



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 6 October 2020

Session 5



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JUSTICE COMMITTEE
24th Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)

*John Finnie (Highlands and Islands) (Green)

*James Kelly (Glasgow) (Lab)

*Liam Kerr (North East Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Liam McArthur (Orkney Islands) (LD)

Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Claire Baker (Mid Scotland and Fife) (Lab)

Patrick McGuire (Thompsons Solicitors)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 6 October 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Adam Tomkins): Good morning, and welcome to the 24th meeting in 2020 of the Justice Committee. We have received apologies from Shona Robison MSP. The first item on our agenda is a decision on taking in private items 3, 5 and 6 on our agenda. Are members agreed? Members are agreed—thank you.

Culpable Homicide (Scotland) Bill: Stage 1

10:00

The Convener: Our next item is to consider the Culpable Homicide (Scotland) Bill at stage 1. I refer members to papers 1 and 2 in our committee pack and I welcome our panel of witnesses, who are attending online: Claire Baker MSP, the member in charge of the bill, and Patrick McGuire, a solicitor from Thompsons Solicitors. I welcome you both—thank you for joining us this morning. I invite Claire Baker to make some short opening remarks and then we will proceed straight to questions.

Claire Baker (Mid Scotland and Fife) (Lab): Good morning, convener. I thank the committee for inviting me along to give evidence on the Culpable Homicide (Scotland) Bill.

This is not the first time that the Scottish Parliament or the Scottish Government has been asked to consider the law that applies when an individual's death is caused by a business or an association. Scottish Government ministers have previously commissioned analysis and expert groups. The United Kingdom Government introduced the Corporate Manslaughter and Corporate Homicide Act 2007, under which there have been no convictions in Scotland. This is the third proposal for a member's bill that seeks to address an injustice that has not gone away.

While we have failed to tackle the issue, the most recent annual average shows that 19 people per year are killed in Scotland while at work—the highest rate in the UK. Those deaths are investigated by the Health and Safety Executive. The most recent figure is that there were 29 such deaths in 2018-19. That does not include deaths investigated by the Rail Accident Investigation Branch, the Air Accidents Investigation Branch or the Office of Rail and Road, or work-related road traffic incidents.

I believe that we must take action to address this poor record of fatalities and provide a route to justice for families by using the powers of the Scottish Parliament to ensure that culpable homicide is applied equally to individuals, small businesses, large businesses and corporations.

I have spoken to families who have suffered the pain of losing a loved one at work. When they said goodbye in the morning, they did not expect that to be the last time that they saw their mother, their father or their son. They have shared with me their frustration at the justice system, which they believe does not fully recognise the responsibility and accountability of the employer.

Although health and safety legislation can be used to issue fines and, in rare circumstances, a custodial sentence, it is not possible to use the current law to effectively pursue a proper homicide case through the criminal courts. The bill would make that possible.

I would also argue that the bill is a positive lever that will improve health and safety practices within the workplace. It will ensure that the consequences for companies, big or small, that fail to implement and maintain good health and safety standards, putting their employees at risk, will be significant and will reflect the seriousness of fatalities at work. That will act as a strong incentive for employers to be confident that they are operating a safe and responsible business.

The bill has the support of the Scottish Trades Union Congress and trade unions that have direct experience of their members experiencing injuries and fatalities in the workplace. I thank Scottish Hazards and Patrick McGuire from Thompsons for their valuable support and expertise, along with families against corporate killers, which, from a place of great loss, has long campaigned on the issue.

There is a strong desire to close the recognised loophole in our current arrangements. Families who have lost a loved one at work feel that they do not have access to justice, and I believe that the time has come for the Scottish Parliament to take action.

The Convener: Thank you, Claire. That was very clear and helpful. Rona Mackay will open the questions for the committee.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Claire, can you expand a wee bit on the general background to your bill and on what prompted you to introduce it? As you say, this is not the first time that such a bill has been introduced. Can you expand a wee bit on why you feel so passionate about the issue?

