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## Crime fighters and border guards: The Scottish law officers in comparative perspective

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# Crime fighters and border guards: The Scottish law officers in comparative perspective

## **Abstract**

This article examines two ways in which the law officer role in Scotland has been affected by this 'new constitutional wave', and draws comparisons with the role of law officers in Australia and, where appropriate, other UK jurisdictions. The first is by virtue of s 57 of the *Scotland Act 1998* (the '*Scotland Act*'), which has exposed the 'acts of the Lord Advocate' to judicial scrutiny and the requirements of the *HRA* and the *ECHR*. The second arises as a more general consequence of devolution, which imposes upon the Scottish Law Officers new functions with respect to the legislative and executive boundaries created by that process. These functions are comparable, in many respects, with the functions performed by law officers (and in particular Solicitors-General) in Australia.

## **Keywords**

Law officers, Scottish law officers, Lord Advocate, criminal prosecution, devolution litigation

## CRIME FIGHTERS AND BORDER GUARDS: THE SCOTTISH LAW OFFICERS IN COMPARATIVE PERSPECTIVE

IAIN FIELD\*

If the engine room of government itself, including its first lawyer, is touched by the new constitutional wave, then it will indeed have been a revolution worth the name.<sup>1</sup>

As in many jurisdictions, inherent tensions, both legal and philosophical, pervade the law officer role in Scotland.<sup>2</sup> Much of the discourse surrounding the role of law officers (in Scotland as elsewhere) can be seen as an attempt to identify the precise nature of these tensions, and to solve the 'constitutional puzzle' that they create.<sup>3</sup> The form and substance of this discourse is influenced, in turn, by differing visions of the role that law officers play, or ought to play, within a given constitutional structure. Such roles may range from 'hired gun' to 'high priest/priestess',<sup>4</sup> and the role of the Lord Advocate, the senior of Scotland's two law officers, has historically tended towards the latter. He or she is at once the head of the systems of prosecution and investigation of deaths in Scotland, the chief legal advisor to the Scottish Parliament, the Scottish Executive's first representative in civil proceedings, and the guardian of the public interest in a variety of statutory and civil contexts.<sup>5</sup>

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<sup>1</sup> Neil Walker, 'The Antimonies of the Law Officers', in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: a Legal and Political Analysis* (Oxford University Press, 1999), 169.

<sup>2</sup> Ibid 144.

<sup>3</sup> Ibid 144-5, 161. Cf Diana Woodhouse, 'The Attorney General' (1997) 50 *Parliamentary Affairs* 98, 98, with Joseph Jacob, 'Some Reflections on Governmental Secrecy' [1974] *Public Law* 25, 41-2. In an Australian context, see Gerard Carney, 'Comment – the Role of the Attorney-General' (1997) 9(1) *Bond Law Review* 1.

<sup>4</sup> Avrom Sherr, 'Of Super Heroes and Slaves: Images and Work of the Legal Profession' (1995) 48(2) *Current Legal Problems* 327, 328-9.

<sup>5</sup> Legal Secretariat to the Lord Advocate, *The Role and Functions of the Lord Advocate* (31 August 2009) Scottish Government Website, [1]

## CRIME FIGHTERS AND BORDER GUARDS: THE SCOTTISH LAW OFFICERS IN COMPARATIVE PERSPECTIVE

In Scotland, a series of recent constitutional developments has exacerbated the tensions inherent in the law officer role.<sup>6</sup> One such development is the *Human Rights Act 1998* (the 'HRA'), which requires all UK public bodies and officials (including the Scottish Law Officers) to comply with the provisions of the *European Convention on Human Rights* (the 'ECHR'). Another such development is the devolution of legislative and executive power to three subordinate units (the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly)<sup>7</sup> with certain matters 'reserved' for Westminster.<sup>8</sup> Collectively, these statutes (the 'devolution statutes') establish what Bogdanor has described as a 'quasi-federal' system of government in the UK.<sup>9</sup>

This article examines two ways in which the law officer role in Scotland has been affected by this 'new constitutional wave', and draws comparisons with the role of law officers in Australia and, where appropriate, other UK jurisdictions. The first is by virtue of s 57 of the *Scotland Act 1998* (the '*Scotland Act*'), which has exposed the 'acts of the Lord Advocate' to judicial scrutiny and the requirements of the HRA and the ECHR. The second arises as a more general consequence of devolution, which imposes upon the Scottish Law Officers new functions with respect to the legislative and executive boundaries created by that process. These functions are comparable, in many respects, with the functions performed by law officers (and in particular Solicitors-General) in Australia.<sup>10</sup>

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<http://www.scotland.gov.uk/About/Directorates/ServicesGroups/LPS/rolelordadvocate>. The Lord Advocate may intervene in any case 'where a proprietary interest of the Crown or the interest of a public trust is involved' (*Helow v Secretary of State for the Home Department* [2008] UKHL 62). See also Legal Secretariat to the Lord Advocate, above n 5, [31].

<sup>6</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) 4.

<sup>7</sup> *Scotland Act 1998* (UK) c 46; *Government of Wales Act 1998* (UK) c 38; *Northern Ireland Act 1998* (UK) c 47.

<sup>8</sup> In Scotland, 'reserved matters' include: the UK Single Market, Energy Regulation, Immigration and Nationality, UK and International Transport, Social Security, Taxation and Economic Management, Foreign Affairs (including European Union negotiations), Defence and National Security, and the *Constitution*. Devolved areas include: Health and Social Work, Education and Training, Local Government and Housing, Justice and Police, Agriculture, Forestry and Fisheries, the Environment and Tourism, Sport and Heritage.

<sup>9</sup> Vernon Bogdanor, 'Asymmetric Devolution: Towards a Quasi-Federal Constitution?' in Patrick Dunleavy, Richard Heffernan, Philip Cowley and Colin Hay (eds), *Developments in British Politics* (Palgrave Macmillan, 7<sup>th</sup> ed, 2007) 222.

<sup>10</sup> For the sake of analysis, the Australian Solicitors-General (State and Commonwealth) are referred to collectively throughout this article. In practice, subtle differences may exist between the functions performed by the Solicitors-General of the States, on the one hand, and the States and the Commonwealth, on the other.

The article begins by briefly outlining the historical origins and roles of the Scottish Law Officers, the interrelationship between those officers, and the general impact of devolution upon them. In order to ground the comparisons subsequently drawn, and with deference to the international readership of this journal, a brief comparison is also made at this stage between the UK's devolved system of government and Australia's federal system. The remainder of the article examines, as indicated, the role of the Scottish Law Officers in the prosecution of crime, and in relation to the new functions bestowed upon them by devolution (in particular the litigation of 'devolution issues').

