

This document relates to the Culpable Homicide (Scotland) Bill (SP Bill 75) as introduced in the Scottish Parliament on 1 June 2020

Culpable Homicide (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Culpable Homicide (Scotland) Bill introduced in the Scottish Parliament on 1 June 2020.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and Claire Baker MSP, the member who introduced the Bill (SP Bill 75–LC);
 - a Financial Memorandum (SP Bill 75–FM);
 - Explanatory Notes (SP Bill 75–EN).
3. This Policy Memorandum has been prepared by Claire Baker MSP, the member who introduced the Bill, to explain the policy behind the Bill and does not form part of the Bill. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament.

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Policy objectives of the Bill

4. The aim of the Bill is to amend the law of culpable homicide to ensure that where loss of life is caused by the 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, the sheer unacceptability to society, of what occurred.

5. As current law on culpable homicide stands, it is necessary to identify the controlling mind of an organisation to successfully prosecute. While this is possible in smaller organisations, it is practically very difficult to do so in larger organisations with layers of management. This means current law is not able to be applied to all sizes of organisation in the same way. The Bill seeks to remedy this by ensuring the law can be applied to all sizes of organisation and company as it is to individuals.

6. The Bill will amend the law of culpable homicide by making it clear in statute: that a person may be guilty of culpable homicide if that person causes the death of another recklessly or by gross negligence; what the elements are of each of those offences; how an organisation may be liable for each of those offences; and that a Crown servant or agent may also be liable for each of those offences.

7. These offences are in addition to, and not in substitution for, existing kinds of offence of culpable homicide at common law.

8. The Bill will introduce an individual offence tied to the offences an organisation may commit. Where an organisation's office holders, individually or collectively, act in a reckless manner that leads to someone's death, the organisation is guilty of culpable homicide and the individuals whose action lead to the organisation's guilt can be convicted and sentenced appropriately.

9. Culpable homicide is an extremely serious crime. A conviction for culpable homicide carries a significant stigma intended to reflect the moral opprobrium that society attaches to taking a life. An important aspect of the Bill is to ensure the same moral opprobrium attaches to individuals, groups and organisations who cause death in sufficiently similar circumstances.

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10. The Bill will address the inequity in current law regarding its application to organisations of different sizes.

11. With clear statutorily defined limits as to what constitutes culpable homicide, the Bill will provide a deterrent by regulating the behaviour of individuals and organisations in such a way that the rate of homicides in Scotland will reduce.

12. The Bill will drive behaviour change in Scotland by focusing companies on the importance of health and safety in the workplace, make clear their responsibility in ensuring a safe working environment, and make clear the significant consequences when preventable failures occur.

Employees

13. A consequence of the Bill will be to encourage safer working environments for all employees by emphasising to companies the importance of adhering to health and safety legislation. While the Bill would introduce significant consequences for employers in the event of an avoidable tragedy, it would also change the behaviour of companies who look to cut corners and minimise their responsibilities, resulting in fewer fatalities.

Employers

14. The Bill should not be a burden to employers, as they should be working within health and safety legislation and the Bill should raise standards within companies. It would also address the inequality between small companies, where an individual can be identified and charged with culpable homicide, and all other companies where a 'controlling mind' cannot be identified. A consequence of the Bill would be to embed a culture of health and safety adherence in all companies and provide a strong incentive to do so.

The Crown

15. It is proposed that that Crown would be liable in the same way as any other individual or legal person.

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Background

Workplace fatalities

16. 147 workers were killed at work in Great Britain in 2018/19, with the average annual number of workers killed at work over the five years 2014/15 to 2018/19 being 142.¹ Construction and agriculture, forestry and fishing account for the greatest number of fatalities each year, while the highest fatal injury rate in terms of number of fatalities per 100,000 workers are in agriculture, forestry and fishing and waste and recycling.²

17. In Scotland there were 29 worker deaths in 2018/19, with the annual average 2014/15 to 2018/19 being 19.³ In the period 2009 to 2019⁴ there were 231 workplace fatalities in Scotland. The provisional figures for 2018/19 show a steep increase, which is mostly attributable to 13 fatalities in the agriculture, forestry and fishing sector.