Claire Baker: As Rona Mackay mentioned, this is not the first time. Karen Gillon was the first to introduce a bill—she represented Larkhall, where there was the tragedy of the Larkhall explosion, which Transco was responsible for. It was recognised at that time that there was a loophole in the law. The Lord Advocate believed that there should have been opportunities—a culpable homicide case was brought forward. Transco should have been held responsible in that way. However, the law did not enable that to happen and the case collapsed. That was the initial response.

I am involved because I have met families against corporate killers and the activists campaigning for change. As I said, there have been no convictions in Scotland under the 2007

act, which was passed by the UK Parliament. There was a peak in the number of deaths in Scotland in the most recent year for which we have figures, but we are still looking at 19 deaths a year on average, and that figure has not changed since the 2007 act came in; if anything, it has got worse. We estimate that, over that time, there have been 250 cases but only nine convictions. It is difficult to take forward prosecutions in this area, and there have been no prosecutions under the 2007 act. The current law is ineffective.

There is also an issue of equality. It is possible for an individual in Scotland to be charged with culpable homicide, and it would be possible for a small business in Scotland to be charged with culpable homicide. The cases that the Government has cited include examples such as the skipper of a shipping fleet. It is easy to identify such a person, but when it comes to a large business, there is a loophole and there is no way for a case to be pursued through the courts. The bill seeks to address that.

The Convener: In your answer to Rona Mackay, you said that there have been no prosecutions in Scotland under the 2007 act, but in your opening remarks you said that there had been no convictions under the 2007 act. I accept that there have been no convictions in Scotland, but is it also true that there have been no prosecutions under the 2007 act in Scotland?

Claire Baker: My understanding is that there have been no prosecutions under the 2007 act in Scotland. There have been a handful in England, but those have involved small construction firms, where the manager has been prosecuted under the act.

The Convener: Thank you. I wanted to clarify that.

James Kelly (Glasgow) (Lab): I declare an interest, as I signed in support of Claire Baker's bill.

Claire, what specifically are you trying to address with the bill? What gap in the legislation do you think exists that means that this proposed legislation is required?

Claire Baker: There are a few areas. On the issue of inequality, the way in which the law acts in Scotland means that a person or a small business can be charged with culpable homicide, but a large business cannot be. If we go back to the Transco case, at the time, the Lord Advocate wanted to take forward a case of culpable homicide, but that case collapsed. Although prosecutions can be brought and fines and an occasional custodial sentence can be issued under health and safety legislation, families do not feel that those measures are sufficient for what they have gone through and that the measures do

not recognise the recklessness and gross negligence involved in the way in which the company has operated that has led to a death.

I am also concerned that there are also other cases in Scotland, including the Stockline plastics factory disaster and—[*Interruption.*] Apologies, as it is a complicated bill, I have a number of papers.

There is the Larkhall case, which involved Transco, as I have mentioned; the Flying Phantom case; the Super Puma case; and the Stockline case. Those are the big, landmark instances that we have had in Scotland. There is strong opinion that those cases should have been prosecuted in a more robust manner that reflected the seriousness of the companies' failings.

I have concerns that, if similar incidents were to happen in Scotland in the future, the law would still be inadequate. Although the level of the fine might be significant, that does not reflect the loss of life that has been experienced by families.

In the Transco case, the situation was described as a loophole. Lord Brodie was the judge in the Stockline case, which was tried under the Health and Safety at Work etc Act 1974. Lord Brodie said that

"that response is by its nature an inadequate response".

There is a recognition in Scotland that the current law is not sufficient to reflect the loss of life that is experienced by families and the companies' lack of care.

If it is acceptable, convener, I will invite Patrick McGuire to come in, because he is indicating that he would like to contribute.

Patrick McGuire (Thompsons Solicitors): I will briefly add to Claire Baker's comments. In a nutshell, what she has said comes down to the point that the name of the offence for which a person or company is convicted really matters. It is that simple. It matters to the families who kissed their loved ones goodbye and never saw them again. That is what we have heard from every family to whom we have spoken. Thompsons has been representing families who have lost loved ones to industrial neglect and recklessness for far too many years.

