

13 September, 2000

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: PROPOSAL TO REMOVE THE PROSECUTION MONOPOLY

Purpose

1. This paper provides advice on allowing private prosecution under the Health and Safety in Employment Act 1992 (the HSE Act). This project is being undertaken as part of the HSE Act Review Project (refer 99/004522). This paper recommends that the monopoly is removed.

Background

2. Summary criminal proceedings in the District Court are subject to the provisions of the Summary Proceedings Act 1957 (the SP Act), which allows private prosecution. Section 54 of the HSE Act expressly prohibits prosecutions by anyone other than an inspector, who under section 29 must have a certificate of appointment issued by the Secretary of Labour.
3. Only employees of the Department of Labour's Occupational Safety and Health Service (OSH) are issued with certificates of appointment, meaning that only OSH's inspectors may take prosecutions under the HSE Act. A private individual may request an informal review of an Inspector's decision.¹ The option of a judicial review of the Department's decision making processes is also available.
4. Other recent public welfare statutes that are similarly non-prescriptive generally do not provide for a monopoly on prosecution.² These include the Biosecurity Act 1993, the Building Act 1991, the Hazardous Substances and New Organisms Act 1996 (which OSH will help enforce), and the Resource Management Act 1991 (the RMA).

¹ The Department may also undertake an informal review, before the decision is made public. Both types of review are conducted by another senior OSH staff member.

² This legislation is listed in Appendix One.

Arguments for removing the monopoly

Private prosecution may provide another avenue of redress

5. Parties may feel aggrieved when their case is not prosecuted.³ The United Kingdom Royal Commission on Criminal Procedure commented that prosecution of serious crime is in the public interest, and prosecutors will invest more time and money in prosecuting those cases. Less serious offences may be of great significance to the victim, but there is little public interest in prosecution.⁴

Private prosecution may prevent an abuse of process

6. Private prosecutions may provide a 'useful constitutional safeguard'⁵ against official inertia, incompetence or biased reasoning.

Limited resources mean strategic prosecutions are necessary

7. Limited resources, in addition to the principles behind public prosecution policy, mean that not all offences may be prosecuted by a government agency. Enabling private prosecution provides a further avenue for aggrieved parties should central government resources be limited.

The deterrent effect of the HSE Act may be increased

8. In occupational safety and health jurisdictions allowing private prosecutions, although very few cases have been taken,⁶ the threat of having other parties taking prosecutions may act as an added deterrent against non-compliance. During the policy development of the RMA, it was noted that the knowledge any person could enforce the provisions of the Act would probably be a useful incentive to encourage compliance in the first place, and concluded that the principle of consistency suggests any person would be able to take part in these proceedings.⁷

Arguments against removing the monopoly

9. The HSE Act has been exempt from the provisions of the SP Act, largely due to concerns about possible misuse of prosecutions for employment issues or for personal financial gain. These arguments stem from the economic and relationship aspects of employment. There is an argument that if the monopoly is removed, individual parties may use prosecutions under the HSE Act as a lever in employment disputes.⁸

³ The Department prosecutes in accordance with Crown Law guidelines ('Prosecution Guidelines' Crown Law Office; Wellington; 1992) and the OSH Enforcement Policy (Policy Circular No.8).

⁴ 'Prosecutions by Private Individuals and Non-police Agencies' Royal Commission on Criminal Procedure: Research Study No.10; 1980; London.

⁵ Lord Diplock; *Gouriet v UPW* [1978] AC, London, 435, 498; [1977] 3 A11 ER 70, 97.

⁶ In New South Wales, Australia, the secretary of a Union may also bring a prosecution. This provision has been used only once, to (successfully) prosecute a TAFE college. ('Work, Health and Safety: Inquiry into Occupational Health and Safety' Vol 2. Industry Commission; Canberra; 1995).

⁷ 'People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform' Ministry for the Environment; December 1988.

⁸ This is one reason for the requirements of 'good faith', 'mutual trust and confidence', personal grievance provisions and the rules for strikes and lockouts contained in the Employment Relations Act 2000.

The fear of inappropriate prosecutions is misplaced

10. During the Australian Inquiry into Work, Health and Safety, the New South Wales Government commented:

As a general principle, it is desirable that recourse in law is accessible to injured parties. However, this principle needs to be applied cautiously so that recourse to the court system does not result in unwarranted and unjustifiable litigation.⁹

11. The motives for bringing a prosecution are only relevant in limited circumstances.¹⁰ There may be occasions where the HSE Act is used for example in employment disputes, but where the prosecution proves each element of the breach ‘beyond a reasonable doubt’, that is still a breach of the HSE Act regardless of motive.