18. The figures in paragraphs 16 and 17 do not include deaths investigated by the Marine Accident Investigation Branch, the Air Accident Investigation Branch, the Office of Rail and Road, or work-related road traffic accidents.

19. Scotland has the highest rate of workplace deaths per 100,000 in the UK and the most recorded deaths in the UK. Scotland has fewer workers in low-risk industries compared to other regions and more workers in high-risk industries.

Ineffectiveness of current legislation

20. Current legislation does not provide for proper accountability in Scottish courts for those whose action in the workplace, or lack of action on matters of safety, result in fatalities.

¹ Data from Reporting of Injuries Diseases and Dangerous Occurrences Regulations available at

<https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>

² <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>

³ <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>

⁴ Figure compiled from HSE publications on fatal injuries at work 2009 to 2019

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21. The law as it stands does not treat individuals and organisations equally capable of conviction for culpable homicide in appropriate circumstances.

22. At present, case law determines how culpable homicide applies to individuals and it is possible to convict the owner of a small business where an employee has lost their life due to neglect. However, there is no expectation that a large business can be pursued through the criminal courts.

23. Some have argued that, despite such incidents being crimes of homicide, they can be adequately and relevantly prosecuted through health and safety legislation. However, this limits the penalties which can be imposed and does not allow for sanctions which reflect the seriousness of offences which result in workplace deaths.

24. The Corporate Manslaughter and Corporate Homicide Act 2007 has failed to address this, evidenced by the lack of prosecutions in Scotland in over a decade since its introduction.

Significant cases

Transco

25. On 22 December 1999, an explosion in Carlisle Road, Lanark, destroyed a home and caused fatal injuries for all four occupants. The gas network provider Transco was legally responsible for the explosion and ultimately convicted of criminal charges under the Health and Safety at Work etc. Act 1974. However, no individuals were convicted of criminal charges.

26. The Lord Advocate brought charges against the company for culpable homicide, but there was doubt as to whether such a charge was competent. There were concerns that the law in Scotland did not permit an incorporated body, separate from its managers and directors, to be convicted of culpable homicide.

27. This was the first time a company had been charged with culpable homicide in Scotland. The charge against Transco took place 18 years after the first time a company had been charged with any common law crime, that is a crime created and developed through institutional writers

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and court decisions rather than through statute. The original view was that companies could not form the necessary guilty mind (*mens rea*) to commit any common law crime. That position changed and it was considered that companies could form the necessary guilty mind for some crimes such as conspiracy and fraud but not others such as perjury or shameless indecency. Very little had been said about whether or not a company could be convicted of culpable homicide.

28. The Court of Criminal Appeal held that, under the law of Scotland, a company, such as Transco, could competently be charged with culpable homicide. But it was only possible to convict it of such a common law crime if the prosecution could identify an individual (or group of individuals) who were “the controlling mind” of the company, whose acts and state of mind could be said to be that of the company itself and who were guilty of that crime. As the charge of culpable homicide did not identify any such individual or group of individuals, it was dismissed.

Flying Phantom

29. On 19 December 2007, the Flying Phantom tug sank in the River Clyde near Yoker while towing the bulk carrier Red Jasmine in poor visibility as a result of heavy fog. Three of the Phantom’s four crew members perished. After charges were pressed against the port managers Clydeport Operations Limited and tug-owner Svitzer Marine Ltd for breaches of the Health and Safety at Work Act 1974, it was established the Flying Phantom had experienced a similar incident in 2000. The High Court in Edinburgh fined Svitzer Marine Ltd £1.7 million and Clydeport Operations Limited £650,000.

Super Puma/Bond Offshore Helicopters

30. On 1 April 2009, helicopter G-REDL, a Eurocopter (now Airbus Helicopters) AS332L2 Super Puma MKII type operated by Bond Offshore Helicopters, crashed in the North Sea, 20 kilometres north-east of Peterhead, on return from the Miller oilfield. Sixteen people were killed – two pilots and fourteen offshore workers. The Air Accident Investigation Branch (AAIB) of the Department for Transport (DfT) report into the incident found the accident occurred as a result of a catastrophic failure of the helicopter’s main gearbox, attributed to fatigue cracks in its components. At the Fatal Accident Inquiry into the deaths of the pilots

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and offshore workers, the helicopter operator Bond admitted a failure to follow the correct task in their safety manuals upon the discovery of foreign particles in the gearbox in the week prior to the accident. In March 2014 the UK Government inquiry found the accident could have been prevented if maintenance procedures had been correctly followed.