Most important in many ways, the name of the offence matters to the authorities. As Claire Baker said, when the Lord Advocate responded to the Transco disaster, he recognised that the name of the offence matters. That is why he did everything in his power to bring a culpable homicide prosecution, but that ultimately failed because the law was not robust enough. Lord Brodie made similar comments, too.

The families, the Lord Advocate and the judges recognise that the name of the offence matters.

Providing the appropriate model is what we have to achieve. A conviction simply under health and safety regulations does not carry that recognition—the families do not recognise it as such—so the law needs to respond to their needs and take into account the comments from the law officers and their judges.

Liam Kerr (North East Scotland) (Con): Good morning. In answer to James Kelly's question, Claire Baker said that the gap is that a large business cannot be prosecuted. However, companies can be prosecuted currently, can they not? Are you, in fact, saying that the penalty or, as Patrick McGuire said, the name of the offence is the inadequate response? Is that your position?

Claire Baker: Yes, I think that it would be fair to say that. Although companies can be prosecuted, that has to be done under health and safety legislation. It has been impossible to convict an individual, because there is a difficulty in identifying the controlling mind within a large business and holding the organisation or corporation accountable. Given the way in which modern companies are structured and the layers of management, it is difficult to identify the responsible person. That was one of the reasons why there were difficulties in prosecuting the Transco case.

If it is okay, convener, I will invite Patrick McGuire to address the issue.

Liam Kerr: May I press you on that point first? As I understand it, the function of the bill relates to the controlling mind in a company. Is it not the case that one of the reasons why there is a difficulty in identifying the controlling mind is that there might not be a controlling mind in a large plc? If the bill were passed, one of its impacts would be that, in effect, criminal liability and criminal penalties could be fixed on shareholders, directors and managers. I see that from one of the bill's sections. The bill is not going to solve the difficulty of identifying a controlling mind, is it? If it is going to solve that, because there is no need for mens rea, is that not quite troubling?

10:15

Claire Baker: I will bring Patrick in, but I disagree with the premise of the question. In a large corporation or a large business, there is a controlling mind; there is responsibility and a duty of care for the people who work for that business.

I am not asking anybody to do anything that they should not already be doing. Health and safety legislation is there for a reason, and it is an employer's responsibility to provide a safe and secure workplace. It would be for the Crown Office and Procurator Fiscal Service to decide whether to take cases forward.

However, if a business fails in that area, there should be consequences and it should be clear that the senior people with responsibility in the company are the people who are ultimately responsible. People are working under their instruction and the company's direction. It is not good enough for a company to say that it ultimately does not take responsibility for an incident because it was caused by a more junior person in the organisation, if the senior people are the ones who are setting up the structure and are responsible for the way in which the company works.

Patrick McGuire: I will address the issue of mens rea. It is not the case that the bill as drafted will create a situation in which there is no mens rea. There will always be mens rea, as I will explain. It is probably helpful to take a step back and look at the way that the law has grappled with applying mens rea to companies over the years, particularly when the conduct of a company or its agents causes the death of an individual, and particularly in cases of culpable homicide.

Under the common law—the Transco prosecution attempted to deal with this—the only way that guilty mind culpable homicide could be applied to a company was through the fiction, and it was very much a fiction, in the law that the controlling mind of that company formed the decision-making process that led directly to death. That was how a company could be seen to have formed mens rea—the guilty mind.

The issue was that it was all but impossible in all but the smallest of companies to draw a direct line or connection between the wrongful act—actus reus, or guilty act—and the decision or, more important, the controlling mind of that company, which the law said was at the highest echelons of the company, or the directors.

