

This document relates to the Culpable Homicide (Scotland) Bill (SP Bill 75) as introduced in the Scottish Parliament on 1 June 2020

Culpable Homicide (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Culpable Homicide (Scotland) Bill, introduced in the Scottish Parliament on 1 June 2020. They have been prepared by Claire Baker MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and by Claire Baker MSP, the member who introduced the Bill (SP Bill 75–LC);
- a Financial Memorandum (SP Bill 75–FM);
- a Policy Memorandum (SP Bill 75–PM).

3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

The Bill

4. The Bill amends the law of culpable homicide in Scotland by creating in effect two different statutory kinds of culpable homicide—culpable homicide where death is caused recklessly or by gross negligence. These statutory offences are in addition to, and not in

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substitution for, the existing kinds of offence of culpable homicide at common law.

5. The Bill consists of 16 sections as follows –

- Sections 1 to 6 define what is meant by the two different statutory kinds of culpable homicide and how an individual and a non-natural person may be guilty of each offence;
- Sections 7 and 8 define what is meant by “non-natural person” and “responsible person” for the purposes of the Bill;
- Sections 9 and 10 make provision for penalties for the offences and for remedial orders to be made on conviction of the offence of culpable homicide where death is caused by recklessness or gross negligence;
- Section 11 deals with the application of the Bill to the Crown;
- Sections 12 to 16 deal with certain general and supplementary provisions, including commencement of the Bill.

Commentary on sections

Culpable homicide

Section 1: Culpable homicide

6. This section provides that where an individual or non-natural person causes the death of a person recklessly or by gross negligence they are guilty of the offence of culpable homicide. This in effect creates two different statutory kinds of culpable homicide that both apply to individuals and non-natural persons alike. At the highest level the test for guilt of individuals and non-natural persons is identical. These offences are in addition to and not in substitution for the offence at common law which section 14 makes clear is unaffected.

Section 2: Meaning of causing death recklessly

7. This section provides that an individual causes death recklessly if the person is, or ought to be, aware of an obvious and serious risk that acting in a particular manner will bring about death but nonetheless acts in that manner where no reasonable person would do so. There is a definition of acting in section 13 which makes it clear that it includes

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failure to act. This provision reflects the definition of recklessness in section 10(a) of the Draft Criminal Code for Scotland published by the Scottish Law Commission 2003 (hereafter called “the Code”).¹

8. At common law, a corporate body may be prosecuted for culpable homicide but it is very difficult to convict it. This is because such a body can only be found guilty of the offence if it is possible to find a “directing mind” of the body that is also guilty of that offence and whose acts and mental attitude (recklessness) necessary to establish culpable homicide can be attributed to, and identified with, the body corporate. This is called the principle of identification but it creates considerable problems in practice. Section 2(2) proposes to avoid the difficulties created by the identification principle by making a non-natural person or organisation vicariously liable for the offence in section 1(a) (that is the offence of culpable homicide for causing death recklessly) if a responsible person, acting within the scope of their employment or on behalf of the non-natural person, causes death by recklessness. What is meant by “non-natural person” and “responsible person” are defined in sections 7 and 8.

9. Section 2(3) makes a non-natural person guilty of the offence in section 1(a) in other circumstances. It is intended to allow the courts to “aggregate” the actings of different responsible persons at different times, none of whom may be guilty of that offence, so that, if those actings, when considered together, would be sufficient to constitute the offence, then the non-natural person is guilty. This provision is not in the Code.

Section 3: Meaning of causing death by gross negligence

10. This section provides that an individual causes death by gross negligence if that individual acts in such a way as to amount to a gross breach of a duty of care owed by that individual to another person and that breach causes the death of that other person. What is meant by “duty of care” and a gross breach of that duty is defined in sections 4 and 5.

¹ https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf

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11. There is currently no similar offence at common law in Scotland but culpable homicide previously included an element of gross negligence. This offence is based upon the English common law offence of gross negligence manslaughter in terms of which a person may be guilty of manslaughter if a person causes the death of a person by gross negligence that is by a gross breach of a duty of care which the accused owed to the deceased.