Stockline

31. The explosion at ICL Plastics Limited (Stockline) on 11 May 2004 was Scotland's worst industrial disaster since 1988, killing nine workers and injuring 40 others. After pleading guilty to breaching health and safety legislation and admitting four offences the operators of the factory, ICL Plastics and ICL Tech, were fined a total of £400,000. The High Court in Glasgow were told a catalogue of failures over a 35-year period had led to the disaster, which was caused by a build-up of liquid petroleum gas which had leaked from pipes dating to 1969. The case only resulted in a fine as it was tried under the Health and Safety at Work Act 1974. The judge in the case, Lord Brodie, said "that response is by its nature an inadequate response".

32. The degree of public sympathy and anger related to these cases, where significant loss of life took place and deaths which were preventable occurred, could not be met by fines. The classification of these incidents as health and safety breaches was seen as inadequate and did not reflect the injustice of what had happened to take the lives of people at work and in their homes. Big businesses should be held fully responsible for their actions and the measures in the Bill would allow a charge of culpable homicide to be pursued in such cases if that was appropriate.

Practical difficulties in prosecuting complex organisations

33. The Transco case highlighted the practical difficulties in using common law to prosecute a complex organisation for culpable homicide. In reaching its decision in the case, the Criminal Appeal Court considered three main issues: the scope of the mental element or guilty mind (*mens rea*) necessary to establish culpable homicide; the competency of charging a company with this offence; the relevance of the allegations which the prosecutions had identified to demonstrate the company's guilt.

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34. While the Court found it was competent to charge a company with culpable homicide, it confirmed this required proof of mens rea. In the case of companies, it is necessary to identify the involvement of an individual or group of individuals constituting the “controlling mind” of the company: the identification principle.

35. In complex organisations, or those with dynamic and diffuse structures, it is difficult to identify individuals at a senior level who are sufficiently directly involved so as to enable their state of mind to constitute the controlling mind of the organisation. It is therefore difficult to identify the controlling mind in anything but the simplest type of organisation. A further complication arises from the fact that corporate structures and the positions held by individuals change over the course of time.

36. The Court also expressly stated that the law did not recognise the principle of “aggregation” whereby the conduct and states of mind of a number of people over a period of time could be accumulated to collectively provide the necessary mens rea.

37. The implications of the Appeal Court judgement in the Transco case is that in practice complex organisations cannot currently be prosecuted for culpable homicide.

Application of law to different sizes of organisation

38. The concepts of controlling mind and senior management mean the current legal situation creates inequity within the law. Very small companies, with very simple management structures, such as family businesses and organisations where the owner and only director is also the manager are certainly capable of being prosecuted for, and convicted of, culpable homicide. However, large businesses with complex management structures and a larger number of workplaces are currently beyond the reach of the law of culpable homicide. The law is uneven in its application and, as it stands, small companies are arguably being discriminated against in being subject to more severe penalties than larger companies.

39. By definition the controlling mind of a company can only be formed by its most senior officers: The Board of Directors. Establishing a link between actions that cause death and recklessness on the part of one or

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more members of a Board of Directors is near impossible in relation to all but the smallest of companies. It will too often be the decisions of individuals one or more tiers below the Board that have tragic consequences.

40. This model does not reflect how modern businesses operate. They operate by the delegation of decisions and actions down, ultimately from the Board, to different tiers of management. When a manager acts under such delegated authority from the Board, the Board will normally not have any detailed knowledge of what the manager is doing; but that manager is acting with the full authority of the company. In that position, with that authority, that manager is the company. The law of culpable homicide should reflect this reality of business operations.

41. The 2007 Act replaced the concept of a controlling mind of a company with “senior management”, which is as problematic for the same reasons. The Act states “An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach”. As stated above, this is a test which continues to ignore the reality of the way companies delegate tasks and decision making.

