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against local authorities or quangos (including applications by one such authority against another) “public law proceedings”. But we are already becoming used to the idea that a different line has to be cut through the supervisory jurisdiction to define those decisions made by “public authorities” for the purposes of the Human Rights Act 1998. A point of greater pressure may develop, however, where the question of the mandatory character of judicial review arises.⁵⁴ Although the logic of the distinctive character of the supervisory jurisdiction may already have demanded that all proceedings for interdict which appear to be within the realm of judicial review rather than ordinary “civil proceedings” should indeed be routed towards judicial review, this has not been clear in all cases.⁵⁵ The decision in *Davidson* may now require that that consequential clarity should also be achieved. There may otherwise be the risk that remedies against the Crown may be denied because the proceedings in which they were sought were not directed to the supervisory jurisdiction.

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Just an Expert Group That Can't Say No: Reforming Corporate Homicide Law

The recent Expert Group Report on Corporate Homicide¹ stems from the 2003 decision in *Transco plc v HM Advocate*,² where the appeal court held that a charge of culpable homicide could not be levelled against a corporate body without alleging the an individual (or perhaps individuals acting collectively), who could be identified as the “directing mind and will” of the corporation, possessed the *mens rea* required for the offence.

That outcome, which largely aligned Scots law with English law in adopting the “identification principle”³ as the basis for corporate criminal liability (at least where culpable homicide was alleged) was recognised as having the consequence that “complex organisations cannot in practice be prosecuted for culpable homicide”.⁴ In due course, the Justice Minister established an Expert Group on corporate homicide in April 2005, the Group’s remit being “to review the law in Scotland on corporate

54 See C M G Himsworth, “Judicial review in Scotland”, in M Supperstone, J Goudie and P Walker (eds), *Judicial Review*, 3rd edn (2005), 659-660.

55 See, e.g., *Bell v Fiddes* 1996 SLT 51.

1 Scottish Executive, *Corporate Homicide: Expert Group Report* (2004) (henceforth *Report*) (available at <http://www.scotland.gov.uk/Publications/2005/11/14133559/35592>).

2 2004 JC 29. See J Chalmers, “Corporate culpable homicide: *Transco plc v HM Advocate*” (2004) 8 EdinLR 262; P W Ferguson, “Corporate culpable homicide” 2004 SLT (News) 97.

3 *Tesco Ltd v Natrass* [1972] AC 153.

4 *Report*, para 2.7.

liability for culpable homicide and to submit a report to the Minister for Justice by the summer, taking into account the proposals recently published by the Home Secretary”.⁵ The Group’s *Report* was published in November 2005 and was understood to be under consideration by the Minister at the time this note was written.

A. WHY LEGISLATE?

Although Transco successfully argued that the charge of culpable homicide levelled against it was irrelevant, it did not escape prosecution as a result. The indictment against it included an alternative charge of a contravention of sections 3 and 33(1) of the Health and Safety at Work Act 1974, which resulted in a conviction and a fine of £15 million being imposed.⁶

If a company can be punished this severely for a breach of the 1974 Act, it might be doubted whether corporate homicide legislation is required. The Group rejects this argument, arguing that health and safety offences “are seen by the public as being of lesser severity than offences prosecuted under the common law of culpable homicide” and that prosecutions for such offences would not meet the “public demand for justice”, or provide as strong a deterrent as a new offence.⁷

One problem is that the structure of the 1974 Act seems to offend against the principle of “fair labelling”.⁸ The label attached to the offence does not necessarily reflect the harm done: the fact of a death is merely part of the factual narrative rather than being relevant to guilt.⁹ It might, of course, be responded that it is unfair to label a corporate body as being liable for a death that it did not foresee, but that is not a leniency afforded to natural persons, who may be liable for culpable homicide and analogous road traffic offences without any need to prove foresight of death.¹⁰ Furthermore, despite the large fine imposed on Transco, it might be argued that the penalties imposed on corporations who cause deaths are often inadequate – either because the “regulatory” nature of the offence leads courts to impose overly lenient penalties, or because of the limited range of sanctions available under current legislation.

There is – although the Group does not discuss it – an argument that continuing to rely on health and safety legislation alone might result in a breach of the European Convention on Human Rights. The relevant case is *Önerjildiz v Turkey*,¹¹ which

5 *Report*, para 1.1. The Home Secretary’s proposals are found in Corporate Manslaughter: The Government’s Draft Bill for Reform (Cm 6497, 2005).

