



Response to Consultation on proposed Culpable Homicide (Scotland) Bill

[About the STUC](#)

The STUC is Scotland's trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 540,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black members, LGBT+ members, and members with a disability, as well as retired and unemployed workers.

STUC response to Claire Baker MSP's consultation on proposed Culpable Homicide (Scotland) Bill

Summary of key points

- The STUC is fully supportive of the proposed Bill. It will provide clarity as to the circumstances when employers (including various sizes of organisations and ministers and crime bodies) will be guilty of culpable homicide; ensure conviction is a real possibility for all organisations; serve as a real deterrent to individuals and organisations alike.
- The STUC welcomes the proposals for two new statutory offences of “culpable homicide by causing death recklessly” and of “culpable homicide by gross negligence”.
- The STUC believes that these proposed offences must apply to all employing bodies.
- All sanctions should be considered, from custodial sentence to remedial orders, in order that the maximum deterrent effect is had.
- This Bill is competent and relies on political will to be passed.

The STUC has consistently argued, along with the Scottish Hazards campaign and Thompsons solicitors, that existing Corporate Homicide legislation is not fit for purpose.

The Corporate Manslaughter and Corporate Homicide Act 2007 came in to force in early 2008 yet there have been no charges brought for corporate homicide in Scotland. As Scottish Hazards have submitted, the Scottish Government's statistics show that 12 deaths have been investigated as corporate homicides in the last 10 years, yet no charges and no prosecutions came out of these investigations despite HSE statistics showing that Scotland has the highest work related fatal injury rate in United Kingdom. These statistics do not even include tragedies investigated by agencies such as the Civil Aviation Authority and the Maritime and Coastguard Agency. Given Scotland's role in offshore oil and gas and significant loss of life in oil disasters such as Pipe Alpha in 1988, or recent helicopter tragedies the actual impact of corporate failure to protect their workers is clearly higher than the HSE headline statistics suggest.

The current law in relation to culpable homicide does not apply evenly and consistently in respect of different categories of wrongdoers.

Individual wrongdoer and organisational wrongdoer have very different rules applied to them. The law also applies inconsistently to organisations of different sizes. The STUC believes that, as a matter of principle, all laws should apply consistently to everyone. It is entirely clear that people are currently 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.

On the whole, deaths at work have never attracted the same level of public reaction that involuntary killings elsewhere in society do. There are exceptions such as the ICL Stockline tragedy in May 2004 where 9 workers lost their lives, the 2009 Bond Helicopters AS332 Superpuma crash that killed 16 and the more recent CHC Superpuma tragedy that resulted in 4 deaths. In these cases the magnitude of the tragedy and multiple loss of life provoke public reaction. Such tragedies also tend to focus the minds of the public on the injustice that occurs when neither corporations that kill their workers, nor their directors are held to account for their negligence that resulted in needless deaths.

The STUC believes that following the failure of the 2007 Act to hold corporations criminally culpable, further legislation is required to ensure that corporations, individual directors and others who, as a result of their failures, cause the deaths of workers are not immune from prosecution under Common Law.

The STUC believes that reform of the law of Culpable Homicide has been necessary following the collapse of the charges brought by the Crown Office against Transco following the deaths of a family of four in Larkhall in December 1999. Despite the Crown Office taking the decision to prosecute, Transco successfully appealed the decision. The reason given by the Court of Appeal was that the prosecution had failed to identify the controlling mind or minds within the organisation who were acting on behalf of the company in committing the errors or omissions that led to the deaths. This judgement clarified the situation relating to the prosecution of companies and made it clear that, as a result of the identification doctrine, it would be impossible to prosecute larger organisations for culpable homicide. These companies invariably have

more complex structures and many layers of management and make identifying the controlling mind extremely difficult if not impossible.

While Transco was the first company to be charged with Culpable Homicide in Scotland this has not been the case in England and Wales. However, where charges of manslaughter have been brought by the Crown Prosecution Service any successful prosecutions have all been against directors of smaller companies. This would tend to suggest that the law of Culpable Homicide in Scotland as it stands discriminates against smaller businesses making it more likely for them to be charged with such a serious offence as Culpable Homicide. The law should not be allowed to discriminate against any particular group of employers or individuals nor should it be seen to protecting others. The STUC are not aware of any other area of law where discrimination of this kind is tolerated. It is, therefore, imperative that any new legislation brought forward in Scotland has to be seen to be fair, applying to all organisations irrespective of their size and complexity of their structures.