That is the case, and it is why the UK Government attempted to grapple with the issue in 2007 and introduced the 2007 act. However, it replaced one fiction with another. It removed the common-law concept of the controlling mind, and introduced a very similar statutory thought map, in which it required—to use the generic, non-specific term, because it is a statutory provision—the guilty mind to be formed by senior management. That became the test. In reality, that presented pretty much the same problem. When dealing with medium-sized companies, large companies and multinational companies, drawing a line between the decisions of senior management and a wrongful act will often be very difficult. That has proved to be the case, and I suggest that that is why we have seen no prosecutions and no convictions under the 2007 act.

The bill says that there is another way of applying the idea of a guilty mind to a company—

one that reflects the reality of the way that companies of all sizes operate in the modern world. Companies are non-natural persons; they can act only through natural persons, whether that is at board, senior management or supervisor level, and they delegate down the authority to act as the company. The bill defines the individual as a “responsible person”. We say that, if a responsible person—such as a supervisor or manager, to whose level authority has been delegated down within the company—acts recklessly or causes a death through a gross breach of duty of care, that individual forms the guilty mind, because they are acting as part of the delegated authority. The company is also responsible, because the company asked the individual to act and passed that delegated authority to them. Therefore, the company is as guilty as the individual; there is a guilty mind that can be tied to a guilty act, and the company, in those circumstances, should be capable of being convicted of culpable homicide. On one level, that is also a fiction, but it ties in far more readily with the reality of modern business.

The Convener: That was a full and lengthy answer; thank you.

John Finnie (Highlands and Islands) (Green): Good morning. Like James Kelly, I am a signatory to the bill, and I commend Claire Baker, Patrick McGuire, Scottish Hazards and the trade union movement for trying to reduce the unacceptable level of workplace deaths.

This question has already been touched on, but I will revisit it. The Crown Office and Procurator Fiscal Service will initiate prosecutions. Can Claire Baker point to any specific examples in which prosecutions under the current law have not taken place or have been abandoned because of deficiencies in the present set-up? Can she advise the committee how the bill might address those deficiencies?

Claire Baker: It has been difficult to identify cases that the Crown Office might be considering taking forward under the 2007 act or health and safety legislation. Families came to me in the consultation process, and I had an event in Parliament, which a number of MSPs attended. Individuals have gone through horrendous experiences, albeit that they are not the big headline cases, and they feel that the process is too slow, that people are not held accountable, and that the law does not work.

In the consultation, someone said:

“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.”

[*Inaudible.*]—died at work recently. From the outline of the case, it was quite clear that there were serious health and safety failings at that company. She has concerns that—[*Inaudible.*]

The Convener: I do not think that I am the only one who is losing the connection with Claire Baker. John Finnie wanted to ask a supplementary question. After he has asked it, we can see whether Patrick McGuire can pick up where Claire Baker left off and deal with any further issues.

John Finnie: One function that the Crown can look at is fatal accident inquiries for work-related deaths. I appreciate that I am talking about two totally separate functions, but I am trying to establish where the deficiency in the existing law is that means that no prosecutions have taken place, when one might reasonably expect them to have taken place. I do not know whether you can help with that, Mr McGuire.

Patrick McGuire: On the more general point, I think that Claire Baker has already given the statistic. We understand that there have been 250 fatalities at work since the 2007 act was introduced, and there has been not one prosecution or conviction. That presents one form of evidence.

I can present another—I can provide it in writing after the meeting, if that would assist. The cabinet secretary received a letter from Scottish Hazards that asked the Scottish Government to support Claire Baker’s bill, to which a member of the cabinet secretary’s senior team responded on his behalf. That letter suggested that, at that stage—before the bill was introduced—the Scottish Government thought that the law was quite robust, despite the inadequacies that we have highlighted. More important, that letter highlighted three prosecutions against individuals under health and safety legislation. Those were the prosecutions of Donald Craig, Guthrie Melville and Robert Harvey. The Scottish Government’s position was that, because those three defendants received custodial sentences under the health and safety legislation, it must mean that the law is working.

I think that those cases prove the complete opposite if we go back to the importance of the name of the offence and the appropriate moral opprobrium attaching to that offence. I have looked at those three cases in as much detail as I can and, in my view, although custodial sentences were eventually handed down, all three would have resulted in convictions under the bill. As I have said, I am happy to provide a written submission to that effect.

