

Scottish Hazards

**Scottish Hazards Response
Private Members Bill Proposals from Claire Baker MSP**

CULPABLE HOMICIDE (SCOTLAND) BILL



January 2019

About You

Q1: Are you responding as:

- an individual – in which case go to Q2A
- on behalf of an organisation? – in which case go to Q2B

Q2A: Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose “Member of the public”.)

- Politician (MSP/MP/peer/MEP/Councillor)
- Professional with experience in a relevant subject
- Academic with expertise in a relevant subject
- Member of the public

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

Q2B. Please select the category which best describes your organisation:

- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
- Commercial organisation (company, business)
- Representative organisation (trade union, professional association)
- Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
- Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

Scottish Hazards is an occupational health and safety charity supported by trade unions; we aim to provide support, advice and representation to workers, mainly in workplaces where there is no recognised trade union and their workers are denied the health and safety benefits associated with trade union membership and collective bargaining in the workplace. We also support families who have unfortunately witnessed the pain and heartache caused when a loved one is killed at work, assisting in their fight to get answers as to why that loved one's life was needlessly taken and helping in their struggle for justice. Our board and workers have a vast range of experience, from personal loss of family and friends and supporting families cheated by the current justice system including most families who lost loved ones in the ICL/Stockline tragedy in 2004.

Our organisation is also associated with Families Against Corporate Killers (FACK) and support their work campaigning for justice for bereaved families in Scotland and throughout the United Kingdom.

Q3. Please choose one of the following:

- I am content for this response to be published and attributed to me or my organisation
 I would like this response to be published anonymously
 I would like this response to be considered, but not published ("not for publication")

If you have requested anonymity or asked for your response not to be published, please give a reason.

(Note: your reason will not be published.)

Reason:

Q4. Please provide your name or the name of your organisation.

(Note: The name will not be published if you have asked for the response to be anonymous or "not for publication".)

Name: Scottish Hazards

Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number.

(Note: We will not publish these contact details.)

Contact Details: Ian Tasker, ian@scottishhazards.org

Q5. Data protection declaration

- I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.

Aim and approach

Q6. Which of the following best expresses your view of the proposed Bill?

- Fully Supportive
 Partially supportive
 Neutral (neither support nor oppose)
 Partially opposed
 Fully opposed
 Unsure

Please explain the reasons for your response.

Scottish Hazards has consistently argued that existing Corporate Homicide legislation is not fit for purpose, in our evidence to the Scottish Government Expert Panel on Corporate Homicide in 2005 we feared that the proposals being put forward by the United Kingdom Government at that time would be largely ineffectual. We thought that, in our view the definition of “senior managers” in the proposals for what became the Corporate Manslaughter and Corporate Homicide Act 2007 continued the identification doctrine and would result in the legislation discriminating against small companies, a point on which we have sadly been proved correct according to analysis of Corporate Manslaughter prosecutions in England and Wales from the [University of Northumbria](#) .

In Scotland the fact that we have not had one charge laid for Corporate Homicide, let alone prosecution would indicate that the existing legislation is failing to punish offenders. If it is failing to punish those who cause the deaths, then the deterrent effect is lost as is the opportunity to encourage employers to take their health and safety obligations seriously.

[The Scottish Government's own statistics](#) show 12 deaths as having been investigated as corporate homicides in the last 10 years, yet no charges and no prosecutions came out of these investigations, a 100% failure rate. We are deeply concerned that this appears to show a deep-rooted flaw in the legislation and makes it highly unlikely we will ever see corporate killers held to account in Scotland.

Q7. What do you think would be the main practical advantages and disadvantages of the proposed Bill?

We believe that the proposals will provide greater clarity in the application of culpable homicide legislation and ensure all those responsible for involuntary deaths by homicide are prosecuted consistently, regardless of where that death occurs, whether in our communities or workplaces, large or small. Justice will be seen to be served providing some comfort to those who lose loved ones through negligent or reckless behaviour by corporate employers, company management or individuals.

