Requirement of Proportionality: Analysis of a Deviant Case in a Comparative Perspective" (1998) 38 Journal of Criminology, 371, 378-9 (Italy).

16 See SM Boyle, *The German Prosecution Service: Guardians of the Law?*, 2014, in particular, pp. 65-70; B Elsner and J Peters, "The Prosecution Service Function within the German Criminal Justice System" in J-M Jehle and M Wade, op. cit., pp. 216-24.

assume other related responsibilities – a suite of powers which looks very similar to our own direct measures. And they may, in cases where the potential sentence does not exceed one year's imprisonment, propose a coercive penal order, which, unless the accused objects within two weeks, may be approved by the judge without a trial and, if it is approved by the judge, counts as a conviction.

Looking across a number of European jurisdictions, one now finds a variety of regimes for the conditional disposal of cases – where the prosecutor may halt proceedings, or decide not to initiate proceedings, on condition that the accused accepts and complies with certain conditions; as well as regimes which permit the prosecutor to impose a sanction, either at her own hand or with the approval of the court. Even England & Wales, which until recently stood markedly apart from this trend, now has statutory provisions allowing for the administration of a conditional caution by the police, either within guidelines issued by the DPP or on the instruction of the CPS. The conclusion which I draw is that, in giving prosecutors a range of potential actions, in addition to the initiation of criminal proceedings, which enable them to achieve an appropriate, effective and proportionate prosecutorial response to offending behaviour, we sit firmly within the European mainstream.

Before I close there are two matters upon which I would like to touch. The first is the role and nature of discretion in prosecutorial decision making.

I prefer, myself, to speak of professional prosecutorial judgment. It will be evident that in applying the evidential test, prosecutors do not exercise discretion; rather, they exercise professional skill in assessing the evidence in light of the relevant law. That may not be an easy exercise; and reasonable professionals may sometimes disagree, but there is no discretionary aspect to the exercise.

If there is sufficient evidence, there is then a prosecutorial decision which falls to be made; and it is here that it may be said that the prosecutor exercises a discretion, or has a judgment to make, as to what prosecutorial action is appropriate in the public interest.

But that is not a judgment which falls to be made in a vacuum. I was struck to read, in a study of the French criminal justice system, published in 2005, a magistrat is quoted as saying: "I am not at all tolerant of sexual offences, but I had a colleague who just didn't give a damn". And in the same work, a French police officer is quoted as saying: "The policies or decisions of certain magistrats are, in identical circumstances but in different places, quite different"[17].

For my own part, I would not regard it to be desirable in our national prosecution service for different prosecutors to apply materially different approaches to similar offending, without good reason. I rely on prosecutors to exercise their professional prosecutorial judgment in the cases before them, and I trust them to do that. There is, of course, no substitute for a close attention to the evidence in the individual case; and the application of professional judgment. But prosecutors exercise that judgment within a framework which, today, seeks to secure a reasonable consistency of approach across the system. We do that not only through guidance which seeks to provide a structure for decision making; but also through institutional mechanisms, such as the establishment of specialist units to deal with particular categories of offending.

The second matter upon which I would like to touch is the position of victims of crime. The prosecution of crime is undertaken at public expense, by a public prosecutor who acts independently in the public interest. The prosecutor is not the victim's lawyer. But that does not mean that, as prosecutors, we can or should ignore the interests of victims – either generally or in the context of individual cases.

The interests of the victim are an aspect of the public interest which, depending on the circumstances, falls to be taken into account in

17 Hodgson, op. cit., p. 234.

deciding what prosecutorial action to take. One of the purposes of the criminal justice system – even if it is not the sole purpose - is to vindicate the injustice which has been done to the victim.

Here too there is a European context. The Victims and Witnesses Act 2014, which sets the current legal framework, implemented the EU Victims Rights Directive. That legislation followed from a remarkable shift in our understanding of the needs and rights of victims of crime since the beginning of this century. As public prosecutors we can only fulfil our public responsibilities if victims have the confidence to come forward, and to speak up, and if their voices are effectively heard in the trial process; and these things are plainly in the public interest. The support which the Service provides to victims is, in my view, entirely compatible with the exercise by prosecutors of independent professional judgment. At the same time, there is a limit to the support which the Service can, as prosecutors, provide for victims of crime; and, as the Thomson Review published by the Service last year described, there is more that can be done across the system in that regard.

I return to my starting point – the significance, to a just and successful society, of the effective, rigorous, fair prosecution of crime by a prosecutor acting independently in the public interest. That is not an end in itself. But it is one of the key means for promoting the safety of individuals and communities and for securing justice. In a society governed by the rule of law, it underpins our freedom and security. The Scottish Government Vision and Priorities document published earlier this year reported that Scotland has become a safer place and that people feel safer in their communities. It stated that public confidence in the system is relatively high. I believe that Scotland's prosecutors have contributed, in no small part, to those outcomes; and they will continue to do so.

Apex Scotland
9 Great Stuart Street
Edinburgh EH3 7TP
Tel: 0131 220 0130
Fax: 0131 220 6796
Email: admin@apexscotland.org.uk
www.apexscotland.org.uk

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