

20 June 2006

CULPABLE HOMICIDE (SCOTLAND) BILL

CONSULTATION PAPER

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CONTENTS

1 INTRODUCTION

2 BACKGROUND

3 PROPOSALS

4 QUESTIONS

APPENDIX 1: SUMMARY OF ENGLISH LAW OF MANSALUGHTER AND PROPOSALS FOR CORPORATE MANSLAUGHTER BILL

APPENDIX 2: CULPABLE HOMICIDE (SCOTLAND) BILL

20 June 2006

1 INTRODUCTION

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

1.2 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.

1.3 The Lord Advocate brought charges against the company for culpable homicide.¹ 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.

1.4 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 crime², that is a crime created and developed through institutional writers and court decisions rather than through statute. The original view³ 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.⁴ 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.

1.5 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

¹ HMA v Transco (hereinafter called "the Transco Case" to include the appeal decision viz Transco PLC v HMA 2004 SCCR 1).

² Dean v John Menzies (Holdings) Ltd. 1981 J.C. 23

³ Of the Sheriff who heard Dean v John Menzies at first instance, some academics and arguably some members of the High Court Judiciary.

⁴ See "The Criminal Law of Scotland" 2nd ed, G H Gordon

20 June 2006

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).

1.6 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.

1.7 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 be capable of being prosecuted and convicted of culpable homicide. In fact successfully convicting such small companies would now appear to be quite simple.

1.8 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.⁵

1.9 There is also considerable doubt 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.⁶ 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.

1.10 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

⁵ Consider Articles 7, 14 and Article 1 of the First Protocol of the European Convention on Human Rights

⁶ See Section 10 the Partnership Act 1890, Gair –v- Brewster 1916 SC(J) LJC Strathclyde Page 38 and also Partnership J B Miller 1973

20 June 2006

forms of organisations aggravating unevenness and unfairness and indeed discrimination solely based on questions of size and the form of other organisations.

1.11 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 1967⁷ 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 2003⁸. 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.

1.12 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 of 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.

1.13 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.

1.14 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 2005⁹. 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.

1.15 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.

⁷ The Criminal Law of Scotland First Edition 1967 G H Gordon.

⁸ Draft Criminal Code for Scotland published by the Scottish Law Commission 2003

⁹ It is available at <http://www.scotland.gov.uk/Topics/Justice/criminal/Corporate/Report2005pdf>

20 June 2006

1.16 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.

These offences have been given effect to in a Bill which is attached in Appendix 2 to this Consultation Paper, together with some Explanatory notes.

1.17 We would welcome any comments which you might have upon this Bill. We would invite you to answer the questions that are asked at the end. The responses that we receive will help us to formulate the Bill to reflect the concerns and interests of as many persons as possible

Please submit your response to this consultation exercise by Tuesday 12th September 2006 and earlier if at all possible.

Responses can be sent electronically to Karen Gillon MSP
karen.gillon.msp@scottish.parliament.uk , by post to Karen Gillon MSP at 7 Wellgate,
Lanark, ML11 9DS or by fax on 01555 660526

Further copies of this consultation paper can be obtained by email from the above address.

2 BACKGROUND

The Essential Elements of any Common Law Crime

2.1 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.

2.2 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

2.3 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.

2.4 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”.

2.5 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.

20 June 2006

2.6 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

2.7 The classic case on culpable homicide, *William Paton and Richard McNab*¹², 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."

¹⁰ Hume's Commentaries (Bell's Ed.) Vol.1 pps.192-3 and 233-4

¹¹ Alison Principles I,116 . In this context Alison envisages culpable homicide simply through a lack of care under the law of delict or negligence.

¹² Paton v HMA 1936 JC 19

20 June 2006

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”.

2.8 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

2.9 As can be seen from the above, Lord Osborne 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 Osborne 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."

¹³ HMA v Cranston 1931 JC 28

¹⁴ Transco PLC v HMA 2004 SCCR 1 para 4

¹⁵ W. v Her Majesty's Advocate 1982 S.L.T. 420,

20 June 2006

2.10 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”

2.11 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

2.12 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.

2.13 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*¹⁶ 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.

2.14 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

¹⁶ *Dean v John Menzies (Holdings) Ltd.* 1981 J.C. 23

20 June 2006

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

2.15 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 some way of attributing the necessary mental element to that company.

2.16 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 cases¹⁷. 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.

2.17 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.

2.18 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 actions 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

¹⁷The 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.

