



Office of the First Minister
St Andrews House
Regent Road
EDINBURGH
EH1 3DG

c/o ASAP Correspondence

FirstMinister@gov.scot

09 March 2016

Dear Ms Sturgeon

PATIENT SAFETY AND THE LAW

We are concerned that your Government is refusing to implement and regulate compliance with the legislation that would secure the safety of the people of Scotland. The law and legal process applies to patient safety and it is a driver to secure acceptable standards of safety. There have been repeated refusals by ministers, senior civil servants, NHS Scotland senior management and their Clinical Director to abide by the legislation and the Rule of Law. Compliance with the law is not optional; it requires:

1. **Recognition:** Full recognition of the application of the Health and Safety at Work etc. Act 1974 (HSWA) to patient safety and to associated social care. It requires an understanding of what that law means.
2. **Plan:** An effective plan to secure compliance with the law and patient safety across all of Scottish health and social care.
3. **Regulator:** Creation of the legally required effective fully independent regulator of healthcare. Regulation of social care also needs to comply with the Act.

Please will you commit to the three points above?

The refusal to comply with the law or to uphold it permits a very large number of reasonably preventable premature deaths in Scotland. By Department of Health estimates and other research this is likely to be about 2,000 deaths a year. Two years ago your principal legal adviser, the Lord Advocate wrote refusing to advise your government on the legal requirements to prevent these deaths. He also demonstrates that he does not understand safety law by not applying it to the Glasgow bin lorry deaths. In healthcare the law has been disregarded.

The principle of the Rule of Law has been rejected by the Government. The problem of avoidable deaths in healthcare is recognized internationally, but not in Scotland. The harm is so widespread that everyone in Scotland will know someone who has been affected. Further, in what independent research there is, it shows that health outcomes and quality of Scottish healthcare are worse than the rest of the UK and falling further behind¹. We have no independent body ensuring the quality of healthcare.

Scottish Cabinet Secretaries for Health, Wellbeing and Sport have repeatedly refused to give patients the protection that the law requires. We have the records of the refusal to comply with the law or to uphold it. Similarly, we have written to your Cabinet Secretary for Justice and he has also repeated his refusal to uphold the law. Your Director General of the Health and Social Care Directorate and Chief Executive of NHS Scotland, Paul Gray has similarly refused. He has even refused to do so when questioned by the Permanent Secretary to the Scottish Government, Leslie Evans. The Permanent Secretary then also refused to comply with the Act, or to uphold the law. It is a requirement of all Ministers and civil servants to both comply with law and to uphold it. This is by the Holyrood Oath and the ministerial and civil service codes. A refusal to do this means that they self-disqualify themselves from holding the posts.

The Scottish Government is also refusing to accept its responsibilities for health as a devolved matter. The Cabinet Secretary for Health and others have stated and confirmed in writing that it is their responsibility to provide the funding to the NHS Boards but that they do not take responsibility for the quality or safety of healthcare in Scotland. **However, the Minister and the Government cannot simply sub-contract their responsibilities.** There are many legal cases under HSWA which demonstrate that safety responsibilities cannot be disregarded. The NHS Scotland Act 1978 also applies and the Minister has responsibilities under section 1.

It should be of national concern that you and your Government have repeatedly refused to implement the law that would secure the safety of the people of Scotland and prevent many avoidable deaths, other harm to patients, and wasted expenditure. Your position on the law was further demonstrated with your reported statement of 17 January 2016 on the proposed Trade Union Bill. The BBC quoted you as stating:

*"So we will oppose this bill across the UK, but we'll also argue for Scotland to be exempted from its provision, and let me be clear on this as well - **if the bill becomes law we will not willingly or voluntarily co-operate with it or implement it in Scotland.**"*

Whatever the merits or demerits of the law, Ministers of the Scottish Government are required by the Holyrood Oath and the Ministerial Code to both comply with the law and to uphold it. It is a condition of being a Minister. A refusal to comply with, or uphold the law means that a minister cannot remain in post. The law is not optional and no-one is above the law. The binding Health and Safety at Work etc Act 1974, particularly as it applies to patient safety, must be implemented in Scotland to give the people of Scotland the standard of protection that the law requires.

Will you now:

- Implement and comply with the Health and Safety at Work etc Act 1974?
- Recommit the Scottish Government to the Rule of Law?
- Fulfil your responsibility to secure compliance with the law?
- Ensure that the Scottish Government accepts its responsibilities for devolved matters?
- Ensure that the Scottish Government accepts its responsibility for ensuring safe effective healthcare?

Your Justice Minister Michael Matheson has recently confirmed that he is refusing to accept any responsibility for COPFS and for Police Scotland. This is in relation to investigating the many suspicious deaths at Ayrshire and Arran NHS Board. There has been no investigation of these deaths.

Commented [RL1]:

In summary:

1. The people of Scotland are not getting the standard of protection of their safety that the law requires.
2. A swathe of legislation is not being implemented or complied with. A very large number of deaths and other harm are occurring as a result.
3. There is no intent by the Scottish Government or NHS Scotland to comply with binding legislation.
4. The Lord Advocate refuses to discharge his responsibilities to uphold the law.
5. There is not the legally required effective plan to comply with the law and so protect patients.
6. The Scottish Government abolished the body in 2011 that should have been making sure that the law was complied with on patient safety.
7. The Human Rights Act 1998 'right to life' is not being ensured. There is also a probable breach of the Scotland Act 1998 s57(2)).
8. The position of Scotland not having effective regulation on patient safety is illegal (HSWA section 18).
9. The Scottish Government has rejected the Rule of Law.
10. As a result of this and the failures to protect the 'right to life' of patients and others, we now fail two of the four main tests of a democracy (Copenhagen Criteria 1993). In rejecting the rule of law we also fail to meet the primary test and basis of being in the EU.
11. The Government is now also rejecting its responsibilities for a devolved matter.
12. The Government is refusing to govern.