6 *Report*, para 2.2. Fines of up to £10million had previously been imposed in a small number of cases: House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill* (HC 540-I, 2005), para 266.

7 *Report*, para 5.3.

8 On which see A Ashworth, *Principles of Criminal Law*, 4th edn (2003), 89-92.

9 As Gobert and Punch note, “[r]esults are simply irrelevant to the determination of whether a company has committed a regulatory offence”: J Gobert and M Punch, *Rethinking Corporate Crime* (2003), 131. That does not mean, of course, that they are irrelevant to the decision to prosecute or on the appropriate sentence following conviction.

10 In respect of culpable homicide, see, for example, *Lord Advocate’s Reference (No 1 of 1994)* 1996 JC 76. The road traffic offences are causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs: ss 1 and 3A of the Road Traffic Act 1998, as amended.

11 (2004) 39 EHRR 12. I am grateful to Fiona Leverick for drawing this case to my attention.

arose out of an explosion at a landfill site which resulted in thirty-nine deaths. Two local mayors were prosecuted for offences of “negligence in the performance of their duties”,¹² and minimal penalties were imposed.¹³

The applicant, who had lost nine members of his family, claimed *inter alia* that Article 2 of the Convention (the right to life) had been breached in those circumstances. In upholding this claim, the European Court of Human Rights reiterated that Article 2 requires “a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death and the putting in place of effective criminal law provisions to deter the commission of offences against the person...”¹⁴ In all the circumstances, even though the court of first instance had referred to the deaths in its judgment as a factual element in the case,¹⁵ the court concluded that “the criminal law remedy, as used in the present case, cannot be regarded as adequate and effective”.¹⁶

Öneriyildiz probably cannot be taken as calling into doubt the proceedings in the prosecution of Transco itself. The deaths involved in that case, although technically not part of the statutory charge against Transco, were nevertheless libelled in the indictment, while the *Öneriyildiz* court laid stress on the minimal sanctions involved in that case,¹⁷ which is not a criticism applicable to the Transco prosecution. Other cases, however, may involve much lower penalties,¹⁸ and there is at least a stateable case that the combination of a criminal offence under the 1974 Act with a relatively low penalty is insufficient to meet the requirements of the Convention.

B. THE REPORT

The most striking feature of the *Report* is the Group’s disinclination to rule out any possible law reform proposal which it considered. Almost all the proposals it considered are supported (if sometimes by a majority), or at least left open for further consideration. Just about the only possibility the Group rules out is modifying the existing common law offence of culpable homicide: if this were done, “an opportunity would be missed to set out on the face of statute a clear and unambiguous offence”.¹⁹ In proposing that a new statutory offence be created, however, the Group

12 *Öneriyildiz*, at [106].

13 The court imposed the minimum prison sentence of three months and a fine of 160,000 Turkish lire on each defendant, but then (a) commuted the sentence to fines (resulting in penalties of 610,000 lire) and (b) suspended enforcement of the fines on the basis that it was satisfied the defendants would not reoffend. See *Öneriyildiz*, at [33].

14 *Öneriyildiz*, at [91].

15 *Öneriyildiz*, at [107].

16 *Öneriyildiz*, at [111].

17 *Öneriyildiz*, at [107]. See, however, A Gerry, “Case comment: *Öneriyildiz v Turkey*” [2005] EHRLR 203, 212, who reaches a stronger conclusion: “[w]here loss of life has occurred in cases where negligence goes beyond error of judgment or carelessness, criminal proceedings under specific offences recognising the loss of life appear to be what Art 2 requires.”

18 See Health and Safety Executive, *Health and Safety Offences and Penalties 2004/2005* (2005), table 8 (noting that across the UK, the average penalty per conviction for a work-related fatality was £29,867 in 2004/2005 (provisional figures)).

