

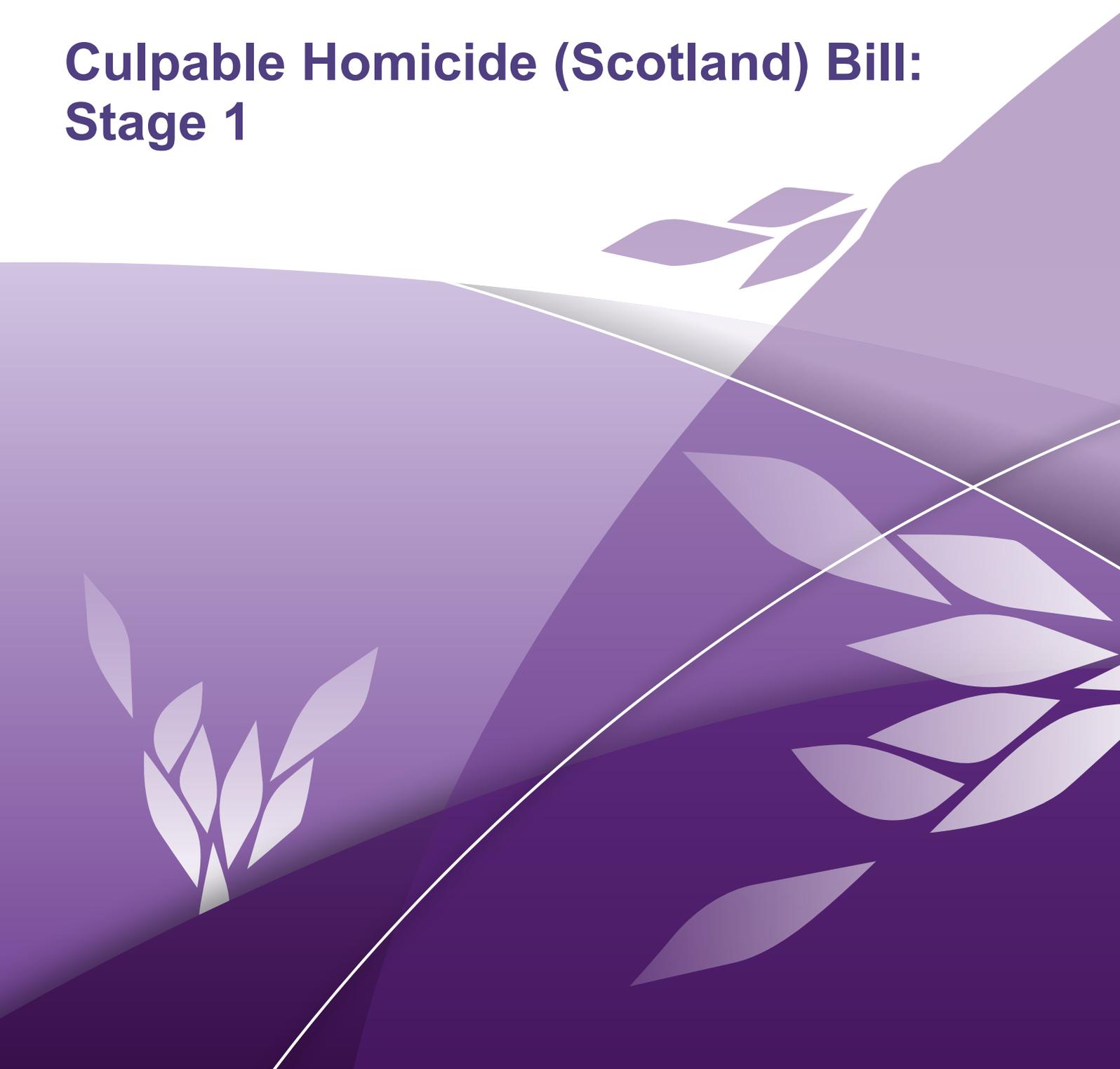


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Culpable Homicide (Scotland) Bill: Stage 1



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Contents

Introduction	1
Overview of the Bill	2
Delegated Powers	3
Annex	5

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 3 November and 1 December 2020, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Culpable Homicide (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

3. This Member's Bill was introduced by Claire Baker MSP on 1 June 2020. The lead Committee is the Justice Committee.
4. The stated aim of the Bill is to "amend the law of culpable homicide to ensure that 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, the sheer unacceptability to society, of what occurred".
5. The Bill proposes to achieve this by:
 - creating two statutory offences of culpable homicide which will sit alongside the current common law definition, these would apply to natural and non-natural persons alike (as does the common law of culpable homicide at present); and
 - providing that a natural person can be liable *art and part* for the culpable homicide committed by a non-natural person if that person's conduct forms part of the acts which constitute the culpable homicide offence.

Delegated Powers

6. The Bill confers two powers to make subordinate legislation on the Scottish Ministers. The Member in Charge has prepared a Delegated Powers Memorandum which sets out the reasons for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.ⁱⁱ
7. When the Committee considered the Bill on 3 November 2020, it was content with the delegated power in section 10(6) of the Bill, which provides power to increase the maximum fine for failing to comply with a remedial order.
8. It did, however, agree to write to the Member in relation to the power in section 7(2) of the Bill which provides power to add, remove or modify a description of a non-natural person.
9. A copy of the correspondence to the Member is included in the **Annex**.
10. On receipt of the response from the Member, the Committee reconsidered the power on section 7(2) of the Bill at its meeting on 1 December 2020. The Member's response can also be found in the **Annex**.
11. The issues considered by the Committee in relation to this power, together with its recommendations, are set out below.

