

## Culpable Homicide (Scotland) Bill Consultation Paper

### Response by Jonathan Deans

1. An individual
2. Professional with experience in a relevant subject. I am a law graduate (undergraduate and postgraduate level), working in a law firm. I am training to be a solicitor.
3. I am content for this response to be published and attributed to me.
4. Jonathan Deans – [REDACTED]
5. I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.
6. Partially supportive – I am fully supportive of the overall aim of the bill but disagree with some of the finer details.
7. The main practical advantage of the Bill would be that we will have a workable statute for corporate culpable homicide, after 12 years with an unworkable law. The main disadvantage is that prosecutions under this Bill would still be dependent on an underfunded and overworked prosecution service.
8. This legislation should go hand in hand with a commitment to keeping and expanding the availability of Civil Legal Aid for Fatal Accident Inquiries. The National Personal Injury Court has been a success in civil proceedings. A specialist court should be considered for financial crimes and corporate offences, which would help address the points regarding the laws failure to give due regard to modern business structures.
9. There should be one offence of corporate culpable homicide, which can be committed by recklessness. It is not clear from the proposal whether one offence is intended, or if the intention is to create two separate offences, akin to dangerous driving and careless driving. It is not clear that gross negligence is less or more severe than recklessness and the difference appears to only be the existence of a duty of care in cases of gross negligence, while recklessness is defined more broadly and can encompass scenarios where there is no duty of care.
10. The Bill should be clear as to how this offence applies to different forms of organisation. Charitable enterprises should not be exempt.
11. If the bill is not carefully drafted, there may be a risk that people will attempt to bring private prosecutions against government ministers as a result of unpopular and damaging policies, or otherwise use proceedings under the Bill in place of judicial review proceedings. I am not convinced that a section which provides that the Crown would be criminally liable for decisions made by employees of the Crown would be within the legislative competence of the Scottish Parliament.
12. Recklessness is a concept well-defined by case-law and understood by judges. I am not sure of the benefit of defining it in statute. Effort should be made to ensure that the definition does not overly limit the discretion of judges. There is the potential for confusion if the Bill creates a definition of recklessness which does not match the definition of recklessness in other areas of law.
13. It is difficult to answer this question without knowing the sanctions that may apply on conviction. Organisations are already vicariously liable for the actions of their employees in civil proceedings. If the employee was acting in the course of their employment when reckless actions were taken that resulted in death, the organisation should be vicariously liable

14. It is not clear from the proposal whether aggregation is intended to apply only where the culpable homicide is caused recklessly, or if it is also to apply where culpable homicide is caused by gross negligence. Aggregation is intended to catch cases where multiple members of staff have carried out reckless acts, which all contributed to the death. As the entity being prosecuted should be seen as a single entity, this approach makes sense.
15. Negligence is usually used in reference to Delict. I agree with Lord Osborne in *Transco* that the word introduces potential for confusion. I think a better approach is to make a single offence of corporate culpable homicide which can be caused by recklessness, while stating that breach of a duty of care is to be a consideration in judging whether the conduct was reckless. The logic is that the organisation should be aware of the existence of their duties of care and any actions which breach that duty of care are therefore reckless with regards to that duty.
16. The term 'gross negligence' is borrowed from the English law of manslaughter. The English law of manslaughter is different from the Scots law of culpable homicide. Defining whether an offence of culpable homicide has been committed with reference to the English law of manslaughter has the potential to cause confusion and a different term should be used. I am not convinced that 'gross negligence' captures anything which is not included in recklessness or which could not be captured by the suggestion above.
17. Duty of care should be defined as it is in the law of Delict. There should be a stated presumption that a company has a duty of care towards its employees. It is not clear how 'gross breach' differs from 'breach', except that the first is obviously worse. It should be defined with reference to the act itself and not with reference to the consequences. A gross breach should be a breach of duty of care which is flagrantly incorrect. A more minor breach of duty of care, which nevertheless causes death, should not be considered a gross breach. This area would probably not benefit from definition in the Bill and should be left to judicial discretion.
18. Damages and awardable in a civil suit for damages. A fine may be applied by an HSE prosecution. The bill should seek other forms of sanction. The removal and disqualification of directors should be possible. There should be provision for barring the organisation from tendering for public contracts, with an exception where this would be detrimental to national security.
19. Government and the public sector – Broadly cost-neutral.  
Businesses – Some increase in cost.  
Individuals – Broadly cost-neutral.
20. I think that using two separate tests would be less cost-neutral than using one test, due to increased complexity causing more drawn-out legal proceedings, as well as requiring more complex training for judges and prosecutors.
21. Slightly positive.
22. Training for prosecutors and the Police should consider the public sector equality duty.
23. Yes.
24. There is some talk throughout the proposal that the current regime is 'discriminatory' as it allows small companies to be prosecuted, while it is more difficult to prosecute larger companies. However, as the proposal admits, there have been no successful prosecutions under the current regime. I am not convinced that the current regime can be described as discriminatory. It may be inequitable, but it is not discrimination. The European Convention on Human Rights is referred to. Article 14 is not a stand-alone right against discrimination. It applies when other articles are 'engaged'. It does not apply on its own. Size of a company is not a 'protected characteristic' and so this inequality should not be described as discrimination. The 2007 Act appears to be compliant with the ECHR.