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## **Justice Committee Comataidh a' Cheartais**

# **Stage 1 Report on the Culpable Homicide (Scotland) Bill**



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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



[justicecommittee@parliament.scot](mailto:justicecommittee@parliament.scot)



0131 348 5047

# Committee Membership



**Deputy Convener**  
**Rona Mackay**  
Scottish National Party



**Convener**  
**Adam Tomkins**  
Scottish Conservative  
and Unionist Party



**John Finnie**  
Scottish Green Party



**James Kelly**  
Scottish Labour



**Annabelle Ewing**  
Scottish National Party



**Liam Kerr**  
Scottish Conservative  
and Unionist Party



**Fulton MacGregor**  
Scottish National Party



**Liam McArthur**  
Scottish Liberal  
Democrats



**Shona Robison**  
Scottish National Party

# Introduction

1. The Culpable Homicide (Scotland) Bill (“the Bill”) is a Member's Bill and was introduced in the Parliament by Ms Claire Baker MSP (“the Member in Charge”) on 1 June 2020. The Parliament designated the Justice Committee as the lead committee for Stage 1 consideration of the Bill.
2. Under the Parliament’s Standing Orders Rule 9.6.3(a), it is for the lead committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other committee. The lead committee is also required to report on the Financial Memorandum and Policy Memorandum, which accompany the Bill.
3. The Presiding Officer has decided under Rule 9.12 of Standing Orders that a financial resolution is required for this Bill.

# About the Bill

4. The Bill changes the law of culpable homicide in Scotland by creating two new offences. These are where the death of a person is caused recklessly or by gross negligence. Culpable homicide is the term used in Scots law for an offence of causing the death of another person without planning or intending to. It is different to murder where there is criminal intention, and from causing death by an accident where no-one can be blamed. These new offences in the Bill are in addition to the current law on culpable homicide.
5. The Bill includes:
  - details of what is meant by the two new offences;
  - how an individual and an organisation or business may be guilty of each offence;
  - the penalties that a court can impose when someone is found guilty of the offences; and
  - how the new offences apply to the Crown (such as Ministers and employed officials in the Scottish and UK Governments).
6. The aim of the Bill is to change the law on culpable homicide. It aims to make sure a person, business or organisation who causes a death can be found guilty of a suitable offence.
7. The current law does not seem to be able to apply in the same way to organisations and businesses of different sizes. There have been very few cases of large businesses being prosecuted for culpable homicide where deaths have been caused by their actions. This is because it is hard to identify who in a large business controls the actions that lead to the death.
8. The Bill aims to make it clear how people in a large organisation or business can be held responsible for a death.
9. Further information is available on the [Bill web page](#) and on the relevant [member's bill proposal page](#) (including a consultation summary).

# Consideration by the Justice Committee and other committees

10. The Bill and the views of the Member in Charge were considered at the Justice Committee's meeting of [6 October 2020](#). Evidence was taken from Claire Baker MSP and Patrick Maguire (of Thompsons Solicitors) who has supported the Member in Charge during the development of her proposal and Member's bill.
11. At its meeting on 3 November, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the the Bill at Stage 1.
12. The Member in Charge has provided the Parliament with a [memorandum on the delegated powers provisions](#) (DPM) in the Bill. The Bill contains a number of provisions granting powers to the Scottish Ministers.
13. Section 7(2) of the Bill grants powers to add, remove or modify a description of a non-natural person. The Member in Charge believes that is of vital importance that the law of Culpable Homicide is able to evolve and develop as businesses and organisations evolve. In her view, the description of a “non-natural person” must therefore be flexible. The Member believes that the best way to achieve this balance is by conferring the power to adapt and modify the description of a “non-natural person” to Scottish Ministers by regulations subject to the affirmative procedure.
14. Section 10(6) grants powers to increase the maximum fine for failing to comply with a remedial order. The Member in Charge believes that it is important that the penalties set out in subsections (4)(b) and (5)(b) continue to represent a real deterrent to individual or non-natural persons who may consider not obeying an order. In her view, the fines must be future-proofed against their worth being eroded by inflation. In her opinion, the easiest way to achieve this objective is by granting the power to the Scottish Ministers to increase the sums. The Bill does not confer upon the Scottish Ministers the power to decrease the sums. These provisions are also subject to the affirmative procedure.
15. **The Delegated Powers and Law Reform Committee had no recommendations it wished to make on the Bill.**



