



Law Society
of Scotland

Consultation Response

Culpable Homicide (Scotland) Bill

Consultation Paper

24 April 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Culpable Homicide (Scotland) Bill Consultation Paper (the Consultation). This is a "proposal to amend the law of culpable homicide to ensure where loss of life is caused by the recklessness or gross negligence of individuals, companies or organisations that where proved, the wrongdoer can be convicted of the offence that reflects the appropriate seriousness and moral opprobrium of what occurred."¹

The Consultation suggests amending the law on culpable homicide by making it clear in statute:

- that a person may be guilty of culpable homicide if that person causes the death of another recklessly or by gross negligence
- what the elements are of each of those offences
- how an organisation may be liable for each of those offences
- that a Crown servant or agent including a minister, civil servant or department may also be liable for each of those offences.

The Consultation's annex sets out that culpable homicide is a common law crime which in Scotland does not currently exist in statute. What the Consultation is proposing is that the crime of culpable homicide is set out in legislation. This would clarify the law where we would support the Consultation's policy objective.

The committee has the following comments to put forward for consideration:

¹ Claire Baker MSP Consultation 8 November 2018

The Law on Culpable Homicide

What is culpable homicide?

Culpable homicide is the killing of a person in circumstances which are neither accidental nor justified, but where the wicked intent to kill or wicked recklessness required for murder is absent. The difference in distinguishing between the crimes of murder and culpable homicide is objective. That means that a judge may withdraw a murder charge from a jury to allow for a conviction for culpable homicide to be considered and to take place.

For a charge of culpable homicide to be successfully proved, the Crown needs to satisfy the court that:

- the accused committed an unlawful act
- the act must have been intentional, or reckless or grossly careless
- the death was a direct result of the unlawful act.

There is no simple definition of culpable homicide. The following highlight the complications:

Drury:² For legal definitions of murder, the case of Drury states that:

“[M]urder is constituted by any wilful act causing the destruction of life, by which the perpetrator either wickedly intends to kill or displays wicked recklessness as to whether the victim lives or dies”

Stuart Drury was originally convicted of murder for the killing of his former partner with a hammer after concluding that she had begun a new relationship with another man. There were two issues in his appeal which referred to culpable homicide in the accused had not intended to kill her and she was killed while acting under provocation. Much of the appeal debated whether provocation should apply in the circumstances of the case which, if proved as a partial defence, would reduce the charge of murder to culpable homicide. The Full Bench decision has been described when referring to the definition of provocation “as the most controversial judicial decision on Scots criminal law of recent years.”³ Though the

² Drury v HMA 2001 SCCR 583,

³ Chalmers, J and Leverick, Fiona “Case Comment: “Murder through the looking glass: Gillon v HM Advocate” 2007 Edin L.R 230

case dealt with infidelity, it adds to the complexity in understanding the relationship between murder and culpable homicide.

Judicial Training: Judges require to direct juries so that the jury can consider its verdict. The suggested jury direction for adopting by judges when charging juries comes from the Judicial Institute for Scotland Jury Manual and now states:

“Culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills.”⁴

Macdonald: He describes culpable homicide as:

“the name applied in law to cases where the death of a person is caused or materially accelerated by the improper conduct of another and where the guilt does not come up to the crime of murder.”⁵

Transco:⁶ It describes culpable homicide as;

“the unlawful killing of a criminal kind in circumstances where the crime does not amount to murder [that] it can occur in a whole variety of circumstances.”⁷

Transco was the first prosecution of a public limited company for culpable homicide in Scotland. The company was charged with breaches of the Health and Safety at Work etc. Act 1974 after a gas explosion which killed four people. Transco were said to have "shown a complete and utter disregard for the public." The court ruled that it was possible to prosecute for culpable homicide but it was possible to convict of culpable homicide only if the court could identify an individual or group of individuals being a directing mind in the company. The charges of culpable homicide were held as irrelevant and were subsequently dismissed.⁸

The Transco case paved the way for major legislative changes. This area is now governed by the Corporate Manslaughter and Corporate Homicide Act 2007 (2007 Act).

In conclusion, these examples illustrate just how broad the definition is. Clarity of the law as envisaged by the Consultation would benefit all concerned.