20 June 2006

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.

2.19 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.

2.20 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.

2.21 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.

2.22 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

2.23 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.”

20 June 2006

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

2.24 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*¹⁸. 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 present¹⁹.

2.25 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

2.26 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

2.19 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.

¹⁸ *Gair –v- Brewster* 1916 SC(A)

¹⁹ Reference is also made to J B Miller :Partnership 1973 page 315.

20 June 2006

2.20 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

2.21 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. A summary of the English law on manslaughter and of the Home Office proposals to deal with the problem of corporate liability by creating a new criminal offence of Corporate Manslaughter²⁰ is given in Appendix 1. That Appendix also explains the main differences between the English law and the Scottish position.

²⁰ Corporate Manslaughter: Government's Draft Bill for Reform March 2005 (Cm 6497)

3 PROPOSALS

Problems

3.1 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.

3.2 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 caused 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;

20 June 2006

- 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

3.3 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.

3.4 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

20 June 2006

kinds of culpable homicide at common law. There is an express saving for the common law.

(a) Culpable homicide by causing death recklessly

3.5 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 Code²¹, 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 Code²², that is by providing that an organization 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 be guilty of the offence if the acts done by a number of different office holders at different times, when considered together, are sufficient to constitute the offence.

3.6 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 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

²¹ Draft Criminal Code for Scotland published by the Scottish Law Commission 2003 section 10

²² Draft Code section 16

20 June 2006

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*

3.7 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.

3.8 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;

20 June 2006

- 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.

3.9 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.

3.10 It may be objected that this offence would introduce 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 recklessness²³. However, it was only with the House of Lords decision in *Adomako*²⁴ 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.

3.11 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.

²³ See Appendix 2

²⁴ *Regina v Adomako* [1995] 1 A.C. 171

4 QUESTIONS

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?

20 June 2006

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

20 June 2006

20 June 2006

Appendix 1: Summary of English law of Manslaughter and proposals for Corporate Manslaughter Bill

Introduction

1.1 This Appendix gives a brief summary of the existing English law of manslaughter and of the proposals to deal with the problem of corporate liability in the Draft Corporate Manslaughter Bill²⁵. It also indicates what some of the differences with the Scottish position are

1.2 It is understood that the Home Office are reconsidering certain of the provisions in the draft Bill²⁶ but this does not affect the main thrust of their proposals

Manslaughter

2.1 Like culpable homicide, manslaughter can be of different kinds. However, the kind of manslaughter with which we are concerned is what is called gross negligence manslaughter.

2.2 Under English law, a person may be guilty of manslaughter if he causes death as a result of gross negligence or carelessness. Until the House of Lords decision in *Adomako*²⁷ in 1995, the English courts were undecided upon whether the appropriate fault term was “gross negligence” or “recklessness” and there were different definitions for each, depending upon whether or not a mental element was a necessary part of the crime²⁸.

2.3 Finally in *Adomako*, the Lord Chancellor, Lord Mackay of Clashfern, defined manslaughter in this way²⁹:

"On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that

²⁵ Corporate Manslaughter: Government's Draft Bill for Reform March 2005 (Cm 6497)

²⁶ Draft Corporate Manslaughter Bill: Government's reply to the First Joint Report from the Home Affairs and Work and Pensions Committees March 2006 (Cm 6755)

²⁷ *Regina v Adomako* [1995] 1 A.C. 171

²⁸ See Law Commission Report: Involuntary Manslaughter 1996 No 237 paras 2.7-2.16

²⁹ *Adomako* p. 187

20 June 2006

breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved; the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission."

2.4 In *Transco*³⁰, Lord Obsbourn commented upon the difference between this definition of manslaughter and culpable homicide as follows-

"[6] Whether the application of this definition to any particular set of facts would, in practice, produce a result different from that produced by the application of the Scottish definition which I have examined, can only be a matter of conjecture. However, it is quite clear to me that the two definitions are fundamentally different. The English one, just quoted, involves, first, the application of the ordinary principles of the civil law of negligence, in order to ascertain whether or not the defendant has been in breach of a legal duty of care towards the deceased victim. The Scottish definition contains no counterpart to that. In the Scottish formulation, as I would see it, there is no reliance on elements of the Scottish civil law of delict. Thereafter, the question which arises in the application of the English definition is whether the breach of duty should be characterised as gross negligence and therefore a crime. While both definitions share the requirement that the conduct under consideration must be of a grave kind, in order to be classified as criminal, as Lord Mackay recognised, in some degree, the English definition involves a circularity. Happily, the most modern formulation of the test adopted in Scotland has avoided that problem. Furthermore, the Scottish formulation implies clearly, to my mind, a certain state of mind on the part of the perpetrator, that is to say *mens rea*, in accordance with the basic principles of Scots criminal law. On the other hand, the English approach seems to involve an objective assessment of the conduct under consideration alone, although the Crown did not argue for that, as appears from p.180 of the report under consideration. In these circumstances, I would respectfully agree with the observations of the Lord Justice-Clerk in delivering the Opinion of the Court in

