

*These notes refer to the Corporate Manslaughter and Corporate Homicide Bill as brought from the House of Commons on 5th December 2006 [HL Bill 19]*

# **CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Corporate Manslaughter and Corporate Homicide Bill as brought from the House of Commons on 5th December 2006. They have been prepared by the Home Office in order 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 Parliament.

2. These notes need to 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 clause does not seem to require any explanation, none is given.

### **SUMMARY**

3. The Bill makes provision for a new offence of corporate manslaughter (to be called corporate homicide in Scotland) and for this to apply to companies and other incorporated bodies, Government departments and similar bodies and police forces. The Bill has 23 clauses and 2 Schedules.

4. Clause 1 defines the offence and identifies the sorts of organisation to which it will apply. The effect of clauses 2 to 7 is to identify the sort of activities covered by the new offence, and to specify certain functions performed by public authorities in relation to which the offence will not apply. Clause 8 outlines factors for the jury to consider when assessing an organisation's culpability. Clause 9 makes provision for remedial orders to be made on conviction.

5. Clauses 10 to 12 deal with the application of the offence to the Crown and police forces, where a number of provisions are required to reflect the particular status of Crown bodies and police forces. Clauses 13 and 14 make further supplemental provision to ensure that rules of procedure, evidence and sentencing apply to Crown bodies and police forces and

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to set out where liability will fall following machinery of Government changes or other cases where functions are transferred.

6. Clauses 15 to 17 deal with a number of ancillary matters, requiring the consent of the Director of Public Prosecutions to commence proceedings in England and Wales or Northern Ireland, precluding the prosecution of individuals as secondary participants in the new offence and abolishing the current law under which companies and other corporate bodies can be prosecuted for manslaughter on the basis of gross negligence. The remainder of the clauses in the Bill, 18 to 23, cover general points including the procedure for amending the list of Government departments and other bodies in Schedule 1, extent and jurisdiction.

7. The Schedules to the Bill set out the Government departments and other similar bodies to which the offence will apply and a number of minor and consequential amendments.

## **BACKGROUND**

8. It is currently possible for a corporate body, such as a company, to be prosecuted for a wide range of criminal offences, including manslaughter. To be guilty of the common law offence of gross negligence manslaughter, there must have been a gross breach of a duty of care owed to the victim. The prosecution of a company for manslaughter by gross negligence is often referred to as “corporate manslaughter”. As the law stands, before a company can be convicted of manslaughter, a “directing mind” of the organisation (that is, a senior individual who can be said to embody the company in his actions and decisions) must also be guilty of the offence. This is known as the identification principle. Crown bodies (those organisations that are legally a part of the Crown, such as Government departments) cannot currently be prosecuted for criminal offences under the doctrine of Crown immunity. In addition, many Crown bodies, such as Government departments, do not have a separate legal identity for the purposes of a prosecution.

9. In 1996 the Law Commission’s report “Legislating the Criminal Code: Involuntary Manslaughter” (Law Com 237) included proposals for a new offence of corporate killing that would act as a stand-alone provision for prosecuting companies to complement offences primarily aimed at individuals. The Law Commission’s report, including its proposals on corporate killing, provided the basis for the Government’s subsequent consultation paper in 2000 “Reforming the Law on Involuntary Manslaughter: the Government’s Proposals”. These papers, and a summary of responses to the consultation paper, are available on the Home Office website ([www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)).

10. A draft Corporate Manslaughter Bill (Cm 6497) was published in March 2005. This set out the Government’s proposals for legislating for reform and proposed an offence based on the Law Commission’s proposals, with some modifications, including the application of the new offence to Crown bodies. The draft Bill was subject to pre-legislative scrutiny by the Home Affairs and Work and Pensions Committees in the House of Commons that autumn.

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Their report was published in December 2005 (HC 540 I-III) and the Government responded in March 2006 (Cm 6755).

11. Although Scots criminal law on culpable homicide differs from the law of manslaughter elsewhere in the UK, the same issues of identifying a directing mind have arisen in Scotland. In 2005 the Scottish Executive established an Expert Group to review the law in Scotland on corporate liability for culpable homicide. The Group reported on 17th November 2005 and the report and other papers are available on the Scottish Executive website ([www.scotland.gov.uk](http://www.scotland.gov.uk))

## **TERRITORIAL EXTENT**

12. The Bill extends to the whole of the UK. Some provisions are, by their nature, only relevant to some parts of the UK.

13. The Bill is essentially concerned with health and safety, which is not a devolved matter in Scotland. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if amendments were introduced that related to such matters the consent of the Scottish Parliament would be sought for them.

## **COMMENTARY ON CLAUSES**

### **Clause 1: The offence**

14. *Clause 1(1)* defines the new offence, which will be called corporate manslaughter in England and Wales and Northern Ireland and corporate homicide in Scotland. The new offence builds on key aspects of the current common law offence of gross negligence manslaughter in England and Wales and Northern Ireland, described in paragraph 8 above. However, rather than being contingent on the guilt of one or more individuals, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run. In summary, the offence is committed where, in particular circumstances, an organisation owes a duty to take reasonable care for a person's safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the person's death. How the activities were managed or organised by senior management must be a substantial element of the gross breach.

