



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

11th Meeting, 2018 (Session 5)

Tuesday 27 March 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.
2. **Remand:** The Committee will take evidence from—
 - Alan Staff, Chief Executive, Apex Scotland;
 - Rhona Hunter, Chief Executive, Circle Scotland;
 - Fiona Mackinnon, Partnership Manager, Shine;
 - Kathryn Baker, Chief Executive, Tayside Council on Alcohol;
 - Kirstin Abercrombie, Service Manager, Glasgow Women's Supported Bail Service, Turning Point Scotland.
3. **Public petitions:** The Committee will consider the following petitions—
 - PE1370 by Dr Jim Swire, Professor Robert Black QC, Robert Forrester, Father Patrick Keegans and Iain McKie on Justice for Megrahi;
 - PE1511 by Laura Ross on the decision made by the Scottish Fire and Rescue Service to close Inverness control room;
 - PE1633 by Bill Alexander on private criminal prosecution in Scotland.
4. **Work programme:** The Committee will consider its work programme.

J/S5/18/11/A

Peter McGrath
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: peter.mcgrath@parliament.scot

The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk - remand

J/S5/18/11/1

Private paper - remand

J/S5/18/11/2 (P)

[Written submission from Turning Point Scotland](#)

[All written submissions received](#)

Agenda item 3

Paper by the clerk - petitions

J/S5/18/11/3

[Written submissions received on petitions](#)

Agenda item 4

Private paper - work programme

J/S5/18/11/4 (P)

Justice Committee

11th Meeting, 2018 (Session 5), Tuesday 27 March 2018

Remand

Note by the clerk

Introduction

1. At its meeting on [19 December 2017](#), the Committee agreed to hold a round-table evidence session on remand, in order to explore issues around the use of remand in Scotland as well as the experience of prisoners held on remand. The round-table evidence session took place on [16 January](#). The Committee heard from the Crown Office and Procurator Fiscal Service, HM Chief Inspector of Prisons for Scotland, the Scottish Prison Service, and the Scottish Working Group on Women's Offending.
2. After that session, the Committee agreed to do further work on remand.

Justice Committee consideration

3. At its meeting on [6 February](#), the Committee heard from Community Justice Scotland, the Convention of Scottish Local Authorities (COSLA), Safeguarding Communities – Reducing Offending (Sacro), and Social Work Scotland. This evidence session explored issues around the reasons for remanding a person into custody; the information available to the court to inform its decision on remand; and the availability of alternatives to remand, such as bail supervision, across Scotland.
4. At its meeting on [13 March](#), the Committee took evidence from Sheriff Gordon Liddle, President of the Sheriffs' Association, and then from the Edinburgh Bar Association, the Law Society of Scotland, and Professor Neil Hutton from the University of Strathclyde. These evidence sessions focused on the decision-making process around bail and remand, as well as the availability of data on the reasons for individuals not being granted bail.
5. At its meeting on 20 March¹, the Committee took further evidence from the Scottish Prison Service, alongside representatives of East Ayrshire Advocacy Service (working at HMP Kilmarnock), Families Outside (a charity working with families of prisoners), and CrossReach who manage the family visitor centre at HMP YOI Polmont. The focus of the session was on the experiences of prisoners held on remand.
6. At the meeting on 27 March, the Committee will hear from Apex Scotland, Circle Scotland, Shine, Tayside Council on Alcohol and Turning Point Scotland. The focus of the session will be the role of third sector in providing and supporting alternatives to remand, the availability and benefits of alternatives to remand, and existing examples of good practice.

¹ The Official Report from that meeting will be available shortly here:
<http://www.scottish.parliament.uk/parliamentarybusiness/ormain.aspx>

7. All written submissions received to date can be found on the Committee's [remand webpage](#).
8. The Committee previously agreed to invite the Cabinet Secretary to give evidence, and to undertake visits in relation to the inquiry. These will take place in April.

Justice Committee
11th Meeting, 2018 (Session 5), Tuesday 27 March 2018
Petitions
Note by the clerk

Introduction

1. This paper invites the Committee to consider its ongoing petitions:
 - **PE1370**: Independent inquiry into the Megrahi conviction.
 - **PE1511**: Police and Fire Control Rooms; and
 - **PE 1633**: Private Criminal Prosecution in Scotland
2. The paper sets out the terms of each the petitions along with information on the most recent consideration by the Committee. It also provides updated information and links to other relevant documentation where appropriate.
3. The Justice Committee webpage summarising its consideration of these petitions in this Session can be found [here](#). Three of the petitions originate from Session 4 of the Parliament and information relating to their consideration by the previous Justice Committee can be found [here](#). Further information can also be found in the Session 4 Committee's [Legacy Report](#). The fourth petition, PE 1633, is a new petition.
4. Further general background information on the petitions process, provided by the Public Petitions Committee, can be accessed on its dedicated [webpage](#).

Options available to Committees considering petitions

5. Once a petition has been referred to a subject Committee it is for the Committee to decide how, or if, it wishes to take the petition forward. Among options open to the Committee are to:
 - Keep the petition open and write to the Scottish Government or other stakeholders seeking their views on what the petition is calling for, or views on further information to have emerged over the course of considering the petition;
 - Keep the petition open and take oral evidence from the petitioner, from relevant stakeholders or from the Scottish Government;
 - Keep the petition open and await the outcome of a specific piece of work, such as a consultation or piece of legislation before deciding what to do next;
 - Close the petition on the grounds that the Scottish Government has made its position clear, or that the Scottish Government has made some or all of the changes requested by the petition, or that the Committee, after due consideration, has decided it does not support the petition;
 - Close the petition on the grounds that a current consultation, call for evidence or inquiry gives the petitioner the opportunity to contribute to the policy process.
6. When closing a petition, the Committee should write to the petitioner notifying the decision and setting out its grounds for closure. Closing a petition does not preclude

the Committee taking forward matters relevant or partly relevant to the petition in another way.

PE1370: Independent inquiry into the Megrahi conviction

Terms of the petition

PE1370 (lodged 1 November 2010): *The petition on behalf of Justice for Megrahi (JFM), calls on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.*

Current consideration

7. At its meeting on 19 December 2017 the Committee agreed, as it had at its meetings on 5 September 2017, 2 May 2017 and 24 January 2017, to keep the petition open pending completion of Operation Sandwood. This is the operational name for Police Scotland's investigation into the nine allegations of criminality levelled by Justice for Megrahi at the Crown Office and Procurator Fiscal Service, the police, and forensic officials involved in the investigation and legal processes relating to Megrahi's conviction. The allegations range from perverting the course of justice to perjury.
8. The clerks understand from Police Scotland that the operation is in its concluding stage. Once Police Scotland's report is completed, it will be submitted for consideration by an independently appointed Queen's Counsel appointed by Police Scotland, before going to the Crown Office. Following submission of the report, there will be discussion with the Crown Office as to what information, if any, can be made public.
9. On 4 July 2017, the Scottish Criminal Cases Review Commission (SCCRC) [confirmed it had received an application](#) to review the conviction¹. The SCCRC may refer a case to the High Court if it believes that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made. The SCCRC stated that it will give careful consideration to this new application, but that it will not make any further comment at this time. No further information is available.
- 10. The Committee is asked to consider and agree what action it wishes to take in relation to the petition (see paragraph 5 for possible options).**

¹ Mr Megrahi previously applied to the SCCRC in 2003, who referred his case to the High Court for appeal in 2007; however, this appeal was abandoned in 2009. After Mr Megrahi's death in 2012, a new application was made to the SCCRC on his behalf in 2014, which was rejected in 2015 as the SCCRC had not had access to appeal materials from 2007-09.

