

# Legal Concerns Regarding Animal Protection in Scotland

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**A**nimal welfare is a devolved matter in Scotland with only a few exceptions as prescribed by the Scotland Act 1998.<sup>1</sup> Accordingly, responsibility for legislation governing animal welfare rests with the Scottish Parliament and the Scottish Government. There are a number of organisations involved in the enforcement of animal welfare law, including local authorities, the police and the Scottish Society for the Prevention of Cruelty to Animals (SSPCA).

In both Scotland and England there are very few prosecutions of animal cases in comparison with the whole plethora of criminal law (murder, rape, assault, theft, fraud, etc). Nevertheless, though, prosecutions regarding animals are relatively more frequent in England than in Scotland.<sup>2</sup> This prompts the following question: What is as the reason for this difference? The present article identifies and discusses three areas in the Scottish legal system which, it is contended here, are liable to impede the enforcement of animal welfare law and which therefore give rise to

concerns regarding animal protection. These areas of concern are the following:

(1) Severe limitations on private prosecution; (2) Absence of judicial review of prosecutorial decisions; and (3) Restricted scope of the police role in animal protection. These three factors are now considered in turn as follows.

## Severe restrictions on private prosecution

In Scotland virtually all prosecutions are brought by the public prosecution service, namely, the Crown Office and Procurator Fiscal Service (COPFS). The COPFS is a department of the Scottish Government and is headed by the Lord Advocate.<sup>3</sup> It is the only public prosecution authority in Scotland. Prosecutions are undertaken by the Lord Advocate (based in Edinburgh) or by local procurators fiscal and their deputies acting on behalf of the Lord Advocate. The COPFS receives reports of alleged crime from the police and a range of reporting agencies such as HM Revenue and Customs, the Health and Safety Executive, the Scottish Environment

Protection Agency, etc.<sup>4</sup> In the light of these reports the prosecutor decides whether to prosecute, what charges should be brought and in which court any prosecution should take place (in statutory crimes, the legislation may dictate the relevant court).

Prosecutions brought by COPFS are known as public prosecutions. In contrast to these, private prosecutions are prosecutions brought by an individual or a company or other non-governmental organisation. In Scotland the right to private prosecution is subject to such severe restrictions that, as a result, private prosecutions are virtually absent.<sup>5</sup> In fact, permission to bring a

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<sup>1</sup> The Scotland Act 1998 provides that the following issues are reserved to Westminster: scientific procedures on live animals; prohibition and regulation of the import and export of endangered species; regulation of the veterinary profession;

xenotransplantation; medicines, medical supplies and poisons [s 30(1) and Sched 5 ( B7, C5, G2, J2, J4)]

<sup>2</sup> This information was provided by Mike Radford, Reader, School of Law, University of Aberdeen

<sup>3</sup> For details of the COPFS see [www.crownoffice.gov.uk](http://www.crownoffice.gov.uk)

<sup>4</sup> [www.copfs.gov.uk](http://www.copfs.gov.uk)

<sup>5</sup> T H Jones and M G A Christie, *Criminal Law* (Edinburgh: W. Green & Son Ltd 5th ed. 2012) 41

private prosecution has been granted only twice in the last 116 years.<sup>6</sup> Neither of those cases concerned animal welfare. This situation stands in marked contrast to that in England and Wales where private prosecutions are not only commonplace but are specifically permitted under section 6 of the Prosecution of Offences Act 1985.<sup>7</sup> Here it is relevant that the Royal Society for the Prevention of Cruelty to Animals (RSPCA), a registered charity in England and Wales, undertakes considerable prosecution work. This is published in Annual Reports by their Prosecutions Department.<sup>8</sup> Resumes of cases are also reported under the heading 'Court Reports' in the RSPCA's quarterly publication entitled 'Animal Life'. In 2014 Sir Stephen Wooler CB, former Chief Inspector of HM Crown Prosecution Service Inspectorate, published an independent review of the prosecution activity of the RSPCA<sup>9</sup> (the 'Wooler Review'). Whilst advocating certain changes in the

