

Opening Keynote –  
Upholding the rule of law:  
Achieving fairness in the justice system

The Rt Hon Dorothy Bain KC  
Lord Advocate

The opening keynote made to the Law Society of Scotland on Friday 21 October 2022.

I would like to start by providing a brief overview of my role and my reflections on this, before going on to talk in more detail about how the rule of law cannot be upheld while certain groups are not receiving justice, and the role that the Crown Office and Procurator Fiscal Service plays in developing a progressive and humane justice system. Finally, I will talk about the important role lawyers play more generally in upholding the rule of law.

### **1. Role of the Lord Advocate**

The role of the Lord Advocate is an office of historical and constitutional significance. It involves a variety of functions associated with maintaining the rule of law and administering justice.

I would like to talk to you briefly about 3 of my main responsibilities, which are all of equal importance:-

- 1) Firstly, the Lord Advocate is a member of the Scottish Government and acts as its principal legal adviser, as is reflected in section 44(1)(c) of the Scotland Act 1998.

The Scottish Ministerial Code, which is the Code of Conduct for Members of the Scottish Government, sets out that the overarching duty of Ministers is to comply with the law, including international law and treaty obligations, and to uphold the administration of justice and to protect the integrity of public life. It also provides that decisions by ministers and officials must be informed by appropriate analysis of the legal considerations.

In my capacity as Lord Advocate, I am responsible for ensuring that the Scottish Government acts lawfully at all times. I have the ultimate responsibility for advising the Scottish Ministers on all matters relating to the law of Scotland. As the senior Law Officer to the Scottish Government the Lord Advocate provides legal advice on the full range of the Government's responsibilities, policies and legislation, including advice on the legal implications of any Government proposals. In practice, this means I may be asked to give my own analysis of particularly significant or difficult legal issues facing the Government.

- 2) Secondly, the Lord Advocate plays a role in civil litigation for example representing the Scottish Government in civil proceedings.
- 3) Thirdly, the Lord Advocate plays a role as head of the systems of criminal prosecution and investigation of deaths in Scotland, with constitutional responsibility for the Crown Office and Procurator Fiscal Service.

The Scotland Act 1998 contains an explicit requirement that any decision taken by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths shall continue to be taken independently of any other person.<sup>1</sup>

This means exercising these functions completely separately from my Ministerial functions, to preserve the independence of this dual role. No one can require me to institute criminal proceedings or to abandon a prosecution. It is also outwith the legislative competence of the Parliament to remove the Lord

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<sup>1</sup> Section 48(5) Scotland Act 1998.

Advocate from her position as head of the systems of criminal prosecution and investigation of deaths.<sup>2</sup>

It is fundamental to the prosecution of crime in Scotland that decisions in individual cases are immune from political influence or other pressure. For me, this means recusing myself from involvement in cases where a conflict of interest or perceived conflict arises, and ensuring appropriate handling arrangements are in place.

- 4) Lastly, I also represent the public interest in a range of statutory and common law civil and constitutional functions. Some of these can be quite unusual: I am an *ex officio* Commissioner of Northern Lighthouses, a member of the Bible Board and one of the Commissioners for the Keeping of the Regalia of Scotland!

In undertaking all of these functions, I exercise my own personal judgment in light of the obligations which I have to uphold the rule of law and the proper administration of justice. Many of you will be aware that I recently exercised powers to refer devolution matters to the Supreme Court under the Scotland Act 1998. This was in relation to whether the question to be asked in a referendum on Scottish Independence, contained in a proposed Scottish Independence Referendum Bill, relates to reserved matters.

The decision to seek a definitive ruling on this issue was mine alone and was taken based on my assessment of the public interest to resolve the matter authoritatively, recognising that this is an issue that is of exceptional public importance. Indeed, it is one of the most important constitutional matters we will face for generations and the decision of the Supreme Court will be hugely significant to the people of Scotland.

Reflecting on what the role of the Lord Advocate means to me – I consider myself to be simply a custodian for a short period of time in the great history of the office, and I

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<sup>2</sup> Section 29(2)(e) Scotland Act 1998.

take that burden very seriously. I have to look after the office for the person who follows in my footsteps.

That burden is immense, and only possible to fulfil thanks to the expertise, dedication and support of those officials working with me in the Scottish Government Legal Directorate and the Crown Office and Procurator Fiscal Service as well as Standing Junior Counsel, Advocates Depute and many lawyers in the private sector who are instructed by Government from time to time.

