

Justice Committee

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.

¹ Section 48(5).

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.

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.

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

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