15. The elements of the new offence are:

- The organisation must owe a "relevant duty of care" to the victim. The relevant duties of care are set out in clause 2.

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- The organisation must be in breach of that duty of care as a result of the way in which the activities of the organisation were managed or organised. This test is not linked to a particular level of management but considers how an activity was managed within the organisation as a whole. *Clause 1(3)* stipulates that an organisation cannot be convicted of the offence unless a substantial element of the breach lies in the way the senior management of the organisation managed or organised its activities.
- The way in which the organisation’s activities were managed or organised (referred to in these notes as “the management failure”) must have caused the victim’s death. The usual principles of causation in the criminal law will apply to determine this question. This means that the management failure need not have been the sole cause of death; it need only be a cause (although intervening acts may break the chain of causation in certain circumstances).
- The management failure must amount to a gross breach of the duty of care. *Clause 1(4)(b)* sets out the test for whether a particular breach is “gross”. The test asks whether the conduct that constitutes the breach falls far below what could reasonably have been expected. This reflects the threshold for the current offence of gross negligence manslaughter. *Clause 8* sets out a number of factors for the jury to take into account when considering this issue. There is no question of liability where the management of an activity includes reasonable safeguards and a death nonetheless occurs.

16. *Clause 1(2)* sets out the sort of organisation to which the new offence applies. In the first place, this is corporations. These are defined as any body corporate, whether incorporated in the UK or elsewhere. This includes companies incorporated under companies legislation, as well as bodies incorporated under statute (as is the case with many non-Departmental Public Bodies and other bodies in the public sector) or by Royal Charter. However, the definition specifically excludes corporations sole, which cover a number of individual offices in England and Wales and Northern Ireland.

17. The term “senior management” is defined in *clause 1(4)* to mean those persons who play a significant role in the management of the whole or a substantial part of the organisation’s activities. This covers both those in the direct chain of management as well as those in, for example, strategic or regulatory compliance roles.

18. The Bill also binds the Crown and will apply to a range of Crown bodies such as government departments. Crown bodies rarely have a separate legal personality. Where they do, the application of the offence to corporations (and the Bill’s application to the Crown) means that the offence will also apply to these bodies. Where they do not, a mechanism is required to identify which Crown bodies are covered by the offence and this is achieved by applying the offence to a list of government departments and other bodies set out in Schedule 1. *Clause 18* sets out the procedure for amending the Schedule.

19. The new offence will be triable only in the Crown Court in England and Wales and Northern Ireland and the High Court of Justiciary in Scotland. These represent equivalent levels of court and involve proceedings before a jury. The sanction is an unlimited fine (*clause 1(6)*), although *clause 9* makes provision in addition for remedial orders.

## **Clause 2: Meaning of “relevant duty of care”**

20. The new offence only applies in circumstances where an organisation owed a duty of care to the victim under the law of negligence. This reflects the current position under the offence of gross negligence manslaughter and, by defining the necessary relationship between the defendant organisation and victim, sets out the broad scope of the offence. Duties of care commonly owed by corporations include the duty owed by an employer to his employees to provide a safe system of work and by an occupier of buildings and land to people in or on, or potentially affected by, the property. Duties of care also arise out of the activities that are conducted by corporations, such as the duty owed by transport companies to their passengers.

21. *Clause 2(1)* requires the duty of care to be one that is owed under the law of negligence. This will commonly be a duty owed at common law, although in certain circumstances these duties have been superseded by statutory provision. For example, in the case of the duty owed by an occupier, duties are now owed under the Occupiers' Liability Acts 1957 and 1984 and the Defective Premises Act 1972 (and equivalent legislation in Northern Ireland and Scotland), although the common law continues to define by whom and to whom the duty is owed. In some circumstances, liability in the law of negligence has been superseded by statutory provision imposing strict liability, for example, the liability of carriers is governed by the Carriage of Air Act 1961. *Clause 2(3)* makes provision for the offence to apply in these circumstances too. The clause also, in *subsection (5)*, makes it clear that the application of the offence is not affected by common law rules precluding liability in the law of negligence where people are jointly engaged in a criminal enterprise (an aspect of the rule referred to by the Latin maxim “*ex turpi causa non oritur actio*”) or because a person has accepted a risk of harm (“*volenti non fit injuria*”).

22. *Clause 2(1)* requires the duty of care to arise out of certain specific functions or activities performed by the organisation. The effect is that the offence will only apply where an organisation owes a duty of care:

- to its **employees or to other persons working for the organisation**. This will include an employer's duty to provide a safe system of work for its employees. An organisation may also owe duties of care to those whose work it is able to control or direct, even though they are not formally employed by it. This might include contractors, secondees, or volunteers. The new offence does not impose new duties of care where these are not currently owed. But where such duties are owed, breach of them can trigger the offence.