As First Minister, you should recognize that these are very serious matters which require your immediate attention. To date these issues have not been addressed and have simply been passed to other Ministers or civil servants who have failed to act in accordance with their codes.

We very much look forward to a timely, personal response.

Yours sincerely

Rab Wilson

1 Nursery View
New Cumnock
Ayrshire
KA18 4NL

On behalf of ASAP-NHS

¹ 'The Four Health Systems of the UK: How do they Compare?' The Nuffield Trust and Health Foundation 2014

Appendix Public Safety and the Law

All deaths involving the public associated with work activities are covered by the Health and Safety at Work etc Act 1974. The Act requires effective precautions to be in place to prevent harm to both the public and employees. In Scotland there are not the effective precautions to prevent harm to the public. There are not the required investigations, there is not the enforcement to prevent recurrences, and there are not the prosecutions. Such deaths in Scotland are covered by the 'Scottish Work-Related Deaths Protocol.' This requires the main bodies to be involved and liaise through the handling of the incidents. It is between Police Scotland, COPFS and HSE. The protocol is not being followed and justice is not delivered in Scotland. COPFS has the responsibility for reviewing the protocol and its operation but have not done so following its own failures to follow it:

1. Glasgow bin lorry deaths: Following initial contact with HSE (Gold Command) on the day after the incident, there was no HSWA investigation and there still has not been into the s7 responsibilities of the driver. Lord Advocate and COPFS took the decision not to prosecute Glasgow City Council under HSWA without consulting HSE (FAI transcripts). Lord Advocate failed to understand HSWA, or 200 years of safety law and strict liability law. Safety law requires proof of negligence but criminal intent is not required. The Lord Advocate said he required proof of criminal intent but this is not required by law. HSWA is about risk at any time and does not require an incident for there to be a prosecution. The Solicitor General in the FAI said that the evidence was that the driver had not taken reasonable precautions to protect (self, colleagues or) the public. She showed that it should be investigated under the Act. The driver can still be prosecuted under s7 HSWA as the Act relates to ensuring safety at any time. It deals with responsibilities of an employee to co-operate with their employer to ensure safety, this is unaffected by the Lord Advocate's amnesty. With making the public statements, the Lord Advocate broke the Prosecutors Code. HSE can now be called in to undertake a proper HSWA investigation.
2. Ayrshire and Arran NHS Board Prosecutions: Two suicide incidents on the same day and which took COPFS two years to notify HSE. Eventually the Board prosecuted after 4 and 5 years (on the deaths of Nicola Black and Gary Nevin). HSE rarely involved in such cases.
3. 'Forty Suspicious Deaths at Ayrshire and Arran NHS: Still no independent investigation of the many deaths. Police Scotland and COPFS did a desk-top paper exercise relying on statements by the suspect the NHS Board, a novel approach to criminal investigations.
4. Lamara Bell and M9 Crash (5 July 2015): Failure in Police control room system design (e.g. safety critical and the system should always deliver safety). No HSE involvement.

5. Mental Welfare Commission Scotland 'Investigation into the Death of Ms MN public report (27 January 2016). Hospital covered up the death. HSE eventually did an initial investigation then nothing. Report shows all the essential safety requirements to ensure patient safety were missing. Prosecution is required and it is similar to Ayrshire and Arran cases. Lessons are not being learned across Scotland. If families do not press COPFS then actions do not take place. COPFS does not have HSWA competence.
6. Vale of Leven Public Inquiry: You called the inquiry as Cabinet Secretary for Health in April 2009. It related to 35-50 deaths associated with infection control. The inquiry made no reference to the binding legislation where compliance would have prevented the avoidable deaths (HSWA and COSHH). NHS Scotland still rejects the UK-wide law. Previously HSE inspected and regulated on this matter. Despite HSE being by default the regulator of last resort were not involved in the inquiry. This is a failed public inquiry. It took over 5 years, and cost £10 million, and still not meet its brief. This was a wasted opportunity to address the major problem of hospital acquired infection(HAI) in Scotland and the many avoidable deaths and costs that are associated. The OECD 2016 report states that with the latest data that your Health and Social Care Directorate could provide, in 2011, one in five patients in Scottish acute healthcare had HAI. The independent regulator of healthcare in Wales (HIW) reports that as well as the all the harm, each case costs the NHS £7,000 for MRSA and £10,000 for c-difficile. HAI deaths can be particularly unpleasant and undignified.
7. Penrose Inquiry: Similarly in 2008 you called a public inquiry into contaminated blood supplies (Hepatitis C and HIV). Department of Health now estimates about 30,000 across the UK infected. Once again the inquiry omitted the law that should have prevented it. NHS Scotland still rejects the law that should have prevented it. Previously HSE inspected and regulated on this. HSE were not involved in the inquiry. Failed public inquiry and wasted opportunity and costs.
8. NHS Boards' Critical Incident Reports: Critical incident reports from across all NHS Scotland Boards show many avoidable incidents, often deaths are associated with major breaches of HSWA. Incidents are often not recognised or reported, e.g. MWCS report into the 'cover up' of the death of Ms MN. FOI requests are obstructed and the act not complied with (e.g. NHS Lothian, Ayrshire & Arran).