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THE CORPORATE MANSLAUGHTER AND HOMICIDE BILL

Summary

The CCA supports the government's intention to reform the law of manslaughter in order to ensure that large organisations can be successfully prosecuted for causing deaths through serious failures.

There is much in this bill that we support – key elements of the legal test, and some removal of crown immunity – however there is much that we do not.

We are very concerned that after twelve years of debate, the Government has brought forward a bill that may well not result in increased accountability of large organisations. This is particularly because of the 'senior manager' test. Unless this aspect of the bill is significantly amended so that the offences can be triggered by failures wider than those carried out by an organisation's senior managers (as currently defined) we fear that this bill may reproduce some of the key problems of existing law in this area, and thus will not succeed in achieving very much.

We are also concerned at the very wide exemptions that exist in the bill – which in particular limit the Bill's application to public bodies. We do not think it is justified that police, prisons, emergency services and child custody services should be immune from prosecution in relation to deaths of members of the public arising from their activities. We also think that the 'duty of care' test should be replaced with a test involving statutory duties.

We are concerned that individual offences for aiding and abetting, and that private prosecutions are prohibited by the bill. We see no reason for prohibiting individual offences and private prosecutions for this area of criminal law, where these are allowed in other areas of criminal law. Equally, we believe the threat of individual accountability by managers and directors of a company will help them focus on their moral and legal obligation to run safe companies, and to take action if they work for a company that might negligently kill people.

What will this new Bill do?

The Bill creates a new offence to be called “Corporate Manslaughter” (in England and Wales) and “Corporate Homicide” (in Scotland).

At present companies can only be prosecuted for the offence of manslaughter if there is sufficient evidence to charge a director or senior manager for the offence of manslaughter¹. If there is insufficient evidence to be able to allege that such an individual caused a death through gross negligence – and hence be charged with manslaughter – the company cannot be separately prosecuted however serious the failures of the company as a whole.

The guilt of the company is also dependent on the guilt of the individual; if the director/senior manager is found not guilty, the company will be automatically acquitted.

The key innovation of the proposed offence is that it separates out the culpability of an individual from that of the company; companies will be able to be prosecuted even though there is insufficient evidence to prosecute a director or senior manager. In broad terms, the new bill allows a company to be prosecuted if:

- There is a ‘relevant duty of care’ between the organisation and the deceased;
- there is a failure in the way any of the organisation’s activities are managed or organised;
- this failure is at a senior manager level;
- this failure amounts to a gross breach of a duty of care;
- this failure causes the death;

Who will be able to commit this offence?

This offence can only be committed by organisations – not individuals.

Whilst under present law the only organisations that can be prosecuted are companies, the new offence will – under quite circumscribed conditions discussed below – be able to be applied to the police, government departments and other crown bodies. This is the first time that crown immunity has been removed for a criminal offence.

To which deaths will this offence apply?

This offence applies to deaths that take place in England, Wales and Scotland. Although, ever since the Law Commission first discussed reform of the law of manslaughter in 1994, it has always been assumed that there would have to be separate legislation for Scotland, this bill applies the offence to deaths throughout Britain.

However, it does not apply to deaths outside Britain, even if the management failure took place in Britain or the death was the result of the conduct of a British company.

¹ In Scotland, the situation is different in that decisions of a group of individuals can result in the prosecution of a company.

What sentences can be imposed?

The principal penalty is an unlimited fine. A court can however impose a “remedy order” upon the organisation.

WHAT DOES THE CCA THINK ABOUT THE BILL?

WHAT DO WE SUPPORT ABOUT THE BILL?

We support the following aspects of the new offence:

- the removal of the need to prosecute an individual before being able to prosecute an organisation
- basing the offence around a test of how well an organisation’s activities are ‘managed and organised’
- defining a “gross” breach of duty as a breach “that falls far below what can reasonably be expected”
- the two factors that a jury *must* take into account when assessing whether or not there has been a gross breach of duty –whether the organisation failed to comply with health and safety law, and if so the seriousness of the failure, and whether the failure created a risk of death.
- the two factors that a jury may take into account – applicable health and safety guidance, and whether there were ‘attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure.’
- the removal of crown immunity so that crown bodies – including departments of government – can be prosecuted.
- allowing the police to be prosecuted

WHAT DO WE NOT SUPPORT ABOUT THE BILL?

➤ **The senior manager test**

For the new offence to be committed, it is not sufficient that the death was caused by a gross breach in the way in which an organisation is organised and managed; the failure must be at a ‘senior manager level.’