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- as **occupier** of premises (which is defined to include land). This covers organisations' responsibilities to ensure, for example, that buildings they occupy are kept in a safe condition.
- when the organisation is **supplying goods or services**. This will include duties owed by organisations to their customers and will cover, for example, duties owed by transport providers to their passengers and by retailers for the safety of their products. It will also cover the supply of services by the public sector, for example, NHS bodies providing medical treatment.
- when **constructing or maintaining buildings, infrastructure or vehicles etc or when using plant or vehicles etc**. In many circumstances, duties of care owed, for example, to ensure that adequate safety precautions are taken when repairing a road or in maintaining the safety of vehicles etc will be duties owed by an organisation in relation to the supply of a service or because it is operating commercially. But that may not be apt to cover public sector bodies in all such circumstances. These categories ensure that no lacuna is left in this respect.
- when carrying out **other activities on a commercial basis**. This ensures that activities that are not the supply of goods and services but which are still performed by companies and others commercially, such as farming or mining, are covered by the offence.

23. The effect is to include within the offence the sort of activities typically pursued by companies and other corporate bodies, whether performed by commercial organisations or by Crown or other public bodies. Many functions that are peculiarly an aspect of government are not covered by the offence because they will not fall within any of the categories of duty of care in this clause. In particular, the offence will not extend to circumstances where public bodies perform activities for the benefit of the community at large but without supplying services to particular individuals. This includes wider policy-making activities on the part of central government, such as setting regulatory standards and issuing guidance to public bodies on the exercise of their functions. It also includes a number of front line activities such as holding prisoners in custody or statutory inspection and enforcement. In many circumstances, duties of care are unlikely to be owed in respect of such activities in any event, and they will remain subject to other forms of public accountability. Clauses 3 to 7 provide that the offence does not apply to the performance of specified public functions. However, whether the offence is capable of applying in any given circumstances will depend in the first place on whether a duty of care is owed to a person by an organisation, and whether the duty of care is a "relevant duty of care" for the purposes of the Bill.

24. In criminal proceedings, questions of law are decided by the judge, whilst questions of fact, and the application of the law to the facts of the case, are generally for the jury, directed by the judge. *Clause 2(4)* provides that the existence of a duty of care in a particular case is a matter of law for the judge to decide. This reflects the heavily legal nature of the tests relating

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to the existence of a duty of care in the law of negligence. Because the judge will be deciding whether the circumstances of the case give rise to a duty of care, he will need to make certain determinations of fact that are usually for the jury. For example, if considering whether a corporation owes a duty of care as employer, the judge will need to decide whether the victim was an employee of the corporation. The questions of fact that the judge will need to consider will generally be uncontroversial and in any event will only be decided by the judge for the purposes of the duty of care question. If they otherwise affect the case, they will be for the jury to decide.

### **Clause 3: Public policy decisions, exclusively public functions and statutory inspections**

25. Clause 3 makes provision specifically to exclude certain matters from the ambit of the offence. *Clause 3(1)* deals with decisions of public policy taken by public authorities. (Public authorities are defined by reference to the Human Rights Act 1998 and include core public bodies such as Government departments and local government bodies, as well as any other body some of whose functions are of a public nature. Courts and tribunals, which are not covered by the new offence, are excluded.) At present, the law of negligence recognises that some decisions taken by public bodies are not justiciable, in other words, are not susceptible to review in the courts. This is because they involve decisions involving competing public priorities or other questions of public policy. This might, for example, include decisions by Primary Care Trusts about the funding of particular treatments. A recent example in which the courts declined to find a duty of care on this basis related to whether the Department of Health owed a duty of care to issue interim advice about the safety of a particular drug. In many circumstances, these sorts of issues will not arise in respect of matters covered by the specified categories of duty within clause 2. And basing the offence on the duty of care should mean that the offence would not apply to these sorts of decision in any event. Clause 3(1) confirms, however, that deaths alleged to have been caused by such decisions will not come within the scope of the offence.

26. *Clause 3(2)* provides for an exemption in respect of intrinsically public functions. In many circumstances, functions of this nature will not be covered by the categories of duty set out in clause 2 (see paragraphs 21 and 22 above). However, it is possible that some such functions will amount to the supply of goods or services or be performed commercially, particularly if performed by the private sector on behalf of the State. For example, whilst holding prisoners in custody would not involve the supply of services, the management of a private prison would be an activity performed commercially. In other circumstances, things done in the exercise of such a function will involve the use of equipment or vehicles. Clause 3(2) therefore also makes specific provision to ensure that an organisation will not be liable for a breach of any duty of care owed in respect of things done in the exercise of “exclusively public functions”, unless the organisation owes the duty in its capacity as an employer or as an occupier of premises. This test is not confined to Crown or other public bodies but also excludes any organisation (public or otherwise) performing that particular type of function. This does not affect questions of individual liability, and prosecutions for gross negligence manslaughter and other offences will remain possible against individuals performing these

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functions who are themselves culpable. The management of these functions will continue to be subject to other forms of accountability such as independent investigations, public inquiries and the accountability of Ministers through Parliament.