⁴ <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualNovember2018.pdf>

⁵ Sir J. H. A. Macdonald A Practical Treatise on the Criminal law of Scotland at page 150

⁶ Transco v HMA (No1) 2004 JC 29

⁷ Transco v HMA (No1) 2004 JC 29 Lord Hamilton at Page 47 para [35]

⁸ The company was later prosecuted on the charge of health and safety and fined £15m

What are the problems caused by the definition of culpable homicide?

The crime of culpable homicide has evolved and been shaped over many years according to the development of the relevant case law and authorities referred to above. Much of the case law and indeed, the language, which is used in connection with the crime, come from a time where there was the death penalty for murder. It is generally accepted that there is a need to review the law and to reform it.

Convictions for culpable homicide provide a range of sentencing options for the judge rather than the imposition of the mandatory life sentence in cases of murder once the death penalty was abolished. However, this still lacks a clear definition as to what culpable homicide means. We therefore agree that the structure and transparency of the nature of the crime of culpable homicide would be better set out in language which is up to date. Furthermore, it can then be readily understood by the courts and juries.

The crime of culpable homicide is too broad in its scope. The boundaries between murder and culpable homicide are blurred, leaving too much to intuition and impression.⁹

The topic of culpable homicide is somewhat complex as seen from the infinite circumstances that it can apply such as driving a car at someone, a death from a health and safety failure at work and the voluntary supply of drugs where someone dies and to the death arising as a result of a medical mistake.¹⁰

There is no statutory differentiation in the range of the crimes that comprise culpable homicide as to the degrees of seriousness of the crime. Very different facts and circumstances amount to the crime being established which can be seen in the range of sentencing it attracts to which we refer below.

The crime of culpable homicide tends to present a sweeping or “mopping up”¹¹ category of crime which includes those crimes which do not amount to murder but there has been a death.

What is happening in relation to the crime of culpable homicide?

The problems highlighted above in lack of definitions have been recognised in the Tenth Programme announced by the Scottish Law Commission¹² as comprising an important area of law which needs review. Its future reform is therefore under consideration. (The Consultation refers too to previous Scottish

⁹ Dr Claire McDiarmid Strathclyde Law School 5 October 2018.

¹⁰ It is significant to note that this issue of criminal charges has been a focus for the General Medical Council who have recently closed a consultation looking at the issue of gross negligence manslaughter and culpable homicide in medical deaths.

¹¹ Lacey, Wells and Quick, *Reconstructing Criminal law: Text and Materials* (Cambridge University Press 2010 at p796

¹² <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

Parliament Member's Bills on this topic that tends to show the importance of the review and reflects public interest. The need for reform resonates with the aims of the Consultation).

Though we support the principles of the Consultation, the reform of the crime of culpable homicide, in our view, does not stand alone. It needs to be examined along with the crime of murder as well as the various partial defences which may apply to such crimes. These include self-defence, provocation¹³ and diminished responsibility.

The crime of culpable homicide is inextricably linked with the scope of the Scottish Law Commission's work where that project is described as:

“examin[ing] the principles underlying and the boundaries between the crimes of murder and culpable homicide; and the mental element required for the commission of each of these offences.”¹⁴

Recognising that reform is needed, the project importantly includes “comparative analysis of the approach taken in other jurisdictions...in regard to all of these topics” and an “understand[ing] of the views and experiences of stakeholders, including practitioners and members of the academic community.”

We would suggest that the importance of the views expressed to this Consultation would be highly relevant to informing the project. It could most likely support an evidence base for changes in future.

We would encourage that the reforms outlined in the Consultation await the outcome of the Scottish Law Commission's report. We agree that the application of the crime of culpable homicide to criminal conduct should not be left to the piecemeal development of case law.

We would mention two other aspects to consider:

1. Lord Pentland¹⁵ has suggested in relation to the project that reform could turn on a restructuring of culpable homicide into degrees where a death occurs. The degrees of seriousness, blameworthiness and proximity to murder could all be considered and appropriately reflected in the relevant definitions. He uses the analogy of a “ladder” going up to reflect the seriousness of the crime and reflecting the wide difference in the range of facts and circumstances that can amount to murder and culpable homicide.
2. There is also a reference in the Consultation to “gross negligence”. Care needs to be taken when considering criminal charges that the difference in terminology between criminal and civil law is appropriately reflected.

¹³ See Drury above

¹⁴ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

¹⁵ 5 October 2018.

