CULPABLE HOMICIDE (SCOTLAND) BILL

CONSULTATION PAPER SUMMARY RESPONSE

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APPENDIX 1: CULPABLE HOMICIDE SCOTLAND BILL
1. INTRODUCTION

On 22 December 1999, a massive explosion occurred in Carlisle Road, Larkhall. A dwelling house situated at 42 Carlisle Road was completely destroyed and all 4 occupants, including 2 children, suffered fatal injuries in the explosion.

The gas network service provider, Transco, was legally responsible for the explosion and was ultimately convicted of criminal charges under the Health and Safety at Work etc Act 1974 for their failures. However many people at the time, and to this day, take the view that only a conviction for culpable homicide would satisfy the appropriate level of moral opprobrium.

The Lord Advocate brought charges against the company for culpable homicide. There was nevertheless considerable doubt as to whether or not such a charge was competent: There were concerns that the law Scotland did not permit an incorporated body, separate from its managers and directors, to be convicted of culpable homicide at all. The law in Scotland in relation criminal culpability of companies was very vague and in many ways still in its infancy.

This was the first occasion that a company had been charged with culpable homicide in Scotland. Only 18 years earlier was the first occasion a company had been charged with any common law crime, that is a crime created and developed through institutional writers 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 such that it was considered that companies could form the necessary guilty mind for some crimes such as reset, conspiracy and fraud but not perjury, rape or shameless indecency. Very little had been said until the court ruling in the Transco even in academic journals about whether or not a company could be convicted of culpable homicide. At the time therefore no one knew if the law in Scotland could cope with the situation that arose on the night of the 22nd December 1999 and whether the law could deliver a conviction for culpable homicide against a company.

In the Transco case, The High Court Criminal Appeal (Scotland’s highest and final appeal court) 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. This is called the identification doctrine. As the charge did not identify any such individual or group of individuals, it was irrelevant and therefore dismissed. It was not good enough simply to identify posts or committees within Transco who may have dealt with the matter over a period of time (Lord Carloway whose decision was reversed had held that the charge of culpable homicide against Transco was relevant).

Accordingly, in anything other than the smallest companies with the simplest of management structures, it will be impossible to prove the elements of the identification doctrine. Such companies are therefore presently beyond the reach of the law for culpable homicide. This is a defect which is waiting to recur again. Many people consider this to be an unacceptable loophole in the law that requires to be closed. The term “the Transco loophole” is certainly a part of our common parlance in Scotland.
The corollary of what is said in the above paragraph is of course also true: Very small companies, with very simply management structures, such as family businesses and organisations where the owner and only director is also the manager can certainly capable of being prosecuted and convicted of culpable homicide. In fact successfully convicting such small companies would now appear to be quite simple.

In relation to companies, the Transco case has therefore left the law in a position where it discriminates against small businesses. The law is uneven and unfair. It is certainly arguable that as the law now stands small companies are being unfairly discriminated against in being subjected to more severe penalties than larger companies contrary to Article 14 of the ECHR. In Scots Law as to whether other legal persons can be charged with culpable homicide. For example, partnerships under Scots Law are separate legal persons. For common law crimes such as culpable homicide it is thought that it would be also be necessary here to establish a guilty mind. Partnerships too can range from the simple to complex and can cover a whole range of activities. There are also firms consisting of one person which do not operate as a company or a partnership but which nevertheless would be engaged in the same activities, and indeed often in competition with other such legal persons within the sphere of their relevant activity. As a natural person they would be likely, as with a small company, to be charged with culpable homicide.

We therefore have not only a problem of small businesses as against larger ones in the context of company structures but an unfairness between the small business and the partnership, and further the individual carrying on a trade as against a larger company or partnership. As well as the law therefore being inconsistent and therefore uneven and unfair in the context of corporate organisations that inconsistency is carried into other forms of organisations aggravating unevenness and unfairness and indeed discrimination solely based on questions of size and the form of other organisations.

The conduct giving rise to culpable homicide also requires reform. This was recognised by Gordon in his book on the Criminal Law of Scotland as long ago as 1967 and was the subject of proposals in the Draft Scottish Criminal Code which was prepared by Professor Clive and others and published by the Scottish Law Commission in 2003. It is surely unsatisfactory as a matter of policy that one of the most serious crimes in our criminal law, that is culpable homicide, should have within it a lack of definition and uncertainty as to what actually constitutes the conduct in question.

It also has to be recognised that the Crown in contemporary society, has responsibilities either itself or through organisations which it controls which in exercise of them may cause death. There should be no reason as a matter or policy and in principle whereby 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.

The law in Scotland therefore requires to be amended (1) to clarify the law on culpable homicide so that it applies consistently, fairly and evenly to all persons natural and legal (2) to clarify the definition of culpable homicide to provide certainty and specify the type of conduct upon which society would wish to visit the opprobrium of culpable homicide and (3) to 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.

In 2005, the Scottish Executive set up an Expert Group to review the law on corporate liability for culpable homicide. Their Report on Corporate Homicide was published by the Scottish Executive in November 2005. While the Justice Minister, Cathy Jamieson, warmly welcomed the report the Scottish Ministers have done nothing to introduce a Bill on the issue. The Expert Group did not conclude that the law of culpable homicide should be amended but instead recommended the creation a new offence. It is thought that there are wider issues requiring amendment of the law of culpable homicide than those canvassed in that Report.

A draft Bill of the UK Government was published in March 2005. The Bill proposes a new offence of corporate manslaughter. The Bill does not propose to amend the Scottish common law in relation to culpable homicide nor could the Bill do so without the consent of the Scottish Parliament. Only culpable homicide carries the appropriate moral obloquy. Accordingly, irrespective of any related legislation at Westminster, Scottish legislation is required.

In order to remedy these defects in the law of Scotland, this Consultation Paper proposes to amend the law of culpable homicide by making it clear in statute

- that a natural person may be guilty of culpable homicide if that person causes the death of another recklessly or by gross negligence;
- what are the elements of each of those offences;
- how an organisation may be liable for each of those offences; and
- that a Crown servant or agent (including a Minister, civil servant or department) may also be liable for each of those offences.

2. BACKGROUND

The Essential Elements of any Common Law Crime

Some crimes are creations of statute. These are called statutory offences. Other crimes, the majority in Scotland, come from years of judicial decisions together with legal principles founded on Institutional Writers. These are called common law offences. Murder and culpable homicide are both common law offences.

Most common law offences require two essential elements before there can be a conviction. There must be a guilty act (called actus reus) and a guilty mind (mens rea). The degree and extent of the guilty mind can vary from crime to crime. For a conviction for any common law offence however there must be some degree of guilty mind (mens rea).

Murder

The mens rea for murder is that either the act of killing (the actus reus) was deliberate, with criminal intent or through “wicked recklessness”. It is obviously a
question of fact in each case as to whether there was a deliberate intent to kill or whether the recklessness was “wicked” but for there to be a conviction of murder one or other of those two legal criteria must be met. If they are not, generally where there has been a death there will be a conviction for culpable homicide subject to what is written below.

