PROPOSED CULPABLE HOMICIDE (SCOTLAND) BILL

CLAIRED BAKER MSP

SUMMARY OF CONSULTATION RESPONSES

This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These sections have been prepared by Claire Baker MSP’s parliamentary office. Section 4 has been prepared by Claire Baker MSP and includes her commentary on the results of the consultation.

Where respondents have requested that certain information be treated as confidential, or that the response remain anonymous, these requests have been respected in this summary.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available on the following website http://www.clairebaker.org/.

A list of respondents is set out in the Annexe.
SECTION 1: INTRODUCTION AND BACKGROUND

Claire Baker’s draft proposal, lodged on 7 November 2018, is for a Bill to:

Amend the law of culpable homicide to ensure that where loss of life is caused by the recklessness or gross negligence of individuals, companies or organisations that, where proved, the wrongdoer can be convicted of the offence that reflects the appropriate seriousness and moral opprobrium of what occurred.

The proposal was accompanied by a consultation document. This document was published on the Parliament’s website, from where it remains accessible: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/29731.aspx.

The consultation period ran from 7 November 2018 to 23 April 2019. The closing date was extended from the original date of 15 February 2019 to compensate for its falling across holiday periods.

The following organisations and individuals were sent copies of the consultation document or links to it:

- Scottish Trades Union Congress – 333 Woodlands Road, Glasgow, G3 6NG
- Scottish Hazards – 113 Kingsknowe Road North, Edinburgh, EH14 2DQ

The consultation launch was at the Scottish Hazards Annual Conference with invited media. The proposed bill has been promoted through news releases at the launch of the Bill, at the launch of the consultation and during International Workers Memorial Day. The consultation was promoted at fringe events at Scottish Labour Conference and at STUC annual conference. The consultation has been promoted on social media by Scottish Hazards. I was also invited to speak to a group of Health and Safety diploma students at the TUC Education Centre of Excellence at City of Glasgow College.

The consultation exercise was run by Claire Baker’s parliamentary office.

The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member’s Bill. Further information about the procedure can be found in the Parliament’s standing orders (see Rule 9.14) and in the Guidance on Public Bills, both of which are available on the Parliament’s website:
SECTION 2: OVERVIEW OF RESPONSES

In total, 77 responses were received.

The responses can be categorized as follows:

- 51 (66%) from private individuals (members of the public)
- 20 (26%) from representative organisations [e.g. business association, trade union, political party or other body with a role representing its members or supporters’ views collectively]
- 4 (5%) from third sector organisations
- 1 (1%) from private sector organisations [e.g. individual company or business]
- 1 (1%) from individual politicians [MSPs, MPs, MEPs, peers, councillors]

Included in the responses were:

- 3 (4%) anonymous submissions
- 38 (49%) very similar responses which appear to have been the product of a standard response template distributed at the Scottish Hazards conference – in full support of the proposed Bill
- 1 (1%) of late responses accepted
- 3 (4%) responses were submitted in the names of more than one individual

Further to the responses detailed above, 3 duplicate responses were also submitted. These have not been included in the information above or this summary.

An overwhelming majority of the responses received were in favour of the proposals to amend the law on culpable homicide as set out in the consultation document, across individual and organisational responses. The main reasons given for support were providing clarity and addressing shortcomings in the existing legislation including perceived inconsistency in application to businesses of different size and in the application of law to individual and organisational wrongdoers.

The principle of deterrence was raised in several responses, with comments on the need to compel organisations to take health and safety obligations seriously or to face consequences. There were arguments that the proposed bill would result in improvements to health and safety practice.

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

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

Respondents were broadly in favour of the application of sanctions as a consequence of conviction, though the potential impact of financial penalties on public bodies was noted as a reason to utilise alternative penalties in some instances. Most respondents supported the application of the proposal across all types and size of organisation, citing the need for consistent application of legislation as one of the key principles of the proposal. The need to ensure proper resourcing for related prosecutions, as well as adequate training and guidance for prosecutors, was also highlighted.

Several responses sought to pre-empt arguments that the proposed legislation would place additional regulatory burden on businesses, stating that such claims were unevidenced. Other respondents argued that any additional cost for business would be worthwhile if it reduced workplace accidents and improved working practices by providing a deterrent to lax health and safety standards, also stating that such costs paled in comparison to the impact on families, friends and loved ones of a death in the workplace.

Regarding questions of legislative competence, respondents supporting the proposed legislation argued that the Scottish Parliament and Government has previously taken forward legislation in areas like this and so that matter was one of political will rather than competence. It was stated the proposals were competent under Section 29 (4) of the Scottish Act 1998. Reference was made to action by the Scottish Government to introduce minimum alcohol pricing and in bringing forward a ban on smoking in public places, with respondents citing this as a progressive approach which should also be taken in regard to this proposal.

The proposals for two statutory types of culpable homicide were also broadly welcomed, with respondents saying this would help address any gaps in the law. The need to ensure the differences in the offences and how they would apply across sectors was noted by some, with comments made on the importance of appropriate definitions.

No issues around equalities or sustainability were raised in consultation responses.
SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

This section sets out an overview of responses to each question in the consultation document.

Please note that question numbers 1-5 comprised the About You section for respondents and the data protection declaration.

