

CULPABLE HOMICIDE (SCOTLAND) BILL
CONSULTATION PAPER

[A proposal 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]

Consultation by
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8th November 2018

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FOREWORD

It is always painful for a family to lose a loved one. Where the death is caused by recklessness or gross negligence the family do not care if the death was caused by an individual, an association or a corporate organisation. The family want to see justice and the wrongdoer convicted of an appropriate crime with the appropriate moral opprobrium; and, where appropriate, the wrongdoer capable of receiving a custodial sentence. In short, the family expects the law to treat all types of wrongdoers the same. I believe that is what society also demands.

But, as law currently stands that does not happen in relation to the serious criminal offence of culpable homicide.

Where an individual causes death by recklessness or gross Negligence, it is relatively easy for the Crown Office and Procurator Fiscal Service (COPFS) to secure a conviction for culpable homicide, although there are some difficulties with the current tests and whether gross negligence remains part of our law. Where a very small company causes death in circumstances that the death can be linked to the gross breach of duty of its senior management (a fairly easy thing to prove in relation to very small companies), it is relatively easy for the COPFS to secure a conviction of corporate culpable homicide under the Corporate Manslaughter and Corporate Homicide Act 2007¹. However, if medium sized or larger company causes a death it remains extremely difficult (and many experts would say practically impossible) for the COPFS to secure a conviction of corporate culpable homicide even in circumstances where there was recklessness or gross negligence on the part of individuals operating in fairly senior positions within the company.

The law of culpable homicide has always failed to have one clear set of rules that apply to all wrongdoers, individuals and organisations alike. Many hoped that would be achieved by the 2007 Act but it has failed entirely in that objective.

The reform of the law of culpable homicide is overdue and I believe that we can no longer wait on the Scottish Government taking action.

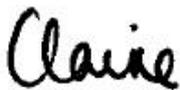
This is not the first time the Scottish Parliament or Scottish Government has been asked to consider the effectiveness of the law of culpable homicide where an individual's death is caused by a business or an association. Scottish Government Ministers have previously commissioned analysis and expert groups, the UK Government has changed the law, introducing the Corporate Manslaughter and Corporate Homicide Act 2007, and this is the third 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 and the ORRR or work related road traffic accidents. Statistics show that a worker in Scotland is more likely to be killed at work than a worker in England is².

¹ <https://www.legislation.gov.uk/ukpga/2007/19/contents>

² www.hse.gov.uk/statistics/tables/ridfatal.xlsx

While currently a company can be pursued through health and safety legislation and fined, it is very difficult to convict them of culpable homicide, even when the Lord Advocate recognises the crime and wants to bring forward criminal charges. This iniquity needs to be addressed. The actions taken in recent years have done nothing to provide justice for families and little to reduce the numbers of lives lost at work in Scotland. My proposed legislation would introduce appropriate legal remedies for loss of life where the recklessness or gross negligence of employers, businesses or corporations is proved. Critically, it would also provide a greater focus on health and safety in organisations and in the workplace, supporting a reduction in fatalities, and changing the culture in Scotland for the better.

I recognise the campaign activities of families and organisations on this loophole in the law for many years, and anticipate there will be debate and discussion over proposing a legislative remedy through the Scottish Parliament. I hope that this proposal convinces the Scottish Parliament that we can take action to address Scotland's poor record on fatalities at work and ensure that those who are responsible are held accountable for these deaths through the criminal justice system when that is necessary and justified.

A handwritten signature in black ink that reads "Claire". The signature is written in a cursive, flowing style.

Claire Baker MSP
8th November 2018

HOW THE CONSULTATION PROCESS WORKS

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

At the end of the consultation period, all the responses will be analysed. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at Claire Baker MSP, M1:03, Scottish Parliament, EH99 1SP, 01592 786 726 or culpablehomicidebill@gmail.com

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website (www.parliament.scot) under Parliamentary Business / Bills / Proposals for Members' Bills.

AIM OF THE PROPOSED BILL

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.

This Consultation Paper proposes to amend the law of culpable homicide by making it clear in statute:

- that a person may be guilty of culpable homicide if that person causes the death of another recklessly or by gross negligence;
- what 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.

