

To

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And

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Other Concerned Entities
Joanna Cherry KC
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Constitutional Briefing Memorandum on the Role of the Lord Advocate in Scotland

Dear Prime Minister,

We write to you as a collective of constitutional parties, civic participants, and lawful stakeholders within the jurisdiction of Scotland, to submit this urgent representation for constitutional intervention regarding the unlawful and unsustainable structure of Scotland's prosecutorial system, with specific regard to the dual function of the Lord Advocate under the Scotland Act 1998. The current arrangement, established under Sections 44(1)(c) and 48(5) of the *Scotland Act 1998*, assigns the Lord Advocate a dual role as both a Minister of the Scottish Government and head of the Crown Office and Procurator Fiscal Service (COPFS). This structure violates the rule of law, undermines prosecutorial independence, and is constitutionally incompatible with the separation of powers required under UK-wide legal norms.

This arrangement is expressly reserved to Westminster under Schedule 5, Part I of the *Scotland Act*, which includes "the constitution, including the Lord Advocate as a Law Officer of the Crown" within the exclusive competence of the UK Parliament. Therefore, any correction to this breach of constitutional integrity falls squarely within your Government's remit.

Constitutional Briefing Memorandum

Reform of the Lord Advocate’s Role in Scotland under Reserved Powers of the United Kingdom Parliament.

Submitted on behalf of Loyal Subjects within the Realms of Scotland

Date: 1st June 2025

Table of Contents

Constitutional Briefing Memorandum on the Role of the Lord Advocate in Scotland.....	1
1. Executive Summary	5
2. Legal Context: Ultra Vires Structure under the <i>Scotland Act 1998</i>	5
3. Prime Ministerial and Parliamentary Acknowledgment	5
4. Public Interest and the Operation Branchform Investigation	5
5. Roger Livermore’s Findings: Systemic Unlawfulness	6
6. Comparative International Models	6
7. Formal Request Under Reserved Powers	6
8. Remedies & Implementation Timetable.....	6
8A. Rebuttal to Scottish Government’s Position on Lord Advocate’s Role.....	7
1. Historical Precedent Does Not Justify Current Incompatibility.....	7
2. Parliamentary Record Contradicts Scottish Government Denial	7
3. The 2022 Review Is Insufficient and Lacks Transparency	7
4. Reserved Powers Preclude Scottish Government Inaction	7
5. Further Constitutional and Legal Rebuttals (Roger Livermore’s Analysis, Points 1–12) below:.....	7
6. Conclusion.....	8
9. Notice of Potential Legal Action	8

10. Deep Research Findings: Structural and Constitutional Failings.....9
11. Appendix: Supporting Materials.....9
12. Footnotes 10

1. Executive Summary

This memorandum calls for urgent constitutional reform of the Lord Advocate's dual role in Scotland. As both a Minister of the Scottish Government and head of the Crown Office and Procurator Fiscal Service (COPFS), the Lord Advocate occupies a structurally conflicted position that undermines prosecutorial independence, violates the rule of law, and breaches Articles 6 and 13 of the European Convention on Human Rights (ECHR). The matter falls within the exclusive legislative competence of the UK Parliament under Schedule 5 of the *Scotland Act 1998*.

2. Legal Context: Ultra Vires Structure under the *Scotland Act 1998*

Sections 44(1)(c) and 48(5) of the *Scotland Act 1998* assign the Lord Advocate both ministerial and prosecutorial duties. Section 48(6), however, mandates that the Lord Advocate act independently in prosecutorial matters—creating a statutory contradiction. This duality is incompatible with:

- ECHR Article 6 and Article 13;
- UN Basic Principles on the Role of Prosecutors (1990);
- UNCAC Article 11(2);
- GRECO Fourth Evaluation Round (2018);
- OECD Phase 4 Follow-Up Report (2023).

3. Prime Ministerial and Parliamentary Acknowledgment

The constitutional concerns have been acknowledged in: **Hansard Debate, 20 July 2021:**

"The dual role of the Lord Advocate... has created a democratic deficit in prosecutorial independence in Scotland."