General aim of proposed Bill

A section on the Aim of Proposed Bill was included in the consultation document outlining the aim of the proposed Bill and what it would involve. Respondents were asked:

<table>
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<tr>
<th>Question 6: Which of the following best expresses your view of the proposed Bill (Fully supportive / Partially supportive / Neutral / Partially opposed / Fully opposed / Unsure)? Please explain the reasons for your response.</th>
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72 respondents (94% of the total) answered this question directly or explicitly stated in their response their view of the proposed Bill. (Other responses may have indicated in other ways whether they supported the general aims of the Bill, but these have not been included in the following analysis.)

A significant majority of respondents (97%) supported the proposed Bill. Only 1% were opposed in principle, with a further 1% partially supportive, but some questioned whether it was necessary or likely to be effective in practice.

Reasons for supporting the Bill

The lack of clarity and consistency in current law was referred to in several responses, covering the application of rules to individuals, different sizes of organisations and for ministers and crown bodies, with it argued that all laws should apply consistently to all parties. Some responses argued the current law discriminated against smaller businesses as it was more likely for them to be charged than larger companies with more complex structures.

Responses pointed to the need to address anomalies in the current law of culpable homicide, including the requirement to identify a controlling mind, issues regarding aggregation and an inability to hold an organisation vicariously liable for the action of officers of employees as well as inequality regarding difficulties in prosecuting large employers. It was also argued the current law did not apply evenly and consistently in respect of the difference between individual and organisational wrongdoers.

Some respondents referred to their personal circumstances in giving support to the proposals, including the deaths of family members at work. A number expressed dissatisfaction with HSE investigations and decisions not to prosecute employers, citing unsafe working practices. The ability to allow for consistent prosecution for deaths by homicide and the bringing of clarity to the
application of culpable homicide legislation were highlighted as reasons to support the proposed Bill.

A few respondents provided additional comment that the existing Corporate Homicide legislation was not fit for purpose. Reference was made to difficulties regarding the definition of “senior managers” in what became the Corporate Manslaughter and Corporate Homicide Act 2007 (response 51). Discrimination against small companies and related analysis of Corporate Manslaughter prosecutions in England and Wales by the University of Northumbria was also mentioned (response 51) and the lack of charges or prosecutions in Scotland related to deaths investigated as corporate homicide in the last decade (response 60). The lack of convictions under the 2007 Corporate Manslaughter and Corporate Homicide Act was cited by some as a reason for change in the law, with a lack of prosecution said to mean a reduced incentive for the maintenance of high standards of health and safety (response 37).

“Nearly 17 years after the death of my dad I welcome these proposals, no family should have to suffer as mine has had to, no one was held to account for my dad’s death and there was no prosecution whatsoever and I was not informed why. I hope this attempt to change the law succeeds to help ensure justice is achieved for others suffering the loss of a loved one as a result of work.” – Response 50

“In Scotland the fact that we have not had one charge laid for Corporate Homicide, let alone prosecution would indicate that the existing legislation is failing to punish offenders. If it is failing to punish those who cause the deaths, then the deterrent effect is lost as is the opportunity to encourage employers to take their health and safety obligations seriously.” – Response 51

“It seems that the larger the organisation the less the public are protected from their conduct under the criminal law… further legislation is required to ensure that corporations, individual directors and others who, as a result of their failures, cause the deaths of workers are not immune from prosecution under Common Law.” – Response 62

“In many ways the Corporate Manslaughter and Corporate Homicide Act 2007 has continued the problems with the older law of ‘mens rea’ or ‘controlling mind’ doctrine, which has led to more prosecutions and convictions against small companies with larger ones escaping justice just as before, and this is even more pronounced in implementation of the law in Scotland. The absence of any Corporate Manslaughter and Corporate Homicide Act prosecutions in Scotland is a travesty and shows the law is not working to hold negligent employers to account, provide justice, suitable punishment and any deterrent effect.” – Response 24

“The goal of deterrence within the proposed bill supports the current regulatory framework for duty holders such as employers to fulfil their duties and responsibilities including those within health and safety legislation.” – Response 26
Reasons for opposing the Bill

One respondent (response 59) outlined opposition to the proposed Bill on the basis that legislation was not required, stating that in the case of individuals and smaller companies, current common law was fit for purpose and the proposals would be disproportionately. They further argued that neither the absence of convictions in Scotland or lack of prosecutions was self-proving of the need for a change to legislation.

Comments were made on potential unintended consequences such as easier conviction of individuals within companies for actions on behalf of the company resulting in individuals and businesses being discouraged from operating in Scotland. The potential for expansion of the categories of code of conduct leading to individuals unconnected to any company being convicted of culpable homicide was also mentioned.

The potential to cause confusion regarding the definition of causing death recklessly was also mentioned.

Other points made

A broader look at all workplace incidents was suggested in one response, referring to workplace injuries which can result in compensation for the injured party but little action against an employer to address the cause of accident.

Reference was made (response 49) to UK Department for Transport proposals to introduce offences of dangerous and careless cycling into UK law and the existing situation whereby dangerous road behaviour offences can be punished as culpable homicide in Scotland. While the proposed changes to culpable homicide legislation are welcomed, the importance of clear definitions is underlined, and a suggestion made to include examples of offences which would be punishable under each offence in different sectors – including road traffic offences – is made.

One response (response 56) called for the Bill to exclude cases involving healthcare professionals, were it to proceed as proposed in the consultation document, citing unintended consequences for the profession. Reference was made (response 23) to a General Medical Council commissioned review of how gross negligence and culpable homicide are applied to medical practice and it was recommended its findings be considered as part of any proposed legislation.

