

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Corporate Manslaughter and Corporate Homicide Bill**

### **Liberty's briefing for Second Reading in the House of Commons**

**October 2006**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

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## Overview

1. Liberty greatly welcomes the proposal for a statutory offence of corporate manslaughter. This Bill provides a long-overdue opportunity for Parliament to fill a significant gap in the criminal law. For too long large organisations have escaped punishment where their gross negligence has killed employees or members of the public. A new offence might provide justice to families who lose loved ones in terrible incidents like the Hatfield derailment, the capsizing of the Herald of Free Enterprise or the many work-place deaths that occur each year. For that it is to be welcomed.

2. Sadly, however, in its current form the Bill would deny justice to families that lose loved ones in circumstances like the tragic cases of Victoria Climbié, Zahid Mubarek, Baha Mousa, Jean Charles de Menezes, Naomi Bryant or the young recruits who died in Deepcut barracks. The Bill is riddled with exemptions and get-out clauses for Government and its agencies, which Liberty believes to be neither acceptable nor necessary. Justice for bereaved families should not depend on who was grossly negligent or what activities they were carrying on at the time. A mother whose son is killed as a result of a grossly negligent decision to allow a dangerous criminal out of prison early has just as much right to justice as a mother whose son is killed by the grossly negligent handling of dangerous machinery in a factory. For all the Government's talk of victims' rights, this Bill shows scant regard for those victims who die as a result of the Government's own gross negligence or that of its agencies.

3. We urge Parliament to insist of the removal of the inequalities, unfairness and injustice that would be created by the many exemptions and immunities in the Bill. We also urge Parliament to ask itself whether, in practice, the statutory offence it creates will be effective in protecting life; whether it will provide a satisfactory deterrent against criminally careless practices that kill. Liberty fears that, in its current form, the answer must be "no". As we explain, in order to create a realistic prospect of conviction, the senior manager test must be removed. More thought must also be given to the punishments that can be imposed on guilty companies and to the inclusion of appropriate sanctions for senior individuals who should be personally

culpable for contributing to the company's gross negligence. Without this, the risk of prosecution will be no more than a financial risk to be balanced in the accounts.

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## **Effectively Protecting Life: A Statutory Offence of Corporate Manslaughter**

4. The aims of this important Bill are to protect life and to provide justice to bereaved families and society as a whole where life is wrongly taken. The great value of life is self-evident and clearly reflected in the post-War human rights framework. The substantive rights in the European Convention on Human Rights begin with the unequivocal statement that:

*“Everyone’s right to life shall be protected by law”.*<sup>1</sup>

Long before the Convention was agreed, the offences of murder and manslaughter or homicide had been features of criminal laws throughout the world. These targeted criminal offences have served to protect life by acting as a clear sign that the taking of life is unacceptable, the threat of a conviction and punishment acting as a powerful deterrent.

5. The law in the UK has, however, failed to provide universal legal protection for the right to life. Organisations, as opposed to individuals, responsible for the wrongful killing of their employees or members of the public are most likely to get off scot-free or at the most with a minor health and safety conviction. The offence of corporate manslaughter developed by the courts has been ineffective, and it has been impossible to use it to hold large organisations to account.<sup>2</sup> Of the 34 work-related manslaughter cases brought since 1992, only seven prosecutions have succeeded (all against very

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<sup>1</sup> Article 2(1)

<sup>2</sup> The main difficulty with the current common law offence arises from the “identification principle”. This means that a company cannot be convicted for gross negligence manslaughter unless an individual, who can be identified as the ‘directing mind’ of the company, is individually guilty of the gross negligence which resulted in the death in question. A ‘directing mind’ is an individual in the company who is sufficiently senior to be ‘identified as the embodiment of the company itself’.<sup>2</sup> It has proved very difficult to identify a ‘directing mind’ in all but the smallest of companies. Complex management structures and the delegation of responsibilities in larger companies make it less likely that an individual can be identified as embodying a company in his or her actions or decisions.

small companies or sole traders). The unsuccessful prosecutions of companies believed to be responsible for large-scale disasters have enraged the public. Examples include the Southall rail crash and the failed prosecution of Great Western Trains;<sup>3</sup> the Hatfield derailment and the failed prosecution of Railtrack and Balfour Beatty;<sup>4</sup> and the capsizing of the Herald of Free Enterprise. Add to these cases the numerous workplace deaths and high-profile deaths at the hands of state agents or due to their carelessness and there emerges a substantial gap in the extent to which everyone's right to life is currently protected by the criminal law in the UK.