³⁰ The *Transco* case op cit Lord Osbourne para 6

20 June 2006

the *Lord Advocate's Reference No.1 of 1994* 1995 S.L.T. 248, at p.253 where he said: "We cannot affirm that the law in England relating to manslaughter is the same as the law in Scotland relating to culpable homicide." I must therefore respectfully disagree with the observations of Lord Fraser of Tullybelton in *Regina v Seymour* [1983] 2 A.C. 493 at p.499 where he observed that there was no relevant difference between the crimes of manslaughter and culpable homicide.

Corporate Manslaughter

3.1 Even although it was held that a company could be indicted for manslaughter, similar problems arose in using the identification principle to attribute liability to a company as in the *Transco* case³¹.

3.2 The (English) Law Commission³² considered that the difficulties created by the identification principle could not be satisfactorily resolved either by imposing vicarious liability on the company for the acts of its employees or by the aggregation principle. They considered that what was required was a new offence of corporate killing for which a company would be liable personally for a death "if it is caused by a failure in the way in which the corporation's activities are managed or organised to ensure the health and safety of persons employed in or affected by those activities". This was called a management failure.

3.3 The Home Office proposals for a new offence of Corporate Manslaughter³³ are based upon the Law Commission's proposals and also upon the *Adomako* definition of gross negligence. The main proposals are

- that an organisation would be personally guilty of the offence of corporate manslaughter if the way in which its activities are managed or organised by its senior managers causes death and amounts to a gross breach of a relevant duty of care to the victim;
- an organisation is defined as being any body corporate and certain listed Government Departments. It would therefore include companies and statutory bodies corporate but would not include partnerships which have no separate legal existence in English law;
- the management failure would be restricted to that of its senior managers so as to avoid organisations being liable for failings at a junior manager level. The

³¹ *R. v Her Majesty's Coroner for East Kent, ex parte Spooner and Others* (1989) 88 Cr. App. R. 10 (Zeebrugge case), *P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72

³² See Law Commission Report: Involuntary Manslaughter 1996 No 237

³³ Corporate Manslaughter: Government's Draft Bill for Reform March 2005 (Cm 6497)

20 June 2006

definition of senior manager is drafted so as to include only those who play a role in making management decisions about the activities of the organisation as a whole or a substantial part of it

- the offence would not be restricted to where the senior managers are also liable. It would also allow senior management conduct to be considered collectively;
- the offence would require the same kind of test as their gross negligence manslaughter – it would only apply where there was a gross failure causing death and gross failure is defined, as the Law Commission recommended, in terms of conduct which falls far below what can reasonably be expected in the circumstances;
- relevant duty of care is limited to duty owed under the law of negligence by the organisation to its employees or as occupier of land or when supplying goods or services or engaged in commercial activities. It excludes certain functions of the Crown

APPENDIX 2

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.

20 June 2006

(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.

20 June 2006

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).

20 June 2006

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.

20 June 2006

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

20 June 2006

18 Short title

This Act may be cited as the Culpable Homicide (Scotland) Act 2006.

20 June 2006

THE CULPABLE HOMICIDE (SCOTLAND) BILL

EXPLANATORY NOTES

Introduction

1.1 This Bill gives effect to the proposals in Part 3 of the Consultation Paper.

1.2 The Bill amends the law of culpable homicide in Scotland by creating in effect two different statutory kinds of culpable homicide— culpable homicide where death is caused recklessly or by gross negligence. These statutory offences are in addition to, and not in substitution for, the existing kinds of offence of culpable homicide at common law.