Section 7(2) – power to add, remove or modify a description of a non-natural person

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

12. Section 7 defines “non-natural person” for the purposes of the Bill. It includes companies, partnerships (including limited liability partnerships), unincorporated associations, the Scottish Administration, the Crown Office and Procurator Fiscal Service, and any department of the UK Government. The regulation-making power in section 7(2) enables the Scottish Ministers to change the list by adding, removing or modifying a description of a non-natural person included in that subsection.

Committee consideration

13. The Committee asked the Member whether it might be more appropriate for such a change to be made by primary legislation, given that the definition of non-natural person is fundamental to the Bill, with significant legal responsibilities and potential criminal consequences flowing from it.
14. The Committee highlighted its concerns to the Member that this power could be used to effect substantial policy change, with serious consequences for bodies falling within any new category of non-natural person. It also noted that the exercise

ii The Delegated Powers Memorandum is available [here](#)

of the power is not subject to any formal consultation or other pre-conditions, and considered it too broad in its terms, even when taking into account the higher level of scrutiny offered by the affirmative procedure.

15. In her response, the Member explained that the ability to change the definition of 'non-natural person' would ensure that the legislation is able to respond swiftly to changes in the way businesses and organisations are structured and managed. While it is not anticipated that the legislation would change frequently, the Member considered that it may need to react to changing situations, and the drafting of the Bill would enable this to happen without unnecessary delay.
16. The Member did, however, recognise the points raised by the Committee regarding parliamentary scrutiny and confirmed she would undertake to reflect further and consider making an appropriate amendment at Stage 2.
17. While noting the Member's response to reflect further, the Committee considers that taking such a broad power is not necessary or justified. The types of legal entity through which a business can operate (for example, an unincorporated association, a company or a partnership) are well established and long standing. They are unlikely to change frequently or at short notice in future.

18. **The Committee therefore recommends that the Member brings forward an amendment at Stage 2 to address the Committee's significant concerns regarding the breadth of this delegated power.**

Annex

4 November 2020 - Correspondence to Claire Baker MSP from the Delegated Powers and Law Reform Committee

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting yesterday and seeks an explanation of the following:

Section 7(2) – power to add, remove or modify a description of a non-natural person

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Section 7 of the Delegated Powers Memorandum (“the DPM”) defines “non-natural person” for the purposes of the Bill. The regulation-making power in section 7(2) enables the Scottish Ministers to change the list by adding, removing or modifying a description of a non-natural person included in that subsection.

The DPM highlights that it is important that the law of culpable homicide can evolve and develop as businesses and organisations evolve, and that the description of a “non-natural person” must therefore be flexible. It also notes that the best way to achieve this balance is by giving the Scottish Ministers the power to adapt and modify the description of a “non-natural person” by regulations. Accordingly, the DPM notes the regulations should be subject to the affirmative procedure because they are capable of modifying the Bill itself.

Taking into account the above, the Committee noted that when the Parliament delegates the role of legislating to the Scottish Ministers, it must have good reasons for doing so. For example, if flexibility is required because the legislation requires to deal with rapidly changing or uncertain situations. However, the Committee questions whether that is the case here as it appears unlikely that the definition will require to change quickly, or on a regular basis.

Furthermore, the Committee considers the definition of non-natural person is fundamental to the Bill as there are significant legal responsibilities with potential criminal consequences which flow from it. It is therefore concerned that this power could be used to effect substantial policy change, with significant consequences for bodies falling within any new category of non-natural person.

The Committee therefore asks, even taking into account the higher level of scrutiny offered by the affirmative procedure for this power, *whether you think it might be more appropriate for such a change to be made by primary legislation?*

23 November 2020 - Correspondence from Claire Baker MSP to the Delegated Powers and Law Reform Committee

Thank you for the letter of 4th November from the Delegated Powers and Law Reform Committee regarding my Culpable Homicide (Scotland) Bill.

I appreciate the Committee’s consideration of the legislation. I do understand the need for robust justification for delegating the role of legislating to Scottish Ministers. As the

committee recognises, the DPM highlights the need to be flexible. I would propose that the ability to change the definition of 'non-natural person' should be fairly 'fleet of foot' and that delegating the power enables the law to react to major but unforeseen events. We have in recent years experienced terrible events such as the Transco gas explosion at Larkhall which lead to loss of life. I want to ensure that the legislation is able to respond swiftly to changes in the way businesses and organisations are structured and managed. While it is not anticipated that the legislation would change with regularity, it may need to react to changing situations, and the drafting of the Bill enables this to happen without unnecessary delay.

I do however recognise the point raised by the committee regarding parliamentary scrutiny and will reflect on the need to amend this section of the Bill. Given the restrictions on the Stage 1 consideration of the Bill, I would give full consideration to the Delegated Powers and Law Reform Committee's constructive comments and consider an appropriate amendment at Stage 2.

