Introduction

Thompson Solicitors are Scotland’s largest Trade Union Law Practice. Each year we represent a significant number of victims of work related accident, injury and disease including assisting the families of victims of fatal accidents. In the last 12 months we received instructions in relation to in excess of 2,800 victims of work related injury. Given the nature of the health and safety legislation the vast majority of those victims are at the very least prima facie victims of a health and safety crime. The Justice Committee Inquiry is a very wide reaching one. We shall restrict our submission to the effectiveness and efficiency of the COPFS; in relation to the investigation, prosecution and effective deterrents of health and safety crimes.

Whilst we recognise the dedication and commitment of individual employees of the COPFS we do have concerns about the effectiveness of the service in relation to health and safety crimes. Some of our concerns are within the direct control of the COPFS, although resources may be an issue. Others are not but we believe should be considered within the context of this inquiry because they have an impact upon the effectiveness of the COPF. We will set out each in turn below.

Obligation of the state to health & safety crimes

In our opinion the primary and fundamental purpose of the State in relation to health and safety should be the prevention of future workplace accidents.

Thus, the criminal law should stand as a real deterrent; and the Fatal Accident Inquiry system should guarantee that answers are found, lessons learned and recommendations followed. In our experience from the perspective of victims, particularly in relation to fatal accidents, punishment of offenders and compensation are a distant second to ensuring that the primary objectives are met. All of our observations and submissions in this paper are focused on the essential role that the COPFS ought to play in promoting and ensuring workplace safety.

Language

The language which is used to describe breaches of health and safety laws is very important. Too many people do not view a breach of health and safety as a “real crime”. It is considered a regulatory or technical infraction. To the contrary, injuries caused by breaches of health and safety laws can and all too often do devastate lives; causing as much pain, trauma and personal violation as any, so called, real crime. To ensure that health and safety obligations are taken seriously by both employers and the public at large we should be careful to use language that conveys the seriousness of the offence and the damage they cause.
We should call them what they are – health and safety crimes.

The impact of low prosecution rates in terms of regulating behaviour

We echo the observations of APIL in relation to the disappointingly low prosecution rates. Those very low prosecution rates send out entirely the wrong message to employers. It strongly suggests that they will “get away” with committing health and safety crimes. For the law to serve as a real deterrence and for us to see an improvement in accident, injury and fatality rates it is essential that there is a marked increase in prosecution rates.

Corporate homicide legislation

This is a most important matter for all of our Trade Union clients. They long campaigned for corporate homicide legislation because of the deficiencies in the common law highlighted by the Transco case. They and we do not believe that the Corporate Manslaughter and Corporate Homicide Act 2007 has made any meaningful improvement in the law. There have been no prosecutions in Scotland under the 2007 Act. The 2007 Act replaced the concept of the “controlling mind” of the company with the need to establish that a gross breach of “senior management” played a “substantial role” in the fatal accident. We would suggest that this test is almost as difficult to meet as the common law test and almost as anachronistic. The reality of modern companies is that they function via chains and delegated authority. The Corporate Homicide legislation should recognise that reality and base liability on a vicarious responsibility model.

Fatal accident legislation

We would again echo the main point made by APIL. Our own experience is that there are invariably and inevitably significant delays between the fatal accident and the FAI being held. There are many reasons for this including the “unofficial plea bargaining procedure” to which we will refer below. In our opinion, the 2016 legislation may improve matters to some extent but not significantly. While we note the comments of APIL we believe that the only way to properly have any meaningful impact upon timescales and delays is by introducing a form of judicial management.

Unofficial plea bargaining

In short and in practical terms, the COPFS treat the prosecution of health and safety crimes more like a civil court case than a criminal prosecution. There are not statutory time limits for bringing a health and safety prosecution or bringing a matter to trial unlike other crimes committed by natural persons. There is therefore a practice within the COPFS that if an organisation indicate a general intention to plead guilty that they will enter into a, often very prolonged, period of discussion and negotiation around agreeing a form of words for the indictment/charge and even down to the precise wording of the narrative that is presented to the judge or sheriff when the organisation eventually pleads guilty. This is extremely common in our experience. It is also our experience that this process can take, not months, but years. There is no more better recent example than in relation to the death of Firefighter Ewan Williamson where there was a gap of 5.5 years from the death to
the guilty plea. All too often, in our experience, the purpose of the detailed negotiations from the organisations’ perspective is to mitigate or minimise the exposure of their funding Employers Liability insurer to pay out personal injury damages.

The delays in conviction alone cause significant distress and upset to victims. That is compounded in fatal cases because a decision upon whether or not to hold a Fatal Accident Inquiry will not be made until after the criminal process is resolved.

**Failure to prosecute employers without compulsory employers’ liability insurance**

This is a real and substantial problem. We have been involved in many cases over the years where we have on our clients’ behalf made formal complaints about the lack of compulsory employers’ liability insurance. We have never seen such a complaint result in a prosecution.

This reinforces our primary viewpoint that all too often health and safety crimes are treated differently to other crimes. The extremely low prosecution rates for a failure to have employers’ liability insurance stands in stark contrast to prosecution rates for a driver’s failure to have motor insurance. To influence and positively regulate behaviour as the criminal law must we submit that every instance of failure to hold employers’ liability insurance should result in a prosecution.

Retaining the analogy with road traffic offences we would also submit that there ought to be a public awareness campaign (like speeding, driving while using mobile phones, driving while under the influence of alcohol and drugs and failure to have motor insurance) for the purpose of making the failure to have employers’ liability insurance socially unacceptable.

We also echo and support the submission of APIL for the creation of an insurance last resort like the Motor Insurers Bureau.

**The need for a statutory framework to empower employees to take preventative enforcing measures**

Just as prosecution rates are low, the number of pre-emptive enforcement measures by the HSE to prevent accidents occurring before anyone is hurt are also too low. This, in our opinion is also down to resources. We appreciate that this Inquiry relates only to the COPFS. Nevertheless, in the context of health and safety crimes, the COPFS and the HSE are often two sides of the one coin. They are currently the only State organisations that can do anything to prevent workplace accidents and fatalities and to reduce the number of workers injured and killed each year. The problem with their funding will never be sufficiently resolved.

In our opinion therefore, the Scottish Parliament should extend “enforcement powers” to employees. There should be a statutory framework that permits employees who have evidence that an employer is in breach of health and safety regulations such that there is a risk of injury to raise the issue directly with the court and to seek the remedy of interdict [whereby the court directs the employer to stop
the dangerous practice] or specific implement [whereby the court directs that the employer must take specific steps to be compliant with health and safety legislation].

**Section 69 of the Enterprise and Regulatory Reform Act**

It is finally worth remembering that because of Section 69 of the Enterprise and Regulatory Reform Act the only purpose that the rich and extensive range of health and safety laws that we have in the UK now serves in relation to the criminal law. Accordingly, the role of the COPFS and the effective use that they make of all of those health and safety laws is more important than it has ever been.

Thompsons Solicitors
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