It is understood that the purpose behind criminal sentencing has three goals, which some say compete and conflict with each other. They are punishment, deterrence and rehabilitation. Culpable Homicide is an extremely serious crime. A conviction for culpable homicide carries a significant stigma intended to reflect the moral opprobrium that society attaches to taking a life.

An important aspect of the proposed Bill is therefore to ensure that the same moral opprobrium attaches to individuals, groups and organisations who cause death in sufficiently similar circumstances. Society does not see homicide caused by a group, organisation or association any differently to homicide caused by an individual and the Bill is intended to reflect that position. Punishment therefore serves an important aspect of what the Bill seeks to achieve.

Deterrence is, however, a far greater goal of the legislation. With clear statutorily defined limits as to what constitutes culpable homicide, I believe that the Bill will regulate the behaviour of individuals and organisations alike in such a way that the rate of homicides in Scotland will reduce. The Bill will focus companies on the importance of health and safety in the workplace, make clear their responsibility in ensuring a safe working environment, and make clear the significant consequences when preventable failures occur, leading to tragedy for families that can't always be satisfied by a system where the only legal remedy is fines, however significant they may be.

In the context of business and similar organisations, it is essential to remember that it is individuals, either acting alone or as a group, whose behaviour must be regulated for this purpose. In that context, therefore, the Bill will be framed in a way as to serve as a real deterrent to the individual or individuals who make the decisions which result in deaths. In short, those individuals must face the consequence of

criminal sanctions themselves, as individuals, if the law is to act as a real deterrent and to regulate their behaviour.

The draft Bill will introduce an individual offence tied to the offences that an organisation may commit. The proposed test for the organisation's guilt turns upon looking at the conduct of its office holders. Where they, individually or collectively, act in a reckless manner that leads to someone's death, the company is guilty of culpable homicide. It is only right that, as well as the company being guilty, the individuals whose action led to the company's guilt can be convicted and sentenced appropriately.

I believe that my proposed Bill can achieve these aims by amending the law of culpable homicide by creating two statutory kinds of 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. The Bill would define causing death recklessly and causing death by gross negligence as defined in the draft Scottish Criminal Code³. I also propose defining duty of care in the Bill to make it clear employers' responsibility to employees in this context. I also propose enabling the courts to 'aggregate' the actions of different officeholders at different times. This provision is not in the Code but I am convinced it is important that it be included to clarify liability of an organisation when an incident is the result of actions over a number of years.

³ https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf

BACKGROUND

Transco case

On 22 December 1999, a massive explosion occurred in Carlisle Road, Larkhall. A house situated at 42 Carlisle Road was completely destroyed and all four occupants, Andrew and Janette Findlay and their children Stacey, 13, and Daryl, 11, suffered fatal injuries in the explosion. The gas network service provider, Transco, was legally responsible for the explosion and was ultimately convicted of criminal charges under the Health and Safety at Work etc Act 1974⁴ for their failures. However, no individuals were convicted of criminal charges and many people at the time, and to this day, take the view that only a conviction for culpable homicide would convey the appropriate level of moral opprobrium.

The Lord Advocate brought charges against the company for culpable homicide⁵. There was nevertheless considerable doubt as to whether or not such a charge was competent. There were concerns that the law in Scotland did not permit an incorporated body, separate from its managers and directors, to be convicted of culpable homicide at all. The law in Scotland in relation to the criminal culpability of companies was very vague and in many ways is still in its infancy.

This was the first occasion that a company had been charged with culpable homicide in Scotland. It was only 18 years since the first time a company had been charged with any common law crime⁶, that is a crime created and developed through institutional writers and court decisions rather than through statute. The original view⁷ was that companies could not form the necessary guilty mind (*mens rea*) to commit any common law crime. That position changed in that it was considered that companies could form the necessary guilty mind for some crimes such as conspiracy and fraud but not others such as perjury or shameless indecency⁸. Very little had been said until the court ruling in the Transco case, 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 22 December 1999 and whether the law could deliver a conviction for culpable homicide against a company.

The High Court of Criminal Appeal (Scotland's highest and final appeal court) held that, under the law of Scotland, a company, such as Transco, could competently be charged with culpable homicide. But it was only possible to convict it of such a common law crime if the prosecution could identify an individual (or group of individuals) who were "the controlling mind" of the company, whose acts and state of mind could be said to be that of the company itself and who were guilty of that crime. As the charge did not identify any such individual or group of individuals, it was irrelevant and therefore dismissed. It was not judged to be sufficient simply to

⁴ <https://www.legislation.gov.uk/ukpga/1974/37/contents>

⁵ HMA v Transco (hereinafter called "the Transco Case" to include the appeal decision viz Transco PLC v HMA 2004 SCCR 1).