27. “Exclusively public functions” are defined in *clause 3(4)*. The test covers both functions falling within the prerogative of the Crown (for example, where the Government provides services in a civil emergency) and *types* of activity that by their nature require a statutory or prerogative basis, in other words, that cannot be independently performed by private bodies. This looks at the nature of the activity involved. It therefore would not cover an activity simply because it was one that required a licence or took place on a statutory basis. Rather, the *nature* of the activity involved must be one that requires a particular legal basis, for example, functions relating to the custody of prisoners (the function of lawfully detaining someone requiring a statutory basis).

28. *Clause 3(3)* provides that an organisation will not be liable in respect of any duty of care owed in connection with the carrying out of statutory inspections, unless the organisation owes the duty in its capacity as an employer or as an occupier of premises. This exemption would cover regulatory activities to ensure compliance with statutory standards: for example, inspection activities by the health and safety enforcing authorities. It is unlikely that these bodies would owe duties of care in respect of such activities or that these activities would be performed commercially; nor would the exercise of these functions amount to the supply of services. It is possible, though, that the carrying out of an inspection might involve the use of equipment, so as to bring *clause 2(1)(c)(iv)* into play. This provision makes explicit that the performance of these functions will fall outside the scope of the offence.

#### **Clause 4: Military activities**

29. *Clause 4* makes provision to exclude certain activities performed by the armed forces. A wide range of operational military activities will be exclusively public functions within the terms of *clause 3(2)* and so exempt from the offence. However, that exemption does not relate to an organisation’s duties as employer or occupier. *Clause 4* provides that certain military activities are exempt in respect of all categories of relevant duty of care. The exemption applies to the conduct, preparation and support of military operations as well as other hazardous and unpredictable circumstances, including peacekeeping operations and operations dealing with terrorism or serious public disorder. The law of negligence already recognises that the military authorities will rarely owe a duty of care in such circumstances. The fact that the Bill will not apply in such circumstances is made explicit on the face of the Bill. In addition, the exemption extends to training exercises that simulate these sorts of operations and to the activities of the special forces.

#### **Clause 5: Policing and law enforcement**

30. *Clause 5* deals with policing and law enforcement activities performed by the police and other law enforcement bodies.



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31. *Subsection (1)* provides an exemption that applies to the police and other law enforcement bodies in respect of all categories of duty of care referred to in clause 2, i.e., including those duties of care owed by an organisation as an employer or the occupier of premises. But this wide exemption is available only in limited circumstances: specifically, operations dealing with terrorism, civil unrest or serious disorder in which an authority's officers or employees come under attack or the threat of attack; or where the authority in question is preparing for or supporting such operations; or where it is carrying on training with respect to such operations. This reflects the approach adopted in the existing law of negligence, which has already recognised that the policing of violent disorder where the police come under attack or the threat of attack will not give rise to liability on the part of an employer. The requirement in *clause 5(2)* that the operations being carried on, or prepared for, or supported, amount to "policing or law enforcement activities" does not mean that only the police can benefit from this exemption: it is potentially available to bodies such as immigration authorities (*clause 5(4)(d)*), and other bodies which in dealing with, say, civil disorder, are exercising functions similar to police functions. But it does mean that organisations that do not carry out policing and law enforcement activities are excluded from the scope of the exemption.

32. *Subsection (3)* confers an exemption that applies to a wider range of policing and law enforcement activities, but not in respect of the duty of care owed as employer (or occupier). The exemption therefore operates to exclude circumstances where the pursuit of law enforcement activities has resulted in a fatality to a member of the public. Many of the activities to which this will be relevant will be ones that are not in any event covered by the offence either because no duty of care is owed or because they do not amount to the supply of services or the activities are exclusively public functions. However, this might not always be the case and some areas may give rise to question. *Subsection (3)* makes it clear that policing and law enforcement activities are not, in this respect, covered by the offence. This will include decisions about and responses to emergency calls, the manner in which particular police operations are conducted, the way in which law enforcement and other coercive powers are exercised, measures taken to protect witnesses and the arrest and detention of suspects. This exemption is not confined to police forces. It extends to other bodies operating similar functions and to other law enforcement activity. For example, it would cover the activities of Her Majesty's Revenue and Customs when conducting investigations and the activities of traffic officers. It also extends to the enforcement of immigration law, which would cover circumstances where, for example, the immigration authorities are taking action to arrest, detain or deport an immigration offender.

33. As with other matters not covered by the Bill, this does not exempt individuals from investigation or prosecution for individual offences, as the Bill does not have a bearing on the question of individual liability.

## **Clause 6: Emergencies**

34. Clause 6 clarifies that the offence does not apply to the emergency services when responding to emergencies. This does not exclude the responsibilities these authorities owe to provide a safe system of work for their employees or to secure the safety of their premises. Emergency circumstances are defined in terms of those that are life-threatening or which are causing, or threaten to cause, serious injury or illness or serious harm to the environment or buildings or other property. However, the exemption does not extend to medical treatment itself, or decisions about this (other than decisions that establish the priority for treating patients). Matters relating to the organisation and management of medical services will therefore be within the ambit of the offence. The exemption also does not apply to duties that arise under clause 2(1)(c) that do not relate to the way in which a body responds to an emergency, for example, duties to maintain vehicles in a safe condition, which will similarly be capable of engaging the offence.

