

9 March 2015

Richard Baker MSP
Room M1.12, Scottish Parliament
Edinburgh EH99 1SP
By email to richard.baker.msp@scottish.parliament.uk

Dear Richard,

Culpable Homicide (Scotland) Bill: Consultation Paper

I write in response to your consultation paper on a Culpable Homicide (Scotland) Bill.

I would not want to suggest that the law in this area is satisfactory. The general law of homicide in Scotland is in need of reform and, until recently, this formed part of the Scottish Law Commission's formal programme of work, although work on this area had been delayed to accommodate other priorities. Homicide has now, unfortunately, been removed from that programme.

In the context of corporate homicide, it seems particularly unsatisfactory that there should be cases where extremely serious breaches of the Health and Safety at Work Act 1974 result in death, and yet the fact of death is not formally part of the offence of which the organisation is convicted. You discuss one such case in your foreword. I am less sure that any redefined offence of culpable homicide could deal with cases such as the second one discussed in your foreword, where no criminal proceedings were taken. If Crown Office considered that no breach of health and safety law could be established in that case, it seems unlikely that any prosecution for culpable homicide (however defined) could succeed. You quote from a conclusion in the Fatal Accident Inquiry that a failure to detect a significant fault in that case "possibly – but only possibly – resulted in the crash". Your Bill, however, requires – for obvious reasons – that it be proved (beyond reasonable doubt) that the natural person or organisation charged with culpable homicide caused the death of another person. Such a requirement could not be satisfied by a finding of "possible" causation.

There are more general difficulties which the proposals in the Bill, as follows:

Legislative competence. Your consultation paper states in the Foreword that the Scottish Parliament "has so far failed to act" on this issue and notes simply that after the report of the Expert Group on Corporate Homicide was published in 2005, "the Scottish Ministers did not introduce a Bill on the issue" (para 1.14). This was because the Scottish Executive concluded that legislation on this topic would be outwith the competence of the Scottish Parliament (see e.g. *The Corporate Manslaughter and Corporate Homicide Bill* (House of Commons Library Research Paper 06/46, October 2006) 43-44; *The Scottish Criminal Justice System: Legal & Administrative Arrangements* (SPICe Briefing 11/54, July 2011) 4).

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It is surprising that the issue of legislative competence is not mentioned in the consultation paper. It is difficult to see how this proposal could be within the competence of the Scottish Parliament. It clearly has a “more than loose or consequential connection” (*Martin v Most* [2010] UKSC 10 at para 49 per Lord Walker) to the reserved matter of health and safety. Your foreword states that the Bill aims “to help foster a greater focus on health and safety in organisations”. Although the Bill purports to be concerned with “culpable homicide” in some general sense, its effect is of most significance in respect to health and safety, which bolsters the conclusion that it is outwith the Parliament’s competence (s 29(3) of the Scotland Act 1998). I note that in setting out the aim of the legislation in your foreword (fourth paragraph from end) you refer solely to the liability of employers and organisations.

I note that although the Smith Commission did consider (at para 96 of its report) that the “functions and operations of the Health and Safety Executive in Scotland” should be reviewed, this was on the basis that health and safety would continue to be a reserved matter.

Proving culpable homicide by aggregation. The key element of the Bill is its proposal (in section 4(2)) that an organisation may be guilty of culpable homicide “if the acts done by a number of different office holders at different times, when considered together, are sufficient to constitute” that offence. It is not easy to see how this would operate. How is a jury expected to assess when these actions are “sufficient” for these purposes? What test applies?

It may be that the answer is simply that the test will be met when a corporation ought to have been aware of an obvious and serious risk of death (cf section 2). But, if so, it is difficult to see how this test goes any further than the one already applicable under section 1 of the Corporate and Manslaughter and Corporate Homicide Act 2007, where a company is guilty of corporate homicide where it has caused a person’s death through “a gross breach of a relevant duty of care” owed to the deceased. Section 1 of the 2007 Act permits a form of aggregation, in that the jury must consider whether the “way in which [the organisation’s] activities are managed or organised by its senior management” amounted to such a breach.

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Discrimination and the European Convention on Human Rights. You suggest (at para 2.21) that the law “creates a situation where two companies can engage in identical conduct through its managers resulting in death” but only one will be liable for culpable homicide. This is surely wrong. If the conduct were truly identical there would be no difficulty in prosecuting both for culpable homicide. The practical difficulty arises because the operation of a large organisation is *not* identical to that of a small one, and a fatality can therefore be caused by a large organisation in a manner which has no possible equivalent in the operation of a small organisation. That does not mean that the law relating to the liability of large organisations is adequate, but it does mean that the argument that the current law contravenes Article 14 of the ECHR (para 2.29) lacks substance. (In any event, such an argument could not be made by reference to Article 14 alone, which creates no free-standing right.)

I am sorry to have to respond negatively to proposals for reform of such an important area of law. I have difficulty, however, in seeing how these proposals are within the legislative competence of the Scottish Parliament, or how they could be expected to make any difference in practice if they were enacted.

Yours sincerely,



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