### **The Scottish Law Officers: origins, roles and the impact of devolution**

The Office of the Lord Advocate can be traced back to the latter half of the 15<sup>th</sup> century, at which time the King was represented in a series of civil cases by an advocate referred to variously as the 'King's Commissioner', 'Procurator for the Crown' and 'Advocate for the King'.<sup>11</sup> As the distinction between civil and criminal wrongs began to develop in the 16<sup>th</sup> century, the remit of the Lord Advocate's role expanded further into the latter area, and in 1587 the Lord Advocate gained responsibility for the prosecution of all 'slaughters and utheris crimes', with or without the consent of the victims.<sup>12</sup> In subsequent years, the Lord Advocate's responsibilities increased further still, transforming the Office of the Lord Advocate into one of the 'Great Offices of State in Scotland'.<sup>13</sup> As Walker has explained, this expansion began before the Union with England in 1707,

when the Lord Advocate was one of the principle Officers of State charged by the Monarch to manage the executive affairs of Scotland. In the immediate post-Union years, the Scottish Ministers at Westminster were removed, leaving the Lord Advocate, from 1725, as effectively the only Minister for Scotland in the new British government. Unsurprisingly, the functions of the Lord Advocate expanded to fill the vacuum, covering not only the administration of the prosecution and courts system but also the supervision of the police and the armed forces. The Lord Advocate continued to be the beneficiary of the failure of the Scottish political classes to establish the case for Scotland's own Secretary of State until 1885, when such a position was eventually created.<sup>14</sup>

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<sup>11</sup> LexisNexis, *Stair Memorial Encyclopaedia of the Laws of Scotland*, vol 7 reissue 2 (at 31 August 2011), 6 Criminal Procedure, '1 Historical Background' [27]; David Walker, *A Legal History of Scotland: The Later Middle Ages*, (W Green, 1990) vol 2, 269-70.

<sup>12</sup> *Jurors Act 1587* (Scot).

<sup>13</sup> Terrence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999) 237.

<sup>14</sup> Walker, above n 1, 141.

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The Lord Advocate was traditionally (and is still required to be) a member of the Faculty of Advocates (the Scottish Bar),<sup>15</sup> although, unlike the Attorney-General of England and Wales, he or she is not the head of that organisation.<sup>16</sup>

The Solicitor-General's office originates in the 16<sup>th</sup> century, when references to the 'King's Solicitor' emerged, but it was not until the 18<sup>th</sup> century that the modern title came into being.<sup>17</sup> As the second Law Officer to the Crown and the Lord Advocate's deputy, the Solicitor-General may assist the Lord Advocate across the full range of his or her functions.<sup>18</sup> The precise division of functions and responsibilities between the two law officers is a matter for the Lord Advocate.<sup>19</sup> According to Daintith and Page, however, 'the dual location of the Scottish Law Officers' functions ... in London and Edinburgh, led to the practice whereby [the Solicitor-General devoted] particular attention to the Crown Office [prosecutorial] work carried out in Edinburgh.'<sup>20</sup> A similar division of functions may still exist in practice, given that, since 2001, all four Solicitors-General have been criminal law specialists, and all but one has been appointed from the Procurator Fiscals Service (Scotland's prosecution service).<sup>21</sup> However, it is not uncommon for Solicitors-General subsequently to become Lords Advocate and, anecdotally, the former is often viewed as preparation for the latter. If this is correct, it seems unlikely that the Solicitor-General's remit is wholly confined to prosecutorial matters. Unlike Lords Advocate, Solicitors-General need not be members of the Faculty of Advocates, although, until recently, they have tended to be so.<sup>22</sup>

The recent history of the law officer role in Scotland is intimately entwined with the process of devolution. As part of that process, the Lord Advocate was removed from Westminster and, together with the Solicitor-General, relocated to Holyrood (the seat

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<sup>15</sup> This requirement has led to controversy in recent years, as the current Lord Advocate, Frank Mulholland, and his predecessor, Elish Angiolini, were both former Procurators Fiscal (solicitors) who were admitted to the faculty for the purposes of their appointment. See, eg, International Bar Association, *Historic Appointments to the Faculty of Advocates* (22 December 2008) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1918d23a-7e15-43d7-820e-ce9c71de9787>>.

<sup>16</sup> Walker, above n 1, 137, 142.

<sup>17</sup> *Ibid* 136.

<sup>18</sup> *Law Officers Act 1944* (UK) s 2.

<sup>19</sup> *Ibid*.

<sup>20</sup> Daintith and Page, above n 13.

<sup>21</sup> Elish Angiolini, Frank Mulholland QC, and Lesley Thomson are all former Procurators Fiscal. John Beckett QC, who served as Solicitor-General for eight months in 2006-07, was formerly an advocate specializing in criminal law.

<sup>22</sup> Stair Memorial Encyclopaedia of the Laws of Scotland, above n 11, [31].

of the Scottish Parliament).<sup>23</sup> Both of the Scottish Law Officers are now Ministers of the Scottish Executive, and are appointed by the Queen on the recommendation of the First Minister with the agreement of the Scottish Parliament.<sup>24</sup> The First Minister cannot remove either of the Scottish Law Officers from office without the approval of the Scottish Parliament.<sup>25</sup> For a time, following devolution, the Lord Advocate sat as a member of cabinet at Holyrood, but this practice ceased in 2007, following concerns regarding the political independence of the incumbent office-holder.<sup>26</sup>

In order to fill the gap left by the Lord Advocate at Westminster, the *Scotland Act* also created a new office of Advocate General for Scotland to advise the UK Parliament on devolved matters in Scotland and to defend the UK's reserved interests.<sup>27</sup> The Advocate General is a Minister of the Crown and a member of the UK Parliament. He or she is therefore a UK, as opposed to a Scottish, Law Officer.<sup>28</sup> Since 2008, the Advocate General has also been the spokesperson for the Scotland Office (headed by the Secretary of State) in the House of Lords.<sup>29</sup>

As noted previously, the Lord Advocate performs four main roles. He or she is head of the systems of prosecution and investigation of deaths in Scotland, the chief legal advisor to the Scottish Parliament, the first representative of the Scottish Executive in civil proceedings, and the guardian of the public interest in a variety of statutory and civil contexts.<sup>30</sup> It might be argued that devolution has also created a new 'role' for the Lord Advocate as the guardian of Scotland's 'devolution settlement' (that is to say, the specific division of powers agreed between Holyrood and Westminster). This new role, if it may be described as such, arises out of the Lord Advocate's existing advisory, representative and public interest roles, but may be distinguished (at least for present purposes) on the basis that it comprises an entirely novel range of

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<sup>23</sup> *Scotland Act 1998* (UK) c 46, s 48(1).

<sup>24</sup> *Ibid.* In contrast with Attorneys-General in England and Wales (and Australia), therefore, the Lord Advocate does not have constituency responsibilities. (Woodhouse, above n 3).

<sup>25</sup> *Scotland Act 1998* (UK) c 46, s 48(1).

<sup>26</sup> Hamish MacDonell, 'Lord Advocate Excluded from New Cabinet' *The Scotsman* (Edinburgh) 23 May 2007. Whether this remains the case is uncertain, as the current Lord Advocate, Frank Mulholland QC, appears ordinarily to be included in cabinet meetings.

<sup>27</sup> *Scotland Act 1998* (UK), c 46, s 87. The nature of this role is well documented in Linda Clark, 'The Role of the Advocate General for Scotland', in Alan Boyle (ed), *Human Rights and Scots Law* (Hart Publishing, 2002) 39. See also, *Stair Memorial Encyclopaedia of the Laws of Scotland*, above n 11, [32].

<sup>28</sup> Advocate General for Scotland, *Office of the Advocate General: the UK Government's Scottish Legal Team* <[http://www.oag.gov.uk/oag/CCC\\_FirstPage.jsp](http://www.oag.gov.uk/oag/CCC_FirstPage.jsp)>.

