

Consultation by Claire Baker MSP on a proposed
Culpable Homicide (Scotland) Bill



Response from GMB Scotland

Scotland's campaigning union

8 February, 2019

QUESTIONS

To assist persons in preparing a response to this Consultation Paper, here are a few questions which they may wish to consider in addition to any other comments which you may wish to make about the consultation paper as a whole, or contents within. You do not have to answer all the questions, with only the questions you have answered considered in the final analysis:

About You

Q1: Are you responding as:

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

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

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

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

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

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

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

GMB Scotland is Scotland's campaigning trades union representing tens of thousands of workers across the Scottish economy including in manufacturing, commercial and public services.

Q3. Please choose one of the following:

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- I would like this response to be considered, but not published ("not for publication")

If you have requested anonymity or asked for your response not to be published, please give a reason. **(Note: your reason will not be published.)**

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

GMB Scotland

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

Contact details:



Q5. Data protection declaration

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

Aim and approach

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

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

Please explain the reasons for your response.

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

GMB Scotland considers that the law in relation to culpable homicide is unclear in some very important respects. The law in relation to culpable homicide does not apply evenly and consistently in respect of different categories of wrong doers. Individual wrongdoer and organisational wrongdoer seem to have very different rules applied to them. The law also applies inconsistently to organisation of different sizes.

There seems to be one law of culpable homicide for individuals; a different law of culpable homicide for small organisations; a different 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.

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

It seems entirely clear that Scottish Citizens are more protected from the risk of death through the conduct of individuals than they are protected from death as a consequence of the conduct of organisation, particularly larger organisations. Indeed it seems that the larger the organisation the less the public are protected from their conduct under the criminal law.

The main advantages of the 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

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

detailed in this consultation?

We are aware that members of the Scottish Parliament have tried to bring forward similar legislation in the past and that it has been suggested that there are potential difficulties in respect of legislative competence.

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.

We believe that the issue comes down to political will.

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 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 believe that this approach is sensible. There is little doubt that there will be an overlap between the two tests and there will be many instances where specific circumstances could meet both tests. We believe that there will nevertheless be examples that the outer edges of both tests where the circumstances will meet one but not the other. Having two tests ensures that there are no gaps in the law. This is important because there have been 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.

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.

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

employees.

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 are 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.

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.

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?

For the reasons set out in our response to question 10, we fully support the recommendation that organisations should be responsible for the actions of their employees for this offence

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

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.

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.

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 reflects. We believe that the victims must see justice served. We believe that the offence and potential penalties must serve as a real deterrence. We accordingly believe that the highest and most severe penalties must be available in appropriate cases. That includes custodial sentences. 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 where senior office holders of an organisation may face a custodial sentence by reason of the organisation being convicted.

We also believe that penalties should include remedial orders and publicity orders.

We also believe that families should have the automatic right to make victim statements in all convictions for culpable homicide.

Financial implications

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

(a) Government and the public sector

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

(b) Businesses

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

(c) Individuals

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

Please explain the reasons for your response.

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

We are unaware of any ways in which the Bill could achieve it aims more cost effectively

Equalities

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

- Positive

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

Please explain the reasons for your response.

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

N/A

Sustainability

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

- Yes
- No
- Unsure

Please explain the reasons for your response.

General

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

We have also been engaged by the Scottish Hazards Campaign on their response to this proposal and are also supportive of the points made therein.