

PE1633/D

Crown Office and Procurator Fiscal Service submission of 28 April 2017

Thank you for the opportunity to respond to this petition.

I should make it clear from the outset that in Scotland there is no absolute requirement that the Lord Advocate must first give his permission, or 'concurrence' in legal terminology, before a private prosecution can commence.

Whilst the Lord Advocate's concurrence must be sought by an individual wishing to raise a private prosecution to ensure that a prosecution is not raised for vindictive or malicious ends, ultimately the Lord Advocate does not have an absolute veto. An individual can petition the Court even where concurrence is withheld and the Court may direct the Lord Advocate to give his concurrence or authorise the private party to proceed without it by ordering Criminal Letters to be issued.

Scotland has for many centuries had a system of public prosecution in which the Lord Advocate is recognised as prosecutor in the public interest and private prosecutions are therefore exceptionally rare.

Lord Guthrie in the case of *McBain v Crichton* (1961 J.C. 25) outlined the reasons for this and the exceptional circumstances in which private prosecutions would be authorised as follows:

"It is an essential feature of criminal administration in Scotland that the Lord Advocate is the public prosecutor, upon whom rests the duty of deciding whether or not to bring a charge against a person in the circumstances reported to him. This system of prosecution by the Lord Advocate in the public interest has been tried and tested. It has worked well in the past, and it continues to work well at present. Indeed, it is a branch of Scottish legal administration of which we have reason to be proud.

It is, therefore, only in highly exceptional circumstances that private prosecution will be authorised, and it is necessary, before permission for a private prosecution be granted by the Court after a refusal to prosecute by the Lord Advocate, that the petitioner should have a particular and special interest to bring the prosecution as a private individual".

This rationale for our system of public prosecution holds good today and is fundamental to the effective prosecution of crime in Scotland, ensuring that prosecutorial decision making is immune from political influence or pressure and that proceedings are always taken in the public interest.

Lord Justice Wheatley in *Meehan v Inglis* 1975 JC 9 identified the safeguard that the independence of the Lord Advocate provides to the Criminal Justice system in Scotland as follows:

"The independence of his role in this capacity has long been recognised, and the extent of that independence and its impartiality has been amply demonstrated over the years. As the focal point of our system of public prosecutions, he is there to protect the public interest, to prosecute malefactors in the public interest, and to safeguard individuals against malicious, vindictive and unjustified prosecutions at the hands of interested private parties".

The requirement for an individual to seek the concurrence of the Lord Advocate prior to pursuing a private prosecution is a reflection of the Lord Advocate's safeguarding role and a valuable check against unjustified prosecutions.

The value of an independent public prosecutor has also been recognised in all other constituent countries of the United Kingdom. In 1985 the Crown Prosecution Service (CPS) was created and is the principal prosecuting authority for England and Wales. The Public Prosecution Service for Northern Ireland (PPSNI) was created in 2005 and is the principal prosecuting authority for that country.

The Courts in Scotland, as final arbiters in determining whether a private prosecution can be raised, in turn provide an important independent safeguard on the exercise of powers by the Lord Advocate and may authorise a private prosecution in exceptional circumstances.

The current system of public prosecution in Scotland and the requirement to seek the concurrence of the Lord Advocate prior to any private prosecution is in keeping with the development of prosecutorial systems in other parts of the United Kingdom and the wider developed world.