I would like to come to the main theme of my talk today: how the rule of law cannot be upheld, where, as a society, we cannot secure justice for certain groups. The rule of law requires that the law should be effectively and consistently enforced, and as Lord Advocate, my fundamental commitment is to the effective, rigorous and fair administration of the criminal justice system. Yet there are a huge number of people in Scotland and abroad who are not experiencing, or have not experienced, justice – women and girls subjected to violence and abuse and those who have suffered childhood abuse.

### 1) Violence against women and girls

The World Health Organisation describes violence against women as a major public health problem and a violation of women's human rights. Statistics published by the WHO in 2021 indicate that an estimated 1 in 3 women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime. These figures are truly shocking.

In Scotland, charges reported to the Crown Office with a domestic abuse identifier have been increasing year on year. In 2020-21, 33,425 such charges were reported to us.<sup>3</sup> In just the month of March 2022, 486 sexual assaults were recorded by the police, an increase of 18% from March 2021.<sup>4</sup> The volume of serious sexual offence

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<sup>3</sup> <https://www.copfs.gov.uk/media/gl1dr2mo/domestic-abuse-and-stalking-charges-in-scotland-2020-21.pdf>

<sup>4</sup> <https://www.gov.scot/collections/crime-and-justice-statistics/>

cases has also increased dramatically, with over 70% of High Court casework now relating to serious sexual offending.<sup>5</sup> In 2020-2021, only 51% of rape and attempted rape trials resulted in conviction, compared to a 91% overall conviction rate.<sup>6</sup>

These figures are staggering and serve to highlight the scale of the problem we are facing. What these figures don't show however, is the severe and lasting impact that domestic violence and sexual offending can have on victims and their families, in terms of their physical, mental, sexual and reproductive health. Such violence also has high social and economic costs, both for women and for society as a whole.

Recent high profile cases in England, such as the murder of Sarah Everard, whose case was so appalling as it involved a person in a position of trust – a policeman – has served to ignite a public discourse on the issue of violence against women. Let's not forget however, that in Scotland we have numerous similar examples of horrific murders of women.

My own experiences of prosecuting Peter Tobin for the brutal rape and murder of Angelika Kluk, and prosecuting paedophiles Lauchlan and O'Neill for the murder of Allison McGarrigle, whose body was sadly never found, have given me a depth of insight into the sexual offences and violent crimes perpetrated against women.

The skills and experience I gained during those trials were important in the successful conviction of Scotland's largest paedophile ring – which was the first time a charge of conspiracy to abuse children was used to convict a group of paedophiles.

I recognise that the nature of sexual offences in particular, makes them different from other crimes. This is because of the higher risk of re-traumatisation of victims through the criminal justice process, and because of the impact on a victim's personal integrity, on their mental and physical health and on their present and future relationships. For these reasons, the prosecution of sexual offences requires a distinct approach.

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<sup>5</sup> <https://www.copfs.gov.uk/about-copfs/news/lord-advocate-announces-sexual-crime-prosecution-review/>

<sup>6</sup> <https://www.gov.scot/publications/criminal-proceedings-scotland-2020-21/documents/>

In recent years, some of the most authoritative voices in our profession have issued stark warnings about how sexual offences cases are dealt with.

In 2020, in the case of Gavin Watson Macdonald,<sup>7</sup> the Appeal Court criticised the court, the Crown and the defence for a number of serious deficiencies.

The Lord Justice General, delivering the judgment, noted that: *“This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable”*.<sup>8</sup>

Lady Dorrian’s review in 2021, into improving the management of sexual offence cases, was set up to address the significant increase in both the volume and complexity of these types of crime. Her review noted that the conviction rate for rape and attempted rape is lower than for any other type of crime. In the review’s report she stated that “the figures cannot simply be ignored. The disparity is such that it cannot be explained by poor prosecutorial decision-making, rogue cases or the like.”

These warnings should be a clarion call to the profession. Indeed – when the most senior judges in Scotland raise such profound concerns – it is clear that we have reached a tipping point.

As head of the system of prosecution in Scotland, I am keenly aware of the need to transform the way we prosecute sexual offences and domestic abuse. Dealing with these cases is the challenge of our generation.

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<sup>7</sup> [2020] HCJAC 21

<sup>8</sup> [2020hcjac21.pdf \(scotcourts.gov.uk\)](#)

I would like to therefore talk to you about some of the initiatives we are working on to address these challenges.

### **Crown Office initiatives**

- a. To achieve better outcomes for women and girls, I believe two things are absolutely key in the prosecution system:- firstly, a strong and effective prosecution system, and secondly, prosecutors who understand the way in which women are treated in society.

Since taking up the role, I have been impressed by the commitment of Crown Office staff to making improvements in this changing landscape. However I recognise the need to drive continuous improvement, to ensure we have a system which is delivering justice.

