Smoke and Mirrors:

The Introduction of Private Prosecutions under s 54A of the Health and Safety in Employment Amendment Act 2002

Natalie K. Fraser*

This paper is dedicated to the memory of Mervyn Andre Jones (Merv)

22nd October 1968 – 20th January 2003.

In looking at occupational health and safety we should never get so caught up in the politics that we forget the people that the legislation is designed to protect.

Hutia te rito o te harakeke
Kei hea te komako e ko?
Ki mai ki ahau
He aha te mea nui o te ao?
Maku e ki atu
He tangata, he tangata, he tangata.

If you pluck out the heart of the flax bush, how can the bellbird sing?
You ask me: What is the greatest thing in the world?
I reply: It's people, it's people, it's people.

* BA/LLB(Hons). This paper would not have been possible without the willingness of seven 'industry players' to speak to me in person, openly and frankly, about what impact they believe the amendments will have on the health and safety arena. Their sometimes very different perspectives have enabled me to achieve a balanced analysis of the practical and theoretical effects that the new s 54A will have on health and safety in the workplace. For that I am grateful: Greg Llyod, NZCTU, Wellington; Paul Jarvie, EMA (Northern), Auckland; Peter Berry, Electricity Engineers Association, Wellington; Tracey Conlon, Department of Labour, Wellington; Bernard Healy, Transpower, Wellington; Malcolm Chase, Electrix, Auckland; Grant Johnson, Electrix, Hamilton. I would like to thank Bill Hodge, of the University of Auckland, Faculty of Law for supervising my dissertation. I would also like thank my mother Linda Fraser, my step-father Grant Johnson, my sister Jan-Maree Fraser and her partner Kay Davis for their unwavering love and support.

"Employers will be forgiven for believing that the size of the stick has much increased but any carrot is entirely missing"[1]

I. Introduction

It is undeniable that work is an essential part of everyone's life. It is also undeniable that the social and financial impact of workplace accidents on the community is devastating. The occupational health and safety record in New Zealand is appalling[2] and the "consequences of workplace injury and illness ripple out and affect all of us."[3] Not only do 400 people die from work-related fatal illnesses every year, there are also estimated to be 160 work-related fatal injuries every year. In any given day it is estimated that someone needs treatment for a workplace incident every two minutes. These figures equate to 242,000 work-related accident insurance claims in 98/99, which is equivalent to a claim being lodged by approximately 1 in 7 workers. 30,000 injured employees are off work for 5 days or more every year, and 1.25 million days of work are lost every year. The real, as opposed to the insured cost of work-related injuries is estimated at $3 billion for 98/99 periods.[4] "Despite popular myth, work accidents and disease do not generally occur because of apathy, carelessness or stupidity on the part of workers, but through unsafe and unhealthy systems, processes and tools of work."[5]

These statistics make it evident that the Health and Safety in Employment Act[6] was obviously lacking, and not enough was being done to protect New Zealand's workers. Yet, despite the need for improvement, legislative amendments in the occupational health and safety arena are inherently political and attract great controversy.

As the curtain closed on the 2002 Parliamentary year the controversial Health and Safety in Employment Amendment Bill was passed. The purpose of this Act was in part to make the principle Act more comprehensive in coverage,[7] and also to promote compliance with International Labour Convention 155 concerning occupational safety and heath and the working environment.[8] The Act came into force on 5 May 2003.[9]

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1 Business New Zealand, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 16.

2 Rt. Hon. M. Wilson "Health and Safety in Employment Amendment Bill – First Reading" (Speech delivered to Parliament, Wellington, 5 December 2001).

3 Occupational Safety and Health, "Aftermath" (2002). http://www.osh.govt.nz/order/catalogue/pdf/aftermath.pdf (last modified 15 July 2003).

4 These figures are based on the statistics in Office of the Minister of Labour, *Discussion Paper on Review of the Health and Safety in Employment Act 1992* (Department of Labour, December 2001). New Zealand's workplace fatality record (4.9 per 100,000) is not good in comparison to Australia (3.8 per 100,000) and the USA (3.2 per 100,000).

5 New Zealand Council of Trade Unions, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* (10-12 December 2002) 6.

6 Health and Safety in Employment Act 1992 ["HASE Act"].

7 Health and Safety in Employment Amendment Act 2002 s 3(a).

8 Ibid s 3(c).

9 See also the extensive advertising campaign as a means of educating the public about the amendments: http://www.workinfo.govt.nz.

Included in these amendments is the new s 54A, which removes the Occupational Safety and Health Service's (OSH's) monopoly on prosecutions under the Principal Act. The crux of this amendment is that it allows for private prosecutions to be brought where OSH decides not to take enforcement action.

Although it was one of the "least controversial"[10] of the amendments, the new s 54A generated heated dialogue from both sides of the employment fence.[11] This paper examines this discourse and the impact that the new s 54A will have on workplace health and safety.

This paper is divided into five sections. The first section (Part II) introduces the issue of private prosecutions as an enforcement tool for breaches of the HASE Act and examines both the history of private prosecutions and the history of the debate. The section concludes with a review of the proposal to remove the monopoly and a summary of the submissions received by the Transport and Industrial Relations Select Committee.

The issue of private prosecutions in the health and safety arena generates emotive rather than objective responses. Parts III and IV detail and critically examine the arguments for and against the introduction of private prosecutions under the Act and analyse the strength of the positions for retaining or amending the status quo.

Part V provides a practical examination of the new s 54A and looks at how the section will be applied by both OSH and the private individual on OSH deciding not to take any enforcement action. Part V also examines the interplay between the removal of the monopoly and the new Sentencing Act 2002, and the impact that the two pieces of legislation will have on private prosecutions under the HASE Act.

The paper concludes with a critical analysis of the perceived effectiveness of the amendments and questions whether the introduction of private prosecutions will result in a substantial change to the occupational health and safety environment. The paper concludes that rather than having a positive effect, the amendments constitute a legislative trick analogous to an illusion with smoke and mirrors that does very little to increase the power of the individual under the HASE Act whilst looking like it introduces substantial change.

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10 Interview with Tracey Conlon, Solicitor, Department of Labour, Legal Services.

11 This paper captures the viewpoints of diverse actors who have an impact on workplace health and safety: the employer; the employer representative; an industry-specific employer interest group; a trade union collective, and the Department of Labour. On request of some individuals, comments will remain anonymous. Interview notes are held by the author.

II. The Background to s 54A of the HASE Act.

1. The Issue

Under the former system "injury [was] the only consequence of a breach."[12] The issue of the OSH monopoly on prosecution, and the consequent bar on private prosecutions shadowed the HASE Act since its inception. S 54 prevented the laying of an information by anyone other than an OSH inspector. The amendments to the Act removed this monopoly on prosecutions.

The HASE Act was the product of the "recognition of a need to regulate for workplace health and safety."[13] Earlier legislation was an eclectic mix of narrow and prescriptive[14] legislation that was applied in a haphazard fashion:[15]

> This...approach was followed through out the world, until the 1970s when governments began to review health and safety legislation from first principles. In the United Kingdom this revision process saw a major Royal Commission led by Lord Robens and the publication of the landmark 'Robens Report' in 1972. The report recommended the introduction of a single piece of legislation which applied consistent policies and enforcement procedures across the range of industries.

In New Zealand the flow on effect of the Robens Report was a comprehensive review of the expanse of health and safety legislation that governed through the 1980s. In 1985 the Advisory Council on Occupational Health and Safety (ACOSH) was implemented as the "principal advisory body to the government on all matters effecting safety, health and welfare at work."[16] They were charged with reviewing all existing legislation that impacted on health and safety and to develop a single piece of "comprehensive legislation"[17] that encapsulated all forms of work activities. The review culminated in the HASE.[18]

The new act was based on a policy of "adherence, accessibility, uniformity of standards, and universal coverage."[19] Its enactment repealed the vast expanse of the earlier legislation. In its place was now a single piece of legislation that pertained to both the public[20] and private sector. This new legislative approach was based on prescription, rather than reaction and was effective through the imposition of minimum standards.[21] Primary responsibility was placed on the

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12 Interview with Paul Jarvie, Employers and Manufacturers Association (Northern), Manager Occupational Health and Safety.

13 Occupational Safety and Health *A Guide to the Health and Safety in Employment Act 1992* Department of Labour, Wellington, (2000).

14 Ibid.

15 Ibid.

16 *Mazengarb's Employment Law,* 3 (1993), 6000.1.

17 Ibid.

18 Supra note 13.

19 Supra note 16.

20 Supra note 6, s 3(2)(b).

21 Supra note 13.

employer who operated under a general duty to provide a safe and healthy work environment. This general duty was enforced via a range of "graduated responses available from OSH Inspectors,"[22] who acted as an "industrial police force."[23]

Although the fundamentals of the act were sound, the impact of the new act on workplace accidents was not nearly as effective as envisaged or intended. It was obvious that more needed to be done to reduce the devastating statistics of workplace accidents and illnesses.[24]

"Internationally, accident and illness rates have been declining."[25] That is also true for New Zealand. However, most of the decline is attributable to changes in the nature of work; as more dangerous occupations shrink in comparison with the rise of the number of safe jobs, not an improvement in workplace safety culture,[26] and certain sectors remain over-represented:[27]

> For some a day at work is uneventful. For an increasing number of people it ends in an accident or even worse death. Every week, on average three people who head off to work don't return. They are killed while doing their jobs, or getting to or from work.