<sup>29</sup> Scotland Office and Office of the Advocate General for Scotland, *Annual Report*, CM 8102 (2011) [1.16].

<sup>30</sup> Legal Secretariat to the Lord Advocate, above n 5, [1].



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functions, which would not exist but for devolution, and which are comparable in many respects with the functions performed by Solicitors-General in Australia's federal system.

Devolution has not created a truly federal system, of course, and the environment within which the Scottish Law Officers now operate differs in important ways from that of law officers in federal systems. For one thing, although devolution reflects the will of the Scottish 'people' as expressed in the 1997 referendum on devolution, there has been no relinquishment of sovereignty by Westminster to the devolved institutions, merely a delegation of governmental power in certain prescribed areas.<sup>31</sup> There is no 'federal compact' of union states in the UK, but rather a 'devolution settlement' between Westminster and each of the devolved jurisdictions.<sup>32</sup> Furthermore, and in contrast with most federal countries, the English 'State' has no devolved Parliament of its own (the 'English question'),<sup>33</sup> yet MPs from the devolved jurisdictions may vote on specifically English issues at Westminster (the 'West Lothian question').<sup>34</sup> The process of devolving power to Scotland, Northern Ireland and Wales has also been (and remains) asymmetrical.<sup>35</sup> The UK is therefore a 'union state', not a 'unitary state'.<sup>36</sup> Finally, unlike the written Constitutions adopted in federal countries, the devolution statutes in the UK do not entrench a specific

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<sup>31</sup> Graham Gee, 'Devolution and the Courts', in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint Academic, 2005) 256. Since the *Australian Constitution* is also contained in an Act of the British (Imperial) Parliament (*Commonwealth of Australia Constitution Act 1900* (UK)), it was not, strictly speaking, until the passage of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK) that sovereignty in Australia was formally relinquished by Westminster.

<sup>32</sup> Nevertheless, it may be accepted that devolution is 'politically, if not constitutionally entrenched', and that 'in practice Westminster may not be able to reverse it except under pathological circumstances as in the case of Northern Ireland.' (Nigel Johnson, 'The Government of Wales Act 2006: Welsh Devolution Still a Process and Not an Event?' (2007) 4 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2007/issue4/johnson4.html>>). Judges in Scotland and the UK have also shown themselves willing to circumvent the parliamentary sovereignty doctrine in favour of interpretative approaches more commonly associated with federal jurisdictions. See, in particular, the comments of Lord President Roger in *Whaley v Lord Watson* 2000 SC 340, 349. See also Gee, above n 31, 281.

<sup>33</sup> See, eg, Robert Hazel, 'The English Question' (2006) 36(1) *Publius* 37; Brigid Hadfield 'Devolution, Westminster and the English Question' (2005) *Public Law* 286.

<sup>34</sup> So named as the question was originally posed (in 1977) to the House of Commons by Tam Dalyell, then the Member for West Lothian.

<sup>35</sup> Bogdanor, above n 9.

<sup>36</sup> Robert Hazell, 'Devolution and Constitutional Reform', in Adam Tomkins (ed), *Devolution and the British Constitution* (Key Haven Publications, 1998).

division of state and federal powers. Devolution 'is a process, not an event'.<sup>37</sup> Thus, unlike Australia, where any alteration to the *Constitution* would require the support of an absolute majority of both Houses of Parliament,<sup>38</sup> Westminster may move the boundaries of devolved power in the UK by a simple Act of Parliament or, in certain prescribed areas, by executive Order<sup>39</sup> (although by convention the agreement of the Scottish Parliament is sought prior to this occurring).<sup>40</sup> At the time of writing, for example, a Bill to increase the Scottish Parliament's fiscal and social responsibilities is awaiting its second reading at Westminster. The *Scotland Bill* seeks to implement the primary recommendations of the 'Calman Commission',<sup>41</sup> which was jointly established by the UK and Scottish Parliament to

review the provisions of the *Scotland Act 1998* in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.<sup>42</sup>

For the preceding reasons, analogies between the UK's quasi-federal system and the Australian federal system (or indeed any 'federal' system so called) should be drawn with caution. Functional comparisons with law officers in federal systems may nevertheless yield practical insights into the longer-term implications of devolution for their Scottish (and other UK) counterparts.<sup>43</sup> As the former Attorney-General for England and Wales, Baroness Scotland, has explained:

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<sup>37</sup> Ron Davies, *Devolution: A Process not an Event* (Institute of Welsh Affairs, 1999).

<sup>38</sup> *Australian Constitution* s128.

<sup>39</sup> Various sections of *Scotland Act 1998* (UK) permit UK Ministers to make Orders in relation to devolved powers. For example, s 30(2) provides that 'Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 [enactments etc. protected from modification and reserved matters] which She considers necessary or expedient'. Since 1999, there have been 'nearly 170 orders made under *Scotland Act* to alter the devolution settlement' (Scotland Bill Committee, *Report on the Scotland Bill and Relevant Legislative Consent Memoranda 1st Report*, Scottish Parliament Paper no 608, Session 3 (2011) [13]).

<sup>40</sup> A 'Legislative Consent Motion' (formerly known as a 'Sewell Motion') is a motion raised in the Scottish Parliament seeking the consent of the Scottish Parliament in relation to legislation proposed by the UK Parliament, 'which makes provision ... applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers' (*Standing Orders of the Scottish Parliament 2011* (Scot) SI 1999/1095, ch 9B).

<sup>41</sup> Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century*, Final Report (2009).

<sup>42</sup> *Ibid* 3.

<sup>43</sup> *Ibid* 5 [16].

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[D]evolution gives us [the law officers] the puzzle so familiar in Canada, in the USA, familiar in many places. That is the puzzle of powers at state level and at national level. And how to cooperate, how to decide who can do what, what goes into which box. If it's even ever as simple as that ... And devolution also gives us ... new rule of law challenges too. Because we all have the role of referring to the Privy Council – soon the Supreme Court – questions about the proper observance of those boundaries.<sup>44</sup>

Questions relating to the boundaries of devolved and reserved power, which, as noted, may be legislative or executive in nature, are referred to in the devolution statutes as 'devolution issues'. Schedule 6, paragraph 1 of the *Scotland Act* defines a 'devolution issue' as being:

- (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
- (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
- (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,
- (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law,
- (e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law,
- (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

The role played by the Lord Advocate (and the Solicitor-General if requested by the Lord Advocate) in relation to devolution issues is multi-faceted. First, as a member of the Cabinet Sub-Committee on Legislation, the Lord Advocate contributes to the

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<sup>44</sup> Baroness Scotland, 'The Rule of Law' (Keynote address at Law Society of Scotland Conference, Edinburgh, 8 May 2009). The 'puzzle' to which Baroness Scotland refers is not, of course, the same 'puzzle' to which Walker refers, above (which is concerned with tensions inherent in the law officer role, as opposed to questions as to the boundaries of legislative and executive power).

planning, management and delivery of the Scottish Government's legislative program.<sup>45</sup> The Lord Advocate also has ministerial responsibility for the Office of the Scottish Parliamentary Counsel ('OSPC'), which drafts the Bills within that program.<sup>46</sup> Secondly, in his or her role as the Ministerial head of the Scottish Government Legal Department ('SGLD'), the Lord Advocate provides Ministers with legal advice as to whether proposed legislation is *intra vires* the Scottish Parliament's legislative power.<sup>47</sup> Thirdly, and as Baroness Scotland observes, the Lord Advocate may refer a devolution issue (whether arising in litigation or otherwise) to the Supreme Court.<sup>48</sup> Finally, if necessary, the Lord Advocate may be called upon to defend a devolution issue in an action brought by a private litigant (or, potentially, another UK jurisdiction).<sup>49</sup>

This final aspect of the law officer's role (devolution litigation) is contrasted with the role played by Australian Solicitors-General in constitutional litigation in the final part of this article. Before doing so, however, the role of the Scottish Law Officers in the prosecution of criminal offences is examined. As will be seen, it is a role that has come under increasing pressure in recent years as the implications of the UK's new constitutional wave have unfolded.