I have therefore commissioned Susanne Tanner KC to conduct a full review of how prosecutors deal with reports of sexual offences. The participation of victims and others in this review will be invaluable in helping to shape our understanding of both the challenges and solutions.

I have also prioritised increased levels of training for Advocates Depute and Procurators Fiscal so that they maintain the expertise needed to prosecute these type of cases.

- b. The ground-breaking Domestic Abuse (Scotland) Act 2018 criminalised both physical and psychological abuse, giving prosecutors more powers to shine a light on coercive and controlling behaviours. It also recognises the profound impact of domestic abuse on children, by creating a statutory aggravation to the offence where a child is involved.

Such far-reaching changes could not have been achieved without the engagement and collaboration of many across the justice sector, including lawyers and organisations representing victims and children.

Our experience of prosecuting offences under the Act has been very positive – it gives us the opportunity to lead evidence about a much wider course of behaviour and, importantly, it allows the victim to better tell their story, thereby ensuring justice for more victims of domestic abuse.

- c. The European Court of Human Rights has long recognised the state’s positive obligations to protect victims from domestic abuse.

In that regard, my own experience as chair of the Victim’s Taskforce, along with the Cabinet Secretary for Justice and Veterans, has given me the opportunity to hear directly from people with lived experience of interacting with the criminal justice system.

What victims tell us is that the criminal justice system is complex and can be re-traumatising. We are therefore looking to develop a “single point of contact” approach for victims, to provide them with better advice and support throughout the process of reporting a crime to the Police, prosecution by COPFS, sentencing and release of a convicted person from prison..

I also recognise that the changing profile of prosecution casework and the backlog that has been created by the pandemic have placed huge pressures on the Crown’s Victim Information and Advice Service. COPFS are therefore conducting a review of our Victim Information and Advice service, to ensure that it can continue to deliver high levels of service to victims and witnesses.

- d. COPFS has also been contributing to a number of initiatives relating to sexual offences – for example:-
  - i. a pilot scheme testing the viability of video recorded interviews for complainers in rape and attempted rape cases;
  - ii. working with Rape Crisis Scotland to receive anonymised feedback from complainers in rape cases; and



- iii. the development of a pilot scheme to allow appropriately qualified and experienced nurses to undertake forensic medical examinations of victims of sexual crime.
  
- e. The Crown Office has also been looking to other jurisdictions, to learn about how they deal with issues of violence against women. At the recent Heads of Prosecution Agencies in the Commonwealth Conference – [in Queensland Australia a man murdered his wife and 5 children, as a result of the public outcry an additional 330 million was invested from the ground up to tackle domestic violence.]

### **Wider criminal justice responses to tackling these issues**

Of course the work of prosecutors, though important, is only one part of the wider criminal justice process. The criminal bar, for example, also provide a vital contribution to protecting the rights of those accused of a crime.

The Scottish Government, the judiciary, the police and other agencies are also all responsible for ensuring an effective and functioning justice system based on fairness and respect for human rights.

In that regard, a number of steps are being taken to improve the justice sector. For example:-

- a. Lady Dorrian's review made a number of recommendations to create an efficient, forward-looking system which improves public confidence in the justice system. The recommendations from her report, such as those regarding judge-only trials for sexual offences, will require extensive consultation and careful consideration.

The Scottish Government has recently consulted on a number of recommendations from that review, including on the right to independent legal representation for complainers in sexual offence cases.

Currently, non means-tested legal aid is available for victims of sexual crimes or domestic violence, to allow victims to get independent legal representation if an application is made to court for recovery of their personal and sensitive records, such as medical records.

I am highlighting this particularly to criminal practitioners as I understand women are often being turned away by lawyers who are perhaps unaware of the existence of non-means tested legal aid in such cases.

The Scottish Government has also commissioned an independent review of the Victim Notification Scheme – which relates to the information victims of crime have about the parole and release of prisoners, and the circumstances in which they can make representations about a release.

- b. The Working Group on Misogyny and Criminal Justice in Scotland, chaired by Baroness Helena Kennedy, published a report in March which noted that “the failure to understand the ramifications of what is seen as low-level harassment and abuse is just one of the ways in which the criminal justice system falls down for women”.<sup>9</sup>

Her report recommends the creation of a new statutory misogyny aggravation, along with a number of new offences in relation to stirring up hatred, harassment and threatening the rape or sexual assault of women and girls. The Scottish Government, in its Programme for Government 2022-2023, has committed to consulting on these recommendations.<sup>10</sup>

- c. Police Scotland are taking a multi-agency approach to dealing with violence against women. Their dedicated public protection teams enable a coordinated and consistent policing response to be delivered locally, to protect those at risk of domestic violence.

