



JUSTICE

Corporate Manslaughter and Corporate Homicide Bill

**Briefing on House of Lords Second Reading
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1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.
2. JUSTICE responded to the Home Office consultation on the Draft Corporate Manslaughter Bill, and gave both written and oral evidence to the Home Affairs/Work and Pensions Committees' inquiry into the draft Bill.¹ Several of our concerns were taken up by the report of the inquiry.² We also briefed MPs on the Bill at Commons Second Reading and suggested amendments to it in Standing Committee and at Report stage.

Summary

3. The current law of manslaughter is ineffective in dealing with deaths caused by gross negligence at a corporate level. We believe that the law should be reformed as soon as reasonably practicable. It should be noted, however, that the law of homicide is in need of *wholesale* reform – as evidenced by the Law Commission's recent consultation paper *A New Homicide Act for England and Wales?*³ and the planned subsequent Home Office review of the law of homicide.
4. Ideally, corporate manslaughter should form part of that review and become part of a new, unified structure of homicide offences. In some ways, therefore, the timing of this Bill is inapposite. However, the current unsatisfactory situation regarding corporate manslaughter necessitates urgent reform: we therefore welcome the creation of the offence in this Bill.
5. We do, however, have serious concerns about the scope and effectiveness of the new offence as drafted in the Bill. Specifically, our primary concerns are that:
 - **The 'senior management' test – even as currently amended – will complicate the offence and make it easier to evade liability, especially for larger corporations;**

¹ *Home Affairs and Work and Pensions Committee: Draft Corporate Manslaughter Bill*, Written Evidence, 26 October 2005, HC 540-II and HC 540-III.

² *Home Affairs and Work and Pensions Committee: Draft Corporate Manslaughter Bill*, First Joint Report, 20 December 2005, HC 540-I.

³ *A New Homicide Act for England and Wales?*, Law Com CP 177, 20 December 2005.

- **Public authorities will only be liable in a very narrow set of circumstances;**
- **Deaths in custody should not be excluded from the ambit of the offence;**
- **The armed forces and policing and law enforcement exemptions should be narrowly defined; deaths in military and police custody should be within the ambit of the offence;**
- **The Government should ensure that the provisions do not prevent prosecutions of individuals for offences alongside the corporation when this is appropriate.**

General remarks

6. The government is obliged, under Article 2 of the European Convention on Human Rights (ECHR), to establish a legal framework in which those responsible for homicides may be brought to justice, which acts as a deterrent against the commission of such offences. In *Öneriyildiz v. Turkey*, the European Court of Human Rights said that

The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2...entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life...⁴

7. In some cases of manslaughter attributable to grossly negligent acts or omissions within a corporation, it may be impossible or inappropriate to prosecute any individual for a homicide offence – but the current law of corporate manslaughter makes it very difficult successfully to bring prosecutions against larger corporate entities. Further, although the offence under section 3 of the Health and Safety at Work Act 1974 allows for substantial fines to be imposed against corporations, it does not carry the ‘label’ of a causing death offence, and it has been observed that ‘apart from some notable exceptions, the fines imposed have been relatively small’.⁵

⁴ App. No. 48939/99, judgment of 30/11/04, EctHR (Grand Chamber), para. 89.

⁵ ‘Corporate Manslaughter: yet more Government proposals’, C.M.V. Clarkson, [2005] Crim LR 677-689 at 678.

8. While the deterrent effect upon corporations of a substantial fine may be considerable, the public opprobrium associated with a manslaughter conviction and its attendant publicity, which (for businesses) may result in loss of custom – particularly in cases where consumers/customers have died – may have a greater effect.
9. We therefore believe that the law of corporate homicide should be reformed in order to provide an adequate deterrent framework against gross negligence by corporate entities.
10. It is also necessary, in our view, that individuals can be tried alongside corporations in relation to a death where appropriate. A charge of corporate manslaughter should not result in impunity for individual corporate officers, employees or others whose individual acts would found a charge of (non-corporate) manslaughter or a health and safety offence. This would be contrary to the rule of law, and, arguably, to Article 2 of the Convention.

