House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill

Twenty-seventh Report of Session 2005–06

HL Paper 246
HC 1625

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Report, together with formal minutes and appendix

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Judy Wilson (Inquiry Manager), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

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Report

Summary

The Joint Committee on Human Rights examines Bills presented to Parliament in order to report on any significant human rights implications. With Government Bills its starting point is the statement made by the Minister under section 19 of the Human Rights Act 1998 in respect of compliance with Convention rights as defined in that Act. However, it also has regard to the provisions of other international human rights instruments to which the UK is a signatory.

The Committee publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses. From time to time the Committee also publishes separate reports on individual Bills.

In this Report the Committee comments for the first time on the most significant human rights issues arising from the Corporate Manslaughter and Corporate Homicide Bill, which creates a new offence of corporate manslaughter (corporate homicide in Scotland).

The Committee notes that there is a clear obligation under Article 2 ECHR to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions, and in certain circumstances this obligation requires the State to ensure that recourse to the criminal law is possible against both private and public bodies in serious cases of unintentional deaths.

The state of the current law prevents larger private bodies and a wide range of public bodies from being prosecuted for gross negligence manslaughter. There is therefore a risk that as a result of the deficiencies in the current law the UK will be found to be in breach of the positive obligation in Article 2 in the circumstances of a particular case. In this sense there is in the Committee's view a clear obligation under Article 2 to introduce an offence of corporate manslaughter which would enable recourse to the criminal law against both private and public bodies in circumstances in which it is not possible under the present law but where such recourse would be required under Article 2. The Committee therefore welcomes the objective of the Bill as a human rights enhancing purpose, but has written to the Minister to ask for further explanation of the assertion in the Explanatory Notes that there is no obligation to introduce an offence of corporate manslaughter, given the Government's acceptance of the deficiencies in the current criminal law. (Paragraphs 1.21–1.36)

The Committee welcomes the express application of the new offence to a range of Crown bodies and the express disapplication of Crown immunity from prosecution. Both of these, in principle, are capable of enhancing the compatibility of the UK's law on corporate manslaughter with the positive requirements of Article 2 ECHR. However, it is concerned that the effect of other provisions in the Bill restricting the scope and applicability of the new offence is to give rise to a serious risk that the UK will be found to be in breach of Article 2 ECHR in the particular circumstances of a future case where the case-law of the Court requires that there be recourse to the criminal law. In particular, the effect of these restrictions, exemptions and exclusions in the Bill is to preclude the possibility of prosecution for corporate manslaughter in precisely those contexts in which the positive

obligation in Article 2 is at its strongest, and may require, in a particular case, that criminal prosecutions be brought: the use of lethal force by the police or army; deaths in custody; deaths of vulnerable children who should be in care, to name just a few examples. This would mean, in situations where responsibility for the death lay with the public body for a management failure, rather than any identifiable individual, recourse to the criminal law would not be possible, which is likely to lead, in a sufficiently serious case, to the UK being found to be in breach of its positive obligation under Article 2 ECHR to put in place an efficient and effective system of judicial remedies including, in certain circumstances, recourse to the criminal law. The Committee has written to the Minister to seek further explanation of why in his view the Bill does not give rise to this risk of incompatibility. (Paragraphs 1.37–1.47).

The Committee also considers whether the various restrictions on the scope of the new offence, and exemptions and exclusions from its applicability, are incompatible with the right not be discriminated in the enjoyment of Convention rights under Article 14 ECHR in conjunction with the right to life in Article 2. In the Committee's view, Article 14 is engaged because the various restrictions, exclusions and exemptions give rise to differential treatment of individuals in analogous situations in relation to their access to the criminal law in respect of negligently caused death. The Committee notes that in its Consultation Paper on this subject issued in 2000 the Government accepted that to restrict the scope of the offence by excluding unincorporated bodies "could lead to an inconsistency of approach and these distinctions might appear arbitrary." To avoid that risk of arbitrariness, the Government at that stage proposed that the new offence should apply to "undertakings" which would include unincorporated as well as incorporated bodies. The Committee also notes that in the case-law of the European Court of Human Rights the public nature of a body's function has not been regarded as a reason for excluding criminal liability, but on the contrary has been treated as a factor which strengthens the obligation to ensure that recourse to the criminal law is available. The Committee has written to Minister asking for a more detailed explanation of the Government's justifications (assuming Article 14 to be applicable) for the Bill's differential treatment of unincorporated compared to incorporated bodies and of public bodies compared to private bodies, and for the Government's reasons for not making the offence apply to "undertakings". (Paragraphs 1.48–1.51)

Bills drawn to the special attention of both Houses

Government Bills

1 Corporate Manslaughter and Corporate Homicide Bill

Date introduced to first House	20 July 2006
Date introduced to second House	
Current Bill Number	HC Bill 220
Previous Reports	None

Background

1.1 This is a Government Bill, introduced in the House of Commons on 20 July 2006.[1] The Home Secretary, the Rt Hon John Reid MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes which accompany the Bill set out the Government's view of the Bill's compatibility with Convention rights at paras 77–80. The Bill is due to receive its Second Reading in the Commons on 10 October 2006, and will be carried over to the next Session. The purpose of the Bill is to create a new criminal offence of corporate manslaughter (corporate homicide in Scotland). It was preceded by a draft Bill which was the subject of a pre-legislative scrutiny report by the House of Commons Home Affairs and Work and Pensions Committees.[2]

1.2 This Report provides our views on what we consider to be the three most significant human rights issues raised by the Bill. We have written to the Minister seeking further explanation in relation to these points and we may report again when we receive the Minister's reply.