**The definition of culpable homicide – case law.**

There are different types of crimes of culpable homicide in Scotland. It is well established that where a person may only intend to assault another but death results from the assault the perpetrator is guilty of culpable homicide. Similarly, it is well established that, where an accused would be guilty of murder but is able to establish factors which the law accepts as mitigating or diminishing the level of guilt, then there will again be a conviction for culpable homicide. Provocation and diminished mental responsibility (less than insanity) are an example of how that aspect of the law works. This is generally categorised by the commentators as “voluntary culpable homicide”.

However there is another type of culpable homicide, what is known as “involuntary culpable homicide”? This would include homicide in the course of lawful conduct. This is where for example a person was carrying out an activity which they were permitted to do but did so below a standard required by society and whereby their failure to fulfil that standard caused a death. The problem is in determining what that standard is.

The institutional writers seemed to have regarded as criminal every negligent act (that is an act which lacked due care) which causes death. For example, Hume defined culpable homicide in the course of lawful conduct as:-

“It is culpable homicide where slaughter falls in the doing of even a lawful act; if it is done without that caution or circumspection which would have served to prevent harm to others.” [10]

Alison also followed Hume and stated:-

“It is culpable homicide if death ensues in the performance even of an act not in itself criminal if due care of others is not taken in the performance of it.” [11]

The classic case on culpable homicide, William Paton and Richard McNab, also endorses this view. Lord Justice Clerk Hope said that:-

“The degree of blame, which will constitute this crime, varies with the circumstances of each case. It is not necessary, in order to substantiate a charge of culpable homicide, either that there should be any intention to do to another the injury which has occurred, or that the party should even know that another is actually exposed to risk, as in the case of a carter who neglects his duty and runs down a child, though he may not know that any child actually is near him. The general rule is, that every person, placed in a situation in which his acts may affect the safety of others, must take all precautions to guard against the risk to them arising from what he is doing… and if that has been omitted, which common sense, and ordinary reflection as to the situation of others required, which… duty to the law required for the safety of others, the guilt is clear.

However, in the Court of Criminal Appeal in that case there was a shift away from this definition, Lord Justice-Clerk Aitchison observed at p.22:
"The difficulty that the case presents is whether there was evidence that the appellant was guilty of criminal negligence in the sense in which we use that expression. At one time the rule of law was that any blame was sufficient, where death resulted, to justify a verdict of guilty of culpable homicide. Unfortunately, this law has to some extent been modified by decisions of the Court, and it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at least analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved."

The court did not define this further. Lord Aitchison went so far as to suggest such modification as "unfortunate" and that the old law should perhaps be reconsidered. The only authority quoted to the court was Cranston [13] which referred to the conduct as being "gross and palpable carelessness".

In the Transco case, the concern of the court was less with the definition of culpable homicide than with the question whether it necessarily involved the mental element of mens rea. Nevertheless, Lord Osborne commented upon Lord Justice-Clerk Aitchison's definition in the Paton case –

"With the greatest of respect to the author of this dictum, it appears to me that this definition involves certain difficulties. His Lordship refers to "criminal negligence" and "criminal indifference to consequences". The use of the adjective "criminal", in an endeavor to define what is in fact involved in a particular crime, involves circularity and is therefore unprofitable. Furthermore, the word "negligence" introduces a potential for confusion. I would believe that that word "negligence" may properly be used in two senses. The first is a reference to the English tort of negligence; the second is the more general English parlance, which connotes some degree of carelessness or neglect of duty in a non-legal context. It is not clear to me in which particular sense that word is used by Lord Justice-Clerk Aitchison. The remaining features of the definition "gross or wicked ... indifference to consequences" appear to me to be more helpful."[14]

As can be seen from the above, Lord Osbourne in the Transco case seems to be moving away from the concept of gross negligence to that of recklessness. Lord Osborne referred to the statement of Lord Justice-General Clyde in Quinn v Cunningham 1956 J.C. 22 at p 24 where he said:

"So far as concerns road accidents in Scotland, it is an essential element in the constitution of a crime at common law that there should be either an intention to commit a wrong or an utter disregard of what the consequences of the act in question may be so far as the public are concerned. Culpable homicide is the typical example of the latter form of crime. The essence of culpable homicide is the degree of culpa which has in fact resulted in the death. Mere culpa plus a death resulting from it does not constitute culpable homicide."

Lord Osbourne pointed out that this quotation was approved by the court in W. v HMA[15], and it was also observed that: ".... it is of the essence that [in the case of this kind of culpable homicide] there should be criminal recklessness in the sense of a total indifference to and disregard for the safety of the public."

Lord Hamilton in the Transco case confined himself to pointing out-

"37 There may be some difficulty in regarding Lord Justice-Clerk Aitchison's observation as a comprehensive definition - not least because of the circularity which arises from the use (twice) of the adjective "criminal" in the definition of the crime.
But it does at least point not only to a degree of want of care which is grave but also to a state of mind on the part of the accused which is "wicked" or amounts, or is equivalent, to a complete indifference to the consequences of his conduct. These latter aspects reflect the mental element which since Hume has been recognised as a necessary ingredient of this crime, albeit the degree of blameworthiness has become greater.

The court on the Transco case held that mens rea (or "criminal recklessness in the sense of a total indifference to and disregard for the safety of the public") was an essential element of the crime of culpable homicide. Nevertheless, it is clearly unsatisfactory that it should be as uncertain and unpredictable as to what are the essential elements of the crime of involuntary culpable homicide in the law of Scotland. There is therefore an urgent need, if natural and legal persons are to be subject to a crime of involuntary culpable homicide, that definition of the conduct required for such a crime is made as clear as possible.

Attributing criminal liability to companies for common law offences
The concept of limited liability which underpins company law relies upon certain legal fictions. The legal fictions are longstanding, ingrained in the law and will never be changed. They say that a company is a legal person. They say that the company is an entirely separate legal persona from those who own and run the company, even in the case where the company is a one man band where only one person is the worker, manager, director and owner.

In view of the fact that the company is a legal fiction and not an actual person there was thought to be difficulties in prosecuting a company where a mental element was involved. For example in the case of Dean v John Menzies (Holdings) Limited a company was charged with shameless indecency for selling pornographic magazines. The Sheriff who heard the case in the first instance found the charge against the company incompetent and expressly stated the view that companies could not be found guilty of common law offences.

The High Court of Criminal Appeal however in the same case rejected the Sheriff’s view that a company could never be found guilty of a common law offence. However, the Appeal Court did agree that a company could not be guilty of shameless indecency because it required the company to exhibit human characteristics. From that point on, the view which was held was that a company could possess the necessary guilty mind for some crimes such as reset, conspiracy and fraud and not for crimes such as perjury, rape or of course shameless indecency. Until the decision in the Transco the position in relation to culpable homicide and how that might apply to companies in Scotland had never been tested. (Although in England there had been decisions on different models for attributing liability to companies - see below)

The Transco decision
The High Court of Criminal Appeal held in the Transco case that a company can be prosecuted and convicted for culpable homicide. However it also held that it was necessary to establish the same two essential elements of the crime, the mens rea and the actus reus, in relation to a company as one would in relation to an actual person. Accordingly, in order for a Company to be convicted it was necessary to find someway of attributing the necessary mental element to that company.