42. In anything but the smallest companies with the simplest of management structures, it is near impossible to prove the responsible person or persons in court. Such companies are therefore presently beyond the reach of the law for culpable homicide. This is a weakness in the current law, which has the potential to recur. Many people consider this to be an unacceptable loophole in the law that requires to be closed.

Recklessness or gross negligence under the current law

43. The Scottish Courts have, over the years, applied different tests when considering if an individual has committed culpable homicide. There have been times when gross negligence has been favoured and times when recklessness was the only test. The two terms overlap but are not identical. Negligence, for example, requires some form of foreseeability of the consequences; but recklessness does not. There is an argument that both tests have their place. To make the law clear and apply equally to individuals and organisations alike a clear statutory test for each is needed.

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Previous relevant proposed and enacted legislation

Historic and current law in Scotland

44. This is not the first time the Scottish Parliament or Scottish Government has been asked to consider the effectiveness of the law of culpable homicide where an individual's death is caused by a business or an association. Scottish Government ministers have previously commissioned analysis and expert groups, the UK Government has changed the law, introducing the Corporate Manslaughter and Corporate Homicide Act 2007, and this is the third proposal for a Member's Bill in the Scottish Parliament.

Corporate Homicide Expert Group Report 2005

45. On 15 April 2005, Minister for Justice Cathy Jamieson set up the Expert Group on Corporate Homicide. Its remit was "to review the law in Scotland on corporate liability for culpable homicide and to submit a report to the Minister for Justice". The Expert Group included representatives from the business, trade union, legal, public and academic sectors and its report was published in 2005.⁵

46. The Group considered that the implication of the Appeal Court judgement in the Transco case (that complex organisations could not in practice be prosecuted for culpable homicide) was a gap in criminal law which should be addressed. The Group considered that the law should be amended to enable such organisations to be prosecuted for culpable deaths arising from their activities.

47. The Group noted that employers and individual directors could be prosecuted for health and safety offences but that the Health and Safety at Work etc. Act 1974 made no distinction between failures which caused death and failures which did not cause death, so there was no specific offence under the Act regarding death in the workplace.

48. The Group identified a number of drivers for legislative change, including – contributing to improved safety in workplaces; achieving the interests of justice and responding to the desire of victim's families and the public for improved social justice; ensuring an organisation can be

⁵ <https://www2.gov.scot/Resource/Doc/76169/0019246.pdf>

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prosecuted for causing death; providing appropriate means of punishment by providing a wider range of penalties.

49. The Group identified three main routes for delivering the change in law required: introducing legislation to amend the existing common law offence of culpable homicide to ensure criminal liability can be effectively attributed to organisations; introducing a new statutory offence of corporate liability for causing death/serious injury; changing Health and Safety legislation.

50. The Group considered the creation of a new offence of corporate killing the most effective means of addressing the problems inherent in culpable homicide law as it applied to organisations.

51. The Report on Corporate Homicide⁶ was published in November 2005. While the then Justice Minister, Cathy Jamieson, welcomed the report, Scottish Ministers did not introduce a Bill on the issue.

Karen Gillon MSP's proposed Member's Bill

52. In June 2006, the MSP for Larkhall, Karen Gillon, introduced a consultation on a draft proposal for a Bill to amend the law on Culpable Homicide.⁷ The consultation stated the draft UK Bill regarding corporate manslaughter⁸ did not seek to amend the Scottish common law in relation to culpable homicide nor could it do so without the consent of the Scottish Parliament. It argued that irrespective of any related legislation at Westminster, Scottish legislation was required.

53. The consultation proposed to amend the law of culpable homicide by making it clear in statute that a natural person may be guilty of culpable homicide if they cause death of another recklessly or by gross negligence, in effect creating two different statutory kinds of culpable homicide. The offences would be in addition to, and not in substitution for, existing culpable homicide at common law.

⁶ <https://www2.gov.scot/Publications/2005/11/14133559/35592>

⁷ https://www.parliament.scot/S2_MembersBills/Draft%20proposals/CulpableHomicideConsultationPaper20June.pdf

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251080/6497.pdf

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54. There were 118 responses to the consultation paper and the overwhelming majority were supportive of the proposal. The proposed Bill received the cross-party support⁹ required for introduction.