The HASE Act empowers OSH as the central enforcement agency for workplace safety. Under the former legislative framework, the Department of Labour failed to achieve satisfactory results in relation to the incidents of workplace non-compliance and the number of cases prosecuted. OSH is currently under-equipped, both financially, and without "enough tools to persuade and require employers who are not complying to comply."[28]

The most effective means of improving health and safety and thereby reducing the statistics of work-related accidents is to improve decision-making; "that is the behaviours of the actors in the system."[29] There was a palpable lack of faith in the system. Parties that took radically different positions in relation to other employment issues agreed that the former system failed to achieve its objectives. Business representatives felt that the amendments would spell the death of "Mum and Dad" businesses that are already crippled by compliance costs.[30] Unions did not have a lot of confidence in OSH.[31] There is the view that OSH is "ridiculously underfunded",[32] and that workers get injured and there

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22 Transport and Industrial Relations Select Committee, *Health and Safety In Employment Amendment Bill 2001* (HSE/DOL/1, 2001) [34].
23 Supra note 16.
24 Supra note 13 at 5.
25 Supra note 4.
26 Ibid.
27 Supra note 2.
28 Supra note 5 at 2.
29 Ibid.
30 Deborah Coddington "Margaret Wilson Wins Over Commonsense" (Media Release, 21 October 2002).
31 Interview with Greg Lloyd, New Zealand Council of Trade Unions, Occupational Safety and Health and Accident Compensation Corporation Coordinator.
32 Ibid.

seems to be no OSH activity – no prosecution.[33] This dissatisfaction has been credited to a failing in the previous legislation.

The current Labour government proposed to fill this gap and:[34]

> [I]mprove the effectiveness of the [HASE] by: providing for increased fine levels,[35] introducing Infringement Offence Notices (IONs) with financial penalties,[36] removing the Department of Labour's Occupational Health and Safety Service's (OSH) monopoly on prosecutions,[37] providing a more flexible limitation period for the initiation of prosecutions and by making it unlawful to insure against any fine imposed.[38]

These proposed amendments formed part of the Government's overall strategy for improving injury prevention in the workplace.[39] OSH's primacy and core responsibility under the HASE Act was to ensure compliance through education and prosecution, and compliance depends on the credible enforcement of the requisite standards when voluntary compliance does not occur.[40] It is this credible enforcement that the Act was deemed to be lacking. "Private prosecutions are perceived as having real potential to increase incentives for compliance."[41]

S 54 of the HASE expressly prohibited the bringing of prosecutions by anyone other than an Inspector. Under the Act only Department of Labour employees could be issued with a certificate of appointment by the Secretary of Labour.[42] Thus, only Department of Labour employees could initiate prosecutions,[43] creating an OSH monopoly on prosecutions. If OSH did not bring a prosecution, criminal redress could not be sought by any other means. This left a bitter taste in the mouths of many.

An increase in OSH prosecutions would:[44]

> [G]ive employers and others with duties under the Act a real apprehension that failure to adhere to the provisions of the Act is likely to result in enforcement action. Without such deterrence, no adequate sanctions exist to deter an employer from using the less regulated environment to fail to put in place adequate interventions to protect their employees from harm.

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33 Supra note 12.
34 *Changes to the Health and Safety in Employment Act: An Overview* (2001) 1.
35 Ibid ss 23, 24
36 Ibid s 29.
37 Ibid s 54A(2).
38 Ibid s 56I.
39 Supra note 34.
40 Ibid 4.
41 Supra note 4 at 20.
42 Supra note 6, s 29.
43 Department of Labour *Health and Safety in Employment Amendment Act Cabinet Papers* (HSE/DOL/1A, Department of Labour, 2002) 5.
44 Rail and Maritime Transport Union *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 16.

In the reality of the business environment employers should not get off scott-free. However, under the previous system a prosecution for a breach was viewed by some as a legitimate business risk.[45]

The Council of Trade Union submissions made it clear that the former system in its deterrent role did not succeed in preventing workplace accidents:[46]

> Enforcement of the Act by the Department of Labour had been 'soft', providing further encouragement to employers who decide to 'take the risk' that they won't be prosecuted for breaches of the Act, even in fatal cases where prosecution would appear to be warranted. More than 90% of prosecutions have been undertaken only after a serious injury has actually occurred, thus highlighting the limited value of criminal prosecution as an injury prevention tool.

The Department of Labour stated that "the need to prioritise and the application of the principles of public prosecution means that not all offences are prosecuted by OSH."[47] Financial restraints define and dictate what constitutes public interest in relation to the laying of an information. This statutorily created government monopoly resulted in dissatisfaction when OSH decided not to bring a prosecution:[48]

> The way that OSH exercises its discretion to prosecute is not open to judicial review. The only matter that can be judicially reviewed is whether or not the discretion has been exercised at all, not the actual exercise of the discretion.

Although under the new section it would be possible for an employer to lay an information against an employee for a breach of the Act, the most likely and most contemplated scenario is one in which an employee or the employee's union[49] brings a private prosecution against their employer. Thus, unless otherwise stated it is this potential situation on which the submissions and consequent discussion are based.

2. The History of Private Prosecutions

The decision whether or not to prosecute is not one that is taken lightly. It is "the most important step in the prosecution process."[50] A case-specific balancing of the interests of the victim, the suspect and the community as a whole determines whether an information will be laid. A wrong decision to prosecute,

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45 Supra note 12.
46 Supra note 5 at 18.
47 Supra note 43.
48 Supra note 44.
49 Especially in a situation where the union is a party to a collective agreement with the employer under the Employment Relations Act 2000.
50 David Leung Cheuk-yin, *Prosecution Policy and the Private Prosecutor: A Hong Kong Perspective* Asia Crime Prevention Foundation http://www.acpf.org/WC8th/AgendaItem3/I3PpleungHK.html (at 26 November 2002).

or conversely a wrong decision not to prosecute would undermine and erode community faith in the system that has been empowered with achieving justice.[51]

A criminal prosecution, such as is the consequence of a breach of the HASE Act, will be instituted "where sufficient evidence exists against an offender and where it is in the public interest to do so."[52] The evidence, upon evaluation must be enough to demonstrate a prima facie case and a reasonable expectation of conviction. "A proper evaluation of such evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as the admissibility of evidence implicating the accused."[53] Any defences that are open to the accused or have been indicated also impact on the balancing exercise of whether to bring a prosecution.

As well as not being brought lightly, a prosecution is also not brought in the interests of the victim.[54]

> The decision to begin a prosecution against an individual has profound consequences... Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and possibly a loss of liberty while awaiting trial.

It has been acknowledged that although in a HSE prosecution "there is not likely to be a loss of liberty pending trial, the other concerns apply."[55]

Prosecuting criminal offenders is a central function of the State.[56] However, it must be acknowledged that investing so much power in the State attracts dangers of another type.

(i) The Use or Non-use of State Power

"The ability of private entities and individuals to commence a prosecution is a safeguard against the misuse [of this] public power."[57] There is a theoretical basis and practical consequences in a system that allows for private prosecutions. It has been stated that private prosecutions are "...[A] useful constitutional safeguard against capricious, corrupt or biased failure or refusal of... authorities to prosecute offenders against the criminal law," thereby providing an important

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51 Ibid.
52 Ibid.
53 Ibid.
54 Cf. New Zealand Law Commission, 'Prosecution Guidelines' in *Criminal Prosecutions*, (1997) PP28, Appendix B.
55 New Zealand Law Society, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 10.
56 Supra note 54 at 137.
57 Ibid 136.

safeguard for the aggrieved citizen.[58] Furthermore, private prosecutions "satisfy State deficiencies existing not through negligence or abuse but rather through economic limitations."[59]

S 13 of the Summary Proceedings Act 1957 states "except where it is expressly otherwise provided by an Act, any person may lay an information for an offence."[60] Under the HASE "the exclusive language of the enabling statute"[61] has functioned as a "major restraint"[62] on private prosecutions on the refusal of OSH, as the central enforcement agency, to bring a prosecution. "[The] important constitutional and theoretical place of private prosecutions within our system warrants their retention."[63]

In 2002 the cathartic effect or intended cathartic effect of private prosecutions was played out in the New Zealand media.[64] It is suggested that the ability to bring a private prosecution provides the victim with further means of protecting their interests if the public prosecution agency declines to prosecute.[65] The instigation of a private prosecution is credited with providing a "window of opportunity for non-professionals to access the increasingly closed shop of justice."[66] Some may argue in the current climate that private prosecutions merely provide another means for breaking the victim's or the victim's family's heart.

3. History of the Debate

The proposal to remove the monopoly is a political issue. Reflected in the debate that accompanies the issue is the political platform of the party in power at the time of the discussion. At the core of the issue is the relationship between private prosecutions and perceived union action. The Labour Party has traditionally "favoured the option of private prosecution in conjunction with central enforcement."[67] By contrast, National seeks to "restrict the power of unions and worker representatives" via their policies.[68] The inherent political nature is evident in the Department dialogue that accompanies the reports to the relevant Select Committees. During National's term in office the official commentary focused on the downfalls that would accompany the removal of the

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58 *Gouriet v Union of Post Office Workers* [1978] AC 435.
59 New Zealand Law Commission, *Criminal Prosecution* (2000) R66, 94.
60 Summary Proceedings Act 1957 s15.
61 Bill Hodge, "Private Prosecutions: Access to Justice" (1998) NZLJ 145-148.
62 Ibid.
63 Supra note 59 at 92.
64 The family of Steven Wallace brought a private prosecution for murder against Senior Constable Abbot after the officer fatally shot the 23 year old in the North Taranaki town of Waitara on 30 April 2000. Constable Abbot was found not guilty by a jury at the High Court in Wellington on 5 December 2002. See *Wallace v Abbott* [2003] 1 NZAR 42.
65 Supra note 54 at 137.
66 Supra note 61 at 145.
67 Angela Mouton, *A Right to Justice: Removing the OSH Monopoly on Prosecutions of Breaches of the Health and Safety in Employment Act 1992* Occupational Safety and Health Policy Unit (2000) 4.
68 Ibid.

monopoly; Labour turns these downfalls on their head and makes them positives. One wonders, as the current amendments have passed, if National was successful in the next election would the debate start again?