### **The role of the Scottish Law Officers in criminal prosecutions**

In Australia, the Commonwealth Attorney-General and the Attorneys-General of the Australian states and territories are ultimately responsible for the initiation and prosecution of crimes arising within their jurisdiction.<sup>50</sup> However, day-to-day responsibility for the investigation and prosecution of all crimes in Australia has, since the early 1980's, rested with 10 'independent' Directors of Public Prosecution ('DPP').<sup>51</sup> Although the Attorneys-General may direct their respective DPP on certain matters, and in South Australia the Attorney-General may overrule the DPP's

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<sup>45</sup> Legal Secretariat to the Lord Advocate, above n 5, [22].

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid* [23]. Ministers responsible for a Bill introduced to Parliament are required by s 31(1) of *Scotland Act 1998* to make statement to the effect that the Bill is within the Parliament's legislative competence.

<sup>48</sup> *Ibid* [25]-[33]. *Scotland Act 1998* (UK) c 46, ss 32-33.

<sup>49</sup> There have been no jurisdictional conflicts, to date, between the UK and devolved governments. *Gee*, above n 31, 266.

<sup>50</sup> *Carney*, above n 3, 2.

<sup>51</sup> *Director of Public Prosecutions Act 1983* (Commonwealth); *Director of Public Prosecutions Act 1973* (Tas); *Director of Public Prosecutions Act 1982* (Vic); *Director of Public Prosecutions Act 1984* (Qld); *Director of Public Prosecutions Act 1986* (NSW); *Director of Public Prosecutions Act 1991* (SA); *Director of Public Prosecutions Act 1991* (WA); *Director of Public Prosecutions Act 1990* (ACT); *Director of Public Prosecutions Act* (NT).

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decision to prosecute or not to prosecute,<sup>52</sup> this does not happen in practice.<sup>53</sup> This convention reflects the 'long held and bi-partisan conclusion that prosecution decisions should be removed from any connection with the political process.'<sup>54</sup> Solicitors-General are not directly involved in the prosecution of crimes in Australia.

In contrast, the Scottish Law Officers have retained their place at the head of Scotland's system of public prosecutions, and both continue to play an active role in prosecutorial decision-making. This role is exercised through the Crown Office and Procurator Fiscal Service ('COFPS'), which is in turn headed by the Crown Agent. The Lord Advocate exercises ultimate discretion over whether or not a prosecution should take place, and may direct Procurators Fiscal and/or Advocates Depute accordingly.<sup>55</sup> In this way, the Lord Advocate has 'effective control of prosecutions in a far more direct way than the Attorney General in England [or Australia].'<sup>56</sup> Prosecutorial decisions must be taken independently of the government and the government's interests,<sup>57</sup> but are not, historically, subject to judicial review.<sup>58</sup>

Section 29(e) of the *Scotland Act* states that it is beyond the legislative competence of the Scottish Parliament to 'remove the Lord Advocate from his [or her] position as head of the systems of criminal prosecution and investigation of deaths in Scotland.' Such removal could only be achieved by an Act of the UK Parliament. As noted earlier, it may be that an informal division of functions exists between the Scottish Law Officers, and that in practice the Solicitor-General performs the bulk of the Lord Advocate's prosecutorial functions. Even if such a division does exist, however, it does nothing to neutralize the issue of political independence, as the Solicitor-General is also a Minister of the Scottish Executive.<sup>59</sup> This state of affairs might be seen as surprising in light of the importance attached to prosecutorial independence in Australia, and even more so given that an 'independent' office of DPP has existed in some shape or form in England and Wales since 1879.<sup>60</sup>

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<sup>52</sup> *Director of Public Prosecutions Act 1991* (SA) s 9.

<sup>53</sup> Carney, above n 3, 3.

<sup>54</sup> Christopher Cragie, '25 Years of Commitment' (Speech delivered at CDPP 25th Anniversary Dinner, Old Parliament House, Canberra, 5 March 2009). See also Jaala Hinchcliffe, 'A Brief History of the CDPP' (Speech delivered at CDPP 25th Anniversary Dinner, Old Parliament House, Canberra, 5 March 2009).

<sup>55</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435.

<sup>56</sup> Peter Archer, *The Role of the Law Officers* (Fabian Research Series, 1978) 26.

<sup>57</sup> *Scotland Act 1998* (UK) c 46, s 48(5).

<sup>58</sup> Christina Ashton and Valerie Finch, *Constitutional Law in Scotland* (Greens, 2000) 56.

<sup>59</sup> *Scotland Act 1998* (UK) c 46, s 29(e).

<sup>60</sup> *Prosecution of Offences Act 1879* (England & Wales). It should be noted, however, that the extent to which, and manner in which, the England and Welsh DPP's office is, and has

Were it not for the passage of the *Scotland Act* in 1998, it might have been thought that the survival of the Lord Advocate's prosecutorial role into the 21<sup>st</sup> century was the result of historical chance, rather than any principled constitutional design. Many of the conditions that enlivened the case for independent prosecuting authorities in other Commonwealth jurisdictions, it would seem, simply never arose in Scotland.<sup>61</sup> In Australia, federalism added a layer of complexity to criminal proceedings that was, until recently,<sup>62</sup> avoided in the UK by the demarcation of Scots criminal law and jurisdiction.<sup>63</sup> The appointment of DPPs across Australia was also precipitated by various high profile events, which raised concerns as to the influence exerted by state Parliaments on prosecutorial decision-making,<sup>64</sup> and which generated a perception of widespread delay and inefficiency in existing systems.<sup>65</sup> These events helped to solidify public and political support for the creation of independent prosecuting authorities across the country.

Similar events took place in England,<sup>66</sup> despite the fact that the Attorney-General for England and Wales is theoretically 'spared any administrative responsibility by a

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been, 'independent', is debatable. See, eg, Graham Mansfield and Jill Peay, *The Director of Public Prosecutions* (Tevestock Publications, 1987) 45-51.

<sup>61</sup> Events subsequent to the passage of *Scotland Act 1998*, and in particular the Scottish government's handling of the Lockerbie trial, may have provided some impetus in this regard. See the comments of Hans Koechler and Robert Black in their reply to the Greshornish House Accord; <[http://www.i-p-o.org/Greshornish\\_House\\_Accord-16Sept08.htm](http://www.i-p-o.org/Greshornish_House_Accord-16Sept08.htm)>.

<sup>62</sup> See below, nn 75-94.

<sup>63</sup> The *Act of Union 1707* did not specify whether appeals could be heard by the House of Lords on Scots Law, but that Court has long accepted this to be the case in respect of criminal matters (*Mackintosh v Lord Advocate* (1876) 3 R. (HL) 34), although not civil matters (*Rosebery v Inglis* (1708) 18 Lds. Jnl. 464).