6. This Bill provides an important and long-overdue opportunity to fill this gap. It aims to enable more prosecutions to proceed by tackling the difficulties with the common law offence. It is regrettable that the introduction of this Bill has taken so long. In the last ten years we have had a Law Commission report on the subject,<sup>5</sup> private member's Bills,<sup>6</sup> a Government consultation paper,<sup>7</sup> Select Committee recommendations<sup>8</sup> and a draft Bill subject to pre-legislative scrutiny.<sup>9</sup> It is nearly ten years since the Government made a manifesto commitment to create a statutory offence of corporate manslaughter. This important Bill has consistently slipped-down the legislative agenda, supplanted by a constant stream of knee-jerk criminal justice, terrorism and asylum bills.

7. Parliament should now seize this opportunity to create an offence that is effective in protecting life and in holding organizations to account where their gross negligence kills. Many changes need to be made to the current Bill to achieve this. Most notably, exemptions need to be removed so that government departments and

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<sup>3</sup> In September 1997, a high speed train from Swansea collided into a freight train at Southall. Seven people were killed and over 150 injured.

<sup>4</sup> In October 2000, four people died and more than 100 passengers and staff were injured when a high-speed GNER train travelling at 115mph from London to Leeds was derailed by a broken rail near Hatfield, Hertfordshire.

<sup>5</sup> Law Commission, *Legislating the Criminal code: Involuntary Manslaughter: Item 11 of the Sixth Programme of Law Reform: Criminal Law: Report No 237*, HC (1995-96) 171, pp 127-131

<sup>6</sup> Corporate Homicide Bill [Bill 114 [1999/2000]] (Mr Andrew Dismore)

<sup>7</sup> Paras 3.4.13 and 3.2.8

<sup>8</sup> Work and Pensions Committee, Fourth Report of Session 2003-04, *The Work of the Health and Safety Commission and Executive*, HC 456-I, para 53

<sup>9</sup> Home Office, *Corporate Manslaughter: The Government's draft Bill for Reform*, Cm 6497, March 2005; Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I; Home Office, *The Government Reply to the First Joint Report from the Home Affairs and Work & Pension Committees*, March 2006, Cm 6755

agencies are not immune from the threat of prosecution, and so that no parent is denied justice purely because of the identity of their child's killer.

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### **The Equal Value of Life: Exemptions from the Offence**

8. The Government has made much of the fact that the Bill removes Crown immunity.<sup>10</sup> It describes this as a recognition that Government also needs to “be clearly accountable where management failings on its part lead to death”.<sup>11</sup> The removal of Crown immunity is an important and welcome step. Sadly, however, Crown immunity has effectively crept back into the Bill by the back door in the years since Government first stated its intention to remove it. As the Home Affairs and Work and Pensions Committees explained:

“We welcome the proposal to remove Crown immunity for the offence of corporate manslaughter. However, we consider that the force of this historic development is substantially weakened by some of the broad exemptions included in the Bill”.<sup>12</sup>

The Bill is riddled with exemptions and immunities, most of which apply to the actions of public bodies.<sup>13</sup> The Government seems to have drawn up a list of all the circumstances in which its gross negligence could cause death and has asked its lawyers to provide a get-out clause for every one of them. Before considering the various exemptions in more detail, we explain why they are both inappropriate and unnecessary.

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<sup>10</sup> According to the legal doctrine of Crown immunity, unless Parliament intends otherwise, onerous legislation does not apply to the Crown (on the basis that legislation is made by the Sovereign in Parliament for the regulation of Her subjects, not Herself). The Crown for this purpose is not limited to the monarch personally, but extends to all bodies and persons acting as servants or agents of the Crown, whether in its private or public capacity, including all elements of the Government, from ministers of the Crown downwards.

<sup>11</sup> *Draft Corporate Manslaughter Bill*, para 38

<sup>12</sup> *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 204

<sup>13</sup> The range of exemptions included in the Bill has been much extended since the Committees reached the above conclusion.

9. It is obvious why the Government would prefer to avoid the embarrassment and public scrutiny that would follow from a corporate manslaughter prosecution. It is far less obvious how one could explain to the mother of a child, killed by the state's gross negligence, why she should not receive justice, why a Government department or agency should get off scot-free when a private body making the same mistakes would be prosecuted. Even if it were established beyond reasonable doubt that gross negligence by the agencies involved had killed their children or parents, there would be no chance of a prosecution under this Bill for the families of Victoria Climbié, Zahid Mubarek, Baha Mousa, Jean Charles de Menezes, Naomi Bryant or the young recruits who died in Deepcut barracks. Justice for bereaved families should not depend on who was grossly negligent or what activities they were carrying on at the time. A mother whose son is killed as a result of a grossly negligent decision to allow a dangerous criminal out of prison early has just as much right to justice as a mother whose son is killed by the grossly negligent handling of machinery in a factory.<sup>14</sup> She might well have felt less injustice if no corporate manslaughter offence had been created at all.

