Dear Convener,

**Hate Crime and Public Order (Scotland) Bill: Amendment 55**

My attention has been drawn to Amendment 55 to the Hate Crime and Public Order (Scotland) Bill. This touches on my responsibilities as head of the systems of criminal prosecution and investigation of deaths in Scotland. I thought it would be useful to the Committee if I were, as head of those systems, to write to explain why that amendment is unnecessary and, indeed, would not be consistent with the constitutional position of the Lord Advocate as head of those systems.

The amendment is in the following terms:

“No proceedings for an offence under section 3 or 5 may be instituted except by, or with the consent of, Crown Counsel."

I appreciate that the background to this amendment lies in Part III of the Public Order Act 1986, which contains current criminal offences in respect of actions stirring up racial hatred. In that Part, section 27 provides:

“(1) No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General.”

No equivalent provision is made in the 1986 Act for consent of the Lord Advocate to the institution of proceedings in Scotland. That is, as I explain below, standard drafting practice.

The absence from section 27 of the Public Order Act 1986 of equivalent provision for proceedings in Scotland, and the drafting practice which it reflects, is not accidental. It is a function of the very significant structural differences between the criminal justice systems of the two jurisdictions; and, in particular, of the fact
that, in Scotland, for practical purposes, all prosecution decisions are made by public prosecutors within the system of criminal prosecution for which the Lord Advocate, acting independently of any other person, is responsible.

The Crown Office and Procurator Fiscal Service, for which the Lord Advocate is Ministerially responsible, is the only public prosecution service in Scotland. Private prosecutions are, as you are aware, exceptionally rare in Scotland, and may be raised only with the concurrence of the Lord Advocate, which failing, the consent of the Court: see *Stewart v. Payne* 2017 JC 155.

The Lord Advocate is, accordingly, by virtue of his responsibilities as head of the system of criminal prosecution, in a position to secure consistency in decision-making and an appropriate level of oversight across all areas of crime in Scotland through the formulation of prosecution policy (including any directions which the Lord Advocate may issue as regards the reporting of cases to Crown Counsel).

The position in England & Wales is quite different. There is, in that jurisdiction, no general or unified system of public prosecution, such as we have in Scotland. There are at least two public prosecution services – namely, the Crown Prosecution Service and the Serious Fraud Office. More significantly, the establishment of the Crown Prosecution Service in 1986 (creating, for the first time, in England & Wales, a national public prosecution service) did not affect the pre-existing right of private prosecution.

As I understand the position, it remains the case today in England & Wales, that private prosecutors have an unlimited right to institute a prosecution, albeit the DPP has the power to take over such a prosecution with a view to discontinuing it. The history is described in *R (Gujra) v. Crown Prosecution Service* [2013] 1 AC 484, paras. 10-21. Accordingly, in England & Wales prosecutions may be – and are routinely, as I understand it - instituted by a wide variety of bodies, public and private, as well as by private individuals.

It is against that background that, from time to time, provision has been made to require the consent of the Attorney General (as in section 27 of the Public Order Act 1986) or of the Director of Public Prosecutions (an example may be seen at section 7 of the Public Order Act 1986) to the institution of proceedings in England & Wales for certain offences. Such a provision ensures that the decision whether proceedings in respect of such offences are instituted is ultimately in the hands of a responsible public official – whether the Attorney General or the DPP.
In Scotland, of course, all prosecutorial decisions are in the hands of responsible public officials, within the system for which the Lord Advocate is responsible. Given the Lord Advocate’s position in Scotland as head of a unified and single system of prosecution, and the controls in our system over the institution of private prosecutions, a similar provision is wholly unnecessary in Scotland.

It is for the Lord Advocate, as head of the systems of criminal prosecution and investigation of deaths in Scotland, acting independently of any other person (as recognised by section 48(5) of the Scotland Act 1998), to put in place the appropriate policies and procedures for decision-making in any particular type of case – including whether or not any particular category of case which would not otherwise require Crown Counsel’s instruction should be reported to Crown Counsel. To seek to pre-empt the Lord Advocate’s independent exercise of those responsibilities in the manner proposed in this amendment would be constitutionally inappropriate and foreign to our system of criminal justice.

For these reasons, it is normal drafting practice, where a UK Bill proposes that the consent of the Attorney General or the DPP should be required for the institution of proceedings in England & Wales, for no equivalent provision to be made for proceedings in Scotland. As recently as 20 January 2021, the point was made by Baroness Goldie, responding on behalf of the UK Government during the House of Lords Second reading debate on the Overseas Operations (Service Personnel and Veterans) Bill.

That Bill contains a provision requiring the Attorney General’s consent in certain circumstances for the institution of criminal proceedings in England & Wales. Lord Garnier called for similar provision to be made requiring the Lord Advocate’s consent in Scotland (HL Deb, 20 January 2021, col. 1188). Baroness Goldie responded on behalf of the UK Government as follows (col. 1256):

"My noble and learned friend Lord Garnier also asked why the Lord Advocate for Scotland had not been included. The consent mechanism does not extend to Scotland because there is no requirement for it to do so; all criminal prosecution decisions in Scotland are already taken by or on behalf of the Lord Advocate in the public interest."

I would invite the Committee to reflect these considerations, when it comes to debate Amendment 55.
I am copying this letter to the Cabinet Secretary for Justice and to Liam Kerr MSP for their information.

Yours Sincerely

W. JAMES WOLFFE, QC