The effect of the Bill

1.3 The Bill provides for a new offence of corporate manslaughter, and for this new offence to apply to companies and other incorporated bodies, Government departments and similar public bodies, and police forces.

1.4 Clause 1 of the Bill defines the new offence of corporate manslaughter. The new offence is committed where, in particular circumstances, an organisation owes a duty to take reasonable care for the person's safety and the way in which activities of the organisation have been managed or organised by senior managers amounts to a gross breach[3] of this duty and causes the person's death.[4] The purpose of defining the offence in this way is to build on the current common law of gross negligence manslaughter, but to make corporations, and certain Crown bodies, liable for the way in which the organisation's

1 HC Bill 220.

2 Home Affairs and Work and Pensions Committee, First Joint Report of Session 2005-06, *Draft Corporate Manslaughter Bill,* HC 540-I.

3 The Bill sets out factors for the jury to consider when deciding whether there was a gross breach of a duty of care.

4 Clause 1(1).

activities are run by its senior managers rather than making their liability dependent on the guilt of a particular individual who is the "controlling mind" of the organisation.

1.5 The new offence applies to corporations (including companies), Government departments and the 37 other Crown bodies listed in Schedule 1, and police forces.[5] Crown immunity from prosecution is specifically disapplied by the Bill,[6] so that Crown bodies that are either bodies corporate or are listed in Schedule 1 are subject to the new offence.

1.6 Liability for the offence is only attributed to the organisation for failures in the way its senior managers managed or organised an activity. Senior managers are defined to mean those who play a significant role in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.[7] This is intended to focus the offence on the overall way in which an activity was being managed or organised by an organisation and to exclude more localised or junior management failings.

1.7 The new offence only applies in circumstances where an organisation owes a duty of care under the law of negligence.[8] Clause 4 provides for wide ranging exclusions from the scope of the offence: any duty of care owed by a public authority in respect of a decision as to matters of public policy (including the allocation of public resources or the weighing of competing public interests); any duty of care owed in respect of things done in the exercise of an exclusively public function; and any duty of care owed by a public authority in respect of inspections carried out in the exercise of a statutory function, are deemed not to be a relevant duty of care for the purposes of the offence, and are therefore outside the scope of the offence.

1.8 Clauses 5 to 8 of the Bill provide for a number of specific exemptions from the scope of the offence. A wide range of operational military activities are excluded from the scope of the offence, including activities carried out in preparation for such activities, and hazardous training for such operations.[9] The operational activities of police forces and other law enforcement bodies are also excluded,[10] as are the emergency services when responding to emergencies[11] and the exercise of child-protection functions by local and other public authorities and probation functions by probation boards or other public authorities.[12]

1.9 The consent of the DPP is required to commence proceedings for the new offence.[13] The new offence cannot be committed by individuals, and the Bill expressly excludes the possibility of any individual being criminally liable for aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter[14] (known as

5 Clause 1(2).

6 Clause 11(1).

7 Clause 2.

8 Clause 3(1).This includes the common law of negligence and also certain duties of care owed under statutes concerning occupier's liability and defective premises.

9 Clause 5.

10 Clause 6.

11 Clause 7.

12 Clause 8.

13 Clause 16.

14 Clause 17.

"secondary liability"). Directors or managers therefore cannot be charged with such offences.

1.10 The Bill abolishes the existing common law offence of gross negligence manslaughter insofar as it applies to corporate bodies.[15] In future all prosecutions for corporate manslaughter must be brought under the new Act.

The relevant human rights standards

European standards

The European Convention on Human Rights

1.11 Article 2(1) ECHR protects the right to life. It provides in its first sentence:

> "Everyone's right to life shall be protected by law."

1.12 The European Court of Human Rights has interpreted the first sentence of Article 2(1) ECHR as laying down a positive obligation on States to take appropriate steps to safeguard the lives of those within its jurisdiction.[16]

1.13 This positive obligation to protect life includes a duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[17] This positive obligation includes an obligation to put such effective measures in place to protect individuals against threats to their life not just from activities of the State but also from other private parties.[18]

1.14 The Court has said on a number of occasions (usually in the context of the use of lethal force by the army or the police) that the effective judicial system required by Article 2 may, and in certain circumstances must, include recourse to the criminal law.

1.15 However, it has also held that if the infringement of the right to life is not caused intentionally, the positive obligation to set up an 'effective judicial system' does not necessarily require criminal proceedings to be brought in every case, and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims.[19] This has been held to be sufficient in the sphere of medical negligence, for example. There is therefore no absolute right to have recourse to the criminal law under Article 2.[20]

1.16 The Court's case-law, however, is clear that in certain circumstances the availability of civil, administrative or disciplinary remedies is not enough, and the positive obligation under Article 2 requires that those responsible for endangering life be prosecuted not only

15 Clause 18.

16 See e.g. *L.C.B. v UK* at para. 36; *Paul and Audrey Edwards v UK* (2002) 35 EHRR 19.

17 *Osman v UK* (1998) 29 EHRR 245 at para. 115 (describing this aspect of the State's positive obligation to protect life as its "primary duty"); *Paul and Audrey Edwards v UK* (above) at para. 54.