10. The many immunities in the Bill offend not only our sense of decency and justice; but also two important constitutional principles, reflected in the post-War human rights framework, with roots stretching much further back into our history. The "Rule of Law" has long been a defining feature of the British constitution and that of other civilised countries around the world. A key element of the rule of law is equality before the law which Dicey, one of our most eminent constitutional lawyers, described as meaning that:

"With us, every official, from the Prime Minister down to a Constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".<sup>15</sup>

Those who are in positions of power are not above the law, but subject to the same law as the rest of us. The inequality of impunity for such bodies is unfair and can

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<sup>14</sup> Article 14 of the European Convention also expressly guarantees non-discrimination in the protection of the human rights the Convention contains, including the right to life.

<sup>15</sup> Dicey, *Law of the Constitution*, 10<sup>th</sup> edition 1959, 189

bring the law into disrepute: if the Home Office can kill without being punished why shouldn't large companies be able to do likewise?

11. The second principle offended by the exemptions in the Bill is the concept that all individuals should have the equal protection of the law. Article 2 of the European Convention requires "everyone's" life to be protected by law. It does not require "almost everyone's" life to be so protected. All life is important and deserves legal protection. The protection you receive from the criminal law should not depend on whose carelessness puts your life at risk (a public body or a private company) or what they are doing at the time.

12. The Government has argued that the immunities are needed because of "important differences between public bodies and bodies in the private sector". It states that it only intends to create a level playing field "between public and private sectors" in areas where they perform the same roles.<sup>16</sup> The Government has sought to argue that it should be immune from prosecution because the "very broad and often unique responsibilities of public bodies raise more difficult questions for accountability that affect the public"; because public bodies frequently operate under a framework of statutory duties which require them to perform functions; because they must often allocate resources between competing public interests with little (if any) option of deciding not to perform particular activities; and because their functions must be carried out in the wider public interest".<sup>17</sup>

13. Liberty is not convinced by these arguments for the following reasons:

- Life should be accorded the same degree of legal protection, and the bereaved the same degree of justice, regardless of what kind of body is responsible for a killing and what kind of function they were performing at the time.
- It is true that public bodies and agencies perform some functions which other bodies do not; but this does not explain why they should be allowed to perform those functions in a grossly negligent way with impunity. Ensuring that no one

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<sup>16</sup> *Draft Corporate Manslaughter Bill*, para 18.

<sup>17</sup> *The Government Reply to the First Joint Report from the Home Affairs and Work & Pension Committees*, March 2006, Cm 6755, p.21



is killed by the grossly negligent performance of its duties must be a priority for Government bodies.

- A manslaughter prosecution for a government body or agency could produce wider public benefits in the form of thorough and open scrutiny.
- The basic offence will only be committed where there has been “gross negligence”, a very high threshold. The Government itself accepts this, explaining:

“[t]he new offence is targeted at the most serious management failings that warrant the application of a serious criminal offence ... The offence is to be reserved for cases of gross negligence, where this sort of serious criminal sanction is appropriate. The new offence will therefore require the same sort of high threshold that the law of gross negligence manslaughter currently requires – in other words, a gross failure that causes death”.

Even without exemptions, Government bodies would only be capable of prosecution where guilty of serious management failings, in which case, as the Home Office comments, “serious criminal sanction is appropriate”.

- Gross negligence is defined as conduct that “falls far below what can reasonably be expected of the organisation *in the circumstances*” [emphasis added].<sup>18</sup> “The circumstances” would require the court to take account of any particular challenges or difficulties facing public sector bodies, such as limited resources or any dangers inherent in the functions performed.