The political nature of the issue is evident in the way that the monopoly on prosecutions has come full circle within the space of 10 years. Prior to 1990, occupational health and safety in New Zealand was governed by a disparate collection of industry specific legislation.

1990 saw the introduction, and subsequent failure, of an OSH Bill by the Labour Party. Due to the Bill not being passed, the issue of private prosecutions was not thoroughly debated at this point.[69] A caucus subcommittee established by the new National Government following the 1990 general election reviewed Labour's Bill and:[70]

> made recommendations in the *Management of Health and Safety in Employment Paper,* known as the '10 Principles Paper' in August 1991. This paper recommended that private prosecutions be provided for.

The government recommended that "initiating prosecution action for alleged offences should not be limited to the administering agency, but available to all parties affected by the alleged offence, including members of the public adversely affected by work activity."[71]

Hansard records that the 1991 debate of the Bill saw Labour call for the increased involvement of workers in OSH legislation,[72] including allowing for private prosecutions under the Act. However, submissions received in response to a consultation paper based on the Ten Principles Paper were generally opposed to private prosecutions.[73] OSH advised the Committee members that the right should be rejected on the basis that it would not materially strengthen enforcement of the HASE Bill, and that it could create a backdoor right to sue for compensation for harm.[74] There was also a fear that the ability to take private prosecutions would result in frivolous or vexatious cases.[75] As a result, the only amendment made was the reinstitution of the monopoly.[76]

In May 1992 a draft bill was presented to the Cabinet Legislative Committee. Treasury proposed that a general duty related to s 6 only (injured employees could prosecute their employers).[77]

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69 Ibid.
70 Ibid.
71 Supra note 16.
72 Supra note 67 at 4-5.
73 Ibid.
74 Ibid.
75 Wren, "The Right to Prosecute" *Safeguard* (January – February 1998).
76 Supra note 67 at 4-5.
77 Ibid.

The Bill, including a report from the Department of Labour prepared by OSH, was sent to the Labour Select Committee, "but ultimately, the status quo remained".[78]

The HASE Act came into force in October 1992, and included in it, via s 54, an OSH monopoly on prosecutions. This was not surprising and it has been suggested that the OSH monopoly on prosecutions was "consistent with the obvious object elsewhere in the Act of removing any effective role for unions or other employee representatives in the new statutory health and safety framework."[79]

In 1991 the Labour Party sought to remove the monopoly by introducing a private member's bill, the aim of which was to repeal s 54 of the HASE Act while retaining OSH as the central enforcement agency. This amendment, it was argued, would bring the Act in line with most of the other recent non-prescriptive public welfare statutes, which do not provide for a monopoly on prosecution. "Labour spokesman on labour relations (as he was then) Pete Hodgson, argued that a significant percentage of valid cases were failing to be prosecuted, evidence that the system was not working."[80]

1999 saw the advent of a general election. The Labour Party's policy on Occupational Health and Safety was released in October of that year. It described the OSH monopoly as "paternalistic in design", and stated that Labour was committed to removing the monopoly in order to bring the HASE in line with comparative legislation.[81]

In November 1999 the Labour Party won the general election – the wheel had turned full circle.

(i) Review of the HASE Act 1992: Proposal to Remove the Prosecution Monopoly

Labour fulfilled their election promise and measures were put in place to remove the prosecution monopoly. The discussion paper on the HASE Act[82] produced by the Office of the Minister of Labour detailed the failings of the Act. The paper suggested that under the former system non-compliant employers had nothing to fear. Employers did not face "any direct financial penalty unless it is a fine imposed following a successful prosecution."[83]

Furthermore, and possibly most telling, were the statistics supporting the report:[84]

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78 Ibid, see also *Report of the Department of Labour to the Labour Select Committee on the Health and Safety in Employment Bill*, July 1992.
79 Supra note 16.
80 Pete Hodgson "Labour to Remove OSH's Prosecution Monopoly" (Media Release, 4 February 1999).
81 Supra note 66, 4-5.
82 Supra note 4.
83 Ibid 17.
84 Ibid.

> At the current level of OSH staffing and activities a non-compliant workplace has on average
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> 1 in 8 possibility of a visit by an HSE inspector during the year
> 1 in 25 possibility of receiving an improvement notice
> 1 in 333 possibility of receiving a prohibition notice
> 1 in 1,000 possibility of being prosecuted.

Compliance requires a real apprehension of being caught in the first instance. Increased systems and procedures are all well and good, but they need to be backed up with known consequences:[85]

> Application of the standards required by the principal Act depends on employers and employees choosing to implement them in their workplaces. In part, this depends on there being a credible enforcement of the standards when voluntary compliance does not occur.

(ii) Summary of Submissions May 2001

On 31 October 2001, Labour introduced their HASE Amendment Bill. It received its first reading in Parliament on 5 December and was referred to the Select Committee.

The amendments generated a high response; the Committee considered 7,456 submissions, which included 6,862 form submissions, and 594 substantive submissions.[86] Emotions were high as concerned parties attempted to convey to the Committee the impact the amendments would have on their businesses and their lives. The opposition parties sought to fan the fire of discontent. Most notably was the Act Party who organised a campaign that aimed to "bombard"[87] the Select Committee with submissions against the amendments, which they described as "anti-business, anti-investment, and at the end of the day anti-job."[88] The Act Party organised a campaign in which they emailed and faxed 130,000 small firms urging them to make submissions in opposition to the 'anti-business' bill.[89]

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85 HASE Amendment Bill *Explanatory Note, 1.*

86 Department of Labour *Discussion Paper on the Review of the Health and Safety in Employment Act Summary of Submissions* (May 2001).

87 "Act Drums Up Opposition to 'Anti-business' Bill" *The New Zealand Herald*, Auckland, New Zealand, 22nd November 2001, online at http://www.nzherald.co.nz/storydisplay.cfm?storyID=229494 (at 15 August 2003).

88 Ken Shirley (Media Release, 6 December 2001).

89 Supra note 86.

As a result of this campaign 57 submitters to the Transport and Industrial Relations Select Committee expressed their opposition using identical or near identical wording:[90]

> Section 54A will allow trade unions to lay prosecutions. This is constitutionally wrong. Only the State should be able to charge an employer. Such a power will be used as an industrial weapon. Workers who claim to have been injured at work will also lay prosecutions hoping the court will award them the fine. This is ridiculous. This is the power to sue for injuries by the back door – only the employer cannot insure against such court-imposed penalties. Under ACC every employee is covered for accidents and should not be able to double dip by getting the union to prosecute the firm.

The Government did not back down in the face of such staunch opposition and scaremongering. Instead they sought to send a message "that we have one of the worst health and safety records in the world at a time when we are trying to say that we are internationally competitive."[91] Furthermore, the Government stated "good employers had nothing to fear from the legislation and it was not in the Government's interest to introduce something that would be unworkable."[92] The Government considered that the benefits of private prosecutions outweighed the downfalls.

In simple terms, the Department stated that the removal of the monopoly would:[93]

- Provide another avenue of redress for victims
- Act as a safeguard against official inertia or incompetence.
- Provide an alternative course of action in those cases where the case is not of sufficient public interest for OSH to pursue a prosecution but it is important to the private individual who has been harmed.

As the table below shows, this view was not widespread. However, it was argued that removing the monopoly would bring about a small, but important shift within the workplace culture that would support better outcomes, and therefore improve workplace health and safety.[94]

The question put to the public was "Should the [HASE] Act be aligned with contemporary legislation and allow anyone to initiate a prosecution?"[95] As was to be expected, the question generated a high response rate.[96]

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90 Encapsulated in submissions to the Transport and Industrial Relations Select Committee were the misunderstandings that underpinned most opposition to s 54A; the fear of union power, opening a backdoor right to sue, and the risk of 'double-dipping'. Had the Department of Labour made clear what powers and limitations they intended s 54A to bestow these concerns could have been alleviated. Transparency in this respect, particularly concerning the impact that the Sentencing Act 2002 was going to have, would have aided discussions.

91 Supra note 86.

92 Ibid.

93 Supra note 4 at 20.

94 Ibid 6.

95 Supra note 86 at 35.

96 Ibid. Table details support levels for the amendments.

	Response Rate	Support	Conditional Support	Oppose	No Clear Opinion
Totals for Question 12	134 of 177 (76%)	26%	10%	54%	9%
Employers	57 of 63 (90%)	7%	11%	75%	7%
Government Organisations	4 of 10 (40%)	50%	0%	25%	25%
Health and Safety Professionals	18 of 24 (75%)	39%	28%	17%	17%
Interest Groups	4 of 10 (40%)	75%	0%	25%	0%
Others	10 of 15 (67%)	50%	10%	30%	10%
Sector/Employer Groups	27 of 32 (84%)	11%	0%	81%	7%
Unions	14 of 18 (78%)	79%	14%	0%	7%

III. Arguments in Favour of Private Prosecutions

> *The argument that the right should not be granted because few people would use it is simply pathetic. History shows that one of the major reasons for the advent of ACC in 1972 was the fact that the tort system was a lottery to which only few had access. In any case, if only a few were to use the right, so what? Employer's representatives should be happy. The fact that habeas corpus is rarely used does not mean that the protection offered by the civil right is denied, so why should workers be denied the right to see that protective legislation is enforced?*[97]

The debate surrounding the introduction of private prosecutions into the HASE Act was emotive rather than objective. The positions taken were for the most part predictable, based on which side of the political or employment fence the opinion-holder sits.