— *Hansard, HC Deb, Vol. 699, Col. 317WH*

Prime Minister's Questions, 26 March 2025:

"The Lord Advocate's dual function is illegitimate and must be reformed." —
Hansard, HC Deb, Vol. 747, Col. 329

4. Public Interest and the Operation Branchform Investigation

The Lord Advocate's recusal from politically sensitive matters such as Operation Branchform—without clear delegation—has obscured lines of accountability. FOI Ref: FOI 202400438066 reveals the suppression of a near-complete internal report on this issue.

5. Roger Livermore's Findings: Systemic Unlawfulness

Roger Livermore, former HM Inspector and Crown Prosecutor, concludes:

- Scotland's system violates the rule of law;
- The dual role is constitutionally incoherent;
- Prosecutorial discretion is vulnerable to political interference.

"No democratic system can tolerate a situation in which political ministers exercise—directly or indirectly—discretionary control over criminal prosecution."

His findings align with warnings from GRECO, OECD, the UN, and comparative common law systems.

6. Comparative International Models

Other democratic states have structurally independent prosecution services:

- **Ireland:** DPP independent of Attorney General since 1974; •
- **Northern Ireland:** *Justice (NI) Act 2002*, Part 4;
- **Canada:** *Public Prosecution Service Act 2006*.

Scotland remains a constitutional anomaly.

7. Formal Request Under Reserved Powers

We respectfully urge the UK Government to:

- Legislate under Schedule 5 to abolish the Lord Advocate's dual role;
- Appoint an interim Director of Public Prosecutions (Scotland) under Section 57(2);
- Convene an inquiry under the *Inquiries Act 2005*;
- Support a *Scottish Law Officers (Devolution) Bill*;
- Ensure compliance with GRECO and OECD standards.

8. Remedies & Implementation Timetable

- **Q4 2025:** Draft legislation;
- **Early 2026:** Interim DPP appointed;
- **By 31 Dec 2026:** Legal separation complete;
- ECHR Article 41 & ex gratia compensation to follow;
- Use of Section 35 to block incompatible devolved measures if required.

8A. Rebuttal to Scottish Government’s Position on Lord Advocate’s Role

We acknowledge the Scottish Government’s official position, as conveyed in the response from Cabinet Secretary Angela Constance MSP (12 May 2025), regarding the dual role of the Lord Advocate. However, we must rebut the claims advanced therein for the following constitutional, legal, and evidential reasons:

1. Historical Precedent Does Not Justify Current Incompatibility

While dual roles existed pre-devolution, the Scotland Act 1998 created a new constitutional order. The Lord Advocate now acts under devolved legislative authority, which is required to comply with the European Convention on Human Rights. The combination of ministerial and prosecutorial roles violates Articles 6 and 13 ECHR and undermines the separation of powers, unlike any comparable common law jurisdiction.

2. Parliamentary Record Contradicts Scottish Government Denial

The Minister's claim that no problem exists is refuted by Hansard:

- Hansard Vol. 699, Col. 317WH (20 July 2021) — Kenny MacAskill and Joanna Cherry raised formal concern over the Lord Advocate’s structural conflict;
- Hansard Vol. 747, Col. 329 (26 March 2025) — The Prime Minister formally declared the dual role “illegitimate”.

3. The 2022 Review Is Insufficient and Lacks Transparency

The internal research commissioned from Malcolm McMillan has not been disclosed, remains under peer review three years later, and has been withheld from FOI request FOI 202400438066. Without publication or scrutiny, the review cannot be treated as credible reform.

4. Reserved Powers Preclude Scottish Government Inaction

Under Schedule 5 of the Scotland Act 1998, matters relating to the constitution and the Law Officers of the Crown are reserved to Westminster. Therefore, ultimate authority lies with the UK Government, which has both the power and obligation to act.

