

Scottish Hazards
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Scottish Hazards submission to the Scottish
Parliament Justice Committee:

PE1633 Private Criminal Prosecution in Scotland

**Scottish Hazards (SC044785) is a Scottish Charitable Incorporated Association (SCIO),
registered with and regulated by the Office of the Scottish Charity Regulator**

Introduction

Scottish Hazards is a registered charity promoting higher standards of health and safety in Scottish workplaces. We work with trade unions, the Scottish Centre for Healthy Working Lives, the Scottish Government and other health and safety organisations to ensure workers are protected from occupational injury, disease or ill health and we are an active participant in the Partnership for Health and Safety in Scotland.

We also work with Families Against Corporate Killers, an organisation formed by members who have lost loved ones as a result of injuries received at work and firmly believe that far more needs to be done to ensure victims' families receive effective justice and those culpable for their losses are held to account.

Scottish Hazards welcomes the opportunity to contribute to the Committee's work and would like to make the following comments.

Is it your view that health and safety breaches are currently investigated and prosecuted with sufficient robustness? If not, why? For example, is there a question about the role of the Health and Safety Executive, and/or the Crown Office approach to such cases? How would any such problems best be resolved?

Scottish Hazards is aware that statistics for prosecution for breaches of health and safety legislation would appear to suggest that prosecution is more robust in Scotland than in England and Wales with Scotland having a 100% success in relations to convictions in the last two years, However, while some prosecutions in Wales have been unsuccessful (77% success rate) the numbers of convictions secured over the last two years is similar 124 in Scotland and 116 in Wales, Scottish Hazards finds this difficult to understand given the difference in size of the respective labour forces.

In respect of other forms of enforcement, it could be argued that Scotland's performance outstrips Great Britain. HSE and local authority enforcement activity involving issuing of prohibition or improvement shows that in year 2016/17 enforcement officers in Scotland issued 968 notices against 775 for 2015/16 an increase of 16%, across the GB notices issued rose from 8776 to 9495, a comparable increase of only 8% across the same period.

It may be that the HSE in Scotland are acting with sufficient robustness in these circumstances, but Scottish Hazards is concerned that in relation to health and safety prosecutions our figures would suggest further action is required.

For Scottish Hazards the starting point should be a review by the Scottish Parliament Justice Committee into the operation of the COPFS Health and Safety Division of the Work Related Deaths Protocolⁱ in Scotland.

The protocol should be supported, it outlines how the HSE should liaise with police following sudden workplace deaths, but the document introduced in Scotland in 2006 requires reviewing, not only by its own review group but as part of a wider review of Scotland's health and safety prosecution record.

One tragic case, where the protocol failed in its purpose related to a road traffic accident in a road traffic accident on 9th January 2008 where Anne Marie Copeland and her two daughters lost their lives in a road traffic accident whilst travelling between Stonehaven and Montrose on the A92.

The cause of the accident in which no other vehicle was involved, was hydraulic fluid leaked from a mobile crane operated by William Whyte's which had travelled the road later that day.

Tayside Police, as it was at that time investigated and found evidence of;

“serious management shortcomings at William Whyte's in respect that there was no system of preventative maintenance, there was no six monthly/thousand hours check as to the safety of the hydraulic system, that although there were documents indicating that daily and weekly checks were being carried out that in fact no such checks were being carried out”ⁱⁱⁱ

Unfortunately, these shortcomings were not reported to the HSE as Scottish Hazards believes they should have been under the protocol and an opportunity was missed for the HSE to investigate these failures and take any further enforcement action necessary including potential prosecutions

While we would agree with Sheriff's finding that Police Scotland, as it is now, has the expertise to investigate road traffic accidents, our view is that they do not have the same expertise in breaches of health and safety regulation or we would not require a health and safety regulator. It was circumstances such as this that necessitated the introduction of the protocol only 2 years earlier.

