



THOMPSONS SCOTLAND

**BRIEFING PAPER –
CORPORATE KILLING**

PART 1

**COMPARISON BETWEEN SCOTTISH
AND ENGLISH PROPOSALS**

PART 2

COMPANY LINE AND RESPONSES

SCOTLAND*Recklessness as basis of culpability*

- Looks at what the employer knew and ought to have known
- Important as imposes object standard making it more difficult for the employer to get off the hook

Management failure

- This is not restricted to Senior Managers or even Senior Management. It is simply management at an appropriate level which properly reflects the reality of the way companies operate

Switch of onus of Proof

- The group propose that the onus of Proof should shift to the employers to prove a defence if a primary breach is established. Employers are far more readily able to put their hands onto evidence which will establish recklessness or a lack of recklessness than any organisation, including the Crown Prosecution Service, attempting to build a case.

ENGLAND*Gross negligence as basis of culpability*

- The definition is extremely complicated and confused. It doesn't seem to add anything to the existing law

Senior Managers

- The term is just as confused as "controlling mind" used in the common law.
- It ignores the reality of the way companies are organised.
- It will allow companies to organise themselves deliberately to avoid culpability.

There is no comparison in the English Legislation

Individual Directors Offence

- Despite companies having a separate legal personality from those who run them the reality is that it is Directors who have the power to ensure that companies meet their duties to health and safety and it is the conduct of Directors on a strategic level which leads to the death of workers. Accordingly, to focus those Directors' mind in a way that an offence against the company alone cannot do it was considered a corner stone of the proposals that there be an individual Directors' offence carrying with it the possibility of imprisonment. Some say culpable homicide already serves this purpose but no Director of a Scottish company has ever been found guilty of culpable homicide.

Director / Managers offence of making a significant contribution to the death

- This is required for all of the reasons discussed above.

All employers are covered by the Scottish legislation

- The proposals cover Partnerships, charities, friendly societies and anybody else who employs workers.

There is no individual Directors' offence in the English Legislation

There is no comparison in the English Legislation

The English Legislation only covers companies incorporated under the Companies Act

- It does not cover partnerships etc

Extra territorial affect

- The Scottish proposals extend to offences committed by Scottish companies abroad. It is very important in terms of political will and also on a practical level given our North Sea industry.

Crown Immunity

- The Scottish proposals remove completely the anachronistic concept of Crown Immunity

Penalties

- The Scottish proposals include a very wide range of interesting, and hopefully very effective penalties including equity fines, corporate probation, corporate health and safety administrators, corporate community service orders and in appropriate circumstances imprisonment.
- This gives the court flexibility to achieve a just outcome: Very bad employers will be seriously punished; others may simply require guidance or education; and security of employment can always be given proper consideration.

The English Legislation does not apply to the conduct of companies abroadThe English proposals partly remove Crown Immunity

- Interestingly decisions at a strategic (dare we say at Ministerial level) continue to attract Crown Immunity. Why should Crown Immunity persist in the 21st Century?

Penalties

- The English legislation only provides for fines.
- This is very inflexible and tends to result in some companies receiving fines which are patently too light while other companies receive fines which threaten the security of employment for their workers.

COMPANY LINE ON
SCOTTISH PROPOSALS FOR CORPORATE KILLING

<u>THE COMPANY LINE</u>	<u>RESPONSE</u>
<p data-bbox="167 488 785 564"><i><u>Scotland and England should be the same</u></i></p> <ul data-bbox="220 618 785 828" style="list-style-type: none"> • Uniformity is a good thing. • It is unfair to have a law in Scotland different from the law in England • It will lead to confusion 	<ul data-bbox="858 618 1433 2038" style="list-style-type: none"> • Two bad laws do not make a good one. If England's law is inadequate why should a law in Scotland also be inadequate. • It is up to England and Wales regarding a law which they require. If they wish to have regard to proposals in Scotland so much the better • Scots criminal law is different from England's anyway (see the very pertinent example of corporate manslaughter for England and Wales and culpable homicide for Scotland). There are many other examples in criminal law. No one ever complains it should be the same. • Our criminal court and appeal system is different. The highest Court of Appeal is in Scotland • There are many other examples of Scots Law being different right across the board including insolvency, family law, property law, commercial law etc. • Our education health and transport are different. • Why do we have a Scottish Parliament if it was not envisaged that there would be different legislation in accordance with the wishes of the Scottish people.

Flight of Capital

- Companies will be afraid to come to Scotland and will go elsewhere.

- This is the usual scaremongering
- It has been put forward on a number of occasions eg minimum wage.
- The scare stories did not happen
- If it is envisaged that a company will not come to Scotland because they may be prosecuted for culpable homicide and thus contemplating such conduct then we do not want them anyway.
- Hard to believe that a good company would come to its investment decisions with such a factor in mind.

Health & Safety Legislation is sufficient

- We have good health and safety legislation and that should be used instead

- Current health and safety legislation has been around for at least 12 and in some cases 15 years.
- It has had little impact on reducing the statistics in Scotland
- The Government launch of “Revitalising Health & Safety” in 2000 which based its initiatives on this legislation and other tactics such as embarrassment, encouragement etc has failed. The alarming statistics continue and even get worse.
- The courts have declared such health and safety legislation as only regulatory. It does not carry the true recognition that conduct of a company or a director can be criminal

Individual Directors

- A general complaint

- If an individual director's reckless conduct causes an employee to be killed why should they not be prosecuted. No one else would get off with such conduct.

Penalties

- This will hammer companies and cause them a variety of problems
- Who will pay for it?

- More scaremongering
- Flexibility of penalties in fact may assist the company to improve its health and safety
- Concentrating solely on fines would be trying to make one size fit all. It would not have rehabilitative or improvement measures
- It may not be appropriate that a fine should be passed on to the customer but should be met by the shareholders who are ultimately responsible for the company
- The court can have consideration to the viability of the company and the effect on employees if there was a large fine and instead give other measures as envisaged by the Scottish proposals
- Such measures may cost less than the fine!