19 *Report*, para 5.2.

is not prepared to rule out the alternative possibility of reforming health and safety legislation to create an offence of causing death through dangerous conduct: “there might be advantage” in reforming health and safety legislation at the same time as creating a new offence.²⁰

Elsewhere, the Group shies away from ruling anything out. On the key issue of capturing corporate fault – how is it to be decided when a corporation is to be blamed for a death? – the Group identifies three obvious options: (i) an objective “recklessness” standard; (ii) a “management failure” approach; and (iii) strict liability subject to a due diligence defence. Now, choosing between these options is a difficult task. The Group’s solution is difficult to follow: in summarising their proposals, they state that the new offence should have *all three*.²¹

This note will return to that particular problem in due course,²² but first the other proposals considered by the Group should be recorded: (i) a stand alone offence for individuals – exactly which individuals is not clear, although there is a reference to “directors/managers”,²³ – which would involve a lower standard of fault than the general law of culpable homicide (favoured by a majority);²⁴ (ii) art and part liability for the new offence of corporate homicide (favoured);²⁵ (iii) a specific secondary offence for “directors/senior managers” (favoured by “most of the Group”);²⁶ (iv) expanding the proposed new offence to cover non-fatal serious injury (“further consideration should be given to it”);²⁷ (v) applying the new offence to unincorporated bodies despite their lack of legal personality (apparently favoured);²⁸ (vi) applying the new offence extra-territorially (favoured “on balance”),²⁹ and (vii) removing Crown immunity in respect of the new offence (favoured).³⁰

Finally, the Group’s enthusiasm reaches its zenith when the *Report* turns to consider the issue of penalties. During the Group’s deliberations, one of its members agreed to produce a paper on possible penalties for corporate homicide. That paper was submitted in due course and outlined a wide range of possible sanctions: monetary fines, equity fines, disqualification orders, dissolution orders, corporate probation, punitive injunctions, community service orders, publicity orders and requiring a senior

20 *Report*, para 5.3. The *Report* does not discuss how this might be achieved given that the relevant parts of the Health and Safety at Work etc. Act 1974 are reserved matters and so outwith the competence of the Scottish Parliament: Scotland Act 1998, Sch 5, Part II, H2.

21 *Report*, para 11.1.

22 See below, section C.

23 *Report*, para 12.1.

24 *Report*, para 12.3.

25 *Report*, para 12.6.

26 *Report*, para 12.6.

27 *Report*, para 13.4.

28 *Report*, para 13.6. The *Report* does not state clearly whether this option is favoured or not, stating that a majority of the group recognise that it may involve “practical difficulties” and going on to state that these are “not insuperable”, although there is no explanation of how they would be overcome.

29 *Report*, para 13.8.

30 *Report*, para 14.3. Here again, the *Report* is not entirely clear: it states that the removal of Crown immunity “should be more extensive” than proposed under Home Office proposals, but does not state how much more extensive.

officer of the company to attend sentencing.³¹ Rather than expressing any concluded view on the relative merits of these options, or deciding that any of them might be inappropriate, the Group's response was to agree to attach the paper as an annex to the *Report*³² and conclude "that providing a suite of possible penalties would provide the courts with the flexibility to respond to the many and various circumstances of the cases which may come before them".³³

C. CAPTURING CORPORATE FAULT

The most important aspect of the proposals is the Group's proposed model of corporate fault, which seems peculiar at first glance. The Group starts by considering the definition of recklessness offered by the Draft Criminal Code for Scotland, which is modelled on an "obvious or serious risk" of which the actor "is, or ought to be, aware".³⁴ There are, of course, serious problems with such an approach – a judge or juror may well be able to make an informed decision on whether, for example, a motorist should have been aware of an "obvious or serious" risk arising from his or her driving, but how is that same individual supposed to determine what (say) a complex multinational corporation "ought" to have been aware of? Nevertheless, an objective definition of recklessness bypasses the *Transco* problem by removing "awareness of risk" from the equation, meaning that it would no longer be necessary to show that a particular individual possessed the *mens rea* of corporate homicide.

At this point, however, the Group's proposals become difficult to follow. For some reason, the Group seems to consider that objective recklessness is an element of *actus reus*,³⁵ and proposes that "the physical element of the offence should be one of an employee or agent of the organisation causing death through recklessness".³⁶ The acts of employees or agents could be "aggregated" for this purpose.

Both aggregation and recklessness, however, are unnecessary complications in this context. If the core of the offence is a *failure* by the management: as the Group puts it, a failure "to put policies, practices and systems in place to ensure the health and safety of its employees and those affected by its activities",³⁷ then there should be no need to aggregate any activities, nor to show that the particular individuals were "reckless". It

31 H Croall, "Penalties for corporate homicide: paper prepared for the Scottish expert group on corporate homicide August 17th 2005", reproduced as Annex B to the *Report*.

32 Minutes of the Fourth Meeting of the Expert Group on Corporate Homicide (Tues 23 Aug 2005), para 30 (at <http://www.scotland.gov.uk/Topics/Justice/criminal/Corporate/4thset>).

