

# **Law Drafting Competition 2023**

Winner

CHEN Zhongyu

Topic 2: Homicide Offences

Legislative Proposal Outline

## **Background**

### *Company to be convicted of a crime*

In Hong Kong, a company (or other kinds of corporation) is treated as a separate person from the members, directors and employees of the company, because a company has its own legal identity. Therefore, a company may be prosecuted for and convicted of a crime.

However, there are many difficulties that the Courts find in deciding a company liable for a crime. For instance, certain offences cannot be committed by a company because of the nature of them; and a company cannot be convicted of any offence where only custodial sentences can be imposed <sup>1</sup>.

A further difficulty is where proving the *mens rea* of a company. The Courts developed a test known as “the identification principle”: if the prosecution could prove that senior executives of the company (the “directing mind and will of the company”) had the necessary *mens rea* required for an offence, the company itself could be prosecuted for and convicted of the crime <sup>2</sup>.

In practice, it is difficult to determine who is the “directing mind” of a company and that “directing mind” has the necessary *mens rea*. In large companies, there may be more than one senior executive; if more than one of them has some knowledge of the crime, but no single person has the required *mens rea*, the identification principle may fail.

### *Manslaughter by Gross Negligence*

Manslaughter by Gross Negligence is a kind of involuntary manslaughter. It has long been established that five elements are required to be proved <sup>3</sup>:

- i. A duty of care owed by the defendant to the victim.
- ii. A breach of that duty of care.
- iii. A risk that the defendant’s conduct could cause death.
- iv. Evidence that the breach of duty caused the death.
- v. Gross negligence, i.e. the defendant fell so far below the standards of a reasonable person in that situation that he is deserving of punishment.

---

<sup>1</sup> R v ICR Haulage Ltd [1944] KB 551.

<sup>2</sup> Tesco Supermarket Ltd v Natrass [1972] AC 153.

<sup>3</sup> R v Adomako [1995] 1 AC 171.

As mentioned above, a company may be prosecuted for and convicted of Manslaughter by Gross Negligence. However, for the several reasons, inter alia, the limitation of “the identification principle”, only several companies were convicted of the Manslaughter by Gross Negligence. Although the company may be convicted of other offences, for example, offences in the Occupational Safety and Health Ordinance, it is not proportionate.

### Similar Legislations in other Jurisdictions

In the United Kingdom, the failure of the prosecution of P&O European Ferries (Dover) Ltd for manslaughter following the Zeebrugge disaster triggered public concerns. After decades debate, in July 2006, the United Kingdom Government introduced the “Corporate Manslaughter and Corporate Homicide Bill” to create a new offence which is to overcome the limitations as mentioned above. The Bill was passed, and the Corporate Manslaughter and Corporate Homicide Act 2007 came into effect on 26 July 2007.

### **Objective of the Proposed Legislation**

Create a new offence to ensure that companies and other organisations can be held properly accountable for very serious failings resulting in death <sup>4</sup>.

Make it easier to prosecute companies and other organisations who grossly breach their duty of care.

### **Justification of the Proposed Legislation**

#### Seriousness of Manslaughter

Manslaughter is a serious offence. Any person who is convicted of Manslaughter may be punished by life imprisonment

#### Deterrence

The maximum penalty for the proposed new offence is unlimited fine. There may also be a publicity order requiring an organisation to publicise its conviction and certain details of the offence and the director may also be disqualified.

#### Protect the Safety of the Public

---

<sup>4</sup> Corporate Manslaughter: <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter>: last visited on 31/01/2023

By making it easier to prosecute and convict a company for causing death due to gross breach of duty of care and put serious penalty, companies will take more care to discharge their duties of care.

## **Content of the Proposed Legislation**

The proposed legislation will contain the following contents. To avoid misunderstanding, the numbering in this proposal is not the numbering to be used in the Bill and the Ordinance.

### *1. Short Title*

The Short Title of the Proposed Legislation is “Corporate Manslaughter Ordinance”.

### *2. Interpretation*

To define terms and expressions used in the Proposed Legislation.

### *3. The Offence*

Create an offence named as “Corporate Manslaughter” (“the Offence”).

Define the Offence by the following elements:

- i. the defendant is a relevant organisation;
- ii. the organisation owed a relevant duty of care to the deceased;
- iii. there was a gross breach of that duty by the organisation;
- iv. the way in which its activities were managed or organised by its senior, and management was a substantial element in the breach;
- v. the gross breach of the organisation’s duty caused or contributed to the death.

The offence of Gross Negligence Manslaughter is abolished insofar as it relates to the relevant organisations.

### *4. Define the Relevant Organisation*

- i. The “relevant organisation” should include:
- ii. A corporation,
- iii. Hong Kong Police Force,
- iv. A partnership, or a trade union or employers' association, that is an employer
- v. A department or other public authority or body listed in Schedule 1

### 5. Define the Relevant Duty of Care

List some common duty of care in common law, and emphasis that, to avoid misunderstanding, the Proposed Legislation does not create any new duty of care.

### 6. Define the “Gross Breach”

List factors for the jury to consider.

### 7. Remedial orders and publicity orders

Empower the Court to order the breach etc. to be remedied, and order the conviction etc, to be publicised.

### 8. Sentencing

The maximum penalty for the proposed new offence is unlimited fine.

### 9. Miscellaneous

Some miscellaneous provisions.

### Schedule 1

List the departments or other public authorities or bodies that may be convicted of the Offence.