18 See e.g. *Osman v UK* (above).

19 See e.g. *Vo v France [GC],* App. No. 53924/00 at para. 90; *Calvelli and Ciglio v Italy [GC],* App. No. 32967/96 at para. 51; *Mastromatteo v Italy [GC],* App. No. 37703/99 at paras 90 and 94–95; and *Rowley v UK*, App. No. 31914/03, inadmissibility decision of 22 February 2005.

20 *Rowley v UK* (above).

for a criminal offence but for an offence which reflects the seriousness of the conduct causing death. In a recent decision of the Grand Chamber of the Court, *Oneryildiz v Turkey*, for example, it found a violation of the positive obligation to protect life in Article 2 ECHR because of the failure to prosecute State officials for negligently causing death, which amounted to a lack of adequate protection by law safeguarding the right to life and deterring similar life-endangering conduct in future.[21]

1.17 A number of inhabitants of a shanty town on the edge of slum land were killed by a fatal mudslide. The local mayors were prosecuted for negligent omissions in the performance of their duties, but were not prosecuted for the more serious criminal offence of negligently causing the deaths. The Court was unequivocal in its statement that in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, a failure to prosecute for an appropriately serious criminal offence may amount to a violation of Article 2:[22]

> "Where it is established that the negligence attributable to State officials or bodies … goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity …, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.
>
> To sum up, the judicial system required by Article 2 must make provision for an independent and impartial investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation."

1.18 Article 14 ECHR guarantees the right to enjoyment of the Convention rights without discrimination on the basis of a list of enumerated grounds or "other status", unless there is an objective and reasonable justification for the differential treatment. It applies wherever the State acts within the ambit of one of the Convention rights, even if it is not strictly speaking required to act in order to avoid a breach of the relevant right.

Committee of Ministers Recommendation No. R(88)18

1.19 In 1988 the Committee of Ministers of the Council of Europe, under Article 15.b of the Statute of the Council of Europe, adopted Recommendation No. R(88)18 concerning the liability of enterprises having legal personality for offences committed in the exercise of their activities. The Recommendation provides, so far as relevant:

> "Considering the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community:

21 *Oneryildiz v Turkey [GC],* App. No. 48939/99, judgment of 30 November 2004.

22 Op. cit. at paras 93–94.

Considering the desirability of placing the responsibility where the benefit derived from the illegal activity is obtained;

Considering the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence;

Considering the difficulty, rooted in the legal traditions of many European states, of rendering enterprises which are corporate bodies criminally liable;

Desirous of overcoming these difficulties, with a view to making enterprises as such answerable, without exonerating from liability natural persons implicated in the offence, and to providing appropriate sanctions and measures to apply to enterprises, so as to achieve the due punishment of illegal activities, the prevention of farther offences and the reparation of the damage caused;

Recommends that the governments of member states be guided in their law and practice by the principles set out in the appendix to this recommendation.

Appendix to Recommendation No. R (88) (18)

The following recommendations are designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities, beyond existing regimes of civil liability of enterprises to which these recommendations do not apply.

They apply to enterprises, whether private or public, provided they have legal personality and to the extent that they pursue economic activities.

I. Liability

1. Enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise.

2. The enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not.

3. To render enterprises liable, consideration should be given in particular to:

a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require;

4. The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission.

5. The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, persons performing managerial functions should be made liable for breaches of duties which conduce to the commission of an offence."

The human rights implications of the Bill

1.20 The main human rights issues to which the Bill gives rise are:

(1) whether there is an obligation under Article 2 ECHR for States to have a criminal offence of corporate manslaughter;

(2) whether the restrictions on the scope of the offence imposed by the "relevant duty of care" requirement in the definition of the ingredients of the offence, the exclusion of unincorporated associations and the exemptions for public policy decisions, exclusively public functions, military activities, policing and law enforcement, emergency services and child protection and probation functions risk giving rise to violations of Article 2 ECHR in the circumstances of a particular case;

(3) whether the various restrictions, exclusions and exemptions will inevitably lead, in certain circumstances, to the UK being in breach of its obligation under Article 14 ECHR to secure the enjoyment of the right to life without discrimination which lacks an objective and reasonable justification.

(1) Is there a human rights obligation to have an offence of corporate manslaughter?

1.21 The Explanatory Notes to the Bill state that there does not appear to be an obligation under the Convention for States to have an offence of corporate manslaughter.[23] This assertion requires very careful scrutiny in the light of the Convention case-law.

1.22 It is correct that there is no absolute right to have recourse to the criminal law under Article 2 ECHR, because in some contexts the Court has held that the positive obligation to set up an effective judicial system may be satisfied if civil, administrative or even disciplinary remedies were available to the victim. In this sense it is correct as a matter of Convention case-law to say that the positive obligation to set up an effective judicial system does not require criminal proceedings to be brought in *every* case of unintentional infringement of the right to life. However, this does not mean that there is no obligation on States to ensure that it is possible under their criminal law to prosecute for appropriately serious criminal offences in those circumstances in which Article 2 requires such recourse to be available. To the extent that the UK's criminal law does not currently permit prosecutions to be brought in such circumstances, the UK is under an obligation to remove the deficiencies in its criminal law to ensure that criminal prosecution is possible in such cases. The issue, therefore, is in what sorts of circumstances does Article 2 ECHR require that recourse to the criminal law must be available in cases concerning loss of life?