ACC legislation removes an avenue of redress

12. Because ACC legislation bars action for personal injury in most circumstances, a possible incentive for private prosecutions under the HSE Act is personal financial gain. First the private prosecutor must secure a conviction and then the Court will consider what fine is appropriate according to *De Spa* criteria,¹¹ including whether under the Criminal Justice Act any part of the fine should be awarded to the victim of a crime.

Other possible incentives are not likely to be important

13. An argument could be made that allowing others to take cases may encourage the Department to wait until a private party initiates a case and bears the costs, therefore encouraging official inertia. This is not a strong argument against private prosecution. The Department has a statutory duty to be accountable to its public prosecution guidelines. If the decision process was to be operated as a *true* prerogative power, the Government and the Department would be exposed to intense scrutiny and potential embarrassment. Also, decisions made as part of a statutory power are always judicially reviewable.

The Crown and legitimacy of criminal sanctions

14. The purposes of criminal sanctions are for the Crown to punish and deter wrongs against society. Prosecutions on behalf of the Crown remove the ‘price tag’ on justice for those who would otherwise not have the resources to take a case to Court. Prosecutions are based on the public interest a number of factors are considered before initiating prosecution. The Crown’s process is based on a principled and publicly known basis, which includes a series of mechanisms to ensure fairness and certainty for defendants.

15. The Courts are where questions of the public interest and justice in criminal cases are determined. Inevitably where the Crown holds the monopoly on prosecution,

⁹ ‘Inquiry into Work, Health and Safety; Productivity Commission’; Australia; 1995.

¹⁰ For example, under the Costs in Criminal Cases Act 1967, section 5 (2)(a) provides that the Court shall have regard to whether the prosecution acted in good faith in determining the costs of the successful defendant.

¹¹ Factors such as culpability, financial position of defendant, degree of harm, and the defendant’s attitude are considered. *Department of Labour v de Spa & Co.*, DC Christchurch. CRN 30090213/93.

this approach raises issues of justice. In some circumstances the monopoly does not provide an avenue of redress. Enabling private prosecutions may remedy this.

Options

16. The need to address these issues argues for an amendment to the current prosecution monopoly. Three broad options available to Government are outlined below.

- **Option 1: The status quo:** make no change to the current prosecution monopoly. The current judicial review process and the Department's informal review process would be clarified.
- **Option 2: Remove the monopoly:** section 54 of the HSE Act would be repealed, allowing private prosecutions by any party. Private prosecutors would be given powers of entry and access to information.
- **Option 3: Remove the monopoly with conditions:** section 54 of the HSE Act would be amended to allow private prosecutions in certain circumstances:
 - a. **consent process:** a third party grants the right to initiate a private prosecution.
 - b. **in the absence of a Crown prosecution:** private prosecution when the Crown formally decides not to prosecute.

Analysis of Options

Option 1: The status quo

17. The current monopoly and informal review procedure remain but operational procedures are clarified. There is a perception that the Department does not prosecute the correct number of cases. This may be based on a misunderstanding of the public prosecution policy. There are two options: a judicial review of the decision-making process, or an internal review of the decision itself initiated by the Department or requested by a member of the public. In *Hallet v A-G*, Judge Gallen held that the Courts would be slow to deprive members of the public the opportunity to ensure that a state authority with the sole power to institute proceedings fulfils their statutory duty.¹²

18. The Department is currently re-examining its enforcement policy as part of an overall review. The draft revised policy states that in cases likely to generate outside interest, or cause controversy, the reason for the decision must be fully documented and referred to another manager to review.¹³

19. Whether or not the prosecution monopoly is removed, through its Purchase Agreement the Department could be required to publicise this review process and be proactive in providing information.¹⁴ Ensuring decisions are documented and

¹² *Hallet v A-G* [1989] 2 NZLR 87, 91, 93.

¹³ 'Draft Report: Review of the Enforcement Policy for Alignment with the Service Delivery Model' Occupational Safety and Health Service; p.11.

¹⁴ A possible model is the Australian Federal agency 'Comcare', which has a monopoly for six months from the date of offence. After six months, in the absence of any prosecution, a health and safety

having a more transparent and publicised review process would go some way in resolving these perceptions. It is envisaged the internal review system would be under increased scrutiny, because experience with other legislation suggests that where no monopoly exists, the main focus of private parties is pressuring the Authority to prosecute.¹⁵ However removing the monopoly would go further in removing these perceptions.