While they had not considered the case of corporate manslaughter (the equivalent of culpable homicide in England) the English Courts had over several decades considered the issue of corporate culpability in a number of cases. Through these
cases the English Courts had developed a principle that a company could be criminally liable if a person or group of persons who were the “directing mind and will” or “controlling mind” of the company and who could, therefore, be said to be identified with it or to embody it, were criminally liable for the crime in question. This principle enabled the Courts to say that it was the company which was acting and have the necessary intention when it was that of the directing or controlling mind. It was therefore possible to ascribe to the company the acts and state of mind of that individual or those individuals. This was called the identification principle.

The High Court held that this identification principle was incorporated into Scots law. However, they also held that the indictment failed to identify or specify any individual or group of individuals who could be said to be the “controlling mind” of Transco and whose acts and state of mind could therefore be regarded as that of the company itself and who were guilty of that crime. As the charge did not do so, it did not establish that the company was guilty of culpable homicide and was irrelevant and therefore dismissed. It was not good enough simply to refer to committees and posts.

Furthermore, the charge had sought to attribute to the company the acts and state of mind of a series of committees and posts over a period of time The court considered that this was an attempt to aggregate the actings and states of mind of a number of different individuals, none of whom would individually be guilty of culpable homicide, in an attempt to argue that, taken together, they might be sufficient to amount to the acts and mental element necessary to establish culpable homicide and be attributed to the company. The court held that this “aggregation principle” was inconsistent both the common law and with the identification principle.

The Transco case – discriminating against small companies.

While it has been widely recognised that one of the main effects of the Transco case is that it will be all but impossible to successfully prosecute a company for culpable homicide, there has been less commentary on the corollary of that fact. The Court has firmly established in the Transco case that the very smallest of companies with the simplest of management structures can certainly be successfully convicted for culpable homicide. Family businesses and small organisations where the owner and only director is also the manager are now in a position where it will be fairly simple for a successful prosecution to be brought against them for culpable homicide in appropriate circumstances.

The decision has therefore created a two tier company structure in Scotland. On one tier there are the very small companies who can easily be prosecuted for culpable homicide. On the second tier are all of the other companies who will never be prosecuted as the law stands. The law is uneven and discriminates against the smaller companies purely because of their size and management structure.

This creates a situation where two companies can engage in identical conduct through its managers resulting in death but that one company may be prosecuted for culpable homicide for that conduct, because it is a small organisation, and the other will not because of its management complexity. That is not an acceptable state for our law to be in.

Accordingly, it is certainly arguable that as the law now stands small companies are being unfairly discriminated against in being subjected to more severe penalties than larger companies contrary to Article 14 of the ECHR. This is not satisfactory and there is an obligation upon the Executive and the Parliament to remove such discrimination.
Other Organisations

In Scotland partnerships are legal persons. The statute governing partnerships is the Partnership Act 1890. The position regarding the criminal liability of a partnership is not clear in terms of this Act. Section 10 which would seem to be the only relevant section states:-

“Whereby any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, with the authority of its co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partners so acting or omitting to act.”

It is not clear whether this section imposes vicarious criminal liability upon the partnership for the acts of the partners.

This section has been considered in the context of statutory offences and where a partnership has been held liable because of the precise terms as in the case of Gair –v- Brewster[19]. However it is clear from this case that the partner would not have been liable for the conduct of a servant or agent by common law because the guilty mind of mens rea would not have been present[19].

Leaving aside the question of vicarious liability, it would seem that similar difficulties would arise in considering a partnership as would arise in respect of a company on the basis of identification (dependent upon the complexity of the partnership) or aggregation (the conduct of previous partners). It is certainly arguable that as the law now stands small partnerships would be unfairly discriminated against in being subjected to more severe penalties than larger partnerships/companies contrary to Article 14 of the ECHR. This is also not satisfactory and there is an obligation upon the Executive and the Parliament to remove such discrimination.

The Crown

The Crown through its various emanations and organisations oversees and controls a multitude of activities through its occupation of premises, the employment of staff and engaging of agents and its civil servants which in exercise of them may cause death. It would be inconsistent, unfair and uneven if servants or agents of the Crown (whether Ministers, civil servants or departments) were immune from being prosecuted for culpable homicide simply because they were part of the Crown in circumstances where they would otherwise be so prosecuted.

Moral opprobrium

Lord Osborne in his opinion in the Transco case acknowledged that there was a particular opprobrium associated with a culpable homicide conviction that was not associated with a conviction under the Health & Safety at Work Act. Offences under the Health & Safety at Work etc Act are regarded by the public as regulatory. They are not on par with what might be described as proper crimes and certainly not considered as serious or deserving public reproach as culpable homicide. Culpable homicide is one of the most serious crimes in Scotland. It is just and proper that in appropriate circumstances where death flows from the reckless conduct of a company that the company can be convicted of such a serious crime with the appropriate level of moral obloquy.

It is for that reason that it is not appropriate to abandon the notion of companies being convicted for culpable homicide. Instead the law must be amended and
clarified in order that in appropriate cases convictions for culpable homicide can be achieved.

The English position
Similar difficulties have also occurred in England and Wales. Accordingly, despite the differences between the English law of manslaughter and culpable homicide, it is only proper that consideration is given to that law and to how it is proposed to amend it.
3. PROPOSALS

Problems
Against this background, it is clear that the common law of involuntary culpable homicide in Scotland requires to be amended –

(a) To clarify the law so that it applies consistently, fairly and evenly to all persons natural and legal;

(b) To clarify the definition of culpable homicide to provide certainty and specify the type of conduct upon which society would wish to visit the opprobrium of culpable homicide; and

(c) To 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.

More particularly, it is thought that there are 8 main problems about the existing common law -

• it is not clear what are the criteria by reference to which the law regards a person as being guilty of culpable homicide if that person causes the death of another – is it if death is causes recklessly or by gross negligence and what is meant by either;

• The Transco case established that, unlike the English law of manslaughter, culpable homicide cannot be established at common law simply by an objective assessment of the conduct involved. There required to be some assessment of the mental state of the accused in order to establish a guilty mind (mens rea). This renders it difficult to attribute liability to a non natural or legal person, such as a company or other organisation;

• the Transco case also established that at common law criminality can only be attributed to a corporate body through the identification principle, that is by finding an individual (or group of individuals) who can be regarded as the controlling mind of the body, whose acts and state of mind can be regarded as those of the body itself and who are guilty of culpable homicide;

• it is difficult to identify such an individual except in the case of smaller and less complex organisations. The effect of the Transco decision is therefore to discriminate against these smaller organisations who can be prosecuted for culpable homicide while the larger companies or bodies corporate (including partnerships) or those with complex managerial structures can evade liability for causing a person’s death;

• the Transco case also established that the common law does not permit aggregation, that is allowing the court to “aggregate” the conduct or state of mind of a number of the body’s controlling minds, none of whom would individually be guilty, so as to constitute in sum the requisite elements of the crime of culpable homicide. This means that the longer some management failure has continued until it causes death, the less likely it is that the organisation will be prosecuted;

• the Transco case also established that the common law does not permit a corporate body to be vicariously liable for a common law crime for the acts or omissions of its officers or employees acting within the scope of their employment, even although it permits this in the case of the civil law and statutory offences;
• the common law does not address the real problem where organisations are concerned, which is making the organisation liable directly and personally for the way in which it is run when it causes the death of a person culpably without having to find a particular individual who is guilty and who can be identified with the organisation or for whose acts the organisation can be made vicariously liable; and

• at common law, the Crown is immune from prosecution and this means that Ministers, civil servants and government departments cannot be prosecuted even if their culpable action causes death. This is unfair and discriminates in favour of the Crown.