1.23 The clearest statement of this obligation by the European Court of Human Rights has been in cases concerning loss of life as a result of the activities of State officials or public authorities. The Court has very recently and unequivocally held, in *Oneryildiz v Turkey*, for example, that in certain circumstances the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy available. The Explanatory Notes to the Bill acknowledge that this is the effect of the decision in *Oneryildiz*, but seek to sidestep the

23 Bill 220 –EN para. 78.

relevance of the decision on the basis that "this concerned the prosecution of individuals and not legal persons."[24]

1.24 In our view this is not a good reason for treating the Court's important decision in *Oneryildiz* as irrelevant to the Bill. It is true that on the facts of the *Oneryildiz* case the question was whether the failure to prosecute two local mayors, as individuals, for the offence of negligently causing death was a violation of Article 2 in the circumstances of that case. However, there is nothing in the relevant part of the reasoning in the judgment which suggests that the important principles which the case establishes are confined to prosecutions of individuals as opposed to legal persons. On the contrary, it seems to us that the relevant part of the reasoning refers to State officials and public authorities interchangeably,[25] and clearly envisages that Article 2 may require criminal penalties to be applied to public authorities as "bodies" if they are identified as being responsible for endangering life.[26]

1.25 In our view, therefore, the decision in *Oneryildiz* means that *in certain circumstances* a criminal remedy must be available in cases of unintentional death caused by a corporate public body. The question, therefore, is *in what sorts of circumstances* will the Court say that the availability of civil, administrative or disciplinary remedies is not enough, and that Article 2 requires there to be recourse to the criminal law. The judgment in *Oneryildiz* makes clear that the possibility of such findings of a violation of Article 2 is not confined to the context of the use of lethal force by the State, but also exists in the context of "dangerous activities" generally where it is established that the negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in that dangerous activity. In short, it is precisely in the context of the conduct of dangerous activities by the State, such as the use of lethal force in the context of law enforcement, or the prevention of harm from serious environmental pollution, or the protection of vulnerable individuals from harm by others, that the Strasbourg case-law imposes the most stringent requirement that there may in certain circumstances need to be criminal prosecution in order to ensure the full accountability of the State for any deaths caused by its gross failures.

1.26 **To the extent that the state of the current law would prevent a public body from being prosecuted for gross negligence manslaughter in such circumstances (which we consider below), there is therefore a risk that the UK will be found to be in breach of the positive obligation in Article 2 in the circumstances of a particular case. In this sense there is in our view a clear obligation under Article 2 to introduce an offence of corporate manslaughter which would enable recourse to the criminal law of homicide against public bodies in such circumstances.**

1.27 In our view there is also an obligation under Article 2 to ensure that recourse to the criminal law is possible where life has been lost as a result of the gross carelessness of a

24 EN para. 78.

25 See the various references to "State officials or authorities/bodies" in paras 93–94 of the judgment.

26 See in particular the references to "lives … lost as a result of events occurring under the responsibility of the public authorities" (para. 93); to "negligence attributable to State officials or bodies" (ibid); and to the need for "investigations capable of … identifying the State officials or authorities involved" (para. 94).

private party, whether an individual or other private entity. The case-law of the European Court of Human Rights is clear that in certain circumstances States are under an obligation to provide the protection of the criminal law in order to provide adequate protection for individuals against serious violations by other private individuals of their right to physical integrity under Article 8 ECHR and their right not to be subjected to inhuman or degrading treatment under Article 3. In a case against the Netherlands, for example, the Court held that criminal law provisions were necessary in relation to sexual abuse, and civil law protections insufficient, because where such fundamental values and essential aspects of private life were at stake, effective deterrence was indispensable and could only be provided by the criminal law. [27] Similarly, in a case against the UK the Court held that the availability of a lawful correction defence to a charge of assaulting a child was a violation of the child's right not to be subjected to inhuman or degrading treatment under Article 3, making clear the obligation on the State to provide effective deterrence of such violations of the child's right by other private individuals through the criminal law.[28]

1.28 **Although to the best of our knowledge there is no clear statement in the Convention case-law to the effect that the right to life in Article 2 ECHR requires the State to have effective criminal law measures protecting an individual's right to life against gross carelessness by another private individual, in our view it follows from the clear statements in the case-law under Articles 3 and 8 ECHR and from the reasoning of the Court in *Oneryildiz* that there is such an obligation, at the very least in cases of serious breaches of the right to life (e.g. involving large numbers of people, or particularly gross failures on the part of the private entity). In our view, therefore, to the extent that the state of the current law would prevent a private entity such as a company from being prosecuted for gross negligence manslaughter in such circumstances (which we consider below), there is a risk that the UK will be found to be in breach of the positive obligation in Article 2 in the circumstances of a particular case.**

1.29 We turn, then, to the question whether, on the current state of the law, there is any risk that the UK would be found to be in breach of the positive obligation in Article 2 because its law does not permit prosecution for a criminal offence in the sorts of circumstances envisaged by the case-law of the Court.

1.30 It is already possible, under current law, for a corporate body to be prosecuted for gross negligence manslaughter.[29] However, as the Explanatory Notes to the Bill acknowledge, the current law of corporate manslaughter has three significant limitations.[30]

1.31 First, on the current state of the law, the basis of corporate liability for manslaughter is the so-called "principle of identification": a corporation can only be found guilty of manslaughter where an individual who is the embodiment of the corporation, such as a director, and can therefore be identified with it, caused the death by their act or omission

27 *X and Y v The Netherlands* (1986) 8 EHRR 235 at paras 24–27 (violation of the right to respect for private life in Article 8 ECHR, which includes positive obligation to adopt measures to secure respect for private life even in the sphere of relations between individuals).

