

Law Drafting Competition 2023

Winner

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Topic 2: Homicide Offences

Proposed Bill — English text

Corporate Manslaughter Bill

A BILL

To

Create a new offence of Corporate Manslaughter and to provide for related matters.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Corporate Manslaughter Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Interpretation

In this Ordinance —

corporation (法團) includes a body corporate incorporated inside or outside Hong Kong;

employee (僱員) means—

- (a) an employee referred to in section 2 of the Employment Ordinance (Cap. 57);
- (b) an apprentice referred to in section 2 of the Apprenticeship Ordinance (Cap. 47); or
- (c) a person referred to in section 16;

gross breach (嚴重違反) has the meaning given by section 6;

organisation (機構) means—

- (a) a corporation;
- (b) a partnership, or a trade union or employers' association, that is an employer; or
- (c) a government department or any other public authority listed in Schedule 1;

partnership (合夥) means—

- (a) a partnership within the Partnership Ordinance (Cap. 38),
- (b) a limited partnership registered under the Limited Partnerships Ordinance (Cap. 37), or

(c) an organisation formed outside Hong Kong of a similar character to the organisation referred to in paragraph (a) or (b);
publicity order (公告令) means an order under section 9;
relevant duty of care (相關謹慎責任) has the meaning given by section 5;
remedial order (糾正令) means an order under section 8;
safety and health enactment (安全及健康成文法則) means any enactment related to safety and health matters, including the Occupational Safety and Health Ordinance (Cap. 509);
senior management (高級管理人員) means persons who play significant roles in—
 (a) making decisions about how the whole or a substantial part of an organisation's activities are managed or organised; or
 (b) the actual managing or organising of such activities;
trade union (職工會) has the meaning given by section 2 of the Trade Union Ordinance (Cap. 332);

3. Application

This Ordinance applies if the gross breach causing death is sustained in Hong Kong.

Part 2

Corporate Manslaughter

4. Corporate manslaughter¹

- (1) An organisation commits an offence if it manages or organises its activities in such a way that—
 - (a) causes a person's death; and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to that person.
- (2) An organisation is guilty of an offence under subsection (1) only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1);
- (3) An organisation which commits an offence under subsection (1) is liable on conviction on indictment to a fine.
- (4) An offence under subsection (1) is indictable only in the Court of First Instance.
- (5) The common law offence of manslaughter by gross negligence as it applies to corporations is repealed from the commencement of this Ordinance.
- (6) Subsection (5) does not affect the operation of the common law offence of manslaughter by gross negligence in relation to conduct occurring before the commencement of this Ordinance.

5. Relevant duty of care²

- (1) A relevant duty of care means any of the following duties owed by an organisation under the law of negligence—
 - (a) a duty owed to its employees or other persons working for the organisation or performing services for it;
 - (b) a duty owed as an occupier of premises;
 - (c) a duty owed in connection with—
 - (i) the supply by the organisation of goods or services (whether for consideration or not),
 - (ii) the carrying on by the organisation of any construction work,
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or
 - (iv) the use or possessing by the organisation of any equipment, vehicle or other things;
 - (d) a duty owed to a detainee or a prisoner.

¹ cf. 2007 c. 19 s. 1 U.K.;

² cf. 2007 c. 19 s. 2 U.K.;

- (2) A duty referred to in subsection (1) includes a duty that was owed under the rules of common law but is now wholly or partly regulated by any enactment.
- (3) For the purposes of this Ordinance, whether a particular organisation owes a duty of care to a particular individual is a question of law.
- (4) For the purposes of this Ordinance, the following rules are to be disregarded—
- (a) any rule of the common law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;
 - (b) any rule that has the effect of preventing a duty of care from being owed to a person by reason of his acceptance of a risk of harm.
- (5) This section is subject to Part 3.
- (6) For the avoidance of doubt, this section does not create any new duty of care.
- (7) In this section—
- construction work** (建築工程) has the meaning given by section 2 of the Factories and Industrial Undertakings Ordinance (Cap. 59);
- detainee** (被羈留者) means a person who is arrested, detained or held in custody by a law enforcement authority;
- law enforcement authority** (執法部門) means—
- (a) the Police Force,
 - (b) the Hong Kong Auxiliary Police Force established under section 3 of the Hong Kong Auxiliary Police Force Ordinance (Cap. 233)
 - (c) the Immigration Service established under section 3 of the Immigration Service Ordinance (Cap. 331),
 - (d) the Customs and Excise Service established under section 3 of the Customs and Excise Service Ordinance (Cap. 342),
 - (e) the Correctional Service Department, or
 - (f) the Independent Commission Against Corruption established under section 3 of the Independent Commission Against Corruption Ordinance (Cap. 204);
- prisoner** (囚犯) has the meaning given by section 2 of the Prisons Ordinance (Cap. 234);
- the law of negligence** (與疏忽有關的法律) includes the Occupiers Liability Ordinance (Cap. 314).

