The Lord Justice General
Parliament House
Edinburgh EH1 1RQ

26 September 2007

The Rt. Hon. Elish Angiolini, Q.C.,
The Lord Advocate,
Lord Advocate's Chambers,
25 Chambers Street,
Edinburgh,
EH1 1LA.

Dear Lord Advocate,

HM ADVOCATE v SINCLAIR

I address this letter to you in formal terms because its subject-matter involves an important principle concerning the relationship between the court and the public prosecutor in Scotland.

I was on leave when you addressed the Scottish Parliament on Thursday 13 September following the acquittal of the accused by the trial judge in the above case on Monday 10 September. I have, however, now read a transcript of your address. I conclude from your reference (column 1765) to the judge's decision as "final" that you do not intend to refer any point of law arising in relation to that decision to the High Court under section 123 of the Criminal Procedure (Scotland) Act 1995. Given that such a reference could not result in a reversal of the acquittal, I can understand that position.

However, the resultant situation is that the trial judge's decision on the section 97 submission made to him is for all purposes final and that in your address to the Parliament you treated it as such.

At column 1766 you are recorded as saying -

"Although I would not normally think it appropriate as Lord Advocate to comment following such a judgment, given the extent of the misunderstandings about the case and the Crown's approach, I feel that I

have to set the record straight about the Crown's understanding of the case and the evidence that was made available to the court.

I am of the clear opinion that the evidence that was made available to the court was sufficient to put before the jury to allow it the opportunity to decide on the case against Angus Sinclair. Let me set out the Crown case presented to the court."

You then set out, in a detailed and carefully crafted narrative, the evidence apparently adduced by the Crown and conclude at column 1769 -

"It was the Crown's position that the evidence in this case allowed ... an inference [of guilt] to be drawn."

It is clear that you were, as Lord Advocate, stating to the Parliament that in your "clear" opinion there was sufficient evidence to go to the jury. The plain implication from that statement was that you were publicly asserting that the decision of the trial judge was wrong.

Although I have read the whole of your statement to Parliament and the statement which the trial judge issued giving detailed reasons for his decision, I have formed no view as to whether or not that decision was sound in law. I am, however, concerned that you have thought it appropriate to challenge, in a public and political forum and in the way which you have, a final decision of the court (whether that decision be right or wrong).

Section 1(1) of the Judiciary (Scotland) Bill provides that certain office holders, including the Lord Advocate, must uphold the continued independence of the judiciary. That section, I believe, reflects an existing recognition that the Lord Advocate, among others, has such a duty. The independence of the judiciary depends, in my view, not only on freedom of individual judges from prior interference with decisions they have to take but a preparedness by the Lord Advocate and others to recognise, in all public pronouncements, that final decisions made by judges, whether on points of law or on applications of the law to particular facts or to particular evidence, reflect the law as it stands and must be respected as such. If such respect is not afforded, the independence of the judiciary as the final arbiter of legal issues is put at risk. An open challenge to the correctness of a final decision does not afford the requisite respect. Rather, it tends to undermine for the future the confidence which judges, faced with difficult decisions in controversial cases, can reasonably expect to have that their decisions will not be openly criticised by other organs of government.

The public prosecutor may of course entertain private views as to the soundness of legal decisions. In the light of experience steps may be taken to amend the law or in a legal forum to challenge the soundness of an earlier decision. But public criticism in a political forum of particular decisions, especially in controversial and sensitive areas, is in my view inappropriate.

My concern is not restricted to this case. The same situation might well arise in any case in which a trial judge sustained a submission under section 97. It might also arise where, on an appeal against conviction, the court held that there had been insufficient evidence in law to warrant it. While such events commonly occur without public interest, they may well occur in controversial cases. It would be most unfortunate were the Lord Advocate to adopt a practice of publicly criticising such decisions.

I can readily understand that, given the issue which had arisen as to whether the Advocate depute had properly exercised his discretion as to what evidence he should lead (or not lead), you would find it appropriate publicly to support him. But such support could have been afforded without public criticism of the judge. In particular, respect for what was treated as being a final decision of the High Court of Justiciary might have been expressly afforded.

I have discussed this letter with the Lord Justice Clerk. He agrees with its terms. He also agrees with my view that the letter should be made public.

I am sorry to have to write in these terms but I think it important that you know my views. If a discussion would assist, I would be happy to meet you at your convenience.

Yours ever,

Anthony Hamilton