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<sup>9</sup> <https://www.gov.scot/publications/misogyny-human-rights-issue/>.

<sup>10</sup> [A Stronger & More Resilient Scotland: The Programme for Government 2022-23 \(www.gov.scot\)](https://www.gov.scot/publications/a-stronger-more-resilient-scotland-the-programme-for-government-2022-23/)

By working in partnership, through forums which share information about domestic abuse perpetrators who present the greatest risk of harm, Police Scotland are better placed to identify threat, manage risk and prevent harm.

## 2) Child abuse

The other theme I would like to address is historical child abuse – and how generations of children have been failed by a system which didn't believe them. As with violence against women, the widespread and consistent denial of justice to those who were abused, is a failure to uphold the rule of law.

It is only now, with the establishment of the Scottish Child Abuse Inquiry, set up to investigate the abuse of children in care throughout Scotland, that the true extent of abuse is being uncovered.

The Inquiry is looking at what happened, why and where abuse took place, the effects of abuse on children and their families and whether the organisations responsible for children in care failed in their duties.

As Lady Smith, Chair of the Inquiry noted, the lives of the children who came into the care system had all already been blighted in some way, whether by being abused in the family home, the death of one or more parent, parental illness, families who could not cope with caring for them, abandonment or by other circumstances.<sup>11</sup>

The fact that following their placement in foster care, schools, religious and young offenders institutions, children were subjected to physical, emotional and sexual abuse – in the very institutions where they should have been safe and protected – is unconscionable.

Thus far, the Inquiry has heard the personal stories of numerous victims. One such victim, Julie, told the inquiry how breakfast times were the “beginning of hell each day”. That if she refused to eat, she would be beaten or humiliated. Julie told the inquiry that

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<sup>11</sup> <https://childabuseinquiry.scot/media/2347/qab-case-study-findings.pdf>

as an adult she has difficulty with food and mealtimes and struggles to get the nutrition she needs, because of the triggers due to her PTSD.<sup>12</sup>

Those experiences, and the experiences of countless others, are beyond comprehension. The work of the Inquiry cannot be overstated. It is shining a light on the abuse suffered by so many and the long-lasting impact it has had on their lives. It is also highlighting the enormous economic and social cost to society of failing to face up to the scale of the abuse.

In 2017, the Crown Office and Procurator Fiscal Service established the Scottish Child Abuse Inquiry Review Team as part of the former Lord Advocate's commitment to supporting the work of the Scottish Child Abuse Inquiry.

The Review Team is responsible for reviewing cases that were reported to COPFS in the past and, where appropriate, will instruct specialist teams within Police Scotland to carry out further enquiries and re-report cases.

The team considers cases involving present day abuse of children in residential care, and routinely offers the police advice and direction in relation to investigations. The investigation of all abuse in an institutional setting is undertaken through a modern lens, recognising developments in the law, policy and understanding, and recognising the dynamics of institutional abuse.

The evidence heard at the Inquiry thus far has been, and will continue to be, very carefully considered and reflected on by COPFS. As an organisation COPFS is committed to listening and learning how it can continue to improve the service it offers to victims.

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 also introduces a scheme of financial redress and support for those who were abused while they were a child and resident in care settings.

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<sup>12</sup> <https://childabuseinquiry.scot/media/3577/day-313-scottish-child-abuse-inquiry.pdf>

The successful creation of this legislation is an example of the Scottish Government's commitment to participation – the principle that individuals should be able to participate in shaping decisions about them – by ensuring survivors of abuse in care were involved in the design and delivery of the redress scheme. It is also down to the dedication of civil society and most importantly, the tenacity and courage of survivors involved in the process.

### 3) Drugs deaths

I would like to also talk briefly about the important issue of drugs deaths in Scotland. In Scotland, we continue to have the highest rate of drug deaths in Europe – this is nothing short of a public health emergency. Again, the rule of law requires that law and the criminal justice system serves every member of society.

Our changing understanding of crime and the causes of crime have underlined the need to find innovative solutions. I announced in September last year, a change to the guidelines on the recorded police warning scheme, which allows the police to take decisions in relation to some types of offending.

Under the updated guidelines, police officers may choose to issue a recorded police warning to those in simple possession of Class A drugs, in the same way as they previously did for Class B and C drugs. As a society we urgently need to address the troubling number of drugs deaths in Scotland.