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way the Society carries out its prosecutorial function (e.g. clearer separation of its investigative and prosecutorial roles, enhancement of transparency),<sup>10</sup> the review concludes with a positive assessment of the Society's prosecutorial function. It states that the RSPCA has carried on prosecutions “to great effect for over 190 years”<sup>11</sup> and that “The reality is that society depends on the RSPCA to enforce a difficult aspect of the law”.<sup>12</sup> Furthermore, private prosecutions by other animal welfare organisations such as the League Against Cruel Sports (LACS) and the International Fund for Animal Welfare (IFAW) have proved particularly useful where the CPS has been reluctant to prosecute.<sup>13</sup>

In sharp contrast to the above, the Scottish charity equivalent to the RSPCA, the Scottish Society for the Prevention of Cruelty to Animals (SSPCA), as a private organisation, has no prosecutorial role whatsoever.

The constraints on private prosecution in Scotland are outlined as follows. First, a person seeking to bring a private prosecution faces the arduous task of seeking permission to do so from the High Court of Justiciary (the 'High Court'). This is done by submitting what has been described as a 'rather archaic and long-winded'<sup>14</sup> form of document called a 'bill for criminal letters' setting out the reasons for the application. The applicant must also apply to the Lord Advocate for his

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concurrency with the private prosecution. Without the Lord Advocate's agreement it is most unlikely that the High Court would grant criminal letters authorising a private prosecution. That agreement is rarely granted.<sup>15</sup> As commented by one Scottish solicitor, this is not surprising, given that applications for permission for private prosecution are generally made following a COPFS decision not to proceed with a public prosecution.<sup>16</sup> However, as held in the case of *J & P Coats Ltd v Brown*,<sup>17</sup> it is possible in exceptional circumstances for permission to be granted without his support (this case is discussed below).

Furthermore, the private prosecutor must show that he has suffered a personal injury or wrong as a result of the alleged crime. The alleged crime must not be a public wrong. This principle carries negative implications for enforcement of animal welfare law. The problem arises from the Court's interpretation of personal injury/wrong. This can

<sup>6</sup> These were the cases of *J & P Coats Ltd v Brown* [1909] Justiciary Cases (JC) 29 and *X v Sweeney* [1982] JC 70

<sup>7</sup> Section 6 of the Act establishes the right of 'any person' to institute or to conduct any criminal proceedings, subject to certain circumstances where the Director of Public Prosecutions is either under a duty to conduct the proceedings or has exercised his right to take over the proceedings

<sup>8</sup> RSPCA Prosecutions Annual Reports are available at < <http://www.rspca.org.uk/whatwedo/prosecution> > accessed 17 June 2016

<sup>9</sup> Stephen Wooler (Independent Reviewer), 'The Independent Review of the Prosecution Activity of the

Royal Society for the Prevention of Cruelty to Animals' 24 September 2014 <[www.rspca.org/web/Content/staticImages/Downloads/WoolerReviewFinalSept2014.pdf](http://www.rspca.org/web/Content/staticImages/Downloads/WoolerReviewFinalSept2014.pdf)> accessed 21 June 2016>

<sup>10</sup> Wooler Review, pp 51, 69, 71, 75, 127

<sup>11</sup> *Ibid* p 127

<sup>12</sup> *Ibid* p 127

<sup>13</sup> Natalie Kyneswood (Winner of ALAW's Student Essay Competition) 'The Hunting Act 2004 has been a useless piece of legislation and therefore should be repealed' Discuss [February 2016] *Journal of Animal Welfare Law* 17, 18-19

<sup>14</sup> Cited from TH Jones and MGA Christie, *Criminal*

*Law* (W Green & Son Ltd, 5th edn 2012) 41

<sup>15</sup> Fiona Leverick, 'Plea and Confession Bargaining in Scotland' (July 2006) Report to the XVIIth International Congress of Comparative Law, *Electronic Journal of Comparative Law* [www.ejcl.org/103/art103-8.pdf](http://www.ejcl.org/103/art103-8.pdf) accessed 19 June 2016

<sup>16</sup> Cameron Fyfe, 'Litigation: Private Prosecution' (21 August 2015) <[www.drummondmillar.co.uk/news/2015/08/litigation-private-prosecution](http://www.drummondmillar.co.uk/news/2015/08/litigation-private-prosecution)> accessed 20 June 2016>

