EXPLANATORY MEMORANDUM TO

THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 (COMMENCEMENT NO. 3) ORDER 2011

2011 No. 1867 (C. 69)

and

THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 (AMENDMENT) ORDER 2011

2011 No 1868

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments. It covers two statutory instruments: an Order commencing section 2(1)(d) of the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Commencement Order") and an Order amending section 2 of that Act ("the Amendment Order").

2. Purpose of the instruments

2.1 The Commencement Order would bring into force on 1st September 2011 section 2(1)(d) of the Act, which sets out the duty of care that certain organisations owe to persons who are held in detention or custody. Once commenced the offence in section 1 of the Act would be capable of applying in relation to deaths of such persons (provided all elements of the offence are satisfied).

2.2. Section 2(2) of the Act sets out the various forms of custody or detention which are covered. The Amendment Order would amend section 2(2) of the Act to include two categories of persons not already covered by the Act. They are persons detained in service custody premises which are the responsibility of the Ministry of Defence and persons detained for customs purposes in custody areas of UK Border Agency offices.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 To the extent that it amends primary legislation, a draft of the Amendment Order has been approved by Parliamentary Counsel.

4. Legislative Context

4.1 The Corporate Manslaughter and Corporate Homicide Act 2007 creates an offence whereby an organisation can be found guilty of the offence of corporate manslaughter if the way in which its activities were managed or organised causes a death and amounts to

a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management. Most of the Act came into force on 6 April 2008.

4.2 When the then Bill was debated in Parliament, amendments were tabled in the House of Lords at a very late stage to ensure the Act would also apply to the management of custody. Those amendments did not cover service custody premises which are the responsibility of the Ministry of Defence or customs custody facilities (which are now the responsibility of the UK Border Agency). When Parliament agreed the amendments (what are now sections 2(1)(d), 2(2), and certain definitions in 2(7)) ("the custody provisions"), Parliament also agreed that their commencement could be delayed for three to five years after the commencement of the rest of the Act, to allow custody providers sufficient time to ensure compliance with the law.

4.3 The Ministry of Justice published reports in 2008[1] and 2009[2], updating Parliament on custody providers' progress towards the implementation of the custody provisions. These reports confirmed that custody providers were on course for commencement in 2011. The reports also indicated that service custody premises which are the responsibility of the Ministry of Defence and customs detention facilities would be added to the list contained in section 2(2).

4.4 Three years have now passed since the commencement of most of the Act in April 2008 and custody providers have indicated that they are ready for the custody provisions to take effect. The Government is therefore commencing section 2(1)(d), as planned.

4.5 Once the custody provisions are commenced, the existing common law offence of gross negligence manslaughter by corporations, which applied in respect of custodial duties until the commencement of section 2(1)(d), will be completely abolished.

4.6 Section 23 of the Act gives power to the Secretary of State to amend section 2(2) of the Act to make it include any category of person not already included. The Amendment Order is making use of this power for the first time.

5. Territorial Extent and Application

5.1 Since the devolution of policing and criminal justice to Northern Ireland in 2010, commencement of section 2(1)(d) in Northern Ireland is a matter for the Department of Justice in Northern Ireland (see paragraph 5 of Schedule 9 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I 2010/976)). The Commencement Order therefore only applies in relation to England and Wales, and Scotland.

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[1] http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/corporate-manslaughter-progress-custody.htm

[2] http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/corporate-manslaughter-progress-custody-09.htm

5.2 The Amendment Order on the other hand concerns matters which are reserved to the UK and amends provisions of the Act which extend to the whole of the UK.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Justice, Crispin Blunt, has made the following statement regarding Human Rights:

"In my view the provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 (Amendment) Order 2011 are compatible with the Convention rights".

7. Policy background

7.1 The Government is seeking to commence section 2(1)(d) in accordance with the timetable agreed during the passage of the Bill in Parliament. As set out in paragraph 4.2 above, the commencement of the custody provisions was delayed in order to allow custody providers enough time to ensure compliance with the law. Once commenced, the duty of care owed to a person by reason of that person being within section 2(2) (i.e. being detained in certain listed circumstances) would be a relevant duty of care for the purposes of the Act.