Scottish Hazards believes that by tackling the issues surrounding the requirement to identify a controlling mind, the problem of aggregation of the conduct of a company's controlling minds and not being able to hold an organisation vicariously liable for the action of its officers or employees, this Bill will finally lay to rest the anomalies in our law of Culpable Homicide that led to the collapse of the Transco prosecution.

The law of Corporate Homicide introduced in 2008 has spectacularly failed to address a serious inequality in our criminal justice system, namely that large employers appear to be practically immune from prosecution, as are the directors and senior management of these organisations, whose individual and/or collective failures play a significant part in the death of a worker, workers or members of the public.

By ensuring these proposals cover Crown Employers consistency is ensured and Scottish Hazards believes this is right and proper and should be the case in any civilized legal jurisdiction.

We believe these proposals would lead to a significant change in the way all employing organisations conduct operations in Scotland. Ensuring more transparency in decision making processes and increasing corporate accountability of organisations and the individuals making decisions on behalf of the company will focus their minds on getting workplace safety right all the time or face the consequences.

Q8. Do you have any further comment to make on the need for legislation of this type as detailed in this consultation?

Scottish Hazards fully expect there will be opposition to these proposals mainly around legislative competence and this being another regulatory burden on business. As an organisation Scottish Hazards is clear and unequivocal: these proposals relate to the Scots common law offence of Culpable Homicide, the need to ensure it applies consistently across our criminal justice system and achieves the aims of any criminal offence, to punish all those who offend, to deter others from offending and to rehabilitate those who have offended and been sentenced by the courts.

Regarding legislative competence we believe that as this proposal seeks to make the law of culpable homicide apply consistently to reserved matters and otherwise then it is within the legislative competence of the Scottish Parliament. This argument needs to be pursued vigorously by all organisations with an interest in ensuring reform of Culpable Homicide law and failings in Scots criminal law that lead to perceived or actual immunity from prosecution for any section of society are addressed.

Scottish Hazards refutes any suggestion that this will place increased burdens on business, if they operate in a responsible way and their organisations and office bearers carry out business fully aware of their responsibilities under our criminal law then they should have nothing to fear. If, however they act in manner, collectively or individually, resulting in involuntary killing they should be subject to investigation, prosecution and punishment under our criminal law.

Q9. Do you have any comments to make on the proposals outlined which suggest that there be two different statutory kinds of culpable homicide – culpable homicide by causing death recklessly and by gross negligence?

Scottish Hazards supports the proposals for two different statutory kinds of culpable homicide, “culpable homicide by causing death recklessly” and “culpable homicide by gross negligence”.

In the case of the first new proposed offence we believe it allows for prosecutions, mainly of individuals, if they knew or should have been aware of the risk that their actions could result in death but carry on regardless.

We would have been concerned, had this been the only proposal put forward, as there are clearly difficulties in ensuring this offence applies to organisations. However, the proposals for the second offence involving gross negligence would close the loopholes identified in the Transco case and this is essential for Scottish Hazards.

We believe that recklessness and gross negligence are equally culpable and where companies cause death by either, they ought to be guilty of corporate culpable homicide.

Q10. Do you have any comments on the range of organisations and office holders who should be defined by the Bill?

We believe that the range of organisations caught by the Act should be as wide as possible and the proposals appear to indicate that intention. There should be no exemptions or immunity from prosecution for culpable homicide where the behaviour of organisations or individuals falls below the standard that society expects, in this case exposing workers to unacceptable risks that could lead to or result in death.

This should include decision makers at every level of management ensuring the law of culpable homicide applies to management and workers alike. It is interesting and perhaps an indication of the failure of existing legislation to punish office holders and companies, that the only prosecution (albeit unsuccessful) for culpable homicide involved a worker, [Dean Reynolds](#), found not proven of causing the death of 17 year old Michael McLean on the last day of Michael's summer job in a workplace in Aberdeenshire.

The current approach to identifying the controlling mind does not reflect how companies operate in practice and is anachronistic. The law of vicarious liability says if an individual does something wrong, then the company is liable. This Bill would ensure this is the case for culpable homicide, recognising that decisions made by senior managers, managers can and do result in death.