28 *A v UK* (1999) 27 EHRR 611 at para. 22 (violation of right not to be subjected to inhuman and degrading treatment in Article 3 ECHR, which requires States to take measures designed to ensure that individuals are not subjected to such ill-treatment, including that administered by private individuals).

29 This was established in principle in 1990 in the case concerning the capsize of the Herald of Free Enterprise, P & O European Ferries (Dover) Ltd. (1991) 93 Cr. App. R. 72.

30 EN para. 8.

and is therefore also guilty of manslaughter. The so-called "principle of aggregation", according to which gross negligence could be established by the cumulative effect of a number of different negligent acts by different persons within the corporation, has been rejected by our courts as the basis of liability for corporate manslaughter. In 1996 the Law Commission concluded that the doctrine of identification was the major obstacle to the successful prosecution of corporations for manslaughter, because of the great difficulty in practice of identifying people who can be said to be the embodiment of the corporation.[31] The effect of the identification doctrine being the basis for liability was recognised to be that larger corporations could more easily evade liability because of their more diffuse company structure and greater devolution of powers to semi-autonomous managers.[32] There is no realistic chance of proving guilt in respect of a substantial corporation, where responsibility for health and safety in daily operations is likely to be highly devolved and proving proximate fault on the part of a director at a high level will normally be impossible.

1.32 Second, under the present law, Crown bodies enjoy a general immunity from criminal liability. This immunity applies both in relation to common law crimes, such as gross negligence manslaughter, and in relation to regulatory offences such as breaches of health and safety legislation, even where death has occurred.

1.33 Third, many public bodies, such as Government departments and police forces, do not have legal personality and cannot therefore be prosecuted.

1.34 In our view the combined effect of these three limitations on the current law of corporate manslaughter is that it is highly unlikely that a public body responsible for causing deaths because of a serious management failure in an area of dangerous activity would be criminally liable under the current law in the absence of an individual who was both grossly negligent and the embodiment of the corporation. In other words, the current state of the law of corporate manslaughter gives rise to a clear risk of a breach of the obligation in Article 2 to protect the right to life by law where, in the circumstances of a particular case, a public body is responsible for causing death by gross negligence or gross breach of health and safety law and one or other of these deficiencies means that there is no criminal law mechanism for holding such a body to account.

1.35 **In our view the current state of the law of corporate liability for gross negligence manslaughter, Crown immunity from prosecution for that offence and the fact that many public bodies do not have a separate legal identity for the purposes of a prosecution together leave the UK at risk of being found to be in breach of its obligation to protect the right to life under Article 2 ECHR in the particular circumstances of a sufficiently serious case where death has been caused by the serious failures of either a private entity such as a company or a public authority in the course of a dangerous activity. We have written to the Minister to ask for further explanation, in light of the above, of the assertion in the Explanatory Notes that there is no obligation to introduce an offence of corporate manslaughter, given the Government's acceptance of the deficiencies in the current criminal law.**

31 Report No. 237, Legislating the Criminal Code: Involuntary Manslaughter, Parts I, VI–IX and Appendix A.

32 In Attorney-General's Reference (No. 2 of 1999) [2000] QB 796 the Court of Appeal held, at 814–5, that the basis for corporate liability for manslaughter remained the principle of identification: "unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter."

1.36 **We therefore welcome the objective of the Bill as one which, in principle, ought to enhance the protection of human rights in the UK. We consider below the extent to which the Bill as drafted reduces the current risk of incompatibility on the present state of the law.**

(2) Do the restrictions on the scope and applicability of the new offence risk incompatibility with Article 2 ECHR?

1.37 The second human rights issue to which the Bill gives rise is whether the various restrictions on the scope and applicability of the new offence of corporate manslaughter are such that there will remain a significant risk of the UK being found to be in breach of Article 2 ECHR even after the passage of the Bill, because a criminal prosecution will not be possible in circumstances in which the case-law of the Court has said that it must be possible for those responsible for endangering life to be prosecuted.

1.38 **We welcome the express application of the new offence to a range of Crown bodies and the express disapplication of Crown immunity from prosecution. Both of these, in principle, are capable of enhancing the compatibility of the UK's law on corporate manslaughter with the positive requirements of Article 2 ECHR.**

1.39 We note, however, that the combined effect of other provisions in the Bill restricting the definition or the scope of application of the offence is substantially to restore the legal or de facto immunity from prosecution enjoyed by many public bodies under the present law.

1.40 First, limiting the scope of the offence by including as a necessary ingredient of the offence that the organisation in question owes a duty of care in negligence to the victim immediately makes it less likely that public bodies are capable of committing the offence, due to the long established case-law, which has largely survived the advent of the Human Rights Act, holding that various public authorities do not owe a duty of care when performing certain inherently dangerous activities.

1.41 Second, the sweeping breadth of the exemptions from the offence in clause 4 of the Bill is such as to remove from the scope of the offence most if not all of those activities of public authorities, or of private parties carrying out public functions, which the European Court of Human Rights regards as dangerous activities in respect of which it may be necessary to have recourse to a criminal remedy to ensure the State's full accountability for deaths caused in the exercise of those functions.