PE1511: Police and Fire Control Rooms

Terms of the petition

PE1511 (lodged 27 March 2014): *Calls on the Scottish Parliament to urge the Scottish Government to review the decision made by the Scottish Fire and Rescue Service to close the Inverness Control Room.*

Current consideration

11. At its meeting on 19 December 2017, as it had done on 5 September 2017, the Committee agreed to keep the petitions open to allow for a response from the Scottish Fire and Rescue Service (SFRS) to a letter from the petitioners of PE 1511. The SFRS response was received on 14 March and is available at **Annexe A**.
12. The SFRS have indicated that they do not have any further response to make to the petitioner, or any new information to provide.
13. In response to the SFRS letter, the Committee has received a further response from the petitioner (see **Annexe B**).
14. The Inverness Fire and Rescue Service Control Room closed in December 2016.
- 15. The Committee is asked to consider and agree what action it wishes to take in relation to the petition (see paragraph 5 for possible options).**

PE 1633: Private Criminal Prosecution in Scotland

Terms of the petition

PE 1633 (lodged 19 January 2017): *Calls on the Scottish Parliament to urge the Scottish Government to change the law to give the people of Scotland the same legal rights as the rest of the UK by removing the requirement that the Lord Advocate must first give permission before a private criminal prosecution can be commenced in Scotland.*

16. This petition was referred to the Justice Committee on 9 November 2017 and has been previously considered once by the Committee at its meeting on 19 December 2017.
17. At its meeting of 19 December, the Committee agreed to write to the Faculty of Advocates, the Law Society of Scotland and the Scottish Trades Union Congress seeking their comments on the petition. These responses have been received, as have submissions from RMT, GMB, Scottish Hazards, and an individual. These are all available at **Annexe C**.
- 18. The Committee is asked to consider what further action, if any, it wishes to take in relation to the petition (see paragraph 5 for possible options).**

Scottish Fire and Rescue Service Response

14 March 2018

The following is a response to the letter from the petitioners of PE1511 – 11 December 2017.

Dear Convener

SFRS PUBLIC PETITION 1511

I write on behalf of Chief Officer Alasdair Hay, in advance of the Committee's next consideration of Public Petition 1511.

The Scottish Fire and Rescue Service is happy that it has provided all the evidence it can possibly give in response to this Petition and the petitioner's subsequent correspondence. In light of the fact that our evidence is not going to change, we would have nothing new to add on this matter.

Yours sincerely

John MacDonald

Deputy Assistant Chief Officer

Chief Officer's Business Support Manager

Letter from the petitioners of PE1511**20 March 2018****Petition PE1511: Inverness Fire Service Control Room**

Thank you for forwarding the response from SFRS regarding our correspondence to you dated 11th December 2017. Unfortunately the response from the SFRS is wholly inadequate and has not answered the primary questions in our correspondence. This was relating to the two MSP Freedom of Information Requests (FOI's), the response has also not answered the request by the Justice Committee meeting where the SFRS were tasked with answering the FOI requests.

The FOIs were asked for by two separate MSPs and the SFRS declined to reply to both, on the grounds that the information requested was too difficult to provide. These FOI requests were very simple requests for information that the SFRS could very easily provide. The first request was to provide the dates that the 13 week tests on all Shetland fire appliances were undertaken in the last two years and the dates that emergency equipment was serviced in the Shetland in the last two years; this information is on a SFRS database! The second request was for the SFRS to provide the call handling times and station attendance times for incidents in the Highlands and Islands and Grampian Area for the years up until the closure of Inverness and Aberdeen control rooms and the same area information from the Dundee control room since it took over responsibility, again information from the control database.

This is the third time we have requested this information and indeed the Justice Committee has requested twice now that the SFRS should provide the information requested.

We must assume from this recent correspondence from the SFRS that the failure to provide such a basic request means that the fire appliances and equipment in the Scottish Islands has not been maintained in line with health and safety guidance and road traffic law in Scotland over the last few years. We must also assume that the failure to provide the basic information regarding the new Dundee control rooms performance compared to the closed Inverness and Aberdeen Control Rooms is so damning that the SFRS are not willing to divulge or admit that the new control room and new control system is failing the public and not fit for purpose.

It is apparent as we are led to believe that the SFRS has completely failed to undertake life safety and legally required maintenance on fire appliances, ladders, cutting equipment and breathing apparatus compressors on Scottish Islands since it took over responsibility from the former Highland and Islands and Grampian Fire and Rescue Services. This is a major failure in management by the single Scottish Fire Service and in the governance by the Scottish Fire Board, it is also a failure in law and has put firefighters and the public they serve at an increased risk, from accidents and failed attendance at emergency incidents.

The call handling times and station turn out times were recorded and measured against each other in the eight control rooms across Scotland; these call handling times were measured in Seconds and failing control rooms were taken to task by the HMI to

improve their performance. The failure of the SFRS to provide a comparison from the previous control centres and the new control centre would indicate a catastrophic failure in the centralisation of controls across Scotland. This was predicted and has been a concern of the public in the North and North East of Scotland from the initial consultation regarding the centralised controls, the new system was promised to be more efficient and improve public and fire crew safety, it has still to confirm this as the case and increasingly looks like a disaster for the fire service provision across Scotland. The control system mistakes are still occurring, recently Tongue in Sutherland was turned out to Tong in The Western Isles and last week all three emergency services were called out to a serious RTC south of Lerwick which was in fact north of Lerwick. This meant the three casualties had an extra 30 minute delay in attendance due to the fire, ambulance and police control rooms all getting it wrong.

The continued failure in our emergency services in Scotland to provide basic health and safety maintenance and timeous control call handling is vindication that the principle managers in each service that said the centralisation was not a good for public safety, means they were all correct in their warning. It is therefore imperative that the Scottish Government act to resolve this matter before there is any margin for loss of life.

Regards

Alexander Kidd

Laura Hansler Ross

Petition PE1633: Private Criminal Prosecution in Scotland**Written submission from the Law Society of Scotland****Introduction**

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and provide comments in relation to the Petition PE 1633: Private Criminal Prosecution in Scotland (Petition) which questions whether there should be any changes in the law by removing the requirement that the Lord Advocate must first give permission before a private criminal prosecution can be commenced in Scotland.

General Background

The background to the Petition has been fully explored by the Crown Office and Procurator Fiscal Service (COPFS) who is Scotland's prosecution service. They receive reports about crimes from Police Scotland and other reporting agencies such as the Health and Safety Executive (HSE). We do however understand that the practical enforcement of the Health and Safety at Work etc Act 1974 (1974 Act) and related legislation is however shared between HSE and local authorities.¹ The HSE are the specific organisation referred to in the four questions that have been posed.

COPFS, having received a report from HSE or any organisation, are solely responsible for deciding what action, if any, to take, including the forum as to where any prosecution should be initiated. Relevant to the issue of any HSE prosecutions in Scotland is COPFS's role in relation to deaths which includes investigation into any sudden, unexpected and unexplained deaths in Scotland.