Specific concerns

- **The ‘senior management’ test – even as currently amended – will complicate the offence and make it easier to evade liability, especially for larger corporations;**
11. The amendments made to this clause in Standing Committee do not remove the focus upon the activities of individual ‘senior’ managers from the offences of corporate manslaughter and corporate homicide. ‘Senior management’ must have been responsible for a ‘substantial’ element of the breach that causes death. The test for ‘senior management’ in subclause 1(4)(c) is the same as the test for ‘senior’ managers that preceded it in the Bill as introduced to the Commons.
 12. The effect of the test is that responsibility must be attributed to those who play a significant role in managing, organising or making decisions about the managing or organising of ‘the whole or a substantial part’ of the organisation’s activities. We believe that this test will retain some of the problems with the current law, making it difficult to convict larger corporations. It will result in inconsistency since a death caused by a policy applicable in a single factory may be ‘corporate manslaughter’ if

the factory is owned by a small business, but merely a health and safety offence if it is owned by a multinational corporation with many factories. This disparity not only detracts from fair labelling but may also result in a lack of public confidence in – and understanding of – the offence.

13. If the ‘senior management test’ is retained, it may be possible for larger corporations to evade liability for corporate manslaughter *entirely*, merely by shifting responsibility for health, safety and other potential liability-attracting activities to junior managers, and not having generalised policies. The deliberate policy of decentralisation would not, we believe, in itself be grossly negligent in most circumstances – unless, for example, those to whom responsibility was delegated were clearly incompetent. Evidence given to the Committees’ inquiry suggests that downwards delegation of health and safety responsibility *has already occurred* in expectation of the corporate manslaughter legislation.⁶
14. The impact of this requirement is likely to be, therefore, that larger companies will not feel the deterrent effects of the legislation, while smaller companies will bear a greater regulatory burden. The Committees’ inquiry was even ‘very concerned that the senior manager test would have the perverse effect of encouraging organisations to *reduce* the priority given to health and safety.’⁷
15. We also believe that this test may make investigations and trials unnecessarily long and complex. As the Committees’ inquiry recognised, court time and argument may be spent on deciding who is a ‘senior manager’ (now ‘senior management’) under the Bill’s definition.⁸ One of the advantages cited by the Court of Appeal of the development of vicarious liability for section 3 of the Health and Safety at Work Act 1974 was that it would reduce the time taken up in trials by such enquiries.⁹
16. We therefore recommend that the offence should not refer to people – particularly by the appellation ‘senior’ – but instead should be defined in terms of a **‘management failure’ by the corporation**. The formulation ‘management failure’ was preferred by the Law Commission, in its consultation on involuntary manslaughter,¹⁰ and by the

⁶ Cf HC 540-I, para 135.

⁷ HC 540-I, para 136, emphasis added.

⁸ Cf HC 540-I, para 149.

⁹ *British Steel plc*, [1995] ICR 586, see Law Com No. 237, para. 6.22.

¹⁰ Cf Law Com No. 237, Draft Bill s4(1).

government in 2000.¹¹ In our view, this latter formulation sets responsibility at the correct level, preventing organisations from being liable for this offence in relation to every act of every junior employee, but ensuring that larger corporations cannot evade liability.

▪ **Public authorities will only be liable in a very narrow set of circumstances;**

17. We welcome the extension of the offence to public authorities. However, we are concerned that the application of the offence to them is in reality very narrow. We note the evidence given to the Committees' inquiry that suggested that the 'supply of goods or services (whether for consideration or not)' in the concept of 'duty of care' would exclude a range of governmental services that are *provided* but not *supplied*.¹² This alone, it seems, could be enough to exclude many deaths in custody from the ambit of the offence.
18. Furthermore, the definition of an exclusively public function in clause 4(4) of the Bill is so broad that it could be interpreted to cover everything that a statutory body does.¹³ The most obvious areas where an exception could be argued for: situations of combat, emergency services provision and law enforcement, and public policy decision making, are covered separately in the Bill. We therefore question what the 'exclusively public function' test adds, apart from the exemption of many deaths in custody, with which we disagree.
19. The exemption for 'public policy decisions' is also very broadly drafted. We agree with the Home Affairs and Work and Pensions Committees that 'this should only apply at a high level of public policy decision-making'.¹⁴ To give an example, a high-level public policy decision not to provide a certain drug on the NHS is a political question that should not, we believe, come within the ambit of the offence. The decision of managers of an individual hospital, however, to cut cleaning services to the extent that the hospital became dirty and secondary infections resulted should, we believe, be covered by the legislation.