1.42 Third, the specific exemptions contained in clauses 5 to 8 of the Bill go even further in removing such activities from the scope of the new offence.[33]

1.43 **In our view the effect of these provisions is to give rise to a serious risk that the UK will be found to be in breach of Article 2 ECHR in the particular circumstances of a future case where the case-law of the Court requires that there be recourse to the criminal law. In particular, the effect of these provisions in the Bill is to preclude the**

33 The Government's response to the Joint Report from the Home Affairs and Work and Pensions Committees on the draft Bill suggests that there may be further clarification of the precise scope of these exemptions during the passage of the Bill: Government Response to the Home Affairs and Work and Pensions Committee, First Joint Report Session 2005-06, HC 540-I, *Draft Corporate Manslaughter Bill,* Cm 6755, see in particular Chapter 10, pp. 20–23.

possibility of prosecution for corporate manslaughter in precisely those contexts in which the positive obligation in Article 2 is at its strongest, and may require, in a particular case, that criminal prosecutions be brought: the use of lethal force by the police or army; deaths in custody; deaths of vulnerable children who should be in care, to name just a few examples. This would mean, in situations where responsibility for the death lay with the public body for a management failure, rather than any identifiable individual, recourse to the criminal law would not be possible.

1.44 In the Explanatory Notes the Government seeks to justify this restricted application of the new offence to public bodies, or bodies exercising public functions, by relying on the availability of other avenues of accountability. Yet it is precisely in these sorts of cases that the case-law of the European Court of Human Rights stresses the inadequacy of other mechanisms of accountability and the importance of the deterrent effect of the judicial system in place and the significance of the role that system is required to play in preventing violations of the right to life.

1.45 In our view one topical example suffices to demonstrate the point. The Office of the Commissioner of the Metropolitan Police is currently being prosecuted under the Health and Safety at Work Act in respect of the shooting of Jean Charles de Menezes. If, hypothetically, that shooting were established to be the result of gross negligence on the part of the senior management of the Metropolitan Police, but not attributable to one individual officer who could be described as the controlling mind of the organisation, under this Bill as drafted it would not be possible for the Metropolitan Police as a public authority to be prosecuted in respect of the death. It would still only be possible to bring proceedings against the Metropolitan Police as a public authority under health and safety legislation, for a much less serious offence. In such circumstances, it seems to us that there is a very strong likelihood that the UK would be found to be in breach of the positive obligation in Article 2 for the very same reason that Turkey was found to be in breach in *Oneryildiz*: that the criminal offences charged did not reflect the seriousness of the conduct which led to the death, and the "judicial system" in place was not adequate to secure the full accountability of State authorities for their role in the death.

1.46 We are also concerned that the exclusion of unincorporated bodies from the scope of the offence will lead to findings of incompatibility with the requirements of Article 2 ECHR. The offence applies only to companies and other incorporated bodies, and those bodies listed in Schedule 1. Small businesses which are not incorporated are therefore not covered by the offence; nor are unincorporated associations such as clubs or trade unions; nor are public bodies not listed in Schedule 1, such as schools, hospitals or prisons. Yet many such unincorporated bodies operate in spheres where serious risks to life often arise. If such organisations are not capable of being prosecuted under the criminal law in relation to deaths arising from serious management failures, but where no specific individual can be identified as being responsible, it seems to us very likely that the UK will sooner or later be found to be in breach of the positive obligation to protect life because of the inadequate protection afforded by its criminal law.

1.47 **In our view, the restrictions on both the scope of the new offence and its applicability are likely to lead, in a sufficiently serious case, to the UK being found to be in breach of its positive obligation under Article 2 ECHR to put in place an efficient and effective system of judicial remedies including, in certain circumstances, recourse**

to the criminal law. We have written to the Minister to seek further explanation of why in his view the Bill does not give rise to this risk of incompatibility.

(3) Are the restrictions, exclusions and exemptions unjustifiably discriminatory?

1.48 The third human rights issue to which the Bill gives rises is whether the various restrictions on the scope of the offence, and exemptions and exclusions from its applicability, as detailed above, are in breach of the right not to be discriminated against in the enjoyment of Convention rights, contrary to Article 14 in conjunction with the right to life in Article 2.

1.49 The Explanatory Notes to the Bill state that Article 14 is not engaged by the new offence, because 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. Alternatively, the Notes say that if Article 14 is 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).[34]

1.50 In our view, Article 14 ECHR is clearly engaged by the restrictions, exclusions and exemptions which define the scope and applicability of the new offence of corporate manslaughter. In our view, those restrictions, exclusions and exemptions give rise to a difference of treatment of individuals who are in the relevantly analogous positions of having suffered the death of a relative as a result of the gross management failure of an organisation in circumstances where no specific individual can be identified as being responsible for the death. That difference of treatment, which amounts to unequal access to a criminal law remedy in respect of loss of life, is within the ambit of the right to life in Article 2 ECHR, even if the State is not under any obligation to provide recourse to the criminal law, because the State has assumed functions in relation to the protection of life against corporate killing by the criminal law. For reasons given by us in earlier reports,[35] we do not accept that Article 14 is as narrow in scope as the Explanatory Notes assert: the European Court of Human Rights does not confine "status" in Article 14 to status flowing from "personal characteristics". **In our view there is therefore a relevant difference of treatment which engages Article 14 ECHR and requires objective and reasonable justification.**