Employer interest groups perceived the removal of the monopoly as adding to an already employee focused system. "Employers will be forgiven for believing that the size of the stick has much increased but any carrot is entirely missing."[98] Rather than using the power in a legitimate fashion it is believed that "unions will do it [bring a prosecution] for the social gain of making the employer pay and to prove that OSH didn't do their job."[99]

The arguments for the removal of the monopoly seek to placate these concerns. There is both a theoretical and constitutional right to allow private prosecutions. The system was failing and private prosecutions have the power to remedy what is lacking.

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97 Supra note 75 at 17.
98 Supra note 1 at 16.
99 Supra note 12.

1. Public versus Private Interests

Inherent in the public prosecutorial model, under which HASE offences are judged, is that serious crime is prosecuted in the public interest. A criminal prosecution conveys a very public message and serves a strictly public purpose. "The purpose of criminal sanctions are for the Crown to punish and deter wrongs against society."[100] Any benefit for the victim is purely a bonus, never the aim. After the initial reporting stage the offence is no longer about the harm to the victim. Rather, a criminal prosecution is about the harm incurred by society. It is this harm for which punishment is meted out. This public harm "translates into public prosecutors investing time and money in prosecuting those cases that are deemed to be in the public interest."[101]

OSH operates under a clearly stated public interest model. Their prosecution policy provides:[102]

> OSH has an obligation to ensure that the legislation is being complied with. The public good can only be fully satisfied when OSH is seen to take positive and effective action, therefore Court proceedings must be the initial option considered where non-compliance has been identified and evidence to sustain a prosecution exists. The use of other enforcement action or a decision not to instigate Court proceedings must be based on sound and reasonable grounds.
> ...In deciding whether a prosecution is the appropriate response to a particular situation, and, if so, the nature and extent of prosecution action, the following points will be taken into account...The public interest.

Conversely, crimes, which are deemed to be of a less serious nature, or do not satisfy the departmental prosecutorial guidelines, may be of great significance to the victim or the victim's family. However, there is little public interest in their prosecution and a public prosecution is often not brought.[103]

The ACC legislative bar has blocked civil litigation, as a means of redress in New Zealand. Exemplary damages claims are very difficult to prove. Under the current legislative model if OSH decides, based on a public interest analysis that they are not going to bring a prosecution, then all legal doors are shut.[104] In this instance justice has not been seen to be done – the public perception is 'someone has been hurt or killed, OSH is doing nothing – someone has to be held accountable and someone has to hold them accountable'. Hence, private prosecutions may provide justice.

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100 Department of Labour, *Review of the Health and Safety in Employment Act 1992: Proposal to Remove the Prosecution Monopoly*, 00/004218 (2000) 3.

101 Supra note 67 at 5.

102 Ibid.

103 Ibid.

104 But see the Injury Prevention, Rehabilitation, and Compensation Act 2001 which reintroduced lump-sum compensation into the Accident Compensation scheme.

The intention of the amendments was to "remove the monopoly when the 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."[105] This statement appears to overlook the policy basis behind prosecutions within the criminal justice system, which is based on remedying a public harm, not allowing an avenue for private 'retribution' or private 'justice'. The flaw in this argument is that the criminal justice system, both in its framework and its procedures has been developed to avoid the dangers that are inherent in individual justice. Prosecutions in the public interest are determined in a system which is based on standards of fairness, consistency, transparency and accountability.[106] If a case is not suitable for public prosecution then to be prosecuted in the interests of a private individual undermines the criminal justice system.

2. Official Inertia, Incompetence or Corruption

> *In the debate so far there is no reference to the fact that OSH would be made to look silly if it didn't prosecute and a private action were to succeed.*[107]

The primary argument in favour of removing the monopoly is to provide access to the criminal justice system where OSH, as the central enforcement agency, has failed to bring a prosecution.[108] The decision not to bring a prosecution may be based not on valid considerations, but rather be the result of official inertia, incompetence, biased reasoning or incompetence.[109] In this instance, private prosecutions may provide a "useful constitutional safeguard against" this risk.[110]

Proponents of private prosecutions in the HASE arena believe that the removal of the monopoly will impact positively on the decision-making processes of OSH, most fundamentally in OSH's decision of whether or not to lay an information. Criticism has been directed at the poor quality of investigations carried out by OSH, which have led to questionable conclusions and the decision not to lay charges.[111] Private prosecutions protect both against the 'misuse of public power'[112] and the 'non-use of public power.'[113]

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105 Transport and Industrial Relations Committee *Commentary on the Health and Safety in Employment Amendment Bill* (2001) 14-15.
106 Supra note 54 at 136.
107 Supra note 75 at 17.
108 Supra note 67 at 6.
109 Supra note 58.
110 Ibid, per Lord Diplock.
111 Engineering, Printing & Manufacturing Union, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 12.
112 Supra note 58.
113 Supra note 61 at 147.

Under the new system, "OSH will be publicly accountable for a decision not to take a prosecution. It will be under the incentive of being able to be 'second guessed'."[114] The EMPU believes that this will lead to a better quality investigation and decision-making in OSH."[115]

It would be embarrassing for the Government and the Department of Labour to be the subject of intense scrutiny[116] as to their decision not to prosecute a breach of the HASE Act. Private prosecutions may operate as a mirror by which OSH can reflect on their decision-making processes and consequent decisions.

Under the former HASE Act the manner in which OSH exercised its prosecutorial discretion was not open to judicial review. All that could be judicially reviewed was whether or not the discretion has been exercised at all, not the actual exercise of the discretion.[117] If the concern of the amendments is to provide a check on official inertia or incompetence, then the right that should be allowed for is not the right to bring a private prosecution. Rather, it should be the right for individuals to challenge OSH's decision not to prosecute.[118]

3. OSH Funding

> *Simply to state that Department Resources are 'limited' and therefore other people should do it is not sufficient reason for this change and is a lame excuse.*[119]

Resources do not limit other enforcement agencies when deciding whether to prosecute. Although criticism has been levelled at the differing quality of OSH inspectors,[120] the regional inconsistencies within the service[121] and a general satisfaction with the level of enforcement,[122] there has been no suggestion of corruption or bias within the Service.

Rather, the greatest, and at times most scathing attack has been on the under-funding of OSH, which has resulted in what is seen to be an inability of OSH to fulfil its functions."[123]

> We are all aware that the current OSH prosecution policy is informed to some degree by budget availability. Thus, OSH deals only with the worst (i.e. death) cases. So employers know that unless they kill their workers, their prosecution risk is minimal.[124]

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114 Supra note 111 at 12.
115 Ibid.
116 Supra note 100 at 3.
117 Supra note 44 at 16.
118 Presbyterian Support, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee*, 7.
119 Supra note 85 at 37.
120 Natalie Fraser, Interview with a confidential source.
121 Ibid.
122 Ibid.
123 Supra note 44 at 13.
124 Robyn Houltain, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 2.

Questions have been raised as to whether or not the "funds collected by the way of the ACC Employers' Levy for OSH funding are appropriately applied."[125] Both the CTU and the RMTU have expressed concern that "the OSH levy funding has not all reached OSH, but has been substantially siphoned off by the Department of Labour for other purposes."[126] Figures compiled by the unions[127] show that over a five-year period[128] this 'siphoned' money "amounted to $37 million and would have equated, roughly, to 150 extra staff had it been applied for the purpose for which it was collected."[129]

> The money foregone is a lost opportunity. NZ has an appalling workplace safety record. It is the view of the RMTU that the failure of OSH to visit sites because of their paucity of resources...and the failure to adequately police the Act is relevant to our safety record.[130]

4. Failure to prosecute offenders is against the objectives of the criminal law

> *We reiterate that if we were given the ability to prosecute where OSH has decided not to we would be unlikely to exercise the right very often. Taking into account the standard of proof required for a successful prosecution and the resources required to mount a case this would not be a step to be taken lightly or frivolously. However, just having the right would in our view contribute to the deterrent aspect of the legislation.*[131]

The power of private prosecutions, it is said, is not in the legal sanction consequent on a breach. Rather, the power lies in the deterrent effect of knowing that the likelihood of a prosecution has increased. This deterrent effect of a criminal sanction is the general philosophy behind prosecutions as a whole. The threat of a prosecution operates as a form of behaviour modification. In theory, if not in practice, it is the risk of being criminally sanctioned that stops people from breaking the law. The long-term usefulness of private prosecutions in occupational health and safety is in the increased perception that poor workplace practices are more likely to be detected. It is hoped that the possibility of a private prosecution will operate as a greater incentive to comply, rather than actual prosecution.[132]

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125 Supra note 5 at 13.
126 Ibid.
127 Ibid; see also supra note 111.
128 See comparable figures taken from Rail and Maritime Transport Union submissions which were calculated over a 10 year period.
129 Supra note 5 at 13.
130 Supra note 44 at 13.
131 Ibid 16.
132 Supra note 10.

