

An IER response to Richard Baker MSP's
Consultation Paper on

Culpable Homicide (Scotland) Bill

By

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Introduction

The Institute wholeheartedly supports Richard Baker's proposed Bill on the basis that it represents a legal challenge to the relative impunity employers currently enjoy even when it can be shown that gross negligence leads to death.

The comments that we set out below raise some broader issues that we would like to raise as part of the consultation process. However we also wish to stress that, in relation to the legal reforms proposed, we agree that the Bill offers an opportunity to redress the failure of Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2008 to improve accountability for the criminal killing of workers and members of the public.

Background

The Bill proposed by Richard Baker deals with a widely acknowledged weakness in the CMCHA: that senior managers and directors are made exempt from liability for the offence of corporate manslaughter/homicide.

Section 18 of the Act, titled "No Individual Liability" assets that:

- (1) An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter; and
- (2) An individual cannot be guilty of aiding, abetting, counselling or procuring, or being art and part in, the commission of an offence of corporate homicide.

It was perhaps the most controversial part of the Act, and one that was widely condemned by the organisations and trade unions that had been most prominent in campaigning for reform. The political importance of this exclusion is indicated by the passage of the Act through the UK parliament. It was only after this part of the legislation was guaranteed by Government during its parliamentary progress that widespread

business support (including the support of the Institute of Directors) for the new law was secured.

In England and Wales, the common law offence of gross negligence manslaughter still exists as a mechanism to hold individuals to account for their part in corporate killings. In Scotland, the equivalent is the common law offence of culpable homicide. However, there is some evidence that one effect of the CMCHA is that in England and Wales, individual liability has been sacrificed for pursuing corporate liability. In 3 of the first 4 cases, decisions to proceed with corporate manslaughter prosecutions were accompanied by decisions not to proceed with charges against individual directors for the offence of gross negligence manslaughter. Some legal commentators have already referred to a nascent trend, with the threat of charges against individual directors being the 'bait'¹ for a corporate manslaughter charge: 'one can see how an offer for the company to plead guilty in exchange for the prosecution dropping charges against individuals might look like an attractive one to a director facing a risk of prison.'²

Just weeks before publication of the UK government's proposals, a Scottish government-appointed expert group had recommended in the strongest terms that liability be imposed on responsible individuals as well as the corporate entity. The report concluded that directors and senior managers should be individually liable to prosecution where there was clear evidence that they had direct responsibility for the death. The report also called for implementation of a secondary offence (referring to the Scottish criminal law concept of 'art and part') if it could be shown that a director or senior manager's actions were a significant contributory factor in the death.

Both recommendations were swept aside as the UK Government incapacitated the Scottish Parliament's autonomy on the matter by asserting that the UK law would also apply to Scotland. This was unusual since Scottish criminal reform has generally been supported by separate

¹ Morrison C, Hunt R and Ollier R. Corporate manslaughter – Are directors the bait? *Clyde and Co. Update*, July 2012. www.clydeco.com/uploads/Files/Publications/2012/CC001561_Are_Directors_the_bait_20.17.12.pdf.

² Meears-White T. Lion Steel, Lessons from the third corporate manslaughter prosecution. *DWF View Point*, 31 August 2012. <http://www.dwf.co.uk/news-events/dwf-press/2012/08/starvp-lion-steel-lessons-from-the-third-corporate-manslaughter-prosecution/>

legislation. It is also an area in which the Scottish Parliament had jurisdiction. It was therefore an unexpected and rather devious constitutional move (done literally with the stroke of a pen, by adding the Scottish legal term 'homicide' to the text) that removed any possibility of a more meaningful criminal justice response in Scotland. It was a law that was clumsily imposed by a Westminster Labour Government. The McConnell Government's consistent promise of a more strident approach in Scotland was quietly dropped.

The Proposals

Richard Baker MSP's current proposal to introduce a law of Corporate Homicide takes a different route to legal reform than that represented by the CMCHA. The draft Bill essentially seeks to restore and extend the common law of culpable homicide through the creation of two linked offences. The first offence will enable individuals to be held liable for deaths caused by recklessness, or by gross negligence. The second offence enables liability to be attributed to the organisation when an 'office holder' of the organisation commits an act or a failure that triggers an offence. This is known as the principle of 'vicarious liability'.