1.51 The Explanatory Notes offer little in the way of justification for the difference in treatment to which the Bill gives rise. It is asserted that any difference in treatment is justified by the "different nature" of incorporated and unincorporated bodies, and the "different position" of those exercising public functions. We note that in its Consultation Paper on this subject issued in 2000 the Government accepted that as there is often very

34 EN para. 79.

35 See e.g. our Report on the Health Bill, Eleventh Report of Session 2005–06, Legislative Scrutiny: Fifth Progress Report, HC Paper 115, HC 899, at para 3.3.

little difference in practice between an incorporated body and an unincorporated association, to restrict the scope of the offence by excluding unincorporated bodies "could lead to an inconsistency of approach and these distinctions might appear arbitrary."[36] To avoid that risk of arbitrariness, the Government at that stage proposed that the new offence should apply to "undertakings" as defined in the Health and Safety at Work Act 1974 which would include unincorporated as well as incorporated bodies. We also note that in the case-law of the European Court of Human Rights the public nature of a body's function has not been regarded as a reason for excluding criminal liability, but on the contrary has been treated as a factor which strengthens the obligation to ensure that recourse to the criminal law is available. **In light of the above, we have written to the Minister asking for more detailed elaboration of the Government's justifications for the differential treatment to which the Bill gives rise, and we may report again in the light of the Government's response.**

36 Home Office Consultation Paper May 2000, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals,* at para 3.2.3.

Formal minutes

Monday 9 October 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Mr Douglas Carswell MP
Lord Lester of Herne Hill	Nia Griffith MP
Lord Plant of Highfield	Mr Richard Shepherd MP
Baroness Stern	

* * * * *

Draft Report [Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.51 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Twenty-seventh Report of the Committee to each House.

A Paper was ordered to be appended to the Report.

Ordered, That the Chairman make the Report to the House of Lords and that Baroness Stern make the Report to the House of Commons.

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[Adjourned till Monday 16 October at 4.00 pm.

Appendix

Letter from the Chair to the Rt Hon Dr John Reid, Secretary of State for the Home Department, re Corporate Manslaughter and Corporate Homicide Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the Corporate Manslaughter and Corporate Homicide Bill, and would appreciate your answer to the following questions in relation to three points in particular which have arisen from the Committee's scrutiny of the Bill so far.

(1) Positive obligation to put in place effective criminal law provisions

The Explanatory Notes to the Bill state (at para. 78) that there does not appear to be an obligation under the ECHR for States to have an offence of corporate manslaughter.

The Committee notes, however, that it is well established in the case-law of the European Court of Human Rights that the State's primary duty under Article 2 ECHR is to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[37]

The existence of the common law offence of gross negligence manslaughter satisfies this positive obligation to protect life against the gross carelessness of another individual. However, under the present law corporations can only be prosecuted for gross negligence manslaughter if such a prosecution can *also* be brought against an individual who can be "identified" with the corporation in the sense that he or she can be said to embody the corporation in his or her actions and decisions. In practice this means that the law of gross negligence manslaughter only applies to small corporations. Prosecution of larger corporations for this offence is in practice impossible because the number of directors and the devolution of responsibility within the corporation means that it is impossible to prove the requisite degree of fault on the part of an individual who can be said to be the "controlling mind" of the organization. The Government has accepted that the criminal law is deficient in this respect since the publication of its Consultation Paper on this subject in May 2000.

The case-law of the European Court of Human Rights is clear that in certain circumstances States are under an obligation to provide the protection of the criminal law in order to provide adequate protection for individuals against serious violations by other private parties of their right to physical integrity under Article 8 ECHR[38] and their right not to be subjected to inhuman or degrading treatment under Article 3.[39] The

37 E.g. *Osman v UK* (1998) 29 EHRR 245 at para. 115.

38 *X. and Y. v. The Netherlands,* 8 EHRR 235 at paras 24–27.

39 *A v UK* (1999) 27 EHRR 611 at para. 22.

availability of a civil remedy against the private party is not enough in such cases. In the Committee's view, States are also under an obligation to provide the protection of the criminal law in order to provide adequate protection for individuals against serious violations by other private parties of their right to life under Article 2.[40]

Q.1: In light of the above, please explain the reasons why, in the Government's view, there is no obligation on the UK under Article 2 ECHR to permit recourse to the criminal law in circumstances where there has been a serious breach of the right to life as a result of the gross management failure of a large private organization, but no identifiable individual within the organization can be proved to be responsible?

In the Committee's view, the case-law of the Court of Human Rights is also clear that where loss of life has been caused by the gross carelessness of State officials or a public authority conducting a dangerous activity, the availability of civil, administrative or disciplinary remedies is not enough, and the positive obligation under Article 2 requires that those officials or the public authority responsible for endangering life be prosecuted not only for a criminal offence but for an offence which reflects the seriousness of the conduct causing death.[41]

Q.2: In light of the above, please explain the reasons why, in the Government's view, there is no obligation on the UK under Article 2 ECHR to permit recourse to the criminal law in circumstances where there has been a serious breach of the right to life as a result of the gross management failure of a public body conducting a dangerous activity, but no identifiable individual within the public body can be proved to be responsible?