⁶ Dean v John Menzies (Holdings) Ltd. 1981 J.C. 23

⁷ Of the Sheriff who heard Dean v John Menzies at first instance, some academics and arguably some members of the High Court Judiciary.

⁸ See "The Criminal Law of Scotland" 2nd ed, G H Gordon

identify posts or committees within Transco who may have dealt with the matter over a period of time.

Controlling Mind and Delegated Authority

By definition, the controlling mind of a company can only be formed by its most senior officers: the Board of Directors. This has two consequences.

Firstly, establishing a link between actions that cause death and recklessness on the part of one or more members of a Board of Directors will practically be impossible in relation to all but the smallest of companies. It will all too often be the (reckless) decisions of individuals one or more tiers below the Board (but still very senior people) that have tragic consequences.

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

Significant cases

Since the Transco judgement there have been further cases which have given rise to concerns over the adequacy of Scots Law to hold properly accountable those responsible for fatalities through breaches of health and safety procedures.

On the evening of 19 December 2007, the Flying Phantom tug sank in the River Clyde near Yoker while towing the bulk carrier Red Jasmine in poor visibility as a result of heavy fog. Three of the Phantom's four crew members perished. After charges were pressed against the port managers Clydeport Operations Limited and tug-owner Svitzer Marine Ltd for breaches of the Health & Safety at Work Act 1974, it was established the Flying Phantom had experienced a similar incident while towing the cargo vessel Abu Eglia in 2000. The High Court in Edinburgh fined Svitzer Marine Ltd £1.7 million and Clydeport Operations Limited £650,000.⁹

On 1 April 2009, helicopter G-REDL, a Eurocopter (now Airbus Helicopters) AS332L2 Super Puma MKII type operated by Bond Offshore Helicopters, crashed in the North Sea, 20 kilometers north-east of Peterhead, on return from the Miller oilfield. Sixteen people were killed - two pilots and fourteen offshore workers. The Air Accident Investigation Branch (AAIB) of the Department of Transport (DfT) published report into the incident found the accident occurred as a result of a catastrophic failure of the helicopter's main gearbox, attributed to fatigue cracks its components.¹⁰ At the Fatal Accident Inquiry into the deaths of the pilots and offshore workers, the helicopter operator Bond admitted a failure to follow the correct task in their safety

⁹ <http://www.scotland-judiciary.org.uk/8/1173/HMA-v-SVITZER-MARINE>

¹⁰ http://www.aaib.gov.uk/publications/formal_reports/2_2011_g_redl.cfm

manuals upon the discovery of foreign particles in the gearbox in the week prior to the accident.¹¹

The ICL Plastics Limited Disaster (Stockline) in 2004 only resulted in a fine for the company, despite the High Court in Glasgow being told a catalogue of failures over a 35-year period led to the disaster - killing nine and injuring 33 - because the case was tried under health and safety legislation. Lord Brodie described this as an "inadequate response" to such a tragedy.¹²

These three major incidents lead to the significant loss of life. Families were devastated due to the failure of companies to ensure a safe place of work for their loved ones. Although not all loss of life is on the same scale as these cases in terms of the number of lives lost, families lose their loved ones, particularly in construction, agriculture and industrial settings, every year in avoidable circumstances.

Changes in the law

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 in November 2005.¹³ While the then Justice Minister, Cathy Jamieson, welcomed the report, Scottish Ministers did not introduce a Bill on the issue. The Corporate Manslaughter and Corporate Homicide Act 2007 was introduced by the UK Government and came into force in 2008. It is now ten years since the law was introduced and there have been no successful prosecutions in Scotland, despite Scotland still having a high rate of workplace fatalities every year.

The New Concept of the Controlling Mind – the 2007 Act

The problem with the concept of the Controlling Mind of a Company is described above. The 2007 Act replaced this concept with one that is just as problematic for exactly the same reasons. Controlling mind was replaced with "senior management". The Act states "An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach." This is a test that continues to ignore the reality of the way companies delegate tasks and decision making.