Recklessness and Gross Negligence

The STUC welcomes the proposals for two new statutory offences of “culpable homicide by causing death recklessly” and of “culpable homicide by gross negligence”.

In the case of the first new proposed offence we believe it would allow for prosecutions, mainly of individuals, should they have been aware of the risk of their actions but carry on regardless resulting in the death or deaths of others.

In relation to the second offence, the STUC welcomes the definition of causing death recklessly as it covers those that act deliberately and through this behaviour cause death. However, it also covers those who may not be aware of the risk and consequences of their actions but should have been aware of these consequences. Gross negligence can be established objectively without any need to identify individual controlling minds removing the need to prove a mental element to the crime or to establish vicarious liability for the acts of office holders and we believe this addresses all the issues that led to the collapse of the case against Transco as it also allows for the manner in which company activities were managed over a period of time to be taken into account resolving the issues of aggregation evident in Transco.

Liability

The STUC believes that these proposed offences must apply to all employing bodies, including government departments, partnerships and other non-incorporated bodies. In relation to the definition of an 'office holder', this should not be restricted to any particular level of management. The STUC would have concerns that any such restrictive definition could result in a continuance of the controlling mind principle in another form and therefore welcome the broad definition of an office holder contained in this section. The law must reflect the reality of the way that modern organisations operate. There can be a range of office holders and 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. The STUC believes it is important that organisations should be liable directly and personally for any failures in the way they are run that leads to the death any person.

Furthermore, the STUC suggests that no organisation should be exempt or excluded from the Act. It is inconceivable that Crown employers including Scottish Ministers should be given immunity from prosecution when the purpose of this Bill is to ensure that any natural person or organisation, irrespective of size or status, whose actions lead to the death of an individual are held accountable for their actions.

The decision of the appeal Court in the Transco decision made it clear that the liability of different individuals over a period of time could not be aggregated and then attributed to the organisation. The STUC believes that the issues of aggregation require to be addressed and the inclusion of aggregation is vitally important in order to lay to rest the issues around failure of common law identified in the Transco case that did not allow the aggregation of individual controlling minds over a long period of time in order to meet the requirement to prove the mental element to secure a prosecution for culpable homicide. Attempting to identify one controlling mind over long periods of time in such cases is difficult and nearly impossible in larger companies like Transco. This proposal would address the inequality apparent within the law of Culpable Homicide as it stands where it is far more likely that smaller companies would be prosecuted than larger ones.

In practice, the issue of attributing liability through aggregation may well lead to instances where individuals have acted in different ways and for varying reasons. We believe that this eventually will be offset by the

increased responsibility placed on organisations to ensure that their officers and employees are fully aware of what is expected of them.

Penalties

The STUC believes that those who are found to be criminally liable for the deaths of other individuals under the terms of the proposed Bill should be liable to an equivalent range of penalties, including terms of imprisonment as others convicted of involuntary killing elsewhere in our society.

To ensure the consistent application of the law 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.

In order to ensure consistency in sentencing for the new offence the Scottish Sentencing Council should be asked to develop guidelines to ensure appropriate sentences are imposed by courts and judges, giving access to the full financial resources available to pay fines with appropriate forensic accounting procedures being put in place to ensure information on company finances provided to the court reflects the true position.

However, prosecution of an organisation might not necessarily lead to improved systems of work being introduced. This is particularly true in the public and third sector where a decade of austerity cuts have led to massively decreased budgets. Imposing substantial fines will only harm public sector budgets further and therefore, in this instance, the STUC would support the introduction of remedial orders as this would ensure that management behaviours or failures that led to the breach that ultimately resulted in the death would have to be addressed. Failure to do so could result in any individual given responsibility for developing and implementing necessary remedial action being prosecuted and potentially facing imprisonment for failure to comply with the order.

Sanctions proposed for corporations and individuals, including orders for remedial action, should be taken as deterrents to organisations and encouragement to review management practices and organisational

cultures to prevent or, at the very least, reduce the risk of fatal injury to their workers or members of the public. Families should have the automatic right to make victim statements in all convictions for culpable homicide.

Political Will and Competence

Undoubtedly business organisations will provide evidence to suggest there will be a significant cost burden on their members. The STUC believes that the only businesses that are likely to be impacted by these proposals are ones that do not currently abide by their duty of care or provide the protection for their workers they are required to do under the Health and Safety at Work Act 1974. Those businesses that do not have adequate health and safety management systems in place are more likely to expose their workers to the risk of fatal injury.

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 legislation 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.

This issue comes down to political will. 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. 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.