35. The effect of exemption is therefore to exclude from the offence matters such as the timeliness of a response to an emergency, the level of response and the effectiveness of the way in which the emergency is tackled. Generally, public bodies such as fire authorities and the Coastguard do not owe duties of care in this respect and therefore would not be covered by the offence in any event. In some circumstances ambulance services may do. The new offence provides a consistent approach to the application of the offence to emergency services, covering organisations in respect of their responsibilities to provide safe working conditions for employees and in respect of their premises, but excluding wider issues about the adequacy of their response to emergencies.

36. The exemption extends to: fire and rescue authorities in the UK; other bodies responding to emergency circumstances by arrangement with a fire and rescue authority or on a non-commercial basis (such as organisations providing fire and rescue services at an airport under the terms of their aerodrome licence); NHS bodies and those providing ambulance services or the transport of organs or blood under contract to such a body; bodies such as the Coastguard and Royal National Lifeboat Institution; and the armed forces (who may be responding to emergency circumstances in respect of their own activities or providing assistance to civil authorities responding to an emergency). The exemption also applies to organisations carrying out rescue operations in emergency circumstances at sea, and to action taken to comply with safety directions (or taken in lieu of a direction) given by the Secretary of State under the Merchant Shipping Act 1995.

## **Clause 7: Child-protection and probation functions**

37. Clause 7 provides that the offence does not apply in relation to the exercise of specific functions to protect children from harm or in relation to the activities of probation services (or equivalent bodies in Scotland and Northern Ireland). Local authorities and probation services will be covered by the offence in respect of ensuring the safety of their employees or the safety of the premises they occupy. The Bill does not however apply in relation to the

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exercise (or the failure to exercise) by local authorities of a number of specific statutory functions relating to decisions made to safeguard the welfare of children. The Bill also does not apply in relation to the responsibilities of probation boards (or other equivalent public authorities) to supervise offenders or provide accommodation in approved premises. It is unlikely that such bodies would owe a duty of care should a person be killed in connection with such activities (for example, if a child was not identified as being at risk and taken into care and was subsequently fatally injured). This clause makes it clear that such circumstances are not covered by the offence.

### **Clause 8: Factors for jury**

38. Clause 1(4)(b) sets out the test for assessing whether the breach of duty involved in the management failure was gross. The test asks whether the conduct that constitutes this failure falls far below what could reasonably have been expected. Whether this threshold has been met will be an issue for the jury to determine. The existing common law offence of gross negligence manslaughter asks whether the conduct was so negligent as to be criminal.

39. To provide a clearer framework for assessing an organisation's culpability, clause 8 sets out a number of matters for the jury to consider. In particular, these put the management of an activity into the context of the organisation's obligations under health and safety legislation, the extent to which the organisation was in breach of these and the risk to life that is involved. Clause 8 also provides for the jury to consider the wider context in which these health and safety breaches occurred, including cultural issues within the organisation such as attitudes or accepted practices that tolerated breaches. When considering breaches of health and safety duties, juries may also consider guidance on how those obligations should be discharged. Guidance does not provide an authoritative statement of required standards and therefore the jury is not required to consider the extent to which this is not complied with. However, where breaches of relevant health and safety duties are established, guidance may assist a jury in considering how serious this was.

40. These factors are not exhaustive and *clause 8(4)* provides that the jury is also to take account of any other relevant matters.

### **Clause 9: Remedial Orders**

41. In addition to the power under clause 1 to impose an unlimited fine, clause 9 gives the courts a power to order an organisation convicted of the new offence to take steps to remedy the management failure leading to death. It also enables the court to order the organisation to remedy any consequence of the management failure, if it appeared to the court to have been a cause of death. For example, where the management failure related to inadequate risk assessment and monitoring procedures, the consequence of which was inadequate safety precautions resulting in death, the court would be able to order the convicted organisation to improve both the management of risk and the resulting safety precautions. Remedial orders may also require an organisation to address deficiencies in health and safety management that

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lie behind the relevant breach of duty. For example, if the breach is indicative of the organisation and employees generally paying little attention to health and safety management, an order could require the organisation to review and promulgate to staff its health and safety practices.

42. Applications for remedial orders must be made by the prosecution, having consulted any relevant health and safety regulator. The prosecution must set out the proposed terms of the order. The convicted organisation will have an opportunity to make representations to the court about the order. The order must specify how long the organisation has to comply with the required steps. This period can be extended on application. Failure to comply with a remedial order is an indictable offence for which the sanction will be an unlimited fine.

### **Clause 10: Application to Crown bodies**

43. The general presumption is that legislation does not apply to the Crown unless this is explicitly the case. *Clause 10(1)* confirms the Bill's application to the Crown and provides that the immunity that generally prohibits the prosecution of the Crown does not apply for the purposes of the new offence. Taken together, this provision and clause 1 mean that Crown bodies that are either bodies corporate or are listed in Schedule 1 to the Bill are subject to the new offence.

