



Proposed Culpable Homicide (Scotland) Bill

**UNISON Scotland's Response to Proposals to amend the law of
Culpable Homicide in Scotland**

March 2015

INTRODUCTION

UNISON is Scotland's largest trade union representing around 160,000 members working in the public sector. Our members work in local government and the Health Service, as well as the Community and Voluntary and private Sectors.

UNISON Scotland welcomes the opportunity to respond to the consultation on Richard Baker MP's proposals to amend the law on Culpable Homicide.

GENERAL COMMENTS

UNISON Scotland responded positively to the Scottish Government Justice Department Expert Group's consultation on Corporate Homicide in June 2005 as we believed at that time that the legal provisions in Scotland were ineffective and that strong and effective legislation needed to be introduced to send a clear message to organisations, shareholders and senior directors about the importance of safe working practices and their accountability when death or serious injury occurred. The Justice Department's deliberations were overtaken by the UK Government's consultation on the Bill that led to the Corporate Manslaughter and Homicide Act 2007. However, this Act has proved to have no impact at all, with not one single prosecution having been served on an employer in the time since it was introduced nor any reduction achieved in the level of deaths caused by the conduct of companies.

The law as it stands, as stated in the consultation, is incapable of dealing with serious crimes committed by large companies. It appears to have one rule for individuals; one for SMEs and another one for large companies which seem to be above the law.

The primary purpose of Corporate Homicide legislation should be to regulate behaviour and to serve as a deterrent. The law must therefore be framed in such a way that prosecutions will succeed and where prosecutions succeed that the punishment must fit the crime. On that basis we believe it is also important that, in appropriate circumstances, individual managers and directors should be prosecuted and appropriately punished.

We believe that Justice must also be served. Where death occurs because of the reckless or grossly negligent conduct of a company, a prosecution under the Health and Safety Act is meaningless to a victim's family. They will only see justice being served if the company, and where appropriate its managers and directors, are prosecuted of a crime with the appropriate moral opprobrium. That is Culpable Homicide.

Richard Baker's proposed Bill meets all of these important issues and we therefore fully support the Bill's proposals and its aims and objectives.

QUESTIONS

General

Q1.1 Do you have any comment to make on the need for legislation of this type as detailed in this paper?

We believe there is a very strong need for legislation of the type detailed in the consultation paper. The current law does not work. Neither common law nor the Corporate Manslaughter and Corporate Homicide Act 2007 are able to deal with the most serious crimes committed by large companies. We need a law that will ensure that individuals, SMEs and large companies are equal before the law and all equally capable of being convicted of culpable homicide. We need Corporate Homicide legislation that will serve as a real deterrent and will ensure that justice is done for the victims of the crime.

There have been many numbers of work related fatalities in Scotland and not one large company or individual director has been held to account following the deaths of workers or members of the public.

Successful charges of manslaughter have been brought against directors of smaller companies, but not against larger companies. This practice therefore discriminates against smaller business and the law should be amended so that it does not discriminate against any group of employers and that all are treated equally and fairly.

The proposals set out in Richard Baker's paper will resolve all of the above issues.

Q1.2 Do you have any comment to make on the proposals outlined which suggest that there should be two different statutory kinds of culpable homicide – culpable homicide by causing death recklessly and by gross negligence?

UNISON welcomes the proposals for two new statutory offences of culpable homicide by causing death recklessly and of culpable homicide by gross negligence.

We agree that there is the need for the two categories of culpable homicide set out in the consultation paper. There will be an overlap between causing death by recklessness and causing death by gross negligence but there will equally be areas where conduct may fall into one description but not the other. We believe that recklessness and gross negligence are equally culpable and where companies cause death by either conduct, they ought to be guilty of corporate culpable homicide.

Q1.3 Do you have any comment on the definitions of organisations and office holders in sections 8 and 9 of the draft Bill?

The STUC welcomes the broad and fully inclusive definition of an organisation outlined in Section 8 of the Bill and welcome the fact that this does not focus solely on incorporated bodies. We believe the legislation

has to apply to all employing bodies, including government departments, partnerships and other non incorporated bodies. We welcome the provision to amend this definition as necessary.

We believe that the organisations caught by the Act should be as wide as possible and the definition of office holders whose conduct can result in a company being convicted should be as wide as possible. Companies, particularly large companies, operate on a system of delegating authority down to medium and low levels of management. The definition of office holder in section 9 is therefore appropriate.

Q1.4 Do you have any comment to make on the provisions applying the new offences to Ministers, civil servants and Crown bodies in the same way as they apply to natural persons and organisations – as set out in sections 12 and 13 of the draft Bill?

UNISON believes that Crown immunity for prosecution should be removed. It is inconceivable that Crown employers including Scottish Ministers should be given immunity from prosecution when the purpose of this Bill is to ensure that any natural person or organisation, irrespective of size or status, whose actions lead to the death of an individual is accountable for their actions in a Court of Law.

We believe that it is important that the law applies consistently and we therefore fully support the provisions of the Bill applying to Ministers, civil servants and Crown bodies.

Culpable homicide by causing death recklessly

Q2.1 Do you have any comment to make on the way in which causing death recklessly is defined in paragraph 3.5 of the proposal and detailed in section 2 of the draft Bill?