# Key issues

## Problem which the Bill seeks to address

16. During the Committee's consideration, Members sought to better understand the particular problem which the Bill seeks to address and the **evidence** collated by the Member in Charge underpinning her case the Bill to proceed.

17. In her evidence, Claire Baker MSP stated that the most recent annual average shows that 19 people per year are killed in Scotland while at work. In her view, existing provisions in law are inadequate. She believes that the Parliament 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. <sup>1</sup>

18. The Member in Charge argues that, since 2007, there have been 250 cases in the UK but only nine convictions under the UK Government's Corporate Manslaughter and Corporate Homicide Act of the same year. She indicated there had been no convictions in Scotland under this Act. <sup>2</sup>

19. In her view—

” 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. <sup>3</sup>

adding that—

” ... 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. <sup>3</sup>

20. In support of the Member in Charge, Patrick Maguire stated that "the name of the offence for which a person or company is convicted really matters". In his view, this was important legally and that "it matters to the families who kissed their loved ones goodbye and never saw them again". <sup>4</sup> He added—

” 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.

21. One of the key challenges that this Bill seeks to address is the prosecution of companies that may have complex structures and unclear lines of responsibility. As the Member in Charge explained—
- ” 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.<sup>5</sup>
22. She did not agree, however, that, 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.<sup>5</sup> In support, Patrick Maguire added—
- ” 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.<sup>6</sup>
23. In its response to the Member in Charge's [consultation](#) on her proposal for a bill, the Law Society for Scotland commented on the lack of prosecutions under the 2007 Act, stating that "it might be helpful to ascertain how the 2007 Act is working (by means perhaps of any post-legislative scrutiny)." Overall, the Society said that it was "neutral" on the proposals put forward by the Member in Charge in her consultation.<sup>7</sup>
24. According to the Member in Charge's [summary document](#) of her consultation, the "overwhelming majority of the responses received were in favour of the proposals to amend the law on culpable homicide as set out in the consultation document, across individual and organisational responses". In her view, the main reasons given for support were because the Bill provides clarity and addresses shortcomings in the existing legislation including perceived inconsistency in application to businesses of different size and in the application of law to individual and organisational wrongdoers.<sup>i</sup>

## Legislative competence

25. The Scotland Act 1998 ("the 1998 Act") established the Scottish Parliament and gave it the power to legislate on certain matters. Section 28(1) of the 1998 Act provides that "subject to section 29, the Parliament may make laws, to be known as

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<sup>i</sup> [https://www.parliament.scot/S5MembersBills/20191112\\_Consultation\\_Summary.pdf](https://www.parliament.scot/S5MembersBills/20191112_Consultation_Summary.pdf)

Acts of the Scottish Parliament”. The limit on that power to legislate, set out in section 29, is the limit of the Parliament’s “legislative competence”.

26. When any bill is introduced, it requires separate statements on the legislative competence of any bill to be made by the Presiding Officer and by the Member in Charge of the bill upon introduction in the Parliament.
27. A bill can be challenged even after it has been passed by the Parliament and before it has received Royal Assent. Section 32 of the Scotland Act 1998 provides that a bill, once passed, may be submitted for Royal Assent by the Presiding Officer after the expiry of a four-week period. During that period, the bill is subject to legal challenge by the Advocate General for Scotland, the Lord Advocate or the Attorney General under section 32A or 33, and may also be subject to an order made by the Secretary of State under section 35.
28. In the view of the Presiding Officer, the provisions of the Culpable Homicide (Scotland) Bill would not be within the legislative competence of the Scottish Parliament.
29. The reasons for this view were that:
  - (1) the Bill as a whole relates to the subject-matter of Part I of the Health and Safety at Work etc. Act 1974 which is a matter reserved under paragraph H2 of Schedule 5 to the Scotland Act 1998; and
  - (2) the Bill as a whole relates to the operation or regulation of business associations which are matters reserved under paragraph C1 of Schedule 5 to the Scotland Act 1998.