Proposals

In order to deal with these problems it is 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 that person causes the death of another recklessly or by gross negligence;

• what are the elements of each of those offences;

• how an organisation may be liable for each of those offences; and

• that a Crown servant or agent (including a Minister, civil servant or department) may also be liable for each of those offences.

These proposals will in effect create two different statutory kinds of culpable homicide. These offences would be in addition to, and not in substitution for, the existing kinds of culpable homicide at common law. There is an express saving for the common law.

(a) Culpable homicide by causing death recklessly

In the case where culpable homicide consists of causing death recklessly, it is proposed to define that what is meant by causing death recklessly along the lines proposed in the draft Scottish Criminal Code[20], 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;

• to make an organisation vicariously liable for that offence along the lines proposed by the draft Scottish Criminal Code[21], 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 office or on behalf of the organisation in doing the acts constituting the offence; and

• to permit aggregation by providing that, even although a particular office holder is not guilty of that offence, an organisation would also guilt 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.

These proposals will go some way towards meeting the common law problems mentioned above. In particular, the definition of causing death recklessly embodies an objective standard which would allow recklessness to be established objectively.
without any guilty mind (*mens rea*). However, there may be still be certain difficulties about making an organisation liable for this offence. This is because

• where aggregation does not take place, it will still be necessary to identify an office holder who has committed the offence and it may be difficult to do so;

• it may be open to objections of principle to impose vicarious liability because it would automatically make an organisation liable for the fault of an office holder even where it may have taken considerable pains to prevent the kind of incident that caused the death;

• the provision permitting aggregation may well give rise to a number of difficult (and perhaps insoluble) problems where different office holders acted in different ways or knew or believed different things. In these circumstances, a court might find it difficult to extract the necessary elements for the offence; and • it does not address the real problem mentioned above which is making the organisation liable directly and personally for the way in which it is run which causes the death of a person.

**(b) Culpable homicide by causing death by gross negligence**

In the case where culpable homicide consists of causing death by gross negligence it is proposed

• to define what is meant by causing death by gross negligence - that a natural person would be guilty of that offence if he 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;

• to make an organisation directly guilty of that offence if the way in which its activities are managed or organised by its office-holders amounts to a gross breach of a duty of care and that breach causes death;

• to define a 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;

• to define 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.

These proposals deal with all the common law problems mentioned above. In particular, 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. This makes it easier to attribute liability to an organisation. In addition, it has certain advantages in the way in which it holds an organisation liable for the offence in that

• it 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;
• it permits account to be taken of the practice of office-holders over a period of time while avoiding the problems about aggregation mentioned above.

It will be observed that this offence is substantially based upon what is being proposed for England in the draft Bill for Corporate Manslaughter which is described in Appendix 1 except that

• it is not confined to an organisation but also applies to individuals as well;

• it attributes liability to an organisation for the way in which any of its office holders have organised the activities rather than, as under the draft English Bill, only the senior managers. The Expert Group took the view that the definition of senior managers is likely to create just as many problems as trying to find a “controlling mind”;

• it refers to any duty of care rather than only to certain kinds of that duty as under the draft English Bill. The more general formulation seems clearer; • it lifts the immunity from prosecution of any Crown servant or agent, whether a Minister, civil servant or a department. The draft English Bill only proposes that Government Departments and certain activities should be liable to be prosecuted for manslaughter. This maintains discrimination in favour of the Crown which does not appear to be justified.

It may be objected that this offence would introduces into Scots law the concept of gross negligence. However, it is really more a re-introduction because, as mentioned in the Background, this concept was part of what was regarded as culpable homicide until the middle of the 20th century but appears to have been overshadowed by our courts in recent times in favour of the recklessness doctrine. It is noticeable that a similar development appears to have taken place with the law of manslaughter in England because for a period of about 10 years before 1995 that law was also based upon recklessness[22]. However, it was only with the House of Lords decision in Adomako[23] that manslaughter was defined clearly in terms of gross negligence. What the House of Lords did for English law, it is proposed that the Scottish Parliament should do by statute.

However, the fact that the common law of culpable homicide is saved will allow the courts to continue to develop the crime of culpable homicide at common law in whatever ways they consider appropriate.
4. QUESTIONS

To assist respondents in replying to the Consultation Paper, I included in Section 4, a series of questions which people were invited to consider in addition to any further comments. These questions are included below for ease of reference. I also intend to follow this same framework of questions when discussing the responses.

Culpable Homicide (Scotland) Bill: Consultation Paper

Section 4

4.1 To assist persons in preparing a response to this Consultation Paper, here are a few questions which they may wish to consider in addition to any other comments which you may wish to make:-

General
1.1 Do you have any comment to make on the need for legislation of this type as detailed in this paper to ensure equality across companies in relation to culpable homicide?

1.2 Do you have any comment 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?

1.3 Do you have any comment on the definition of organisations and office holders as defined in sections 8 and 9 of the Bill?

1.4 Do you have any comment to make on the provisions of the Bill applying to Ministers, civil servants and Crown bodies in the same way as they apply to natural persons and organisations - as set out in sections 12 and 13 of the Bill?

Culpable homicide by causing death recklessly
2.1 Do you have any comment to make on the way in which causing death recklessly is defined in paragraph 3.5 of the proposal and detailed in section 2 of the Bill?

2.2 Do you have any comment to make on the proposal that an organisation is made responsible for the actions of their employees for this offence (made vicariously liable) as proposed in section 4(1) of the Bill?

2.3 Do you see any difficulties as to how aggregation as proposed in section 4(2) of the Bill will work in practice?

Culpable homicide by gross negligence
3.1 Do you have any comment to make on proposals set out in paragraph 3.7 to re-introduce culpable homicide by gross negligence into the law in Scotland?

3.2 Do you have any comment to make on how these proposals are defined in section 5 of the Bill?

3.2 Do you see any difficulties with what is proposed to define what is meant by that offence where it is committed by a natural person in section 3 and by an organisation in section 5 of the Bill?
3.3 Do you have any comment to make on the definitions of a duty of care and gross breach as proposed in sections 6 and 7 of the Bill?