<sup>64</sup> Such as, for example, the resignation of former Commonwealth Attorney-General Robert Ellicot QC, following pressure from Cabinet to discontinue a prosecution against former Prime Minister Gough Whitlam. See Carney, above n 3, 3.

<sup>65</sup> These delays were especially pronounced in Western Australia, where some prosecutions were delayed by more than a decade. See Hinchcliffe, above n 54.

<sup>66</sup> For example, in 1924, the then Attorney-General, Sir Patrick Hastings, bowed to pressure from Parliament not to prosecute a communist editor for mutiny (See John Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) 216; Walker, above n 3, 149). Other examples are cited by Ashton and Finch, above n 58, 56-7. Concerns have been raised more recently in the Scottish media regarding the decision taken by Elish Angiolini, during her tenure as Solicitor-General, not to prosecute the alleged abusers of Hollie Greig. However, the concerns raised in this instance related to Ms Angiolini's professional association with certain of the accused, not her institutional independence from government.

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deliberate policy of separating the Attorney from daily politics'.<sup>67</sup> Unlike its Australian counterparts, however, the office of DPP for England and Wales was established long before these events transpired, and was not initially intended to (and, indeed, did not aspire to) secure the independence of prosecutorial decision-making.<sup>68</sup> Rather, the *Prosecution of Offences Act 1879* (UK) was passed in response to 'nearly a century of criticisms directed against a criminal law, which depended upon private individuals to initiate prosecutions.'<sup>69</sup> In contrast, as noted previously, the Lord Advocate has prosecuted crimes in the public interest, with or without the consent of victims, since (at least) 1587.<sup>70</sup> Issues of independence were at the heart of a Royal Commission and subsequent reforms in England and Wales in 1981, which transformed the office of DPP in that jurisdiction into the one we recognise today, but it was independence from the investigatory authorities (the police) with which the Royal Commission was primarily concerned, not independence from Parliament.<sup>71</sup> In Scotland, Procurators Fiscal were already independent from investigatory authorities (and had been for some time)<sup>72</sup> hence there was no need for reform along these lines.

It should also be noted that Scotland is not the only Commonwealth nation in which law officers continue to exercise advisory and prosecutorial functions. The New Zealand Law Officers perform a comparable dual role,<sup>73</sup> and apparently with little controversy. Given the broadly similar populations of Scotland and New Zealand, it is possible (in addition to the reasons set out above) that the 'critical mass' of prosecutorial work was simply never reached in these jurisdictions to justify the creation of a separate prosecuting authority.

Whatever the historical reasons underpinning the Lord Advocate's continued role in public prosecutions, however, the fact remains that the combination of this role with that of the chief legal advisor to the government raises difficult questions in a society purportedly governed by the rule of law. Koechler and Black have expressed the view that:

It is inappropriate that the Chief Legal Adviser to the Government is also head of all criminal prosecutions. Whilst the Lord Advocate and Solicitor General

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<sup>67</sup> Carney, above n 3, 3.

<sup>68</sup> *Prosecution of Offences Act 1879* (UK).

<sup>69</sup> Archer, above n 56, 12.

<sup>70</sup> Jurors Act 1587 (Scot).

<sup>71</sup> England and Wales, *Royal Commission on Criminal Procedure*, Cmnd 8092 (1981). See also Mansfield and Peay, above n 60, 4-5.

<sup>72</sup> Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford University Press, 1995) 65-6.

<sup>73</sup> Crown Law Office, *Law Officers of the Crown* <<http://www.crownlaw.govt.nz/pagepub/docs/about/officers.asp>>.

continue as public prosecutors the principle of separation of powers seems compromised. The potential for a conflict of interest always exists.<sup>74</sup>

The Scottish Law Officers must also now operate within the complex, quasi-federal constitutional framework outlined above, which has imposed unanticipated limitations upon the exercise of their powers. Indeed, as foreshadowed above, a considerable number of the Lord Advocate's decisions in relation to public prosecutions have been subject to challenge since devolution. These challenges have arisen not, as might be expected, on the basis of any perceived political interference in the criminal process or undermining of the separation of powers, but, rather, as a consequence of the constitutional control mechanisms introduced by the *Scotland Act* itself.

The problem, identified by the judges of the Court of Session (Scotland's supreme civil law court)<sup>75</sup> in a written submission to the Calman Commission, is that as a member of the Scottish Executive the Lord Advocate 'has no power', in accordance with s 57(2) of the *Scotland Act*, to do any act that is 'incompatible with any of the Convention rights or with Community law.' If it is contended that the Lord Advocate (or his or her agent) has acted *ultra vires* this provision, then the validity of that impugned act becomes subject to determination as a devolution issue, either in the Court of Session (in Scottish jurisdiction), or, in certain instances, the Supreme Court (in UK jurisdiction).<sup>76</sup> To date, these issues have tended to involve an allegation that the Lord Advocate has acted contrary to Article 6 of the European Convention on Human Rights (the right to a fair trial)<sup>77</sup> on the basis, for example, that he or she has failed to disclose material evidence,<sup>78</sup> or has proceeded to trial in circumstances where a fair trial could not reasonably be expected.<sup>79</sup>

The upshot of this arrangement is that prosecutorial decisions taken by the Lord Advocate (or on his or her behalf) are subject to challenge in the highest court of two

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<sup>74</sup> Koechler and Black, above n 61.

<sup>75</sup> The Judiciary in the Court of Session, *Submission to the Commission on Scottish Devolution* (10 October 2008) <<http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf>>.

<sup>76</sup> *Scotland Act 1998* (UK) c 46, Sch 6. Litigants may also seek leave to the European Court of Justice (in EU jurisdiction) and the European Court of Human Rights (in ECHR jurisdiction).

<sup>77</sup> The first case in which this argument was raised was *Montgomery v Her Majesty's Advocate* (No 2) 2001 SC (PC) 1. It has since been raised in a number of cases including, notably, *Brown v Stott* 2001 SC (PC) 43 and *Her Majesty's Advocate v R* 2003 SC (PC) 21.

<sup>78</sup> See, eg, *Holland v Her Majesty's Advocate* 2005 SC (P.C.).

<sup>79</sup> See, eg, *Sinclair v Her Majesty's Advocate* [2007] HCJAC 27.



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discrete jurisdictions,<sup>80</sup> each of which is subject to differing legal considerations, imperatives and standards. This has led, in turn, to the development of different legal tests within the respective jurisdictions,<sup>81</sup> and the compounding of delays in the Scottish criminal court system.<sup>82</sup> The Scottish judges offered three possible solutions to this problem:

- (i) That the UK Parliament amends the *Scotland Act* so as to exempt the Lord Advocate's prosecutorial role from s 57(2), placing him or her (in this regard) in a position similar to that of the DPP in England and Wales.<sup>83</sup>
- (ii) That the UK Parliament amends the *Scotland Act* so as to strip the Lord Advocate of his or her prosecutorial role, to be replaced by a DPP along the same lines as England and Wales (and Australia).<sup>84</sup>
- (iii) That the UK Parliament introduces a general right of appeal in criminal matters to the UK Supreme Court (at present, only criminal matters that raise a devolution issue are subject to UK jurisdiction).<sup>85</sup>

The Scottish judges did not express a preference for any solution,<sup>86</sup> and the Calman Commission declined to provide any recommendation on the basis that the issue fell outside its remit.<sup>87</sup> The Advocate General for Scotland subsequently established an expert group to consider the merits of the first of these options.<sup>88</sup> The second and third options were not put to the expert group on the basis that they would require 'very significant institutional or constitutional change'.<sup>89</sup> In light of the expert group's advice,<sup>90</sup> the Advocate General announced his intention to introduce an amendment to the *Scotland Bill* removing the acts of the Lord Advocate in his or her capacity as the head of the systems of criminal prosecution and investigation of deaths from the

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<sup>80</sup> The Judiciary in the Court of Session, above n 75, [7]-[12]

<sup>81</sup> Ibid [12].