<sup>17</sup> *J & P Coats Ltd v Brown* (1909) SC(J) 29

<sup>18</sup> *McBain v Crichton* (1961) JC 25

<sup>19</sup> *Meehan v Inglis* (1975) JC 9

be found in the cases of *McBain v Crichton*<sup>18</sup> and *Meehan v Inglis*.<sup>19</sup> In *McBain*, the applicant's bill for criminal letters was refused when he sought to prosecute the bookseller, Mr Crichton for selling a book which he alleged to be obscene and to be designed to corrupt the morals of the public, particularly the morals of young people. The Lord Advocate had declined to prosecute and had refused to concur in the private prosecution. The Court ordered a hearing upon the matter. The Court refused to grant the bill because the action complained of, even if it were a wrong, was of a quite general and public nature, committed against a wider population. Accordingly, it was held to be devoid of that personal and peculiar interest without which a private prosecution cannot be sustained. Whilst the complainer may feel indignation and concern for the morals of the lieges, especially of young people, there is no special harm inflicted on him as an individual. Consequently, the Court held that this is a matter of public interest and as such cannot ever entitle a private individual to undertake a private prosecution. Thus no matter how strong the private 'interest' in the matter, prosecution is not possible without 'title' which involves special, personal impact of the measure in question. The stringency of the Court's interpretation of this matter is epitomised by the case of *Meehan v Inglis*. There the Court specified that, in order to qualify for undertaking prosecution, the complainer must show that he had "suffered injury of a substantial, particular, special and peculiarly personal nature beyond all others" as a result of the actions alleged. In this case, the complainer, who was serving a life sentence for murder, alleged that three police officers had committed perjury as Crown witnesses at his trial and

thereby conspired to pervert the course of justice. The Lord Advocate had refused to prosecute the officers for the offences alleged and thereafter refused to concur in a private prosecution. The Court refused to grant a bill of criminal letters. The Court held that the Lord Advocate had investigated the matter thoroughly and it concurred with his decision not to proceed with a public prosecution. In his judgment, Lord Justice-Clerk Wheatley set out the principles governing the nature of crimes which can qualify for private prosecution. He held that perjury and conspiracy to pervert the course of justice are crimes which "strike at the very heart of the proper administration of justice". They are pre-eminently crimes which the Lord Advocate as public prosecutor should investigate and prosecute. The investigation should be "impartial and not *ex parte*." The Lord Advocate needs to have evidence extending beyond the evidence from just one source before arriving at a decision whether to prosecute. "While therefore an individual can say that he has suffered substantial personal injury as a result of perjury and/or conspiracy to pervert the course of justice if there crimes are established, that is not in itself sufficient to justify the granting of criminal letters since other factors have to be taken into account." The Lord Justice-Clerk held that it would require to be a very special case indeed to justify departure of this general rule and that "this broad consideration of public interest and public policy must normally outweigh the private interest an individual may seek to qualify." In the case of *J & P Coats Ltd v Brown*<sup>20</sup> the High Court of Justiciary drew some boundaries to the concept of public wrong. Here the company of J & P Coats had sought bring a private prosecution against a coal

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merchant for seeking to obtain payment for coal fraudulently by presenting a false colliery certificate which wrongfully described the provenance of the coal supplied. The Lord Advocate had refused to concur with a private prosecution on grounds that fraud is a public wrong and therefore not susceptible to private prosecution. However, the High Court held that the Lord Advocate had been wrong in his reasoning as this was a very special case where the interest was much more private than public and a *prima facie* case for a prosecution was available from undisputed documents and was not dependent upon statements from witnesses furnished *ex parte*.

It is contended here that the foregoing principles are likely to block private prosecution of many animal welfare issues. One could envisage certain exceptions, for example the fraudulent sale of sick animals or criminal injury inflicted on one's livestock or domestic animals by another party. However, the current law would exclude the majority cases of abuse, mistreatment or neglect as such cases primarily elicit general views and feelings of distress or concern. Here society must rely solely on the COPFS to investigate and prosecute accordingly.