Option 2: Remove the monopoly and provide powers of entry and access to information

20. Removing the current prosecution monopoly provides a safeguard against official inertia, incompetence or biased reasoning. The Department would continue taking prosecutions in the public interest but there may be instances where cases are not prosecuted. Removal of the monopoly would accommodate these cases and provide an avenue of redress for those affected or harmed by work activity.
21. In jurisdictions allowing private prosecutions, they are rarely taken. While it is likely that some private parties would initially be motivated to bring charges, in the longer term their usefulness as a deterrent is gained from the increased perception that poor workplace practice is more likely to be detected.

Access to sufficient information and fairness to defendants

22. Health and safety inspectors have relatively extensive investigative powers allowing entry to premises, access to witnesses and information, and power to stop dangerous work practices immediately or to seal a scene in order to collect evidence. In cases where the Department decides not to prosecute, the evidence collected by the Inspector is subject to the provisions of the Official Information Act 1982 (the OI Act) and the Privacy Act 1993. At present, members of the public may request investigation information under the OI Act.¹⁶
23. Arguments may be made for and against refusal to supply information under these Acts. Should the Department investigate an alleged breach but decide not to prosecute, private prosecutors may want access to any evidence collected by the Department. This is particularly important since a period of time is likely to have elapsed between the alleged breach, the initial investigation and the time that the private investigation and prosecution begins. In particular, it is unlikely that the work site will remain in the same state as it was when the accident happened.
24. In New South Wales, a union involved with the case has the same power to lay charges as the Authority. The New South Wales Trade and Labour Council commented on their experience of private prosecution:

representative may request the Authority to prosecute. The Authority must inform the applicant within three months of its decision and reasons.

¹⁵ This has been the experience of private prosecution activity under the Building Act 1991 and the Resource Management Act 1991. (Stephen Quin, Counsel for Wellington City Council, personal communication).

¹⁶ Investigation information that is released usually consists of the health and safety inspector's report and some appendices containing for example photographic evidence. Statements and identifying details are not released.

One of the problems with the Act ... is that whilst the Act provides that a union secretary can initiate a prosecution, there are no provisions in the Act that actually enable a union to investigate a breach.¹⁷

25. There is an argument that to provide true and fair access to justice through the removal of a monopoly private prosecutors should be given powers of entry in order to undertake their own investigation, especially when the Authority declines to prosecute. Concerning rights of entry, the Ministry of Justice comments:

Any such rights and powers potentially raise issues under section 21 of the Bill of Rights, which provides that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise ... the approach adopted by the Canadian Supreme Court is that in determining the “reasonableness” of any search, legitimate state interests must be balanced against the privacy, dignity, and property expectations of private citizens.¹⁸

26. Existing legislation shows how the right to be secure against unreasonable search and seizure may be balanced against the ability to bring private prosecutions. For example, section 338(4) of the RMA allows any person to lay a charge with the Environment Court. However section 332 and 333 provide that *only enforcement officers have powers of entry and search*.¹⁹ Therefore, although this Act allows any person to initiate proceedings, there are no powers given to private parties to assist in obtaining proof of the charge.

27. The Ministry of Justice has also indicated that such matters may raise issues of freedom of expression under section 14 of the Bill of Rights:

... a statutory requirement to produce information may be *prima facie* inconsistent ... as this section has also been interpreted as including the freedom not to say anything. Further, the exclusion of certain official information from the OI Act may be *prima facie* inconsistent with freedom to seek and receive information ... Any such *prima facie* inconsistencies under section 14 would then fall to be considered under section 5 of the Bill of Rights, as to whether they were justified limitations.²⁰

28. There must be an appropriate balance between providing a right to bring a private prosecution that is effective, and the rights of the defendant to have a fair process. Providing either for a right to prosecute without powers to access information, or one that does not sufficiently protect the defendant from abuse of process, would not satisfy private prosecutors or defendants. Because of this, this option is not recommended.

¹⁷ ‘Inquiry into Work, Health and Safety’ p.123.

¹⁸ *Hunter v Southam* (1985); Canadian Supreme Court; 11 DLR 4th 641. Communication from the Ministry of Justice, p.3

¹⁹ Although section 334 has wide powers for applications for warrants to search, section 335(1) indicates that it can only be executed by constables or enforcement officers.

²⁰ Communication from the Ministry of Justice; p.3.