55. The proposed Bill was withdrawn by Karen Gillon on 29 September 2006 with reference to the UK Bill on corporate manslaughter and corporate homicide which would also cover Scotland.

Corporate Manslaughter and Corporate Homicide Act 2007

56. The Corporate Manslaughter and Corporate Homicide Act 2007¹⁰ was introduced by the UK Government and came into force in April 2008. The Act sought to broaden the law on corporate manslaughter in the UK and created a new offence of corporate manslaughter in England and Wales and Northern Ireland, and of corporate homicide in Scotland.

57. The 2007 Act was billed “a landmark in law”¹¹ which meant for the first time companies and organisations could be found guilty of corporate manslaughter (or corporate homicide in Scotland) as a result of serious management failures which resulted in a gross breach of duty of care.

58. As of February 2020, the Crown Office and Procurator Fiscal Service for Scotland has raised zero prosecutions under the Corporate Manslaughter and Corporate Homicide Act 2007.¹²

59. Confidence in the legislation for trade unions, safety campaigning organisations and the families of those killed at work has been undermined by the fact not a single potential corporate homicide has reached the threshold for proceedings.

⁹ https://www.parliament.scot/S2_MembersBills/Supporters/CulpableHomicidebyCorporateBodies-supporters.pdf

¹⁰ <http://www.legislation.gov.uk/ukpga/2007/19/contents>

¹¹ <https://www.hse.gov.uk/corpmanslaughter/about.htm>

¹² Figure provided by COPFS in response to FOI request from Claire Baker MSP, 3rd March 2020

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Richard Baker MSP's proposed Member's Bill

60. In December 2014, Richard Baker MSP introduced to the Scottish Parliament a proposal¹³ for a Bill to redefine culpable homicide in terms of causing death by recklessness or gross negligence, and to define the circumstances in which office-holders in organisation can be guilty of the offence. The consultation¹⁴ on the proposal closed on 16 March 2015.

61. The consultation document argued that the 2007 Act had failed in addressing the need for reform of culpable homicide law, citing no reduction in deaths and the absence of a single conviction in Scotland under the Act.

62. Richard Baker stood down as an MSP in January 2016 and the proposed Bill was not progressed.

Culpable homicide (offence by individual)

63. Under Scots Law culpable homicide is committed when a person has caused loss of life through wrongful conduct, but there was no intention to kill or “wicked recklessness” which is required in cases of murder. Wicked recklessness is inferred from the circumstances of the accused’s actions and will normally be based on the severity of the injuries and other factors about the nature of the assault.¹⁵

64. To successfully prove a charge of culpable homicide, the court must be satisfied that the accused committed an unlawful act; the act was intentional, reckless or grossly careless; the death was a direct result of the unlawful act.¹⁶ The difference in distinguishing between murder and culpable homicide crimes is objective and there is no simple definition of culpable homicide.

65. The suggested jury direction for adopting by judges when charging juries comes from the Judicial Institute of Scotland Jury Manual and

¹³ <https://www.parliament.scot/parliamentarybusiness/Bills/84553.aspx>

¹⁴ https://www.parliament.scot/S4_MembersBills/20141205_Culpable_Homicide_Consultation_Document.pdf

¹⁵ <https://www2.gov.scot/Publications/2004/12/20339/47561>

¹⁶ <https://www.lawscot.org.uk/media/362512/24-04-2019-crim-culpable-homicide-scotland-bill-consultation-response.pdf>

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states: “Culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills.”¹⁷

66. The boundaries between murder and culpable homicide are not clear and too much is left to interpretation. The crime of culpable homicide is also too broad in scope and there are complexities from the numerous circumstances in which it could apply.¹⁸

67. The differences in being convicted of murder and culpable homicide can be huge. While a conviction for murder carries a mandatory life sentence, there is no such rule for culpable homicide, so the full range of disposals is available to the court. It is possible to be convicted of culpable homicide and not be imprisoned.

Culpable homicide (offence by an organisation)

68. It is possible for an organisation to be convicted of a common law crime in Scotland and, if circumstances warrant, an organisation may be prosecuted for culpable homicide. However, there has only been one prosecution of a company in Scotland for the crime of culpable homicide – the Transco case – which was subsequently dismissed by the Appeal Court, with Transco prosecuted under the Health and Safety at Work etc. Act 1974.

