



Partnership (Prosecution) (Scotland) Bill (HL Bill 51)

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This note outlines the reasons for the Partnership (Prosecution) Scotland) Bill. This is one of a series of Bills suggested by the Law Commissions of either Scotland or England & Wales. It has a special Parliamentary procedure reflecting the specificity of its purpose.

Following a fire at the Rosepark nursing home in Lanarkshire The partnership that ran the nursing home was dissolved which meant that nobody could be prosecuted under health and safety legislation in Scotland, because of a legal technicality. This Bill remedies this situation.

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The Bill

This is one of several Law Commission derived pieces of legislation which address specific issues of law and have their own distinct parliamentary procedure.¹

This Bill had a formal second reading in the Commons, but was sent to a second reading committee. The proceedings can be found [here](#).

Outlining the bill the Minister, David Mundell, said:

Members will be aware of the tragic circumstances of the night of 31 January 2004, when 14 people lost their lives in a fire at the Rosepark nursing home in Uddingston in Lanarkshire. Following the tragedy, the Lord Advocate brought a prosecution of serious criminal charges under health and safety legislation in Scotland, but because of a legal technicality—the dissolution of the partnership that ran the nursing home—nobody could be prosecuted. The Partnerships (Prosecution) (Scotland) Bill takes forward the proposals of the Scottish Law Commission to address the loophole that at present makes it impossible to prosecute partnerships that have been dissolved.

Rosepark nursing home was run by three individuals who had come together to form a business partnership. Following the fire, the partnership was dissolved. The Crown Office attempted three times to prosecute offences under the Health and Safety at Work etc. Act 1974. Those offences could be committed only by an employer. The first attempt to prosecute the former partners of the nursing home failed because they were charged as having been the employer at the time of the fire. The partners successfully argued that it was the partnership, which by then was no longer in existence, that had been the employer. A second charge was brought against the dissolved partnership. The partners successfully argued that the partnership no longer had any legal existence, so could not be prosecuted. A third charge was brought against the three individuals as whole surviving partners of the dissolved partnership. That was not successful because it had already been established, at the first attempt, that the partnership was the employer and therefore responsible for answering the charges, not any of the individual partners.

In summary, despite the loss of 14 lives and the serious nature of the charges, prosecutors were unable to find a legal basis on which to pursue, in the Scottish courts, the partnership that ran Rosepark nursing home at the time of the fire. The Rosepark tragedy created the impetus for a Scottish Law Commission project to investigate why the prosecutions had failed and how the anomaly in the law could be addressed. In May 2011, the commission published a discussion paper on the issue and, following consultation with the legal profession, it reported with a draft Bill. Since then, the commission has worked tirelessly, alongside the Advocate-General for Scotland and the Scotland Office, to produce a Bill that provides a sound yet simple solution, ensuring that partnerships and culpable partners cannot evade prosecution by dissolving.

[...]

The Bill responds to a feature of the general law of partnerships. In Scotland, a partnership is a legal person in its own right, and is distinct from its partners. The essential reason why the Rosepark prosecutions could not proceed was that the offence being prosecuted was one that could be committed only by an employer. As

¹ Because it is a Scottish Law Commission Bill, under Standing Order No. 59, Law Commission Bills automatically stand referred to a Second Reading Committee, as opposed to having their Second Reading on the Floor of the House. A similar procedure takes place in the Lords.

the employer in that case was a Scottish partnership, when it ceased to exist in law, there ceased to be a legal person to prosecute.

The aim of the Bill is to ensure that the dissolution of a partnership, or a change in its membership, will not prevent the prosecution in Scotland of a partnership, or, where the conditions for individual criminal liability exist, responsible partners. The Bill is therefore deliberately limited in scope. It will reverse the current position, which is that in Scots law dissolved partnerships cannot be prosecuted. It does not attempt to reform the law of partnerships more generally. In particular, it does not criminalise acts that are not presently criminalised. In other words, there is no expansion of criminal liability, either for partnerships or individual partners. The Bill merely closes down a technical bar to prosecution. Nor is it an attempt to clarify points of partnership law that do not relate directly to the competency of prosecution. The principle underpinning the Bill is that it should reflect, so far as is feasible, what would happen if a live partnership were prosecuted. In short, the principal effect of the Bill is to ensure, as far as possible, that if it would have been possible to prosecute a partnership had it been extant, it will be possible to do so if it has been dissolved, or has changed its legal personality through the assumption or resignation of partners.