12. As mentioned above, it is very difficult to convict a corporate body of culpable homicide because of the need to find a “controlling mind” under the identification principle. Section 3(2) proposes to avoid the difficulties created by the identification principle at common law by making a non-natural person liable for the offence in section 1(b) (that is of culpable homicide for causing death by gross negligence). There is no need to find a particular individual who can be identified within the non-natural person or to make the non-natural person vicariously liable for the acts of its office holders.

13. There are many circumstances at common law and under statute where non-natural persons owe a duty of care to individuals and classes of people. If a non-natural person is in breach of any such duty of care and that breach of duty cause the death of an individual, the non-natural person will be guilty of culpable homicide if that breach of duty of care was a gross one as defined by section 5.

14. One of the advantages of the offence in section 1(b) is that it can be established objectively without proof of any mental element. This makes it easier to attribute liability to a non-natural person.

Section 4: Duty of care

15. Section 4 defines a duty of care as meaning any duty of care owed by an individual or a non-natural person whether under the common law or under any enactment. It would therefore include duties of care arising from the common law of delict as well as from enactments.

Section 5: Gross breach

16. Section 5 defines what is meant by a gross breach of a duty of care. The test is whether the failure constituting the breach falls far

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below what could reasonably have been expected of the individual or, as the case may be, the non-natural person in the circumstances.

17. The test is a “jury question” to be judged by the facts and circumstances of the individual case.

Section 6: Art and part

18. Section 6 creates a statutory test for individuals being guilty as art and part of the main offences of culpable homicide under the Bill. In particular, the action describes the circumstances where a “responsible person” as defined by the Bill will be guilty of being art and part of culpable homicide by causing a death recklessly or by gross negligence. The test is whether the conduct of the responsible person forms part of the acts constituting the offences under sections 2(2), 2(3) or 3(2).

Non-natural person and responsible person

Section 7: Non-natural person

19. Section 7(1) defines what is meant by a non-natural person or for the purposes of the Bill. A non-natural person consists of:

- (a) any body corporate. It does not matter how it has been made a body corporate and so it would include registered companies and statutory bodies corporate, such as Health Boards or local authorities. It also does not matter where it is incorporated and will therefore include foreign companies;
- (b) a company;
- (c) a limited liability partnership;
- (d) any other partnership;
- (e) an unincorporated association of persons;
- (f) the Scottish Administration; this includes any non-ministerial office in the Scottish Administration. This is a concept used in the Scotland Act 1998 to refer to non-ministerial offices, such as the Registrar General of Births, Deaths and Marriages for Scotland;
- (g) the Crown Office and Procurator Fiscal Service. This is intended to refer to the department of that name which is run by the Lord Advocate. It is expressly mentioned because it is not

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clear whether it would be regarded as coming within the Scottish Administration;

(h) any department in the UK Government.

20. Section 7(2) enables the Scottish Ministers to amend the list of non-natural persons or organisations by regulations subject to the affirmative procedure (see section 12).

Section 8: Responsible person

21. Section 8 defines the category of persons for whom acts and omissions the non-natural person shall be vicariously responsible in respect of causing death recklessly and therefore for the purpose of culpable homicide under the Bill. A responsible person is defined as a company director or secretary; a member of a limited liability partnership; a partner; a member or office holder of an unincorporated association; or any individual who supervises, manages or organises any people or activities on behalf of a non-natural person, or any part of the non-natural person, as part of their actual, ostensible or implied duties for the non-natural person.

22. Section 8(2) makes it clear that owners, partners, employees and contractors may all be responsible persons for the purpose of the Bill.

Penalties and remedial orders

Section 9: Penalties

23. This section makes provision for the penalties for breaching the offence of culpable homicide under section 1(a) or (b).