Perhaps the most telling evidence of the failed drafting of the 2007 Act is the fact that there has not been a single conviction under the Act.

Inequity in the law for small and all other companies

For the reasons set out above about the concepts of controlling mind and senior management, the current legal situation creates inequity within the law. Very small companies, with very simply management structures, such as family businesses and organisations where the owner and only director is also the manager are certainly capable of being prosecuted and convicted of culpable homicide. In fact successfully convicting such small companies would now appear to be quite simple. However,

¹¹ <http://www.scotland-judiciary.org.uk/10/1244/Fatal-Accident-Inquiry---Super-Puma-Helicopter-Crash>

¹² <https://brodies.com/sites/default/files/pages/corporate%20manslaughter.pdf>

¹³ <http://www.nm.stir.ac.uk/documents/expert-group-report.pdf>

big businesses with complex management structures and a larger number of workplaces are currently beyond the reach of the law of culpable homicide. The law is uneven 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.¹⁴

We have a situation where in anything other than the smallest companies with the simplest of management structures; it is be impossible to prove the responsible person or persons in court of a larger business or organisation. Such companies are therefore presently beyond the reach of the law for culpable homicide. This is a weakness in the current law, which has potential to recur. 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.

Ineffectiveness of current legislation

This consultation cannot predict the outcome in the courts of any case, which could be prosecuted under this proposed legislation. However, it is clear that 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. Some have argued that, despite such incidents being crimes of homicide, they can be adequately and relevantly prosecuted through health and safety legislation. However, the Corporate Manslaughter and Corporate Homicide Act 2007, which was designed to provide a remedy, has not addressed this gap in the law. A Freedom Of Information Request published in February of this year reported that there had been fewer than five prosecutions pursued by COPFS under this legislation since it was enacted, despite the fact that, on average 17 people are killed in work related incidents in Scotland each year.¹⁵

Recklessness or Gross Negligence under the Current Law

As the detailed summary of the law contained in the supplement to this Consultation shows, the Scottish Courts have, over the years, applied different tests when considering if an individual has committed culpable homicide. There have been times when gross negligence has been favoured and times when recklessness was the only test. The two terms overlap but are not identical. Negligence, for example, requires some form of foreseeability of the consequences; but recklessness does not.

There is an argument that both tests have their place. To make the law clear and apply equally to individuals and organisations alike I believe that a clear statutory test for each is needed.

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

¹⁵ <http://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/48-responses2018/1692-cases-reported-to-copfs-for-manslaughter-and-corporate-homicide-act-2007-sections-70-and-143-of-the-cp-s-a-1995-february-2018-r017752>

ADDRESSING PROBLEMS IN CURRENT LAW

I believe there are 8 main problems that must be addressed within 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 in 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 larger companies, bodies corporate or partnerships, or those with complex managerial structures, can evade liability for causing a person's death;
- The *Transco* case also established that the common law does not permit aggregation, that is allowing the court to “aggregate” the conduct or state of mind of a number of the body's controlling minds, none of whom would individually be guilty, so as to constitute in sum the requisite elements of the crime of culpable homicide. This means that the longer some management failure has continued until it causes death, the less likely it is that the organisation will be prosecuted;
- The *Transco* case also established that the common law does not permit a corporate body to be vicariously liable for a common law crime for the acts or omissions of its officers or employees acting within the scope of their employment, even although it permits this in the case of the civil law and statutory offences; and
- At common law, the Crown is immune from prosecution and this means that Ministers, civil servants and government departments cannot be prosecuted

under the common law even if their culpable action causes death. This is unfair and discriminates in favour of the Crown.

DETAILS OF THE PROPOSED BILL

In order to deal with these problems I propose to amend the law of culpable homicide by making it clear in statute:

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

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

(a) Culpable homicide by causing death recklessly

In the case where culpable homicide consists of causing death recklessly, it is proposed

- To define that what is meant by causing death recklessly along the lines proposed in the draft Scottish Criminal Code 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;
- 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.

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 ways or knew or believed different things. In these circumstances, a court might find it difficult to extract the necessary elements for the offence.