After several months of pre-legislative scrutiny of the draft Bill, hearing evidence from a range of experts and stakeholders, the Home Affairs and Work & Pensions Committees reached the same conclusions:

“We are very concerned by the exemption for exclusively public functions and are not convinced by the Government's arguments for including in the Bill a blanket exemption for deaths resulting from the exercise of public functions. We do not consider that there should be a general exception under this heading since bodies exercising such public functions will still have to

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<sup>18</sup> Clause 1(3)(a)

satisfy the high threshold of gross breach before a prosecution can take place, namely that the failure must be one that "falls far below what could be reasonably expected." We do not consider that a private or a Crown body should be immune from prosecution where it did not meet this standard and as a result, a death occurred.”<sup>19</sup>

14. The Government has also sought to justify the various immunities in the Bill on the basis that other accountability mechanisms are available and would be more appropriate than criminal prosecution. These include Ministerial accountability to Parliament, liability under the Human Rights Act, public inquiries and other independent investigations, judicial review and ombudsmen. First, other accountability mechanisms will not exist in all of the situations excluded from the scope of this offence.<sup>20</sup> We do, however, accept that in some cases a corporate manslaughter prosecution may not be the most timely and/or appropriate form of accountability. The public interest in a promptly held inquest or inquiry which reveals how a terrible accident occurred and how similar incidents may be prevented in the future may, for example, outweigh the public interest in a prosecution. This does not, however, mean that a prosecution should be excluded as a possibility. A victim’s family may feel that they cannot move on without a prosecution or the Government may refuse to allow a public inquiry to take place. Instead of exemptions, the Director of Public Prosecutions, when deciding whether it is in the public interest to prosecute a public body for the offence, should take account of other accountability mechanisms and the impact of a prosecution thereon.

15. We also accept that the punishments currently proposed may not be appropriate in the case of a public body. At present, the main sanction would be an unlimited fine which, if imposed on a public body, could impact on its ability to perform important public functions or amount to a pointless exercise of circulating money. The only other sanction that would currently be available is a remedial order. Making such an order against a central government department would put the courts in an awkward

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<sup>19</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 217

<sup>20</sup> The exclusively public function exemption, for example, also applies to private bodies that would not be subject to other forms of accountability.

position – requiring them to tell the Government how to perform its functions. These issues do not, however, justify a blanket exemption from potential liability for the offence. Rather, they demonstrate the need for a more imaginative approach to the available sanctions or an alternative set of sanctions for public bodies. The Government’s original consultation paper had, for example, recommended a separate offence for Crown bodies, carrying declaratory relief only.

16. The following paragraphs describe the various immunities from prosecution and illustrate the kind of cases in which a prosecution might otherwise have been available and appropriate. By including these examples we do not intend to suggest that a corporate manslaughter would have been successful against the agencies involved.

***Public Policy Decisions and Exclusively Public Functions (Clause 4)***

17. Clause 4 of the Bill contains two wide-ranging immunities from liability for the offence:

- Where the death occurs in the context of a decision taken by a public authority as to matters of public policy.
- Where the death occurs in the context of the performance of an exclusively public function, unless relating to employees or the management of property. This is not limited to public authorities and would, for example, apply to privately-run prisons.

Zahid Mubarek’s case (below) is illustrative of the kind of situation covered by the second immunity. The Prison Service could not be prosecuted for and convicted of the offence of corporate manslaughter even it were established that its gross negligence had caused Mubarek’s death.

**Zahid Mubarek**

Zahid Mubarek was beaten to death with a table leg in his cell at Feltham Young Offenders' Institution on Tuesday 21 March 2000. Mubarek’s cellmate Robert Stewart who was known by the Prison Service at the time to be a violent and sometimes racist psychopath committed the murder. The decision of the Prison

Service to place Mubarek and Stewart in the same cell has been severely criticised by an independent inquiry. The Report stated “Had there been effective management from the governor down, and within the wider prison system, the death could have been prevented” and that “Stewart should have stood out from the crowd” and should not have been placed in the same cell as Mubarek.

18. The Government has argued that criminal prosecutions are not necessary in the case of deaths in custody as they are “already subject to rigorous independent investigations through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest.”<sup>21</sup> We do not agree with this position for the reasons set out above. As the Home Affairs and Work & Pensions Committees concluded:

“We believe that there is no principled justification for excluding deaths in prisons or police custody from the ambit of the offence. The existence of other accountability mechanisms should not exclude the possibility of a prosecution for corporate manslaughter. Indeed public confidence in such mechanisms might suffer were it to do so. We are particularly concerned that private companies running prisons or custody suites, which are arguably less accountable at present, would be exempt. Accordingly, we recommend that, where deaths in prisons and police custody occur, they should be properly investigated and the relevant bodies held accountable before the courts where appropriate for an offence of corporate manslaughter.”<sup>22</sup>

### ***Military Activities (Clause 5)***

19. Deaths caused by gross negligence in the course of military operations,<sup>23</sup> when preparing for or supporting such operations and during hazardous training activities are expressly exempted from the offence. The exemption covers the killing of both civilians and members of the armed forces. The following high-profile deaths

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<sup>21</sup> *Draft Corporate Manslaughter Bill*, para 22

<sup>22</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 227

<sup>23</sup> Including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in which members of the armed forces come under attack or face the threat of attack or armed resistance (Clause 5(2))

illustrate why the Ministry of Defence might wish to remain immune to the risk of a criminal prosecution and the public scrutiny that would surround it.