In jurisdictions that allow private prosecutions very few cases have been taken. "Experience with other legislation suggests that where no monopoly exists, the main focus of private parties is pressuring the Authority to prosecute."[133] The deterrent effect of private prosecutions was also noted during the policy development of the Resource Management Act 1991 insofar as the "threat of having other parties taking prosecutions may act as an added deterrent."[134]

5. The failure to prosecute creates "favoured classes"

> *Lax enforcement of the law undermines the position of employers who responsibly abide by these minimum standards. The law should therefore be adequately, uniformly and equitably enforced, through a system of inspection and the imposition of penalties for contravention.*[135]

The reality of limited resources and the application of the principles behind private prosecutions result in only a percentage of offences being prosecuted by OSH. In situations where the monopoly on prosecutions is held by the State, and that monopoly is exercised selectively, whether through corruption, bias or limited resources, 'favoured' and 'disfavoured' classes are created.[136]

'Disfavoured' classes are those victims of crime who are low on the State prosecutor's priority list. Conversely, 'favoured classes' are those who rank highly.[137] "Since not all offences can be prosecuted those with a high profile or a high precedent value will attract higher priority status than others. Unfortunately, this means that some victims of crime are left without recourse to justice, retribution and possibly compensation."[138]

In not prosecuting all identified breaches of the Act, OSH, due in part to financial constraints, are engaging in selective prosecutions. In examining the issue of selective prosecutions, OSH seeks to make it clear that they are to be distinguished from "official inertia, bias and corruption."[139] With selective prosecutions, they state, "there is no question of an underhanded enforcement authority, only a question of limited resources which necessitate strategic prosecutions."[140] Strategic prosecutions are described as a 'necessary mechanism to ensure the greatest level of enforcement is achieved within the limited resources available to OSH prosecutors."[141]

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133 Supra note 100 at 5.
134 Ibid 2 [emphasis added].
135 Supra note 5 at 4.
136 Supra note 67 at 13.
137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.

However, the very nature of strategic prosecutions means that favoured and disfavoured classes will be created and reinforced. More 'mileage' is achievable from the prosecution of a well-known company than one that is unknown.

Private prosecutions, it is suggested, may provide a means for balancing out the inequality. Unfortunately the division still remains. Private enforcement action is unlikely to be taken by those who are most at risk of injury; those entering the workforce, the poorly educated and unskilled, and those with a poor understanding of English.[142]

The legal system in which we operate creates its own favoured classes by their ability or inability to meet the 'price tag of justice'.[143] Allowing private prosecutions will not remove the spectre of favoured classes; it is possible that the financial constraints of prosecuting a case could exacerbate them.

6. Provides Another Avenue of Redress

People who have suffered personal injury by accident have been without access to the civil courts since 1974 "when ACC first gripped our legal system".[144] "Families suffering the death of a loved one have neither a wrongful death claim, nor an action for punitive damages."[145]

It was thought when the amendments to the HASE Act were introduced that private prosecutions would provide a vehicle for compensating the victim or the victim's family for the harm caused. Fears of large awards were placated by the fact that prior to an award being made a private prosecutor would have first had to secure a conviction; money would not be paid where it was not deserved. On conviction the court would have to consider the appropriate level of fine according to the criteria detailed in *Department of Labour v De Spa & Co Ltd*,[146] including, it was said, whether under the s 28A of the Criminal Justice Act 1985 any part of the fine should be awarded to the victim of the crime.[147] The amendments increase the level of fine able to be imposed under the Act.[148] As such, employers viewed this as a means of providing employees with backdoor compensation. Concern was expressed that prosecutions would be motivated by the chance of a monetary penalty.[149]

Research undertaken by the Department prior to the introduction of the amendments makes the observation that had the concern of a private prosecution being motivated by a backdoor right to sue been a real concern, then the obvious

142 Ibid 14.
143 Ibid.
144 Supra note 61 at 147; see also *In Re Chase* [1989] 1 NZLR 325 (CA).
145 Ibid.
146 [1994] 1 ERNZ 339 (HC), in which are considered factors including culpability, the financial position of the defendant, the degree of harm, and the defendant's attitude.
147 Supra note 100 at 3.
148 Supra note 7.
149 Supra note 4 at 35.

answer would have been to amend s 28.[150] Obviously the repealing of the relevant section shows that this was perceived to be a valid concern, and that a policy decision had been made not to return to the right to sue:[151]

> The ability of the courts to make such awards under the [Criminal Justice Act 1985] is widely perceived by businesses as an avenue for topping up the perceived inadequacies of the accident compensation legislation.

Prima facie, these concerns appear to be valid. However, the repealing of the Criminal Justice Act by the Sentencing Act 2002 makes them academic. The legislative landscape in which these fears were developed has been radically altered. The judicial discretion that existed under the Criminal Justice Act to award a percentage of the fine to the victim or the victim's family has been repealed. The danger no longer exists that the Act may be used to inflate fines in order to increase compensation for the victim.[152] In its place the Sentencing Act provides for a reparation assessment that is severely limited by ACC.[153]

In reality, removing the prosecution monopoly does not provide another avenue of redress. More likely it is a case of the Government being seen to be giving with one hand while taking away with the other.

IV. Arguments against Private Prosecutions

1. Using the HASE to pursue ulterior motives

"Power of unions to bring prosecutions where OSH chooses not to"[154]

A high degree of scaremongering surrounds the proposed amendments to the HASE Act.[155] These rumours and half-truths inform the majority of objections against removing the OSH monopoly. The biggest fear concerned the power that employers perceive that their employees will have over them via their unions. This was evident in the Auckland Chamber of Commerce submissions that were headed 'Power of Unions to bring a Prosecution where OSH chooses not to'. The removal of the monopoly does not solely empower unions. Although, "realistically only unions are likely to bring private prosecutions, this is based on expertise and knowledge."[156] It is not based on a desire "just to prove a point."[157]

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150 Criminal Justice Act 1985 s28; see also supra note 67 at 23.

151 BHP New Zealand Steel, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee* 6.

152 Supra note 67 at 23.

153 See infra Part V for a complete discussion of the impact of the Sentencing Act 2002 on the Health and Safety in Employment Act 1992.

154 Auckland Chamber of Commerce, *Submission on Health and Safety in Employment Amendment Bill to the Transport and industrial Relations Select Committee.*

155 Supra note 10.

156 Supra note 31.

157 Supra note 12.

Regardless of this, the removal is seen as tantamount to arming unions with a weapon of employment relations when their arsenal is already perceived to be well stocked.

The relevance of motivation

"HSE offences are strict liability offences. By definition they are prosecutable."[158] On this basis, the motivation for bringing a prosecution should not be a relevant factor. "As long as the prosecution is able to prove its case, overcoming the high evidential threshold of 'beyond a reasonable doubt' there will be a valid case which the defendant will be required to answer."[159]

The Department of Labour has stated although there may be occasions where the HASE Act is misused for example as a tool in employment disputes, where the prosecution proves each element of the offence to the requisite standard there is still a breach of the Act regardless of motive.[160]

In the limited circumstances where motivation is deemed to be relevant and "there is clear evidence that a prosecution has been brought for a collateral purpose inconsistent with the objects of the HSE"[161] the courts have recourse to ss 5 and 7(2) of the Costs in Criminal Cases Act 1967. As becomes evident in this section, the Costs in Criminal Cases Act operates as statutory tool, providing a major disincentive to the bringing of a private prosecution for a non-legitimate purpose. Pursuant to this Act, bad-faith in "bringing, continuing, or conducting a prosecution" will be a relevant consideration in awarding costs to a successful defendant.[162]

The United Kingdom Law Commission concludes:[163]

> [T]he likelihood of an offence being prosecuted for an improper motive is not, in itself, a reason for restricting private prosecutions which are otherwise well-founded and not contrary to the public interest.

2. Inconsistency and Subjectivity

Central to the nature of the criminal justice system is the consistent and objective application of the law. Justice, it is argued requires consistency of practice. Private prosecutions would promote inconsistencies as to when or what cases are prosecuted.[164] Opposition to the amendments suggest that if private prosecutions were introduced, the law will no longer be known or knowable. Cases will be brought not on logic, but on emotion.[165]

158 Ibid.
159 Supra note 67 at15.
160 Supra note 100 at 3.
161 Supra note 67 at 15.
162 Ibid.
163 United Kingdom Law Commission, *Consents to Prosecution* (1998) LC255 at 64.
164 Supra note 86 at 35.
165 Interview with Bernard Healy, Transpower.

Private prosecutions do not provide any assurance that an individual's decision to prosecute would have been made taking into consideration any of the relevant factors detailed in the Solicitor-General's Prosecution Guidelines, in particular, public interest factors.[166] There are no statutory limitations when bringing a private prosecution that requires an individual to take into consideration any "alternatives to a formal prosecution in court."[167] The private prosecutor is not subject to the usual requirements of disclosure.[168] Unlike private prosecutions "an independent enforcer allows an in-depth and reasoned consideration of the strengths of the case in deciding whether to prosecute."[169] Concern is held that private prosecutions will not be approached objectively.

Existing Mechanisms to Prevent Subjectivity

Inherent in the 'closed shop' of public prosecutions are safeguards and standards that are perceived to be lacking in prosecutions brought by private individuals. The Law Commission believes[170] that private prosecutions carry their own dangers and they "do not fit well into a prosecution system which requires certain standards of fairness, consistency, transparency and accountability."[171] Control, the Commission believes, is desirable. Due to offences of the HASE Act being strict liability offences and the existing mechanisms to prevent subjectively private prosecutions should not be ruled out based on the issue of motivation. The law is well equipped to handle cases of obviously subjective prosecutions.[172] As discussed earlier, the:[173]

> Costs in Criminal Cases Act 1967 provides inter alia that conducting an investigation and prosecution in bad-faith, unreasonably or improperly will be taken into account in awarding costs in favour of an acquitted defendant.