24. It provides that –

- an individual who is guilty of either of those offences is liable on conviction on indictment to a maximum penalty of life imprisonment or a fine (or both);
- a non-natural person that is guilty of either of those offences is liable on conviction on indictment to a fine;

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- A responsible person guilty of an offence of culpable homicide by art and part is liable on conviction on indictment to a maximum penalty of life imprisonment or a fine (or both).

Section 10: Remedial orders

25. Section 10(1) gives the courts a power to order an individual or a non-natural person convicted of the offence in section 1(b) (that is culpable homicide by causing death by gross negligence) to take steps to remedy the failure that led to the death.

26. Section 10 (1) also enables a remedial order to specify that the state of affairs resulting from the failure, and representing the more immediate cause of death, be addressed. (For example, where the management failure related to inadequate risk assessment and monitoring procedures, the consequence of this might be inadequate safety precautions, leading to a death. The court would be able to order that both failures be addressed.)

27. Section 10(2) requires a remedial order to specify the period within which these remedial steps must be taken.

28. Section 10(3) makes provision for that period to be extended.

29. Section 10(4) provides that an individual who fails to comply with an order under this section is guilty of an offence and liable:

- on conviction on indictment, to a maximum penalty of life imprisonment or a fine (or both);
- on summary conviction, to a maximum penalty of 12 months imprisonment or a fine of up to £10,000 (or both).

30. Section 10(5) provides that if a non-natural person fails to comply with such an order it is liable for an unlimited fine is available on indictment and a fine of up to £10,000 on summary conviction.

31. Section 10(6) enables the Scottish Ministers to increase the fine by regulations subject to the affirmative procedure (see section 12).

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The Crown

Section 11: The Crown

32. The general presumption is that legislation does not apply to the Crown unless this is expressly stated.

33. Section 11(3) ensures that the offences will apply to any servant or agent of the Crown as it applies to an individual and a non-natural person. A servant or agent of the Crown is defined in section 11(5) as including an officer of the Crown (such as a Minister in the UK Government or the Scottish Ministers), a person employed by the Crown (including members of staff of the Scottish Ministers) and an organisation which is a servant or agent of the Crown. This means that any servant or agent of the Crown is subject to the new offences of culpable homicide mentioned in section 1.

34. Sections 11(4) and (5) address the fact that many of the activities and functions carried out by a servant or agent of the Crown are, legally, performed by the Crown rather than that individual or body. For example, civil servants in government departments are employed by the Crown rather than the department for which they work. If provision were not made to deal with this, it would mean that those government departments might not technically be liable for management failings that occurred within them: the relevant conduct legally being attributable to the Crown rather than the department concerned. Similar difficulties might arise in respect of the duty of care owed as employer as technically this might be considered owed by the Crown rather than the relevant government department.

35. The Crown Proceedings Act 1947 made the Crown liable for damages in the civil law as employer, occupier and vicariously for the wrongful acts of its servants and agents. The offence mentioned in section 1(b) is, however, predicated on an individual or a non-natural person owing a personal duty of care to the victim. In order to attribute the duties owed by the Crown as a whole to the relevant Crown servant or agent, section 11(6) makes it clear that Crown servant or agent is to be treated as owing for the purposes of the offence the duties of care that they would owe if they were not a servant or agent of the Crown.

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General and supplementary

Section 12: Regulations

36. Section 12 provides that any regulations made by the Scottish Ministers under the Bill shall be made by statutory instrument and, with the exception of the commencement order; require to be approved in draft by the Scottish Parliament before they can be made.

Section 13: Interpretation

37. This section defines when someone is responsible for an action.

Section 14: Effect on common law

38. Section 14 makes it clear that the provisions of this Bill are without prejudice to the existing offence of culpable homicide at common law.

Section 15: Commencement

39. Section 15(1) provides for the provisions of the Bill to come into force the day after Royal Assent.

40. Section 15(2) makes it clear that the Bill is not retrospective. It does not apply in relation to any death which occurs prior to its commencement.

Clause 16: Short title

41. Section 16 gives the short title to the Act.

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