3.4 Do you see any difficulties with the definitions of a duty of care and gross breach as proposed in sections 6 and 7 of the Bill?

Sanctions
4.1 Do you have any comment to make on the penalties detailed in section 11 of the Bill?
5. CONSULTATION PROCESS

I distributed copies of the consultation to a wide range of stakeholders including CBI Scotland, local authorities, Federation of Small Business, STUC, Institute of Directors, trade unions and MSP’s. In addition the document was also placed on the Parliament’s website.

When the consultation closed on 12th September 2006, I had received 118 responses to the Culpable Homicide (Scotland) Bill: Consultation Paper. These include detailed responses and letters of support, both personal and on behalf of organisations. I also received 3 responses from organisations who did not wish to comment. Not all respondents replied to all questions.

It should be noted however, that the overwhelming majority of those who responded are wholly supportive of my proposed Bill and agree that the law of culpable homicide needs to be applied consistently across our society. Only one organisation, the Institute of Directors believe that legislation of this type is unnecessary.
6. SUMMARY ANALYSIS

General

1.1 - Most responses agreed that a change to the law of Culpable Homicide is desirable. Most also pointed out that current penalties were inadequate (with UCATT recommending the inclusion of jail sentences) and that a Scottish Culpable Homicide law would be fairer than the current provision. It is the opinion of more than half of the respondents above that the current law discriminates against smaller businesses in that it is easier here to identify a ‘controlling mind’, in turn making it easier to charge an individual or individuals.

In their response USDAW point out that it is “grossly unfair that larger corporations should be immune from homicide charges when individuals or smaller organisations can be successfully prosecuted.” On this same point the CCA point out that no company in Scotland – big or small – has been successfully prosecuted for a homicide offence and the only company charged was a big one. In England and Wales a significant number of small companies are prosecuted. The CCA go on to suggest that this indicates that if there is going to be a change in the law, (or not) investigative practice most change, “so that deaths in Scotland are subject to the same kind of police enquiries as those in England and Wales.”

Many of the respondents speak with concern about the corporate manslaughter Bill in the Westminster parliament. In particular, it has been stated that this proposed Bill’s ‘senior manager’ test and the failure to introduce clauses that would allow a secondary offence making individual directors liable, are serious weakness that will need to be addressed. Speaking of this T&G Scotland believe that “the proposed legislation will deliver justice and plug the loopholes in the Transco judgement. We do not believe this will happen if we only implement the Home Office proposals that will still leave many organisations immune from prosecution.” On the other hand, IoD Scotland see no merit in having different legislation for Scotland and the rest of the UK and believe that this would disadvantage the Scottish economy and the people working in it. However, the overwhelming consensus is that this Bill I propose would do away with an inequality in Scottish law which discriminates against small businesses by making them more susceptible to prosecution.

1.2 – Most respondents welcomed the proposal for two statutory kinds of homicide law, though Dundee City Council pointed out that ‘the idea of moral opprobrium might well be lost or diluted’ by increasing the distinctions of the law. North Lanarkshire Council’s submission welcomed the re-introduction of gross negligence to Scots Law – mirroring the position in England.

PCS Dundee requested that direct accountability remains a ‘direct virtue’. They offer the example of an organisation mistaking the facilitation of H&S for the responsibility of H&S; “this could mean that a junior person faced being charged with a crime that they realistically could not physically have prevented, without the support of the wider management structure.” RMT add that “it is likely that prosecutions would have been possible in the Transco case if [causing death through negligence] had been on the statute book. Both the CCA and USOERG refer to a UK-wide MORI poll in 2003 which found that 65% of people agreed that “workplace safety would only improve if company directors can be prosecuted for a serious criminal offence like manslaughter.”
Renfrewshire Council however, disagree with the dual definition and state that they would prefer one definition of culpable homicide, “that of causing death recklessly.”

1.3 – Again the majority of respondents welcomed the draft definitions of both organisations and office bearers and noted that the definition of office holder was broad enough to ensure that this would not result in a continuance of the controlling mind principal.

The CCA have some concerns. Specifically, that the definition of organisations does not appear to apply to the police force or to prisons and should also apply to unincorporated associations. In addition the CCA are concerned about sub-section 8(2) that enables Scottish Ministers to amend the application of subsection (1). With regard to the definition of ‘office holder’ and the use of the term ‘manager’ the CCA had the following to add:

“There is a common provision in British law which allows individual to be prosecuted if their conduct contributed to an offence by a company. This provision applies to “director, manager, secretary or other similar officer” of a company. The courts have defined ‘manager’ very narrowly indeed. In the case of R v Boal ([1992] 3 All ER 177), it is defined as:

“Only those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at underlings.”

It is likely that this definition – which is narrower than the existing ‘controlling mind’ test in English law and the new ‘senior manager’ test incorporated in the Corporate Manslaughter Bill - will be applied to the term manager in section 9 of the Bill.

We do not think that this could have been the intention of Bill drafters – since it will have the effect of significantly narrowing the application of the offence. This appears to be a defect in the current Bill – that applies to both offences – that needs to be rectified.

The Bill needs to include a clear definition of the term ‘manager’ which widens it beyond the Board and the most senior company mangers.”

North Lanarkshire Council pointed out that the definition of office holder would have a huge impact on organisations such as themselves as this would include officers of the Council. PCS Dundee suggested broadening the definition of organisation by adding ‘or agency’ after “any department” in section 8(1) (f). PCS Dundee also cautioned against using the word ‘participates’ in Section 9 as this “may leave a loophole for “sleeping directors.””

1.4 – With regard to the question of the removal of immunity for the Crown and for Crown servants or agents – all who responded unanimously agreed that none should be immune, irrespective of size or status.

Culpable Homicide by Causing Death Recklessly

2.1 – All who answered this question welcomed the proposed definition of culpable homicide by causing death recklessly because it closes the loopholes evident in the current legislation. The SHCG who believe the changes would allow courts to
consider all factors which may contribute to work-related fatalities. PCS Dundee suggested including ‘acts or omissions’ as opposed to just ‘acts’ because “H&S breaches more often occur from failure to act than from acts”.

2.2 – The majority of respondents commenting on Section 4 of the draft Bill welcomed the principles of vicarious liability and aggregation and were of an opinion equal to that of Amicus Scotland, that “organisations must take responsibility for the actions of their officers and employees”. North Lanarkshire Council however were of the view that the automatic imposition of vicarious liability would be unacceptable and believe that the phrases “acting within the scope of the office” and “acting on behalf of the organisation” require more clarification.

2.3 – This question seeks opinions on the proposed use of aggregate evidence. CWU HQ point out that a systematic failure is often due to “the cumulative effect of multiple failings rather than a single, obvious “hammer blow.””

Renfrewshire Council believe that more guidance and explanation would need to be made available and ask, ‘how do you compare roles and how far back do you go?’ North Lanarkshire Council point out that the nature of working in a government department or local authority, i.e. to a legislative and policy framework could make it easier for a court to extract the necessary elements for an offence. Dundee City Council question whether the introduction of aggregate concepts would actually clarify the law or further complicate it. The general consensus of respondents however is that this inclusion is necessary and they agreed in principle because it will lead to a greater responsibility being placed on managers and directors, but there are concerns that it will also be difficult to implement.