(2) Restrictions on the scope and applicability of the new offence

The Committee is concerned that the effect of restricting the scope of the offence to situations where the organization owes a duty of care in negligence, the exclusion of unincorporated associations other than those scheduled to the Bill, the breadth of the exemptions for public bodies or bodies carrying out public functions, and the specific exemptions for certain activities of particular public bodies, is that there is a serious risk that the UK will be found to be in breach of Article 2 ECHR in the particular circumstances of a future case where the case-law of the Court requires that there be recourse to the criminal law. In particular, the effect of these provisions in the Bill is to preclude the possibility of prosecution for corporate manslaughter in precisely those contexts in which the positive obligation in Article 2 is at its strongest, and may require, in a particular case, that criminal prosecutions be brought: the use of lethal force by the police or army; deaths in custody; deaths of vulnerable children who should be in care, to name just a few examples of dangerous activities conducted by public authorities.

40 *Osman v UK* (above).

41 *Oneryildiz v Turkey* [GC], App. No. 48939/99, judgment of 30 November 2004.

The Committee notes that the availability of other avenues of accountability, which is the main justification relied on by the Government for the restricted application of the new offence to public bodies, is not a factor which has proved persuasive with the European Court of Human Rights. On the contrary, in cases concerning public authorities the Court has often stressed the inadequacy of other mechanisms of accountability and the importance of the deterrent effect of the criminal law in preventing violations of the right to life.

Q.3: In light of the above, please explain why, in the Government's view, the Bill does not give rise to a risk that the UK will in future be found to be in breach of its positive obligation under Article 2 ECHR, to put in place an effective judicial system including recourse to the criminal law, when the effect of the restrictions on the scope of the offence and the exemptions and exclusions from its applicability, is that recourse to the criminal law would not be possible in circumstances where responsibility for loss of life lay with a public body, rather than any identifiable individual, for a serious management failure in its conduct of a dangerous activity?

(3) Discrimination

The Explanatory Notes to the Bill say that if Article 14 ECHR is 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. In the Committee's view, Article 14 is engaged because the various restrictions, exclusions and exemptions give rise to differential treatment of individuals in analogous situations in relation to their access to the criminal law in respect of negligently caused death.

The Committee notes that in its Consultation Paper on this subject issued in 2000 the Government accepted that as there is often very little difference in practice between an incorporated body and an unincorporated association, to restrict the scope of the offence by excluding unincorporated bodies "could lead to an inconsistency of approach and these distinctions might appear arbitrary."[42] To avoid that risk of arbitrariness, the Government at that stage proposed that the new offence should apply to "undertakings" as defined in the Health and Safety at Work Act 1974 which would include unincorporated as well as incorporated bodies. The Committee also notes that in the case-law of the European Court of Human Rights the public nature of a body's function has not been regarded as a reason for excluding criminal liability, but on the contrary has been treated as a factor which strengthens the obligation to ensure that recourse to the criminal law is available.

Q.4: In light of the above, please provide a more detailed explanation of the Government's justifications (assuming Article 14 to be applicable) for the Bill's

42 Home Office Consultation Paper (2000) at para. 3.2.3.

differential treatment of unincorporated compared to incorporated bodies and of public bodies compared to private bodies.

Q.5: What are the Government's reasons for not making the offence apply to "undertakings" as it originally proposed in 2000?

I would be grateful if you could let me have your response to these questions by 24 October 2006.

9 October 2006

Bills Reported on by the Committee (Session 2005–06)

* indicates a Government Bill

Bills which engage human rights and on which the Committee has commented substantively are in bold

BILL TITLE	*REPORT NO*
Armed Forces Bill*	**22nd**
Charities Bill*	**1st**
Children and Adoption Bill*	**5th & 15th**
Civil Aviation Bill*	**7th, 14th & 21st**
Commissioner for Older People (Wales) Bill*	**6th**
Commons Bill*	**15th & 21st**
Compensation Bill*	**20th & 21st**
Consumer Credit Bill*	**1st & 14th**
Corporate Manslaughter and Corporate Homicide Bill*	**27th**
Council Tax (New Valuation Lists for England)*	5th
Criminal Defence Service Bill*	**1st**
Crossrail Bill*	1st
Education and Inspections Bill*	**18th, 21st & 25th**
Electoral Administration Bill*	**11th**
Equality Bill*	**4th & 11th**
European Union (Accessions) Bill*	5th
Fraud Bill*	**14th**
Government of Wales Bill*	14th
Health Bill*	**6th & 11th**
Identity Cards Bill*	**1st**
Immigration, Asylum and Nationality Bill*	**3rd, 5th & 11th**
Legislative and Regulatory Reform Bill*	**17th & 21st**
London Olympic Games and Paralympic Games Bill*	**15th**
Merchant Shipping (Pollution) Bill*	1st
National Insurance Contributions Bill*	14th
National Lottery Bill*	1st
Natural Environment and Rural Communities Bill*	1st
NHS Redress Bill*	15th
Northern Ireland (Offences) Bill*	**7th**
Police and Justice Bill*	**20th & 21st**
Racial and Religious Hatred Bill*	**1st**
Regulation of Financial Services (Land Transactions) Bill*	5th
Road Safety Bill*	**1st**

Safeguarding Vulnerable Groups Bill*	**25th**
Terrorism Bill*	**3rd**
Terrorism (Northern Ireland) Bill*	11th
Transport (Wales) Bill*	1st
Violent Crime Reduction Bill*	**5th**
Work and Families Bill*	15th