We welcome the definition of causing death recklessly as it covers those that act deliberately and through this behaviour cause death. However, it also covers those who may not be aware of the risk and consequences of their actions but should have been aware of these consequences.

This is based on the Draft Criminal Code for Scotland and is a model that we feel clarifies the definition of reckless behaviour, through the use of an objective standard, ensuring that ignorance of potential risk to life is also punishable under the offence.

We also appreciate the difficulty of attributing liability for this offence to companies and recognise the importance of the additional offence that will close the loopholes in the current legislation.

Q2.2 Do you have any comment to make on the proposal that organisations be made responsible for the actions of their employees for this offence (made vicariously liable) as proposed in section 4(1) of the draft Bill?

UNISON sees this as one of the key proposals and fully supports it. Modern businesses work on the basis of delegating authority and the law should reflect this with a model of attributing liability to the company based upon vicarious liability.

We believe that making organisations liable for the actions of their officers and employees will ensure that organisations, their directors or managers take personal responsibility for ensuring that all necessary precautions are taken to meet existing legal obligations to their workers and the public.

We accept the difficulties outlined in section 3.6 but do not believe that these concerns should prevent the inclusion of vicarious liability within the legislation. 7

Q2.3 Do you see any difficulties in how aggregation, as proposed in section 4(2) of the draft Bill, will work in practice?

No. It will simply be a question of what evidence can be produced. Just as we believe the vicarious liability component is essential and necessary as it reflects modern business, so too does the concept of aggregation proposed in section 4(2) of the draft Bill.

We are of the view that the issues of aggregation require to be addressed and the inclusion of section 4 (2) will ensure that the Courts consider the aggregation of the actions of different individuals within the company, and at different times, when considering whether the offence has been committed.

We realise that, in practice, the issue of attributing liability through aggregation may well lead to instances where individuals may have acted in different ways and for varying reasons. We believe that this eventually will be offset by the increased responsibility placed on organisations to ensure that their officers and employees are fully aware of what is expected of them.

Culpable homicide by gross negligence

Q3.1 Do you have any comment to make on proposals set out in paragraph 3.7 to reintroduce culpable homicide by gross negligence into the law in Scotland?

We agree with the proposal and believe that the re-introduction of this offence is imperative if it is to be possible to hold organisations directly liable for the offence of culpable homicide. We welcome the fact that there is no requirement to identify any responsible individual connected with the organisation or prove any mental element to the crime. The opportunity to make organisations vicariously liable for the actions of their officers is also welcome.

Q3.2 Do you have any comment to make on how these proposals are defined in section 5 of the draft Bill?

We agree with the proposals as defined at section 5 of the draft Bill as we support the concept of management failure being used as the basis on which liability can be attributed to the organisation. We do not have a problem with the proposals being based on the Draft Corporate Manslaughter Bill but welcome the inclusion of a number of additional elements that again clarifies what is expected of organisations and their officers namely:

1. A duty of care being placed on organisations to organise their activities in a manner that will not cause harm to workers and members of the public. We welcome that this duty of care is placed on the organisation other than a “senior manager” or any other narrowly defined group of individuals.
2. The inclusion of a provision that allows the management failure to be viewed as the cause of death even although the immediate cause followed the failure by an individual. Trade unions believe that this will put an end to the corporate veil, a protection that has effectively rendered organisations immune from prosecution in Scotland following work related deaths.

Q3.2 Do you see any difficulties with what is proposed to define what is meant by that offence where it is committed by a natural person in section 3, and by an organisation in section 5, of the draft Bill?

We do not see any difficulties in this area. The law ought to apply consistently and evenly between individuals and organisations. We believe that the definitions set out in sections 3 and 5 achieve that objective.

Q3.3 Do you have any comment to make on the definitions of “duty of care” and “gross breach” as proposed in sections 6 and 7 of the Bill?

UNISON agrees with both terms. “Duty of care” and “gross breach” are terms which are well known to the courts and the law.

One potential difficulty could be that the natural person may not be in full possession of the facts regarding potential actions or behaviours that could be classified as a breach of their individual duty of care. However, in workplaces we see this as the employer’s responsibility to ensure policies and procedures are in place and training provided to make individuals at every level aware of what is expected. If employers take this responsibility seriously or, indeed are forced to do so, the net result will be that everyone will know what is expected of them.

Sanctions

Q4.1 Do you have any comment to make on the penalties detailed in section 11 of the draft Bill?

UNISON agrees with the penalties set out in section 11 of the draft Bill. We believe that those who are found to be criminally liable for the deaths of other individuals under the terms of the proposed Bill should be liable to an equivalent range of penalties, including terms of imprisonment as others convicted of involuntary killing elsewhere in our society.

However, prosecution of an organisation might not necessarily lead to improved systems of work being introduced. We would support the introduction of remedial orders as this would ensure that management behaviours or failures that led to the breach that ultimately resulted in the death would have to be addressed. Failure to do so could result in any individual given responsibility for developing and implementing necessary remedial action being prosecuted and potentially facing imprisonment for failure to comply with the order.

We believe the sanctions proposed for corporations and individuals, including orders for remedial action to be taken should act as a deterrent to organisations and hopefully an encouragement to review management practices and organisational cultures to prevent or, at the very least, reduce the risk of fatal injury to their workers or members of the public.

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