Health and Safety at Work etc. Act 1974

69. In addition to the common law offence of culpable homicide, employers, individual employees, the self-employed and individual directors can be prosecuted for health and safety offences under the Health and Safety at Work etc. Act 1974.

70. The 1974 Act places duties on employers to ensure, so far as reasonably practicable, the health and safety of employees and others who may be affected by their undertaking. No distinction is made between failures which cause death and those which do not cause death

¹⁷ <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualNovember2018.pdf>

¹⁸ <https://www.lawscot.org.uk/media/362512/24-04-2019-crim-culpable-homicide-scotland-bill-consultation-response.pdf>

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so there is no specific offence under the Act regarding death in the workplace.

71. The majority of health and safety prosecutions are made against organisations rather than individuals and there is no mens rea in relation to health and safety offences.

Detail of the Bill

Definition of culpable homicide

72. The need to review and reform the law of culpable homicide is generally accepted. The crime of culpable homicide has evolved in accordance with relevant case law and language over a number of years, and much of the case law and language used in connection with the crime is from a time where the death penalty existed for murder.¹⁹

Culpable homicide by causing death recklessly

73. The Bill defines causing death recklessly as proposed in the draft Scottish Criminal Code as published by the Scottish Law Commission in 2003, that is if the person is, or ought to be, aware of an obvious and serious risk that acting will bring about death but nonetheless acts where no reasonable person would do so.

74. The Bill will make an organisation vicariously liable for that offence as proposed by the draft Scottish Criminal Code, that is by providing that an organisation is vicariously liable if an office holder is guilty of the offence and was acting within the scope of the offence or on behalf of the organisation in doing the acts constituting the offence.

75. The Bill permits aggregation by providing that, even although a particular office holder is not guilty of that offence, an organisation would be guilty of the offence if the acts done by a number of different office holders at different times, when considered together, are sufficient to constitute the offence.

¹⁹ <https://www.lawscot.org.uk/media/362512/24-04-2019-crim-culpable-homicide-scotland-bill-consultation-response.pdf>

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Culpable homicide by causing death by gross negligence

76. The Bill defines gross negligence as when a natural person acts in a way which amounts to a gross breach of a duty of care to another and that breach causes that person's death.

77. An organisation would be guilty of causing death by gross negligence if the way in which its activities are managed or organised by its office-holders (even if these are not "senior management", as has to be the case under the 2007 Act) amounts to a gross breach of a duty of care and that breach causes death.

78. The Bill defines duty of care simply as any duty of care imposed under the common law or by an enactment. It would therefore include any duties under the law of delict (breach of duty of care).

79. The Bill defines the test of what amounts to a gross breach of a duty of care as being whether the breach falls far below what could reasonably have been expected.

80. The definition of what is meant by causing death by gross negligence makes it clear that it can be established objectively without proof of any mental element, that is without establishing any intention on the behalf of an individual to commit this crime. This will make it easier to attribute liability to an organisation.

81. This definition avoids the difficulties created by the identification principle by making an organisation liable for the offence where it causes a person's death in certain circumstances. There is no need to find a particular individual who can be identified with the organisation or to make the organisation vicariously liable for the acts of its office-holders; it focuses upon where the real problem may lie, namely the way in which the activities of an organisation are managed or organised rather than on questions of individual culpability; and it permits account to be taken of the practice of office-holders over a period of time.

The Crown

82. The Crown in contemporary society has responsibilities either itself or through organisations which it controls which in exercise of them may cause death.

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83. There should be no reason as a matter of policy or in principle why the Crown, by reason of the conduct of its Ministers and civil servants, or through an organisation which is a servant or agent of the Crown, should not be liable in the same way as any other individual or legal person.

84. The Bill will clarify the law so that it applies consistently, fairly and evenly to all persons natural and legal. It will clarify the definition of culpable homicide to provide certainty and specify the type of serious and socially unacceptable conduct culpable homicide refers to, and ensure that the Crown civil servants and organisations for which it has control are also required to ensure that such conduct is not carried out by them.