<sup>82</sup> Ibid [13].

<sup>83</sup> Ibid [14].

<sup>84</sup> Ibid [14].

<sup>85</sup> Ibid [15].

<sup>86</sup> Ibid [14], [16].

<sup>87</sup> Commission on Scottish Devolution, above n 41, 165 [5.3.7].

<sup>88</sup> The Advocate General for Scotland, *Devolution Issues and Acts of the Lord Advocate – Consultation on Clauses* <<http://www.oag.gov.uk/oag/262.102.html>>.

<sup>89</sup> Ibid [16].

<sup>90</sup> Lord Boyd of Duncansby, Sir David Edward, Paul McBride, Frances McMenamin, *Section 57(2) and Schedule 6 of Scotland Act 1998 and the Role of the Lord Advocate: Report of the Expert Group Appointed by the Advocate General for Scotland* (11 November 2011) Advocate General for Scotland <<http://www.advocategeneral.gov.uk/oag/223.html>>.

purview of s 57(2).<sup>91</sup> The expert group also recommended, and the Advocate General agreed, that the jurisdiction of the Supreme Court should be retained in relation to criminal proceedings in Scotland, 'both for reasons of constitutional propriety and, more importantly, to ensure that fundamental rights enshrined in international obligations are secured in a consistent manner for all those who claim their protection in the United Kingdom.'<sup>92</sup>

It remains to be seen whether the Scottish Parliament will support the Lord Advocate's proposed amendment to the *Scotland Bill*. The Scotland Bill Committee (an ad-hoc committee of the Scottish Parliament established to advise MSP's on the *Scotland Bill*) welcomed the proposal 'in principle', but declined to make any overall recommendation to Parliament on the basis, inter alia, that there 'remain differences of opinion between the Lord Advocate and the Advocate General for Scotland on the detail of the way forward.'<sup>93</sup> In light of negative views recently expressed by the Scottish First Minister as regards the future role of the UK Supreme Court in Scots criminal matters,<sup>94</sup> however, it seems doubtful that this aspect of the proposed amendment, at least, will find much support amongst the nationalist majority at Holyrood.

But whatever the outcome in this regard, strong arguments remain for excision of the Lord Advocate's role in public prosecutions. Any such reform would, of course, raise a number of further questions. First, to whom should this role be passed? One obvious solution would be the Crown Agent, but there would not appear to be any reason in principle why, as suggested by the Scottish judges, a new body similar to that of the DPP in England and Wales, and the various Australian jurisdictions, should not be considered. A second question, more relevant in the current context, would be how best to deploy the Scottish Law Officers across the Lord Advocate's remaining advisory and public interest roles (especially if the Solicitor-General is currently engaged primarily in prosecutorial work). These are grand questions, and the answers to them are beyond the scope of this article. Any solution offered to the second question, however, should take account of the Lord Advocate's new role as the guardian of Scotland's devolution settlement. As outlined above, the functions comprising this role are multi-faceted, and range from the provision of advice during the committee stage of a Bill, through to the litigation of devolution issues. The remainder of this article contrasts the approach taken in Scotland with respect to the

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<sup>91</sup> Advocate General for Scotland, *Devolution Issues and Acts of the Lord Advocate – Expert Group Findings* <<http://www.oag.gov.uk/oag/223.html>>.

<sup>92</sup> Lord Boyd of Duncansby, et al, above n 90, [4.15]-[4.17], [5.3].

<sup>93</sup> Scotland Bill Committee, above n 39, [203]-[205]

<sup>94</sup> See, eg, Severin Carrell, 'Alex Salmond Provokes Fury with Attack on UK Supreme Court', *The Guardian* (London), 1 June 2011.

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latter of these functions, with the approach taken in Australia to constitutional litigation.

### **The Scottish Law Officers' role in devolution litigation**

In Australia, the burden of defending the boundaries of state and Commonwealth power is borne by the Solicitors-General, who act on behalf of Attorneys-General in matters of 'special interest' to the Crown.<sup>95</sup> By convention, it has been the 'dominant function of the Solicitor-General ... to appear on behalf of the Commonwealth in important constitutional cases,'<sup>96</sup> a function fulfilled with the support, as and when appropriate, of relevant government departments and stakeholders with expertise and interests in the area in dispute.<sup>97</sup> Whereas the Attorneys-General in Australia are known as 'politician's first',<sup>98</sup> and may or may not be lawyers, Solicitors-General are typically drawn directly from the private bar. They have been, almost without exception, senior constitutional barristers of considerable skill, experience and repute. As David Bennett has explained, in relation to the Commonwealth Solicitor-General:

[T]he Solicitor-General tends to possess the skills that arise from appearing in the area of constitutional law over time. However, the Solicitor-General has generally been selected from the pool of private barristers with expertise in constitutional law. Thus, the Solicitor-General also tends to bring with him (so far, the eight solicitors-general since Federation have all been male) the skills developed over a long career as a specialist advocate at the bar, representing many interests over that career and forging many strong relationships with fellow barristers.<sup>99</sup>

As in Scotland, the powers of the Australian Solicitors-General are subject to, and are derived from, those of the senior law officer.<sup>100</sup> In contrast with the Scottish Solicitor-

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<sup>95</sup> See, eg, Electoral and Administrative Review Commission (Qld), *Report on Review of Independence of the Attorney-General*, (July 1993), [5.2.2] <<http://www.parliament.qld.gov.au/documents/committees/PCEAR/1990/earc/pcear-report21.pdf>>.

<sup>96</sup> David Bennett, 'Constitutional Litigation and the Commonwealth' (delivered at ANZSOG Public Lecture, 16 July 2008) <[http://epress.anu.edu.au/anzsog/critical/mobile\\_devices/ch09.html](http://epress.anu.edu.au/anzsog/critical/mobile_devices/ch09.html)>

<sup>97</sup> *Ibid.*

<sup>98</sup> Harold Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 205.

<sup>99</sup> Bennett, above n 96.

<sup>100</sup> *Law Officers Act 1964* (Cth) s 17; *Solicitor-General Act 1969* (NSW) ss 3-4; *Solicitor-General Act 1969* (WA) s 9; *Attorney-General and Solicitor-General Act 1972* (Vic) s 5; *Solicitor-General Act 1972* (SA) s 6; *Solicitor-General Act 1985* (Tas) ss 7-8; *Solicitor-General Act 1985* (Qld) s 8; *Law Officers Act 2011* (ACT) s 17; *Law Officers Act* (NT) s 14.