44. The liability of the Crown in the law of negligence is governed by the Crown Proceedings Act 1947. This makes the Crown liable as an employer or occupier and also vicariously liable for the torts of its servants and agents. The new offence is, however, predicated on an organisation owing a personal duty of care to the victim. *Clause 10(2)* bridges this difference by requiring Crown bodies to be treated as owing, for the purposes of the offence, the duties of care that they would owe if they were ordinarily constituted corporate bodies independent of the Crown.

45. *Clause 10(3)* and *(4)* addresses the fact that many of the activities and functions carried out by government departments and other Crown bodies are in law performed by the Crown rather than that 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 might mean that the new offence did not work properly in its application to Crown bodies: conduct relevant to the offence might legally be attributable to the Crown rather than the body concerned and the employer's duty of care might technically be considered to be owed by the Crown rather than by the relevant department. These provisions ensure that the activities and functions of government departments and other Crown bodies can properly be attributed to the relevant body. *Clause 10(5)* ensure that the relevant parts of these provisions apply to Northern Ireland departments, which are corporate bodies and therefore, although Crown bodies, do not need to be listed in Schedule 1 for the offence to apply.

### **Clause 11: Application to armed forces**

46. Clause 11 defines the term “armed forces” used in clauses 4 and 6 of the Bill so that it includes the Royal Navy, Army and Air Force. Clause 11 also addresses the fact that technically members of the armed forces are not employed by the Ministry of Defence. Provision is required in the same way as described in paragraph 43 above to ensure that a duty of care as employer is owed to such personnel by the Ministry of Defence for the purposes of the offence.

### **Clause 12: Application to police forces**

47. As police forces are not incorporated bodies, similar issues arise for the application of the offence to them as with Crown bodies. (This does not apply to police authorities, which are bodies corporate under the Police Act 1996 or the Police (Scotland) Act 1967 and to which the offence therefore applies separately and as for any other corporate body.) Clause 12 therefore makes similar provision to clause 10 and ensures that police officers are to be treated as the employees of the police force for which they work (and are therefore owed the employer’s duty of care by the force); it also makes similar provision in relation to special constables and police cadets, police trainees in Northern Ireland and police officers seconded to the Serious Organised Crime Agency or National Policing Improvement Agency. It also ensures that police forces are treated as occupiers of premises and that other conduct is attributable to them as if they were distinctly constituted bodies.

### **Clause 13: Procedure, evidence and sentencing**

48. Generally, provisions relating to criminal and court procedure, and sentencing, relate to the prosecution of individuals. Many of these will also be applicable to corporate bodies. But some separate provisions have been enacted to cater for the specific position of corporations. For example, section 33 of the Criminal Justice Act 1925 enables a corporation to plead through its representative as it cannot plead in person. It is possible that these provisions, either general or tailored, will not apply to Government departments or other bodies listed in Schedule 1 or police forces because they are not corporate bodies. Clause 13 ensures that for the purposes of the new offence all such provisions apply to those Government departments or other bodies listed in Schedule 1, as well as to police forces, in the same way as they apply to corporations.

49. Clause 13 also enables any necessary modifications to be made to existing provisions by order. For example, a reference in the rules on criminal procedure to a director or the secretary of the corporation would need modification in order to apply to a department or police force. Such orders would be subject to the negative resolution procedure (that is, they will become law after being laid before Parliament for a certain period of time unless specifically annulled).

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50. Similar provision for Scotland can be achieved under the existing powers of the High Court to regulate procedure by Act of Adjournal.

#### **Clause 14: Transfer of Functions**

51. This clause makes provision for cases where functions have been transferred between (or out of) Government departments or other bodies listed in Schedule 1, incorporated Crown bodies or police forces. In summary, prosecutions will generally be commenced, or continued, against the body that *currently* has responsibility for the relevant function. But if the function is transferred out of the public sector entirely, proceedings will generally be against the body by which the function was last carried out. For machinery of Government changes, the effect of this is to place responsibility for defending proceedings with the organisation within which a function currently sits. But in order to retain the Crown's overall liability for proceedings if a function is transferred to a non-Crown body (for example, if a function were privatised), liability remains with the Crown body that previously performed the function.

52. In some circumstances, a different approach might be warranted. For example, where a function transfers between Government departments but there is no corresponding transfer of personnel, it might be more appropriate for the department responsible at the time of the fatality to retain liability. Clause 14 therefore includes provision for the Secretary of State to make an order specifying that liability rest with a different body. Such orders would be subject to the negative resolution procedure.

#### **Clause 15: DPP's consent required for proceedings**

53. The consent of the Director of Public Prosecutions (or DPP for Northern Ireland in the case of that jurisdiction) is needed for proceedings to be instituted. In Scotland all proceedings on indictment are instigated by the Lord Advocate. There is therefore no need for a consent mechanism.

#### **Clause 16: No individual liability**

54. The offence sets out a means of attributing certain failures within an organisation to the organisation itself for the purposes of prosecuting it for manslaughter. It therefore only applies to organisations and does not apply to individuals, be they directors or anyone else within an organisation. Individuals who assist or encourage the commission of an offence can also be convicted of an offence where they have aided, abetted, counselled or procured it or, in Scotland, are guilty art and part. This is known as secondary liability – the person is guilty of the offence itself, but not as the primary offender. Clause 16 expressly excludes secondary liability for the new offence. However, the new offence does not affect an individual's potential liability for any other offences such as the existing common law offence of gross negligence manslaughter, culpable homicide or health and safety offences.

