

CULPABLE HOMICIDE (SCOTLAND) BILL
CONSULTATION PAPER

**Hazards Campaign and Families Against Corporate Killers
Response**

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:

The Hazards Campaign has been working for better health and safety at work for over 30 years and Families Against Corporate Killer has been supporting individual families gain justice since 2006 as well as campaigning for a better law of Corporate Manslaughter and Corporate Homicide, and an end to all work related deaths.

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).

The Hazards Campaign, established in 1987, is a network of worker oriented health and safety centres, individual activists and groups working with workers, trade union safety reps, families and communities on all aspects of work-related safety and ill-health. It includes the Scottish Hazards Campaign, Greater Manchester and London Hazards Centres, the Asbestos Victims Support Groups, Construction Safety Campaign, Families Against Corporate Killers, trade union safety reps and specialists and the award-winning Hazards Magazine. The Hazards Campaign brought International Workers Memorial Day to the UK in the 1990s, and runs the annual Hazards Conference, attracting 350 – 400 safety reps. The 29th Hazards Conference, Hazards 2018, was held 27-29th July at Keele University with 350 union safety reps and activists participating.

FACK is a project of the Greater Manchester Hazards Centre which support families of those killed by work through the aftermath of a work death , the investigation, the inquest, trial and any compensation case, We provide support, advice, advocacy and information, and seek pro bono legal representation for the Inquest as legal aid is usually denied to work-death families. We provide an opportunity for families to speak out and make public the pain and impact on their lives caused by employers' negligence.

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.)

Reason [Click or tap here to enter text.](#)

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: **Hazards Campaign and Families Against Corporate Killers**

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.

Contact Details: [REDACTED]

(Note: We will not publish these 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.

The Hazards Campaign for many years supported and campaigned for a new law of Corporate Manslaughter which would allow large companies and corporations to be prosecuted for killing workers as the existing law allowed them to escape justice. We campaigned hard during the passage of the Corporate Manslaughter and Corporate Homicide Bill for positive duties on directors. This we argued would allow directors/senior management individually and larger organisation to be prosecuted more easily for the decisions they make that kill workers. This was refused but we were promised directors' duties in other legislation. This never happened. At this time FACK described this as a betrayal <http://www.hazardscampaign.org.uk/fack/news/whataboutworkers.htm> and so it has proved. In many ways the Corporate Manslaughter and Corporate Homicide Act 2007 has continued the problems with the older law of 'mens rea' or 'controlling mind' doctrine, which has led to more prosecutions and convictions against small companies with larger ones escaping justice just as before, and this is even more pronounced in implementation of the law in Scotland. The absence of any Corporate Manslaughter and Corporate Homicide Act prosecutions in Scotland is a travesty and shows the law is not working to hold negligent employers to account, provide justice, suitable punishment and any deterrent effect. Only 12 deaths have even been investigated over 10 years in Scotland, which has a higher work fatality rate than England and Wales and Northern Ireland, where there have been around 30 prosecutions albeit all of small and medium sized enterprises. .

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

We believe that the law in relation to culpable homicide is unclear in some very important respects and the clarification in these proposals will help to ensure that people responsible for involuntary manslaughter deaths will be held fully to account by ensuring consistency of prosecution regardless of whether the death occurred- in community or the workplace. . Individual wrongdoer and organisational wrongdoers have very different rules applied to them but we think wrongdoers in corporations/organisations must be treated equally with other categories. Currently the law also applies inconsistently to organisations of different sizes. It does not provide an equitable approach to accountability for corporate wrongdoing across employers or compared to individuals in non –workplace settings.

There is one law or application of culpable homicide for individuals; a different law of culpable homicide for small organisations; another law of culpable homicide for medium and large organisation; and a different law of culpable homicide when it comes to the ministers and crown bodies.

Justice will only be provided to families of those killed by negligence or recklessness of corporate employers, company directors and managers at work are treated the same as those killed by in non-work related settings.

We believe that this is unjust, unfair and does not provide accountability, justice or deterrence. As a matter of principle all laws, but especially the law of culpable homicide, should apply consistently to all. Practically, our colleagues at Scottish Hazards have seen how the confusion and inconsistency in the law as it currently stands can impact on the lives and wellbeing of Scottish Citizens and especially Scottish workers. This adds insult to the injury killing someone they love and makes the recovery of a family from a work related bereavement far harder to achieve.

Scottish Citizens are at far more risk of death as a consequence of the conduct of organisations, particularly larger organisations, than from non-work related individuals.. Indeed it seems irrefutable that the larger the organisation the less the public are protected from their conduct under the criminal law.