3. Vexatious Litigation

> *[V]ictims and their families may, with unquestionable sincerity, act to a point of vexation in pursuing beliefs from an emotional perspective irrespective of the particular facts.*[174]

166 Supra note 54 at 137.
167 Ibid.
168 Ibid, but see the Privacy Act 1993.
169 Department of Labour *Prosecutions Under the Health and Safety in Employment Act* (Ministerial briefing paper, Department of Labour).
170 Supra note 54 at 136.
171 Ibid.
172 Supra note 67.
173 Ibid 16.
174 Ibid.

Prima facie, the threat of vexatious litigation presents a strong argument against the removal of the OSH monopoly on prosecutions. Traditionally employment relationships have been based on a 'them and us' mentality; Employer against employee (or more likely employer against employee representative). A fear, whether justified or not, pervades the submissions of employers and employer interest groups, both large and small. It is believed that granting the power of private prosecutions to unions is tantamount to arming them with a "weapon in employment relations."[175] Unions will test their political strength by taking a case just to prove that they can. The HASE Act is already criticised for being employee biased and containing "nothing but ignorance and a loathing of business and employers."[176]

During the 1991 debate concerning the original bill, the Department of Labour was against the idea of private prosecutions as a means of enforcement of the HASE Act for the same reasons that civil action was abandoned.[177] In the Department's opinion there seemed to be little chance of establishing restrictions to the taking of cases that amounted to a misuse of the law. "For example, sequential cases being taken against an employer for the same or similar breach of the duty when each could have been exposed to the same condition such as toxic fumes or noise."[178]

There is concern not only in regard to the perceived lack of safeguards available to prevent vexatious litigation. If the section were not worded properly it would allow for the "untrammelled scope for private prosecution."[179] It is thought that while private prosecutions potentially "serve as a desirable check on the executive...they also have the potential for abuse, and lack the safeguards of public prosecutions."[180] In response to similar amendments in Australia it was stated that private prosecutions will undermine the reputation of OSH by parties bringing "irresponsible and nuisance prosecutions."[181]

However, Wren notes that "there is no evidence anywhere in the industrialised world that unions and workers have misused what limited power they have in regard to health and safety issues." Moreover, he questions what this fear by employers of vexatious or frivolous prosecutions reveals about how employers view and manage their industrial relations.[182] What it reveals, he suggests is a "very negative and conflict-based image held by employer representatives about workers and their representatives."[183] This negativity existed prior to or regardless of the introduction of private prosecutions.

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175 Supra note 25 at 35.
176 Supra note 30 at 1.
177 Supra note 67.
178 *Report to the Department of Labour Select Committee on the HSE Bill* (July 1992).
179 Supra note 54 at 100.
180 Ibid 100.
181 Ibid 123.
182 Supra note 75 at 16.
183 Ibid.

"Private prosecutions fall outside many of the safeguards built into the present prosecution system,"[184] and there are no assurances that an individual's decision to prosecute would have been made "taking into consideration any of the relevant factors set out in the Solicitor-General's Prosecution Guidelines, in particular public interest factors."[185] However, the fear of vexatious litigation does not provide a credible argument against the introduction of private prosecutions into the health and safety arena. The court system has in place checks and balances to ensure that cases brought before the court are legitimate: "These are matters for which adequate existing provision is made, either by way of statutory interpretation or by other checks and balances in the criminal justice system."[186]

(i) Existing checks and balances

> *The existing institutional, statutory, and financial restraints on private prosecutions are effective; there is no evidence of abuse, and further controls at this time are both constitutionally dangerous and functionally unnecessary.*[187]

It cannot be ruled out that private prosecutions could be used as instruments of vexation. However, "it is expensive to investigate, prepare and bring such prosecutions"[188] and it is unlikely that they would be used lightly.

Taking a case to court does not guarantee a criminal conviction. In the first instance the burden of proof that needs to be attained is the criminal standard of 'beyond a reasonable doubt'. This is a high hurdle to reach and will operate to knockout undeserving prosecutions.

Existing legislation operates to monitor statutorily the legitimacy of prosecutions. The Summary Proceedings Act provides for stays in proceedings in the event of vexatious litigation. Furthermore, pursuant to the Costs in Criminal Cases Act 1967 s 7(1)(b), costs can be awarded against private prosecution litigants who are shown to be motivated by vexation. S 5 provides guidelines as to the necessary motivation, including the need to be acting in good faith, the requirement of sufficient evidence to convict, appropriate consideration of any exculpatory evidence, and the undertaking of a reasonable and proper investigation.[189]

Proving a malicious prosecution has been described as an uphill task.[190] However, the tort provides an acquitted defendant with a means by which to seek redress. The tort of 'malicious prosecution' has "a wide scope and is an important safeguard available to defendants."[191]

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184 Supra note 55 at 11.
185 Ibid.
186 Supra note 16; also see supra note 67 at 17.
187 Supra note 54.
188 Supra note 75 at 17.
189 Supra note 61.
190 Ibid.
191 Supra note 67 at 17.

(ii) Cost as a informal check

Although not a formal check on vexatious litigation, the most effective check on bringing a private prosecution will undoubtedly be the expense of court proceedings.

Legal aid is not available in New Zealand to fund private prosecutions.[192] Hence, legal process and costs will present a huge barrier.[193] It is likely that an employer will have access to greater resources than an employee,[194] and "when an engagement of this sort becomes a financial war of attrition those who face corporate defendants are plainly prejudiced."[195] This barrier is evident under comparable legislation. Since its inception "there has been only one private prosecution brought under the [Resource Management Act 1991, which was not successful."[196]

It has been noted that the fines "awarded to victims cannot compete with the expense of bringing proceedings."[197] This statement is even more accurate under the proposed system. In bringing a private prosecution there is a definite bar of costs.[198]

The nature of a prosecution under the HASE Act is likely to be industry specific and "one that is potentially dealing with technical matters.[199] Rather than being used as a tool of vexation, it will be a big decision to take it on.[200]

(iii) Costs of Defending a Private Prosecution

In discussion with a panel of Employer/Sector representatives, concern was expressed in relation to the additional costs incurred by an employer defending a private prosecution. Although not clearly stated, these concerns can only apply to vexatious or malicious prosecutions. It cannot be thought that a valid criticism can be levelled at a valid prosecution based on the cost of providing a defence. It has been submitted:[201]

> While acknowledging that individuals may feel particularly strongly about the incident, the employers should not be liable for defence costs where the Crown has either failed to act or deemed that no action is required.

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192 Legal Services Act 1991.
193 Supra note 31.
194 However it is likely that many small businesses would have fewer resources than a union.
195 *Health and Safety at Work* 14(4) 21.
196 Supra note 31.
197 Supra note 75 at 16.
198 This bar does raise questions of out-of-court settlements.
199 Supra note 31.
200 Ibid.
201 Transpower, Submission on *Health and Safety in Employment Act Amendment Bill to the transport and Industrial Relations Select Committee.*

In the writer's opinion, that cannot be correct. If a prima facie case exists and an actionable wrong has been committed then whether or not a prosecution is brought by the central enforcement agency or by a private prosecutor, the costs involved are a legitimate consequence of a breach of the Act.

4. Ineffectiveness Due To Problems In Investigation

Two issues under this head provide the most credible criticism that would justify retaining the monopoly; the lack of investigative machinery, and the lack of access to OSH records. The earlier criticisms, although plausible, were based on a more theoretical modal of what it means to mount a private prosecution. The ineffectiveness of private prosecutions, due to the problems in investigation are more than theoretical and will amount to actual practical hurdles to those seeking redress.

(i) Lack of investigative machinery

In order for the HASE Act to work:[202]

> Health and Safety inspectors have relatively extensive 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 inspectors is subject to the provisions of the Official Information Act 1982 and the Privacy Act 1993.

Under the current system members of the public may request investigation information under the Official Information Act. The investigation material that is usually released "consists of the Health and Safety Inspector's report and some appendices containing for example photographic evidence."[203] Statements and identifying details are not released.[204]

These restrictions will still apply under the proposed system. A private individual will be able to lay an information and bring a private prosecution, however, they will not be provided with investigative powers or the right of entry that are available to an OSH Inspector. This effectively undermines their ability to prepare their case.

The limiting effect of this type of legislation is evident in the South Australian system. Unlike New Zealand:[205]

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202 Supra note 100 at 5.
203 Ibid.
204 Ibid.
205 *Inquiry into Work, Health and Safety* 123.

> [I]n New South Wales, a union involved with the case has the same power to lay charges as the Authority. The NSW Trade and Labour Council commented on their experience of private prosecution: 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.

The ineffectiveness of these limitations are echoed by the New Zealand Council of Trade Unions:[206]

> South Australia does not have to wait until their enforcement body decides not to lay an information, but neither do they have the same right to gather information. This procedure is ridiculous if OSH does not provide information.