A senior manager is defined as a person who plays a “significant role” in either “the making of decisions about how the whole or substantial part of [the organisation’s] activities are to be managed or organised” or in “the actual managing or organising of the whole or a substantial part of those activities.”

In effect, only those failures of the most senior managers of a company will allow a company to be prosecuted for manslaughter. However serious the failures outside of this senior management circle – the company will escape prosecution.

In the CCA’s view the definition is far too restrictive, and could well mean that the same problem that currently exists with the current legal test - the difficulty of prosecuting large companies for gross failures, where such failures must be identified with one or more

controlling minds of the organisation - will be replicated with this new offence. In addition, it provides an incentive for companies to delegate safety responsibilities outside of this small circle 'senior managers' – at the same time that the government is trying to encourage company directors to take more responsibility for safety.

In the explanatory note that goes with the bill the Government indicates that it wants to improve this test – and in the CCA's view it is crucial that it does.

Possible amendments:

- Section 1(1): delete the words "by its senior managers." This would make the offence based on management failure alone, without relation to a tier of individuals, in effect returning to the Law Commission's original formulation. And delete Section 1(3)(a) and Section 2, relating to the definition of senior manager; or
- Redefine the meaning of senior managers so that it encompasses a wider range of managers.

➤ **Exemptions on the application of the new offence**

The Bill contains a number of significant exemptions in the circumstances in which the offence can apply – particularly in relation to the activities of public authorities and crown bodies.

A. Exemption for organisations that do not owe a "duty of care" towards members of the public

For the offence to be committed, there needs to be a "duty of care" relationship between the responsible organisation and the deceased individual. A "duty of care" is a civil law concept used to limit the circumstances in which organisations have to pay compensation. In particular it is used by the courts to restrict the circumstances when public bodies have to pay compensation to members of the public affected by their activities. In the CCA's view, factors that might justify restricting compensation payments should not be used to restrict the application of an offence of manslaughter.

In the CCA's view, the appropriate limiting factor should be whether an organisation has *either* a 'duty of care' relationship *or* a statutory duty towards the safety of a person. The CCA accepts that an organisation should not be subject to prosecution if the law does not already impose one of these duties towards the safety of the person who died.

Unless the existence of a statutory duty can form the basis of a corporate manslaughter prosecution, public bodies – which have duties under section 3 of the Health and Safety at Work Act 1974 towards the safety of members of the public but will often not have a 'duty of care' towards them – will escape prosecution for corporate manslaughter in relation to the death of a member of the public.

Possible amendments:

- Section 1(1)(b), insert after "duty of care" the text: "or statutory duty"; and Section 3 definition needs to be added to define "statutory duty" which should include Health and Safety at Work Act 1974 and other relevant statutory legislation. The phrase "relevant duty of care" is used throughout the bill and will either need to be changed

wholesale (such as to “relevant duty”) or have “or statutory duty” added after each use.

B. Exemption for specified public bodies

The Bill contains a number of explicit exemptions that allow specified public bodies to escape prosecution when their activities cause the death of *members of the public*².

These are:

- the police³;
- prisons⁴;
- fire, rescue and ambulance services whilst responding to emergency services;
- child protection and probation services;

The exemptions about which we are most concerned relate to deaths within prison and at the hands of the police.

However, in addition, whilst the circumstances that could justify a prosecution against emergency or child protection services are likely to be rare, the CCA does not believe that these public bodies should be exempt however grossly negligent their conduct.

Possible amendments:

- Cut the following sections of the Bill – 4(2), 6(3), 7 and 8.

C. Exemption for deaths arising from public policy decision-making

A death that arises out of a decision of a public body concerning the ‘allocation of public resources or the weighing of competing public interests’ will not result in a prosecution under the new bill. It is important to note that such issues of resource allocation and competing interests are not unusual in the management of safety in commercial and industrial contexts – and so we do not accept that such a substantial exemption should be given to public bodies. Furthermore there is no such exclusion in the Health and Safety at Work Act 1974 protecting public bodies from prosecution for a breach of section 3 of the Health and Safety at Work Act 1974; it is surely, therefore, inappropriate for such an exemption to exist for a far more serious offence involving death. It is the CCA’s view that this exclusion sends entirely the wrong message to public bodies and the way in which they make decisions involving the safety of the public.

D. Exemption for unincorporated bodies

The new offence does not apply to unincorporated bodies – like schools and large partnerships (including law firms and businesses). Although the circumstances that would justify prosecution of such a body for manslaughter are likely to be rare, in the CCA’s view, the offence should apply to all employing organisations. The practical difficulties in prosecuting such bodies – which have no distinct legal identity - can be

² These public bodies would however be able to be prosecuted when an employee has died or when a member of the public has died as a result of defects in the building of these public bodies.