Consultation

85. The member carried out a consultation exercise on a draft proposal,²⁰ lodged on 7 November 2018, which ran from 8 November 2018 until 23 April 2019. There were 77 responses²¹ to the consultation and a summary²² of those responses was published along with the final proposal.

86. Twenty-five responses (32% of the total number) were from organisations (including trade unions, representative organisations and third sector bodies) and the remaining 52 (68% of the total number) were from individuals.

87. An overwhelming majority of respondents were in favour of the proposals to amend the law on culpable homicide, across individual and organisational responses. The main arguments in favour were providing clarity and addressing shortcomings in the existing legislation including

²⁰ Claire Baker MSP (7 November 2018) Proposed Culpable Homicide (Scotland) Bill consultation document. Available at https://parliament.scot/S5MembersBills/CULPABLE_HOMICIDE_draft_4_-_with_UPDATED_extended_deadline.pdf

²¹ Consultation responses available at http://www.clairebaker.org/?page_id=2211

²² Claire Baker MSP (12 November 2019) Proposed Culpable Homicide (Scotland) Bill consultation summary document. Available at https://parliament.scot/S5MembersBills/20191112_Consultation_Summary.pdf

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perceived inconsistency in its application to businesses of different size and in the application of law to individual and organisational wrongdoers. There was also support for the argument that strengthening legislation would improve health and safety practices within the workplace. The proposals for two statutory types of culpable homicide were also broadly welcomed, with supporters saying this would address gaps in the law.

88. Respondents highlighted the absence of charges under existing corporate homicide legislation as an argument the current system was failing. Benefits of the proposed Bill were stated as promoting a change in business operations and increasing transparency in decision-making processes because of increased corporate accountability.

89. A number of responses referred to the importance of providing a means for families of those killed at work to secure justice for their loved ones, with some respondents providing personal examples of their experience and the difference they feel this change to law could have secured. The need for a clearly defined legal process which could be followed in such circumstances was noted, with reference to inconsistency regarding current health and safety and legal routes.

90. No issues around equalities or sustainability were raised in consultation responses.

91. The Bill was not amended following the consultation period.

Alternative approaches

92. The Member considers that there are no alternative means by which the policy objectives of the Bill can be met, and in particular, there are no non-legislative means by which the objectives can be achieved. Legislative change at Westminster has proved ineffectual in addressing the shortcomings of existing law and the continuing reliance on Health and Safety legislation for fatalities due to the reckless behaviours of employers does not reflect the moral opprobrium and is deeply unsatisfactory for the families of victims. This Bill would also ensure the law is applied equally to all sizes of organisations, and close loopholes in the current legislation. The comparatively high number of deaths at work in Scotland warrants a Scottish-specific approach being taken, and this also justifies the need to take decisive action now rather than wait for the

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work of the Scottish Law Commission Tenth Programme to conclude and make recommendations for Government to consider.

Scottish Law Commission Tenth Programme

93. The Tenth Programme announced by the Scottish Law Commission in February 2018²³ recognised problems regarding the lack of definitions related to culpable homicide. The Commission intends to examine the law of homicide to consider whether and how any necessary proposals for modernising law should be made. The Scottish Law Commission has included homicide in some of its previous programmes, but as a result of giving priority to other projects had not taken the matter forward until the current programme.

94. In December 2019 the Scottish Law Commission advised it was “working towards developing a Discussion Paper on the mental element in homicide”.²⁴ There is no guarantee that the Programme will result in a Bill regarding culpable homicide.

95. The work of the Scottish Law Commission appears focused on homicide as it is committed by an individual, rather than by an organisation. This Bill seeks to address the difficulties in prosecution of organisations and groups.

96. By way of consultation and previously proposed Member’s Bills, consultation regarding the law of culpable homicide has already been taking place over a number of years and the Parliament has the means to approve legislation within the current session. The advantages of delaying action until the conclusion of the work of the Scottish Law Commission are unclear. The annual statistics on workplace deaths however provide evidence against further delay.

