



Law Society
of Scotland

Stage 1 Briefing

20 January 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 previously responded to the Culpable Homicide (Scotland) Bill Consultation Paper in April 2019. This provided the background to the introduction of the Culpable Homicide (Scotland) Bill ("the Bill")¹ as a Member's Bill by Ms Claire Baker MSP on 1 June 2020. The Justice Committee has published its Stage 1 Report on the Bill on 13 November 2020.² The Stage 1 debate which is scheduled to take place on Thursday 21 January 2021.

General

The Bill proposes to amend the law of culpable homicide in Scotland by putting it into statutory form in creating two new offences as outlined in Section 1 of the Bill. These changes would be significant in seeking to clarify the law on culpable homicide. The Bill's intention is that these offences would be in addition to and not in substitution for the common law of culpable homicide. Essentially, under the Bill, a person would be guilty of an offence where they caused the death of a person by an act or an omission recklessly or by gross negligence.

At the outset, we express our sympathy to any family who have lost a family member due to an accident at the work. These are tragic circumstances and provide the tragic background to the Bill's introduction which we fully appreciate. However, there are some points which we would suggest are relevant to consider when debating this Bill. These are as follows:

¹ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/culpable-homicide-scotland-bill/introduced/bill-as-introduced-culpable-homicide-scotland-bill.pdf>

² <https://sp-bpr-en-prod-cdnp.azureedge.net/published/J/2020/11/13/Stage-1-Report-on-the-Culpable-Homicide--Scotland--Bill/JS520R18.pdf>

Problems with the crime 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. Much of the case law and indeed, the language, which is used in connection with this crime, has come from the time where there was a death penalty for murder. Under Appendix 1, we include a brief outline of the existing law which seeks to emphasise its complexity.

We agree that a considered and detailed review of the law on culpable homicide is necessary. This forms part of the work being currently undertaken by the Scottish Law Commission³ (SLC) with its review on Homicide. That project is focused on “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.”⁴ When the SLC Report is issued, it will provide a set of recommendations and collection of evidence upon which to proceed with the reform of this law in this area. That would avoid a piecemeal approach in seeking even, if competent legislatively, to amend the crime of culpable homicide. Just how to prosecute any organisations as well as individuals where deaths have arisen at work should be considered as a whole as part of a comprehensive review once the SLC report is available.

The scope of culpable homicide as a crime is complex as can be seen from the infinite circumstances to which it can apply from death resulting from driving a car at someone, a health and safety failure at work, the voluntary supply of drugs or from a medical mistake.⁵ There is no statutory differentiation in the situations that may comprise culpable homicide as to the degrees of seriousness of the crime. Very different facts and circumstances amount to the crime being established which is seen from the range of sentencing it can then attract. Culpable homicide tends to present a sweeping or “mopping up”⁶ category of crime which includes those homicides which do not amount to murder but there has been a death.

Legislative Competence

We note that the Bill has obtained a negative legislative competence certificate from the Presiding Officer that considers that there are provisions that may lie outwith the legislative competence of the Scottish Parliament.⁷ These are outlined in the letter from the Cabinet Secretary for Justice to the

³ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

⁴ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

⁵ 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.

⁶ Lacey, Wells and Quick, *Reconstructing Criminal law: Text and Materials* (Cambridge University Press 2010 at p796)

⁷ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/HY_to_JC_1201.pdf

Convener of the Justice Committee on 12 January 2021. These are substantial points which would need to be resolved if the Bill were to progress.

Decisions to Prosecute

The decision whether to prosecute in any relevant case lies with Crown Office and Procurator Fiscal Service (COPFS). 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 Corporate Manslaughter and Corporate Homicide Act 2007 (2007 Act) or health and safety legislation.⁸

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.

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 indictment⁹ as head of COPFS. Health and safety prosecutions have serious implications for those that are found guilty. These represent significant convictions and sentences reflecting the seriousness of the circumstances of the relevant case such as:

HMA v Craig Services & Access Limited, Donald Craig and J M Access Solutions Ltd¹⁰ where 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. Significant fines too resulted on Craig Services 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 and J M Access Solutions Ltd 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.

Review of just how the 2007 Act is working may be a salient consideration - perhaps involving a post-legislative scrutiny. We recognise that there has been criticism of the 2007 Act but there needs to be empirical evidence to support these criticisms.

⁸ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

⁹ Summary cases will run in the name of the relevant Procurator Fiscal

¹⁰ <http://www.scotland-judiciary.org.uk/8/1712/HMA-v-Craig-Services-And-Access-Limited--Donald-Craig-and-J-M-Access-Solutions-Ltd>

Any 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” could require to be explored further.

A commitment to review the law on culpable homicide as suggested above would represent progress which could include the Scottish Government considering how and if there are developed powers to consider the interaction with health and safety legislation and the 2007 Act.

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Appendix 1 Note on the law on 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:¹¹ 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.”¹² Though the 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.”¹³

¹¹ Drury v HMA 2001 SCCR 583,

¹² Chalmers, J and Leverick, Fiona “Case Comment: “Murder through the looking glass: Gillon v HM Advocate” 2007 Edin L.R 230

¹³ <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualNovember2018.pdf>

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.”¹⁴

Transco:¹⁵ 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.”¹⁶

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.¹⁷

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).

¹⁴ Sir J. H. A. Macdonald A Practical Treatise on the Criminal law of Scotland at page 150

¹⁵ Transco v HMA (No1) 2004 JC 29

¹⁶ Transco v HMA (No1) 2004 JC 29 Lord Hamilton at Page 47 para [35]

¹⁷ The company was later prosecuted on the charge of health and safety and fined £15m