Deaths that may give rise potentially to the consideration of any such criminal proceedings arising under the 1974 Act will already have been initially the subject of a report to COPFS and thereafter, an investigation by COPFS. Consideration will be given as to whether there should be any criminal prosecution and/or a Fatal Accident Inquiry

¹ For an allocation of specific activities or premises refer to HSE's website at www.hse.gov.uk/lau/lacs/23-15.htm

(FAI) held under the Inquiries into Fatal Accident and Sudden Deaths (Scotland) Act 2016 (2016 Act). It is also competent to hold a public inquiry, arising more usually in the case of multiple deaths such as Piper Alpha.²

Many deaths that give rise to HSE implications will fall into the category of deaths arising as a result of an accident in the course of their employment which will require a mandatory FAI to be held by COPFS. The purpose of an FAI is not to establish guilt or fault as with civil or criminal proceedings as a FAI is an inquiry conducted in the public interest. FAIs are significant inquiries into the circumstances of a death in respect of which a usually a sheriff in issuing his determination can make recommendations as to various matters such as:

- (e) any precautions which (i) could reasonably have been taken and (ii) had they been taken, might realistically have resulted in the death, or any accident resulting in the death, being avoided
- (f) any defects in any system of working which contributed to the death or any accident resulting in the death
- (g) any other facts which are relevant to the circumstances of the death.³

As a result, making recommendations to possible changes in working practices may well be considered. The Determination into the death of John Grant Cousin⁴ is a recent example of a mandatory (course of employment) inquiry into his death which arose in relation to a workman on the Queensferry Crossing. (Normally, a criminal prosecution will precede any FAI but this is not a requirement as discussed in our Conclusion section.)

Another relevant objective to consider in relation to COPFS is that all such deaths are investigated appropriately and without due delay. That ties in with observations made about timescale for decisions to be made as to possible criminal prosecutions and FAIs and implications for the relatives.

Turning to the specific questions, we would comment as follows:

Question 1: Is 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 HSE and/or Crown Office approach to such cases? How would any such problems be resolved?

The HSE is the national independent watchdog for work-related health, safety and illness. It acts in the public interest to reduce work-related death and serious injury across the Great Britain's workplaces where HSE operates and applies the same policies and standards throughout. The important difference for HSE and other health and safety regulators in Scotland is that in England and Wales, HSE makes the decision

² <http://discovery.nationalarchives.gov.uk/details/r/C7084>

³ Section 26 of the 2016 Act

⁴ <http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018fai01345d46a7898069d2b500ff0000d74aa7.pdf?sfvrsn=0>

to prosecute and conducts cases themselves whereas, in Scotland, prosecution decisions and the conduct of cases is entirely a matter for COPFS.

As far as criminal prosecutions are concerned, HSE will report, as highlighted above, as the reporting agency to COPFS in relation to any alleged criminal breach of the relevant legislation that falls under its remit. That will mostly include contraventions of the 1974 Act. HSE does provide very clear guidance as to how it investigates such cases.⁵

Once reported, decisions as to whether to prosecute are entirely for COPFS who require to be satisfied as to the sufficiency of admissible evidence in relation to any alleged offence and the identification of the accused⁶. The jurisdiction to take proceedings for the alleged offence must also be within Scotland. Once a prosecution is instructed, for any conviction to be obtained, the court will require to be satisfied as to the criminal standard of proof beyond reasonable doubt. The unique features of Scots criminal law such as corroboration do require to be considered when considering evidential satisfaction in relation to any offence of the Scottish evidential and procedural requirements.

There is always the possibility too that a case may be prosecuted at common law for culpable homicide against an individual. For prosecutions to be taken against an organisation⁷ that is now possible following the Corporate Manslaughter and Corporate Homicide Act 2007.⁸ (The case of Transco preceded this legislation. In 2003, the High Court in Edinburgh rejected a charge of 'culpable homicide' against the gas pipeline firm, Transco after the death of a family of four in Larkhall in 1999. Convictions were subsequently obtained under sections 3 and 33 of the 1974 Act. The company was fined a record £15m).

In October 2008, a specialist Health and Safety Division (HSD) of procurators fiscal and support staff were formed dedicated to progressing health and safety cases.⁹ There will be the opportunity to discuss and consider such complex cases as required prior to and at the time of reporting. There now exists in relation to HSE cases, the Work Related Death Protocol for Scotland (Protocol)¹⁰ which has been signed by COPFS, ACPOS (the Association of Chief Police Officers in Scotland), British Transport Police and HSE.

This ensures that, when a work related death occurs, a thorough, co-ordinated and multi-agency investigation takes place allowing all possible offences to be

⁵ <http://www.hse.gov.uk/enforce/enforcementguidesc/index.htm>

⁶ And a public interest in prosecution

⁷ Since 26 July 2007

⁸ Section 1(5)

⁹ The Health and Safety Division (HSD) was created to better reflect the priorities of COPFS and work closely with law enforcement to bring a more strategic and cohesive approach to the prosecution of Health and Safety cases.

HSD oversees all health and safety related death investigations and leads the investigation and prosecution of health and safety cases (including Corporate Homicide) across Scotland. HSD is also involved in the preparation and conduct of Fatal Accident Inquiries arising from an accident in the course of employment or at a workplace which are deemed to require specialist input.

¹⁰ <http://www.hse.gov.uk/scotland/workreldeaths.pdf>

considered.¹¹ Under paragraph 44 of the Protocol, the National Liaison Committee (with representatives from such organisations) will meet at least once a year to review the operation of the Protocol and consider the need for changes to the arrangements. We understand that there has been regular liaison with HSE in relation to ongoing investigations and cases. The Head of HSD meets the Director of Operations, HSE every six weeks to discuss ongoing cases and any issues arising. This seems to be a useful route in which to consider how the joint approach between HSE and COPFS is working.

It may be useful to bear in mind a perspective on the number of cases that are reported by HSE to COPFS. In the financial year 2015/16, the number of charges (not cases) reported were 152 with court action taken in respect of 43 charges. There were 30 charge convictions.¹²

There seem to us to be clear systems in place for the reporting of HSE cases and any subsequent prosecutions which have been improved by the introduction of the Protocol and a specialist COPFS team of prosecutors.

The thrust of the questions appear to relate to circumstances where HSE declines to investigate a non-fatal accident or submit a report of an investigation to COPFS, as COPFS can at present do nothing to compel HSE to do so. But in the case of that scenario arising, Police Scotland, as with any criminal investigation can be instructed to investigate and report to COPFS. Thereafter, as highlighted above, a criminal prosecution could be instructed if prosecutions were in the public interest and sufficient admissible evidence.

That seems to us to relate more to the accountability of HSE as an investigatory body which lies beyond the remit of the Committee and the Society in representing the interests of our members.

Question 2: Would greater access to private prosecutions help resolve any concerns about the current prosecution of health and safety law?

The Lord Advocate prosecutes crime in the public interest, assisted by the Solicitor General, Advocates Depute, and Procurators Fiscal, who are the local agents of, and appointed by the Lord Advocate.

