

Consultation by Claire Baker MSP, Mid Scotland and Fife Region on a Proposed Culpable Homicide (Scotland) Bill

Response by BLM

Who we are

1. On 1 May 2014, the Scottish law firm HBM Sayers - operating from both Edinburgh and Glasgow - formally combined with the English-based law firm, Berrymans Lace Mawer, creating BLM. BLM now operates from 14 offices across the UK and Ireland.
2. We are a leading risk, regulatory, commercial and insurance law business, with over 200 partners and more than 800 legal specialists. Handling in excess of 65,000 claims at any one time, we act for some of the UK's largest public sector organisations and corporations as well as many of the biggest insurers in the UK.
3. We have considerable experience in acting for both companies and individuals from initial incident through regulatory investigations and subsequent report to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of criminal prosecutions and fatal accident inquiries.

Introduction

4. We are opposed to the proposed Bill at this time. We hope to explain why in this response.

Legislative need and proportionality

5. We start from the premise that legislation should not be passed unless that is better than no legislation being passed. It follows that the burden of proving a need for legislation rests with those proposing it.
6. If a legislative need is proven then legislation to meet any such need should be enacted proportionately (i.e. it should not go further than is necessary).

What is the proposal?

7. The proposal is for "a Bill to amend the law of culpable homicide to ensure that where loss of life is caused by recklessness or gross negligence of individuals, companies or organisations that, where proved, the wrongdoer can be convicted of the offence that reflects the appropriate seriousness and moral opprobrium of what occurred."

Individuals

8. Insofar as individuals are concerned, the Foreword to the proposal essentially concedes that there is no real legislative need: "Where an individual causes death by recklessness or gross negligence, it is relatively easy for COPFS to secure a conviction for culpable homicide". We consider that the current common law is fit for purpose on the prosecution of individuals for culpable homicide. There is no need for legislative interference. By covering individuals, the proposed Bill is at least disproportionate.

Small companies and organisations

9. Referring to very small companies, the Foreword to the proposal notes that where such a company "causes death in circumstances that the death can be linked to the gross breach of duty of its senior management (a fairly easy thing to prove in relation to very small companies),

it is relatively easy for the COPFS to secure a conviction of corporate culpable homicide under the Corporate Manslaughter and Corporate Homicide Act 2007". This strongly suggests that there is no legislative need to interfere with the position regarding such companies and organisations. The proposed Bill would, therefore, also be disproportionate in covering those.

Medium sized and larger companies and organisations

10. So, even on the proposed Bill's own premises, the perceived legislative need is only for medium sized and larger companies and organisations to be held more accountable under criminal law. It appears that these entities - and certain of those employed within them - are the real target of the proposed Bill.

Can it be said that the current legislation is ineffective?

11. The Corporate Manslaughter and Corporate Homicide Act 2007 came into force, UK-wide, on 6 April 2008. The 7 pages of "context" in the present proposal (pages 29 - 35) do not analyse this Act. As part of Scots Law, this Act should be considered as present day context. We provide such context by quoting from Gloag and Henderson, *The Law of Scotland*, 14th edition, 46.03 at the foot of page 1318 and top of page 1319 as follows:

"As a general rule, a company cannot be guilty of a criminal offence which it, unlike its human agents, is incapable of committing as an entity. Although it was formerly held incompetent to charge a company with a common law offence involving mens rea, the Corporate Manslaughter and Corporate Homicide Act 2007 permits a company to be convicted of corporate homicide where the ways in which the company's affairs are managed or organised cause a person's death and amount to a gross breach of a duty of care owed by the company to the victim. The duty of care is the duty of care owed by the company to the victim under the law of negligence. A "gross" breach of that duty is where the conduct amounting to the breach falls far below what can reasonably be expected of the organisation in the circumstances. The company will be liable if the way in which its activities are managed or organised by its senior management is a substantial element in the breach. It is for the judge to decide whether there has been a breach of the duty of care, but for the jury to decide if it has been a "gross" breach of that duty. A court may make a remedial order requiring the company to remedy the breach and any other matter or defect in the organisation's policies. On conviction, the company may be fined."

12. We respectfully agree with the above statement of Scots Law. The burden of proving a need for legislative change to the law as set out here rests with those proposing it. Neither absence of convictions in Scotland nor any lack of Scottish prosecutions is self-proving of any such need. Need can only be assessed in the context of explanation, with reference to specific real-life examples, of why there have been no convictions and / or why prosecutions may not have been brought by COPFS. No such assessment or explanation is provided in the present proposal. A need for change has, therefore, not been demonstrated.

Other relevant observations relating to individuals, companies and organisations

13. Inasmuch that the real target of the proposed Bill seems to be medium to large companies, it should be noted that the fines imposed on such companies for breach of existing health and safety legislation are higher than the equivalent fines for smaller companies. That is because existing law takes turnover into account when determining any financial penalty.
14. The proposal alludes to discrimination against small companies on the basis that it is said to be easier to prosecute them under the 2007 Act than medium to large companies. That may be

correct but presently there is no Scottish case law to demonstrate any need for legislative change.

15. Comparisons are made in the proposal between Scotland and England and Wales on fatalities. Approaching these matters on a holistic basis, it is worth noting that the level of civil damages which may be awarded against companies who negligently cause deaths in Scotland are significantly higher than the comparable level in England and Wales. South of the border, a bereavement award is presently capped by statute at £12,980. Such an award is available to a more limited class of claimants than the equivalent award in Scotland. North of the border, the comparable award is uncapped and has been known to reach up to £140,000. On access to justice in respect of the civil law of damages, it is worth noting that those pursuing claims for the loss of a loved one as a result of personal injury negligently caused will benefit from Qualified One-Way Cost Shifting (QOCS) when that is introduced to Scotland, probably later in 2019. Reference is made to s.8(1)(a)(ii) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.
16. Those proposing and considering legislation should always be mindful of unintended consequences. The proposed Bill may expand the categories of conduct which may lead to an individual, unconnected with any company, being convicted of the very serious crime of culpable homicide. That would seem to be a potential unintended consequence of a Bill whose real aim seems to be to further target big business rather than individuals.
17. Also on unintended consequences and insofar as the proposed legislation may make it easier to convict individuals within companies for decisions and actions taken as part of company business, that may drive the best quality individuals away from Scotland, thereby perhaps worsening - not improving - good governance. Businesses, of themselves, may be discouraged from setting up in Scotland. Scotland should think carefully before taking any step which may discourage business.

Conclusion

18. For the reasons given, we are presently opposed to the proposed Bill.