Culpable Homicide by Gross Negligence

3.1 – The majority of respondents agree that the charge of culpable homicide by gross negligence should be reintroduced in Scotland and deem this necessary if organisations are going to be held liable for H&S breaches. In particular, this reintroduction was seen as a better alternative to the current system which requires the identification of a ‘controlling mind’. USDAW state that this reintroduction “would mean that a similar legal standard would apply across the whole of the UK, while allowing for the fact that [there] Scots law does differ from English law.” SLETUC state that this reintroduction is a progressive and welcomed measure.

3.2 - The vast majority of respondents agreed with the concept of management failure being used as the basis on which liability can be attributed to the organisation. They were also content with the proposals being based on the Draft Corporate Manslaughter Bill but welcome the inclusion of a number of additional elements that again clarifies what is expected of organisations and their officers namely;

- A duty of care being placed on organisations to organise its activities in a manner that will not cause harm to workers and members of the public. We welcome that this duty of care is placed on the organisation other than a “senior manager” or any other narrowly defined group of individuals.

- The inclusion of a provision that allows the management failure to be viewed as the cause of death even although the immediate cause followed the failure by an individual. Trade unions believe that this will put an end to the corporate veil, a protection that has effectively rendered organisations immune from prosecution in Scotland following work related deaths.
In their submission the CWU welcomed the draft Bill’s new offences which target very serious failings in the strategic management of a company’s activities which result in death. Amicus Scotland particularly welcomed 5(2), which makes it clear that the senior manager of an organisation can be held liable for the actions of others under their control.

PCS Dundee raised concerns about the definition of “gross” in as much as it states “what could reasonably have been expected of the organisation in the circumstances”. They believe that there should be clearly defined minimum standards referred to within the Bill.

North Lanarkshire Council raised concerns with Section 5 of the Bill. They point out that local authorities work under financial constraints and may find their obligations under duty of care difficult to discharge. They argue that this could result in local authorities being found guilty of culpable homicide unless they were able to establish that their failure in those circumstances was conduct could reasonably be expected.

3.3 - In relation to the question posed at 3.3 a number of respondents concurred with the view expressed by Unison Scotland, who indicated that one potential difficulty could well be that the natural person may not be in full possession of the facts regarding potential actions or behaviours that could be classified as a breach of their individual duty of care. UNISON Scotland go on to state, “however, in workplaces we see this as the employer’s responsibility to ensure policies and procedures are in place, and training provided, to make individuals at every level aware of what is expected. If employers take this responsibility seriously or, indeed are forced to do so, the net result will be that everyone knows what is expected of them.”

The CWU supported the straightforward definition of the offence as it relates to organisations and through this simplicity avoids the potential difficulties of continuing with any identification principle in whatever shape or form as we believe to be the danger in England and Wales. Amicus Scotland in their submission stated that, “we do think it is essential to provide real justice for those who are injured and for the families of those who are killed. We see sections 3.3 and 3.5 as a perfectly reasonable consequence of this.”

The SSP submitted that the concepts are well defined in the Bill and accompanying notes and should be effective in practice. In their response, PCS Dundee argued that the HSE principles of deciding if the negligence is an error or a violation should be applied as a test enabling an assessment to be made both of individual and company actions.

3.4 - Most respondents support the broad definition of a duty of care and many stated that they would be strongly against any restrictions being placed on the limit of an organisation’s breach of this duty of care. They also agree with the definition of gross breach in relation to the duty of care placed on individuals and organisations and welcome the fact that it applies equally to organisations and individuals.

Echoing the concerns of PCS Dundee mentioned above the USOERG suggest that in order to make the intentions of the Parliament clear and limit the scope for discretionary intervention by the courts, it may also be important appropriate to define more closely what is meant by ‘gross’ breach. They propose adopting the definition used in the Corporate Manslaughter and Corporate Homicide Bill of ‘falling far below what could reasonably be expected’.
3.5 – None of the respondents who addressed this point could not foresee any difficulties with the definitions.

Sanctions

4.1 - The vast majority of respondents concluded with the view expressed by TGWU who stated that those who are found to be criminally liable for the deaths of other individuals under the terms of the proposed Bill should be liable to an equivalent range of penalties, including terms of imprisonment as others convicted of involuntary killing elsewhere in our society.

Ideally, they would have preferred the sanctions on the organisations to be far wider reaching than unlimited fines but appreciate there are other opportunities to consider more innovative penalties that could potentially be imposed on organisations.

In their submission, the Centre for Corporate Accountability and Stirling University suggested a range of possible sanctions. These included:

- Public shaming provisions (such as the publication of details of the offence and the offender in newspapers and industry publications);
- confiscation of assets associated with the offending;
- prohibition of the corporation from business activities associated with the offending;
- dissolution (or the ‘corporate death penalty’) under certain circumstances and;
- equity fines which reduce the value of shares in the company (thus preventing the costs of large fines being passed on to workers, consumers or other smaller client firms);
- disqualification of directors from holding office for a period of time;
- disqualification of senior managers from holding office for a period of time;

Scottish Hazards believes that those found criminally liable for deaths under the terms of the proposed Bill should be liable to a range of penalties, including imprisonment, equivalent to that faced by others convicted of involuntary killing in Scotland.

They are not convinced that even very large fines, such as that imposed on Transco under Health and Safety law; provide adequate punishment and deterrence for a crime as serious as causing death by recklessness or negligence. They are disappointed that the proposed Bill does not incorporate any of these and would look to the Scottish Parliament to seek ways to provide for more innovative and effective penalties as a matter of urgency.

They welcome the fact that the Bill makes it possible to order breaches to be remedied; however, again we are disappointed that the penalty for an organisation failing to comply is limited to a fine.

Additional issues

Stirling University and the Centre for Corporate Accountability raised the following additional issues for consideration:

Secondary Offence
The UK Bill expressly states that “an individual cannot be guilty of aiding, abetting, counseling or procuring the commission of an offence of corporate homicide.” This exception means that the UK Bill in its current form will not necessarily enable individuals to be held to account when they commit acts and omissions that significantly contribute to the criminal conduct of the organisations. There is similarly no provision for an aiding and abetting type offence (or ‘art and part’ in Scots law) in the Culpable Homicide (Scotland) Bill. Such an offence can be useful in preventing directors and senior managers using the complexity of the organisation as a cover for their serious offending. The Canadian government and parliament recently took this view in framing the Canadian C-45 Bill which passed into law in November 2003. Bill C-45 Bill stipulates that a corporate executive or board member can be liable under the Canadian Criminal Code for aiding or abetting an offence, for counselling a person to be a party to an offence or being an accessory after the fact to an offence. This would seem to us to be a sensible and relatively uncomplicated amendment to make. We do not propose that this would be an offence that could carry the same penalty as the proposed offences of causing death recklessly or of causing death by gross negligence. It would not be appropriate to imprison individuals for an ‘art and part’ type offence in which the offence was contributory. However, there is certainly a case for disqualification of officers, or the imposition of probation restrictions upon individuals when their acts and omissions have contributed significantly to a serious offence.