While supporting the principles of the consultation, one respondent (response 21) called for the examination of reform of the crime of culpable homicide alongside the crime of murder and various partial defences which can apply to such crimes, including self-defence, provocation and diminished responsibility. The response also highlights the links to work by the Scottish Law Commission in its Tenth Programme and calls for any reform related to this consultation to await the outcome of the Scottish Law Commission’s
report. The importance of any Culpable Homicide Bill considering how it would sit with current legislation was also stressed.

**Advantages of the proposed Bill**

**Question 7: What do you think would be the main practical advantages of the proposed Bill?**

20 respondents (26% of the total) answered this question.

Respondents commented on potential for the proposed Bill to provide clarity to the law regarding culpable homicide and ensure its consistent application to individual and organisational wrongdoers, including organisations of different sizes. Current legislation was referred to as confused and inconsistent, with the proposals seeking to provide a clear set of rules applying to all. Changing the ways employer organisation operate such as promoting a more transparent decision-making process and increasing corporate accountability were also highlighted as benefits of the proposals.

Several responses also noted the role of the proposed Bill in providing a deterrent and ensuring conviction was a possibility for all offenders. The importance of ensuring adequate resourcing for related prosecutions was also highlighted.

Responses stated the role of stronger legislation and the possibility of conviction as providing both a deterrent for employers who may breach regulations and an incentive to ensure higher health and safety standards.

It was argued (response 21) that the structure and transparency of the nature of culpable homicide as a crime requires updating to improve its understanding by courts and juries.

“The law of culpable homicide in Scotland is not fit for purpose. That is particularly the case in relation to how the law applies to organisations. More to the point, the law of culpable homicide has got itself tied up in knots by having different tests for different types of wrongdoers. The result is that the law is confused and does not apply consistently across individuals and different types of organisations. We need one clear set of rules that apply to everyone – individuals, small organisations, large organisations, ministers and crown bodies. That is exactly what the proposed bill will achieve and that is why it has my full support.” – Response 63

“The main advantages of this Bill are that it will: Provide clarity as to the circumstances when all types of wrong doers(individual and all types and sizes of organisations including ministers, civil servants and crime bodies) will be guilty of culpable homicide; Level the playing field and provide one clear and consistent set of rules that applies to all types of wrongdoer; Ensure conviction is a real possibility for all organisations; Serve as a real deterrence
to individuals and organisations alike and accordingly make Scotland and Scottish people safer.” – Response 24

“The crime of culpable homicide is too broad in its scope. The boundaries between murder and culpable homicide are blurred, leaving too much to intuition and impression”. – Response 21

“We believe that as a matter of principle all laws, but especially the law of culpable homicide, should apply consistently to all. Practically, we have seen how the confusion and inconsistency in the law as it currently stands can impact on the lives and wellbeing of Scottish Citizens and especially Scottish workers.” – Response 31

“The advantage of the question is finding the people or responsible persons properly prosecuted and the families getting closure.” – Response 33

“Although I agree with the bill, I feel that workplace accidents in general must be looked at. Often when a person is injured in the workplace, they will receive compensation. However, no one is ever prosecuted for the cause of the accident even although under the Health and Safety at Work Act 1974 section 7 they can be.” – Response 36

“We believe that the proposals will provide greater clarity in the application of culpable homicide legislation and ensure all those responsible for involuntary deaths by homicide are prosecuted consistently, regardless of where that death occurs, whether in our communities or workplaces, large or small. Justice will be seen to be served providing some comfort to those who lose loved ones through negligent or reckless behaviour by corporate employers, company management or individuals.” – Response 51

“The main practical advantage of the Bill would be that we will have a workable statute for corporate culpable homicide, after 12 years with an unworkable law. The main disadvantage is that prosecutions under this Bill would still be dependent on an underfunded and overworked prosecution service.” – Response 54

The need for legislation

The aim of this proposed Bill is to amend the law of culpable homicide to ensure that where loss of life is caused by the recklessness or gross negligence of individuals, companies or organisations that, where proved, the wrongdoer can be convicted of the offence that reflects the appropriate seriousness and moral opprobrium of what occurred.

Current legislation does not provide for proper accountability in our courts for those whose actions in the workplace, or lack of action on matters of safety, result in fatalities.
Question 8: Do you have any further comment to make on the need for legislation of this type as detailed in this consultation?

17 respondents (22% of the total) answered this question.

A few responses raised the area of legislative competence, arguing that the Scottish Parliament and Government have previously taken forward legislation pushing at the boundaries of legislative competence, so the issue is a matter of political will. Supporters argued that the Bill proposed is competent by reason of Section 29 (4) of the Scottish Act 1998 and called on the Scottish Government and Parliament to take a strong stance to drive forward reform, saying its passing would rely on political will.

Reference was made to potential opposition based on regulatory burden on business, which is refuted by supporters arguing that this claim is unevidenced and false (response 24).

Comments were also made on retention and expansion of Civil Legal Aid for Fatal Accident Inquiries and consideration of a specialist court for financial crimes and corporate offences (response 54).