**Baha Mousa**<sup>24</sup>

“It was dawn when the squad of British soldiers raided the Ibn Al Haitham hotel. Baha Mousa's night shift on the reception desk was coming to an end and his father had just arrived to drive him home. The soldiers ordered Baha, 26, to lie on the black tiled floor of the lobby with six other hotel employees, their hands on their heads. Troops searched the building and arrested the staff, driving them off to a British military base in Basra, southern Iraq ... Four days later Baha was dead. When his father, Daoud Mousa ... arrived at the British military morgue to identify his son's body he was confronted with a bruised, bloodied and badly beaten corpse.”<sup>25</sup>

**Deepcut**

Between 1995 and 2002 four young soldiers at Deepcut Barracks in Surrey died of gunshot wounds. The families of Sean Benton, 20, Cheryl James, 18, Geoff Gray, 17, and James Collinson, 17, do not accept the official explanation that they killed themselves and have campaigned for a full public inquiry. After a number of lower-level investigations and inquests, repeated examples of bullying and a failure to learn past lessons at Deepcut were uncovered. A review by Nicholas Blake QC found that some recruits had suffered "harassment, discrimination and oppressive behaviour" and commented that "there was a reluctance by trainees to complain against NCOs; those who did complain about a senior NCO were vulnerable to reprisals and received an ineffective response by their immediate superiors".

20. The Government has argued that this exemption is necessary so as not to adversely affect matters of national security or the defence capability and so that the ability of the Armed Forces to carry out, and train for, combat and other warlike operations is not undermined.<sup>26</sup> For the reasons set out above, we do not believe the

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<sup>24</sup> NB a prosecution for this type of incident would also be impossible due to the limited territorial scope of the Bill.

<sup>25</sup> Extract from *Guardian* reports of incidents leading to Baha Mousa's death: Rory McCarthy, February 21, 2004

<sup>26</sup> *Draft Corporate Manslaughter Bill*, para 40

exemption to be either appropriate or necessary. The duties of care owed by the armed forces, as defined by law, are already framed by reference to the realities of combat and preparation for combat. Furthermore, the nature of the necessarily dangerous activities undertaken by the armed forces would already be recognised by the definition of “gross negligence”. The Bill expressly states that a breach of that duty will only be “gross” where, “*in the circumstances*”, it falls far below what could reasonably be expected. Even if one assumed that the exemption were necessary or appropriate, at present it is too widely drawn. We are particularly concerned that the inclusion of “preparation for any combat operation” might include elements of basic training. The Committees that undertook pre-legislative scrutiny shared these concerns, concluding that the exemption should not be so widely drawn and recommending that preparation for operations should be excluded.<sup>27</sup>

### **Policing, Law Enforcement and Emergency Services (Clauses 6 and 7)**

21. The Bill contains three new, specific exemptions which were not included in the draft Bill:

- First, a blanket exemption for deaths of civilians caused by the gross negligence of the police or other public authorities in the performance of policing or law-enforcement activities.
- Secondly, an exemption for the killing of both members of the public and employees of a police force which occurs in connection with operations or training for dealing with terrorism, civil unrest or serious public disorder in which the police come under attack or face the threat of attack or violent resistance.
- Thirdly, where deaths are caused by the emergency services (widely defined) when responding to an emergency. This exemption only applies where a member of the public is killed. It does not cover the killing of employees.

It would appear that the second exemption was specifically designed to deal with incidents like the killing of Jean Charles de Menezes.

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<sup>27</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 227

**Jean Charles de Menezes**

On Friday 22<sup>nd</sup> July 2005, Jean Charles de Menezes was shot seven times in the head by plain-clothes policemen on a tube train at Stockwell station in South London. Jean was in no way involved in any terrorist activity. Jean's family were not informed about his killing until over 24 hours after it happened and the metropolitan police immediately began briefing the press with 'off the record' statements saying that Jean was a terrorist, that he was acting suspiciously, that he was wearing a bulky coat and that he was challenged but refused to co-operate. All of these statements have turned out to be false. As a result of demands by Sir Iain Blair, the Independent Police Complaints Commission (IPCC) investigation into the killing was delayed for 6 days. Many questions about how this mistake was allowed to happen and about the whereabouts of important evidence remain unanswered.