Before 1975, in Scotland, HSE inspectors could initiate and conduct proceedings in the Sheriff Court but that authority was lost when the 1974 Act came into force. Since then, prosecution of health and safety offences has been through HSE or local authority inspectors reporting offences to the Procurator Fiscal, or occasionally, by the Procurators Fiscal instructing a prosecution on the basis of evidence provided from other sources, such as the police.¹³

We suspect that the concerns identified in the Petition are unlikely to arise in relation to cases that arise where death has resulted since these will be caught under the ambit of

¹¹ <http://www.hse.gov.uk/scotland/copfs.htm>

¹² <http://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/46-responses2017/1524-health-and-safety-cases-r015426>

¹³ Police or Maritime Coastguard Agency (MCA cases make up (9% of reported cases (COPFS))

a mandatory FAI. Even where the death did not fall into such the category of course of employment, the Lord Advocate has the power to instruct a discretionary FAI where:

'the Lord Advocate considers that the death occurred in circumstances giving rise to serious public concern and decides that it is in the public interest for an inquiry to be held into the circumstances of the death'.¹⁴

Under the 2016 Act,¹⁵ the Lord Advocate is required to give reasons for a decision not to hold an inquiry. Such a decision is also subject to judicial review.

Private prosecutions: It is possible for an individual to seek authority to take a private prosecution in Scotland. The procedure is and has been very rarely invoked. Virtually all criminal proceedings in Scotland are conducted by means of public prosecution as discussed above.

For a private prosecution to proceed, the individual needs to show that the crime alleged is a wrong to them and they have applied to the Lord Advocate for his concurrence in the prosecution. In effect, the Lord Advocate would require to provide his consent to a Bill of Criminal Letters (the procedure by which the private prosecution is authorised).

The recent high profile application in respect of the families involved in the Glasgow bin lorry case¹⁶ was refused by the High Court in December 2016 which case confirmed that:

*'[it] remains open to a private prosecution to apply to the court for permission to bring a private prosecution where the Lord Advocate has declined to prosecute or grant his concurrence to a private prosecution, the circumstances in which such permission may be granted have been repeatedly described as exceptional.'*¹⁷

The question then arises as to what might be deemed to be 'exceptional.'

The case of Carol X¹⁸ in 1982 was one in which a private prosecution was granted. This was a case of rape where COPFS had declined to prosecute due to the complainer's ill-health. Thereafter, the complainer recovered sufficiently to give evidence but the Lord Advocate was barred from prosecuting. This was clearly an exceptional and in our word unexpected set of circumstances.

In an earlier case in 1909¹⁹, an application for a private prosecution was successful.²⁰

While we accept that an application for private prosecution remains competent, the likelihood of success has to be addressed. The Glasgow bin lorry case does not in our

¹⁴ Section 4 of the 2016 Act

¹⁵ Section 9 of the 2016 Act

¹⁶ Bill for Criminal Letters by (1) John and Linda Stewart and (2) Alan and Aileen Convy v William Payne and (1) Matthew McQuade, and Jacqueline McQuade and (2) Yvonne Reilly v Henry Clarke [2016] HCJAC 122

¹⁷ Paragraph 85

¹⁸ X v Sweeney and not a Health and safety case

¹⁹ J & P Coats v Brown 1909 6 Adam 19

view go so far as to rule out altogether the possibility of a private prosecution taking place in Scotland but it does serve as a stark reminder of the considerable barriers that must be overcome by those seeking authority to bring a private prosecution in Scotland. We would make the following observations though we accept that this would be determined on the facts and circumstances on a case by case basis.

- **Complainer's interest:** As was noted by the Lord Advocate: *'to bring a private prosecution an individual must show a wrong personal to themselves, from which they have suffered injury of a substantial nature beyond all others, giving them a special and peculiar interest in bringing proceedings'*.²¹

There are limited categories of persons who can demonstrate that necessary interest.

- **Nature of crime:** This could, in our view, only arise in what might be the most serious of health and safety cases (as far as Question 3 is concerned, this would mean the most serious and therefore, indictable (solemn) crimes such as rape or murder) where significant injury or death had occurred (we have already considered issues regarding cases involving death above).
- **Frequency of cases:** The infrequency of success in such applications has to be a factor. In effect, there has been one successful application in thirty years showing the high bar which requires to be satisfied.
- **Exceptional:** What does appear clear from the Glasgow bin lorry case is how the exceptional nature of any such case will be considered. The Lord Justice- Clerk Lady Dorrian said: *'... 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 professional judgment that the whole tenor and weight of the evidence did not justify prosecution, unless in making that decision the Lord Advocate had acted **oppressively, capriciously, or wantonly** [our emphasis]. Accordingly, even if we had disagreed with the Crown's assessment, or the weight attributed to individual pieces of evidence, we would be unable to conclude that the decision of the Lord Advocate not to prosecute was so **extravagantly wrong** [our emphasis] as to amount to special circumstances justifying the passing of the bills in either case.'*²²

We have highlighted that this does show for a private prosecution to be justified, it would take the Crown potentially to have made a significant number of errors before any private prosecution could possibly be justified. It will not be granted to provide a review mechanism of the Crown's assessment of the evidence. There has been a view expressed that:

²¹ Paragraph [17]

²² [para 101]

*'private prosecutions have their origin in the mists of legal history and, nowadays, such prosecutions sit so uncomfortably alongside a modern system of public prosecution that they simply cannot be justified.'*²³

We are not persuaded that the concerns outlined in the Petition would be resolved by making it easier for any person, such as the injured party, to seek to mount a private prosecution. The onus would fall on that person to investigate and compile a case. That would inevitably be expensive and there would be no certainty that legal aid would necessarily be granted in respect of any application for Bill for Criminal Letters.

We do note that legal aid was indeed granted to the families in the Glasgow bin lorry case. It is stressed that this would be a matter for the Scottish Legal Aid Board to consider. In granting legal aid then, the Justice Secretary Michael Matheson said:

'In light of the unique and special circumstances of this case, which raises fundamental questions that have not previously been tested in case law, Scottish ministers believe it is in the public interest that all parties are adequately represented....'

It is important too to note that in making the grant of legal aid that this did not acknowledge that there had been any error in law in the original decision made by the Crown not to prosecute.

In conclusion, the Glasgow bin lorry case does set a precedent for how such cases would be assessed in the future. So, in short, there is a mechanism but success is unlikely to be achieved. It does not appear to be an issue about access to justice as much as a question of law.

What appear to be implied in the Petition are concerns that health and safety cases are regularly going un-investigated or being investigated but not reported to COPFS²⁴. Were this route of private prosecution to be required to hold the HSE to account, there is an established complaints and appeals²⁵ procedure to investigate any aspect of service. This includes the Office of the Parliamentary and Health Service Ombudsman²⁶ to further review the complaint.

Question 3: Would wider access to private prosecution be desirable in itself, separate to questions of health and safety laws?

We refer to our answer to Question 2 which covers many of the same issues regarding private prosecutions.

The Victims and Witnesses (Scotland) Act 2014²⁷ requires the Lord Advocate to publish rules about the process for reviewing decisions not to prosecute. Such a right of review was introduced on 1 July 2015 and can be made by the person who is or appears to be a victim in relation to an offence or alleged offence.

²³ John Macaulay <http://www.journalonline.co.uk/Magazine/62-1/1022696.aspx>

²⁴ Health and safety cases are not regularly being investigated and/or reported to COPFS.

²⁵ <http://www.hse.gov.uk/contact/complain-about-hse.htm>

²⁶ <https://www.ombudsman.org.uk/>

²⁷ Section 4

These rules are now set out in COPFS's²⁸ *'Lord Advocate's Rules Review of a Decision Not to Prosecute Section 4 of the victims and Witnesses (Scotland) Act 2014.'* (Its introduction does specifically refer, *inter alia*, to cases reported from the HSE). Such a review requires to consider the original report, witness statements, productions including medical and expert reports and other documents. The question is:

'if on review the decision not to prosecute the case was reasonable having regard to all the circumstances and in line with the COPFS Prosecution Code²⁹ and prosecution policies'.