“The purpose of the Bill is clearly to make an important area of Scots Criminal Law apply consistently to reserve matters and non-reserved matters. We believe that the willingness of the Scottish Government and the Scottish Parliament to take a brave and progressive stance to the issue of legislative competence is a fundamental test of their political will and political objectives.” – Response 29

“Anything that reduces the chances of other families suffering as other have done should be done, too many workers lose their families and do not receive justice... these proposals, if they become law would comfort me that others will be treated with more respect and have a greater chance of getting justice for their loved ones.” – Response 50

“In our opinion there is no other area that is more important than the current proposal in respect of taking a brave and progressive stance on legislative competence. The proposals seek to make the law of Culpable Homicide apply consistently to reserved matters and therefore is within the legislative competence of the Scottish Parliament.” – Response 24

“These proposals relate to the Scots common law offence of Culpable Homicide, the need to ensure it applies consistently across our criminal justice system and achieves the aims of any criminal offence, to punish all those who offend, to deter others from offending and to rehabilitate those who have offended and been sentenced by the courts.” – Response 60

“We refute any suggestion that this will place increased burdens on business, if they operate in a responsible way and their organisations and office bearers carry out business fully aware of their responsibilities under our criminal law
then they should have nothing to fear. If, however they act in manner, collectively or individually, resulting in involuntary killing they should be subject to investigation, prosecution and punishment under our criminal law.” – Response 51

“We also refute in the strongest terms possible, the unevidenced and clearly false argument that such a change in the law would be much of an increased burden on organisations operating within the law and complying with their duty of care and all health and safety legislation. The reverse is the truth. The failure of the law to hold organisations/corporations accountable gives them virtual immunity to behave recklessly and negligently without fear of charges and puts the lives and health of workers at a massively increased risk.” - Response 24

**Statutory types of culpable homicide**

The proposals will in effect create two different statutory offences of culpable homicide: culpable homicide by causing death recklessly and culpable homicide by causing death by gross negligence. These offences would be in addition to, and not in substitution for, the existing kinds of culpable homicide in common law.

**Question 9: Do you have any comments to make on the proposals outlined which suggest that there might be two different statutory kinds of culpable homicide – culpable homicide by causing death recklessly and by gross negligence?**

17 respondents (22% of the total) answered this question.

Most respondents indicated support for this approach. Comments were made on the probability of overlap between the two and instances where circumstances could meet both tests, but respondents also highlighted that some cases would meet the circumstances of one test but not the other, therefore having two tests would ensure no gaps in the law. Particular reference was made to this allowing a closing of loopholes related to the Transco case.

It was argued (response 62) the offence of “culpable homicide by gross negligence” would cover those acting deliberately and through that behaviour cause death, but also those who may not be aware of the risks and consequences of their actions but should have been.

“Having two tests ensures that there are no gaps in the law. This important because there have been too many gaps in the law of culpable homicide for too long.” – Response 27

“As a matter of principle we believe that individuals and organisations who cause death by both recklessness and gross negligence are and should be guilty of culpable homicide.” – Response 64
“We believe that recklessness and gross negligence are equally culpable and where companies cause death by either, they ought to be guilty of corporate culpable homicide.” – Response 51

“There should be one offence of corporate culpable homicide, which can be committed by recklessness. It is not clear from the proposal whether one offence is intended, or if the intention is to create two separate offences, akin to dangerous driving and careless driving. It is not clear that gross negligence is less or more severe than recklessness and the difference appears to only be the existence of a duty of care in cases of gross negligence, while recklessness is defined more broadly and can encompass scenarios where there is no duty of care.” – Response 54

“It is important that there are clear definitions of ‘recklessness’ and ‘gross negligence’ to ensure that both terms are properly understood and consistently applied in the legal system. Examples of offences that would be punishable under each offence in different sectors – such as road traffic offences – would also be helpful and would aide professional and public understanding. This is currently a gap, as identified in the consultation, in the current culpable homicide legislation, and which the proposed definition(s) goes some way to addressing.” – Response 49

**Organisations and office holders**

In the case where culpable homicide consists of causing death recklessly, it is proposed to make an organisation vicariously liable for that offence along the lines proposed by the draft Scottish Criminal Code, 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 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.

In the case where culpable homicide consists of causing death by gross negligence it is proposed to make an organisation directly guilty of that offence if the way in which its activities are managed or organised by its office-holders (even if these are not “senior management”, as has to be the case under the 2007 Act) amounts to a gross breach of a duty of care and that breach causes death; to define a duty of care simply as any duty of care imposed under the common law or by an enactment.

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.

**Question 10: Do you have any comments on the range of organisations and office holders who should be defined by the Bill?**

16 respondents (21% of the total) answered this question.

Comments were made in favour of as wide a range as possible of organisations being covered by the proposed Bill, with several respondents expressing the view that no organisation should be exempt or excluded from the Act. A few responses also argued that the term “office holder” should be defined as widely as possible, not be restricted to any particular level of management, and follow the recognised vicarious responsibility model. It was commented that having exemptions in place would reduce any incentive for those organisations to implement effective health and safety practices.

“All Stakeholders should be held accountable whether they are organisations or individuals and punishable accordingly under law.” – Response 32

“The Bill should be clear as to how this offence applies to different forms of organisation. Charitable enterprises should not be exempt.” – Response 54

“There should be no exemptions or immunity from prosecution for culpable homicide where the behaviour of organisations or individuals falls below the standard that society expects, in this case exposing workers to unacceptable risks that could lead to or result in death.” – Response 51

“The current approach to identifying the controlling mind does not reflect how companies operate in practice and is anachronistic.” – Response 60

**Ministers, civil servants and Crown bodies**

It is proposed that that Crown would be liable in the same way as any other individual or legal person. The proposals in the Bill would also enable to the Crown to pursue cases of culpable homicide against companies which they have previously been unable to do, even when they decided it was appropriate.
Question 11: Do you have any comment to make on the provisions applying the new offences to Ministers, civil servants and Crown bodies in the same way as they apply to natural persons and organisations?