22. When the Home Affairs and Work & Pensions Select Committees considered the draft Bill, which did not include these exemptions, they concluded:

“We are concerned by the possibility that the inclusion of police and fire operational activities might lead to a culture of risk averseness. However, this could be countered by effective education. We believe that the Bill should be drafted so that emergency services' operational activities are only liable for the offence in cases of the gravest management failings.”<sup>28</sup>

We agree that liability for the offence should only arise from the “gravest of management failings”. An organisation should not be prosecuted for this offence where the failings were minor. We do not, however, believe that this additional exemption is necessary given the already restrictive scope of the basic offence and the requirement of *gross* negligence. As the Committees concluded, any danger of risk-averseness should be addressed by educating those performing these important services about the very limited scope of the offence and by ensuring that they do not commit grave management failings which cause death.

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<sup>28</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 245

## **Child Protection and Probation**

23. The Bill contains another new immunity, not included in the draft. This covers deaths arising from gross negligence in the performance of functions to protect children from harm or in relation to the activities of probation services. For the reasons cited above, we believe this exemption to be neither acceptable nor necessary. The following cases illustrate the kinds of situations where the exemption may apply.

### **Victoria Climbié**

In 2000 Victoria Climbié was tortured to death by her great-aunt, Marie Therese Kouao, and the woman's boyfriend Carl Manning. When Victoria died she had 128 separate injuries on her body, including cigarette burns, scars where she had been hit by a bike chain and hammer blows to her toes. She was also forced to sleep in a bin liner in the bath at the home in Tottenham, north London, where she lived with Kouao and Manning. Victoria was seen by dozens of social workers, nurses, doctors and police officers before she died but all failed to spot and stop the abuse, as she was slowly tortured to death. She was taken into hospital with injuries on a number of occasions and calls were made to her local authority warning of her abuse. Lord Laming's public inquiry into the case concluded that the failings by the agencies involved were a "disgrace".

### **Naomi Bryant**

In August 2005 Naomi Bryant was stabbed to death in her home in Winchester. Her killer, Anthony Rice, was freed on licence nine months before and had been serving a life sentence for violent offences against women. An inquiry by HM Inspectorate of Probation concluded that Mr Rice should not have been released. The report catalogued a "string of deficiencies, in the form of mistakes, misjudgements and miscommunications at various stages throughout the whole process of this case."



## ***Indirect Exemptions***

24. In addition to the express exemptions, clear on the face of the Bill, the Bill contains a number of less obvious get-out clauses, creating significant gaps in the coverage of the offence:

- An organisation can only commit the offence if it owed a “duty of care in negligence” to the deceased.<sup>29</sup> This legal concept is a complicated one and the courts have been reluctant to find that a duty of care in negligence exists in relation to public authorities performing high-risk functions.<sup>30</sup> Accordingly, even if the exemptions were removed, it would often be impossible to prosecute a public body for the offence because no “duty of care in negligence” would exist. The inclusion of the requirement for a duty of care in negligence also causes an unnecessary level of complication to the offence, criticised by the Home Affairs and Work & Pensions Committees.<sup>31</sup> The Law Commission had proposed a much simpler idea that an organisation should be liable for the offence whenever a management failure of the organisation kills an employee or any other person affected by its activities. Surely, every organisation should owe a public duty not to kill a person by their gross negligence.
- Even if a “duty of care in negligence” did exist, an organisation cannot be prosecuted if that duty of care does not arise in one of the limited circumstances set out in sub-clause 3(1)(a) to (c). These circumstances include duties owed by employers to employees, by occupiers of premises and in connection with the supply of goods or services or the carrying on of a range of other functions on a commercial basis. Many circumstances in which a person should owe a duty not to kill another by their carelessness are excluded from this list, making a prosecution impossible. The prison service and most policing would not, for example, be included. This exclusive list is again unnecessary and was severely criticised by the Committees that undertook pre-legislative scrutiny: “If the Government does decide to continue to base the offence on duties of care in

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<sup>29</sup> Clause 3(1)

<sup>30</sup> Because of the risk of facilitating too many damages claims against public bodies, making them risk-averse and causing an unsustainable drain on limited public resources.