7.2 The Government is also seeking to amend section 2(2), which sets out the various forms of custody or detention covered by the Act, so as to include Ministry of Defence and UKBA customs custodial facilities which are not currently covered by the Act. This is to ensure consistency to the extent possible in the application of the legislation to persons held in custody or detention.

7.3 Reflecting the application of the Act to prisons and police custody, the policy intention in extending the Act to Ministry of Defence and UK Border Agency customs custodial facilities is to apply the Act to controlled custody environments only.

7.4 For UK Border Agency facilities, the duty of care would therefore apply in relation to those detained in the custody area of an office of the UK Border Agency. These are former Her Majesty's Revenue and Customs custody facilities which have now transferred to the responsibility of the UK Border Agency. The custody area in a UK Border Agency office is a readily identifiable and separate secure area which contains cells, interview rooms, a custody office, prisoner toilets and showers.

7.5 For Ministry of Defence custodial facilities, the duty of care will apply in relation to persons subject to service law and civilians subject to service discipline detained in premises under the control of the Secretary of State for Defence for the keeping of persons in service custody.

8. Consultation outcome

8.1 Commencement of the custody provisions is proceeding in accordance with the timetable agreed in Parliament. The Government did not consider a public consultation on the Commencement Order was therefore necessary.

8.2 The Amendment Order would ensure consistency in the application of the legislation to persons held in custody or detention. This is within the overall intended ambit of the policy contained in the Act and is in accordance with previous statements to Parliament. The Government did not consider therefore that a public consultation exercise on the Amendment Order was necessary or justified.

9. Guidance

9.1 The Ministry of Justice published a *Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* ahead of commencement of the Act, which also covered the custody provision (available on the Ministry of Justice website[3]).

9.2 As custody providers and practitioners are aware of the existence of the custody provisions and have been preparing for their commencement for the past three years, there is no need for specific additional guidance. However, the Government is planning to issue a circular as a matter of good practice and to ensure that the commencement and amendment of the Act are brought to the attention of those operating in the criminal justice system. The Ministry of Justice will also issue a notice on its website once the Orders have been made.

10. Impact

10.1 The commencement of the custody provisions does not create any new duty, since custody providers already owe a duty of care in the law of negligence to the people they hold in custody and they must already comply with health and safety laws.

10.2 Given the majority of custody providers are public bodies there would be an impact on the public sector. However, as set out above, custody providers are aware of the existence of the custody provisions and have been preparing for their commencement for the past three years so no impact on resources is foreseen in this respect.

10.3 The impact on business, charities or voluntary bodies is limited. The custody provisions only concern custody providers, some of whom might belong to the private sector. In that respect, businesses will be affected but charities and voluntary bodies will not, as they are not custody providers.

10.4 Ministry of Justice officials carefully considered whether the commencement and extension of the custody provisions should require an Impact Assessment. For commencement, after a preliminary analysis of the impact of the provisions on the Criminal Justice System, businesses and the general public, a view was taken that it would not be proportionate to conduct a full Impact Assessment of provisions that had

[3] http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/guidance/manslaughteractguidance.htm

already been debated and agreed in Parliament. For the Amendment Order, as set out above, this Order would ensure consistency in the application of the legislation to persons held in custody or detention. Given it is an extension of existing policy the Ministry of Justice, in agreement with the Better Regulation Executive, did not consider it justified a full impact assessment. One has therefore not been prepared for these instruments.

11. Regulating small business

11.1 Not applicable.

12. Monitoring and review

12.1 The Act will be subject to the normal procedures for post-legislative scrutiny; the custody provisions will be part of that monitoring process once they have bedded in.

13. Contact

Magali Provensal at the Ministry of Justice can answer any queries regarding the instruments (Tel: 020 3334 6075 or email: magali.provensal@justice.gsi.gov.uk).