17 respondents (22% of the total) answered this question.

Most of those commenting did not believe any individual or organisation should be exempted, including Ministers, civil servants and crown bodies. One respondent (54) questioned whether it was within the legislative competence of the Scottish Parliament to make the Crown criminally liable for decisions made by Crown employees, also suggesting careful drafting was required to prevent the legislation being used to bring private prosecutions against government ministers.

One response (21) notes the consultation refers to a need to expand the law to include Crown employees, ministers and civil servants, arguing that given the scope of the 2007 Act, and particularly before it is tested, the presence of gaps is unclear.

“The law of culpable homicide should apply consistently to all individuals and organisations. Logically, therefore, we fully support the law applying to Ministers, civil servants and crown bodies in the same way as they apply to natural persons and organisations.” – Response 29

“These proposals should apply to everybody and every organisation.” – Response 58

“It is inconceivable that Crown employers including Scottish Ministers should be given immunity from prosecution when the purpose of this Bill is to ensure that any natural person or organisation, irrespective of size or status, whose actions lead to the death of an individual is accountable for their actions in a Court of Law.” – Response 62

“If the bill is not carefully drafted, there may be a risk that people will attempt to bring private prosecutions against government ministers as a result of unpopular and damaging policies, or otherwise use proceedings under the Bill in place of judicial review proceedings.” - Response 54

Culpable homicide by causing death recklessly

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

Question 12: Do you have any comment to make on the way in which causing death recklessly is defined in the proposal?
16 respondents (21% of the total) answered this question.

One respondent suggested there was potential for confusion if a definition of recklessness was created which did not match the concept as understood in other areas of law. Another respondent argued that recklessness was not properly defined in existing legislation and the definition proposed would provide an objective standard. All other responses were supportive of the definition in the proposal, with comments that it would improve overall understanding of the offence and provide clarity.

The proposal states the Bill would make an organisation vicariously liable for causing death recklessly along the lines proposed by the draft Scottish Criminal Code, 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.

Question 13: Do you have any comment to make on the proposal that organisations would be responsible for the actions of their employees for this offence?

20 respondents (26% of the total) answered this question.

90% of those responding to this question were supportive of the proposal, saying it would encourage employers to ensure high standards of training for all employees and provide reassurance to any employees undergoing internal inquiries. Other comments welcomed this as a step to removing the weaknesses in current legislation regarding larger companies and said it would ensure those in charge of companies understood their legal obligations. One respondent indicated it was difficult to answer this question without knowing what sanctions may apply on conviction but noted that organisations were already vicariously liable for employee actions in civil proceedings.

“We completely support the proposal that ensures organisations are vicariously liable for the actions of their employees and officers as it is not acceptable for the law to allow organisations and senior officers to escape accountability by delegation of responsibility for health and safety to lower level management levels, often without adequate training and support.” – Response 24

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

Question 14: Do you have any comments on the inclusion of aggregation and how it will work in practice?
16 respondents (21% of the total) answered this question.

Comments were broadly supportive of the inclusion of aggregation, though one response (response 54) stated it was unclear whether this would also apply in instances of gross negligence. Some responses stated the inclusion of aggregation as essential in reflecting the way organisations operated and ensuring no loopholes in the law, particularly in relation to management failures over a long period or in very large organisations. Reference was also made to the Transco case.

“Allowing for aggregation... ensures equality between large and small companies, rather than unjustly holding smaller companies far more accountable in law than larger corporations.” – Response 24

“The inclusion of aggregation is vitally important in order to lay to rest the issues around failure of common law identified in the Transco case that did not allow the aggregation of individual controlling minds over a long period of time in order to meet the requirement to prove the mental element to secure a prosecution for culpable homicide.” – Response 62

**Culpable homicide by gross negligence**

In cases 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.

**Question 15: Do you have any comment to make on proposals to reintroduce culpable homicide by gross negligence into the law in Scotland?**

18 respondents (23% of the total) answered this question.

A significant majority of responses to this question were supportive of the proposal, with reference made to prosecutions in England and Wales for gross negligence manslaughter in addition to corporate manslaughter. Comments were made in the need for clarity regarding the re-introduction of gross negligence as an offence, with one response cautioning there could be confusion with English law definitions.

“The absence of any provision within existing Corporate Homicide legislation to prosecute individuals aligned to the fact that it is virtually impossible to prosecute work related deaths as acts of culpable homicide in Scotland necessitates a change in the law.” – Response 60

“If a re-introduction of culpable homicide by gross negligence were to take place, it is pertinent that the offence is introduced with sufficient clarity, time and guidance to ensure that organisations and law enforcement agencies can
easily understand and implement the requirements. This will help to ensure that the law can be better applied and utilised.” – Response 22

Question 16: Do you have any comment to make on the proposals to define what is meant by that offence where it is committed by a natural person?

16 respondents (21% of the total) answered this question.

All respondents who commented were in support of the proposal and the definition on how the offence would apply to a natural person.