*These notes refer to the Corporate Manslaughter and Corporate Homicide Bill as brought from the House of Commons on 5th December 2006 [HL Bill 19]*

### **Clause 17: Abolition of liability of corporations for manslaughter at common law**

55. Clause 17 abolishes the application of the existing common law offence of gross negligence manslaughter to corporate bodies. Prosecutions for corporate manslaughter would in future fall under this legislation. This clause does not affect the common law offence of culpable homicide in Scotland.

### **Clause 18: Power to amend Schedule 1**

56. This clause sets out the procedure for amending Schedule 1 (the list of Government departments and similar bodies to which the offence applies). Changes that are consequential on machinery of Government changes are to be made by the negative resolution procedure. This includes changes to the name of a particular department, as well as the addition of a department (if the reason for adding it is that it will have functions all of which were previously exercisable by another organisation to which the offence applies) or deletion of a department (again, if the reason is that all of its functions are being transferred to another organisation to which the offence applies, or if the department is being abolished). The effect is that changes which alter the range of activities or functions in relation to which the new offence applies will require a resolution by Parliament before they can come into effect, but otherwise the changes will take effect unless disapproved by Parliament.

### **Clause 19: Orders**

57. Orders under the Act are to be made through secondary legislation. Order-making powers (clauses 13, 14 and 18) provide whether the order is to be made under the negative or affirmative resolution procedure. Clause 19 defines these procedures. The commentary on these clauses above describes the implication of this for each order-making power.

### **Clause 20: Minor and consequential amendments**

58. Clause 20 gives effect to Schedule 2 (see below).

### **Clause 21: Commencement and saving**

59. *Clause 21(1)* provides for the legislation to be brought into force by order - known as a commencement order - made by the Secretary of State. *Subsection (2)* makes it clear that the legislation is not retrospective. *Subsection (3)* makes provision for the existing offence of manslaughter by gross negligence to remain in place in respect of corporations for conduct and events that occur prior to commencement. Proceedings in respect of the existing offence, arising out of conduct and events occurring prior to commencement, will not be affected by the Bill.

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## **Clause 22: Extent and territorial application**

60. Clause 22 deals with extent and territorial application. The Bill extends to the whole of the UK. (Amendments to other legislation have the same extent as the provision they are amending: *clause 22(2)*.)

61. *Clause 22(3)* and *(4)* set out the circumstances in which the courts will have jurisdiction for the new offence. Under section 10 of the Offences Against the Person Act 1861, English courts have jurisdiction in a case of homicide if the injury causing death is inflicted in England and Wales, or in a place where the English courts have jurisdiction (such as on a British ship), even if the death occurs elsewhere. The Bill makes similar provision to this (but on a UK basis reflecting the application of the new offence across the UK), providing for jurisdiction if the harm causing death is sustained in the United Kingdom or other locations where criminal jurisdiction currently extends. *Clause 22(4)* ensures that the offence will still apply if the harm resulting in death is sustained as a result of an incident involving a British ship (or aircraft or hovercraft), but the victim is not on board when he suffers that harm. For example, if a grave safety failing resulted in a ship being wrecked and the passengers being killed by drowning.

## **Clause 23: Short title**

62. The short title of the Bill is the Corporate Manslaughter and Corporate Homicide Bill. This reflects the fact that the offence will be known as corporate manslaughter in England and Wales and Northern Ireland, and corporate homicide in Scotland.

## **Schedule 1: List of Government departments etc**

63. The Schedule sets out the list of Government departments and other similar bodies to whom the offence applies. This does not cover Crown bodies that are incorporated (for example, such as the Health and Safety Commission and Executive) to which the offence applies by virtue of clauses 1(2)(a) and 10(1) without further provision.

## **Schedule 2: Minor and consequential amendments**

64. Schedule 2 updates references to homicide offences in the Coroners Act 1988 to include the new offence and ensures that the term “person” in that Act is wide enough to include organisations capable of committing the new offence but which are not incorporated bodies. The Schedule also updates legislation in England and Wales and Northern Ireland that provides for a case to be retried in certain circumstances following acquittal and for appeals by the prosecution against certain terminating rulings. Currently, those provisions apply to specific, listed offences, including manslaughter (whether by individuals or a corporate body). These lists need amendment to reflect that future manslaughter proceedings against corporations will be for the new offence.



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## **FINANCIAL EFFECTS OF THE BILL**

65. Because the Bill does not introduce any new regulatory burden for industry or the public sector, costs arising from the offence are expected to be small. However, it is possible that organisations may seek legal advice and undertake additional training in preparation for the Bill and estimates of these costs across industry are around £12 million.