The decision of the review will be notified in writing and will advise what documents were considered in the review, whether prosecution policies were considered during the review,³⁰ any previous (and by implication authoritative or binding) court decisions and the decision made on review. As much detail will be given about the decision and reasons for decision as soon as possible.

Where following a review the conclusion is reached that proceedings should have been taken or the case should not have been discontinued, if it is still possible to do so, then proceedings will be commenced as quickly as possible.³¹

In the *'Standards of Service for Victims and Witnesses Annual Report on Performance 2016-17'*³²³³ COPFS received 139 applications from victims for a review of the decision not to prosecute or not to continue with a prosecution. In 100 applications, the original decision made was upheld or the review request withdrawn. In 15 applications (approximately one/seventh), the original decision was overturned and proceedings were raised. 24 reviews are ongoing.³⁴

In conclusion, there is a review mechanism available. Once a review has been carried out and the original decision upheld, it has to be even less likely that the High Court would grant authority to bring a private prosecution. They certainly would not consider any application without all prior processes have been fully completed. Private prosecution remains a possibility. It does not appear likely that this is an area in which legislation would be required or considered by the Scottish Parliament as has been stressed, mechanisms currently do exist were the circumstances in a future case to arise. Decisions would be made as to the success or otherwise by judges well able and placed to consider the complex evidential and legal issues that would require to be considered and the precedent status of the Glasgow bin lorry case.

²⁸ http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Lord%20Avocates%20Rules%20-%20June%2015%20v2.pdf

²⁹ <http://www.copfs.gov.uk/publications/prosecution-policy-and-guidance>

³⁰ Noting that some reasons remain confidential to COPFS

³¹ Page 6 of the COPFS Rules Review

³² <http://www.scotland.police.uk/assets/pdf/138327/284146/standards-of-service-2017-18?view=Standard>

³³ 1 July 2015 and 30 June 2016

³⁴ Page 12 of the Standards of Service

It may be worth in passing of reflecting on the English and Welsh position, as we have highlighted above, health and safety is a reserved matter³⁵ to consider how the issue of private prosecutions³⁶ are dealt with there. These are defined as:

*'..a prosecution started by a private individual or entity which is not acting on behalf of the police or other prosecuting authority.'*³⁷

HSE can prosecute cases themselves in the English and Welsh courts so that would not be a private prosecution. In circumstances where the Crown Prosecution Service did not take action or the HSE did not report a case to the Crown Prosecution Service, the right to bring private prosecutions³⁸ is preserved with certain limitations that:

- the Director of Public Prosecutions (DPP)³⁹ can to take over private prosecutions
- in some cases, the private prosecutor must seek the consent of the Attorney General or of the DPP before the proceedings commence.

Private prosecutions do seem to be on the increase in England and Wales because:

*'police budget cuts and pressures on the justice system force hundreds of Britons to fund their own criminal actions. Prosecutions for a wide array of offences including sex attacks, violent assaults and multi-million pound frauds are currently being pursued by private law firms. The growing trend for private criminal prosecutions has raised concerns about the prospect of a "two-tier" justice system, with some cases reaching court only because the victims – often corporations – can afford to pay the substantial costs.'*⁴⁰

The practices as to criminal prosecution procedures are quite different in Scotland from England and Wales so we do not feel that this really presents a useful comparison. The same can said with regard access to justice or legal aid considerations. What seems to have been highlighted in this article is that private prosecutions actions have been taken in relation to fraud or IP crime and not related to what might be referred to as an aggrieved complainer with which the health and safety legislation is concerned.

Question 4: 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 by the Lord Advocate and schedule 5 (Part 11 H2) in relation to Health and Safety at Work Executive?

Section 48(5)⁴¹ protects the independence of the Lord Advocate as head of criminal prosecution and investigation of deaths in Scotland. Any decision made by him is taken

³⁵ Schedule 5 of the Scotland Act 1998

³⁶ <https://www.cps.gov.uk/legal-guidance/private-prosecutions>

³⁷ This includes but is not limited to an entity which has a statutory power to prosecute

³⁸ Section 6 of the Prosecution of Offences Act 1985

³⁹ Section 6(2) of the Prosecution of Offences Act 1985

⁴⁰ <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html>

⁴¹ Scotland Act 1998

by him independently of any other person. Health and safety are reserved matters in terms of Schedule 5. That sets out the purposes as:

‘securing the health, safety and welfare of persons at work, protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work, and controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the lawful acquisition, possession and use of such substances; and the Health and Safety Commission (HSC), the Health and Safety Executive (HSE) and the Employment Medical Advisory Service (EMAS)’.

Any changes to health and safety legislation would be a matter for the UK Parliament.

In practice, the Lord Advocate’s and HSE’s roles seem well defined and operate as outlined above.

We have nothing more directly to add in relation this question.

Brexit: We did reflect whether the implications of the UK withdrawal from the EU had any implications. The UK’s current Health and Safety regime⁴² was demonstrated in 2011 to be improving safety so that it seems unlikely that the UK Government would jeopardise those safety standards to confer any UK trading advantage post Brexit but Brexit would potentially offer the UK Government that independence.

The scope for changing health and safety regulation has been severely limited by its requirement to implement EU law and much of the health and safety regulation applying to businesses implements EU Directives.⁴³ Many of the requirements that originate from the EU will probably continue to exist anyway as many are contributing to improved health and safety outcomes.

Conclusion

We are of course aware of press articles concerning decisions made in relation to specific cases by COPFS such as the Clutha Helicopter⁴⁴ crash which circumstances will give rise to a FAI (still to be held) but not to any criminal proceedings. COPFS has indicated following the receipt of the submission of a detailed report by the Helicopter Team that there is insufficient evidence available to justify instructing criminal proceedings. In coming to their decision, there has been:

⁴² Reclaiming health and safety for all: An independent review of health and safety legislation Professor Ragnar E Löfstedt November 2011
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf

⁴³ According to one study, 41 of the 65 new health and safety regulations introduced between 1997 and 2009 originated in the EU, and EU Directives accounted for 94 per cent of the cost of UK health and safety regulation introduced between 1998 and 2009
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf

⁴⁴ This is of course not a health and safety case but is included for illustrative purposes

*[consideration] of the evidence available, the recommendations of the inquiry team and an assessment of what information may reasonably become available in the future.*⁴⁵

With regard to that decision to date, COPFS have reserved the right to raise criminal proceedings should further evidence become available to prosecutors.

The public interest demand the circumstances of a high profile case such as this to be fully examined to ascertain what lessons can be learnt to avoid these issues in the future. It should be observed of course that the Clutha Helicopter crash falls into the category of a mandatory FAI given that those who died within the helicopter were acting in the course of their employment.⁴⁶ Where there is criminality that should of course be prosecuted where prosecution is justified in the public interest and the requirements of Scots criminal law as to admissibility and sufficiency are satisfied.