Essentially, the Bill allows the prosecution of a dissolved partnership. There are two notable aspects of the measure. First, there is a time limit. A prosecution will have to commence within five years of the dissolution of the partnership for the new law to have effect. The five-year period was the one most commonly suggested by the consultees of the Scottish Law Commission, and it reflects the period of negative prescription applying to most civil obligations to which the estate of a former partner might be subject, following the dissolution of the partnership. The time limit applies only in the case of dissolved partnerships, and runs not from the date of the alleged offence, but from the date of the dissolution of the partnership. The other place agreed that, as recommended by the Scottish Law Commission, the five-year time limit strikes an appropriate balance between the public interest in permitting the prosecution of a crime, and the interest of certainty in winding up the affairs of a dissolved partnership and the estates of former partners.

Secondly, the Bill applies only to offences that are capable of being committed by the partnership in its own right. As those are the only offences where the mischief arises—that is, where the dissolution or change of membership would prevent prosecution—the Bill is drafted to catch only them.

The Bill provides that a fine for an offence committed by a dissolved partnership can be enforced in the same way as a fine for an offence committed by a live partnership. Under existing law, where a criminal fine is imposed on a live partnership, it is enforceable in the same way as a civil debt of the partnership. The liability to pay a fine arises at the time when it is imposed. If partnership assets are insufficient to meet such debts, individual partners are liable to pay the fine from their personal assets. In Scotland, partners are jointly and severally liable for such fines. Therefore the net effect of the Bill is that persons who were partners immediately prior to dissolution are jointly and severally liable to pay the fine. It is relatively common for statutory offences to provide that an individual partner is also liable for an offence committed by the partnership where the offence is committed with that partner's consent or connivance. Where the conditions for such individual liability exist, the Bill makes it clear that the prosecution of the individual will not be prevented by the dissolution of the partnership, or a change in its membership.

Sometimes, where a statute creates an offence that may be committed by a partnership, it goes on to provide that any fine must be paid from the partnership assets. In such a case, no fine could be enforced against a partnership that had

dissolved, since there would no longer be any partnership left to own assets. In order to allow such offences to be prosecuted effectively, the Bill provides that any such restriction will not apply where a partnership has been dissolved. When a fine imposed on a partnership is enforced against the assets of a partner, that partner will have, in terms of the Partnership Act 1890, a right of relief against his or her fellow partners. That partner may also, depending on the terms of the contracts agreed between incoming and outgoing partners, have further claims against those former partners who were members of the firm at the time when the offence was committed.

The Bill also ensures that the prosecution of a partnership can proceed in the event of a change in membership. As the Law Commission and the Scottish Law Commission noted in their report on partnership law, in Scots law there is “uncertainty as to whether a change in membership terminates the personality of the ‘old’ partnership and brings into being a ‘new’ partnership entity.”

One cannot say with certainty whether a partnership is the same legal entity before and after a change in membership. Given that the present law may be that a change in membership establishes a new legal entity, distinct from the one that existed before the change in membership, the Bill has been drafted to ensure that the continuing partnership can still be prosecuted. Otherwise, there is a risk that the assumption of a new partner, or the resignation of a partner, might make it legally impossible for the partnership to be prosecuted for offences it had already committed.

It might be suggested that a potential consequence of including the assumption of new partners in clause 4 is that a new partner could find him or herself criminally liable for an offence committed before he or she joined the partnership. That, however, is not the effect of the Bill. Clause 4 is solely about liability of the partnership entity to prosecution. It clearly would be wrong to impose criminal liability on any person who had not been involved in the commission of the offence, and the Bill does not do so.

The Bill extends to Scotland only. The Advocate-General has worked closely with the Lord Advocate in taking forward the Bill, as he does on many other issues. The Lord Advocate and his ministerial colleagues in the Scottish Government in Edinburgh accept that this is a matter that only Westminster can remedy. Since we came into government in 2010, we have introduced important new legislative measures for Scotland, not least of which was the further devolution of powers to the Scottish Parliament through the Scotland Act 2012. The Partnerships (Prosecution) (Scotland) Bill demonstrates the continuing and important role of the UK Government in taking forward Scottish legislation at Westminster, and our commitment to doing so.

The Rosepark tragedy revealed a serious failing in the legal capacity for prosecutors to pursue responsible partnerships for serious offences in Scotland. New legislation will not dispel the anger, frustration and grief felt by the families of the Rosepark victims, but for their sake and the sake of other potential victims, it is right that we change the law to ensure that such a tragedy never happens again. I look forward to a constructive debate, and I commend the Bill to the Committee.²

This was virtually half the entire committee proceeding.

Explanatory notes for the Bill can be found [here](#).

² Second Reading Committee 11 March 2013 c1

The Lord's Special Public Bill Committee published public evidence received on the Bill. This can be found [here](#).³ It includes both the evidence and actual Lords proceedings, which were rather longer than those in the Commons.

³ SPBC HL119, 2012/13