

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Corporate Manslaughter and Corporate Homicide Bill

Liberty's briefing for Report Stage in the House of Lords

January 2007

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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Introduction

1. Liberty greatly welcomes the proposal for a statutory offence of corporate manslaughter. The 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, or the many work-place deaths that occur each year. It could also protect life by making a clear legislative statement that gross negligence that kills will not be tolerated. For this the Bill is to be welcomed.

2. Sadly, 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, Jean Charles de Menezes and Naomi Bryant. The Bill is still riddled with exemptions and get-out clauses for Government and its agencies. As we have explained in more detail in our previous briefings on this Bill, we believe these exemptions 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.

3. In previous briefings we have proposed detailed amendments that would restrict the scope of these many exemptions or, preferably, remove them altogether. We are now focusing on a smaller number of amendments, which focus on the exemptions which have consistently raised concern in the debates in both Houses.

4. We have also produced separate briefing with the Prison Reform Trust, INQUEST and JUSTICE which focuses on the issue of deaths in custody. Bodies that hold people in custody (whether under mental health, immigration or criminal justice powers) have a special legal and moral duty to keep them safe. Where a body's gross negligence kills someone in their custody they should be held to account and bereaved families should not be denied justice.

Amendment 1: The “Relevant Duty of Care” - Limited Categories of Duty (Clause 2)

Clause 2, page 2, lines 21-22, delete “of the following duties” and insert “duty”

Clause 2, page 2, line 22, at end insert “including, but not limited to -”

Clause 2, page 2, line 27, after “supply” insert “or provision”

Effect

5. At present the Bill contains an exclusive list of relationships in which a relevant duty of care might exist.¹ The main effect of this amendment would be to make the list of relationships indicative rather than exhaustive.

Briefing

6. As Mr Grieve MP explained in Committee: “What is ... surprising is that in [Clause 2], the Government appear to be set on limiting the offence by making it lower than the duty of care in negligence that currently exists”.² Even if a “duty of care in negligence” did exist, an organisation could not be prosecuted for this offence if that duty of care did not arise in one of the limited circumstances set out in sub-clause 2(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 gross negligence are excluded from this list, making a prosecution impossible. The prison service and most policing would not, for example, be covered as the prison service and police are not “supplying” anyone with goods or services. A state-run prison would not fall within the heading of “the carrying

¹ Clause 2(1)(c)(i)-(iii)

² Standing Committee B, Thursday 19th October 2006, col 36

on of any other activity” (2(1)(c)(iii)) as they are not carrying on an activity for consideration.

7. This exclusive list of types of relationship is again unnecessary and adds extra complexity to the offence. It was severely criticised by the Committees that undertook pre-legislative scrutiny of the draft Bill.³ In its response, the Home Office accepted that this list was designed to operate, in part, as a means of exempting certain activities of public authorities.⁴ In Grand Committee the Minister appeared to emphasise this:

“It is undoubtedly right that there will be certain activities that are not covered by the heads of activity set out in Clause 2(1)(c), but they will generally relate to matters where a duty of care is not owed or which are covered by exclusions to the offence. For example, regulatory activity on the part of government.”⁵

We do not believe that it is either necessary or acceptable to include exemptions in the Bill for the activities of Government and its agencies. Nevertheless, as we have argued before, if it is decided that exemptions are appropriate, these should be clear on the face of the Bill, rather than resulting from obscure provisions like Clause 2.

8. One of the best examples of obscure provisions like Clause 2 being used to sneak exemptions into the Bill is the Government’s decision to use the phrase “supply of goods or services” rather than “supply or provision”. The select committees which scrutinised this Bill criticised this provision:

“We are particularly concerned that the material accompanying the draft Bill did not highlight the use of the word “supply” and its intended purpose of automatically excluding certain activities “provided” by the state.”⁶

³ Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 108

⁴ *The Government Reply to the First Joint Report from the Home Affairs and Work & Pension Committees*, March 2006, Cm 6755, pp.10-11

⁵ Grand Committee, 15 January 2007, cols 179, 180

⁶ Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 108

It appears that this is exactly why the Home Office has decided not to include the word “provision” in the Bill. In Commons Committee, the Minister stated:

“‘Supply’ is used deliberately in that case; it is intended to cover the relationship between companies and either their customers or those receiving their services ... However, the term ‘providing’ covers a potentially wider range of activity and could include many situations in which no duty of care is owed. For example, it would extend to circumstances in which a service was provided to the public at large, such as when local authorities were working to cut crime. No duty of care is owed in that respect, nor is the activity being supplied.”⁷

Amendment 2: Special Considerations for Jury

(Clause 3: Exclusively public functions, Clause 5: Policing and Law Enforcement, Clause 6: Emergencies, Clause 7: Child Protection)

After Clause 8, insert new clause –

“9 Factors for Jury – Special Considerations

- (1) Subsection (2) shall apply where –
 - (a) it is established that an organisation owed a relevant duty of care to a person,
 - (b) it falls to the jury to decide that whether there was a gross breach of that duty, and
 - (c) that duty was owed in respect of one of the circumstances described in sections [3(2), 5(3), 6 and 7].
- (2) When determining whether there was a gross breach of the “relevant duty of care”, the jury must consider any factor specified in an order made by the Secretary of State which is shown to have affected the way in which the organisation’s relevant activities are managed or organised. An order under this section is subject to the affirmative resolution procedure.”