1.3 The Bill consists of 18 sections as follows –

Sections 1 to 7 define what is meant by the two different statutory kinds of culpable homicide and how a natural person and an organisation may be guilty of each offence;

Sections 8 and 9 define what is meant by organisation and office holder for the purposes of the Bill;

Sections 10 and 11 make provision for penalties for the offences and for remedial orders to be made on conviction of the offence of culpable homicide where death is caused by gross negligence;

Sections 12 and 13 deal with the application of the Bill to the Crown

Sections 14 to 18 deal with certain general and supplementary provisions, including the territorial application of the Bill

Commentary on sections

Culpable homicide

Section 1: The offence of culpable homicide

This section provides that a natural person who causes the death of a person recklessly or by gross negligence is guilty of the offence of culpable homicide.

This in effect creates two different statutory kinds of culpable homicide. These offences are in addition to and not in substitution for the offence at common law which is preserved by section 17(3).

Section 2: Meaning of causing death recklessly

This section provides that a natural person causes death recklessly 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. There is a definition of acting in section 15(1) which makes it clear that it includes failure to act.

This provision reflects the definition of recklessness in section 10(a) of the draft Scottish Criminal Code (“the Code”)³⁴.

Section 3: Meaning of causing death by gross negligence

This section provides that 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. What is meant by “duty of care” and a gross breach of that duty is defined in sections 6 and 7.

There is currently no similar offence at common law in Scotland but culpable homicide used to include an element of gross negligence. This offence is based upon the English common law offence of gross negligence manslaughter in terms of which a person may be guilty of manslaughter if he causes the death of a person by gross negligence that is by a gross breach of a duty of care which the accused owed to the deceased.

³⁴ Draft Criminal Code for Scotland published by the Scottish Law Commission 2003

20 June 2006

Section 4: Liability of an organisation for culpable homicide by causing death recklessly

At common law, a corporate body may be prosecuted for culpable homicide but it is very difficult to convict it. This is because such a body can only be found guilty of the offence if it is possible to find a “directing mind” of the body that is also guilty of that offence and whose acts and mental attitude (recklessness) necessary to establish culpable homicide can be attributed to, and identified with, the body corporate. This is called the principle of identification but it creates considerable problems in practice.

Section 4(1) proposes to avoid the difficulties created by the identification principle by making an organisation vicariously liable for the offence in section 1(a) (that is the offence of culpable homicide for causing death recklessly) if an office holder, acting within the scope of the office or on behalf of the organization, is guilty of that offence.

What is meant by “organization” and “office holder” are defined in sections 8 and 9. There is a definition of “acting” in section 15(1) which makes it clear that it includes any decision, policy, practice or course of conduct and any failure to act. This provision reflects the provisions of section 16(1) and (4) of the Code.

Section 4(2) makes an organisation guilty of the offence in section 1(a) in other circumstances. It is intended to allow the courts to “aggregate” the actings of different officeholders at different times, none of whom may be guilty of that offence, so that, if those actings, when considered together, would be sufficient to constitute the offence, then the organisation is guilty. This provision is not in the Code.

Section 4(3) provides that a person who, as an office holder of an organisation, is responsible for any action which amounts to, or leads to, the commission of the 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. Section 15(2) provides that a person is responsible for an action not only if the person is directly responsible for it but also if the action provides This reflects sections 16(2) and (4) of the Code.

Section 5: Liability of an organisation for culpable homicide by causing death by gross negligence

As mentioned above, it is very difficult to convict a corporate body of culpable homicide because of the need to find a “controlling mind” under the identification principle. Section 5 (1) proposes to avoid the difficulties created by the identification principle at common law by making an organisation liable for the offence in section 1(b) (that is of culpable homicide for causing death by gross negligence) where it causes a person’s

20 June 2006

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.

One of the advantages of the offence in section 1(b) is that it can be established objectively without proof of any mental element. This makes it easier to attribute liability to an organisation.

The main elements of the offence in section 1(b) as it applies to an organisation are that

- the organisation must owe a duty of care to the victim. What is meant by organisation and duty of care is defined in sections 8 and 6;
- the way in which the organisation manages or organises its activities by its office holders must have breached that duty of care. This introduces an element of management failure by the office holders. What is meant by office holders is defined in section 9;
- the management failure must have caused the victim's death. There is a special provision about causation in section 5(2) which is intended to prevent a break in causation;
- the breach of duty must have been gross. Section 7 defines what is meant by "gross".

The "management failure" concept attributes liability to an organisation for the way in which in practice managers have organised the performance of a particular activity rather than focussing on questions of individual culpability.