The Convener: I am sorry that we lost Claire Baker. John Finnie asked a supplementary

question that was directed to Patrick McGuire. Do Claire Baker and Mr Finnie want to wrap up the line of questioning? Does Claire Baker have anything that she wants to add?

Claire Baker: I seem to have been disconnected—apologies for that. I caught most of Patrick McGuire’s reply, in which he referred to the Scottish Government letter that we received. I was disappointed that the Government felt that the 2007 legislation was robust. The figures in Scotland, which show a continuing rate of fatalities at work, suggest that the existing legislation is ineffective and that we need to take a different approach in Scotland.

Liam Kerr: Section 14 of the bill says that it is “without prejudice to the offence of culpable homicide at common law.”

This is completely outwith my professional training, but I think that there are defences available to culpable homicide in the common law, which I do not see replicated here. What examination, if any, have you done of the interplay between the bill and what currently exists in the common law?

Claire Baker: As you say, the bill states that it does not replace in any way the common law that exists for culpable homicide. The bill is focused on trying to address the issue of inequality between individuals, small businesses and large businesses. It deals with criminal law. You have raised an important issue. If the bill proceeds, there might be the opportunity to give greater scrutiny to such issues.

10:30

The Convener: I want to ask you about the issue of legislative competence. You have referred several times in your evidence this morning—including three times in your opening remarks, I think—to your bill as legislation in the field of health and safety. As you know, under schedule 5 to the Scotland Act 1998, the whole of the subject matter of part 1 of the Health and Safety at Work etc Act 1974 is reserved to the United Kingdom Parliament. As you also know, we have a certificate from the Presiding Officer to the effect that your bill is outwith legislative competence for that reason. Can you explain why you are seeking to pursue a bill about health and safety when the subject matter of health and safety is reserved to the Westminster Parliament and the Presiding Officer has certified that the bill is outwith our legislative competence?

Claire Baker: I do not think that I have referred to the bill as being a health and safety piece of legislation. I think that I have compared the effectiveness of the bill to that of the existing health and safety legislation, which I feel is

inadequate. I have said that the legislation could improve health and safety in the workplace, but I would counter that it is not a health and safety piece of legislation. It is a piece of legislation—

The Convener: I am sorry to cut across you, but can you explain what that means? I do not understand that, as a lawmaker or as a lawyer. How can a piece of law that is about health and safety not be about health and safety?

Claire Baker: It is about equalising the culpable homicide law, which is part of Scots criminal law and which applies equally to individuals, small businesses and large businesses. I would argue that one of the consequences of equalising that law would be improving health and safety. It looks to address fatalities at work, but it comes within Scots criminal law. It is about introducing a culpable homicide act. It is—

The Convener: What would you say—

Claire Baker: [*Inaudible.*] I recognise the Presiding Officer's judgment, and I accept that there is an area for debate. However, from previous examples, such as the Alcohol (Minimum Pricing) (Scotland) Act 2012 and the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, there have been times when the Parliament has taken the decision to push what we believe our responsibilities to be. That has not always been done on a consensual basis, but we have taken the decision to push those responsibilities.

There are different ways to look at the area. I do not accept that it is cut and dried that the bill is not within our competence. We should be ambitious and brave enough, and we should move forward with the legislation. I think that it is competent under Scots law. If it would be helpful, I could bring in Patrick McGuire to talk about the area in the Scotland Act 1998 that we think means that the bill is within competence.

The Convener: I will bring in Patrick McGuire in a minute, but I want to pursue that with you a bit further. Annabelle Ewing also wants to ask a question about that. We will bring in Patrick McGuire once we have heard from Annabelle Ewing.