(b) Culpable homicide by causing death by gross negligence

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

- To define what is meant by causing death by gross negligence - that a natural person would be guilty of that offence if he acts in a way which amounts to a gross breach of a duty of care to another and that breach causes that person's death;
- To make an organisation directly guilty of that offence if the way in which its activities are managed or organised by its office-holders (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. It would therefore include any duties under the law of delict (breach of duty of care);
- To define the test of what amounts to a gross breach of a duty of care as being whether the breach falls far below what could reasonably have been expected.

These proposals deal with all the common law problems mentioned above. In particular, the definition of what is meant by causing death by gross negligence makes it clear that it can be established objectively without proof of any mental element. This makes it easier to attribute liability to an organisation. In addition, it has certain advantages in the way in which it holds an organisation liable for the offence in that:

- It avoids the difficulties created by the identification principle by making an organisation liable for the offence where it causes a person's death in certain circumstances. There is no need to find a particular individual who can be identified with the organisation or to make the organisation vicariously liable for the acts of its office-holders;

- It focuses upon where the real problem may lie, namely the way in which the activities of an organisation are managed or organised rather than on questions of individual culpability;
- It permits account to be taken of the practice of office-holders over a period of time while avoiding the problems about aggregation mentioned above.

(c) *The Crown*

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 or in principle why the Crown, by reason of the conduct of its Ministers and civil servants, or through an organisation which is a servant or agent of the Crown, should not be liable in the same way as any other individual or legal person.

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

- To clarify the law so that it applies consistently, fairly and evenly to all persons natural and legal;
- 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
- 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.

POTENTIAL IMPACT OF THE BILL

Employees

The Bill seeks to ensure safer working environments for all employees by emphasising the importance of adhering to health and safety legislation to companies. Everyone should be able to work in an environment where they can be confident that their safety is paramount. While it would introduce significant consequence for employers in the event of an avoidable tragedy, it would ultimately seek to change the behaviour of companies who look to cut corners and minimise their responsibilities, resulting in fewer fatalities.

The Bill would also respond to campaigns from families affected by fatalities in the workplace. The campaign group FACK (Families against Corporate Killing) describe the experience of relatives as feeling been robbed twice: Once of their loved ones in incidents that should have been prevented by employers simply obeying the law on workplace health and safety; and secondly of their right to justice.

Employers

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

Trade Unions

Trade unions have campaigned for a change in the law. The Bill would address their concerns that health and safety is too often neglected in the work place and that employees are too often vulnerable.

The Crown

There are two areas that would impact the Crown. 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.

Financial implications

I do 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.

EQUALITIES

An initial assessment has been undertaken to consider the impact of this proposed Bill on those groups whose characteristics are protected under the Equality Act 2010. It is not anticipated the proposed Bill would impact on any of those groups with protected characteristics.

As the consultation argues earlier, small companies are being unfairly discriminated against in being subjected to more severe penalties than larger companies contrary to Article 14 of the ECHR, and the Bill would seek to address that.

SUSTAINABLE DEVELOPMENT

An initial assessment has also been undertaken to consider the impact of this 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 have a positive impact on society and how we value employees. It would improve governance arrangements in companies by making clear the responsibility of senior managers and it would contribute positively to our economy by minimising accidents at work. It is not anticipated that the Bill would have a significant impact in other areas.

QUESTIONS

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 about the consultation paper as a whole, or contents within. You do not have to answer all the questions, with only the questions you have answered considered in the final analysis:

About You

Q1: Are you responding as:

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

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

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

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

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

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

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

Q3. Please choose one of the following:

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

If you have requested anonymity or asked for your response not to be published, please give a reason. **(Note: your reason will not be published.)**

Q4. Please provide your name or the name of your organisation. **(Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.)**

Name:

Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. **(Note: We will not publish these contact details.)**

Contact details:

Q5. Data protection declaration

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

Aim and approach

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

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

Please explain the reasons for your response.

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

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

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

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

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

Culpable homicide by causing death recklessly

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

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

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

Culpable homicide by gross negligence

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

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

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

Sanctions

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

Financial implications

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

(a) Government and the public sector

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

(b) Businesses

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

(c) Individuals

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

Please explain the reasons for your response.

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

Equalities

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

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

Please explain the reasons for your response.

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

Sustainability

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

- Yes
- No
- Unsure

Please explain the reasons for your response.

General

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

HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Format of responses

If possible, please submit your response electronically – preferably in a MS Word document. Please keep formatting of this document to a minimum.