Section 29(2)(b) of the 1998 Act states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters. Whether a provision relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.
30. The Member in Charge does not agree stating, in her view, the provisions of the Culpable Homicide (Scotland) Bill would be within the legislative competence of the Scottish Parliament.
31. In her evidence to the Committee, Claire Baker argued that whilst the legislation could improve health and safety in the workplace, it is not a health and safety piece of legislation.<sup>8</sup> She added the Bill was—
 

” ... 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.
32. Whilst accepting that legislative competence of this Bill was "an area for debate" she argued that "there have been times when the Parliament has taken the decision to push what we believe our responsibilities to be", citing the Alcohol (Minimum Pricing) (Scotland) Act 2012 and the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.<sup>8</sup>

33. The Member did not agree that both the purpose and the effect of the legislation are intimately tied up with health and safety, stating that "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."<sup>9</sup>
34. Ms Baker MSP further argues that section 29(4) of the Scotland Act 1998 gives the flexibility for the Scottish Parliament to take steps in the area because, in her view, the purpose of the Bill's provisions 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.
35. Trades unions such as UNISON Scotland, ASLEF and Unite Scotland all expressed support for the Bill. Commenting on the dispute about competence, UNISON Scotland argued that overcoming this was an "issue [that] comes down to political will".<sup>10</sup>
36. Finally, the Member in Charge was asked about the reported plans of the Scottish Law Commission to consider this area of law and make recommendations. Ms Baker said that the Scottish Law Commission has had the issue of culpable homicide in its sights "for a while" and that "timescales for the Commission's report are too long, and could be extended, and it would then take time for the Government to legislate."<sup>11</sup> She argued that it may therefore take another 10 years to legislate and that action should be taken now.

# Views on the Financial and Policy Memorandums

37. The **Financial** and **Policy** Memoranda which accompany the Bill set out indicative costs and savings the Member in Charge estimates will be delivered by the policy set out in the Bill.
38. According to the Member in Charge, "it is not anticipated that any significant costs will occur as a result of the Bill." and that "it is not anticipated that entirely new cases will result from the Bill, rather that some cases which would previously have been considered as breaches of health and safety regulations could instead be considered as culpable homicide offences." <sup>12</sup>
39. Claire Baker MSP provided estimates that the average court costs per procedure for the High Court of Justiciary in Scotland was £16,650 and the average prosecution costs per procedure was £67,658. The average court costs per procedure for Sheriff Court solemn are £2,190 with the average prosecution cost per procedure £4,363. The average court costs per procedure for Sheriff Court summary is estimated at £430. <sup>12</sup>
40. The Member noted that it would be for the Scottish Government to decide the terms of an awareness-raising campaign, but that she considers that a short-term targeted campaign is appropriate. The Member in Charge believed that this could be achieved for less than £100,000. <sup>12</sup>
41. She also noted that there may be additional costs for bodies such as the HSE, Police Scotland, local authorities, health boards and other public services relating to the implementation of the Bill. She believed these would not be "onerous". <sup>12</sup>
42. The Committee has no particular concerns it wishes to bring to the attention of the Parliament in relation to the Financial or Policy Memoranda produced for this Bill.