Resource implications

29. A system that allows private prosecution may require the Department to direct some of its resources to support them, rather than towards prevention activities. However given the infrequency of cases being taken in other jurisdictions this is not likely to be a major issue.²¹

Option 3: Remove the monopoly with conditions:

a. consent process

30. Once the Department has made a decision not to prosecute, the right to lay charges for a private prosecution would be granted by a third party. The third party process provides a limited safeguard against information and evidence being used for other purposes, ensuring fairness for defendants and accountability for private prosecutors. There would be little change to current operational practices, because the Department would still investigate alleged breaches and make its decision according to public prosecution guidelines.

31. There are two options available providing procedural safeguards to prevent misuse of the HSE Act.

i. “Gatekeeper” system

32. Canada operates a consent system through its network of Justices of the Peace (JPs). In provinces that allow private prosecutions, the Provincial Offences Act allows any person to ‘inform’ the Court about a contravention, by filing an information before a JP under any provincial statute, including the Occupational Health and Safety Act. The JPs act as ‘gatekeepers’, deciding whether there is any merit for the case to proceed.²²

ii. Consent granted by the Minister

33. South Australia is presently considering a review of its monopoly. The Occupational Health, Safety and Welfare Act 1986 has a stated limitation period of two years.²³ Under the proposal, the Authority retains its monopoly for 12 months from the date of offence. For the next six months, private parties (defined as the affected worker, an immediate family member or an involved union) may apply to the Minister for the right to lay charges. At this stage the file becomes ‘discoverable’, and subject to ‘freedom of information’ rules. There are strict guidelines for releasing information.²⁴ For the final six months, no permission is required and any party may prosecute.

34. According to the Authority, perceived low prosecution levels brought about this review. This is due to both limited resources and the policy of ‘prosecutions taken in the public good’. However there is also a desire to provide an avenue of redress

²¹ Under the RMA, there has been one private prosecution, which was unsuccessful. *Wislang v Rodney District Council*, District Court, North Shore, 7 May 1997. CRN: 7044004690.

²² Two private prosecutions have been initiated under the Provincial Offences Act in the past twenty years, both by unions. In one case, the Ministry decided not to prosecute, and subsequently, the Union successfully prosecuted. In the other case, the subsequent prosecution was not successful. (Joel Waterman, Ministry of Labour, Ontario, personal communication).

²³ Section 58(7), Occupational Safety, Health and Welfare Act 1986.

²⁴ For example, it will release photos, evidence, and statements of fact but not disputed evidence.

for those affected by work activity, in circumstances where the Authority decides not to prosecute. It is expected that Unions will lay a charge and then summons Inspectors to give evidence.

Consent systems create barriers instead of safeguards

35. These consent systems do not remove the perception that decisions may be subject to political or public pressure, therefore do not provide a sufficiently objective decision-making process. Private prosecutors should simply be subject to safeguards already present in the Court process, without increasing its workload. Although applications made to the District Court create a decision-making process clearly separate from the Government, there is a danger this will create a ‘deposition style’ process where the case is pre-judged.
36. While the primary enforcement role should remain with the Crown, there is no sound reason why another barrier should be created for an already potentially lengthy and costly private prosecution. Therefore, officials do not recommend this option.

b.: in the absence of a Crown prosecution

37. This sub-option removes the monopoly when a case is not suitable for public prosecution. The Department would still investigate and make its decision based on public prosecution guidelines, thus avoiding any issues of double jeopardy.

Certainty for defendants and fairness for private prosecutors

38. For defendants, the private prosecutor is subject to the rules of criminal procedure and must lay charges within the limitation period. Information given to private prosecutors is limited by the provisions of the OI Act and the Privacy Act, without the additional barriers and costs (such as a ‘deposition-style’ hearing) associated with the other sub-option. Perceptions that the case may be pre-judged and the laying of charges is open to interference are removed. It is expected that health and safety inspectors may be summoned to Court to give evidence. An accountability mechanism would ensure the Department is proactive in notifying all interested parties of its decision.²⁵
39. This option avoids the perception that allowing private prosecutions may encourage the Department to operate its prosecution process in a true prerogative manner, while ensuring the Crown retains primary responsibility for prosecuting in the public interest. Where the Authority and other parties have equal rights to lay charges, for example, in New South Wales, Australia,²⁶ the role of the Crown as primary enforcer of the public good is removed. It has been observed there is an unofficial “tag team system” operating, where private investigators are either re-interviewing witnesses or pre-empting interviews by the Authority.²⁷

²⁵ In the majority of cases this includes the victim and their representative, and the potential defendant and their representative.