(ii) Investigative powers and rights of entry

Failure to provide rights of entry will render private prosecutions 'toothless'.[207]

OSH has six months from being made aware of a workplace accident, or when they reasonably should have been aware of an accident to decide not to bring a prosecution. Only after that time has lapsed can an information be laid by a private prosecutor.[208] Due to the inherent nature of worksites it is unlikely that they will remain in the same state as when the accident happened.[209] Any potentially probative evidence would have already been collected by OSH or would have disappeared forever. The ability of a private prosecutor to gather evidence will be severely limited.[210]

The Department has acknowledged:[211]

> That to provide true and fair access to justice through the removal of the monopoly, private prosecutors should be given powers of entry in order to undertake their own investigation, especially when the Authority declines to prosecute."

However, the Ministry of Justice has raised problems of practicality. The granting to private prosecutors powers of entry "potentially raise issues under s 21 of the Bill of Rights, which provide that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise."[212] Employers have the right not to have people crawling over their worksites and rifling through their business records. But, private prosecutors also have the right to present the best case possible. This is a difficult balance to strike.

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206 Supra note 31.
207 Supra note 67 at 19.
208 Supra note 6, s 54B.
209 Supra note 67.
210 Supra note 31.
211 Supra note 100 at 6.
212 Ibid.

The system cannot work unless a median is found and clear guidelines and powers are put in place. Provision needs to be made so that the right to bring a private prosecution is an effective right. Conversely, the defendant has the right to fair process:[213]

> Providing either for a right to prosecute without powers of access to information, or one that does not sufficiently protect the defendant from abuse of process or Bill of Rights breaches would not constitute a satisfactory system for either the prosecutor or the defendant.

However, taking into consideration the limitations in relation access to information, the removal of the monopoly becomes a power in name only. What use is a power to bring a private prosecution if you lack the power to gather the evidence necessary to prepare your case?

(iii) Information Sharing: Access to OSH records

> *"Responsibility to seek own information"*[214]

It is not only the lack of investigative machinery that cripples an individual's ability to bring a successful or even meaningful private prosecution. Under the amendments there is no duty imposed on OSH to share information that they have obtained during their investigation. The converse is in fact true.[215] There is no specific duty to disclose. It is the private prosecutor's "responsibility to seek their own information,"[216] "the Act contains nothing special to say that OSH has to disclose."[217]

Industry insiders believe that "OSH won't disclose more than they would have to"[218] and "they presumably will not actively support a private prosecution."[219] The position taken by OSH is understandable due to the need that the service remain an objective third party and that "...the requirement for OSH to share any information with the party taking the prosecution will erode the trust employers have in the service."[220] It is thought that working in cooperation with OSH in the initial stages of the investigation will disadvantage employers, as this information can then be utilised by the third party to take their own prosecution. However, the employer would be required to provide the information prior to the decision being made as to who would lay the information. The information is not

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213 Ibid.
214 Supra note 10.
215 See infra "V. A Practical Examination of s 54A".
216 Supra note 10.
217 Ibid.
218 Supra note 31.
219 Ibid.
220 Federated Farmers, *Submission on Health and Safety in Employment Act Amendment Bill to the Transport and Industrial Relations Select Committee.*

being obtained for the benefit of a third-party, but rather as part of a criminal investigation. Thus, it is more than likely that the information would be used to assist an OSH prosecution than a private prosecution.

What information is to be disclosed will be decided on a case-by-case basis, starting from the premise that "the [Official Information Act] applies to all information held."[221] Hence, unless a good reason exists for non-disclosure the information must be released. Ostensibly this means that information must be released unless there are conclusively good reasons for withholding it. In reality, coupled with the inability to undertake one's own investigation, this lack of access to information results in the very real possibility that a private prosecutor will be denied access to evidence necessary to prepare their case. What power does a private prosecution have if it is based only on limited evidence?

V. A Practical Examination of s 54A

1. The Sentencing Act 2002

Wren suggests that only two real incentives exist for workers or their representatives to bring an action; the first being to correct a manifest injustice, the second, for financial gain. The second incentive, he believes can largely be ignored.[222] Prior to the amendments, he stated that the "current levels of fines handed down by the judiciary against employers would not justify the cost involved in taking a private prosecution, particularly if the decision was appealed."[223] If that statement was true prior to the introduction of the proposed amendments it is even more so now. The limitations in the Sentencing Act radically alter the incentives for bringing a private prosecution for financial gain, "because the victim can no longer be awarded part of the fine."[224]

S 28(1) of the Criminal Justice Act provided that:[225]

> [W]here an offender was convicted of an offence arising out of an act or omission that occasioned physical or emotional harm to any other person, and that Court imposed a fine, it must consider whether it should, if it thinks fit, award by way of compensation to the victim the whole or such portion of the fine as it thinks just."

Subject to the remaining part of the section, there was a positive duty on the court, in applicable cases to consider whether to award part of the fine to the victim by way of compensation.

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221 Supra note 10.
222 Supra note 75 at 16.
223 Ibid.
224 Supra note 86 at 15.
225 Criminal Justice Act 1985 s 28.

In July 2002[226] the Criminal Justice Act was repealed. From its ashes arose the Sentencing Act 2002.[227] The new Act radically transformed the way that sentencing is approached and implemented by the courts.

Central to the HASE Act is that under the new sentencing regime the court can no longer order part of a fine to the victim. In its place an order of reparation has been posited. The relevant reparation sections are: s 12 Reparation; s 14 Reparation, fines, and financial capacity of offender; s 32 Sentence of reparation; s 40 Determining amount of fine; s 41 Financial capacity of offender; s 42 Declaration as to financial capacity. The most important, in this instance, being s 32 Sentence of Reparation.

Reparation under the Act "may be awarded on the basis of loss or damage consequential on any emotional or physical harm to the victim."[228] Pursuant to s 32, a court may impose a sentence of reparation if any offender has, through or by means of an offence for which they have been committed caused a person to suffer loss or damage consequential on any emotional or physical harm or loss.[229] Moderating the impact of this section, a sentence of reparation cannot be imposed unless the person who has suffered the emotional harm or loss or consequential damage is either, the person against whom the offence has been committed, a person who has suffered physical injury or loss as a result of the offence, the legal guardian of a child or young person who has been offended against or a member of the victim's immediate family if the victim has died or become incapable as a result of an offence.[230]

In determining whether a sentence of reparation is appropriate in the circumstances and the appropriate amount of the order for any consequential loss or damage[231] the court must take into account whether a legal right is available to that person to bring proceedings.[232] Under this section, whether that right has not been exercised or the limitation period has expired is irrelevant.[233]

Central to the section's application in a HASE Act prosecution is the fact that the court must not order reparation to be made in respect of any consequential harm or damage under s (1)(c) for which the court believes that the person has an entitlement under the Injury Prevention, Rehabilitation, and Compensation Act 2001.[234]

An order of reparation under s 32 cannot be made based purely on proof of physical harm. A worker who has lost a limb because of a workplace accident does not automatically receive reparation on the conviction of the defendant. The victim must be able to show emotional loss or damage that is consequential on the physical harm. There needs to be more than the pure physical injury.

226 But see the sections dealing with mentally disordered offenders.
227 Geoff Hall, "The Sentencing Act 2002 – New Bottle, Same Wine?" *Law Talk* (2002) 583, 20.
228 Ibid.
229 Sentencing Act 2002 s 32(1)(c).
230 Ibid s 4.
231 Supra note 7, s 32(1)(c).
232 Ibid, s32(3).
233 Ibid, s32(4).
234 Ibid, s32(5).

The policy rationale behind this is that under New Zealand legislation, ACC compensates for physical injury by accident, and the two pieces of legislation should not overlap. The HASE Act and the Sentencing Act are pieces of criminal legislation; ACC is civil. The Sentencing Act provides specific limitations against the award of what is compensatible under ACC. So if an injured worker is being compensated through ACC for 80% of their lost wages, they can only seek the remaining 20% through the court. However, this is only if they can demonstrate consequential harm.

Thus, if a victim brings a private prosecution under the HASE Act and on conviction the Court imposes a fine, that fine will be paid to the court, not to the victim. Unless the victim can show loss that is consequential on the physical harm they will be without financial redress.[235]

If an offender has the means only to either pay a fine or make reparation to the victim the court must make an order for the offender to make reparation.[236] It is more likely than not that a company would have the means to pay the fine. This means that the Court would receive payment, but the private prosecutor would be still be required to cross the further hurdle and show consequential harm. Unless the victim is merely seeking justice through the legal system, then this is potentially a very expensive process, for very little gain.

2. The Practical Application of s 54A – The Devil is in the Detail [237]

The new s 54A provides that a person other than an inspector may lay an information for an offence under the Act, subsequent on the satisfaction of the following three conditions:

1. An inspector or another person has not taken enforcement action against a possible defendant in respect of the same matter; and
2. an enforcement authority has not taken prosecution action in respect of the same incident, situation, or set of circumstances; and
3. any person has received notification from OSH that an inspector has not and will not lay an information or issue an Infringement notice or take a compliance order.

Prosecution action means the laying of an information, the issuing of an Infringement Notice (IN), or the making of an application for a compliance order.

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235 The new legislative scheme is also applicable to prosecutions brought by Occupational Safety and Health, so under the Sentencing Act 2002 is it necessary to show consequential harm for a reward of reparation regardless of the prosecutor's identity. However, it seems fundamentally difficult when applied to private prosecutors who have funded prosecutions personally.

236 Supra note 229, s 14(2).

237 Supra note 10. Procedures in the section are based on the Department of Labour's *Draft Operational Policy* which is intended to guide Occupational Safety and Health staff in relation the new ss 54, 54A and 54C.