Section 5(1) is substantially based upon what is being proposed for England in the draft Bill for Corporate Manslaughter³⁵ but it has some key differences. In particular, section 5(1) differs from the draft English Bill in attributing liability to an organisation for the way in which any of its office holders have organised the activities rather than only the senior managers. This is because of the view taken in the Expert Group Report³⁶ that the definition of senior managers is likely to create just as many problems as trying to find a "controlling mind".

Section 5(2) is about causation. It makes it clear that the management failure 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 an individual. It therefore prevents a break in causation. This provision (or something like it) was suggested by the English Law Commission in their

³⁵ Corporate Manslaughter: Government's Draft Bill for Reform March 2005 (Cm 6497)

³⁶ Expert Group Report on Corporate Homicide published by the Scottish Executive 2005. see note 9.

20 June 2006

Report³⁷. The draft English Bill does not contain anything similar because the Home Office take the view that this is no longer required under English law³⁸.

Section 6: Duty of Care

Section 6 defines a duty of care as meaning any duty of care owed by a natural person or an organisation whether under the common law or under any enactment. It would therefore include duties of care arising from the common law of delict as well as from enactments.

It is thought that this general formulation is preferable to the more specific formulation of “relevant duty of care” in clause 4 of the draft English Bill.

Section 7: Gross breach

Section 7 defines what is meant by a gross breach of a duty of care. The test is whether the failure constituting the breach falls far below what could reasonably have been expected of the natural person or, as the case may be, the organisation in the circumstances.

This test is the current test used in the English offence of gross negligence manslaughter but its introduction is new in Scotland.

Organisation and office holder

Section 8: Organisation

Section 8(1) defines what is meant by an organisation for the purposes of the Bill.

An organisation consists of

(a) any body corporate. It does not matter how it has been made a body corporate and so it would include registered companies and statutory bodies corporate, such as Health Boards or local authorities. It also does not matter where it is incorporated and will therefore include foreign companies;

(b) any other body with legal personality. This would include partnerships under Scots law;

³⁷ Law Commission Report on Involuntary Manslaughter 1996 No 237 para 8.36-8.39

³⁸ Government’s Reply to the First joint Report from the Home Affairs and Work and Pensions Committee March 2006 (Cm 6755) Chapter 4

20 June 2006

(c) the Scottish Executive. This is intended to refer to the department of that name which is run by the Scottish Ministers and not the Scottish Ministers. However, as the Scotland Act refers to the Scottish Executive as a body whose members consist of the Scottish Ministers³⁹, it is thought that it might be safer to refer to the department of the Scottish Executive;

(d) the Crown Office. This is intended to refer to the department of that name which is run by the Lord Advocate. It is expressly mentioned because it is not clear whether it would be regarded as coming within the Scottish Executive if that is intended only to cover the department run by the Scottish Ministers;

(e) any non-ministerial office in the Scottish Administration. This is a concept used in the Scotland Act to refer to non-ministerial offices, such as the Registrar General of Births, Deaths and Marriages for Scotland⁴⁰; and

(f) any department in the UK Government. This is intended to include all the departments which are listed in Schedule 1 to the draft English Bill.

Section 8(2) enables the Scottish Ministers to amend the list of organisations by order. The order is subject to draft affirmative procedure by section 14

Section 9: Office holder

Section 9 defines an office holder of an organisation as a person who 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.

This definition is derived from section 16(1) of the Code.

Penalties and remedial orders

Section 10: Penalties

This section makes provision for the penalties for breaching the offence of culpable homicide under section 1(a) or (b).

It provides that –

- a natural person who is guilty of either of those offences is liable on conviction on indictment to imprisonment for a period not exceeding life imprisonment or to a fine;

³⁹ Scotland Act 1998 section 44(1).

⁴⁰ Scotland Act 1998 section 126(8)

20 June 2006

- an organisation that is guilty of either of those offences of is liable on conviction on indictment to a fine.

Section 11: Remedial orders

Section 11(1) gives the courts a power to order a natural person or an organisation convicted of the offence in section 1(b) (that if culpable homicide by causing death by gross negligence) to take steps to remedy the failure leading to death.

Section 11 (1) also enables a remedial order to specify that the state of affairs resulting from the failure, and representing the more immediate cause of death, be addressed. (For example, where the management failure related to inadequate risk assessment and monitoring procedures, the consequence of this might be inadequate safety precautions, leading to a death. The court would be able to order that both failures be addressed.)

Section 11(2) requires a remedial order to specify the period within which these remedial steps must be taken. Section 11(3) makes provision for that period to be extended.