⁷ Standing Committee B, Tuesday 24th October 2006, col 96

To cover “exclusively public functions” include:

Clause 3, page 3, line 41, delete sub-clause (2) and insert-

“Section [9] shall apply in respect of any relevant duty of care owed in respect of things done in the exercise of an exclusively public function, unless the relevant duty of care falls within section 2(1)(a) or (b).

To cover non-terrorist policing and law enforcement include:

Clause 5, page 4, delete lines 43 to 46

Clause 5, page 5, lines 10 – 12, delete sub-clause (3) and insert -

- “(3) Section [9] shall apply in respect of any relevant duty of care owed in respect of
- (a) training of a hazardous nature, or training carried out in a hazardous way, which it is considered needs to be carried out, or carried out in that way, in order to improve or maintain the effectiveness of officers or employees of the public authority with respect to such operations, or
 - (b) other policing or law enforcement activities, unless the relevant duty of care falls within section 2(1)(a) or (b).

To cover emergency services include:

Clause 6, page 5, line 31, at beginning insert “Section [9] shall apply in respect of”

Clause 6, page 5, lines 32 - 33, delete “is not a “relevant duty of care””

Clause 6, page 6, line 14, at beginning insert “Section [9] shall apply in respect of”

Clause 6, page 6, lines 15 - 16, delete “is not a “relevant duty of care””

To cover child protection and probation functions include:

Clause 7, page 7, delete lines 2 and 3 and insert –

“Section [9] shall apply in respect of any relevant duty of care to which this section applies unless it falls within section 2(1)(a) or (b)”

Effect

9. The Bill would currently exclude deaths arising in various contexts from the scope meaning that no corporate manslaughter prosecution would be possible. It does this because it treats some public functions as “special” or “unusual” in some way involving, for example, difficult public policy or funding issues.

10. This amendment would remove some of these blanket exemptions. In their place the new Section 9 would require the jury to take account of the “special” or “unusual” circumstances in question when deciding whether the behaviour of the body is really “grossly negligent”, whether it has really fallen so “far below what could reasonably be expected *in the circumstances*” that it is criminal. It would require the Government to pass secondary legislation in respect of each of these “special” situations setting out the factors which a jury would be obliged to take into account.

Briefing

11. The Government has made much of the fact that the Bill removes Crown immunity.⁸ It describes this as a recognition that Government also needs to “be clearly accountable where management failings on its part lead to death”.⁹ The removal of Crown immunity is an important and welcome step. Sadly, as the Home Affairs and Work and Pensions Committees explained “the force of this historic development is substantially weakened by some of the broad exemptions included in the Bill”.¹⁰ Crown immunity has effectively crept back into the Bill by the back door. The Bill is riddled with exemptions and immunities, most of which apply to the actions of public bodies.¹¹

⁸ 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.

⁹ *Draft Corporate Manslaughter Bill*, para 38

¹⁰ *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 204

¹¹ The range of exemptions included in the Bill has been much extended since the Committees reached the

12. As we have explained in our previous briefings, Liberty has profound concerns about these many exemptions. We do not believe that justice for bereaved families should depend on who was grossly negligent or what activities they were carrying on at the time. The many exemptions in the Bill offend not only our sense of fairness and justice, but also two important constitutional principles:

- 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 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”.¹² The inequality of impunity for public bodies is unfair and can bring the law into disrepute: if the Home Office can kill without being punished why shouldn’t large companies be able to do likewise?
- The second principle offended by the exemptions 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.

13. We do, however, accept that there are some real and legitimate concerns which underlie the Government’s desire to immunise numerous public activities from prosecutions. It has argued that immunities are necessary because of 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”.¹³ We agree that the organisations concerned

above conclusion.

¹² Dicey, *Law of the Constitution*, 10th edition 1959, 189

¹³ *The Government Reply to the First Joint Report from the Home Affairs and Work & Pension Committees*,

are performing important public services, very difficult jobs often in difficult situations. Of course the prison service should not be convicted whenever a person is killed in custody; police authorities should not be convicted whenever someone is killed during a riot or counter-terrorism operation; and ambulance services should not be prosecuted whenever they don't make it to the scene of an accident in time.

14. This does not, however, mean that a conviction would never be justified in such circumstances – the approach currently taken in the Bill. It means that the nature of the difficult jobs in question must be taken into account when assessing whether it has acted in a grossly-negligent way. We believe that, with appropriate guidance, juries can and should be trusted to make sensible decisions about such matters. They should be able to decide whether there has been a “gross” breach of a duty of care, i.e. whether the way the government body of agency has acted “falls far below what can reasonably be expected of the organisation *in the circumstances*”.¹⁴ Rather than creating broad exemptions, no-go areas for the courts and the criminal law, we should trust juries not to make rash or unreasonable decisions and trust them only to convict public bodies of corporate manslaughter when it is appropriate to do so.