Though not touched on, it is of course open in any HSE case for civil proceedings to be raised. Any civil proceedings are of course outwith the main responsibilities of COPFS which are:

- investigate, prosecute and disrupt crime, including seizing the proceeds of crime
- establish the cause of sudden, unexplained or suspicious deaths
- investigate allegations of criminal conduct against police officers.⁴⁷

There, the evidential requirements and the burden of proof, are set at a lower level than in criminal prosecutions (Civil proceedings may be raised and sisted pending the outcome of any FAI). That does provide a redress and means of action for those affected persons or relatives.

We trust this is helpful for your purposes and are happy to provide any further information.

Law Society of Scotland
23 February 2018

⁴⁵ <https://www.eveningexpress.co.uk/news/scotland/no-criminal-proceedings-after-clutha-helicopter-crash-prosecutors/>

⁴⁶ Even were this not to fall into the category of a mandatory FAI, one could surmise that it would have been instructed as discretionary inquiry given the public interest factors of an otherwise unexplained helicopter falling from the sky on a crowded public house in Glasgow.

⁴⁷ <http://www.copfs.gov.uk/about-us/about-us>

Petition PE1633: Private Criminal Prosecution in Scotland

Written submission from the National Union of Rail, Maritime and Transport Workers (RMT)

Introduction

RMT believe that access to justice for workers, as well as families and loved ones affected by workplace accidents or fatalities, needs to be improved. Making it easier and simpler to undertake a private criminal prosecution would improve access to justice.

RMT welcomes the public petitioner bringing this matter to the attention of legislators. The Scotland Act 1998 states that any “decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.”¹

The principle of a public prosecutor is an important one which we do not seek to undermine or to undermine through the introduction of market forces.

We believe, however, that there is compelling evidence to support reform to the current arrangement which would assist in improving access to justice in specific circumstances which would not undermine the principles underpinning the role of the Lord Advocate.

Our submission focuses on existing access to justice issues for thousands of workers employed in the major hazard offshore oil and gas industry which the RMT trade union organises in. We believe that our members and their colleagues, across offshore energy and transport industries, as well as wider society could benefit from an easier route to private criminal prosecutions in Scotland.

Offshore helicopter industry

The Civil Aviation Authority is responsible for the regulation of safety standards in the offshore helicopter sector. Commercial helicopter operators are responsible for transporting workers to and from offshore oil and gas installations. It is the only viable means of transport for offshore workers.

There have been two fatal accidents in the UK offshore helicopter sector since 2009, causing the deaths of eighteen offshore workers and two crew members. In that period, sixty-five workers and crew have been rescued from the North Sea following two fatal and three non-fatal accidents, all involving Super Puma model helicopters, H225 and AS332 L2.

Tragically, on 29th April 2016, the Norwegian sector experienced its first fatal helicopter incident for nearly twenty years, when a Super Puma H225 crashed off the south east Norwegian coast, with the loss of all 13 crew and passengers, including Iain Stuart from Aberdeenshire.

¹ Section 48(5).

Norwegian air crash investigators have initially identified gearbox fatigue as the main cause, which is consistent with UK Air Accident Investigation Branch findings from the 1st April 2009 tragedy and two non-fatal ditchings of Super Pumas in the UK sector of the North Sea in 2012.

The Super Puma H225 and AS332 L2 models were grounded by the CAA in the UK, their Norwegian counterparts and the European Aviation Safety Agency (EASA) in May 2016. Although EASA lifted its official Super Puma ban in October 2016 and the UK and Norwegian regulators lifted theirs in July 2017, the Super Pumas have not returned to transporting offshore workers, mainly due to strong opposition to their deployment from the workforce, their trade unions and even the oil companies.

It should also be pointed out that neither air crash investigators nor the Super Puma manufacturer, Airbus, has still not been able to establish the exact cause of the fatal incident in Norway. As a result, workers across the North Sea remain strongly opposed to the return of Super Pumas and generally very concerned about helicopter safety in general. The Super Pumas account for around one-third of the UK offshore fleet. In their absence, the S92 is being used, which is heavier, slower and lower in terms of passenger carrying capacity.

There have been no criminal prosecutions resulting from the fatal incidents in this sector, including where there is strong evidence of causality between separate fatal incidents. As a result, we are concerned by the lack of access to justice for families of victims of tragedies in the offshore helicopter sector to date. This is clearly an unsustainable and unacceptable situation.

Fatal Accident Inquiries

The mandatory Fatal Accident Investigation (FAI) into the tragic incident on 1st April 2009 concluded (in March 2014) that the accident could have been prevented. In the absence of criminal proceedings by the Crown, the only route to justice for families and victims is the FAI which is completely distinct from the sort of criminal legal proceedings which workers' families naturally look to when loved ones are killed or injured at work.

It is notable that the FAI into the fatal helicopter incident on 1st April 2009, which was the biggest single loss of life in a UK North Sea helicopter accident since 1986, only started on 6th January 2014, nearly five years after the original incident.

The final determination was issued on 13th March 2014 into the deaths of John Barkley, Paul Burnham, James Costello, Alexander Dallas, Raymond Doyle, James Edwards, Vernon Elrick, Nairn Ferrier, Nolan Goble, Garethwyn Hughes, Richard Menzies, Warren Mitchell, David Rae, Leslie Taylor, Stuart Wood and Mihails Zuravskis, the 16 passengers and crew who were travelling on the Super Puma AS332 L2 that tragic day.

Despite the FAI clearly establishing that there was a case to answer over why a helicopter with detectable flaws in the gearbox mechanism was allowed to fly, the Sheriff failed and indeed was prevented by statute from making any further recommendations for a public inquiry or consequential legal proceedings.

In his final determination in the case of the sixteen deceased, Sheriff Pyle commented that the FAI is:

“...an opportunity for an independent judge to come to his or her own conclusions on the evidence and to present them in the form of findings in a determination. But the determination is not the same as a judgment delivered at the end of a civil proof or a criminal trial. It has no consequences.”

For loved ones to have to wait nearly five years for this confirmation that whatever is in the final determination has no repercussions was distressing enough and an indictment of the justice process attending deaths at work.

Disappointingly, the FAI into the fatal incident on 23rd August 2013, in which four offshore workers lost their lives following a Super Puma AS332 L2 ditching in the North Sea off Sumburgh still has not been held.

We acknowledge, however, that criminal proceedings should not start automatically when a worker dies or experiences life changing injuries as a result of a workplace accident.

We also acknowledge that the Scottish Government has taken action to reform the FAI process, through the introduction of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. This Act increases transparency and imposes time frames for people and organisations named in recommendations contained in the determinations of the FAI but, crucially, this remains a separate legal process from criminal proceedings. FAI determinations, recommendations and responses remain inadmissible as evidence in any subsequent judicial proceedings of any nature.

The Act's requirement for improved consultation and support for families of the victims who are the subject of the FAI is welcome but, overall, the 2016 Act does not sufficiently improve access to justice and certainly does not satisfy the issues raised by Public Petition PE0163.

We believe that a robust legal framework by which workers and their families can *and can be seen to achieve* justice is still lacking in Scotland. The removal of the Lord Advocate's role in deciding whether private criminal prosecutions can be launched would, in our view go some way to providing a more effective means of obtaining justice for families, particularly those of oil and gas workers who have lost their lives in the series of tragedies on Super Puma helicopters in recent years.

Offshore installation safety regulation

We are extremely concerned at the impact that the Supreme Court ruling of 8th February 2018² in the case of HM Inspector of Health and Safety (Appellant) v Chevron North Sea Limited (Respondent) (Scotland) might have on installation health and safety regulation, trade union health and safety representatives and the overall safety of offshore oil and gas workers who are employed in a major hazard environment.