The main advantages of this Bill are that it will:

- Provide clarity as to the circumstances when all types of wrong doers(individual and all types and sizes of organisations including ministers, civil servants and crime bodies) will be guilty of culpable homicide
- Level the playing field and provide one clear and consistent set of rules that applies to all types of wrongdoer
- Ensure conviction is a real possibility for all organisations
- Serve as a real deterrence to individuals and organisations alike and accordingly make Scotland and Scottish people safer

Hazards Campaign and Families Against Corporate Killers agree with Scottish Hazards that improving the current law depends on tackling issues around the requirement to find a 'controlling mind', the aggregation of conduct of the controlling mind of a corporation

organisation and ability to hold organisations vicariously liable for the actions of their officers and employees. These proposals do tackle these issues and we hope that this will enable more prosecutions and prevent travesties of justice such as the collapse of the Transco case.

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

The Scottish Parliament has tried to bring forward similar legislation in the past and it has been suggested that there are potential difficulties in respect of legislative competence and of claims that regulation poses an 'increased burden on business'. Considerable opposition is likely from the business community which must be strongly resisted in interests of justice, equality and deterrence of criminal behaviour that kill workers.

These proposals are about the common law offence of Culpable Homicide and how to ensure it operates consistently across the criminal justice system in Scotland in a manner that ensures punishment for all those guilty of a criminal offence, and deters others for offending while also rehabilitating those convicted by the courts.

The Scottish Parliament and the Scottish Government have shown themselves willing and able in the past to take forward legalisation that pushes at the boundaries of legislative competence. They have done so in many important areas of the law. In our opinion there is no other area that is more important than the current proposal in respect of taking a brave and progressive stance on legislative competence. The proposals seek to make the law of Culpable Homicide apply consistently to reserved matters and therefore is within the legislative competence of the Scottish Parliament.

We believe that the Bill proposed is competent by reason of Section 29 (4) of the Scottish Act 1998. The purpose of the Bill is clearly to make an important area of Scots Criminal Law apply consistently to reserved matters and non-reserved matters.

We also refute in the strongest terms possible, the unevidenced and clearly false argument that such a change in the law would be much of an increased burden on organisations operating within the law and complying with their duty of care and all health and safety legislation. The reverse is the truth. The failure of the law to hold organisations/corporations accountable gives them virtual immunity to behave recklessly and negligently without fear of charges and puts the lives and health of workers at a massively increased risk. Indeed it is workers, and their families, who bear the burden of lax laws and lack of rigorous enforcement, prosecution and punishment of negligent/reckless employers.

We believe that the issue comes down to political will. And we insist that the arguments must be pursued vigorously by all politicians and organisations wanting to reform the Culpable Homicide law and the failings in Scottish criminal law that have resulted in immunity from prosecution by larger organisations/corporations and their officers.

We believe that the willingness of the Scottish Government and the Scottish Parliament to take a brave and progressive stance to the issue of legislative competence is a fundamental test of their political will and political objectives.

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?

We agree with this proposal. There will inevitably be an overlap between the two tests and maybe many instances where specific circumstances could meet both tests. We believe that there will nevertheless be examples on the outer edges of both tests where the circumstances will meet one but not the other. Having two tests should cover any potential grey areas and ensure no gaps in the law. This is vital given too many gaps in the law of culpable homicide for too long.

As a matter of principle we believe that individuals and organisations who cause death by both recklessness and gross negligence are, and should be, guilty of culpable homicide. We think that causing death recklessly will apply mostly to individuals and causing death by gross negligence will apply to organisations/corporations. So we believe that the proposals for the two offences are crucial to close the loopholes identified in Transco case, and to provide proper justice, fairness and deterrence.

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

The law must reflect the reality of the way that modern organisations operate.

We do not believe that any organisation should be exempt or excluded from the Act. And it should be act as wide as possible to prevent any immunity from prosecution for Culpable Homicide where behaviour of organisations or individuals falls well below the standard society expects thereby exposing workers to unacceptable risk of injury or death.

In fact to allowing for any exemptions just continues the current inequitable and unjust situation on accountability and justice.

In terms of the range of office holders the law of culpable homicide should follow the long standing principles of vicarious responsibility that are recognised in civil law and in other areas where organisations are held responsible for the wrongdoings of their officers and employees.

The current law requiring identification of a controlling mind but this does not reflect how organisations work now. Organisations operate by delegating decision-making down through different tiers of management and supervision. If an individual at any level of management or supervision in exercising authority delegated to them by the organisation causes death then the organisation who delegated that authority to the manager/supervisor

should be as equally responsible. If they were acting within their delegated authority they were acting for and as the organisation and as such the organisation is as culpable as the individual manager/supervisor.

The “term office” holder should therefore be defined as widely as possible. It should follow the well-recognised vicarious responsibility model and it should therefore encapsulate all circumstances where managers and supervisors are acting within their delegated authority.

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?

