

## Justice Committee

### Petition PE1633: Private Criminal Prosecutions in Scotland

#### Written submission from the Petitioner

I have a few brief comments to make, primarily on the submission of the Law Society.

In the first instance I am not aware of any evidence to support the suggestion by the Law Society that the background to the petition had been fully explored by the Crown Office and Procurator Fiscal Service (COPFS). What actually happened when I first raised a concern with the COPFS was that it was deflected to an unrelated health department who, after quite a few months, agreed that it was actually nothing to do with them. As I understand it the COPFS did not explore the background at the time, instead they simply issued a vague reply which made no attempt to consider the issues. Had they done so at the time, then there might not have been a need to petition the Parliament. If the Law Society can provide more information to support their statement and share it with the Committee, that would be most helpful I would suggest.

Police Scotland have confirmed in writing to me that they will not investigate a non-fatal health and safety complaint, so any suggestion that there is an alternative remedy to the HSE is fundamentally flawed. The COPFS will not, as a matter of policy, instruct Police Scotland to investigate a non-fatal health and safety matter. The gap in the law remains. If HSE decline to investigate a complaint then there can be abuse of health and safety protection for vulnerable workers. At the moment the policy of the HSE in regard to professional sports appears to be a “three wise monkeys” position, whereby if there is no fatality they will not get involved. In effect you can be paralysed in accident, almost die due to severe injuries, suffer mental health issues, but because it is professional sport, the law will be applied in a different manner to other workplaces. For clarity the local authorities in Scotland follow the policy guidelines issues by the HSE. They have no independence in real terms.

With respect, what the Law Society appear to have done is fall into the practice of simply stating what the current position is, as opposed to considering in the public interest, why the law cannot or should not evolve to provide greater access to justice. The quotation from the “Bin Lorry” case does not address the position where there is no report to the COPFS, so it is not wholly appropriate as it is a completely different set of circumstances. You could also possibly take the view that the comments of the Lord Justice-Clerk Lady Dorrian, potentially indicate there will always be bias in favour of the Lord Advocate when it comes to private criminal prosecutions, since why would it be normally presumed that the COPFS are always going to be correct in their assessment. If it is being inferred by the courts that there should be a legal presumption in advance that every COPFS decision not to prosecute will be correct, then does that not contradict “The statement of Principles of Judicial Ethics for the Scottish Judiciary”.

If it is the position that the COPFS never make a mistake, then there would actually be no point in criminal defence lawyers even showing up, since the COPFS position

would be so perfect that there would be no prospect of a defence. This is not the reality of how the courts work.

There is also the fact that the number of prosecutions by the COPFS are apparently reducing, whether by policy, a lack of resources, or a combination of both, and this will have an impact on access to justice for some people.

At this juncture there has still been no explanation put forward by the COPFS as to why private criminal prosecutions, with built in safeguards and guidelines, which are perfectly acceptable in the rest of the UK, but for some strange reason the people of Scotland and their legal representatives are to be regarded with such suspicion that they might behave inappropriately. Even in this day and age we still suffer in Scotland from the “bogey man” culture by the authorities it would appear. Surely we should be able to move on and have a reasoned debate, supported by evidence.

There are other instances whereby the conventional view of the COPFS and Police Scotland that a civil remedy is available is not always in the interests of access to justice for the injured party. Some examples might be; the baby ashes cases where a prosecution would potentially be of greater comfort to the families than financial compensation, and situations of fraud in construction projects where sub-contractors lose out on payment due to a deception by a large contractor who subsequently goes into liquidation and there is no prospects of recovery in the liquidation process. Another area that has not been discussed so far is in regard to animal welfare. The charities who are reporting agencies do not have unlimited resources, and there may be instances where a private prosecution would be wholly appropriate.

Ultimately this petition is about access to justice and the protection of those in society who are vulnerable and open to intimidation and being exploited. The position of the COPFS from the outset has simply been to constantly say no, without even attempting to carry out any form of investigation which allows for contribution by other parties. It seems to me that this culture may be more about control by the legal institutions and less about access to justice.

The law of Scotland can, and should evolve, and this parliament is the custodian and protector of the people of Scotland.

Bill Alexander  
22 March 2018