<sup>31</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 105

negligence we do not believe the common law concept should be limited by introducing categories where a duty of care must *[sic]* be owed.”<sup>32</sup>

25. Another gap in the protection provided by the offence arises from the definition of the bodies that could be prosecuted. Only “corporations”, bodies listed in the Schedule to the Bill and police forces are covered. Partnerships, sole traders and other unincorporated bodies, such as clubs and associations, are excluded. The decision to exclude unincorporated bodies appears to be a “u-turn” from the original Home Office Consultation document, which argued against “artificial barriers between incorporated and non-incorporated bodies”. The Government has argued that it would not be appropriate to extend the offence to unincorporated bodies because they do not have a distinct legal personality. As a strict matter of company law this is true. We do not, however, consider this to be sufficient reason to leave a gap in protection for those killed by the gross negligence of large unincorporated bodies such as big partnerships of accounting and law firms which, in the public’s perception, do have distinct identities.<sup>33</sup> We are also concerned that this could create an artificial incentive for irresponsible and careless businesses to structure themselves as partnerships rather than companies. Other legislation, like the Disability Discrimination Act 1995, applies to unincorporated bodies showing that liability for such unincorporated bodies is not impossible to achieve.

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### **Will the Bill be Effective?**

26. This Bill provides an important opportunity to protect life, by creating an effective deterrent against gross negligence causing death. It also provides an opportunity to deliver justice for the bereaved relatives of victims killed by corporate gross negligence. These important aims will, however, only be achieved if there is a realistic chance of conviction for the offence and if the sanctions are sufficiently

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<sup>32</sup> Ibid, para 108

<sup>33</sup> In the case of small partnerships or sole traders an individual prosecution for gross negligence manslaughter is likely to be possible.

serious. At present, we doubt whether this would be achieved by the Bill, for the following reasons:

- The requirement that the gross negligence be attributable to a “senior manager” of the company may mean that the offence is no more effective than the current law in facilitating the prosecution of large companies.
- The unimaginative range of sanctions against organisations which mean that the cost of a conviction will merely be passed on to a consumer or shareholder. Unless the sanctions are extended, the risk of a conviction will become simply a potential cost to balance in the accounts.
- The lack of sanctions for directors, individually culpable for contributing to the grossly negligent practices of the organisation that caused death.

### ***Senior Manager Test (Clause 2)***

27. At the core of the proposed new offence is the concept of “management failure” described by the Home Office as:

“an approach that focuses on the arrangements and practices for carrying out the organisation’s work, rather than any immediate negligent act by an employee (or potentially someone else) causing death.”<sup>34</sup>

The Bill only focuses on how the organisation’s activities have been managed or organised by its senior managers –failures lower down in the organisation cannot lead to liability. Management failures that are not the responsibility of an organisation’s “senior managers” are not considered to be at a high enough level within the organisation to render the organisation itself liable. A ‘senior manager’ is defined as a person that plays a significant role in deciding how the whole or a substantial part of its activities are to be managed or organised, or in the actual managing or organising of the whole or a substantial part of those activities.

28. Liberty is concerned that the concept of senior management failure will significantly reduce the effectiveness of the offence. It could mean that larger organisations could escape liability by delegating health and safety management

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<sup>34</sup> Para.14

below senior manager level. It would also mean that the offence would apply differently to small and large organisations:

Gross negligence in the management of a building site controlled by a small company could lead to a successful conviction because those managing the site are likely to be “senior managers” of the company. The site is a “substantial part” of the company’s activities. The same failure at a site controlled by a large company is unlikely to lead to a successful conviction because the managers of the site are unlikely to be “senior managers” of the large company. The site is just one of many for the large company and not a “substantial part” of its activities.

The inclusion of this concept would also replicate the problems with the existing common law offence, with the requirement of identifying a directing mind simply being replaced by that of identifying responsible senior managers.

29. Following severe criticism of the senior management test by the Home Affairs and Work & Pensions Committees, the Government has agreed to reconsider it.<sup>35</sup> The Explanatory Notes to the Bill explain that “[t]he Government is continuing to consider whether this part of the Bill can be improved”.<sup>36</sup> We would suggest a return to the Law Commission’s original proposals, which were much less complicated and likely to be a lot fairer. They focused on gross failures in the way a company’s activities were managed or organised, regardless of the level of management responsible for the failure.