“We agree with the definition of how the offence would apply to a natural person, we feel this is clearly explains what would be required for a natural person to be guilty of the offence. This is in line with other areas of law where behaviour that falls short of that expected by a reasonable person is likely to result in an offence being committed and a reasonable chance of conviction if proved.” – Response 60

The proposal seeks 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 (breach of duty of care). It also seeks 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.

Question 17: Do you have any comment to make on the definitions of “duty of care” and “gross breach”?

16 respondents (21% of the total) answered this question.

The clear majority of those who commented agreed with the proposal, highlighting that such definitions were capable of being understood by members of the public with appropriate judicial direction.

“These are well established legal principles and well established and entirely appropriate for the reform of culpable homicide the Bill is seeking to achieve”. – Response 51

“Duty of care should be defined as it is in the law of Delict. There should be a stated presumption that a company has a duty of care towards its employees. It is not clear how ‘gross breach’ differs from ‘breach’, except that the first is obviously worse. It should be defined with reference to the act itself and not with reference to the consequences. A gross breach should be a breach of duty of care which is flagrantly incorrect. A more minor breach of duty of care, which nevertheless causes death, should not be considered a gross breach. This area would probably not benefit from definition in the Bill and should be left to judicial discretion.” – Response 54
Sanctions

**Question 18: Do you have any comment to make on the penalties which may be imposed if a conviction is successful under a new law?**

16 respondents (21% of the total) answered this question.

Responses noted that unlimited fines were able to be imposed on health and safety offenders and called for penalties available to judges to reflect the moral opprobrium of offences. There were also calls for a consistent approach which was in line with English law, with comments on current arrangements and potential for inconsistency in the way financial sanctions were imposed.

Some respondents suggested the Scottish Sentencing Council could develop guidelines similar to the England and Wales Sentencing Council, also calling for resources to make for forensic accountancy investigation of company finances. Other responses referred to health and safety cases which have resulted in significant convictions and fines, and an increase in prison sentences for health and safety offences following the introduction of new sentencing guidelines in England and Wales.

Several respondents called for custodial sentences to be available in appropriate cases both for offences by individuals and organisations. Other suggested sanctions included community orders, remedial orders and publicity orders. A number of respondents called for families to have an automatic right to make victim statements. Reference was made to reduced budgets in the public sector.

Some respondents questioned the imposition of substantial financial penalties on public bodies such as health boards and local authorities, suggesting alternative sanctions be applied including sanctions against board members.

One respondent noted that fines imposed on medium to large companies for breach of existing health and safety legislation were higher than for smaller companies as turnover was taken into account when determining any financial penalty.

It was noted that (response 21) in Scotland discretion as to any prosecution lies with the Crown Office and Procurator Fiscal Service, including the charges under which to prosecute. The same response argues that regarding convictions for culpable homicide there is no suggestion that current sentencing powers are not appropriate or adequate.

"We believe that the offence and potential penalties must serve as a real deterrence. We accordingly believe that the highest and most severe penalties must be available in appropriate cases. That includes custodial sentences." – Response 25
“Damages are awardable in a civil suit for damages. A fine may be applied by an HSE prosecution. The bill should seek other forms of sanction. The removal and disqualification of directors should be possible. There should be provision for barring the organisation from tendering for public contracts, with an exception where this would be detrimental to national security.” – Response 54

“In order to ensure consistency in sentencing for the new offence the Scottish Sentencing Council should be asked to develop similar guidelines [to the Sentencing Council for England and Wales] to ensure appropriate sentences are imposed by courts and judges are given access to the full financial resources available to pay fines with appropriate forensic accounting procedures being put in place to ensure information on company finances provided to the court reflects the true position.” – Response 51

“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… To ensure the consistent application of the law custodial sentences should be available not only in circumstances where the offence is committed by an individual but also in appropriate circumstances where an organisation is convicted.” – Response 62

**Financial implications**

The proposal does not anticipate the Bill having significant financial implications. There would be costs involved in the enforcement of a new criminal offence and it would be the decision of the COPFS to pursue any relevant criminal cases. The Bill would seek to equalise the law and companies could be charged and convicted for culpable homicide, which would incur costs. However, the intention of the Bill is to reduce fatalities in the workplace by reinforcing the importance of health and safety and making clear its significance to employees and employers.

<table>
<thead>
<tr>
<th>Question 19: Taking account of both costs and potential savings, what financial impacts would you expect the proposed Bill to have on (a) Government and the public sector (b) Businesses (c) Individuals?</th>
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<tbody>
<tr>
<td>20 respondents (26% of the total) answered these questions.</td>
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<tr>
<td>Among respondents, the majority felt in all cases the impact would be broadly cost neutral or a reduction in cost.</td>
</tr>
<tr>
<td>(a) <strong>Government and the public sector</strong> (Significant increase in cost / Some increase in cost / Broadly cost neutral / Some reduction in cost / Significant reduction in cost / Unsure)</td>
</tr>
<tr>
<td>Among respondents to this question 60% felt they the impact would be broadly cost neutral, with 30% anticipating some increase in cost and a</td>
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</tbody>
</table>
further 10% unsure. Those anticipating a cost increase referred to costs related to the investigation and enforcement of new criminal offences.

The impact on the Scottish Courts and Tribunals Service of the proposals was highlighted (response 61) in terms of court time and programming, associated staff and accommodation resources and costs for relevant IT changes.