In both offences, there is an attempt to broaden the scope of the offence beyond the relatively narrow realm of senior managers and directors. Therein lies one issue that we wish to highlight about the intention of the proposed Bill and its potential effect. In relation to the individual offence, no distinction is made between managers and employees (potentially a problem in cases where organisations pin the blame on workers); in relation to the organisational offence, the person that triggers the offence is not merely a senior manager but any 'office-holder' acting on behalf of the organisation.

The danger here flows from the courts not adequately recognising the differences in the power to act that people at different levels in organisational hierarchies have. Workers do not have the statutory right in this country to stop unsafe work. Neither do they have authority over safety-critical decisions such as how many workers are allocated to a job, how maintenance schedules are organised, or how training provision is made. Managers do. The proposed Bill needs to take account of those power differentials, and ensure that the person liable for prosecution

should be a person with the necessary authority and power to prevent risks

In sections 4 and 5 of the draft Bill, the corporate offence can only be triggered by 'office holders'. This very clear route to vicarious liability is made for sound reason: that only office holders have the sufficient authority and seniority to be regarded as directing the organisation. Sections 1 and 2, which apply to the individual offence, is based upon no such logic. We understand that the Bill locates this offence much more generally on the broad terrain of culpable homicide. However, we would argue that, for all of the reasons outlined in the preceding paragraph, an individual offence conducted where it has also been shown that there has been an organisational offence should apply the same logic.

Given that sections 1 and 2 of the draft Bill seek a broader clarification of the current law of culpable homicide in Scotland, we do not see how this might be easily remedied. Certainly consideration should be made to emphasising that the clear intention of the Bill is to hold office holders responsible in other sections and in accompanying documentation.

In so far as they seek to fill the gap in the law between corporate and individual responsibility, the Baker proposals mark an attempt to retrieve some of the key messages of the policy-making process that preceded the Act. Richard Baker's proposals seek to pierce what we might call the criminal corporate veil. Corporate lawyers use the term 'corporate veil' to describe the shield that exists to protect the owners and shareholders of the corporation from liability for the harms caused by the corporations.

In criminal law, the CMCHA preserves a similar 'veil'. This veil is drawn when CMCHA permits the prosecution and conviction of organisations but not its senior officers. If a senior officer appears in court, it is only as a *de facto* representative of the organisation, not as the accused. The CMCHA, rolled out across the UK seven years ago to radically improve accountability for corporate killing, has thus actually come to exemplify the legal structure of impunity that exists for corporations, their owners and their directors.

The Problem of Enforcement

Yet the issues dealt with in the draft Bill do not touch significantly on another crucial lesson that must be learned about the failure of the CMCHA to have a significant impact. To be effective, every Act of Parliament – and this one is no different – requires mechanisms of enforcement.

In any case, the CMCHA looks unlikely to have any more than a minor symbolic effect on the state of corporate accountability. At the time of writing,³ there have been just 12 successful prosecutions. It is of particular interest to this consultation process that none of these have taken place in Scotland (although, there have been three convictions in Northern Ireland; see Table 1). Meanwhile, tens of thousands still die from work-related illnesses every year in the UK, and a very significant proportion certainly die due to legal breaches by their employers.⁴

Moreover, further scrutiny of these cases indicates other key failings with the enforcement of the law.

First, all of the companies successfully prosecuted thus far have been small to medium sized enterprises which could have been successfully prosecuted under the common law of manslaughter – the large, complexly owned companies for which the new law was ostensibly designed, have so far evaded its reach. Perhaps relatedly, all of the convictions secured thus far relate to offences involving a single fatality – while a key intention behind the law was to encompass multiple fatality incidents.

Second, when those cases have actually reached the courts, the level of fines has been relatively low. Following the passage of the Act, the Sentencing Guidelines Council had issued ‘definitive’ guidance on determining appropriate levels of penalties following successful prosecution under the Act. These guidelines marked ‘a very considerable backstep from a [2007] draft guideline’,⁵ which had proposed that fines should be calculated within a percentage range of company turnover, a link likely to proportionate levels of fine. The ‘definitive’ guidelines

³ 1st March 2015

⁴ Tombs, S and Whyte, D (2007) *Safety Crimes*, Cullompton: Willan.

⁵ Slapper G. (2010) Corporate punishment. *Journal of Criminal Law*, vol. 74, no. 3, page 183.

removed any link with turnover, with the key rationale for setting the level of fine being the 'seriousness of the offence' and factors contributing to this.