# Conclusions and recommendations

## Constraints on scrutiny

43. The Justice Committee's ability to scrutinise this Member's Bill in depth has been constrained by two factors.
44. Firstly, the impact of COVID-19 and the imposition of lockdown restrictions in March 2020 has meant a delay in all aspects of the work programme of the Justice Committee. The critical period of March to June 2020 was taken up with re-establishing the Committee and how it would be able to operate during the pandemic and also with vital scrutiny of the impact of the virus on our justice and policing systems. It was the Committee's view that this scrutiny took priority during that period, resulting in delays to the consideration of other work streams such as consideration of Scottish Government and Member's bills.
45. Secondly, the Scottish Government's programmes for government of September 2019 and September 2020 have resulted in a substantial legislative workload for the Justice Committee, consideration of which has been delayed by the pandemic.
46. The Committee is currently considering the following Scottish Government bills during the same time period as its consideration of this and one other Member's bill:
  - Defamation and Malicious Publication (Scotland) Bill;
  - Hate Crime and Public Order (Scotland) Bill; and
  - Domestic Abuse (Protection) (Scotland) Bill
47. The Scottish Government has made it clear to the Committee that it places a high priority on the consideration of these bills during the time available in the remainder of this parliamentary session.
48. Additionally, at least one of these bills - on hate crime - is already proving to be contentious and will require a significant amount of evidence to be taken and considered if the tight timetable for the bill's passage is to be adhered to.
49. Nevertheless, the Justice Committee believes that Member's bills are an important feature of the Scottish Parliament and appreciates the amount of effort that is required for any Member to bring forward a proposal and then a bill.
50. We are also aware that, for this particular Bill, there are a number of families for whom this Bill's provisions are very important given the tragic circumstances behind the death of a loved one whilst attending their workplace.
51. It is for these reasons that the Committee chose to take evidence from the Member in Charge of the Bill and to also consider the issues raised in the Member's consultation before agreeing this Stage 1 Report.
52. It is also the case that the Committee's ability to scrutinise this Bill in any further depth has been constrained for the reasons cited above and the Committee has now completed its Stage 1 scrutiny with this Report.

## Our views

53. The Committee notes the statistics provided by the Member in Charge of the Bill in relation to the lack of successful prosecutions in Scotland under the UK Government's Corporate Manslaughter and Corporate Homicide Act 2007. The Committee shares the Member's concern about the devastating impact that this will have had on the families who have lost a relative in these circumstances.
54. The Committee has some sympathy with the policy intentions underpinning this Bill. The Committee notes, however, that some issues with the Bill have been raised in the questioning of the Member in Charge and in her consultation.
55. The Committee also notes the disputed view between the Member in Charge of the Bill and the Presiding Officer on the legislative competence of the Bill and believes that this may lead to a challenge against the Bill under the provisions in the Scotland Act 1998.

56. **On the basis of the above, the Committee makes no recommendation to the Scottish Parliament on the general principles of the Bill and invites it to consider whether there is merit in the Bill proceeding to Stage 2 given the limited time available for further consideration of the Bill in the remainder of this session and given the Presiding Officer's views on the legislative competence of this Bill.**
57. **Of particular relevance to consideration of whether the Bill should proceed will be the views of the Scottish Government on the general principles of the Bill and the Committee recommends that the Cabinet Secretary for Justice makes clear whether the Scottish Government supports the general principles of this Bill in his formal written response to this Report which we request in advance of the Stage 1 debate.**

**Justice Committee**

Stage 1 Report on the Culpable Homicide (Scotland) Bill, 18th Report, 2020 (Session 5)

- [1] Justice Committee. (2020, October 6). Official Report, col 2.
- [2] Justice Committee. (2020, October 6). Official Report, col 4.
- [3] Justice Committee. (2020, October 6). Official Report, col 3.
- [4] Justice Committee. (2020, October 6). Official Report, col 5.
- [5] Justice Committee. (2020, October 6). Official Report, col 6.
- [6] Justice Committee. (2020, October 6). Official Report, col 8.
- [7] Law Society of Scotland. (2020). Submission to Claire Baker MSP.
- [8] Justice Committee. (2020, October 6). Official Report, col 11.
- [9] Justice Committee. (2020, October 6). Official Report, col 12.
- [10] UNISON Scotland. (2020). Written submission to Claire Baker MSP.
- [11] Justice Committee. (2020, October 6). Official Report, col 17.
- [12] Claire Baker MSP. (2020). Financial Memorandum.