6. Gross Breach³

³ cf. 2007 c. 19 ss. 1(4)(b) & 8 U.K.;

- (1) An organisation is guilty of a gross breach of a relevant duty of care if the act that constitutes the breach falls far below what the organisation can reasonably expect in the circumstances.
- (2) In determining whether there was a gross breach, the jury—
 - (a) must consider whether the evidence shows that the organisation failed to comply with any safety and health enactment that relates to the alleged breach, and if so—
 - (i) how serious that failure was; and
 - (ii) how much of a risk of death that failure posed.
 - (b) may also consider—
 - (i) the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in paragraph (a), or to have produced tolerance of it; and
 - (ii) any safety and health guidance that relates to the alleged breach.
- (3) Subsection (2) does not prevent the jury from having regard to any other matters they consider relevant.
- (4) In this section—

safety and health guidance (安全及健康指引) means any code, guidance, manual, or similar publication that is concerned with safety and health matters and is made or issued (under an enactment or otherwise) by an authority responsible for the enforcement of any safety and health enactment.

7. Secretary for Justice's Consent Required for Prosecution

The Secretary for Justice must give consent before any prosecution under this Ordinance can be undertaken.

8. Power to make a remedial order⁴

- (1) A court before which an organisation is convicted of an offence under section 4 may make an order (*a remedial order*) requiring the organisation to take specified steps to remedy—
 - (a) the gross breach causing the death;
 - (b) any matter that appears to the court to have resulted from the alleged breach and to have been a cause of the death; or
 - (c) any deficiency, as regards safety and health matters, in the organisation's policies, systems or practices of which the alleged breach appears to the court to be an indication.

⁴ cf. 2007 c. 19 s. 9 U.K.;

- (2) A remedial order may be made only on an application by the prosecution specifying the terms of the proposed order.
- (3) A remedial order must be on such terms (whether proposed by the prosecution or not) as the court considers appropriate having regard to any representations made, and any evidence adduced, in relation to the proposed order, by the prosecution or on behalf of the organisation.
- (4) Before making an application for a remedial order the prosecution must consult any authority responsible for enforcing the safety and health enactment (*relevant authority*), if any, as it considers appropriate having regard to the nature of the alleged breach.
- (5) A remedial order—
 - (a) must specify a period (*specified period*) within which the steps referred to in subsection (1) are to be taken;
 - (b) may require the organisation to supply evidence that those steps have been taken, within the specified period, to the relevant authority consulted.
- (6) The court may extend or further extend the specified period upon the prosecution's application made before the end of that period or extended period.
- (7) An organisation that fails to comply with a remedial order is guilty of an offence, and liable on conviction on indictment to a fine.

9. Power to make a publicity order⁵

- (1) A court before which an organisation is convicted of an offence under section 4 may make an order (*a publicity order*) requiring the organisation to publicise in a specified manner—
 - (a) the fact that the organisation has been convicted of the offence;
 - (b) specified particulars of the offence;
 - (c) the amount of any fine imposed; and
 - (d) the terms of any remedial order made, if any.
- (2) In deciding on the terms of a publicity order that it is proposing to make, the court must—
 - (a) ascertain the views of any authority responsible for enforcing the safety and health enactment (*relevant authority*), if any, as it considers appropriate, and
 - (b) have regard to any representations made by the prosecution or on behalf of the organisation.
- (3) A publicity order—
 - (a) must specify a period (*specified period*) within which the requirements referred to in subsection (1) (*relevant requirements*) are to be complied with;

⁵ cf. 2007 c. 19 s. 10 U.K.;

- (b) may require the organisation to supply evidence that the relevant requirements have been complied with, within the specified period, to the relevant authority.
- (4) An organisation that fails to comply with a publicity order is guilty of an offence, and liable on conviction on indictment to a fine.
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Part 3

Exceptions from the Relevant Duty of Care

10. Public policy decisions, exclusively public functions and statutory inspections⁶

- (1) 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) is not a “relevant duty of care”.
- (2) Any duty of care owed in respect of things done in the exercise of an exclusively public function is not a “relevant duty of care” unless it falls within section 5(1)(a), (b) or (d).
- (3) Any duty of care owed by a public authority in respect of inspections carried out in the exercise of a statutory function is not a “relevant duty of care” unless it falls within section 5(1)(a) or (b).
- (4) In this section—
exclusively public function (完全屬公共性質的職能) means a function that falls within the prerogative of the Government or is, by its nature, exercisable only with authority conferred—
 - (a) by the exercise of that prerogative, or
 - (b) by or under an enactment;*statutory function* (法定職能) means a power, duty or activity conferred by or under any enactment or national law applying in Hong Kong.

11. Public order and law enforcement⁷

- (1) Any duty of care owed by a public authority in respect of—
 - (a) operations referred to in subsection (3) (such operations),
 - (b) activities carried on in preparation for, or directly in support of, such operations, or
 - (c) 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,is not a “relevant duty of care”.
- (2) Any duty of care owed by a public authority in respect of other law enforcement activities is not a “relevant duty of care” unless it falls within section 5(1)(a), (b) or (d).
- (3) Operations are within this section if—

⁶ cf. 2007 c. 19 s. 3 U.K.;

⁷ cf. 2007 c. 19 s. 5 U.K.;

- (a) they are operations for dealing with terrorism or serious public disorder,
- (b) they involve the carrying on of law enforcement activities, and
- (c) during the operations, law enforcement officers in question come under attack, or face the threat of attack or violent resistance.