Legislative competence

97. The Culpable Homicide (Scotland) Bill makes provision for an Act of the Scottish Parliament to amend the law relating to culpable

²³ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

²⁴ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

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homicide and for connected purposes. As such, on the face of the primary purpose of the Bill its sole purpose is to amend the Scots common law in respect of criminal law. Accordingly, on any fair reading of the pith and substance of the Bill it relates only to Scots criminal law and a clear case is made that it is within the legislative competence of the Scottish Parliament.

98. The Bill sets out a statutory offence of culpable homicide by causing death recklessly or by gross negligence. The statutory offences apply equally to individuals and non-natural persons.

99. It is therefore recognised that there will be circumstances in which the death forming the basis of the new offence will arise out of an employer/employee of similar relationship. It is similarly recognised that one of the purposes of the legislation (as is the case with all criminal offences) is to serve as deterrence. It is intended to deter individuals and non-natural persons alike and equally from engaging in conduct that will cause death recklessly or by gross negligence. There will be some benefit to workplace health and safety as a result of the deterrence function that the new legislation will serve.

100. It is recognised that it could be argued on that basis that the Bill relates to reserved matters - Head H2 of Schedule 5 of the Scotland Act 1998 viz. Health and Safety. However, any such benefits are entirely collateral. They cannot on any fair reading of the Bill or the Explanatory Notes be viewed as in any way the pith and substance of the Bill. Accordingly, the primary position is that the Bill cannot on any plain or fair reading be considered as relating to reserved matters.

101. If that position is not accepted, it is submitted that the Bill is in any event within the legislative competence of the Scottish Parliament by operation of section 29(4) of the Scotland Act 1998. Section 29(4) states:

“A provision which -

- (a) would otherwise not relate to reserved matters, but
- (b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

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is to be treated as being related to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.”.

102. It is entirely clear that the Bill makes modification of Scots criminal law. For those who argue that it applies to reserved matters, it is both self-evident and beyond doubt that the purpose of the provision in so doing is to make the law apply consistently to reserved and devolved matters, in that the law of culpable homicide (for causing death recklessly or by gross negligence) applies to individuals and non-natural persons alike. Accordingly, it is proposed that by operation of section 29(4) the Bill is within the competence of the Scottish Parliament.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

103. The provisions in the Bill do not discriminate on the basis of age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief. All parties are judged to benefit from measures to increase employer accountability and improve workplace safety practices which will result from the Bill. The Bill is expected to have a particular impact on groups which experience a higher rate of worker fatalities.

Gender

104. Fatal injuries to workers are predominantly to male workers, with 95% of worker fatalities in Great Britain to male workers.²⁵ By reducing risks of workplace fatalities, through deterrence and the improving of health and safety practices, the Bill is expected to result in particular positive impacts for male workers.

Age

105. In 2018/19, 25% of fatal injuries to workers in Great Britain were to those aged 60 and over, although they make up around 10% of the

²⁵ <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>

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workforce.²⁶ The rate of fatal injury at work across the period 2014/15-2018/19 shows a clear increase in the rate of fatal injury with age. This applies in almost all the main industry sectors. By reducing risks of workplace fatalities, through deterrence and the improving of health and safety practices, the Bill is expected to result in particular positive impacts for older workers.

106. As worker fatality rates are highest in the construction, agriculture, forestry, fishing, and waste and recycling sectors, it is anticipated that these sectors would experience a particular positive effect from the Bill.

Human rights

107. The Bill should have no adverse impact on human rights. The Bill aims to provide workers with more effective protection and improve health and safety standards in the workplace.

Island Communities

108. The Bill should have no differential impact on island communities.

Local Government

109. It is not anticipated that the Bill will have any significant impact on local authorities.

Sustainable development

110. It is not anticipated that the Bill will have any significant environmental impacts, but it should have a positive impact on sustainable development by improving workplace health and safety, allowing current and future generations of employees to experience safer workplaces.

111. There are various principles in the UK Shared Framework for Sustainable Development adopted by the Scottish Government in 2005 which are of relevance to the Bill, primarily: ensuring a strong, healthy and just society; promoting good governance, and achieving a sustainable economy.

²⁶ <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>

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112. There will be a positive effect in that the Bill will promote behavioural change resulting in fewer deaths in the workplace in Scotland, thus contributing to sustainable development in that families and businesses will not be disadvantaged by a sudden death.

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Culpable Homicide (Scotland) Bill

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