Calculated in this way, fines should 'be punitive and sufficient to have an impact on the defendant', so that the 'appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds'.⁶ In fact, and as Table 1 indicates, only one fine thus far has reached this putative minimum – although it should be noted that the fine of £500,000 was imposed upon a company which at the start of the trial was in fact in administration (Sterecycle [Rotherham] Ltd). Interestingly, a recognition of the poverty of current sentencing practice under the Act has prompted a new set of draft guidelines, currently under consideration, in which it is proposed that there be a more explicit link between fines and turnover – although these are to be aimed at medium and larger companies none of which, as we have indicated, have yet been convicted.⁷

There are more general problems with the use of monetary fines as a punishment. First, even the largest fines are never likely to be an effective sanction for large organisations. For example, the record £15m fine for a health and safety offence in Scotland levied on Transco Plc in August 2005 for killing a family of four in a gas explosion in Larkhall, amounted to 0.16% of the turnover of Transco's wider group of companies for the previous year.⁸

Second, because fines are levied on the corporation generally, rather than targeted at a particular group within it, those costs can be absorbed by the organisation in any form that senior management sees fit and off-set against a chosen budget heading. This might result in cuts to running or maintenance costs that may even worsen safety standards in an organisation (as probably was the case following the Transco fine); or it may result in price rises for customers and clients. The costs of fines may

⁶ Sentencing Guidelines Council (2010) *Corporate manslaughter & health and safety offences causing death. Definitive guideline*. London: Sentencing Guidelines Council: paras 22 and 24. http://sentencingcouncil.judiciary.gov.uk/docs/web__guideline_on_corporate_manslaughter_accessible.pdf.

⁷ *ibid*; Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines consultation, November. http://www.sentencingcouncil.org.uk/wp-content/uploads/Health_and_safety_corporate_manslaughter_food_safety_and_hygiene_offences_consultation_guideline_web1.pdf.

⁸ Tombs and Whyte, D, 2007, footnote 2.

even be passed onto workers - those most endangered by safety offences - in the form of wage cuts or adverse changes in working conditions.

Those three issues are clearly crucial for any proposed legislation to be implemented effectively.

The Limits to Scottish Reforms

To the extent that Richard Baker's proposals seek to pierce the criminal corporate veil, they are to be welcomed. However, they only go so far. They will not pierce the corporate veil that shields *owners* from liability. It is the owners who profit most from the reckless cutting of corners or from endangering people by not employing enough staff on the job, and yet it is owners who are least likely to be held to account when things go wrong. Even if the entire board of Transco had gone to jail for the Larkhall killings, the company's owners would have emerged unscathed. In 2005, a Bill to implement a system of fines levied directly against shareholders was proposed by Bill Wilson MSP but deemed to be a matter reserved for Westminster before it reached the Scottish Parliament.⁹ This indicates that a lack of autonomy over business-related matters will continue to stifle Holyrood's power to intervene in ways that can provide a broader range of interventions to more effectively respond with corporate killing.

The Smith Commission did not contemplate a remit over business law and policy generally. But it did include a review of the function and operation of the Health and Safety Executive in Scotland in a section titled "Additional issues for consideration." Pressure is mounting for further regulatory autonomy in Scotland.¹⁰ This can not be merely a footnote or a minor concern.

The national system of health and safety regulation in the UK - and crucially the enforcement of law - has been profoundly weakened on every measure of effectiveness in recent years.¹¹ The number of offences prosecuted for health and safety violations that endanger and kill workers and members of the public has halved in the past 15 years. Under the

⁹ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/18055.aspx>

¹⁰ Watterson, A, Gorman, T and McCourt, J (2014) *Occupational Health and Safety in Scotland: an opportunity to improve work environments for all*, Stirling: University of Stirling, <http://www.regulatingScotland.org/ohsscotland/ohsscotland.pdf>

¹¹ Tombs, S. and Whyte, D. (2010) *Regulatory Surrender: death, injury and the non-enforcement of law*, London: Institute of Employment Rights

Coalition, routine health and safety inspections have been withdrawn from the vast majority of UK businesses. Only workplaces deemed “high risk” are now inspected regularly. Those include nuclear power stations, offshore oil installations and chemical factories. Workplaces deemed to be “low risk” include most manufacturing factories, docks and quarries. Those are the workplaces that are effectively left to self-regulate. A recent analysis showed that 53% of deaths in UK workplaces occur in industries deemed to be low risk.¹² In order to address this, the Health and Safety Executive would need to be adequately resourced to the same level of other comparable European countries. This, according to available data, would mean at least a doubling in the meagre resources devoted to health and safety inspection in Scotland.¹³

Thus, we conclude that although we fully support the measures proposed in Richard Baker’s Bill, we do so noting that we can only regard those measures as a starting point in the development of effective policy to deal with corporate killing.