General, however, Australian Solicitors-General are not public service appointments.<sup>101</sup> 'Political independence' has been the catch-cry of Australian reform in this area for over a century,<sup>102</sup> and statutory regimes have been introduced at the Commonwealth, state and territory level, which seek to insulate the Solicitors-General from political interference by providing, inter alia, certain guarantees in relation to appointment, tenure and remuneration.<sup>103</sup>

In constitutional litigation, the powers of the Solicitors-General are set out in the *Judiciary Act* 1903. Section 78A of that Act provides the Attorneys-General of the Commonwealth, states and territories with the right to intervene (personally or by counsel), in any federal, state or territory court, in any 'proceedings that relate to a matter arising under the *Constitution* or involving its interpretation.' Section 78B of the *Judiciary Act* 1903 places a duty on all courts not to proceed with such matters until satisfied that reasonable notice has been provided to the Attorneys-General. While this means that interventions may theoretically be made in any Australian case in which a constitutional issue is raised, in practice this seldom occurs below the upper appellate level (at which stage there is a natural limit to the number of cases that can be heard).<sup>104</sup> According to Keyzer, Australian Attorneys-General (Commonwealth, state and territory) have authorised their respective Solicitors-General to intervene on 689 occasions in the 292 cases that were decided by the Australian High Court between 1976 and 2010 (approximately 27 interventions a year across all Australian jurisdictions).<sup>105</sup>

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<sup>101</sup> Cf *Scotland Act 1998* (UK) c 46, s 48(1).

<sup>102</sup> Shortly after federation, for example, Sir Thomas Harrison Moore noted the importance of maintaining 'a permanent official of high legal qualification, a necessity which has been recognised in some of the colonies by the appointment of a Solicitor-General as a non-political and permanent officer.' (*The Constitution of the Commonwealth of Australia* (Legal Books, 2<sup>nd</sup> Ed, 1997) 180).

<sup>103</sup> See generally: *Law Officers Act 1964* (Cth); *Solicitor-General Act 1969* (NSW); *Solicitor-General Act 1969* (WA); *Attorney-General and Solicitor-General Act 1972* (Vic); *Solicitor-General Act 1972* (SA); *Solicitor-General Act 1985* (Tas); *Solicitor-General Act 1985* (Qld); *Law Officers Act 2011* (ACT); *Law Officers Act* (NT).

<sup>104</sup> Bennett, above n 96.

<sup>105</sup> Patrick Keyzer, *Open Constitutional Courts* (The Federation Press, 2010), 91. NB the *Judiciary Act 1903* was amended in 1976 to provide the states with rights of intervention, and again in 1983 to provide the same rights to the territories. These figures are supported by yearly percentage figures provided by Andrew Lynch and George Williams for the 10 year period beginning 1999 and ending 2008, which indicate that approximately 20% of all cases heard by the High Court of Australia (roughly 10 cases per year) involved constitutional issues ('The High Court on Constitutional Law: The 2008 Statistics' (2009) *The University of New South Wales Law Review* 181, 183).

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In Scotland, the Lord Advocate and the Solicitor-General may both theoretically appear in cases involving devolution issues, reflecting the fact that, in contrast with Australian jurisdictions, the Scottish Law Officers are both professional lawyers (although not, in the case of Solicitors-General, necessarily advocates). As outlined in the preceding section, the Lord Advocate has been named as the respondent in a number of proceedings in which a devolution issue has been raised, and would have been notified in these instances in the same manner as any other party to judicial proceedings.<sup>106</sup> But the Lord Advocate (and the Advocate General) also enjoy rights of intervention similar to those of Attorneys-General in Australia, and procedures are set out to ensure that they (or a representative) have the opportunity to participate in any proceedings, in Scottish or UK jurisdiction, which give rise to a devolution issue.<sup>107</sup> The Lord Advocate or the Advocate General may also initiate proceedings for the determination of a devolution issue.<sup>108</sup> Devolution issues raised in litigation are in practice notified to the Legal Secretariat to the Lord Advocate, who then determines the most appropriate course of action in conjunction with the relevant governmental department, the Scottish Government Legal Directorate ('SGLD'), and/or 'Standing Junior Counsel' (a list of whom is maintained by the Lord Advocate).<sup>109</sup> Senior counsel may also be called upon to conduct litigation, if deemed necessary by the Lord Advocate.

Thus, while the Lord Advocate may and does appear personally in cases in which a devolution issue has been raised, most devolution litigation to which the Scottish Government is a party, or in which the Lord Advocate intervenes, is conducted on the Lord Advocate's behalf by persons with specialist expertise in the relevant area. In 2010, for example, the Lord Advocate was represented by private counsel four times in the UK Supreme Court in cases raising devolution issues,<sup>110</sup> and appeared personally on only one occasion.<sup>111</sup> The Solicitor-General, in contrast, rarely represents the Lord Advocate in such matters.<sup>112</sup> The expertise required to defend

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<sup>106</sup> *Scotland Act 1998* (UK) c 46, Sch 6, ss 5, 15.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Scotland Act 1998* (UK) c 46, Sch 6, s 4(1).

<sup>109</sup> In some areas, such as reparation actions, outside firms are used. The SGLD may in turn instruct counsel, and does so for all litigation in the Court of Session. Litigation thereafter proceeds on the instructions of individual departments subject to the overall supervision of the Law Officers.

<sup>110</sup> *Allison v Her Majesty's Advocate* [2010] UKSC 6; *McInnes v Her Majesty's Advocate* [2010] UKSC 7; *Martin v Her Majesty's Advocate* [2010] UKSC 10; *Miller v Her Majesty's Advocate* [2010] UKSC 10.

<sup>111</sup> *Cadder v HMA* [2010] UKSC 43.

<sup>112</sup> The Solicitor-General has not appeared in many such cases, however. An example is *Brown v Procurator Fiscal* [2000] Scot HC 14.

'devolution issues' in Scotland – and, indeed, to decide whether any such defence is necessary – is therefore spread across a number of individuals and departments, and in many cases involves the appointment of private counsel. When the Lord Advocate has appeared personally in cases, the issues raised have tended to be of particular importance.<sup>113</sup> Such an approach would be consistent with that taken by the former Advocate General for Scotland, Lynda Clark, whose usual policy was 'not to intervene except in the higher courts, especially the Privy Council, where significant issues of principle may be decided.'<sup>114</sup> As noted previously, a similar approach is also adopted by Solicitors-General in Australia.

The preceding analysis is not intended to paint a complete picture of the devolution/constitutional litigation models adopted in Scotland and Australia, and those familiar with the practical operation of these models may find fault with the brief descriptions provided. In at least one important respect, however, it is clear that the Scottish and Australian models differ markedly, and that is in the highly specialized and comparatively narrow role performed by Australian Solicitors-General. By isolating and limiting the functions performed by the their Solicitors-General, the Australian Commonwealth, states and territories have created statutory office holders who tend more towards the 'hired gun' than the 'High Priest/High Priestess' embodied by the Scottish Law Officers.<sup>115</sup>

Each model might be thought to have its advantages. In Scotland, responsibility for devolution litigation may (at least in theory) be shared between the Scottish Law Officers, both of whom are experienced professional lawyers (and often advocates). The lack of any clear demarcation between the Scottish Law Officers' roles, and the routine appointment of outside counsel, may also provide a greater degree of flexibility, and access to a broader range of skills, than does the Australian model. On the other hand, as Bennett has pointed out, in relation to the Australian Commonwealth Solicitor-General,

there is an advantage in the Solicitor-General appearing in almost all the major constitutional cases because of the importance of the Commonwealth not putting submissions in one case that are inconsistent with its submissions in another and the desirability of not giving an answer to a question from the Bench in one case that might be used against the Commonwealth in another.<sup>116</sup>

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<sup>113</sup> Ibid.