Furthermore, in Scotland private prosecutions can be brought only under solemn procedure. This is because the possibility of private prosecution under summary

<sup>20</sup>1909 SC(J) 29

procedure was abolished by statute in 1995.<sup>21</sup> This rule has negative implications for the enforcement of animal welfare law in Scotland. For example, it would block the possibility of any private prosecutions under the Animal Health and Welfare (Scotland) Act 2006 asp11.<sup>22</sup> The reason is that this legislation, which specifies a wide range of offences, also provides that all of those offences are to be prosecuted under summary procedure (ss 20-25; 29-31). The offences concerned are by no means trivial. For example, they include mutilation, cruel operations, administration of poisons, failure to ensure welfare, abandonment, the sale of animals to children, offering animals as prizes. It is ironic that this legislation, which criminalises such a range of cruel or detrimental actions against animals, then stipulates that all these actions must be prosecuted under summary procedure – the very procedure which is specifically excluded from private prosecution. Thus as matters stand at present, we have a strong piece of legislation which has been

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rendered powerless against any enforcement through private prosecution.

English law does not create the foregoing anomaly. In English law the division of crimes is the same although the terminology is different. Thus there are (a) serious “indictable” crimes which can only be prosecuted in the Crown Court which involves jury trial (if there is not a guilty plea); (b) ‘minor’ cases which must be prosecuted by summary procedure in the Magistrates Court; and (c) “either way” cases which can be prosecuted by either procedure - it is the defendant who decides which court he wants the case to be heard in.<sup>23</sup> What is of crucial significance here is that a private prosecution can take place under any of these procedures. The Animal Welfare Act 2006 is the English equivalent of the Animal Health and Welfare (Scotland) Act 2006. Both statutes stipulate similar crimes and both statutes specify that these crimes are to be tried under summary procedure. Ironically, as explained above, this stipulation blocks any possibility of private prosecution under the Scottish Act. This blockage of private prosecution does not occur under the English Act given the availability of private prosecution under summary procedure.

Finally, it should be noted that private prosecutions are very expensive and Legal Aid is almost impossible to obtain for this purpose. One can apply for a special grant from the Scottish Government

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but this is equally difficult to obtain.<sup>24</sup>

We now examine the second factor which raises concerns regarding animal protection in Scotland. This is the absence of judicial review of prosecutorial decisions.

#### **Absence of judicial review of prosecutorial decisions**

In Scotland the public prosecution service, the Crown Office and Procurator Fiscal Service (COPFS) is immune from judicial review of its decisions on whether or not to prosecute. This is regarded as having been determined by the case of *Law Hospital NHS Trust v Lord Advocate*.<sup>25</sup> This position stands in contrast to the situation in England where the Public Prosecution Service (CPS) is susceptible to judicial review of its decisions to prosecute or not to prosecute.<sup>26</sup> Although the threshold for this remedy is high, the exercise of the court’s power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute.<sup>27</sup>

There is clear evidence that the absence of judicial review of prosecutorial decisions has had adverse implications for animal protection in Scotland. This has been examined in detail in an earlier

<sup>21</sup>Criminal Procedure (Scotland) Act 1995, s 133(5). Solemn procedure is used for the prosecution on indictment, before a judge and jury, of the most serious criminal offences, eg rape, murder. In contrast, summary procedure involves prosecution before a sheriff or justice(s) of the peace sitting without a jury (TH Jones & MGA. Christie, *Criminal Law* (W Green & Son Ltd 5th edn 2012) 27

<sup>22</sup>The acronym ‘asp’ denotes ‘Act of the Scottish Parliament’

<sup>23</sup>I am grateful to Professor Peter R Duff, School of Law,

University of Aberdeen, for this explanation of the English law regarding prosecutions

<sup>24</sup>Cameron Fyfe, ‘Litigation: Private Prosecution’ (21 August 2015) <[www.drummondmillerc.co.uk/news/2015/08/litigation-private-prosecution](http://www.drummondmillerc.co.uk/news/2015/08/litigation-private-prosecution)> accessed 20 June 2016

<sup>25</sup>*Law Hospital Trust v Lord Advocate*, 1996 SC 301

<sup>26</sup>*Sharma v Brown-Antoine and others* [2006] UKPC 57; *R(B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)* [2009]

EWHC 106 (Admin).

<sup>27</sup>See judgment of Toulson LJ in *R(B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)*, n 26 above

<sup>28</sup>Patricia Gail Saluja, ‘Judicial review of prosecutorial decisions: implications for animal welfare in Scotland’ [Spring 2014] *Journal of Animal Welfare Law* 1