



Corporate manslaughter

Gerard Forlin ponders the future of the Draft Bill provisions

ON 20 DECEMBER 2005, THE HOME AFFAIRS and Work and Pensions Committees of the House of Commons finally published their three volume joint report into the Draft Manslaughter Bill.

This Draft Bill was first published in March 2005, following the trailer in the Queen's Speech of November 2004, after a lengthy and turbulent ride that began in 1997 when Labour announced as part of its manifesto that the law in this area would be generally tightened.

Space sadly disallows any canvassing of what has transpired since, but the Committees' Report did state:

"... We are concerned at the length of time it has taken [the government] to introduce a Draft Bill since it first passed legislation on corporate manslaughter... we urge the government to introduce the Bill, including our recommended changes, by the end of the present parliamentary session making provision for carry-over if necessary".

Key proposals

In relation to the key proposals of the Draft Bill which does away with the concept of "aggregation and identification (finding a controlling mind)" and in place imposes a test of gross breach by a "senior manager" which is a defined term, the Committees have a different opinion.

At para 105, the Committees propose that the concept of "duty of care" in negligence should be removed and replaced with a test of whether a management failure of an organisation kills an employee or any other person affected by the organisation's activities the offence would then be committed.

They also state that whether an organisation has failed to comply with any relevant health and safety legislation should be an important factor for the jury in assessing whether there has been a general gross management failure.

In relation to parent companies, the Committees agree with the pending proposals that parent companies should be able to be prosecuted where a gross management failure in that company has caused death to a person in one of their subsidiaries. In fact they attempt to widen it to include employment agencies and principal contractors for their sub-contractors

if it is proved that their own management failure was at fault.

Senior management test

The Committees were highly critical of the "senior management test", which they described as a fundamental weakness in the Draft Bill "which would do little to address the problems that have plagued the current common law offence".

At para 169, the Committees say that the offence should be based on the concept of "management failure", relating to either an absence of correct process or an unacceptably low level of monitoring or application of a management process. This should include a jury reviewing how far the failure was in relation to current health and safety guidance and legislation.

Crown immunity

In terms of the removal of Crown immunity, the Committees want further action and point out that "five years have passed since the government committed itself to removing Crown immunity for health and safety offences". They further reject the bequeathing of an exemption for public functions, stating, "we do not consider that a private or a Crown body should be immune from prosecution where it did not meet this standard and... death occurred".

They go on to say there should be an exemption to the offence for public policy decisions, but only at a high level of public policy-making, for instance in the NHS (para 233). They also revisit the current proposed exceptions in the Bill for police and prison custody deaths (and the military and fire sectors generally) and want the sections to be drastically cut back.

Jurisdiction or geographical scope

Arguably one of the most controversial (or innovative) changes the Committees recommend, relates to jurisdiction. While the Draft Bill rams home the point that the offence should in reality only relate to England and Wales, the report seeks a wide extension to this approach. They state: "we recommend that the offence be extended so that deaths that take place in the rest of the UK are within the scope of the offence when the management failure occurred in England and Wales". They con-

tinue in a tone bound to agitate UK plc generally: "We also urge the government to make provision in the Bill for the offence later to be extended at least to cover cases where deaths have occurred in the EU.

"We consider that the government should take to itself a power to require information from the relevant UK body about such a death".

Scotland

In relation to Scotland where the Scottish Expert Group has recently reported in November 2005, they state, when considering the difference between corporate manslaughter and culpable homicide, "... the government should be doing all it can to ensure there is as little practical variation as possible".

Sentence and individual liability

The Committees call for higher fines and much greater scope for remedial sentences and compensation, including the somewhat draconian recommendation that directors can be prosecuted with contempt if the company fails to take the steps required by the court. Further, the Committees urge that a new offence be introduced so that an individual who has a secondary role to any gross management failure should also be prosecuted on an individual basis with a maximum sentence of 14 years.

They also push for a separate directors' statutory code of health and safety, which they suggest should be introduced alongside the Bill or closely thereafter.

Conclusion

The two select Committees have undertaken a very detailed exercise that will clearly cause the government to rethink the Bill. The Home Office confirmed last week it was reviewing the report. I remain uncertain as to how much the Bill will change in reality; at least for the present time, I think that the government will proceed in broad terms with their present intentions as set out in their Draft Bill.

● What do you think?

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