Q11. Do you have any comment to make on the provisions applying the new offences to Ministers, civil servants and Crown bodies in the same way as they apply to natural persons and organisations?

Scottish Hazards believes that Crown immunity for prosecution should be removed to ensure justice is seen to be done to all, and applied consistently across society, including small employers, large employers, voluntary sector and public employers as well as Crown employers.

It is inconceivable that Crown employers including Scottish Ministers should be given immunity from prosecution when the purpose of this Bill is to ensure that any natural person or organisation, irrespective of size or status, whose actions lead to the death of an individual is accountable for their actions in a Court of Law.

To do would undermine the proposals as well as the integrity of the Scottish Parliament and the Scottish Government if they were to take public policy decisions that result in more favourable treatment being afforded to them than other employers.

Culpable homicide by causing death recklessly

Q12. Do you have any comment to make on the way in which causing death recklessly is defined in the proposal?

Scottish Hazards believes that Crown immunity for prosecution should be removed to ensure justice is seen to be done to all, and applied consistently across society, including small employers, large employers, voluntary sector and public employers as well as Crown employers.

It is inconceivable that Crown employers including Scottish Ministers should be given immunity from prosecution when the purpose of this Bill is to ensure that any natural person or organisation, irrespective of size or status, whose actions lead to the death of an individual is accountable for their actions in a Court of Law.

To do would undermine the proposals as well as the integrity of the Scottish Parliament and the Scottish Government if they were to take public policy decisions that result in more favourable treatment being afforded to them than other employers.

Q13. Do you have any comment to make on the proposal that organisations would be responsible for the actions of their employees for this offence?

We are fully supportive of the proposal to make organisations vicariously liable for the actions of their employees, it is unacceptable that the law allows organisations to delegate responsibility and accountability for health and safety decisions to lower level management, often with little or no health and safety training. For Scottish Hazards health and safety accountability start and ends in the board room, you can delegate the task but as part of that delegation you should not be able to delegate responsibility for the health, safety and wellbeing of workers. Holding organisations vicariously liable would ensure those in charge of companies and employing organisations understood their legal obligations and the implications of not driving health and safety improvement.

Q14. Do you have any comments on the inclusion of aggregation and how it will work in practice?

Inclusion of aggregation is vitally important in order to lay to rest the issues around failure of common law identified in the Transco case that did not allow the aggregation of individual controlling minds over a long period of time in order to meet the requirement to prove the mental element to secure a prosecution for culpable homicide. In Transco and the ICL Stockline tragedy the mismanagement of buried gas pipe work over an extended period (4 decades in the case of ICL Stockline) had compromised the integrity of the pipework resulting in the deaths of 4 in the first case and 9 in the latter. Attempting to identify one controlling mind over long periods of time in such cases is difficult and nearly impossible in larger companies like Transco. This proposal would address the inequality apparent within the law of Culpable Homicide as it stands where it is far more likely that smaller companies would be prosecuted than larger ones.

Culpable homicide by gross negligence

Q15. Do you have any comment to make on proposals to re-introduce culpable homicide by gross negligence into the law in Scotland?

Scottish Hazards support the proposals to re-introduce culpable homicide by gross negligence into our criminal law. The absence of any provision within existing Corporate Homicide legislation to prosecute individuals aligned to the fact that it is virtually impossible to prosecute work related deaths as acts of culpable homicide in Scotland necessitates a change in the law. In England and Wales, several individuals have been prosecuted, found guilty and in some cases imprisoned for gross negligence manslaughter in addition to prosecutions being taken against their companies for corporate manslaughter.

When considering the re-introduction of this offence, Scottish Hazards feels it is important to remember this would be returning to a position that existed previously, providing bereaved families with some expectation those responsible for their loved one's death could be held accountable for their loss, where their actions fell below those expected of a reasonable person.

Gross negligence can be established objectively without any need to identify individual controlling minds removing the need to prove a mental element to the crime or to establish vicarious liability for the acts of office holders and we believe this addresses all the issues that led to the collapse of the case against Transco as it also allows for the manner in which company activities were managed over a period of time to be taken into account resolving the issues of aggregation evident in Transco.