¹² O’Neill, R (2013) Low life: How the government has put a low price on your life, *Hazards Magazine*, January, <http://www.hazards.org/votetodie/lowlife.htm>

¹³ see Watterson et. al., footnote 9, page 15.

Table 1: Convictions under the Corporate Manslaughter and Corporate Homicide Act, 2007

Company	Death(s) in Question/ date (plea)	Sentence / Date of Conviction	Additional Notes
Cotswold Geotechnical (Holdings) Limited Company had 8 employees and a sole Director, Peter Eaton	Alex Wright, September 2008 (not guilty)	Fined £385,000 (no costs) - payable over 10 years, at £38,500 a year February 2011	A charge of gross negligence manslaughter against Peter Easton was dropped due to his ill-health. In May 2011, Geotechnical Holdings lost an appeal against the verdict, and within weeks it had entered into voluntary liquidation.
JMW Farm Limited (NI) c60 employees	Robert Wilson November 2010 (guilty)	Fined £187,500 and ordered to pay £13,000 costs May 2012	
Lion Steel Limited 142 employees	Mr Berry, May 2008 (guilty, but see Additional Notes)	Fined £480,000, plus £84,000 costs July 2012	Lion Steel had appealed to the court to try the corporate manslaughter charge separately from and subsequent to the charges against the individual directors. The judge agreed. After the trial against the three individuals had begun, the cases of gross negligence manslaughter against two of them were dismissed. Negotiations with the Prosecution with the company pleading guilty to corporate manslaughter - though the offence was not part of the ongoing trial - with all remaining charges against the individuals being withdrawn.

J Murray and Sons (NI) 16 employees	Norman Porter, February 2012 (guilty, but see Additional Notes)	Fined £100,000, and costs of £10,000; fine to be paid in annual instalments of £20,000. October, 2013	The guilty plea of J Murray and Sons was accompanied by a decision not to proceed with the prosecution for gross negligence manslaughter of one James Murray, director and owner of the company.
Princes Sporting Club Ltd	Mari-Simon Cronje (11-year-old), September, 2010 (guilty)	Fined £134,579.69, November 2013	Fine was equal to the entire assets of the company.
Mobile Sweepers (Reading) Ltd, sole director, Mervyn Owens Described in reports as a "small limited company"	Malcolm Hinton, March 2012 Guilty	Fined £8,000 plus costs of £4,000, February 2014.	Company's sole director, Mervyn Owens was convicted of gross-negligence manslaughter in relation to the death of Malcolm Hinton. He was fined £183,000 and £8,000 costs. He was ordered to pay the fine within 12 months, or face a three-year jail sentence. He was also banned from holding the position of a director for 5 years.
Sterecycle (Rotherham) Limited c50 employees	Michael Whinfrey, January 2011. (no plea entered since company was in administration at the start of hearings)	Fined £500,000, November 2014	The company was in administration at the time of prosecution.

Cavendish Masonry Ltd, a sole director company	David Evans, 2010.	The company was fined £150,000 and ordered to pay £87,000 in costs, November 2014.	
Diamond & Son Timber Ltd (NI) 50 employees	Peter Lennon, September 2012 (Guilty)	Fined £75,000 plus £15,832 costs in January 2015	
Peter Mawson Ltd	Jason Pennington, October 2011 (Guilty)	Fined £200,000, February 2015	Peter Mawson, owner of the company, pleaded guilty to HSWact offence and was sentenced today to: eight months in prison, suspended for two years; 200 hours unpaid work; a publicity order to advertise what happened on the company website for a set period of time, and to take out a half page spread in the local newspaper; and pay costs of £31,504.77.
Pyranha Mouldings Ltd 90-100 employees	Alan Catterall December 2010 (not guilty)	Sentencing due March 2015	Company director Peter Mackereth, who designed the oven, was also found guilty of two breaches under the HSWAct.
Cavendish Masonry Ltd	David Evans, 2010.	The company was fined £150,000 and ordered to pay £87,000 in costs, November 2014.	