15. This would be the effect of Amendment 2. It would remove a number of the broadest and most worrying exemptions in the Bill:

- For deaths caused by gross negligence in the performance of “exclusively public functions”;¹⁵
- By a public authority in respect of certain policing or law enforcement activities;¹⁶
- By organisations in respect of the way in which it responds to emergency circumstances;¹⁷ and
- By organisations in respect of child protection or probation functions.¹⁸

March 2006, Cm 6755, p.21

¹⁴ Clause 1(4)(b)

¹⁵ Clause 3(2)

¹⁶ Clause 5(3)

¹⁷ Clause 6(1)

New section 9 would instead apply in these contexts. This would recognise that some cases involving public bodies will involve special considerations and would require the jury consideration such a case to take account of these in relevant cases. These special considerations that would have to be taken into account would be specified by order, subject to the affirmative resolution procedure.

16. The importance of this amendment can be clearly seen in the child protection context. Clause 7(2) currently provides immunity from prosecution where a child is killed because a local authority or other public authority is grossly negligent in the performance of some of its child protection functions under the Children Act 1999. Even if a local authority rashly decided to ignore repeated and substantiated claims that a child in their area was suffering serious abuse,¹⁹ it would be impossible to prosecute that authority for corporate manslaughter. A tragic case like that of Victoria Climbié (summarised below) could not, for example, result in a prosecution of the agencies concerned:

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".

The approach currently taken in the Bill cannot be right. In an extreme case, where an organisation's causes a child's death a criminal prosecution of the body concerned could be the only acceptable sanction.

¹⁸ Clause 7(1)

¹⁹ It is required to do this under section 47 of the Children Act 1989

17. Our amendment would make it possible for a jury to convict an organisation where it has been shown that its conduct has fallen far below what could reasonably be expected in the particular context. It does, however, acknowledge that protecting vulnerable children is not an easy job - those charged with responsibility for the care of children are often faced with very difficult situations. They may, for example, be required to balance a possible risk to the safety of a child against the desire not to separate that child from its family. Furthermore, it would not, for example, be fair to prosecute a local authority which simply could not investigate all of the cases which are brought to its attention: due to sheer volume or limited resources. Our amendment does not seek to prosecute individuals who, with the benefit of hindsight, may have reached the wrong conclusion with the result that a child dies. It would require a jury to take account of these wider special considerations when deciding whether the bodies have been grossly negligent.

Amendment 3: Military Activities

Clause 4, page 4, after line 37 insert –

““activities carried on in preparation for, or directly in support of, such operations” does not include training which is not of a hazardous nature or training which does not need to be carried out in a hazardous way in order to improve or maintain the effectiveness of the armed forces with respect to such operations.”

Effect

18. This amendment clarifies that the broad exemptions for military combat activities do not inadvertently also exempt non-hazardous training.

Briefing

19. Deaths caused by gross negligence in the course of military operations,²⁰ when preparing for or supporting such operations and during hazardous training activities are currently expressly exempted from the offence. The exemption covers the killing of both civilians and members of the armed forces. While the Select Committees undertaking pre-legislative scrutiny of the Bill, considered that some exemption for military operations was necessary, they were concerned about the current scope of the exemption:

“Although we recognise the unique position of the armed forces, we consider that the exemption is drawn too widely. We are concerned that “preparation” for combat operations would encompass routine training and believe that such a wide exemption cannot be justified. We therefore recommend that the words “in preparation for” be removed ... so that the exemption is restricted to combat operations and acts directly related to such operations.”²¹

Similar views were expressed in Committee and in Grand Committee²². While an exemption for combat operations was not considered to be controversial, several members considered the extent of the existing exemptions to be a cause for concern.

20. Liberty has raised particular concerns about the fact that the phrase “activities carried on in preparation for ... operations” could exempt non-hazardous training or training which need not be hazardous because all military training could be said to be in preparation for combat operations. Take for example the following hypothetical scenario:

A young soldier is killed during scuba-diving training undertaken in preparation for a military operation (say liberating an oil tanker which has been hijacked by terrorists). The MoD had provided no training to the soldier before he entered the water and no one with appropriate training accompanied the soldier on his

²⁰ 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 4(2))

²¹ Home Affairs and Work & Pensions Select Committees, *Draft Corporate Manslaughter Bill*, 2005-06, HC 540-I, para 239

²² For example, Grand Committee, HL, 17 January 2007, col. 227

first dive. The MoD knew how dangerous its actions were because other recruits trained in the same way had been previously injured.

At present, the MoD could not be prosecuted for the statutory offence even in the situation set out above because the training was “in preparation for” a military operation. Our amendment would enable a prosecution to take place in the scenario above because the recruit could have been trained to scuba dive in a safe way, i.e. by being given prior training. A conviction would not, however, result purely because the MoD had made the soldier do scuba-diving training which is inherently dangerous – the gross negligence in the case would be the unacceptable way in which the training was carried out.

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