5. Further Constitutional and Legal Rebuttals (Roger Livermore’s Analysis, Points 1–12) below:

1. The Lord Advocate cannot lawfully act as both a Minister of Government and as an independent prosecutor under international standards and the ECHR;
2. There is no genuine accountability mechanism to distinguish or resolve conflicts in the dual role;

3. The current system places prosecutors in a position vulnerable to political interference and ministerial direction;
4. Scotland is the only modern democratic jurisdiction in Europe where the same person occupies these constitutionally conflicted roles;
5. The absence of a Director of Public Prosecutions (DPP) structure violates best practice models used across comparable systems;
6. Prosecutorial decisions are potentially compromised where they involve the Scottish Government or associated institutions;
7. The role is incompatible with GRECO and OECD anti-corruption recommendations on prosecutorial autonomy;
8. This structure may prejudice fair trial rights, as guaranteed under Article 6 ECHR, particularly in cases involving the Scottish Government;
9. The Lord Advocate's presence in Cabinet inherently politicises prosecution strategy and direction;
10. The Scottish Parliament does not have competence to unilaterally amend this structural flaw, given its reservation to Westminster;
11. Repeated FOISA refusals and redacted internal reviews suggest institutional suppression of reform discourse;
12. The Scottish Government's refusal to publish material such as the 2022 McMillan review demonstrates a lack of transparency and obstructs lawful scrutiny.

6. Conclusion

The Scottish Government's refusal to acknowledge the gravity of the Lord Advocate's dual role, despite Hansard debates, legal precedent, international guidance, and FOI disclosures, constitutes an abdication of constitutional responsibility. It is incumbent upon the UK Government to intervene and enforce lawful structural reform in accordance with its reserved powers.

9. Notice of Potential Legal Action

If no action is taken, we reserve the right to:

- Initiate Judicial Review in the Court of Session or UK Supreme Court or noble officium;
- Representation to the UN Special Rapporteur on the Independence of Judges and Lawyers;
 - File with the Venice Commission and Joint Committee on Human Rights;
- Seek ECHR just satisfaction under Article 41.

This is not speculative. It is a lawful assertion of constitutional rights.

10. Deep Research Findings: Structural and Constitutional Failings

A. Structural Contradictions

1–3: Conflicting statutory duties under the *Scotland Act*

B. Human Rights Violations

4–8: ECHR, UN, GRECO, OECD breaches

C. Lack of Oversight

9–13: FOI suppression, lack of transparency

D. Case Law and Precedent

14–17: Constitutional jurisprudence

E. Expert Opinion & Global Comparison

18–21: Livermore and international parallels

F. Legal Conflict and Risk

22–26: Legislative overreach and devolved incompetence

G. Remedial Actions

27–32: Proposals for lawful remedy and UK intervention

11. Appendix: Supporting Materials

- FOISA Disclosure FOI 202400438066;
- Case Law:
- *McGonnell v UK* (2000) 30 EHRR 289;
- *R (Corner House) v Director of the Serious Fraud Office* [2008] UKHL 60;
- *H v Lord Advocate* [2012] UKSC 24;
- *Cherry/Miller No.2* [2019] UKSC 41;
- GRECO and OECD Evaluations;
- UN Basic Principles (1990);
- International Comparative Legislation:
- Ireland (DPP Act 1974);
- Canada (PPSC Act 2006);
- Northern Ireland (Justice NI Act 2002).

Respectfully submitted, with Good Faith

Date: 4 June 2025

12. Footnotes

1. *Scotland Act 1998*, Schedule 5, Part I – Reserves constitutional matters to Westminster
2. *European Convention on Human Rights*, Articles 6 and 13 – Fair trial and effective remedy
3. *UN Basic Principles on the Role of Prosecutors* (1990), Arts. 4 & 5
4. *UNCAC*, Article 11(2) – Impartiality and transparency
5. *GRECO Fourth Evaluation Round* (2018) – Institutional independence concerns
6. *OECD Phase 4 Report* (2023) – Political interference risk
7. Hansard Vol. 699, Col. 317WH (20 Jul 2021)
8. Hansard Vol. 747, Col. 329 (26 Mar 2025)
9. FOI Ref: FOI 202400438066
10. Case Authorities: *McGonnell*, *Corner House*, *H v Lord Advocate*, *Cherry/Miller*
11. Roger Livermore’s submissions
12. Comparative legal systems: Ireland, Canada, Northern Ireland