²⁶ Section 48(1) of the Occupational Health and Safety Act 1983 provides that ‘... an information may be laid with the consent of the Minister or prescribed officer, or by an inspector, or by the secretary of industrial organisation of employees ...’.

²⁷ Nicholas Wilson, Director, Industry Services, WorkCover South Australia (personal communication).

40. Private prosecution in the absence of a Crown prosecution preserves the role of the HSE Act in enhancing and protecting the public good through encouraging workplace safety, and the Crown's role as primary enforcer. Based on these arguments, officials recommend this option.

Linkages

The difficulties of laying charges within the current limitation period

41. The monopoly issue requires consideration within the context of the HSE Act being subject to the SP Act. The current six month limitation period begins on the date the breach of the HSE Act occurred. Consequently, in the absence of amendment to the limitation period, private prosecution will be subject to the same difficulties of laying an information in time as the Department experiences at present. A paper is being prepared on this issue, which discusses an option allowing managed extensions for private prosecutions.²⁸

Recommended option

42. The current prosecution process does not provide an avenue of redress for private interest cases that are not prosecuted. Provisional to this removal must be fairness to the defendant and private prosecutor. The Department recommends removal of the prosecution monopoly, with a provision for charges to be laid by a private party in the absence of a Crown prosecution. The Department would undertake through its Purchase Agreement to ensure proactive information sharing (within the constraints of the OI Act and the Privacy Act), and a publicised informal review system that operates in a documented, transparent manner.

Comment by the Ministry of Justice

43. The Ministry of Justice has had the opportunity to consider the Law Commission's draft report on Criminal Prosecutions that considers the scope for private prosecutions in New Zealand. The Government has yet to make any decisions on a final report, which is due to be released in October. The Ministry believes it is highly desirable, in the interests of consistency, that any decision on this aspect of the current proposals be made following the Government's decisions on the Law Commission's final report.

Comment by the Crown Law Office

44. The Crown Law Office agrees with the comments made by the Ministry of Justice. They question whether individuals or parties who may not be guided by the objectives of the legislation will promote the public interest through the pursuit of private prosecutions.²⁹

Department's view

45. The removal of the monopoly held by health and safety inspectors is in keeping with New Zealand's legislative trend. Legislation such as the Hazardous

²⁸ Refer 'HSE Act Review: Limitation Period for Laying Charges' (00/004217).

²⁹ Communication with Crown Law Office, p.1.

Substances and New Organisms Act 1996 and the Resource Management Act 1991 do not have monopolies. As discussed in the paper there are no substantive reasons for the retention of the monopoly in the HSE Act. Neither is there reason for concern regarding private prosecutions motivated by anything else than public interest. There is still a breach of the HSE Act regardless of motive.

Recommendations

I recommend that you:

- a) **agree** that the prosecution monopoly is removed, with a provision that private prosecutions may be undertaken when the Crown formally decides not to prosecute.
- b) **note** that the removal of the monopoly has implications for the current limitation period to which the HSE Act is subject.

RJM Hill
For Secretary of Labour

New Zealand legislation concerning criminal offences

Legislation which allows for private prosecution:

- Section 109 (2) of the Hazardous Substances and New Organisms Act 1996 provides that “any information in respect of any offence against subsection (1) of this section may be laid by any person ...”
- Section 338(4) of the Resource Management Act 1991 provides that “any information in respect of any offence against subsection (1) of this section may be laid by any person ...”

Legislation which allows for private prosecution for some offences:

- The Misuse of Drugs Act 1975 allows private prosecution with the consent of the Attorney-General
- The Electricity Act 1992 allows private prosecutions for certain offences

Legislation which is silent as to private prosecution, and therefore private prosecutions are not barred pursuant to section 13 of the Summary Proceedings Act 1957:

- The Building Act 1991
- The Biosecurity Act 1993
- The Local Government Act 1974

Legislation that specifically forbids private prosecution:

- Section 419 of the Maritime Transport Act 1994 provides that only the Director of Maritime Safety may bring proceedings. However the New Zealand Police and Regional Council harbourmasters have initiated prosecutions under this Act. In a recent case, the Maritime Safety Authority successfully appealed a High Court decision that would have limited the initiation of prosecutions to the Director.³⁰
- The Transport Act 1962

³⁰ *Canterbury Regional Council v Dong Won Fisheries Company Limited*; Judge McGechan; New Zealand Court of Appeal; 24 November 1999.