Scottish Hazards would also suggest that any revision of the protocol should include provisions to prevent unduly hasty decisions being taken on whether

an incident involving deaths on the road are investigated under road traffic regulations where there is clearly a link to work or an employer.

The incident on 22 December 2014 in Glasgow City Centre, as a result of which 5 people lost their lives, following the collapse of a driver at the wheel, was discounted as being anything other than a road traffic accident on the 23rd December, the day after the deaths had occurred.

Passing primacy of the investigation into 5 deaths to the Police within 24 hours of the deaths without examination of Glasgow City Council's policies and procedures on occupational health and risk assessments on routes reflected badly on the HSE not only within the health and safety community but the wider public. Scottish Hazards believes the public need to have confidence in all regulators and such announcements without any requirement to justify their decision or provide evidence to support it does not instil confidence.

In England and Wales, a similar protocol, introduced in 2002 has been reviewed at least twice, allowing one major alteration around 2011 that allowed the HSE to proceed with health and safety cases prior to an inquest into the death under investigation. This was required to attempt to progress health and safety prosecutions without unnecessary delay, not only providing justice for families of the deceased at an earlier stage but also allowing health and safety lessons to be learned and any changes required implemented as soon as possible.

There appears to have been little oversight of the operation of the protocol in Scotland and there are far fewer signatories; notable exclusions in the Scottish protocol include COSLA, the Office of the Rail Regulator, Maritime and Coastguard Agency as well as other safety regulators such as the Care Commission in Scotland.

Any review should cover its effectiveness in operation, whether the signatories to the protocol requires to be increased and suggest any necessary changes required.

Scottish Hazards would also suggest that the work of the COPFS Health and Safety Division should be subject to the same level of scrutiny by the Justice Committee.

In a report in 2013 by the Inspectorate of Prosecutions on the Health and Safety Division's work, 38 recommendations were made on work required to make the division more effective.

Some key concerns arising from the thematic report for Scottish Hazards included:

- that police were judged to be “frequently” unaware that a death at work should be reported to the HSE
- no list of organisations that should report to the Health and Safety Division existed
- there continued to be delay in concluding health and safety prosecutions
- a bottleneck in progressing the division’s work due to extra resources required for consideration of potential corporate homicide cases (in the 10 years since the Corporate Homicide legislation was introduced there has not been one petition laid in respect of this offence).

While it is welcome that a follow up report showed that many of the 38 recommendations had been implemented Scottish Hazards believes that parliamentary scrutiny of the work of HSE, other safety regulators and the Health and Safety Division is required. Scrutiny by the Scottish Parliament Justice Committee with input from trade unions, relatives of those killed at work or by others involved in health and safety at work would lead to far more transparency than we have presently.

Would greater access to private prosecution help resolve any concerns about the current prosecution of health and safety laws?

Scottish Hazards would agree with the petitioner about the anomaly created by the Lord Advocate having to provide concurrence in order that a private prosecution can proceed. It is a strange position that an individual or their families or their trade union can, in theory, take a private prosecution for harm caused by the negligence of their employers but they will be treated vastly differently by the separate legal jurisdiction covering Scotland compared to that in England and Wales.

Having to seek the agreement or “concurrence” of the Lord Advocate as to whether a private prosecution can proceed is going to reduce the chances of the prosecution taking place given that the Lord Advocate heads up the prosecution agency that originally decided there were no grounds for prosecution.

The decision of three High Court Judges, outlined in our response to the next question, in consideration of an appeal against the Lord Advocates failure to

concur, or agree to a private prosecution by some of the families bereaved in the bin lorry tragedy would tend to suggest that the legal establishment is not about to concede any ground on private prosecutions any time soon.

Scottish Hazards believe that there does appear to be some disparity in the amount of health and safety cases brought to court in Scotland compared to Wales considering the substantial differences in the size of the labour markets of both countries. With approximately 2.6 million people participating in the Scottish labour force and just over 1.4 million in that of Wales there appears to be an anomaly when the amount of cases taken is comparable in most years.