Please make clear whether you are responding as an individual (in a personal capacity) or on behalf of a group or organisation. If you are responding as an individual, you may wish to explain briefly what relevant expertise or experience you have. If you are responding on behalf of an organisation, you may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

Please include with your response contact details (e-mail if possible, or telephone or postal address) so we can contact you if there is any query about your response.

Where to send responses

Responses prepared electronically should be sent by e-mail to:

culpablehomicidebill@gmail.com

Responses prepared in hard copy should be sent by post to:

Claire Baker MSP
M1:03
Scottish Parliament
Edinburgh EH99 1SP

You may also contact Claire Baker's office by telephone on 01592 786 726.

Deadline for responses

All responses should be received no later than Wednesday 24th April 2019 (originally Friday 15th February 2019). Please let me know in advance of this deadline if you anticipate difficulties meeting it.

How responses are handled

Any information you send in response to this consultation (including personal data) will be seen by the MSP progressing the Bill, their office and by staff at Thompsons Solicitors, who are helping with the progression of this consultation and bill.

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses

received (other than confidential responses) on my website www.clairebaker.org. Published, responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published.

Where responses include content considered to be offensive, defamatory or irrelevant, my office may contact you to agree changes to the content, or may edit the content itself and publish a redacted version.

I expect to prepare a summary of responses that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member's Bill). The summary may cite, or quote from, your response (unless it is confidential) and may name you as a respondent to the consultation (unless your response is anonymous).

If I lodge a final proposal, I will be obliged to provide copies of responses (other than confidential responses) to the Scottish Parliament's Information Centre (SPICe). SPICe may make responses available to MSPs or staff on request.

Requests for anonymity or confidentiality

If you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly. You still need to supply your name, but if the response is treated as anonymous, only an anonymised version will be published or provided to SPICe. If you request anonymity, it is your responsibility to ensure that the content of your response does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly. If the response is treated as confidential (in whole or in part), it (or the relevant part) will not be published or provided to SPICe. I may reflect the general content of a confidential response in the summary, but only if you are content that the way I propose to do so is consistent with the confidentiality involved.

Other exceptions to publication

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory content. If I think your response contains such content, it may be returned to you with an invitation to provide a justification for the content or to edit or remove it. Alternatively, I may publish it with the content edited or removed, or I may disregard the response and destroy it.

Data Protection

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request and I agree anonymity or confidentiality. I will not publish your signature or personal contact information.

The legal basis for collecting, storing and using the personal data that you provide with your consultation response can be found in Article 6(1)(e) of the GDPR. This Article permits the processing (using) of the personal data where it is necessary for the performance of a task carried out in the public interest.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response.

Further information about data protection can be found at: www.ico.gov.uk and you can read my full data protection privacy notice at www.clairebaker.org.

ANNEX: THE CONTEXT OF THE PROPOSAL WITHIN SCOTS LAW

The Essential Elements of any Common Law Crime

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

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

Murder

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

The definition of culpable homicide – case law

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

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

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

“It is culpable homicide where slaughter falls in the doing of even a lawful act; if it is done without that caution or circumspection which would have served to prevent harm to others.”¹⁶

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.”¹⁷

The classic case on culpable homicide, *William Paton and Richard McNab*¹⁸, also endorses this view. Lord Justice Clerk Hope said that:

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

However, in the Court of Criminal Appeal in that case there was a shift away from this definition. Lord Justice-Clerk Aitchison observed at p.22:

“The difficulty that the case presents is whether there was evidence that the appellant was guilty of criminal negligence in the sense in which we use that expression. At one time the rule of law was that any blame was sufficient, where death resulted, to justify a verdict of guilty of culpable homicide. Unfortunately, this law has to some extent been modified by decisions of the Court, and it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at least analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved.”

The court did not define this further. Lord Aitchison went so far as to suggest such modification as “unfortunate” and that the old law should perhaps be reconsidered. The only authority quoted to the court was *Cranston*¹⁹ which referred to the conduct as being “gross and palpable carelessness”.

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

¹⁶ Hume's Commentaries (Bell's Ed.) Vol.1 pps.192-3 and 233-4

¹⁷ Alison Principles I,116 . In this context Alison envisages culpable homicide simply through a lack of care under the law of delict or negligence.

