

Witness Name: W James Wolffe KC
Statement No.: 1
Exhibits: WJW
Dated: 28 November 2023

UK COVID-19 INQUIRY

WITNESS STATEMENT OF RT HON WALTER JAMES WOLFFE KC

In relation to the issues raised by the Rule 9 request dated 16 June 2023 in connection with Module 2A, I, WALTER JAMES WOLFFE, will say as follows: -

1. I am Walter James Wolffe. I am a practising advocate and barrister and serve as a Judge of Appeal of Guernsey and Jersey. I am a Kings Counsel. My professional addresses are the Advocates Library, Parliament House, Parliament Square, Edinburgh EH1 1RF and Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD. I was Lord Advocate during part of the period of interest to the Inquiry. I remain a Privy Counsellor. I am not currently employed by the Scottish Government.
2. I have prepared this statement myself. My present specific recollection is limited and I have refreshed my memory by reference to documents provided to me by the Scottish Government Covid Inquiry Unit and Crown Office and Procurator Fiscal Service. For the reasons which I explain below, this statement is limited to a general explanation of my involvement in the matters of interest to the Inquiry. Unless stated otherwise, the facts stated in this witness statement are within my own knowledge and are true. Where they are not within my own knowledge, they

are derived from sources to which I refer and are true to the best of my knowledge and belief.

3. References to exhibits in this statement are in the form WJW/number - INQ000000.

Scope of statement

4. Following receipt of the Inquiry's letter of 16 June 2023, I sought clarification as to the extent to which I was expected to address my responsibilities as head of the systems of criminal prosecution and investigation of deaths in Scotland. One of the reasons for doing so was that, if I were to be required to address those responsibilities, I would require to obtain relevant documents from COPFS. I was advised at that time that the Inquiry did not require me to address in the statement my responsibilities as head of the systems of criminal prosecution and investigation of deaths in Scotland.
5. I prepared a draft statement on that basis which was provided to the Inquiry in early July 2023. The draft included some illustrative examples of my role as head of the systems of criminal prosecution and investigation of deaths. It stated:

“I understand that, at this stage, the Inquiry seeks a statement from me only in respect of the Law Officer functions and does not require me to address my role as head of the systems of criminal prosecution and investigation of deaths, and I accordingly do not propose to address these matters in this statement. I will be happy to provide a further statement on them in due course, once I have had access to relevant documents from COPFS, should the Inquiry wish me to do so.”

6. On 22 November 2023, I was told, for the first time, that the Inquiry had advised as follows:

“Mr Wolffe should address his head of system functions insofar as they are necessary to answer the questions he has been asked under reference to the scope of the module. What is or is not included in that regard is a matter for him as it depends on the extent to which his actions in that role assist with the issues the Inquiry is endeavouring to address.”

This represented a significant change of position as far as I was concerned. In order to respond to it, I will require to review relevant documents sourced both from Scottish Government and from COPFS. Work is ongoing urgently to identify and to provide me with the documentary record necessary for me to respond to the Inquiry's request. Unsurprisingly, given the short time since that request was made, that work is not yet complete.

7. At 11:22 am on 27 November 2023, I was advised both: (i) that the Inquiry required me to sign my existing draft statement by 5 pm on 28 November; and also (ii) that I should address in it my responsibilities as head of the system of prosecution and investigation of deaths. This was the first time that I had been advised of this deadline. As I have observed above, the work to provide me with the documentary record to enable me to comply with the latter request was commenced urgently last week, when I was advised of the Inquiry's changed expectations in that regard and is not yet complete.
8. In the circumstances, this statement is based on the existing draft, on the basis that I will provide a supplementary statement dealing with my responsibilities as head of the system of criminal prosecution and investigation of deaths as requested by the Inquiry as soon as I am able to do so. I should stress that I am keen to be of assistance to the Inquiry. The draft statement which I produced in July invited the Inquiry to advise whether it wished me to provide a further statement on those responsibilities. Urgent work has been put in hand to enable me to respond to the request to do so, made to me on 22 November 2023, and I will provide an additional statement as soon as I have been able to review the documentary record.
9. References to exhibits in this statement are in the form WJW/number - INQ000000.