I hear what you say about ambition. However, I am afraid that the terms of the Scotland Act 1998 do not refer to ambition, but to purpose and effect. You have made it crystal clear that the purpose of the bill is to equalise an element of Scots criminal law with regard to health and safety, and you have equally made it crystal clear that the effect of the bill will be to transform one area of Scots law with regard to health and safety. Therefore, both the purpose and the effect of the legislation are intimately tied up with health and safety, which is a reserved matter, as the Presiding Officer

explained in the certificate. I completely understand the ambition, but ambition is an irrelevant consideration. The relevant considerations are purpose and effect, and both purpose and effect speak to health and safety, which is reserved.

Claire Baker: I understand your position, but it is not one that I fully accept. The sole purpose of the bill is to amend Scots law in respect of criminal law, and the pith and substance of the bill, as the consultation says, relate only to Scots criminal law. That makes the case that it is within the legislative competence of the Parliament.

The Convener: Annabelle Ewing is next. We can bring in Patrick McGuire afterwards, if that is what Claire Baker wants.

Annabelle Ewing (Cowdenbeath) (SNP): I would be hugely frustrated by the constraints of schedule 5 to the Scotland Act 1998 if it applied in its entirety. Claire Baker cited other instances. In one example that has been cited, the Lord Advocate took a view that was very different from that of the Presiding Officer. I am not sure whether that is the position in this case.

I am hugely ambitious for us all. Workarounds are important, and I would be interested to hear from Patrick McGuire what attention has been given to finding a way around the conundrum. In that regard, there must be an element of caution in making any assessment, because the interplay of devolved and reserved elements has consequences under schedule 5. Is there a real intention to proceed here, given the risk following the PO's ruling that there could be a legal challenge? Such a challenge would not help the families—indeed, it would not help anybody. Are Claire Baker and her team confident that there is a reasonable workaround that could be the way forward?

Claire Baker: We are confident that section 29(4) of the Scotland Act 1998 gives us the flexibility to take steps in the area. For those who argue that the bill falls under the issue of reserved matters, we think that the purpose of the provision is to make the law apply consistently to reserved and devolved matters and that the law of culpable homicide applies to individuals and non-natural persons alike. We think that section 29(4) of the Scotland Act 1998 gives enough flexibility for us to proceed.

As I said earlier, a version of the bill has been introduced three times. When it was first introduced, by Karen Gillon, it was signed by Nicola Sturgeon and John Swinney. Six members of the Government party have signed the bill, and it has support from other political parties. There is a desire in the Parliament to see action on the issue and to take it as far as we can. Many

members of the Scottish Parliament believe that we have the ability to legislate on the matter. I propose that the bill is competent for consideration by the Scottish Parliament, and I would be grateful if the committee would consider taking the bill forward at stage 1 and giving us the opportunity to explore the arguments.

Patrick McGuire would like to comment on the Scotland Act 1998, but I know that time is tight, convener.

The Convener: I would like to hear from Patrick McGuire on the matter, unless Annabelle Ewing has any further questions.

Annabelle Ewing: I do not.

The Convener: There seems to be a problem with Patrick McGuire's sound. Let us move on with the questions from Fulton MacGregor and hope that we can reconnect Patrick after that.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I thank Claire Baker for her tenacity. It is unacceptable that we are still in this position. Every year in my constituency we remember the men who went to work at Auchengeich mine in Moodiesburn—as colleagues will know, this year is the 61st anniversary of the disaster. It is terrible that, 61 years later, we are still talking about the issue.

Just because I am not a signatory to the bill, please do not think that I do not have a lot of sympathy for, or that I am not generally supportive of, the bill. I have been interested in the issue of whether it is competent for us to do what the bill seeks to do, which has just been covered in the discussion. It is extremely interesting to listen to the arguments back and forth on that.

You have talked about having support from other parties. I know that six colleagues from my party are signatories to the bill. Will you expand on what discussions you have had with colleagues across the five political parties? Have you had any discussions with Government ministers or cabinet secretaries?

Claire Baker: As this is a member's bill, I believe that it is important for me to speak to people from all political parties and to provide opportunities for engagement. I held an event in Parliament so that families who had experienced the loss of a loved one at work could come along to and speak to members of the Scottish Parliament.