Legislating for Other Serious Crimes of Violence

At the moment, if a company either recklessly endangers its workers or the public, or causes injury or disease to a person as a result of gross negligence/recklessness then it is prosecuted - if prosecuted at all - for a breach of health and safety law, rather than for an offence that properly describes serious unlawful conduct. There is no logical reason for not including ‘injuries’ offences that capture physical injury and occupational disease. Indeed, it may be sending out a confusing message to say that we will criminalise serious offences that result in death or particular types of death and not those that don’t, by virtue only of the good fortune that the offence caused injury or deaths due to disease and not due to safety failings. We would urge that the inclusion of new criminal offences which prohibit the causation of endangernent, injury and disease is considered in the consultation process.

Foreign liabilty

We would also like to make a comment on the limiting of the territorial application of the offence to Scotland. This has particular implications for southern hemisphere countries where regulatory standards are driven down by the need to attract foreign capital. Any new law should not permit Scottish companies to establish lower standards of protection for workers in developing countries. A principle of foreign liability is entirely consistent with the law as it stands. At the moment, Scottish nationals can be prosecuted in Scotland for committing homicide abroad. In addition, there are a range of legislative provisions (not least those covering financial wrongdoing and corruption) that enable the prosecution of UK companies operating abroad under domestic (UK and Scottish) law. The granting of immunity to Scottish companies abroad for killing rather than embezzling would represent an unnecessary anomaly in law.
7. CONCLUSIONS

The aim of the consultation paper was to find out the views of interested parties regarding the current law on culpable homicide in Scotland and their views about proposals for change. The vast majority of respondents felt that the current law was inadequate and led to unequal treatment under the law.

It was felt that introducing two new offences of culpable homicide by recklessness and culpable homicide by gross negligence would have a positive impact, removing anomalies that have been created by the Transco appeal.

There was general consensus that the proposals currently proposed in the UK do not meet these objectives and separate Scottish legislation was required to address the issue.

There was general consensus that the range of penalties available to the courts should be extended.

Overall, the strong message that came through from this consultation was that there is a great deal of support for the changes proposed and the Scottish Parliament is the proper vehicle to deliver that change.
8. RESPONDENTS

Amicus Scotland
Amicus UK
ASLEF
Centre for Corporate Accountability (CCA)
City of Edinburgh Council
Communication Workers Union, Grampian & Shetland Branch (CWU G&S)
Communication Workers Union, HQ (CWU HQ)
Communication Workers Union, Scotland Motor Transport Branch (CWU SMT)
Dundee City Council
Institute of Directors (IoD) Scotland
Musicians Union
National Union of Rail, Maritime and Transport Workers (RMT)
North Lanarkshire Council
North Lanarkshire Trades Council
Public and Commercial Services Union (PCS) Scotland
Public and Commercial Services Union (PCS) Dundee Taxes Branch
Public and Commercial Services Union (PCS) Edinburgh Taxes Branch
Renfrewshire Council
Scottish Hazards Campaign Group
Scottish Socialist Party
Scottish Trades Union Congress (STUC)
South Lanarkshire and East Kilbride Trades Council
South Ayrshire Council
Transport and General Workers Union (Scotland)
TGWU Branch 7/148
Union of Construction Allied Trades and Technicians (UCATT)
Union of Shop Distributive and Allied Workers (USDAW)
UNISON Scotland
University of Stirling Occupational and Environmental Research Group (USOERG)
Thomas Rush
Stephen Heaney
James Grant
Frank McHutchison
Peter Coyle
John Brodie
Alan Robertson
Adrain Weller
Patricia Lines
John Leroy
Janet Watson
Claudia Bleamish
Harry Smith
Alex Scott
Ralph Barker
Pat Divers
B McLaughlin
Lindsay McLean
H Buick
Kenneth Drury
Jim Thomson
Matt Heasman
Crawford Johnstone
A Kelly
Jean & John Ellarby
Ian Walker
Margory Brauchin
John Gilmour
William Mackie
Mary Coats
Ronnie Ogilvie T&GWU
No Name
Jim Brown
Dave Daniel
Allan Miller
Janet Brown
Kenny Wright
Mary McNeill
Edith Turnbull
Chris Ross
Keith Coyne
Jim Lynn
David Lynch
J Cassidy
L Marr
Frank McPate
Steven McDonald
M Lee
No Name
J S Wood
Andy Stark
E Main
K Kyle
Scott Lindsay
I Brown
No Name
No name
S Balson
James Hamilton
Mat Kane
John McDonald
Stephen Walsh
D Mcneil
John Campbell
Alaister Campbell
J Johnstone
No Name
Peter Kennedy
Mr McMahon
G Camlor
Raymond
No Name
John Doe
Ian Carr
D Longlee
Peter Smith
David Bolt
A Kelly
F Coogans
D Gordon
Thomas Rush
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<td>Glenn Timmins</td>
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<td>Bryan Middlemass</td>
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<tr>
<td>Graeme Russell</td>
<td>Communication Workers Union, Edinburgh Dundee Branch</td>
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<tr>
<td>Stuart Paterson</td>
<td>Royal Mail</td>
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<tr>
<td>Kenny Wright</td>
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9. FURTHER COMMENT

Comments on this paper should be addressed to Karen Gillon MSP at –

Scottish Parliament
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EH99 1SP

Tel – 01555 660526
Fax – 01555 660528

E-mail – karen.gillon.msp@scottish.parliament.uk
CULPABLE HOMICIDE (SCOTLAND) BILL

An Act of the Scottish Parliament to amend the law relating to culpable homicide; and for connected purposes

Culpable homicide

1. Culpable homicide

A natural person who causes the death of another person

(a) recklessly or

(b) by gross negligence

is guilty of the offence of culpable homicide.

2 The meaning of causing death recklessly

A natural person causes death recklessly if that person is, or ought to be, aware of an obvious and serious risk that acting will bring about the death of another person but nonetheless acts where no reasonable person would do so.

3 The meaning of causing death by gross negligence

A natural person causes death by gross negligence if that person acts in such a way as to amount to a gross breach of a duty of care owed by that person to another person and that breach causes the death of that other person.

4 Liability of an organisation for causing death recklessly

(1) An organisation is guilty of the offence in section 1(a) if an office holder is guilty of that offence and was acting within the scope of the office or on behalf of the organisation in doing the acts constituting the offence or giving rise to liability for the offence.

(2) Even although a particular office holder is not guilty as mentioned in subsection (1), an organisation is guilty of the offence in section 1(a) if the acts done by a number of different office holders at different times, when considered together, are sufficient to constitute that offence.
(3) A person who, as an office holder of an organisation, is responsible for any action which amounts to, or leads to, the commission of that offence by the organisation or any of its employees or agents is guilty of that offence unless the consequences of the action could not reasonably have been foreseen.