33 *Report*, para 15.4.

34 E Clive, P Ferguson, C Gane and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (2003), 32-33 (available at http://www.scotlawcom.gov.uk/downloads/cp_criminal_code.pdf).

35 The Group appears to have been misled by a comparison with the offence of causing death by dangerous driving, which it considered to be a strict liability offence despite the requirement that "it would be obvious to a competent and careful driver" that the accused's driving was dangerous (*Report*, para 9.2 *et seq*). As Michael Christie has pointed out, however, the argument that dangerous driving does not require *mens rea* is simply "based on the opinion that negligence is not a matter of *mens rea*" (GH Gordon, *The Criminal Law of Scotland*, 3rd edn by M G A Christie (2001), para 30.08). Whether this requirement is described as *mens rea* or not, it nevertheless represents the *fault* element of the offence.

36 *Report*, para 11.1.

37 *Report*, para 11.1.

should suffice simply to show that the “management failure” caused the death. That, however, gives rise to the same problem noted above: how is “management failure” sensibly to be assessed?

The Group goes on to suggest that “a due diligence defence would be available to an organisation if they could demonstrate that they had all reasonable policies, systems and procedures in place, which should have prevented the offence taking place”.³⁸ This would be an odd *addition* to a requirement of “management failure”: if that had been proven by the Crown, how could a company possibly succeed in making out this defence? It seems, however, that what the Group has in mind is a simple reversal of the burden of proof:³⁹ where a death occurs, it would be for the corporation to prove that there had *not* been a management failure, rather than for the Crown to prove that there had been.

Reverse burdens of proof are, of course, common throughout the criminal law, particularly in “regulatory” offences.⁴⁰ But to suggest that a reverse burden should be imposed in respect of an offence as serious as *homicide* is unprecedented.⁴¹ There is much to be said for the argument that it is unjust that corporations are not in practice subject to the law of homicide in the same way as individuals, and that reform should be taken to eliminate this discrepancy so far as possible. But if corporations are to be treated as severely as individuals, they must also be entitled to the same protections as individuals, and it is difficult to see why they should be subject to the law of homicide but not entitled to the full benefit of the presumption of innocence in that regard.

Such an approach gives rise to obvious human rights objections, but the Group sees it as no function of its own to consider those, saying only that “there are potential human rights issues associated with reverse burdens of proof which would have to be considered carefully”.⁴² Nor does the Group seek to justify reversing the burden of proof, doing no more than asserting it as the “preferred approach”. This is wholly inadequate in human rights terms: in order to show that a reverse onus is compatible with the presumption of innocence, it must be shown *inter alia* that the reversal serves a legitimate aim and is proportionate to that aim.⁴³ If the Group is not prepared to articulate its own arguments to address these points, how is any resultant provision to be defended in court? It is regrettable that the Group is prepared (both here and elsewhere) simply to assert support for various law reform proposals without putting forward arguments in their favour.

38 *Report*, para 11.1.

39 *Report*, para 10.6.

40 A Ashworth and M Blake, “The presumption of innocence in English criminal law” [1996] *Crim LR* 306.

41 An accused who pleads insanity or diminished responsibility in such a case must make out the plea on the balance of probabilities (for recent discussion, see the Report on Insanity and Diminished Responsibility (Scot Law Com No 195, 2004), part 5). But in such cases, the prosecution must still prove both the *actus reus* and *mens rea* of the crime in order to secure a conviction.

42 *Report*, para 10.6.

43 I Dennis, “Reverse onuses and the presumption of innocence: in search of principle” [2005] *Crim LR* 901, 905.

D. A TERRIBLE FIX?

There are a number of further problems with the Group's *Report* which will present considerable difficulty in moving towards legislation. First, the Group's approach to the various options it considered, and its reluctance to rule anything out, presents political difficulties for the Executive in considering the *Report*. Almost any legislation the Executive brings forward now runs the risk of being portrayed as a "watering down" of the Group's proposals. There is no reason why this should be the case: much of the *Report* simply leaves matters open for further consideration, or fails entirely to explain how the proposals would operate (how, for example, are bodies which lack legal personality to be prosecuted and sanctioned for corporate homicide?) It must be recognised that the Group's *Report* does not contain a set of proposals which the Executive can simply either adopt or reject.