### **Sanctions**

30. The Draft Bill proposes that organisations guilty of corporate manslaughter should be “liable on conviction on indictment to a fine.”<sup>37</sup> Fines are unlikely to constitute an adequate deterrent in many cases, especially where large companies are involved. The risk a fine could be outweighed by higher income achieved, perhaps, by

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<sup>35</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, paras 136 to 169; Home Office, *The Government Reply to the First Joint Report from the Home Affairs and Work & Pension Committees*, March 2006, Cm 6755, pp14 to 15

<sup>36</sup> para 16

<sup>37</sup> Clause 1(5)

cutting corners in health and safety compliance. Furthermore, fines currently imposed on large companies are relatively insignificant and there is nothing in the Bill that would require higher levels of fine to be imposed. In addition, unlimited fines are already available for offences under the Health and Safety at Work Act 1974. The level of fines should be commensurate with the offence, significantly higher than for convictions under the 1974 Act. They should also be linked to the profitability of the company, perhaps 10% of a company's annual turnover, like the fines the Financial Services Authority can impose for financial mismanagement. Companies could also avoid fines by going into liquidation.

31. The draft Bill also proposes that the courts be given the power to make orders requiring convicted organisations to remedy either (a) the gross breach of the duty of care; or (b) any matter resulting from it and appearing to have been a cause of the death.<sup>38</sup> While we welcome the inclusion of remedial orders in the Bill, we note that the Courts already have these powers under the Health and Safety at Work Act, but they appear never to have been used. We are also concerned about the fact that a remedial order would presumably have to wait until a long investigation and complex Crown Court trial has led to conviction. We would stress that the possibility of a punitive order being awarded should not preclude the Health & Safety Executive and local authorities using their existing powers, prior to conviction, to require improvements as a preventative measure.

32. An opportunity has been missed to introduce a wider and more innovative range of penalties that are likely to provide a better deterrent against poor health and safety practices and more effectively to deliver justice to bereaved families. Possible alternatives or additions could include naming and shaming organisations, through publicity in the media and/or by notice or in the company's annual report; confiscation of assets associated with the offending; cessation from any activity in the company until an acceptable plan of action is introduced; equity fines, which would reduce the value of shares in the company which would either go to the Government or into a victims' fund; punitive damages to be paid to relatives of victims; and restorative justice mechanisms.

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<sup>38</sup> Clause 10

### ***Individual Liability***

33. At present the Bill explicitly excludes the possibility of an individual being guilty of aiding, abetting, counselling or procuring the offence of corporate manslaughter.<sup>39</sup> While we would oppose automatic, unfair or overbroad criminal sanctions for individuals in organisations that are guilty of manslaughter, we believe that in some circumstances it would be right for senior officers to bear some responsibility. Imagine, for example, that in order to increase profitability and his/her own bonus, a company director consents to a working practice that s/he knew gives rise to serious and avoidable risks to the lives of employees. An employee is killed as a result. Alternatively, imagine that a senior police officer had connived in fraudulently obtaining weapons handling qualifications for junior officers. The junior officer shoots a member of the public by mistake. Both acts could create a significant risk that a person would die and in each case it would seem unjust for the senior officer or director to escape any personal liability. The threat of some kind of personal liability may have been enough to dissuade the individual from consenting or conniving to the dangerous practice. For the victims' family, justice may not seem to have been done if the culpable individuals get off scot-free. In the senior police officer's case, continued faith in the police service may well require the senior officer to be publicly held to account.

34. The Home Affairs and Work & Pensions Committees considered the question of individual liability and concluded that under the existing proposals there "would be a gap in the law, where individuals in a company have contributed to the offence of corporate manslaughter but where there is not sufficient evidence to prove that they are guilty of individual gross negligence manslaughter."<sup>40</sup> In its 2000 Consultation Paper the Government itself agreed that some form of individual liability would be appropriate, such as disqualification for directors. We note the Government's readiness, in other contexts, to create secondary liability for directors. Section 18 of the Terrorism Act 2006, for example, provides that where a terrorism offence in Part 1

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<sup>39</sup> Clause 17

<sup>40</sup> Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 308

of the Act is committed by a company with “the consent or connivance” of a senior officer in the company “he (as well as the body corporate) is guilty of that offence and shall be liable to be proceeded against and punished accordingly”. Under the Health and Safety at Work Act 1974 relevant officers of a company can also be prosecuted for a health and safety offence which is committed by the company if that offence was the result of the officer’s personal ‘consent’, ‘connivance’ or ‘neglect’.<sup>41</sup> This health and safety offence is punishable with a fine and directors who are guilty can be disqualified from being a company director for up to two years.<sup>42</sup> We see no reason, in principle, why a similar type of individual liability should not be included in this Bill.

**Jago Russell, Liberty**

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<sup>41</sup> Section 37(1). Since 1986 only eight company directors have been disqualified on such grounds.

<sup>42</sup> Company Directors Disqualification Act 1986, section 2(1)