Any proposed change or lowering in the standard of blame required to establish the crime would need to be carefully considered as to what stage the threshold for criminal law and sanctions should apply.

Health and safety cases

The Consultation is mainly focused on health and safety cases.

The decision whether to prosecute lies with Crown Office and Procurator Fiscal Service (COPFS). They need to be satisfied that there is sufficient admissible evidence to allow a prosecution to take place and that the prosecution is merited in the public interest. They also have the choice of what charges to bring which are not restricted in cases of death to culpable homicide. There may well be relevant charges that arise and may be prosecuted under the health and safety legislation.¹⁶

Health and safety policies and standards apply equally across England, Wales and Scotland though any prosecutions that arise in Scotland will be undertaken by COPFS and will run in the name of the Lord Advocate on indictment¹⁷ as head of COPFS. COPFS conduct inquiries into such deaths under their specialist health and safety division that was formed in 2009.

Health and safety prosecutions have serious implications for those that are found guilty. The case of HMA v Craig Services & Access Limited, Donald Craig and J M Access Solutions Ltd¹⁸ is one such example.

Donald Craig, the manager of the company, was sentenced to two years' imprisonment for breaches of the relevant legislation. A faulty cherry picker was the cause of the accident which was owned by Craig Services & Access Limited, the company that hired out lifting equipment. The person who to all intents and purposes was the manager of that company, was Donald Craig.

The unsafe cherry picker buckled while it was in use, causing the death of Gary Currie.

- Craig Services was fined a total of £61,000 for breaching its duty to ensure that those using the cherry picker were not exposed to the risk of injury or death, for failing to maintain the equipment and for hiring it out when it had not been certified as safe.
- J M Access Solutions Ltd was also fined £30,000 for breaching its duty to ensure that those using the cherry picker were not exposed to risks of serious injury or death and by failing to carry out an adequate check.

¹⁶ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

¹⁷ Summary cases will run in the name of the relevant Procurator Fiscal

¹⁸ <http://www.scotland-judiciary.org.uk/8/1712/HMA-v-Craig-Services-And-Access-Limited--Donald-Craig-and-J-M-Access-Solutions-Ltd>

The company was under an absolute duty to maintain the cherry picker in efficient working order and good repair. The company also had a duty to ensure the cherry picker was thoroughly inspected at least every six months.

These represent significant convictions and sentences reflecting the seriousness of the circumstances of the case.

Corporate Manslaughter and Corporate Homicide Act 2007

Since the Transco case discussed above, the 2007 Act allows for prosecutions in circumstances where a work-related death occurs. A thorough, co-ordinated, multi-agency investigation takes place and offences under the 2007 can be considered in line with the Work Related Death Protocol for Scotland¹⁹ among COPFS, ACPOS (now Police Scotland)²⁰, British Transport Police and the Health and Safety Executive.

Section 1(1) of the 2007 Act sets out the relevant offence which states:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

Section 1(2) of the 2007 Act sets out the organisations which can be prosecuted that include:

- (a) a corporation
- (b) a department or other body listed in Schedule 1 of the 2007 Act²¹
- (c) a police force
- (d) a partnership, or a trade union or employers' association, that is an employer.

The crime of corporate homicide arises where a duty is owed by the accused to the deceased. A “gross breach” of duty of care arises if the conduct set out in the charge falls far below what can reasonably be expected of the organisation in the circumstances. The “senior management” covers those people who play significant roles in making decisions about how the whole or a substantial part of the organisation’s

¹⁹ <http://www.hse.gov.uk/scotland/workreldeaths.pdf> (undated)

²⁰ From 1 April 2013, Scotland’s eight police forces, the Scottish Crime and Drug Enforcement Agency (SCDEA) and the Association of Chief Police Officers in Scotland (ACPOS), merged to form Police Scotland.

²¹ This set out a range of government departments which would be caught by the legislation <https://www.legislation.gov.uk/ukpga/2007/19/schedule/1>

activities are to be managed or organised, or in the actual managing or organising of the whole or a substantial part of those activities.

The existence of such a crime of corporate homicide has been criticised, especially from the point of view of law and economics which argues that civil damages are a more appropriate means of compensation, recognition of the loss suffered and future deterrence. Such arguments emphasise that, because the civil courts award compensation commensurate with the damage/injury done, they apply the appropriate level of deterrence. This may also be an aspect to consider when looking at how to reflect on the consequences of fatal cases as outlined in the Consultation.