Secondly, the Group is too quick to dismiss the argument that individuals may be deterred from taking up senior posts in organisations by the spectre of individual liability, or that corporate bodies may avoid locating in Scotland due to fears about corporate homicide legislation. The Group's response is simply that "good managers would not be deterred" by such liability.⁴⁴ That may be true, but even the most conscientious of managers may be deterred by legislative proposals if they fear that they may operate in an arbitrary and unjust fashion. If the Group had explained exactly how it envisaged individual liability would work, it might be easier to convince persons in that position that they had "nothing to fear", but as it is no such line of argument is possible. In advancing towards corporate homicide legislation, it may not be realistic to expect the Executive to secure the enthusiastic support of the commercial sector. Nevertheless, the Executive has an obligation to engage fully with that sector in the process.

Thirdly, it is regrettable that the Group does not discuss in any detail the interface between health and safety legislation and its proposed new offence. There is a strong case for saying that if a company is not in breach of any safety regulation, and could not be convicted of a health and safety offence, there should be no basis for convicting it of an offence of homicide; and conversely, that if the corporate body is in breach of health and safety law, there should be no need to waste court time considering whether "management failure" (or whatever test must be satisfied for an offence of corporate homicide) has been made out.⁴⁵

Fourthly, the Group's approach to sentencing is unhelpful. In England and Wales, the government has estimated that its proposed new offence of corporate manslaughter will attract no more than five prosecutions per year, although that assumption has been challenged by some bodies.⁴⁶ If that is a reasonable estimate, prosecutions are likely to be even rarer in Scotland, meaning that it will take some considerable time

44 *Report*, para 12.8. Or, as one member of the Group has put it: "the innocent have nothing to fear". D Whyte, "Getting away with homicide" 2005 SCOLAG 170, 174.

45 P R Glazebrook, "A better way of convicting businesses of avoidable deaths and injuries?" (2002) 61 CLJ 405, 417. The Group does note the suggestion of the Centre for Corporate Accountability that "management failure", for the purposes of the new offence, could be defined as including "gross breaches of specified statutory duties, in particular those under sections 2 to 6 of the Health and Safety at Work Act.": *Report*, para 5.4.

46 House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill* (HC 540-I, 2005), ch 12.

for the judiciary to build up any expertise in sentencing corporations. Offering up an enormously wide-ranging “suite of penalties” without further guidance would simply pass the parcel back to the judges and dodge the difficult question of how exactly corporate bodies should be sanctioned.

Part of the problem here is the manner in which this review exercise has been carried out. The Law Society member of the Group asked at its first meeting “whether the Group could access the Executive’s Central Research Unit, or external providers who could undertake a literature review”, receiving the response that it “was doubtful that this would be possible within existing timescales and resources”.⁴⁷ As a consequence, the *Report* contains next to nothing by way of reference to either the vast literature on corporate liability for crime, and only passing reference to – rather than analysis of – legislation and law reform proposals in other jurisdictions.

The *Report* has, of course, emerged in a much shorter timescale than would have been expected if (for example) the review had been carried out by the Scottish Law Commission,⁴⁸ but that is not an advantage. A Commission report could have been expected to produce a much more detailed analysis and proposals more ready for transposition into legislation. More importantly, the two-stage nature of a Commission review, involving a discussion paper being put out to consultation, would have led to the proposals being substantially refined by the time of a final report.⁴⁹ As it is, the *Report* is a limited exercise which leaves most of the difficult questions in this area unresolved. Legislative reform is likely to be a long process: in England, the Law Commission issued a consultation paper addressing the topic in 1994,⁵⁰ and legislation has still not been enacted. The Group’s *Report* is merely a first step.

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47 Minutes of the First Meeting of the Expert Group on Corporate Homicide (Fri 6 May 2005), para 30 (at <http://www.scotland.gov.uk/Topics/Justice/criminal/Corporate/minsfirstmeeting>).

48 Referring the issue to the Commission would not have been an option for the Executive given that the Commission was already engaged with its review of rape and other sexual offences: see Rape and Other Sexual Offences (Scot Law Com DP No 131, 2006).

49 Compare, for example, the changes made between the discussion paper and the report in the Commission’s project on the age of criminal responsibility: Age of Criminal Responsibility (Scot Law Com DP No 115, 2001); Age of Criminal Responsibility (Scot Law Com No 185, 2002).

50 Criminal Law: Involuntary Manslaughter (Law Com CP No 135, 1994).