¹⁸ *Paton v HMA* 1936 JC 19

¹⁹ *HMA v Cranston* 1931 JC 28

“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.”²⁰

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

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

Lord Osbourne pointed out that this quotation was approved by the court in *W. v HMA*²¹, and it was also observed that: “... it is of the essence that [in the case of this kind of culpable homicide] there should be criminal recklessness in the sense of a total indifference to and disregard for the safety of the public.”

Lord Hamilton in the *Transco* case confined himself to pointing out:

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

The court in 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

²⁰ *Transco PLC v HMA* 2004 SCCR 1 para 4

²¹ *W v. Her Majesty's Advocate* 1982 S.L.T. 420

essential elements of the crime of involuntary culpable homicide in the law of Scotland. There is therefore an urgent need, if natural and legal persons are to be subject to a crime of involuntary culpable homicide, that definition of the conduct required for such a crime is made as clear as possible.

Attributing criminal liability to companies for common law offences

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

In view of the fact that the company is a legal person and not a natural person there were 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*²² a company was charged with shameless indecency for selling pornographic magazines. The Sheriff who heard the case at first instance found the charge against the company incompetent and expressly stated the view that companies could not be found guilty of common law offences.

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

The Transco decision

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

While they had not considered the case of corporate manslaughter (the English equivalent of corporate culpable homicide) the English courts had over several decades considered the issue of corporate culpability in a number of cases.²³ 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

²² *Dean v. John Menzies (Holdings) Ltd.* 1981 J.C. 23

²³ The leading cases were *Tesco Supermarkets Ltd v. Nattrass* 1972 A.C.153; *R v. Her Majesty's Coroner for East Kent Ex Parte Spooner & Others* 1989 88CR.APP.R.10

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 had the necessary intention when it was that of the directing or controlling mind. It was therefore possible to ascribe to the company the acts and state of mind of that individual or those individuals. This was called “the identification principle”.

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

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

Delegated authority and the reality of modern business

The law has never been able to cope with culpable homicide in the context of organisations because it seems to ignore or fail to understand the reality of modern business structures. If it is at all true that it is possible to identify a “controlling mind” of a company, that controlling mind, being the board of directors as the law would have it in relation to any company larger than the smallest of enterprises, does not turn its mind to anything other than the most high level strategic matters and certainly does not consider the running of the business on a day to day basis or therefore the operational issues that give rise to the decisions that lead to deaths occurring.

The entire point of a modern corporate structure is that the board of directors delegates decisions down to different levels within the structure. Some decisions are delegated to national managers, others to regional managers, some to plant managers and some important decisions affecting safety even to department heads. But when each person within that structure makes a decision, they are doing so on behalf of and as the company because the board of directors have entrusted them with that role on their behalf. Thus, if acting with his delegated authority, a national manager decides not to sign off new safety equipment and someone dies because the old equipment was no longer safe, why should the company not be guilty of culpable homicide? If a plant manager delays signing off on a faulty safety gate being fixed until the next financial year and this results in a fatal injury, why should the company not be guilty? If a department head allows a new start employee to

undertake duties for which he has not received training and is not safety competent and someone is killed, why should the company not be guilty?

In terms of organisations, the primary purpose of this Bill is to move away from the anachronistic notion of a controlling mind and to have a system of culpable homicide that reflects the modern way that organisations operate through delegated authority by looking at the conduct of office holders.

Other organisations

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

“Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his 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 therefor to the same extent as the partner so acting or omitting to act.”

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

This section has been considered in the context of statutory offences and a partnership has been held liable because of the precise terms as in the case of *Gair v. Brewster*²⁴. However it is clear from this case that the partner would not have been liable for the conduct of a servant or agent by common law because the guilty mind of *mens rea* would not have been present.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

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 and unfair if servants or agents of the Crown (whether Ministers, civil servants or departments) were treated differently in terms of the law of culpable homicide simply because they were part of the Crown, by comparison with other employers.

Moral opprobrium

²⁴ *Gair –v- Brewster* 1916 SC(A)

²⁵ Reference is also made to J B Miller :Partnership 1973 page 315

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 etc. Act 1974. 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 of public reproach as culpable homicide. Culpable homicide is one of the most serious crimes in Scotland. It is just and proper that in appropriate circumstances where death flows from the reckless conduct of a company that the company can be convicted of such a serious crime with the appropriate level of moral obloquy.

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