Any Culpable Homicide Bill would need to consider carefully just how it would sit with the current legislation.

Looking further at the 2007 Act, there have been no prosecutions in Scotland so far under the 2007 Act.²²

It might be helpful to ascertain how the 2007 Act is working (by means perhaps of any post-legislative scrutiny). Victoria Roper, an academic, has suggested when seeking to review the effectiveness of the 2007 Act as far as England and Wales are concerned that the 2007 Act has not been the failure that may have been predicted. Instead, she suggests that it occupies a statutory middle ground as well as having attracted widespread publicity in the local national and trade press.²³ There is a perception that a corporate manslaughter charge might be better than “just” a health and safety charge as it presents “increased reputational risks for corporations and .. act as a greater deterrent to lax health and safety practices.” Health and safety offences may not be regarded as real crimes. These may all be useful observations to consider in relation to the Culpable Homicide Bill.

We would stress as far as Scotland is concerned that the discretion as to any prosecution lies with COPFS which extends to the charges under which to prosecute.

As well as section 1(2) of the 2007 Act, sections 11-14 of the 2007 Act deal with the Crown, armed forces, partnerships and police forces who can all be prosecuted where appropriate for this offence.

Though the Consultation refers to the need to expand the law to include a Crown servant or agent including a minister, civil servant or department to be liable for each of those offences, given the scope of the relevant section of the 2007 Act, we are unsure where there are gaps, certainly before the 2007 Act is tested.

²² Roper, Victoria: The Corporate Manslaughter and Corporate Homicide Act 2007 - a 10-year review Victoria Roper 2018 J. Crim. L. 48

²³ Supra at Page 21

It is worth noting that any organisation found guilty of the crime in Scotland of corporate homicide²⁴ is liable on conviction on indictment to a fine.

Sentencing

Where the crime of culpable homicide arises, someone will have died. That is always going to be tragic. Where the deceased have relatives, they will be seeking justice for the victim.

Where sufficient evidence exists, that serious crime is going to be prosecuted in the High Court. Where that crime is proved to the criminal standard of proof of beyond reasonable doubt against an individual, a company or organisation, they will fall to be sentenced according to the facts and circumstances found proved. The range of sentencing is unlimited and can include admonition to significant periods of imprisonment. Were there to be any suggestion that the sentence was too lenient, this sentence can always be appealed by the Crown.²⁵

Where a conviction arises for culpable homicide, there seems to be no suggestion that the current sentencing powers are not adequate or appropriate. There is mention that “the same moral opprobrium attaches to individuals, companies or organisations” which is entirely correct.

We refer to the Scottish Sentencing Council²⁶ who carry out a range of work concerning sentencing in Scotland. Their responsibilities include:

- preparing sentencing guidelines for the courts
- publishing guideline judgments issued by the courts
- publishing information about sentences handed down by the courts.

We understand that there are no plans announced to issue any guidance on cases involving culpable homicide in Scotland. It may be worth noting in England and Wales as far as health and safety cases are concerned that:

“the rate that individuals are being sentenced to prison for health and safety offences has increased dramatically in the seven months since the new sentencing guideline was introduced.²⁷

²⁴ Section 1(6) of the 2007 Act

²⁵ <https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentences-and-appeals/#Appeals>

²⁶ <https://www.scottishsentencingcouncil.org.uk/>

²⁷ <https://www.healthandsafetyatwork.com/news-and-prosecution/sentencing-guideline-increased-risk-jail-introduced-in-february-2016>

Questions

The Consultation posed a number of question where we considered it might be easier to provide the information set out above where we would be happy to suggest meeting or responding further as might be helpful.

In relation to the questions, please see our following comments:

Q1: We are responding as an organisation

Q2B: We are the statutory regulator ad representative for Scottish solicitors.

Q3: We are content for this response to be published and attributed to us.

Q4: The Law Society of Scotland

Q5: We confirm that we have read and understood the privacy notice attached to the consultation which explains how personal data will be used.

Q6: We refer to our answer above. We are fully supportive of the principles.

Q7-Q18: Please see our response above.

Q18: We refer to the section on sentencing above with regard to sanctions.

Q19-Q20: We have no comment to make.

Q21: Neutral

Q22- Q23: We have no comment to make.

Q24- We refer to our response above.

For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 0131 476 8206
gillianmawdsley@lawscot.org.uk