Taking offence

Dave Whyte is a member of Scotland’s expert group on corporate homicide. He thinks the government’s draft corporate killing bill for England and Wales is an employer-driven cop out. Here he explains why.

In April 2005, shortly after the publication of the draft Corporate Manslaughter Bill for England and Wales (Hazards 90), a Scottish Executive Group on Corporate Homicide was set up to consider whether these proposals were appropriate for Scotland. The group comprises civil servants, academics, lawyers, STUC and business representation. Because we were determined to introduce a law that would be an effective deterrent, rather than the half-hearted business-friendly compromise that produced the Draft Bill in England and Wales, we decided to kick the government’s proposals into touch.

The academics and the trade union representatives on the Group argued that the guilty ‘senior management’ test in this Draft Bill -- if a boss isn’t responsible then the firm can’t be done -- would just replicate the flaws in existing laws and tie the hand of prosecutors.

We also argued that without a tightening of the law on individual offending, directors and senior managers will be able to use the company as an alibi for their own negligence and culpability.

Killer report

Our report was sent to the Scottish justice minister in November 2005. We concluded that a new offence of corporate killing should be introduced for organisations guilty of recklessness resulting in the death of employees or members of the public.

We said an organisation should be liable for this offence where it fails to put policies, practices and systems in place to ensure the health and safety of its employees and those affected by its activities. Corporate liability should be based on the concept of management failure.

This approach would impose an evidential burden on the organisation. In other words, the organisation would not be held liable for the offence if it could show that it complied with the law and that it had policies and procedures in place which should have prevented the death.

The group wanted to ensure that individual directors and senior managers could no longer use their organisations as a shield. For this reason, we proposed that offences by individuals would be an essential component of an effective law. We proposed two new offences.

We recommended a new stand alone offence for culpable individuals acting with managerial authority who are directly responsible for the death of employees or members of the public. And we recommended the introduction of a secondary offence to allow individual directors or senior managers to be prosecuted when their actions or omissions contributed significantly to a corporate killing -- a type of ‘aiding and abetting’ charge.

We also proposed the introduction of new penalties including corporate probation, equity fines and community orders (Hazards 87). Penalties for individuals should include disqualification from senior office in an organisation and imprisonment.

Deadly consequences

Deadly occupational diseases are covered in our recommendations. We concluded that “the new offence would cover any death caused by recklessness, whether that death results from an immediate injury or whether it is the outcome of a long-term industrial illness.”

Because of disagreements, the report judged the issue of criminalisation of serious injuries, concluding “further consideration should be given” to the issue. This leaves a major legal anomaly. By criminalising deaths and not serious injuries, we are saying corporate killing should be regarded as a crime of violence, but corporate maiming and injuring should not.

We should not understate the strength of the forces that are gathered in opposition to criminalisation. The corporate lobby represented by the CBI and the Institute of Directors, satisfied the government’s proposals into the legislative timetable and that it had policies and procedures in place which should have prevented the death.

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with the settlement they have won in the Draft Bill for England and Wales, will pull out all stops to avoid a more accountable and punitive law. We should expect nothing less. After all, it is their members who are in the frame. The CBI representative on the Scottish Executive Group trawled out the two oldest and least convincing arguments in the book: A tough law will provide a disincentive to the best directors; and companies will leave the country – the ‘myth of capital flight’ – if the risks of being caught are too high. When challenged, he failed to provide any evidence to substantiate either claim. In 10 years of studying corporate crime and regulation, I have never come across a shred of material evidence that supports either of those arguments. Both companies and their directors have too much to lose by leaving the country. In Canada and in Australia, there has been no capital flight since their laws were introduced. And there is no shortage of directors in those countries queuing up to receive their share options and annuities.

That said, what sort of society would want directors and companies that invest in the country for the sole reason that they can get away with killing their workers? Corporate lawyers in Scotland have argued existing provisions of the Health and Safety at Work Act are deterrent enough. Some point to the Transco case in which the gas supply company was prosecuted and fined a record £15m for killing a family of four (Hazards 92). But a fine does not carry the same gravity as a prosecution for an offence of violence. And the average fine for killing is not £15m, but just over £30,000, a sum that would not hurt major firms. And even the largest fines will have a negligible impact on major firms (Hazards 90). The Draft Bill must be improved. We will only get one chance at this reform for a long time to come. It is important that we get it right. At the same time we must insist, as the House of Commons Select Committee has (right), that redrafting of the Draft Bill for England and Wales to give it the necessary teeth does not mean a delay in the implementation of the law.

The report warns that the bill, as currently drafted, may let some big firms off the hook and create “perverse” incentives to treat health and safety less seriously, by allowing senior directors to delegate decisions on health and safety to more junior staff in order to avoid the danger of prosecution. And it might mean large corporations escaping prosecution over a death at one of a number of factories or sites, while a smaller company with only one factory would find itself in court over an identical incident.

The report urges the government to introduce an additional offence of “secondary liability for corporate manslaughter” to be used against individuals personally responsible for the organisation’s failing. The committee also called for a broad range of possible penalties for those found guilty of corporate manslaughter, to allow courts to reflect the individual circumstances of the death. The government says there is now insufficient parliamentary time to progress the Bill in the 2005/06 parliamentary session, so it unlikely to be implemented this year.