<sup>114</sup> Scotland, *House of Commons Debates*, Commons Sitting, 9 July 2002, 733 (Lynda Clark, Advocate General for Scotland) available at <http://hansard.millbanksystems.com/commons/2002/jul/09/devolution>. See also Clark, above n 27.

<sup>115</sup> Sherr, above n 4.

<sup>116</sup> Bennett, above n 96.

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It would be facile to suggest, however, that for these or any other reasons the Australian or Scottish model is inherently superior to the other, or that the claimed benefits of one model would necessarily accrue to the other, if certain features were to be transposed. Both models serve their own distinct ends, and in their own distinct environments. But it would also be wrong, and historically inaccurate, to insist that these models are static, or that they must be shielded from reform. In truth, the law officer role, in Scotland as in Australia, has evolved over time to serve the prevailing legal and constitutional demands placed upon it. In Scotland, as noted earlier, the Lord Advocate's role has expanded and contracted over the centuries in response to Scotland's fluctuating relationship with England and the UK. Similarly, the roles and functions of Australian Law Officers have been shaped by the peculiar demands of federalism, and the highly specialised role entrusted to the Australian Solicitors-General is, at least in part, a response to these demands. Is there a possibility, on this basis, that the demands of devolution might reshape the law officer role in Scotland?

The answer to this question will depend, in part, on whether the volume of devolution litigation increases or decreases in the coming years. At first glance, it might be thought that devolution has resulted in a deluge of litigation across the UK. Since 1998, more than 10 000 devolution issues have been intimated to the Advocate General for Scotland.<sup>117</sup> In 2008 alone, 326 devolution minutes were intimated to that office, and the Advocate General reports intervening (although not, it would seem, always personally) in 13 cases.<sup>118</sup> In 2010, some 2249 devolution issues were intimated to the Advocate General, although interventions were only made by the Advocate General in two cases.<sup>119</sup> Similar figures do not appear to have been published by the Lord Advocate's office, although other sources indicate that more than 1200 devolution minutes were intimated to the Lord Advocate in 2009.<sup>120</sup>

These figures may be misleading, however. Most devolution minutes do not result in litigation, and the vast majority of devolution litigation has arisen in respect of the 'acts of the Lord Advocate' (as outlined above).<sup>121</sup> In comparison, the number of challenges to the legislative competence of the Scottish Parliament, or the administrative competence of other Scottish Ministers, has been 'minuscule'.<sup>122</sup> Most

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<sup>117</sup> Lord Boyd of Duncansby, et al, above n 90, [3.13].

<sup>118</sup> Scotland Office and Office of the Advocate General for Scotland, *Annual Report*, CM 7601 (2009) [3.18]

<sup>119</sup> Scotland Office and Office of the Advocate General for Scotland, *Annual Report*, CM 8102 (2011) [3.15]. No annual report appears to have been issued in 2009/10.

<sup>120</sup> Lord Boyd of Duncansby, et al, above n 90, [3.13].

<sup>121</sup> *Fraser v Her Majesty's Advocate* [2011] UKSC 24.

<sup>122</sup> Lord Boyd of Duncansby, et al, above n 90, [2.1]. Examples include *Napier v The Scottish Ministers* [2001] CSIH 162, in which the practice of 'slopping-out' in prisons was found to

of these cases have also involved questions arising under the *ECHR*,<sup>123</sup> as opposed to the division of powers between the UK and devolved jurisdictions.<sup>124</sup> Resolution of the issue pertaining to Lord Advocate's dual role may therefore stem the flow of devolution litigation in the short term. However, and as the development of that particular issue demonstrates, once a viable devolution issue has been identified it will often pollinate a multiplicity of similar claims. If, as seems inevitable, the Scottish Parliament gains further tax-varying powers following the enactment of the *Scotland Bill*, a number of devolution issues are also likely to be identified in this area.<sup>125</sup> Moreover, while Scottish (and other UK) litigants may have been slow to embrace devolution litigation, the fact remains that:

[A]s a category of legal question, devolution issues are expansive. First, they apply to legislative outputs and the exercise of executive functions ... Second, the boundaries of each devolved institutions' competence is not limited merely to questions of whether a particular policy area is devolved or not devolved. Rather, the requirement to act in a manner compatible with Convention Rights and Community Law adds pervasive boundaries. As such, the range of possible devolution issues, and hence the range of possible legal challenges is wide.<sup>126</sup>

It might be added that, in contrast with the Australian High Court, which may only determine 'matters' that raise 'some immediate right, duty or liability',<sup>127</sup> the UK Supreme Court is able to provide 'advisory opinions' on matters of constitutional

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be in breach of Article 3 of the *European Convention on Human Rights* ('*ECHR*') and ultra vires the Scottish Executive's power under s 57(2), and *Trevor Adams and Others v Advocate General for Scotland and Scottish Ministers* (2003) UKSC 171, in which the validity of the *Protection of Wild Mammals (Scotland) Act 2002* was held not to be incompatible with Article 8 or Article 1 Protocol 1 of the *ECHR*.

<sup>123</sup> See, eg, *ANS & DNS v ML* [2011] CSIH 38.

<sup>124</sup> An exception is *Martin and Miller v Lord Advocate* [2010] UKSC 10. That case involved a question as to whether s 42 of the *Criminal Proceedings etc (Reform) (Scotland) Act 2007*, which purported to extend the range of sentence that could be served by a Sheriff for driving while disqualified, was outside the legislative competence of the Scottish Parliament insofar as it encroached upon a 'reserved matter' (the *Road Traffic Act 1988* (UK) c 52 and the *Road Traffic Offenders Act 1988* (UK) c 53).

<sup>125</sup> Given the relative speed of the legislative process in Scotland, litigation may also provide those opposed to a particular Bill before Parliament with a more direct form of action than demonstrating or lobbying (Colin Munro, 'Privilege at Holyrood' [2000] *Public Law* 347; Gee above n 31, 273-4).

<sup>126</sup> Gee, above n 31, 258.

<sup>127</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.



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significance,<sup>128</sup> further extending the opportunity for devolution issues to be raised at the highest appellate level.

It is a distinct possibility, therefore, that the volume and breadth of devolution litigation will increase in Scotland (and in the UK as a whole) as the legislative competence of the Scottish Parliament increases, and as the tactical benefits and possibilities generated by devolution are realised.<sup>129</sup> Were this possibility to eventuate, the role of the Scottish Law Officers in devolution litigation would become increasingly important to the long-term viability of Scotland's devolution settlement. At a time when significant reforms are already being considered in relation to the Lord Advocate's role in public prosecutions, it is unfortunate that this aspect of the law officer role in Scotland has not formed part of that debate, or, indeed, the foundation for a broader debate as to ideal role that the Scottish Law Officers ought to play within the UK's new constitutional structure.

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<sup>128</sup> This rule is not without its critics in Australia. See, for example, Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments (2010) 22(3) *Bond Law Review* 156.

<sup>129</sup> Gee, above n 31, 256.