“We would argue that the proposals would result in shorter more focused investigations as the tests are more objective, the investigations will be less cumbersome, and costs may well be reduced as a result, particularly as the deterrent effect takes hold and fatalities decrease.” – Response 60

“The COPFS, Police Scotland and HSE need to be fully funded, but these proposals should actually help to overcome some of the huge delays and cumbersome processes involved in implementing current laws, which has led to long investigations but no prosecutions over the last 10 years.” – Response 24

(b) **Businesses** (Significant increase in cost / Some increase in cost / Broadly cost neutral / Some reduction in cost / Significant reduction in cost / Unsure)

45% of respondents felt the proposals would be broadly cost neutral for businesses, with 25% anticipating some reduction in cost and 15% saying there would be some increase in costs. A further 15% were unsure. It was commented that little or no increase in costs would apply to those businesses compliant with their duties and responsibilities including health and safety law, with cost impacts only being felt where required protections for workers were not provided. Other comments highlighted the financial cost of workplace harm as a result of poor health and safety; and stated the importance of an effective publicity campaign to ensure awareness of legal responsibilities.

“If a business invests in health and safety there will be a cost benefit accrues through time, including less likelihood of exposure to litigation and prosecution.” – Response 51

“The main change is the increased chance of being held fully to account and it is beyond belief that any argument business advances that defends negligent employers and reckless behaviour would be entertained as a serious objection.” – Response 24

(c) **Individuals** (Significant increase in cost / Some increase in cost / Broadly cost neutral / Some reduction in cost / Significant reduction in cost / Unsure)
85% of respondents felt the impact on individuals would be broadly cost neutral, with the remaining 15% unsure. No respondent indicated an increase in cost to individuals was anticipated.

Some comments were provided on the impact beyond loss of wages and financial support for families related to loss of a loved one to work related death, citing this as motivation to support the proposals.

**Question 20: Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?**

12 respondents (15% of the total) answered this question.

75% of those respondents felt there was no way to achieve the Bill’s aim more cost effectively. One respondent (8%) suggested savings could be made, saying using two separate tests would increase costs as it increased complexity and required training for judges and prosecutors. Additional comments were provided by 17% of respondents.

“Cost effectiveness should not come into addressing injustice.” – Response 20

**Equalities**

It is not anticipated the proposed Bill would impact on any of groups with protected characteristics under the Equality Act 2010. The consultation argues small companies are being unfairly discriminated against in being subjected to more severe penalties than larger companies contrary to Article 14 of the ECHR.

**Question 21: What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, race, religion and belief, sex, sexual orientation?**

18 respondents (23% of the total) answered this question, choosing from the following response options: Positive / Slightly positive / Neutral (neither positive nor negative) / Slightly negative / Negative / Unsure

15 respondents (83%) said the impact would be neutral, 2 were unsure and 1 respondent felt there would be a slightly positive impact. No further comments were provided by any respondent in this section.

**Question 22: In what ways could any negative impact of the Bill on equality be minimised or avoided?**
5 respondents (6% of the total) answered this question.

Of those responding, 4 stated they did not anticipate any negative impacts. 1 respondent suggested training for police and prosecutors would help minimise negative impacts.

**Sustainability**

An initial assessment considered the impact of the proposed Bill in terms of supporting the sustainable development of society, environment, economy and governance. In reducing the number of fatalities in the workplace, the Bill would expect to have a positive impact on society and how we value employees. It would aim to improve governance arrangements in companies by making clear the responsibility of senior managers and it would seek to minimise accidents at work.

**Question 23: Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?**

18 respondents (23% of the total) answered this question on a Yes/No/Unsure basis. 17 respondents said Yes and 1 was Unsure.

Almost all respondents provided no comment in this section. Those commenting did not anticipate any disproportionate impact.

**General**

**Question 24: Do you have any other comments or suggestions on the proposal?**

10% of respondents provided additional comments in this section.

One respondent (response 54) referred to the characterisation of the current regime as “discriminatory” and questioned whether this was the case. Acknowledging the current situation may be “inequitable” depending on size of company, the respondent stated the size of a company was not a protected characteristic and therefore any inequality could not be described as discrimination.

Deterrence was highlighted as an important aspect of the bill and the expected consequence of a greater focus on health and safety practice as a result of the proposed legislation was mentioned as a positive in several responses.

It was suggested that aside from the legislation proposed in this consultation, there may be scope for further change to improve health and safety and increase related protections, with reference to the construction, offshore and
agricultural sectors. Reference was made to concerns of workers regarding their own job security if they speak out about health and safety matters.

The importance of changes in corporate culture was raised in a number of responses, calling for a recognition in law of the importance of health and safety reporting. There were suggestions that Scotland have its own Health and Safety Executive and for the devolution of employment law to Scotland as part of moves to better protect workers.

Anticipation of protests against the proposed changes by the business community were voiced alongside comments that the proposals seek to provide bereaved families more confidence in the justice system and have the resultant legislation provide a deterrent, adding that there should be no reasonable objection to this.

The lack of prosecutions in Scotland under current legislation was mentioned as evidence as a lack of equity however another respondent argued a lack of prosecutions in itself was not evidence of a need to change legislation.
Additional Comments

A number of responses were not set out in line with the structure of questions included in the consultation. Where the responses have fallen within the scope of the questions they are included in the relevant summary sections, any further comments are covered below.