Q16. Do you have any comment to make on the proposals to define what is meant by that offence where it is committed by a natural person?

Scottish Hazards agrees with the definition of how the offence would apply to a natural person, we feel this clearly explains what would be required for a natural person to be guilty of the offence. This is in line with other areas of law where behaviour that falls short of that expected by a reasonable person is likely to result in an offence being committed and a reasonable chance of conviction if proved.

Q17. Do you have any comment to make on the definitions of “duty of care” and “gross breach”?

Scottish Hazards agrees with the definition of duty of care and how that applies to natural persons and organisations and what constitutes a gross breach of a duty of care owed by one party to another. These are well established legal principles and well established and entirely appropriate for the reform of culpable homicide the Bill is seeking to achieve.

Sanctions

Q18. Do you have any comment to make on the penalties which may be imposed if a conviction is successful under a new law?

Unlimited fines can already be imposed on health and safety offenders with the ability to pay being considered by the sentencing judge, the financial sanctions being imposed by courts in England and Wales, particularly on large companies and corporations, have risen quite dramatically in recent years due to the [sentencing guidelines issues by the Sentencing Council for England and Wales](#). Provisions are made in the guidelines for fines equivalent to 100% of pre-tax profits. These guidelines are not directly applicable to Scotland and the Scottish Sentencing Council appears to have no plans to follow suit, therefore creating a potential for serious inconsistency in the way financial sanctions are imposed by court between the two jurisdictions. There is evidence that some judges in Scotland consider these guidelines and have been encouraged to have some regard for them when considering penalties for health and safety breaches. This was highlighted in a decision by the Court of Appeal in Scotland against a fine imposed on [Scottish Power Generation](#) following the scalding of an employee at the now closed Longannet Power Station in 2013. Scottish Hazards is of the view that in order to ensure consistency in sentencing for the new offence the Scottish Sentencing Council should be asked to develop similar guidelines to ensure appropriate sentences are imposed by courts and judges are given access to the full financial resources available to pay fines with appropriate forensic accounting procedures being put in place to ensure information on company finances provided to the court reflects the true position.

Scottish Hazards would question the logic of imposing substantial penalties on public bodies such as health boards, emergency services and local authorities. In 2015 the Scottish Fire and Rescue Services were fined £54000 following the death of Ewan Williamson in 2009. On this occasion the judge, Lord Uist considered “that he was dealing with a public body whose daily business was the prevention of injury and death and preservation of property” when imposing the penalty. The consequences of this and any other financial sanction placed on public bodies is that public services suffer as a result and the financial burden is ultimately met by the tax payer. Consideration should be given to alternative sanctions such as remedial orders, publicity orders, sanctions on public boards or their members where they collectively or individually contributed to the failures that led to the death.

We would also support bereaved families being able to provide victim statements to the judge as part of the sentencing process, this would ensure consistency with opportunities afforded to other victims of crime.

Financial implications

Q19. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

(a) Government and the public sector

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

(b) Businesses

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

(c) Individuals

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

Scottish Hazards is of the view these proposals would have little financial impact on the public sector, business or individuals.

For the public sector we would see the main impact being on the COPFS and Police Scotland. That said both the COPFS and Police Scotland are involved in investigating work related fatalities at the moment along with the HSE under the [protocol for investigating work related deaths](#) . Scottish Hazards would envisage the COPFS and Police Scotland having primacy in investigation of workplace culpable homicides with the HSE becoming involved in cases where there is insufficient evidence to meet the tests of the new offences. The option of prosecution for breaches of the Health and Safety at Work Act should remain for such cases.

The COPFS currently resources the Health and Safety Division who have responsibility for investigating potential corporate homicide cases, 12 in the last 10 years all of which have not reached prosecution. The [thematic report on the COPFS Health and Safety Division](#) refers to the “huge delays” and the “cumbersome” process involved in investigating what turn out to be unsuccessful cases. Scottish Hazards would argue that the proposals would result in shorter more focused investigations as the tests are more objective, the investigations will be less cumbersome, and costs may well be reduced as a result, particularly as the deterrent effect takes hold and fatalities decrease.