² <https://www.supremecourt.uk/cases/uksc-2016-0166.html>

As the Justice Committee may already be aware, the Supreme Court's ruling means that employers can challenge HSE enforcement notices in an employment tribunal using evidence collected *after* the regulator issued the safety enforcement notice in question.

We regard this as a potentially serious erosion of safety regulation and access to justice for offshore workers who are heavily reliant on the smooth and effective functioning of both. The fact that this ruling comes in the 30th anniversary year of the Piper Alpha disaster is particularly unsettling for offshore workers.

The Supreme Court's ruling, we believe, will make HSE Inspectors think twice before issuing a Prohibition Notice (PN – shuts down the installation) for fear it will be challenged and leave the HSE open to further legal action by the employer and the installation Duty Holder. In these circumstances, an Improvement Notice, which gives the Duty Holder time to comply may be issued instead of the more serious PN.

There is real concern that offshore workers' safety could be compromised by this ruling, particularly in the context of the production expediencies and efficiencies demanded by the policy of 'Maximising Economic Recovery' of oil and gas resources under the UK Continental Shelf.

It most certainly should be the case that private criminal prosecution against employers in the offshore oil and gas industry in relation to safety issues should be made easier.

RMT
2 March 2018

Petition PE1633: Private Criminal Prosecutions in Scotland
Written submission from Scottish Hazards

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. The Health and Safety Executive (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 Great Britain 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 Crown Office and Procurator Fiscal Service (COPFS) Health and Safety Division of the Work Related Deaths Protocol¹ 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.

¹ Work Related Deaths – a protocol for liaison <http://www.hse.gov.uk/scotland/workreldeaths.pdf>

One tragic case, where the protocol failed in its purpose, related to 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”.²

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 22nd 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

² 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>

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 Advocate's 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, the Marine Accident Investigation Branch (MAIB) and Air Accidents Investigation Branch (AAIB) are independent non-departmental public bodies sponsored by UK Government Departments, the Department for Work and Pensions in the case of HSE and Department of Transport for the others. It should be noted that the Chief Prosecutor for the Crown Prosecution Service (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.

Scottish Hazards
13 February 2018

Petition PE1633: Private Criminal Prosecution in Scotland**Written submission from the Scottish Trades Union Conference (STUC)**

The STUC agrees overall with the submission by the Scottish Hazards campaign.

In the first instance, the STUC is concerned that a funding cut to the Health and Safety Executive (HSE) has resulted in less health and safety inspectors who are able to effectively carry out investigations in a timeous manner. The STUC understands that HSE has had its budget cut by 35% over the last five years leading to fewer investigations. In Scotland, HSE inspectors must prepare a report to go to the Crown Office and Procurator Fiscal Service in order for them to determine whether there is enough evidence to proceed with prosecution. As such, the HSE report requires to be extremely thorough as Crown agents rely heavily on these reports. Without staff and resources to complete these reports in a robust manner, COPFS can feel ill equipped in prosecuting. Out with Scotland it is the HSE Inspector who prosecutes rather than simply appearing as a professional witness.

As the coalition Government attacked health and safety legislation including excluding civil liability from health and safety litigation, this means that there is currently no efficient and effective court procedure for enforcing health and safety legislation, perhaps one of the most powerful levers to encourage employers to manage health and safety effectively. The STUC agrees with the Scottish Hazards Campaign that all legislative powers over health and safety should be devolved to the Scottish Parliament. It would then be for the Scottish Parliament to legislate to give their law officer powers to direct the HSE to carry out investigations in a specific Scottish context.

The STUC agrees with Scottish Hazards that the situation created by the Lord Advocate having to provide permission to bring a private prosecution reduces the chances of the prosecution taking place given that the Lord Advocate oversees the COPFS which originally decided there were no grounds for prosecution. This anomalous situation in Scotland creates a conflict of interest which requires to be statutorily rectified.

The STUC agrees with the submission by the Scottish Hazards Campaign that any individual or organisation wishing to ensure justice is served through bringing a private prosecution should be allowed to do so. For example, the STUC understands that no Scottish prosecutions have taken place under the Corporate Manslaughter and Homicide Act 2007 as yet. If private prosecutions were allowed in instances where corporations had breached health and safety legislation, this could potentially ensure that the legislation is effective and that families and individuals are no longer ceding their authority to Crown agents to prosecute when those Crown agents can only do so based on HSE reports, which are not as forthcoming due to budget cuts.

Nonetheless, the STUC would be very concerned if private prosecutions were to be used as a way of transferring the onus of bringing corporations or employers to justice from the public to the private realm; or from the public purse to the individual. The STUC, ultimately, believes that HSE's budget should be reinstated to allow inspectors to carry out their duties; and for COPFS personnel to be sufficiently trained in dealing with health and safety cases.

Nonetheless, with increased expenditure required as part of the criminal litigation process, and cuts to the Scottish Legal Aid budget, the potential for justice to be denied still exists. For this reason, coupled with the fact that often health and safety cases require limited time scales, even when coupled with civil remedies (e.g. petitioning for specific implement as well as bringing a case for private prosecution of a breach), the STUC believe that if some form of simplified criminal procedure may be required. If the

normal criminal procedure is followed then this would take precedence in terms of evidential preference which would put the civil remedy requested, which is potentially the avenue for enforcing the fastest action, to take a back seat. Out with the workplace, where no civil litigation is ongoing, and the prosecution takes place after the fact, then this will not be an issue.

As such, people, including workers and their trade union representative organisations, should still be able to petition court for civil remedies - to force employers to stop certain conduct (eg unsafe practices) via interdict or force them to take certain action (eg carry out a risk assessment) via specific implement. However, in the workplace, workers and health and safety representatives must be empowered to ensure that health and safety legislation is complied with prior to breaches occurring. The HSE has powers to put employers on notice. With the cuts to the HSE budget, it would be interesting to explore potential options which allow trained and accredited health and safety representatives to enforce this power as well as HSE inspectors.

Ensuring that all of these powers are in place will enable health and safety legislation to be more effectively enforced.

STUC

16 February 2018

Petition PE1633: Private Criminal Prosecution in Scotland**Written submission from GMB****Introduction**

GMB is Scotland's campaigning trade union, having members across many of Scotland's key economic sectors; delivering health and social care, other essential public services, in gas and utilities, shipbuilding and whisky distilleries as well in the growing, but exploitative gig economy.

We are a growing, forward-thinking trade union in increasingly challenging, changing, diverse and divisive times. We communicate and engage constantly and credibly with our members on every aspect of their life at work. We use every tool at our disposal, from the digital to the legal, to represent our members.

Our union will work with employers, wherever possible, to develop constructive dialogue and positive working relationships but we will not fail to challenge those employers who place the health, safety and welfare of GMB members at risk.

GMB Scotland secures substantial amounts of compensation for members every year but sometimes for GMB Scotland members and their families it is about more than financial recompense for harm done, it is about securing justice for the impact employers negligence has had on them.

We would like to make the following comments in response to the questions asked.

Response

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?

GMB Scotland would suggest that this question should also have included reference to the number of prosecutions taken as well as the robustness of investigations leading to prosecution. We believe many employers know full well they have little chance of being found in breach of health and safety regulations as they have as equally small chance of being routinely inspected, or even investigated after an incident in the workplace.