As I said, I have the support of six members of the governing party, members of my party and strong support from the Green Party. Liam McArthur, who is here today, is also a signatory to the bill. I had a discussion with Liam Kerr, who I appreciate has a good deal of knowledge of this area, prior to the bill being introduced. I spoke to

all the justice spokespeople of the political parties in Parliament. Although Liam Kerr did not become a signatory to the bill, I think that we had a productive conversation, which made me optimistic that the bill introduces a discussion that is important for us to have and that, with changes, it can, I hope, be passed.

Scottish Hazards contacted the Government on my behalf. The Government's letter has been referred to already. I am slightly disappointed by the Government's defence of the 2007 act and its description of it as "robust". I do not think that the figures in Scotland reflect that. The number of deaths has not decreased; indeed, they have increased in recent years. Therefore, I do not accept the argument that the 2007 act is an effective deterrent. However, the Government concluded by saying that it would give careful consideration to the bill when it was introduced and that it would examine whether the current legislation could be improved.

Although the Government has not given a commitment to support the bill, it has the support of members of the governing party, and the Government said that it would consider it once it had been introduced.

Fulton MacGregor: Thank you for that very full answer.

Following the Presiding Officer's ruling on the competence of your bill, what further advice did you take that has brought you to where you are today? You said that, given that the bill has reached stage 1, you would conclude that it is within competence. Did you take any advice on that? What led you to continue with the bill after the Presiding Officer's ruling?

Claire Baker: As I have explained, a version of the bill has been introduced three times. I am not denying the fact that the issue of competence has been in and around what has been proposed. My proposed bill had the support of members of different political parties. In introducing the bill, I decided to get the support of Thompsons Solicitors, because we anticipated the Presiding Officer's judgment—it was not unexpected that the Presiding Officer took that view, but there are alternative views.

I understand that Patrick McGuire has rejoined us; we could maybe ask him to speak about the section of the Scotland Act 1998 that I mentioned earlier. Those alternative views are shared by people across the trade union movement, by the families who support the bill and by members in the Parliament who think that we should take the opportunity to make the proposed changes in the law, and that we have the powers to defend our making that decision.

Fulton MacGregor: That concludes my questioning. I again thank Claire Baker for all her work in this area.

The Convener: I am not sure whether we have Patrick Maguire back with us. We can see you, but we are not sure whether you can see and hear us, Patrick. If you can, could you come back to the issues of competence that we were dealing with before we lost your connection? I apologise for the fact that we lost you. Could somebody from broadcasting please unmute Patrick's microphone? We cannot hear him.

10:45

Patrick McGuire: I pressed the button, convener. I am sure that that is not normal procedure. I am happy to proceed if that is okay.

The Convener: Excellent—we can hear you, Patrick. Please continue.

We were talking about the legislative competence issue, and Claire Baker wanted you to explain to the committee why the legislation could be brought within the competence of the Parliament.

Patrick McGuire: Thank you, and I apologise for my signal drop.

I heard everything that you had to say about the purpose and effect of the bill, convener. However, it is important to take a step back. A lot of the debate around the bill, and previous iterations of it, has centred on the consequential impact that it will have on the health and safety environment in Scotland. There is a problem that trade unions, campaigners, and families wish to resolve in that regard. It is often that aspect that is discussed and focused on with bills such as Claire Baker's, and it is easy to be dragged down that line of questioning and to focus only on that part of the bill.

However, based on a pure ex facie reading, and considering its general purpose and carefully constructed policy document and explanatory notes, the bill does much more than that. It recognises that the law of culpable homicide is in need of reform generally in relation to how it applies to individuals and organisations. The bill recognises that there is an inconsistent approach in the way in which the law deals with wrongful acts that cause death as between individuals and organisations, and as between organisations of different sizes.

Most important, the bill seeks to introduce two tests that apply equally to individuals and organisations alike and that level the legislative test for culpable homicide. I am labouring the point about there being two tests because the bill also recognises that, over the years, Scots law has had

two different approaches to the mental element of culpable homicide.