Legal Professional Privilege

10. In respect of the Law Officer functions within Scottish Government, the Law Officers are bound by the professional obligations of confidentiality and confidence which apply to any legal adviser. Further, by long-recognised convention ("the Law Officers Convention"), Governments in the UK do not disclose whether or not Law Officers have advised personally on any particular matter¹. I have prepared this statement on the basis that the Scottish Government has not waived legal professional privilege in relation to the matters identified in the Inquiry's letter to me of 16 June 2023 and has maintained the Law Officers Convention in relation to those matters.

Professional history

11. I became an advocate in 1992. and took silk in 2007. I was called to the bar of England & Wales in 2013. I was First Standing Junior Counsel to the Scottish Ministers 2002-2007. I served as a full-time Advocate Depute 2007-2010. I was elected successively as Vice-dean (2013) and then Dean (2014) of the Faculty of Advocates. I served as Dean from 2014 until my appointment as Lord Advocate in 2016.

12. I was appointed Lord Advocate in June 2016. In May 2021 I announced my intention to resign, although I remained in office until the appointment of my successor on 18 June 2021. I had, and have, no party-political affiliation.

Functions of the Lord Advocate

13. The Lord Advocate is the senior Scottish Law Officer. The holder of the office is head of the systems of criminal prosecution and investigation of deaths in Scotland. These functions are exercised independently of any other person². The Lord Advocate also exercises numerous statutory functions which are conferred

¹ See eg *HM Treasury v Information Commissioner* [2010] QB 563; the Convention is reflected in the provisions of the Scottish Ministerial Code to which I have referred above.

² This long-established position is recognised in the Scotland Act 1998, section 48(5).

specifically on the holder of that office and are therefore exercised by the office-holder qua Lord Advocate and not as a Scottish Minister. These include, notably, functions in relation to extradition and mutual legal assistance³ and certain functions under the Scotland Act 1998 in relation to Scottish legislation⁴.

14. The Lord Advocate is ex officio a member of the Scottish Government⁵. The role and responsibilities of the Law Officers within the Scottish Government are described in the Scottish Ministerial Code⁶ at paragraphs 2.30 to 2.43. I refer to the responsibilities set out in those paragraphs as “the Law Officer functions”. In fulfilling those functions, the Lord Advocate is generally described as the principal legal adviser to the Scottish Government. In addition to the Law Officer functions, the Lord Advocate has (or at least had during my period of office), within the Scottish Government, allocated Ministerial responsibility for the Civil Recovery Unit (which fulfils functions conferred on the Scottish Ministers under the Proceeds of Crime Act) and exercises certain functions in respect of trusts which are conferred by statute on Scottish Ministers.

Organisational context

15. The Lord Advocate is assisted, in the exercise of the wide-ranging responsibilities which I have described, by the Solicitor General for Scotland, who by statute may exercise the Lord Advocate’s functions⁷. During my period of office, the Solicitor General for Scotland was Alison di Rollo KC. The Solicitor General for Scotland and I were supported by the staff of the Law Officers’ Private Office and the Legal Secretariat to the Lord Advocate (“LSLA”). LSLA comprises a small team of lawyers, led by the Legal Secretary to the Lord Advocate, which supports the Scottish Law Officers in relation to their non-prosecutorial functions.

³ Extradition Act 2003, section 191; Crime (International Co-operation) Act 2003.

⁴ Scotland Act 1998, sections 32 and 33, Schedule 6.

⁵ Scotland Act 1998, section 44(1)(c).

⁶ Exhibit [WJW/001-INQ000102901]

⁷ Law Officers Act 1944, section 2.

16. As paragraph 2.31 of the Scottish Ministerial Code recognizes, whilst the Law Officers have Ministerial responsibility for the provision of legal advice to the Scottish Government, most legal advice provided to the Scottish Government is tendered not by the Law Officers personally but by lawyers employed in the Scottish Government Legal Directorate (“SGLD”). In addition, Scottish Parliamentary Counsel Office (“SPCO”) contains specialist legislative drafters who draft Bills. SGLD is headed by the Solicitor to the Scottish Government.
17. As head of the systems of criminal prosecution and investigation of deaths in Scotland, the Lord Advocate is responsible for the work of the Crown Office and Procurator Fiscal Service (“COPFS”). COPFS is the agency which is responsible, in Scotland, for the prosecution of crime and investigation of deaths. COPFS employs staff - professional lawyers and others - who are engaged in the prosecution of crime and investigation of deaths in Scotland. It is headed by the Crown Agent. Just as the Lord Advocate exercises functions as head of the systems of criminal prosecution and investigation of deaths independently of any other person, so COPFS acts independently of the Scottish Government.
18. The system of criminal prosecution of which the Lord Advocate is the independent head is a unified system. No person or body has power to initiate a prosecution in the public interest other than (in respect of proceedings on indictment) the Lord Advocate or an Advocate Depute exercising the Lord Advocate’s functions, or (in respect of summary proceedings) a procurator fiscal or a procurator fiscal depute exercising the procurator fiscal’s functions⁸. The Lord Advocate may promote a consistent and coherent approach to prosecutorial decision-making across the system by the promulgation of prosecution policy. Further, whilst the police generally investigate alleged crimes on their own initiative, they are, as a general rule, obliged to report their investigations to the procurator fiscal and to act in accordance with any direction which the prosecutor may give⁹. The Lord Advocate