5 Liability of an organisation for causing death by gross negligence

(1) An organisation is guilty of the offence in section 1(b) if

   (a) the way in which any of the organisation’s activities are managed or organised by its office holders amounts to a gross breach of a duty of care owed by that organisation to a person; and
   
   (b) that breach causes the death of that person.

(2) The way in which any of the organisation’s activities are managed or organised by its office holders may be regarded as the cause of a person’s death of a person even although the immediate cause is the act or omission of a natural person.

6 Duty of Care

A duty of care means any duty of care owed by a natural person or, as the case may be, an organisation whether under the common law or under any enactment;

7 Gross breach

A breach of a duty of care owed by a natural person or an organisation is a “gross” breach if the failure in question constitutes conduct falling far below what can reasonably be expected of the natural person or, as the case may be, the organisation in the circumstances.

Organisation and office holder

8 Organisation

(1) An organisation means -

   (a) a body corporate, wherever and however incorporated;

   (b) any other legal person (such as a partnership) which has a separate legal personality, but does not include an individual human being;

   (c) the department in Scotland called the Scottish Executive;

   (d) the department in Scotland called the Crown Office
(e) any non-ministerial office holder in the Scottish Administration; and

(f) any department of the United Kingdom Government.

(2) The Scottish Ministers may amend subsection (1) by order.

9 Office holder

A person is an office-holder of an organisation if he participates in the management or organisation of the whole or any part of its activities as a director, manager, partner or holder of a similar office or position.

Penalties and remedial orders

10 Penalties

(1) A natural person who is guilty of the offence of culpable homicide under section 1(a) or (b) is liable on conviction on indictment to imprisonment for a period not exceeding life imprisonment or to a fine.

(2) An organisation that is guilty of the offence of culpable homicide under section 1 (a) or (b) is liable on conviction on indictment to a fine.

11 Power to order breach to be remedied

(1) A court before which a natural person or an organisation is convicted of culpable homicide under section 1(b) may order that person or it to take specified steps to remedy

   (a) the breach mentioned in section 4(1);

   (b) any matter that appears to the court to have resulted from that breach and to have been a cause of the death.

(2) The order must specify a period within which the steps are to be taken.

(3) The period so specified may be extended or further extended by order of the court on an application made before the end of that period or extended period.

(4) A natural person who fails to comply with an order under this section is guilty of an offence and liable

   (a) on conviction on indictment to imprisonment for a period not exceeding life imprisonment or to a fine;

   (b) on summary conviction, to imprisonment for a period not exceeding life imprisonment or to a fine
(5) An organisation that fails to comply with an order under this section is guilty of an offence and liable

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine

(6) The Scottish Ministers may, by order, substitute a higher amount for the amount for the time being specified in subsection (4) (b) and (5) (b).

The Crown

12 Application to Crown servants or agents

(1) A servant or agent of the Crown is not immune from prosecution under this Act for that reason.

(2) Anything done, or omitted to be done, purportedly by a servant or agent of the Crown but, in law, by the Crown, is to be treated for the purposes of this Act as done or omitted to be done by that servant or agent.

(3) A person in employment under or for the purposes of a servant or agent of the Crown but, in law, by the Crown, is to be treated for the purposes of this Act as employed by that servant or agent.

(4) A servant or agent of the Crown is to be treated for the purposes of this Act as owing whatever duties of care it would owe if they were not such a servant or agent of the Crown.

(5) In this section, “servant or agent of the Crown” includes –

(a) an officer of the Crown, such as a Minister of the Crown or the Scottish Ministers;

(b) a person employed by the Crown, including persons employed by the Scottish Ministers under section 51(1) of the Scotland Act 1998 (c.46); and

(c) an organisation that is a servant or agent of the Crown.

13 Application to the Crown

This Act binds the Crown.

General and supplementary
14 Orders

Any order made by the Scottish Ministers under this Act is to be made by statutory instrument but any such order (other than under section 14(1)) shall not be made unless a draft has been laid before, and approved by resolution of, the Scottish Parliament.

15 Interpretation

(1) In this Act -

“action” includes any decision, policy, practice or course of conduct and any failure to act and “acts” and “actings” shall be construed accordingly;

“causing death by gross negligence” shall be construed in accordance with section 3 in the case of a natural person and section 5 in the case of an organisation;

“causing death recklessly” shall be construed in accordance with section 2 in the case of a natural person and section 4 in the case of an organisation;

“duty of care” has the meaning given by section 6;

“gross breach of a duty of care” has the meaning given by section 7;

“office holder” has the meaning given by section 9; and

“organization” has the meaning given by section 8.

(2) In this Act, a person is responsible for an action not only if the person is directly responsible for it but also if the action is attributable to the person’s neglect or if the person connived in or consented to it.

16 Territorial application

This Act applies if the injury resulting in death is sustained in Scotland.

17 Commencement and saving

(1) Sections 1 to 13 shall come into force on such day as the Scottish Ministers may appoint by order and different days may be appointed for different purposes

(2) This Act does not apply to any act or omission causing death before it comes into force.

(3) The provisions of this Act are without prejudice to the offence of culpable homicide at common law

18 Short title

This Act may be cited as the Culpable Homicide (Scotland) Act 2006.
HMA v Transco (hereinafter called “the Transco Case” to include the appeal decision viz Transco PLC v HMA 2004 SCCR 1).

Dean v John Menzies (Holdings) Ltd. 1981 J.C. 23

Of the Sheriff who heard Dean v John Menzies at first instance, some academics and arguably some members of the High Court Judiciary.

See “The Criminal Law of Scotland” 2nd ed, G H Gordon

Consider Articles 7, 14 and Article 1 of the First Protocol of the European Convention on Human Rights

See Section 10 the Partnership Act 1890, Gair –v- Brewster 1916 SC(J) LIC Strathclyde Page 38 and also Partnership J B Miller 1973


Draft Criminal Code for Scotland published by the Scottish Law Commission 2003


Hume's Commentaries (Bell's Ed.) Vol.1 pps.192-3 and 233-4

Alison Principles I,116. In this context Alison envisages culpable homicide simply through a lack of care under the law of delict or negligence.

Paton v HMA 1936 JC 19

HMA v Cranston 1931 JC 28

Transco PLC v HMA 2004 SCCR 1 para 4

W. v Her Majesty's Advocate 1982 S.L.T. 420,

Dean v John Menzies (Holdings) Ltd. 1981 J.C. 23

The leading cases were Tesco Supermarkets Ltd v Nattrass 1972 A.C.153; R v Her Majesty’s Coroner for East Kent Ex Parte Spooner & Others 1989 88CR.APP.R.10; and Attorney Generals Reference (No. 2 of 1999) 2000 QB 796.

Gair –v- Brewster1916 SC(A)

Reference is also made to J B Miller :Partnership 1973 page 315.

Draft Criminal Code for Scotland published by the Scottish Law Commission 2003 section 10

Draft Code section 16

See Draft Culpable Homicide (Scotland) Bill

Regina v Adomako [1995] 1 A.C. 171