For the reasons set out above, we do not believe that there should be any gaps in the law of culpable homicide. We do not believe that any individuals or organisations should be exempted or excluded from the law of culpable homicide. We therefore believe that the law of culpable homicide should apply consistently to all individuals and organisations. Logically, therefore, we fully support the law applying to Ministers, civil servants and crown bodies in the same way as they apply to natural persons and organisations. We feel this is a vitally important point, and wish to underline it.

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.

We agree with the way the offence has been defined and agree that an individual and organisation that have caused death recklessly should be guilty of culpable homicide.

We think that Crown Immunity for prosecution should be removed to ensure justice is seen to be done to all, applied consistently across society, to all employers, large and small, the voluntary sector and public employers as well as Crown employers. And must apply to Scottish Ministers too: no-one should be given immunity from prosecution under this Bill.

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?

The reasons set out in our response to question 10, shows how and why we fully support the recommendation that organisations should be responsible for the actions of their employees for this offence.

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

The decisions that count are those taken in the Board Room by CEOs, and Directors. The [CBS investigation](#) into 15 deaths caused by the explosion at Texas City Refinery, as they traced the responsibility to the Board Room of BP. Arrangements and tasks to comply with health and safety can be delegated but the responsibility and accountability remains with the Board, those in charge, those at the top of an organisation.

Consequently, organisations must be held vicariously liable to ensure they understand and discharge their legal duties for health and safety, the consequences of failing to do so properly for which they can be held accountable.

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

We believe that the inclusion of aggregation is necessary and essential to ensure that the law reflects the reality of the way that organisations operate and to ensure that there are no gaps or loopholes in the law. Issues to do with refusal to accept aggregation have led to cases being dropped or not pursued across the UK.

Case such as Transco, ICL in Scotland, and many in other parts of the UK, where management failures extend over very long periods, and where the organisation is very large, it is impossible to identify one person responsible, or a controlling mind.

Allowing for aggregation addresses many of these problems and ensures equality between large and small companies, rather than unjustly holding smaller companies far more accountable in law than larger corporations.

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?

We support this proposal and refer to our earlier comments. We believe as a matter of principle that where an individual or organisation causes death through gross negligence they should be guilty of culpable homicide.

In England and Wales there have been a number of cases where individuals have been prosecuted for Gross Negligence Manslaughter, found guilty and sentenced in some cases to prison terms, as well as prosecutions being taken against their companies for Corporate Manslaughter.

It does not seem right or just to us that this does not occur in Scotland.

Gross negligence can be established objectively, avoiding the need to identify a controlling mind.. Gross negligence also allows the way the company managed it's activities over a period of time to be taken into account and removes the need to establish vicarious liability for office holders for their actions and may resolve some of the issues of aggregation.

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?

We agree with the proposal. Clarity and certainty is as essential in relation to death caused by natural persons as it is when death is caused by organisations

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

We agree with the proposal. These are jury questions that are capable of being understood by members of the public with appropriate judicial direction.

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?

We believe that the penalties available to the Judge on conviction must reflect the moral opprobrium that the offence requires. We believe that the victims must see justice served, and the seriousness of the offence and its potential penalties must serve as a real deterrence. The highest and most severe penalties must be available in appropriate cases. That includes custodial sentences. To ensure the consistent application of the law that we believe must be at the heart of this legislation we believe that custodial sentences should be available not only in circumstances where the offence is committed by an individual but also in appropriate circumstances where an organisation is convicted. There will accordingly be circumstances when senior directors, CEOs or senior managers of an organisation whose behaviour lead to negligence and deaths, may face a custodial sentence by reason of the organisation being convicted.

We also believe that penalties should include remedial orders and publicity orders though these sort of actions must happen right after the incidents not years later in court.

We also believe that families should have the automatic right to make victim impact statements in all convictions for culpable homicide. It is essential that the person(s) killed by the offences in brought into the court via family testimony about the impact of their death. This happens in other cases of deaths and manslaughter and would bring equality, and also

ensure the impact was taken into account in sentencing. Speaking out in court in this way can be immensely painful but also begin a healing process for families.

We are concerned that there is a considerable discrepancy between the penalties available for Scottish Court compared to those in England and Wales which follow the Sentencing Guidelines issued by the Sentencing Council England and Wales and the Scottish Sentencing Council has not produced equivalent guidelines. While some judges apparently do consider the England and Wales Guidelines when sentencing, the potential exists for a considerable and unjust discrepancy in sentencing between the two jurisdictions. This has been highlighted in some cases such as a decision by the Court of Appeal Scotland against a fine imposed on Scottish Power Generation after an employee was scalded in 2013.

To ensure consistency the Scottish Sentencing Council should develop guidelines similar to those of the England and Wales Sentencing Council. Resources must be made available to the prosecution and courts for forensic accountancy investigation of company finances to ensure they are subject to fines on the truth about their accounts. It is especially important that courts are not misled by notions of separate, smaller branch organisations, or local managements being solely responsible rather than the larger parent organisation which in reality calls the shots and makes the decisions.