The HSE and Scottish local authorities have not only suffered severe budgetary cuts in the name of austerity, they have suffered from the political ideology of the current United Kingdom Government and their coalition predecessor that, for whatever reason, protecting the health, safety and well-being of workers is increasingly seen a burden on business.

Since 2010 the budget of the HSE has been cut by 40% and by 2020 and the HSE face receiving over £100 million less Government funding than it did in 2010, a massive 46% budgetary cut over the 10-year period.

The UK Government, in addition to fuelling the myth that health and safety is a burden are now directing regulators as to what industries and how many inspections HSE and local authority enforcement officers and can carry out.

Health and safety is far from a burden, it is a basic human right, our members expect to leave for work and come home safe to their family after a shift, sadly too often workers do not return.

Local authority environmental health budgets have been hit equally as hard, most work premises previously inspected by local authority environmental health officers will now no longer be subject to health and safety inspections, unless a worker suffers a major injury that meet the threshold set out in the HSE incident selection criteria.¹

One of our biggest health and safety concerns now is the gig economy, many workers are denied protection from health and safety legislation as they are falsely, in GMB Scotland's opinion, classified as self-employed. There is often we believe a contractual and exclusive link to the organisation employing their services. However, as they are self-employed the contracting organisation under health and safety legislation may owe no duty of care, other than when they are on company premises.

Many GMB Scotland members will be working in these workplaces and in precarious employment and it is unacceptable to our union that budgetary cuts, the drift towards precarious false self-employment and political ideology are putting workers lives at risk.

GMB Scotland recognises the reserved nature of health and safety legislation and the role of the COPFS as public prosecutor in Scotland including of employers facing action for health and safety breaches. In our view the race to the bottom regarding health and safety enforcement and the loss of many experienced investigators can only result in less enforcement resources for prosecution. Perhaps cases that may have been recommended for prosecution in the past will not progress because of the genuine and extremely concerning cuts imposed on the HSE and local authority environmental health departments.

Our view would be that the Scottish Parliament Justice Committee should carry out an inquiry into the robustness of health and safety prosecutions focusing on the work of the Crown Office Health and Safety Division, the HSE, local authorities and the extent to which economic cuts have impacted on health and safety justice and take evidence from trade unions, professional bodies such as the Royal Environmental Health Institute for Scotland and victims organisations such as Families Against Corporate Killing and Scottish Hazards.

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

GMB Scotland has an established and extensive network of highly trained health and safety representatives whose priority is to prevent accidents in the workplace by exerting their rights under legislation to inspect workplaces and investigate any incidents that result in injury to GMB Scotland members.

Union health and safety reps in unionised workplaces save lives and reduce accidents and evidence exists throughout the world recognising this fact.

However, the world of work is changing as outlined above and GMB have secured significant victories in the fight for employment rights for gig economy workers including a High Court Action against Uberⁱ for denying drivers basic employment rights. Late last

¹ HSE Incident Selection Criteria updated 2014: <http://www.hse.gov.uk/enforce/incidselcrits.pdf>

year GMB requested an intervention in Uber's High Court Appeal² against Transport for London's decision to ban Uber for operating in London. GMB are arguing that Uber's business model and excessive hours drivers face is placing public safety at risk, a position that was not planned to be raised by Transport for London in their evidence.

This is an example of how committed GMB are to use the public prosecution system to defend worker's rights to the highest level.

Given the slow pace that public prosecutors progress most health and safety cases in Scotland and the changing employment relationship that calls into question an employer's duty of care to falsely self-employed workers then it may well be that GMB Scotland has to consider launching a private prosecution in the future.

For example, if a courier company "contracts" an individual on a self-employed basis, on condition he works for no other company and that the driver rents a company liveried van from their leasing company.

Who has responsibility for the van? The Provision and Use of Work Equipment Regulations (PUWER) place a duty of care on the employer to ensure roadworthiness of vehicles provided for work for employees. All evidence in the example suggests that to all intents and purposes this driver is an employee apart from their legal employment status as dictated by the courier company.

The question would be what the position is should the driver be in a road traffic accident and the vehicle established to be unroadworthy; the driver may be prosecuted under road traffic laws, but it is doubtful if action would be taken under PUWER³, unless against the self-employed driver who might be legally regarded as their own employer. It may well be that a private prosecution against the courier and vehicle leasing company would provide the opportunity to expose the ludicrous contractual relationship most courier drivers face.

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

GMB Scotland believes all citizens should have access to justice and clearly there may be times when prosecutors, investigators or both get it wrong. This could also include situations where workplace accident investigators, either HSE or local authority environmental health officers do not recommend prosecution when legal representatives, family members of workers killed at work or their trade union have justification to believe this decision is wrong.

Where that party feels there is strong evidence to suggest that criminal negligence could be proved beyond reasonable doubt and the COPFS or investigating officers have got it wrong then the desire for natural justice to run its course should allow for access to public prosecutions without the need for the Lord Advocate to concur.

The decision of the High Court Judges in an appeal against the Lord Advocate's decision not to allow a private prosecution for two bereaved families in the Glasgow bin lorry tragedy show that there will be little opportunity for private prosecution in the futures unless the role of the Lord Advocate and High Court Judges is examined and made fit for purpose for a modern society.

² <http://www.gmb.org.uk/newsroom/GMB-wins-uber-case>

³ http://www.hse.gov.uk/foi/internalops/ocs/800-899/803_69/

Lady Dorrian, Scotland's second most senior judge said,

"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."

From Lady Dorrian's comments it is clear that GMB could raise a private prosecution in England and Wales without having to jump through the legal loopholes we would encounter in Scotland.

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.

GMB Scotland acknowledges the reserved nature of health and safety legislation as well as the devolved powers the Scottish Parliament has over public health, local government, the economy and, of course justice.

GMB Scotland would like to see the Scottish Government using its existing powers to bring forward plans to address the anomaly of private prosecution in Scotland as well as creating safer healthier workplaces.

This would be best served initially by;

- The Scottish Parliament's Justice Committee having an inquiry into the powers of the Lord Advocate as the arbiter of private prosecutions, such an inquiry should also look at the work of the COPFS Health and Safety Division and Scotland's Health and Safety prosecution record.
- A further inquiry into Scotland's health and safety performance by an appropriate Scottish Parliament Committee to include prosecution, wider health and safety enforcement, the changing world of work, the dangers precarious employment poses for the health, safety and wellbeing of exploited workers and any other health and safety concern which evidence to the committee may uncover.
- The Scottish Government stand up to the HSE and refuse to allow them to direct where local authority environmental health officers carry out health and safety inspections.

GMB SCOTLAND

16 February, 2018

Justice Committee

Petition PE1633: Private Criminal Prosecution in Scotland

Written submission from James Macfarlane

It has been drawn to my attention that the Justice Committee is considering the above public petition, which seeks to "remov[e] the requirement that the Lord Advocate must first give permission before a private criminal prosecution can be commenced in Scotland".

I am writing to express my view that implementing this proposal would arguably be outside the legislative competence of the Scottish Parliament. This is because removing the requirement for concurrence would give every person the same right to initiate proceedings as the Lord Advocate, and its effect would therefore be to "remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland", which is expressly outside legislative competence in terms of the Scotland Act 1998, section 29(2)(e).

James Macfarlane

March 2018