The first thing to note about s 54A is that the person laying the information does not have to be the same person who registered their interest. Under s 54 "a person may notify the Secretary in the prescribed manner that [they] have an interest that has been, is, or is to be, subject to the taking of enforcement action by an Inspector."[238] This means that a person other than the original notifier can lay an information, as long as OSH has had notification of that interest. Furthermore, the section requires that a person has received notification from OSH prior to an information being laid. In practice it is thought that notification of interest will be received either at head office or the regional offices rather than by the secretary.

Thus OSH is under a duty to ensure that the notifying person (the notifier) is advised forthwith of any decision that has already been made, then "the notifier is [to be] advised that the decision will be communicated as soon as possible after it is made."[239] Furthermore, the notifier must be informed as to whether prosecutorial action is to be taken by another enforcement agency. Enforcement by another agency does not instantly rule out a private prosecution. A person may seek the leave of the court to lay an information, even though another enforcement agency[240] has taken prosecutorial action.[241] In these instances, s 54A (2) (a) and (c) must still be complied with.

S 54 (2) (a) makes it clear that although OSH is required to notify its decision, it is under no obligation to notify of the reasons for its decision. The operational policy states that OSH staff are to notify the decision only and are to avoid any discussion on the merits or otherwise for the decision. "...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."[242]

3. The Importance of the "Same Matter"

The interpretation of the term 'same matter' will have the most impact on private action. "Matter in ss 54, 54A, 54C, and 56H, means a failure or a series of associated failures to comply with the Act or regulations under this Act that arise out of or relate to the same incident, situation, or set of circumstances."[243]

A private prosecution can only be considered where an inspector does not take enforcement action. Any form of prosecutorial action taken by either OSH or another enforcement agency, be it the laying of an information, the issuing of an infringement notice or the making of an application for a compliance order precludes prosecution by any other party involved, thereby effectively closing the

238 Supra note 7, s 54(1).
239 Department of Labour, *Draft Operational Policy*, supra note 237.
240 See e.g. the Civil Aviation Authority or the Maritime Safety Authority.
241 Supra note 237.
242 *Draft Report: Review of the Enforcement Policy for alignment with the Service Delivery Model* 11.
243 Supra note 7, s 2.

door for the bringing of an action by anyone else. This also applies to private prosecutions. If any person has taken enforcement action against a possible defendant then all other possible defendants are unable to be prosecuted assuming the criteria under s 54A (2) were met for the first enforcement action:[244]

> In practice this means that if an inspector has laid an information against a principal then other parties who are involved in the same accident (employer, employee, self-employed etc) could not be prosecuted by any party at a later time, this includes an inspector.

However, if the matter is continuing or repeated then more than one action can be brought.[245] For example if an infringement notice is issued for boxes stored in front of a fire exit and those boxes are not removed within the required period, then the continuing action does not constitute the 'same matter' and further action may be brought.

4. SS 54B and 54C Time Limits for laying information

Under s 54B an information may be laid at any time within 6 months, after the earlier of; the date when the "incident, situation or set of circumstances to which the offence relates first became known to an inspector",[246] or the date when the "incident, situation or set of circumstances to which the offence relates should reasonably have become known to the inspector".[247] However, because OSH may take time to consider whether to take enforcement action, s 54(2)[248] provides a means of extending the limitation period by an application to the District Court, once OSH has signalled that they will not be taking enforcement action.[249] A person has one month from receiving notification of OSH's intentions to make an application for an extension of time.[250] This extension is subject to s 54(c) which provides that the Court must not grant an extension of time unless three criteria are satisfied: (a) another person wishes to decide whether to lay an information in respect of that matter; (b) it is unreasonable for that person to make the decision to lay the information in the 6 month limitations period and (c) an inspector has not made an application for an extension of time.[251]

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244 Supra note 237.
245 Supra note 7, s 45E.
246 Ibid, s 54B(1)(a).
247 Ibid, s 54B(1)(b).
248 S 54(2) is subject to ss 54C and 54D.
249 S 54(2), see also supra note 237.
250 Supra note 7, s 54(c)(3).
251 S 54(c)(4), see also supra note 237.

5. OSH involvement in Private Prosecutions

For private prosecutions to have an effect there needs to be greater transparency in the decision making process that OSH undertakes. The Minister of Labour has stated that the introduction of the ability of other parties to prosecute "is a real incentive for inspectors to consistently and transparently apply their powers."[252]

As discussed earlier, any information collected during an investigation will be subject to the Official Information Act and the Privacy Act 1993. Whether the information is released to parties contemplating a private prosecution will be considered in light of these statutes. The fact that a party "are possibly prosecuting or defending has no bearing on the decision on the release of information."[253] Although it is not to be released, it is important that the reasons for the decision are to be recorded. If necessary, staff are advised to seek advice from Legal Services.

6. Appearing as a Witness

OSH will not actively support private prosecutions.[254] However, it is obvious that the defence will rely heavily on the fact that OSH has not prosecuted. For this reason, it is likely that the first person to be called as a witness will be the OSH Inspector.[255] In the *Draft Operational Guidelines* it is made clear that if approached by the lawyer for either side officers are to discuss the matter with their manager and shall only appear as witness where they have been subpoenaed.[256]

VI. Smoke and Mirrors: S 54A Health and Safety in Employment Act 1992

Although it is a 'wait and see' game as to the actual impact the amendments will have, strong feelings are evident as to the perceived effect that private prosecutions will have on workplace safety. Across the board the overwhelming impression is that the impact of the new s 54A will be negligible. The amendments represent a "philosophical right"[257] but not a practical one. When asked directly whether the amendments would have any effect, one employee representative replied "To be honest, I don't [think that they will]."[258] This sentiment was echoed by all to whom I spoke.

252 Supra note 27.
253 Supra note 237.
254 Supra note 31.
255 Ibid.
256 Supra note 237.
257 Supra note 31.
258 Ibid.

On close analysis it becomes obvious that the moves are political rather than practical. The employment statutes[259] constitute one of the most politicized legal arenas.[260] If one stands back and removes the politics, are the changes a good move? It is not thought so:[261]

> [Allowing private prosecutions] lessens OSH's ability to be able to do their job properly. If conditions apply they have the knowledge that [prosecutorial action] can still be done by someone else.

The main question has to be 'is allowing for a private prosecution going to increase the odds of a non-compliant workplace being held accountable for their actions under the HASE Act?' It appears not. In order to reduce the incidence of breaches of the HASE Act it would seem more effective to increase the likelihood of a workplace being visited by an inspector. An increase in monitoring would impact more on the likelihood of a non-compliance being identified prior to an accident or incident occurring. Whereas a private prosecution is likely to be brought only after someone has been killed or injured; this appears to be too little too late. For a prosecution to take place it means that harm has probably already occurred, it is hoped that the system is designed to achieve more than that.

If the aim of the amendments is to reduce workplace injury, it does not seems that allowing private prosecutions will have the desired effect. An information can only be laid by an individual after OSH has decided not to take enforcement action. Private prosecutions do not increase the threat of enforcement to a degree that would operate as a deterrent for a non-compliant workplace.

VII. Conclusion

Taking into consideration the unlikelihood of a private prosecution being brought, and the application of the Sentencing Act on conviction, it is difficult to see what actual effect the removal of the monopoly will have on health and safety in the workplace. The removal of the monopoly does not result in a substantial change. Rather, in practice the amendments amount to a change in appearance only; a trick with smoke and mirrors. The new s 54A creates the appearance that changes have been introduced which will placate the concerns that OSH are failing to fulfil their prosecutorial obligations. But in reality, the amendments add very little, if anything to the effectiveness of the HASE Act.

It seems ironic that private prosecutions under the HASE Act are feared most by employer's and their representatives, when those who have the most to fear are the private prosecutors who view the new system as being a means of

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259 See, for example, the Employment Relations Act 2000.
260 Interview with Bill Hodge, Associate Professor at the University of Auckland.
261 Supra note 12.

achieving justice and redress. The possibility exists that without adequate information individuals seeking to bring a private prosecution are merely setting themselves up to be emotionally disappointed, and possibly financially devastated.

If the amendments were introduced unaccompanied by the Sentencing Act a private prosecution would have power. But as they stand they are toothless. It is a nice idea, allowing an aggrieved victim redress where the central enforcement agency does not prosecute for a workplace accident. It addresses a failure that is evident in the current legislation, and empowers private individuals to act when the State does not. But that empowerment is negated by the failure of the Legislature to enact clear procedures and support systems for the bringing of a private prosecution.

It is difficult to understand the introduction of a right to prosecute privately, but not the right to investigate privately or the right to have open access to the all the investigation materials. It would seem obvious that if information obtained in the course of an investigation plays a role in OSH's decision not to take enforcement action, then the same information is more likely than not to be important in any subsequent decision as to whether to bring a private prosecution. There is an assumption that is OSH is not bringing a prosecution then there is good reason for it not being brought, which would limit the likelihood of a private information being laid.[262] Without access to the evidence obtained by the inspector during an investigation a case will be difficult to prove; without access to OSH's records, a case would arguably be pointless.

It is also difficult to understand why someone would engage in a private prosecution, with all the expense, both emotional and financial, when all access to financial compensation via the courts is barred. Although it is problematic to comment without seeing the amendments in practice, the machinery that allows for private prosecutions under the HASE Act appears to create an unfairness that is not evident at first glance. Without access to the judicial discretion under s 28A of the Criminal Justice Act any fine imposed by the court ends up back in the Government's coffers. It has been said that "it would be a tough system that would not bring a prosecution and then award the fine back to the Government that refused to bring the prosecution in the first place."[263] S 54A in conjunction with the Sentencing Act introduces that system.

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262 Supra note 31.
263 Ibid.