Successful health and safety prosecutions are one of the most effective deterrents for employers, often driving them (and others in their sector) to review and improve their own health and safety management practices. Access to private prosecutions would allow those who feel that they have sufficient evidence to suggest the COPFS have reached the wrong conclusion, we are sure they are not infallible, to have their cases heard. If these cases are successful lessons may, or may not, be learned by the COPFS. More importantly for Scottish Hazards successful private prosecutions could lead to healthier and safer workplaces as employers recognise there is a further avenue open to victims of health and safety crime, if the public prosecutor reaches, in their opinion, the wrong decision.

Would wider access to private prosecution be desirable in itself, separate to questions of health and safety laws?

The response from Lady Dorrian in consideration of a proposed private prosecution by families of victims killed in the Glasgow bin lorry incident, is a clear indication of the mountain to be climbed if a private prosecution is to proceed in Scotland

"It is quite difficult to conceive of circumstances in which the court would pass a bill where the Lord Advocate had examined and investigated the circumstances of the case and concluded as a matter of informed judgment that the whole tenor and weight of the evidence did not justify prosecution."

Scottish Hazards believes that there appears to be little prospect of movement in the legal establishments view of private prosecutions given the words of Lady Dorrian quoted above.

However, Scottish Hazards feels that the test of beyond reasonable doubt as applied rigorously by prosecutors when considering prospects of obtaining a conviction may be viewed differently by lawyers and legal advisers looking at the same case considering the prospects of a private prosecution.

In our view, the COPFS are in danger of being the gatekeeper of the criminal justice system. We do not see this as an appropriate role for a public prosecutor and any individual or organisation wishing to ensure justice is served through bringing a private prosecution should be allowed to do so.

Do you have any comments on the scope for action by the Scottish Government and Parliament, taking into account the provisions of the Scotland Act 1998? For example, sections 29 and 48 in relation to the Lord Advocate, and Schedule 5 (Part II, H2) in relation to the Health and Safety Executive.

Scottish Hazards believes that all legislative powers over health and safety should be devolved to the Scottish Parliament, in our view this would clarify once and for all the situation in relation to the role of the Lord Advocate. It would then be for the Scottish Parliament to legislate to give their law officer powers to direct the HSE to carry out investigations. We believe that would require the formation of a new Scottish Health and Safety Executive.

It is correct that the Lord Advocate already has powers to direct Police investigations as it says in the petition, however he or she also has similar powers regarding the work of the Scottish Environmental Protection Agency, a wholly devolved regulator.

Other regulators such as the HSE, MAIB and AAIB are independent non-departmental public bodies sponsored by UK Government Departments, the DWP in the case of HSE and Department of Transport for the others. It should be noted that the Chief Prosecutor for CPS in England and Wales does not have powers to direct the HSE. We would be surprised if the letter of the law is being applied in practice as one of the main reasons for the formation of the COPFS Health and Safety Division was to establish more effective working relationships in preparing a case where guilt can be proved beyond reasonable doubt and to increase the prospects of success.

The Lord Advocate of the time, now Lord Mulholland, expressed the views that the powers to direct the HSE, the MAIB and AAIB other regulators in a speech

in 2015 and the Scottish Government has not progressed these thoughts any further as a matter of public policy.

Scottish Hazards would obviously wish to contribute to any such work if it was to come to fruition.

ⁱWork Related Deaths – a protocol for liaison <http://www.hse.gov.uk/scotland/workreldeaths.pdf>

ⁱⁱ ANN MARIE MERRIGAN or COPELAND, date of birth 18th March 1962, NIAMH MARIA COPELAND, date of birth 14th May 1997 and CIARA JENNY COPELAND, date of birth 24th; Para (46)
<https://www.scotcourts.gov.uk/search-judgments/judgment?id=c4a38aa6-8980-69d2-b500-ff0000d74aa7>