⁸ A victim of crime may initiate a prosecution only with the consent of the Lord Advocate or the approval of the Court. Private prosecutions are exceptionally rare.

⁹ *R v. Manchester Stipendiary Magistrate ex parte Granada Television* [2001] 1 AC 300, 305B-F per Lord Hope of Craighead; *Johnston v. HM Advocate* 2006 SCCR 236, para. 117. The constitutional position is reflected in the Police and Fire Reform (Scotland) Act 2012, section 17(3); and the Crime and Courts Act 2013, Schedule 1, para. 6.

has statutory power to issue directions to the Chief Constable in respect of the reporting of crimes to the procurator fiscal¹⁰.

My involvement in matters of interest to the inquiry

19. In the draft statement which I provided in early July 2023, I stated as follows:

“So far as I recall, my personal involvement in the matters of interest to the Inquiry was, firstly, in the exercise of the Law Officer functions within Scottish Government, and, secondly, in the exercise of my responsibilities as head of the systems of criminal prosecution and investigation of deaths. For example, as head of the system of criminal prosecution, I issued directions to the Chief Constable on the reporting to the procurator fiscal of offences under Covid regulations. As head of the system of investigation of deaths, I issued directions on the reporting of Covid-related deaths to the procurator fiscal and made a statement to the Scottish Parliament on 13 May 2020 on the establishment of a Unit within COPFS to investigate certain Covid-related deaths. I contributed policy input as head of the systems of criminal prosecution and investigation of deaths into certain Scottish Government decisions (for example, I have a recollection of commenting on the level of fixed penalty notices). I understand that, at this stage, the Inquiry seeks a statement from me only in respect of the Law Officer functions and does not require me to address my role as head of the systems of criminal prosecution and investigation of deaths, and I accordingly do not propose to address these matters in this statement. I will be happy to provide a further statement on them in due course, once I have had access to relevant documents from COPFS, should the Inquiry wish me to do so.”

20. As I have explained above, I have very recently been asked to address those matters further, and work has been urgently put in hand to allow me to do that. I will provide a further statement addressing those issues as soon as I have been able to review the documentary record.

¹⁰ Criminal Procedure (Scotland) Act 1995, section 12.

21. In respect of the Law Officer functions, Law Officers are bound by the professional obligations of confidentiality and confidence which apply to any legal adviser. Further, by long-recognised convention (“the Law Officers Convention”), Governments in the UK do not disclose whether or not Law Officers have advised personally on any particular matter¹¹. I understand that the Scottish Government has not waived legal professional privilege in relation to the matters identified in the Inquiry’s letter to me of 16 June 2023 and has maintained the Law Officers Convention in relation to those matters. As paragraph 2.41 of the Scottish Ministerial Code explains, the Law Officers Convention does not prevent disclosure of the fact that Law Officers have advised that a Bill is within the legislative competence of the Scottish Parliament. I can accordingly confirm that I cleared the Coronavirus (Scotland) Bill and the Coronavirus (No. 2) (Scotland) Bill as being within the legislative competence of the Scottish Parliament for the purposes of their introduction into the Parliament. So far as the exercise of the Law Officer functions is concerned, I am otherwise constrained by the professional obligations of confidentiality and confidence to which I have referred.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed: _____

Personal Data

Dated: _____ 28 November 2023 _____

¹¹ See eg *HM Treasury v Information Commissioner* [2010] QB 563; the Convention is reflected in the provisions of the Scottish Ministerial Code to which I have referred above.