A number of responses provided personal accounts of the impact of losing a loved one through death at work. Such responses were supportive of the changes proposed and referred to current law as not providing an incentive to improve health and safety in the workplace. The importance of stringent health and safety practices being in place, and accountability for such arrangements, is mentioned in a number of these responses. The long-term effects on families of a workplace death were highlighted in addition to accounts of judicial processes and dissatisfaction with outcomes in terms of not reflecting the magnitude of failures which occurred. The need to look beyond statistics of work-related incidents and the importance of remembering these were people, with families, is stressed.

One submission (response 50) mentions a lack of information and compassion shown by the HSE and a lack of explanation as to why no charge was made. The opportunity for those affected by such loss to pursue a change in legislation via this proposed Bill is welcomed as a means to ensuring other families do not feel let down by the justice system (response 58) as they have been or suffer a similar loss (response 55).

Supporting the proposal, one respondent (response 55) indicated in their case the Sherriff had said he was limited by Parliament in terms of fines which could be imposed, with the respondent suggesting a guilty plea would have been less likely if a charge of culpable homicide had been levied.

Referring to medical defence organisations and the provision of indemnity to healthcare professionals (response 56), one respondent noted the proposals do not make any specific reference to healthcare but the proposed definition of “cause of death” would include a medical fatality. The submission refers to proceedings relating to prosecutions in a healthcare setting and the Marx/Hamilton review carried out by the General Medical Council and calls for the proposed Bill to exclude cases involving healthcare professionals.
SECTION 4: MEMBER’S COMMENTARY

I would like to thank all those who have responded to this consultation on my Culpable Homicide (Scotland) Bill. I have received support and responses from the STUC and individual trade unions and recognise that this is an issue they have been campaigning on for some time. They have direct experience of members experiencing injury and fatalities in the workplace and want to see a change in the law that recognises the responsibility of employers to ensure safe workplaces. I would like to thank Scottish Hazards for their valuable support and expertise during the consultation process. Families Against Corporate Killing (FACK) have long campaigned for reform, and I appreciate their support for the proposed legislation.

While these organisations represent their membership, it is significant that the majority of responses have come from private individuals. Often these people and their families have direct experience of losing a loved one at work. They have expressed their frustration at a justice system which they believe does not fully recognise the responsibility of the employer. When a husband, mother, child loses their life in the workplace due to reckless or gross negligence, the respondents have supported the proposition that there should not be a distinction between a death caused by an individual, an association or a corporate organisation.

This Bill seeks to determine that culpable homicide applies equally to an individual, a small business and a large business. At present, case law determines how culpable homicide applies to individuals, and it is possible, as a recent case has demonstrated in Scotland, to convict the owner of a small business where an employee has lost their life due to their neglect. However, there is no expectation that a large business can be pursued through the criminal courts. They can be pursued through Health and Safety legislation, and receive fines, but it is not possible to use the current laws to effectively pursue a culpable homicide case through the criminal courts.

There is also support from consultation responses for the argument that strengthening the legislation will improve health and safety practices within the workplace. If passed, this legislation will ensure that the consequences for companies, big or small, who fail to implement and maintain good health and safety standards, will be significant and will effectively reflect the significance of fatalities at work. This will act as a strong incentive for employers to be confident that they operate a safe and responsible business.

I am pleased that my proposal has received overwhelming support from those who have responded to the consultation both from individual and organisational responses. There is a strong desire to close the recognised loophole in our current arrangements which fails to treat individual, small businesses and large businesses equally. Families who have lost a loved one at work feel they have not had access to justice, and I believe the time has come in the Scottish Parliament to take action.
While a clear majority of respondents support the proposals, the General Medical Council did highlight their own review of this area in relation to their profession. I recognise the issues they have raised and accept that there is a need for clarity in this area, and I will give consideration to the appropriateness of exemptions to the Bill. The Bill deals with a complicated area of law and I appreciate the comments on the need to prove the requirement for legislation. I will also give consideration to the response from the Law Society of Scotland and its comments regarding related work by the Scottish Law Commission.

This is not the first time the Scottish Parliament or Scottish Government has been asked to consider the effectiveness of the law of culpable homicide where an individual’s death is caused by a business or an association. Scottish Government Ministers have previously commissioned analysis and expert groups, the UK Government has changed the law, introducing the Corporate Manslaughter and Corporate Homicide Act 2007, and this is the third proposal for a member’s bill seeking to address an injustice that has not gone away. While we have failed to tackle this issue, on average 17 people are killed in work related incidents in Scotland each year, which are investigated by the Health and Safety Executive. This does not include deaths investigated by the MAIB, AAIB ant the ORRR or work-related road traffic accidents.

I believe we can take action to address this poor record and provide a route to justice for families by using the powers of the Scottish Parliament to ensure culpable homicide is applied equally. I look forward to working to secure the support of MSPs to enable the Bill to progress.
**ANNEXE**

**List of Respondents**

<table>
<thead>
<tr>
<th>Response</th>
<th>Name of organisation/individual</th>
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<tbody>
<tr>
<td>1</td>
<td>Paterson, R</td>
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<td>2</td>
<td>Anonymous</td>
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<td>Anonymous</td>
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<td>Brown, L</td>
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<td>Members of British Transport Police</td>
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<td>General Medical Council</td>
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<td>Hazards Campaign and Families Against Corporate Killers</td>
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<td>Unite Edinburgh Not For Profit Branch</td>
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<td>Royal Environmental Health Institute of Scotland</td>
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*Responses 33, 57 and 79 have been omitted from this list and report as they were found to be duplicate submissions.*