Many decades ago—in fact, it was longer ago than that—the test was principally one of negligence and gross negligence. The law then developed into the area of recklessness, and there was a period during which recklessness and gross negligence applied equally as tests for culpable homicide. The bill returns us to that point, for both individuals and organisations. It says that both tests are equally applicable and that both should form the basis of a conviction for culpable homicide.

That is important, because although there is a significant overlap between recklessness and gross negligence, there are gaps in between, which we recognise need to be addressed for both organisations and individuals. Our position is that the bill deals principally with Scots criminal law and seeks to make the law apply equally across organisations and individuals alike.

We recognise that there is an argument that the bill impacts on areas that are reserved to Westminster under the Scotland Act 1998, but we argue that section 29(4) of the 1998 act provides the route by which the bill can be viewed as being within the competence of the Scottish Parliament. It states:

“A provision which—

(a) would otherwise not relate to reserved matters”—

for example, one that impacts on health and safety—but which

“(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters”,

which the bill certainly does,

“is to be treated as relating to reserved matters unless the purpose ... is to make the law in question apply consistently to reserved matters and otherwise.”

That is exactly what the bill seeks to do.

I cannot remember whether it was Ms Ewing or Ms Mackay who asked what further advice and views we took in the light of the Presiding Officer's statement on legislative competence. The answer is that, disappointingly, despite the policy memorandum clearly stating that we rely on section 29(4) of the Scotland Act 1998, that section is completely untested, there has been no parliamentary discussion about it and the Presiding Officer has not dealt with that at all in his statement on competence. Therefore, it remains a live issue. There has been no de facto determination from the Presiding Officer, because he has not dealt with the issue.

The Convener: I hear what you say about section 29(4), but it is not completely untested. A few years ago, there was a House of Lords or

Supreme Court case in which there was a three-two split on the issue and Lord Hope and Lord Rodger were on different sides.

Before we wrap up, Liam Kerr has a final question for Claire Baker.

Liam Kerr: Is not the Scottish Law Commission specifically looking at reform of this area of law? If so, at what stage is that work? Why are we not waiting for it?

Claire Baker: The Scottish Law Commission has had the issue of culpable homicide in its sights for a while. The issue has been on the agenda, but it has been pushed back and back and has only recently been added to the commission's work programme, which runs from 2018 to 2023. The commission is considering culpable homicide, but we will not have its report until 2023 at the earliest, and I am not sure whether the impact of the Covid pandemic has delayed the work in any way.

At that stage, we will have only the commission's report, and the Government will then have to reflect on it and decide whether to legislate, so we are looking at an extremely long timescale to address a problem that has already been identified. We are offering a route to solve it. We can deal with the matter as a discrete issue and, if the bill is passed, it can be included in the Scottish Law Commission's review.

We have waited long enough. The timescales for the commission's report are too long, and could be extended, and it would then take time for the Government to legislate. Since the 2007 act was passed, there have been 250 fatalities at work. Last year, 29 people died at work. If we have to wait another 10 years for the Scottish Law Commission to prepare its report and the Scottish Government to decide whether to legislate, how many more lives will be lost? We can do something now by taking steps to prevent fatalities at work in Scotland.

The Convener: I thank Claire Baker and Patrick McGuire for their time and their full and helpful evidence, for which the committee is grateful. The committee will take all the evidence away and discuss its approach to the bill and to another member's bill—the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill—on which we took evidence last week. We will be in touch with Claire Baker in due course, once we have decided how to progress matters.

That concludes the public part of our meeting. Our next meeting will be on Tuesday 27 October, after the parliamentary recess, when we will begin our stage 1 scrutiny of the Hate Crime and Public Order (Scotland) Bill by hearing from the Cabinet Secretary for Justice, Humza Yousaf, the bill team that supports the bill, and Lord Bracadale and his officials. At that meeting, we will also consider our

approach to the Domestic Abuse (Protection) (Scotland) Bill and deal with some secondary legislation.

10:55

Meeting continued in private until 12:40.

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