

## Justice Committee

### Petition PE1633: Private Criminal Prosecutions in Scotland

#### Written submission from GMB Scotland

#### 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.<sup>1</sup>

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.

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

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 Uber<sup>2</sup> for denying drivers basic employment rights. Late last year GMB requested an intervention in Uber's High Court Appeal<sup>3</sup> 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 PUWER<sup>4</sup>, 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.

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

<sup>3</sup> <https://www.leighday.co.uk/News/News-2017/December-2017/GMB-granted-permission-to-intervene-in-Uber-appeal>

<sup>4</sup> [http://www.hse.gov.uk/foi/internalops/ocs/800-899/803\\_69/](http://www.hse.gov.uk/foi/internalops/ocs/800-899/803_69/)

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.

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