¹¹ 'Reforming the Law on Involuntary Manslaughter: the Government's Proposals' (2000).

¹² Cf HC 540-I, para 107.

¹³ Cf HC 540-I, para 212.

¹⁴ Cf HC 540-I, para 233.

20. We believe that while there may be some areas – notably combat deaths in war, and high-level public policy decision-making – where the application of this offence would not be appropriate, that these should be the subject of specific exceptions, and that there should not be broadly-drawn exemptions for public authorities whose gross negligence causes death.

▪ **Deaths in custody should not be excluded from the ambit of the offence**

21. We are particularly concerned that the ‘exclusively public functions’ exemption would exclude many deaths in custody from the ambit of the offence. The European Court of Human Rights has emphasised that ‘[i]n the context of prisoners...persons in custody are in a vulnerable position and...the authorities are under a duty to protect them.’¹⁵ The UN Human Rights Committee, in relation to a death in custody, was of the view that a state party to the International Covenant on Civil and Political Rights was ‘under an obligation to take effective steps...to bring to justice any persons found to be responsible for his death’.¹⁶

22. We believe that there is no principled justification for excluding deaths in custody (including those caused otherwise than by defective premises or food, etc.) from the offence. While the government has pointed to the existence of alternative mechanisms for accountability, these are not proving sufficient in practice to prevent deaths. At a time of extreme overcrowding in prisons, prisoners are in even greater need of legal protection.

23. While inquests can provide a verdict and the coroner can suggest remedial measures under rule 43 of the Coroners’ Rules 1984, these recommendations have no binding force. The government points to public inquiries as an alternative route of accountability – but it refused to hold public inquiries into the deaths of both Zahid Mubarek and Joseph Scholes. In both cases,¹⁷ the government fought the families’ attempts to have a public inquiry held in the civil courts. Without a legal victory by the family, the Zahid Mubarek Inquiry¹⁸ would not have been held. Without a similar verdict in the *Scholes* case, it is very unlikely that a public inquiry will be held. An inquiry – for which a family have had to fight – held years after a death, is in any

¹⁵ *Keenan v UK*, App. No. 27229/95, judgment of 3/4/2001, ECtHR (Third Section), para. 91.

¹⁶ *Barbato v Uruguay*, Communication No. 84/1981, UN Doc Supp No. 40 (A/38/40) at 124 (1983).

¹⁷ Cf *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 ; *R (Scholes) v Secretary of State for the Home Department* [2006] EWCA (Civ) 1343.

event not sufficient in itself to provide an effective deterrent against gross negligence causing deaths in custody.

24. While individuals can be prosecuted in relation to deaths in custody, it has in practice proved very difficult to prosecute individuals, even if the inquest decides that the person was killed unlawfully. Of the cases known to INQUEST from 1991 to 2 August 2006, there were no convictions for manslaughter in relation to deaths in custody following an inquest verdict of unlawful killing.¹⁹
25. One reason why it may be difficult to prosecute individuals in relation to a death in custody is that a number of members of staff will usually have responsibility for the care of a prisoner, and may be acting on the basis of policies and procedures that may themselves be at fault in relation to the death. We believe that existing mechanisms of accountability are not doing enough to prevent deaths in custody, and that they should not be excluded from the corporate manslaughter offence.
26. In relation to private custodial corporations, there is even less argument for excluding deaths in their custody from the ambit of this offence. They are not electorally accountable. Recent concerns over the treatment of children in privately-run secure training centres (STCs), after the death of 15-year-old Gareth Myatt in an STC,²⁰ and the findings of the Carlile Inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children,²¹ highlight the need for proper accountability for privately-run, as well as publicly-funded, institutions.
27. We therefore recommend that the 'exclusively public functions' test be amended to ensure that deaths in custody, including deaths of those in prisons and young offenders' institutions, secure mental healthcare facilities, secure children's homes, secure training centres, immigration removal centres, court cells, police cells, and subject to supervision by court, prisoner and detainee escort services, should be included within the ambit of the offence.