Undoubtedly business organisations will provide evidence to suggest there will be a significant cost burden on their members, we do not believe that to be the case the only businesses that are likely to be impacted by these proposals are ones that do not provide the protection for their workers they are required to do under the HASAW Act 1974. Those businesses that do not have adequate health and safety management systems in place are more likely to expose their workers to the risk of fatal injury. Scottish Hazards would find it incredible that business organisations seek to defend such negligent employers, resorting to unevidenced ideological arguments that regulation is a burden on business rather than evidence showing if business invests in health and safety there will be a cost benefit accrues through time, including less likelihood of exposure to litigation and prosecution.

We believe the financial impact on individuals to be cost neutral for families but in this case the costs go far beyond monetary measurement, the loss of a loved one, the loss of companionship and the vast gap left in the lives of those impacted by work related deaths should be enough motivation for employers, political parties and politicians to support these proposals.

Please explain the reasons for your response.

Q20. Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?

Scottish Hazards has no comment to make in relation to this question other than this Bill focuses on delivering justice for families who lose loved ones as a result of work-related injury and incidents. Cost effectiveness should not come into addressing injustice.

Equalities

Q21. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, race, religion and belief, sex, sexual orientation?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

Please explain the reasons for your response.

We see neither positive or negative impacts arising from these proposals.

Q22. In what ways could any negative impact of the Bill on equality be minimised or avoided?

We do not anticipate any negative impacts arising from the Bill.

Sustainability

Q23. Do you consider that the proposed bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

Yes

No

Unsure

Please explain the reasons for your response.

Scottish Hazards cannot anticipate any disproportionate impact of these proposals that would justify not acting to ensure that our law of culpable homicide delivers justice for families who lose loved ones as a result of negligent or reckless acts in the workplace and society that result in death.

General

Q24. Do you have any other comments or suggestions on the proposal?

In this case the Supreme Court ruled that the Parliament was acting within its powers and were not in breach of any European Legislation as the SWA had claimed.

Scottish Hazards would hope any Bill arising from these proposals would not require ending up with a decision at the Supreme Court and we would hope the Bill is supported by the Scottish Government, our view is that any attempt made to conflate or confuse this with any area of reserved legislation should be challenged by them in the same way they have challenged these other attacks on legislative competence. Not to do so may have consequences for our criminal justice system in future years.

Scottish Hazards envisages protest from the business community aided and abetted by political parties who are ideologically opposed to regulation. These proposals aim to ensure bereaved families have more confidence in our justice system as the process will be more consistent and transparent and the resultant deterrent effect of legislation that ensures justice is seen to be done will drive down the number homicides in our workplaces. We see no reasonable objection to legislative proposals with such laudable aims although, sadly there will be some based on self-interest and not in providing justice for those who lose most.

The issue of legislative competence will also be challenged going by previous attempts to deliver justice for families bereaved as a result of employer negligence. Scottish Hazards believes any proposal to amend criminal legislation to ensure it is applied consistently across our society is within the competence of the Scottish Parliament. We believe the Scottish Government should be prepared to challenge any attempts to confuse this with reserved legislation as will undoubtedly happen.

We note the Scottish Government's robust defence of their proposals for minimum pricing of alcohol against an attack from the Scotch Whisky Association despite the view from the Law Society of Scotland that the Bill proposals were a matter reserved to the UK Parliament.

The primary objective is to provide consistency and clarity in the way the law of culpable homicide is applied across our society and to ensure those who lose loved ones following work related fatal incidents are not denied justice. Justice for involuntary homicide should be seen to be done for their families in the same way as it is for those losing loved ones through other acts of homicide. There will be other additional benefits from the proposals as we believe there will be an increased focus on protecting workers from risk of fatal injury.

The Smoking, Health and Social Care (Scotland) Act 2005 served a similar dual purpose, the primary purpose being to improve the public health of Scotland's population and legislation was promoted as having a potential impact on the health and safety of many workers particularly in the hospitality industry by protecting them from secondary tobacco smoke. There was never any question or public outcry about that straying into reserved health and safety legislation.