12. Emergencies and health services⁸

- (1) Any duty of care owed by an organisation within subsection (2) in respect of the way in which it responds to emergency circumstances is not a “relevant duty of care” unless it falls within section 5(1)(a) or (b).
- (2) The organisations within this subsection are—
 - (a) the Fire Service Department;
 - (b) the Auxiliary Medical Service raised and maintained under section 3 of the Auxiliary Medical Service Ordinance (Cap. 517);
 - (c) the Hong Kong St. John Ambulance incorporated under section 3 of the Hong Kong St. John Ambulance Incorporation Ordinance (Cap. 1164);
 - (d) any other organisation providing a service of responding to emergency circumstances either—
 - (i) pursuant to arrangements made with an organisation within paragraphs (a), (b) or (c), or
 - (ii) (if not in pursuance of such arrangements) otherwise than on a commercial basis;
 - (e) a hospital;
 - (f) an organisation providing ambulance services in pursuance of arrangements made with, or at the request of, a hospital;
 - (g) an organisation providing services for the transport of organs, blood, equipment or personnel in pursuance of arrangements made with a hospital;
 - (h) an organisation providing a rescue service;
- (3) For the purposes of subsection (1), the way in which an organisation responds to emergency circumstances does not include the way in which—
 - (a) medical treatment is carried out, or
 - (b) medical decisions are made.
- (4) Any duty of care owed in respect of the carrying out, or attempted carrying out, of a rescue operation at sea in emergency circumstances is not a “relevant duty of care” unless it falls within section 5(1)(a) or (b).
- (5) In this section—

emergency circumstances (緊急情況) means circumstances that are present or imminent and—

⁸ cf. 2007 c. 19 s. 6 U.K.;

- (a) are causing, or are likely to cause, serious harm or a worsening of such harm,
- (b) are likely to cause the death of a person, or
- (c) are believed to be of either paragraph (a) or (b);

hospital (醫院) means—

- (a) a public hospital referred to in section 2 of the Hospital Authority Ordinance (Cap. 113); or
- (b) any premises within the meaning of section 4 of the Private Healthcare Facilities Ordinance (Cap. 633);

medical decision (醫療決定) means a decision as to the carrying out of medical treatment, other than decisions as to the order in which persons are to be given medical treatment.

medical treatment (醫學治療) includes any treatment or procedure of a medical or similar nature;

serious harm (嚴重傷害) means—

- (a) serious injury to or the serious illness (including mental illness) of a person;
 - (b) serious harm to the environment (including the life and health of plants and animals);
 - (c) serious harm to any building or other property.
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Part 4

Supplementary Provisions

13. No individual liability⁹

- (1) An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence under section 4.
- (2) For the avoidance of doubt, this section does not exclude an individual's liability under common law or any other enactment.

14. Application to unincorporated organisations¹⁰

- (1) In criminal proceedings for an offence under this Ordinance against an organisation other than a corporation (*unincorporated organisation*), any enactment about criminal proceedings applies to the unincorporated organisation, subject to subsection (2), as if the organisation is a corporation.
- (2) The Secretary for Justice may make rules about criminal proceedings applicable to non-incorporated organisations.

15. Application to partnerships¹¹

- (1) Criminal proceedings for an offence under this Ordinance against a partnership are to be brought in the name of the partnership and not in the name of any of its members.
- (2) A fine imposed on a partnership on its conviction of an offence under this Ordinance is to be paid out of the funds of the partnership.

16. Certain categories of persons to be treated as employees¹²

For the purposes of this ordinance—

- (1) A person employed by the Government for the purposes of a department is to be treated as an employee of that department.
- (2) A member of the Police Force is to be treated as an employee of the Police Force.
- (3) A member of the Hong Kong Auxiliary Police Force is to be treated as an employee of the Hong Kong Auxiliary Police Force.
- (4) A special constable appointed under section 40 of the Public Order Ordinance (Cap. 245) is to be treated as an employee of the Police Force when acting as a special constable.

⁹ cf. 2007 c. 19 s. 18 U.K.;

¹⁰ cf. 2007 c. 19 s. 15 U.K.;

¹¹ cf. 2007 c. 19 s. 14 U.K.;

¹² cf. 2007 c. 19 ss. 11(3) & 13(3) U.K.;

Schedule 1¹³

[s.2]

Government departments etc

¹³ Pursuant to para 1(8)(c) of the “*Law Drafting Competition 2023: Format of the Proposed Bill*”, the Schedule 1 set out in the Legislative Proposal Outline is not reflected here because of the word limit for the Proposed Bill. The purpose of this Schedule is to provide a full list of government departments and other non-incorporated public authorities so that they are within the meaning of “organisation” under section 2, but not to exclude any of them. However, a public authority which is a corporation (e.g., the Hospital Authority, the Legislative Council Commission) is also within the meaning of “organisation” under section 2. Therefore, Schedule 1 is considered relatively less important.