Section 11(4) provides that a natural person who fails to comply with an order under this section is guilty of an offence and liable

- on conviction on indictment to imprisonment for a period not exceeding life imprisonment or to a fine;
- on summary conviction, to imprisonment for a period not exceeding life imprisonment or to a fine

Section 11(5) provides that if an organistaion fails to comply with such an order it is liable for an unlimited fine is available on indictment and a fine on summary conviction.

Section 11(6) enables the Scottish Ministers to increase fine by order.

20 June 2006

Sections 12 and 13: The Crown

The general presumption is that legislation does not apply to the Crown unless this is expressly stated. Section 13 makes it explicit that the Bill binds the Crown. However that is not sufficient.

Section 12 ensures that the offences will apply to any servant or agent of the Crown as it applies to a natural person and an organization. A servant or agent of the Crown is defined in section 12(5) as including an officer of the Crown (such as a Minister in the UK Government or the Scottish Ministers), a person employed by the Crown (including members of staff of the Scottish Ministers) and an organisation which is a servant or agent of the Crown.

The draft English Bill only makes Crown bodies such as a department liable to the criminal offences but there appears to be no reason why, in appropriate cases, Ministers and their civil servants should not also be liable in the same way as any other individual or member of a private organisation. For example, if Ministers or their civil servants are grossly negligent in the way in which they exercise some function, such as the licensing of blood products for use within the NHS, and this causes the death of hundreds of NHS patients in Scotland as a result of some contracted disease such as Hepatitis C, there seems to be no reason why they should not be prosecuted for culpable homicide for causing death by gross negligence in addition to their Department for the management failure which permitted such grossly negligent decisions to be taken.

Section 12(1) provides that the immunity that generally prohibits the prosecution of a servant or agent of the Crown does not apply for the purposes of the Bill. This means that any servant or agent of the Crown is subject to the new offences culpable homicide mentioned in section 1.

Sections 12(2) and (3) address the fact that many of the activities and functions carried out by a servant or agent of the Crown are, legally, performed by the Crown rather than that individual or body. For example, civil servants in government departments are employed by the Crown rather than the department for which they work. If provision were not made to deal with this, it would mean that those government departments might not technically be liable for management failings that occurred within them: the relevant conduct legally being attributable to the Crown rather than the department concerned. Similar difficulties might arise in respect of the duty of care owed as employer as technically this might be considered owed by the Crown rather than the relevant government department. Subsections 12 (2) and (3) ensure that the activities and functions of government departments and others can properly be attributed to the relevant body.

20 June 2006

The Crown Proceedings Act 1947 made the Crown liable for damages in the civil law as employer, occupier and vicariously for the wrongful acts of its servants and agents. The offence mentioned in section 1(b) is, however, predicated on a natural person or an organisation owing a personal duty of care to the victim. In order to attribute the duties owed by the Crown as a whole to the relevant Crown servant or agent, section 12(4) makes it clear that Crown servant or agent is to be treated as owing for the purposes of the offence the duties of care that they would owe if they were not a servant or agent of the Crown.

General and supplementary

Section 14 Orders

Section 14 provides that any orders made by the Scottish Ministers under the Act shall be made by statutory instrument and, with the exception of the commencement order; require to be approved in draft by the Scottish Parliament before they can be made.

Section 15 Interpretation

This section defines certain expressions used in the Bill or refers to the provision in the Bill where the expression is defined.

Section 16 Territorial application

Section 16 provides that the Act applies in any case where the injury causing death occurred in Scotland. Scotland is defined in the Scotland Act as including “so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland”⁴¹. This definition is automatically attracted to this Act⁴².

Clause 16(2) of the draft English Bill also applies their Bill to certain ships and aircraft. In order to avoid any question as to whether the Scottish Parliament can make similar provision, it may be preferable to do so in an order made under section 104 of the Scotland Act. (Power to make provision consequential upon an ASP).

⁴¹ Scotland Act 1998 section 126(1) and (2)

⁴² the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379) Article 6(3)

20 June 2006

Section 17 Commencement and Saving

Section 17(1) provides for sections 1 to 13 to be brought into force by a commencement order made by the Scottish Ministers. Different days may be appointed for different purposes.

Section 17(2) makes it clear that the Act is not retrospective. It does not apply to any act or omission causing death before it comes into force.

Section 17(3) makes it clear that the provisions of this Act are without prejudice to the offence of culpable homicide at common law

Clause 18: Short title

Section 18 gives the short title to the Act.