¹⁸ www.zahidmubarekinquiry.org.uk.

¹⁹ Cf www.inquest.org.uk.

²⁰ Cf 'Youth's death sparked review', BBC News, 17 February 2006, <http://news.bbc.co.uk/1/hi/england/northamptonshire/4723356.stm>.

²¹ Available from www.howardleague.org.uk.

- **The armed forces and policing and law enforcement exemptions should be narrowly defined; deaths in military and police custody should be brought within the ambit of the offence;**
28. While there may be good public policy reasons for exempting combat operations from the ambit of the offence, any extension beyond these circumstances should be carefully scrutinised. In particular, the reference in subclauses 5(1)(b) and 6(1)(b) to ‘activities...in preparation for, or directly in support of’ the operations in subclauses 5(2) and 6(2) respectively could be capable of a wider interpretation than is justified. In subclauses 5(3) and 6(3), in the references to ‘training...which it is considered needs to be carried out, or carried out in that way...’ it is unclear by whom the training should be so considered. The decision-makers here should be specified, in the interests of legal certainty.
29. We also believe that consideration should be given to extending the clause to cover deaths in military custody caused by the gross negligence of UK authorities. In *R (on the application of al-Skeini and others) v Secretary of State for Defence*²² it was held in relation to the death of Baha Mousa, who died in a military prison in Iraq in British custody, that his death took place within the jurisdiction of the United Kingdom so as being capable of falling within the scope of the European Convention and the Human Rights Act.
30. Since it may be difficult to prosecute individuals in relation to some deaths in military custody (as it is for those in civilian custody), existing remedies may not satisfy Article 2 of the Convention. We therefore recommend that consideration be given both to providing that the clause 10 exception does not apply to deaths in military custody, and to extending the extra-territorial jurisdiction of the Act to military custodial facilities under British control in foreign territory.
- **The Government should ensure that the provisions do not prevent prosecutions of individuals for alongside the corporation when this is appropriate**
31. In principle, the liability of a corporation for a homicide offence, in our view, should not result in automatic impunity for individuals who bear criminal responsibility for a

²² [2005] EWCA Civ 1609.

death. We believe that in a corporate context, the threat of individual prosecution for corporate officers may be the most effective deterrent against poor health and safety practices. The government should therefore ensure that the Bill does not prevent the prosecution of an individual alongside, or in addition to, a corporation in relation to a death – for example, for a health and safety offence.

32. S37 of the Health and Safety at Work Act 1974 provides a precedent for liability where an offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a corporate officer. However, we do not consider that this test is suitable for a corporate manslaughter offence. We are concerned that reliance on ‘neglect’, in particular, may be a somewhat low test for liability for a homicide offence, with the attendant consequences in terms of stigma as well as potentially, in sentencing. A person should not, we believe, be convicted of corporate manslaughter without having himself been grossly negligent.
33. In our response to the Law Commission’s consultation paper *A New Homicide Act for England and Wales?*²³, we said that ‘conduct causing another’s death should be manslaughter if: the defendant owed a duty of care to the victim in the circumstances, a real risk that the conduct would cause death would have been obvious to a reasonable person in the defendant’s position, the defendant had the capacity to appreciate the risk and the defendant’s conduct fell far below what could reasonably be expected of him in the circumstances.’ This should also apply to individuals in the corporate setting.
34. However, we are concerned that the current legal regime does not make corporate officers sufficiently accountable for loss of life. We understand that the Health and Safety Commission will be reporting to the DWP in December as to when it considers that legal duties should be imposed on directors in relation to safety.²⁴ We await this report with interest. We also recommend that where the facts of a corporate manslaughter case disclose serious failings by a director, disqualification proceedings should be pursued after the prosecution.

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²³ Law Com CP No 177; cf JUSTICE, *Response to Law Commission Consultation No. 177 A New Homicide Act for England and Wales?*, May 2006, www.justice.org.uk.

²⁴ Cf HC 540-II, *Memorandum submitted by the Centre for Corporate Accountability*.