

The Honourable Lord Pentland
Chairman
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

15th May 2017

Dear Lord Pentland

Tenth Programme of Law Reform

We would like the Commission to consider our proposal for reform of the legal framework applying to coaches, teachers and officials working in sports and physical activity so as to provide better concussion prevention and management. There is a pressing need for legal reform to secure participant welfare, reform would carry considerable resource benefits as well as significantly reducing participants' risk of traumatic brain injury, and the proposal has the potential to be suitable for the special process. We have addressed the Commission's criteria below.

First, the proposal is *important* because of its clear potential benefits. Scotland is the world leader in cross-sport concussion management. In 2015 the Scottish Government in collaboration with sportscotland and all major sports' representative organisations launched the unique 'Scottish Sports Concussion Guidance' providing clear direction on concussion management for all sports. To date, this remains the only national, cross sports approach to this issue globally. However, its effectiveness is undermined because too many coaches and officials are either unaware of it or choose not to follow it. Reform which ensures more people have even a basic level of

understanding would help ensure that better-informed decisions are made when people are faced with difficult choices.

The topic is *suitable* for the Commission because other bodies which may seem better placed to deliver widespread compliance have been unable to do so despite the strong consensus among the stakeholders. Our concern is that they are unable to compel clubs and individuals to undergo training without the force of law, but at the same time it is not desirable to alienate the coaches and match officials upon whom Scottish sport relies by placing undue demands or compelling them to participate in an onerous activity. Indeed, this was identified as a potential issue back in 2014, when progress towards the current Scottish Sports Concussion Guidance was launched with the support of Shona Robison MSP and Mike Russell MSP. Mr Russell intimated then that, if voluntary take-up was low, legislation would be considered. We believe that stage has been reached but it has to be approached sensitively, and the Commission is best-placed to determine how to best deliver a scheme that is simple, cost-effective and fit-for-purpose without using the blunt tool of the criminal law and without placing unnecessary demands on those whose involvement lets others play. By way of example, the Commission might wish to consider whether Scottish charities, public bodies or funding organisations could be statutorily required to solicit evidence from funding applicants that all their coaches etc. have either completed a short online course or attended a training event before their application will be considered; but there are other approaches which could achieve the same ends

The *resources* required of the Commission could be low, given the potential simplicity of the proposed reform and the materials that are already available - including the common protocol and the degree of consensus on this important issue that has already been established among stakeholders in Scotland. The proposers (and many others) will be happy to lend their expertise if required, and we are sure that any Commissioners or staff for whom this is a novel area of law will readily appreciate the health benefits and financial benefits of reform.

From a financial perspective, the arguments in its favour are also strong: a comprehensive review of hospital attendees in Glasgow over 1996 indicated that 2998 patients were diagnosed with mild traumatic brain injury (concussion), with recent health economic data from New Zealand and elsewhere suggesting this figure would now translate to an annual NHS Scotland healthcare cost of some £24 million. Further, to give some indication of the legal costs of worst-cases scenarios, Lucas Neville received EUR 2.75 million in compensation from his former school and a local health board in the Irish Republic. Statutory disability and other sickness benefits become payable in the worst of cases, and even if awards are covered by insurance policies the impact on premiums can be very significant.

To conclude, several high-profile concussion-related accidents recently, including the death of Benjamin Robinson in Northern Ireland (after which the coroner called for mandatory concussion training) and the severe injuries sustained by Lucas Neville and Zack Lystedt in the United States (the latter resulting in a model law on mandatory medical attention) have shared a common feature: sport-specific protocols were in place, but officials failed to follow them and nobody else stepped in to correct the error. The same problem is also evident in the caselaw on analogous issues such as traumatic spinal injury - see *Smoldon v Whitworth* [1997] PIQR P133, *Vowles v Evans* [2003] 1 WLR 607 and the Australian case of *Agar v Hyde* [2000] HCA 41. In their seminal work 'Nudge' (Yale University Press, 2008) Thaler and Sunstein explored how herd mentality can be avoided if trained individuals have the confidence to positively influence difficult decisions rather than deferring to a small number of 'experts' who may still get it wrong. Our simple proposal would help ensure that more people have concussion training and the confidence to use it, rather than the herd being followed.

Being mindful of the Commission's workload we have tried to keep our suggestions brief, but we are, of course, available to discuss them further if that would be useful. Brief information about the concussion cases mentioned above can be found at:

Ben Robinson <https://www.theguardian.com/sport/2013/dec/13/death-of-a-schoolboy-ben-robinson-concussion-rugby-union>

Lucas Neville <http://www.independent.ie/irish-news/courts/young-rugby-player-secures-275m-after-head-injury-in-schools-game-30120235.html>

Zack Lystedt <http://www.seattlemag.com/article/story-behind-zackery-lystedt-law>

Yours sincerely

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