However, we think that large fines imposed on public bodies which then come out of tax payers purse and out of public service provision and are counterproductive in penalising service users and vulnerable people rather than the wrongdoers concerned. In these cases individual offences should be considered, and also creative penalty alternatives including sanctions against Board members, community and remedial orders etc.

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.

We feel there would be little financial impact on business, public sector or individuals in organisation especially if there is an effective publicity campaign to ensure organisation are made aware of their legal responsibilities for health and safety to prevent risks to workers and others who may be affected by their work activities, and the new consequences of failing to comply are brought home to them.

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

There will be an inevitable claim by business organisations mostly representing the larger corporations and firms, that these proposals will impose a new and excessive financial burden upon them. This must be resisted strongly by the use of an evidence based response. To avoid being prosecuted under these new legal proposals requires organisation/corporations to fully comply with health and safety law, to prevent risks to the lives of workers and others, and to ensure arrangements, assessments, monitoring and management to ensure this happens and the organisation and any of its officers or employees is not behaving recklessly or grossly negligently. This is not a new requirement.

The main change is the increased chance of being held fully to account and it is beyond belief that any argument business advances that defends negligent employers and reckless behaviour would be entertained as a serious objection That is equivalent to burglars complaining that increased police patrols might catch them out and should be stopped! , The reality is that this legal change would have the effect of ensuring that business invests properly in discharging its legal duties to protect the health and safety of workers and others, through risk assessment, safe systems of work, safe equipment, safety procedures, training and monitoring and so on. In this way the burden which workers and their families bear of unsafe, illegal employers would be reduced.

The financial cost of workplace harm caused by poor health and safety in Great Britain according to the HSE is borne very unequally: 57% of the cost is borne by the individual worker harmed and by the families of those killed and injured, 24% by the State, and only 19% by the employers who exposed worker to those risks.

In addition to the loss of wages and financial support, there is the emotional cost of heartbreak of losing a family member – loss of companionship, friendship, a parent's support and love, a sibling's life long shared experience , or the loss of a much loved young adult child, all of which destroy lives for many years and often permanently as

FAK knows only too well - due to their employers negligence or recklessness is beyond calculation. Removing this burden should be more than sufficient motivation for the Scottish Government, employers, political parties and MSPs to support the proposal in Claire Baker's Culpable Homicide (Scotland) Bill

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

We would only reiterate here, that for the Hazards Campaign and especially Families Against Corporate Killers, this Bill rightly focuses on providing justice to those families whose loved ones are killed by their employers' negligence or recklessness, and to act as powerful deterrent to other employer and so prevent future deaths in work related incidents. And so we feel a question about 'cost effectiveness or increased savings', other than referring to our answer in Q19 about who really bears the burden and cost of employers current negligence, is irrelevant.

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.

We do not see positive or negative impacts arising for these proposals.

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

We don't anticipate any negative impacts arising from the Bill.

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.

The Hazards Campaign and FACK cannot anticipate any disproportionate impact of these proposals that would justify not acting to ensure that our law of culpable homicide delivers justice for families who lose loved ones as a result of negligent or reckless acts in the workplace and society that result in death. We can only see positive impacts for the sustainability of families.

General

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

We think that the lack of any prosecutions in Scotland for work-related deaths under the Corporate Manslaughter and Corporate Homicide Act 2007 is unacceptable in terms of lack of equity across all the countries of Great Britain which is unjust in itself.

We believe that the Scottish Government has the legal competence to introduce this Bill and we hope they will defend any claims to the contrary as there is the possibility in this Bill, to drive down work-related homicides, to prevent family heartbreak, and to improve Scotland's poor record as having the highest rate of work-related death in Great Britain.

Scotland led the way in improving public and workplace health in bringing forward The Smoking, Health and Social Care (Scotland) Act 2005 and this has had a major impact in improving public health in Scotland, and spurring other parts of GB to do better. We hope this same progressive, preventative approach will be used in implementing Claire Bakers Bill.

We hope that inevitable 'burdens on business' bleatings from business organisations and ideologically deregulatory, 'its all unnecessary silly red tape' political parties will be treated in rigorous evidence-based manner. This will expose the cost of poor health and safety and the fact that individual workers and their families disproportionately bear that cost, and that the state also pays a larger proportion than the wrongdoing employers. The Hazards Campaign under our 'We Love Red Tape because it's better than bloody bandages' campaign, can provide more information. Families Against Corporate Killers can provide many harrowing accounts by bereaved families of the full, cost of negligent employers they

have been forced to pay, the huge and long term impact on their lives and how all of this is utterly preventable by proposal in this Bill, plus strict health and safety enforcement.