COPFS has, for some years, sought to identify the most appropriate outcomes in the public interest where an accused person suffers from drug dependency. Using Diversion as an alternative to prosecution in appropriate cases, prosecutors can divert vulnerable individuals towards treatment and support services, in order to address the underlying causes of offending and prevent reoffending.

These practical and tangible actions are going some way towards delivering a more progressive, humane justice system.

However, in our constantly changing society, we need to ensure that the prosecution system responds to evolving challenges. That is why, as prosecutors, we regularly review our procedures and continuously seek innovative solutions to provide justice.

And importantly, we need to ensure our response to issues such as drugs deaths, violence against women and girls and child abuse is both multi-dimensional, collaborative and tailored to the needs of individuals.

### **3. The role of lawyers within the profession in upholding the law**

The law provides a framework for all aspects of society, and solicitors are therefore at the heart of upholding it. This gives us a unique opportunity to be disruptors for good – one of the themes of the Law Society’s conference today. I would therefore like to end by talking about some particular aspects of the work lawyers in Scotland are doing (and can do) to uphold the rule of law.

#### **1) Scottish Criminal legal profession**

Reflecting on the role of the profession – I want to take a moment to recognise the crucial role the criminal bar plays in achieving justice.

I am pleased to see the values of the Crown Office and Procurator Fiscal Service embodied across the department – those of impartiality, thoroughness, integrity, sensitivity, co-operation and professionalism.

I see the incredible value that members of COPFS bring in prosecuting cases in the public interest while upholding the fundamental rights of those who come into contact with the justice system – both the perpetrators and the victims of crime. I have a great respect for prosecutors, including those Advocates Depute who come from private practice, many of whom personally sacrifice much to serve the people of Scotland.

I also recognise how incredibly committed defence agents and defence counsel are to providing progressive and humane justice by ensuring the respect of the most basic of rights – the right to a fair trial.

That work is absolutely critical to the work I do. I recognise and understand some of the challenges being faced within the criminal legal profession.

The service that you give to the people of Scotland, and to some of the most marginalised people in our society, is truly immense.

I have always found it a privilege to work in criminal law, and I hope that those within the criminal legal profession continue to find it rewarding, through our shared endeavour of providing a valuable public service for the people of Scotland.

## 2) Trauma-informed practice

Trauma informed practice is a really important way for all of us to improve the experiences of people who need our services and to ensure a more compassionate legal system, both in criminal and civil practice.

It helps us to recognise the impact of trauma and adverse childhood experiences and it gives us the tools to better support clients across the profession.

I'm pleased to see the work that the Law Society and lawyers are doing to increase trauma awareness by fostering discussion and promoting trauma-informed training. As a profession, we can be proud of the progress we have made in achieving a more caring society.

## 3) Ukraine

Looking further afield to the international arena, it is clear that the rule of law is fundamental to international peace and security.

We have seen, with the invasion of Ukraine in February, how the breaking of our international rules-based order, which is made up of treaties and agreements, has resulted in political and economic instability on a global level.

These international agreements are part of our law. In fact, as I mentioned earlier, the Ministerial Code sets out that the overarching duty of Ministers is to comply with the law, including international law and treaty obligations.

This places responsibilities directly on Ministers to uphold treaties such as the UN Charter and human rights treaties including the Convention on the Elimination of Discrimination against Women.

As the situation unfolds in Ukraine, it has never been more important to adhere to the international rules-based order, to the rule of law. Now more than ever, we need strong institutions both in Scotland and abroad, which uphold the rule of law. And crucially, we need lawyers and citizens to hold those institutions to account.

#### 4) Tackling violence against women and girls

It will come as no surprise – given what I have been talking about today – that I consider that women and girls are being failed by the justice system. Equality within the justice system cannot be achieved while justice is not being delivered to a significant proportion of a group within our society.

I have outlined how prosecutors are looking to tackle these issues, but we can only do so much to achieve a modern and progressive justice system. While we should rightly be proud of the progress we have made both in Scotland and further afield in protecting human rights and striving for equality, there is more still to be done.

I want to take this opportunity to highlight that each and every one of us here today has a responsibility to ask ourselves why such unacceptable forms of abuse against women and girls are allowed to happen, and what can be done to challenge the underlying societal behaviours that lead to such intolerable levels of abuse.



While I acknowledge that society as a whole must be involved in addressing such a widespread problem, I think the legal profession itself has a crucial role to play.

As lawyers, we are perhaps most well-versed in the principles of law, justice and fairness.

That is why we must be at the forefront of the debate on new and innovative models to achieve justice in both our legislation and in our courts. Accepting the status quo is no longer an option.

I ask you to be bold in accepting this challenge, and for us to find ways to work collaboratively together, so that we can do better for women and girls in Scotland.