³ Through the application of section 6(3).

⁴ Through the application of section 4(2). Another concern is that individual “prisons” are not listed as public bodies that can be prosecuted. As a result, in the event of the death of a prison officer, only the Home Office could be prosecuted. This is likely to be inappropriate since all management decisions will be made at a prison level.

overcome. The Companies Act 1985, for example, allows unincorporated bodies to be prosecuted.

E. Exemption for British companies that cause deaths abroad

Whilst under existing law, British citizens can be prosecuted for causing deaths that take place abroad, the new offence will not apply to deaths abroad even if the management failures that caused the death took place in Britain. The CCA does not believe that British companies should be protected from accountability; such immunity from accountability is not, of course, extended to individual British citizens implicated in deaths that occur abroad..

Proposed amendment:

- An amendment will need to be made to section 22 of the Act.

➤ **Limitation on Private Prosecutions**

In order for a private citizen to initiate proceedings for this offence, s/he must obtain the consent of the Director of Public Prosecutions. The CCA does not accept that this requirement is legitimate for the reasons set out by the Law Commission in its 1996 report on reform to the law of manslaughter:

“[T]he right of a private individual to bring criminal proceedings, subject to the usual controls, is in our view an important one which should not be lightly set aside. Indeed in a sense it is precisely the kind of case with which we are here concerned, where the public pressure for a prosecution is likely to be at its greatest, that that right is most important: it is in the most serious cases such as homicide, that a decision not to prosecute is most likely to be challenged. It would in our view be perverse to remove the right to bring a private prosecution in the very case where it is most likely to be invoked.”

Possible amendments:

- Section 16 should be deleted or changed to remove the requirement for DDP consent .

➤ **No Individual Liability**

The Bill prevents any individual from being prosecuted for “aiding, abetting, counselling or procuring” the commission of an offence of corporate manslaughter or corporate homicide.

Whilst the CCA accepts that no new separate individual offences are appropriate, it is our view that individuals should be able to be prosecuted for the existing offences of ‘aiding and abetting’ etc. We are not aware of other circumstances in which individual liability is excluded in this manner

Possible amendment:

- Delete Section 17 and modify Section 1(5) to address individual penalties.

➤ Sentencing

The principal penalty is an unlimited fine. A court can also impose a “remedy order” upon the organisation.

Sentences for Corporations

In the CCA’s view a judge should have a much wider set of sentencing options that fines and a penalty order in order to be able to address the seriousness of the offence. The government has for several years promised to create a broader set of penalties for corporate offences. The government's report to the Work and Pensions Select Committee scrutinising the 2005 draft corporate manslaughter bill, states (para 49):

“The [Better Regulation Executive] expect to publish their final report this Autumn and the Government will consider the possibility of applying innovative sanctions to the offence of corporate manslaughter in the light of their findings.”

This draft bill would have been an ideal vehicle for fulfilling this commitment. Other jurisdictions have moved ahead to implement a variety of penalties for corporations convicted of criminal offences, which provide excellent models for use in the UK. These include:

- larger fines than currently given for health and safety offences;
- linking fines to a company’s turnover; and
- equity fines which reduce the value of shares in the company (thus preventing the company from passing the cost of large fines to workers, consumers, or to their smaller clients).

Other possible sentences were set out in a European Council recommendation, including:

- prohibition to certain activities, in particular exclusion from doing business with public authorities;
- exclusion from fiscal advantages and subsidies;
- prohibition upon advertising goods or services;
- annulment of licenses; removal of managers;
- appointment of a provisional caretaker management by the judicial authority;
- closure of the enterprise; winding-up of the enterprise;
- compensation and/or restitution to the victim restoration; and
- publication of the decision imposing a sanction or measure.

Sentences for Individuals

CCA does not propose that the individual aiding and abetting offence would carry the same penalty as an individual convicted of the individual manslaughter offence. It should be a lesser offence, but should carry with it a possible custodial sentence, as well as possible disqualification from taking up a directing or managing position within a company. This is consistent with current practice in the UK of using custodial sentences for company officers convicted of serious financial crimes.

➤ Scotland

Ever since the Law Commission first discussed reform of the law of manslaughter in 1994, it has always been assumed that there would have to be separate legislation for Scotland. The sudden decision to include Scotland in this bill raises the question of how the Westminster Parliament can now legislate on corporate homicide, clearly a criminal law issue, where Scotland has long had separate laws and processes from England and Wales. For this reason, CCA questions the soundness of the decision to include Scotland in the scope of the bill.