66. It is estimated there will be 10 – 13 additional cases of corporate manslaughter/homicide a year following implementation of the offence. Costs of defending these are likely to be around £5 - 6.5 million. The costs of prosecution service preparation for these cases is expected to be £2 – 2.5 million and court costs are expected to be £0.1 – 0.2 million. However, because the offence is aimed at the sort of behaviour which would already be subject to prosecution (either under the existing law of corporate manslaughter or health and safety law), not all of these costs will be in addition to costs currently incurred both by defendants and the Crown. In addition there are likely to be savings as a result of fewer cases of corporate manslaughter failing at court which currently can result in large sums being awarded by the courts to defendants in respect of costs.

## **PUBLIC SERVICE MANPOWER EFFECTS OF THE BILL**

67. It is anticipated that there might be a small increased need for additional staff in the Crown Prosecution Service (CPS) as a result of the increase in the number of referrals and prosecutions taken forward by the CPS. Because it is likely that there will be only a small number of additional cases in Scotland and Northern Ireland a year (2 or 3), the work should be absorbed without the need for additional staff.

## **SUMMARY OF THE REGULATORY IMPACT ASSESSMENT**

68. A regulatory impact assessment (RIA) was published with the draft Bill in 2005 and further comments were sought on the RIA or any other costs identified. An updated RIA has been published with the Bill, including extension to Scotland and Northern Ireland.

69. The offence will apply to all corporate bodies, the Crown and the police. However, the offence does not introduce new standards for the management of health and safety and therefore does not increase regulatory burdens for these organisations.

70. Some costs may be incurred as a result of organisations seeking legal advice or implementing training and there will be some increased costs of criminal trials (as detailed above). These costs are likely to be in total £19.2 – 21.2 million. These costs need to be seen in the light of any savings as a result of fewer workplace injuries and accidents. The cost to society as a whole of workplace accidents and ill-health is estimated to be £20 – 32 billion. It is hoped that the effect of the Bill will be to encourage organisations which are not complying

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with health and safety laws to do so. In particular, it should provide an added incentive to organisations with very poor safety standards to improve. In overall terms, the costs identified with the new offence amount to less than 0.1% of the costs of work-related accidents and ill-health, so even a very small reduction in work-related deaths and injury as a result of better compliance would represent significant savings.

71. On balance, respondents agreed with the Government's assessment in 2005 that there would be little additional cost to those organisations already complying with health and safety, particularly as the offence would be linked to existing health and safety obligations and targeted at the most serious cases.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND**

72. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention (as defined by section 1 of that Act).

73. A statement of Convention compatibility has been signed in respect of the Bill by the Minister of State for the Home Department (Baroness Scotland of Asthal).

74. The Bill raises 3 potential issues under the Convention.

75. The first is whether there is an obligation under Article 2 of the Convention, the right to life, for such an offence to be introduced, making any exemptions from the offence incompatible with the Government's obligations. A recent decision of the Grand Chamber in the case of *Oneryildiz v Turkey* (App. No. 48939/99) suggests that in certain circumstances a criminal remedy must be available in cases of unintentional death. However, this concerned the prosecution of individuals and not legal persons and there is no uniform practice in the rest of Europe in the application of the criminal law to legal persons or emanations of the State. There would not therefore appear to be an obligation under the Convention for States to have an offence of corporate manslaughter.

76. The second issue is whether introducing such an offence, but not applying it to unincorporated bodies, or certain public functions, is discriminatory contrary to Article 14 (taken with Articles 2 and 13). Article 14 prohibits discrimination in the enjoyment of Convention rights on any ground such as sex, race, colour, language, religion or other opinion, national or social origin, association with a national minority, property, birth or other status. Any difference in treatment between those who may or may not be victims of the new offence, depending on whether their death is caused by an incorporated or unincorporated body or by the exercise of functions to which the offence does not apply, would not be a difference based on the personal characteristics of the deceased, but rather the circumstances in which the offence applies. Accordingly, the offence does not appear to engage Article 14.

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If Article 14 were engaged, any difference of treatment is justifiable in light of the different nature of incorporated and unincorporated bodies, as well as the different position of those exercising public functions, including the public policy dimension of the decisions they must take and wider forms of accountability to which they are already subject (such as accountability to Parliament and under the Human Rights Act 1998).

77. The third issue the offence raises is the need for criminal offences to be sufficiently certain (Article 7). The current law of gross negligence manslaughter has been challenged on the basis that the test for criminality – conduct that is sufficiently grossly negligent to be criminal – is not sufficiently certain. The Court of Appeal rejected this challenge in *R v Misra [2004] EWCA Crim2375*. The new offence adopts a test of conduct “far below that which can reasonably be expected of the organisation in question”. The Bill also contains guidance to the jury on factors to consider when assessing this issue and accordingly is considered to be sufficiently certain.

78. Section 75 of the Northern Ireland Act 1998 requires public authorities to have due regard to the need to promote equality of opportunity, and to have regard to the desirability of promoting good relations, between certain categories of people in Northern Ireland. A screening found no evidence of adverse or differential impact of the policy on any of the section 75 categories.

## **COMMENCEMENT**

79. The provisions of the Bill will be brought into force by commencement order (see clause 21(1)).

# **CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL**

## **EXPLANATORY NOTES**

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