House of Commons
Home Affairs and Work and Pensions Committees

Draft Corporate Manslaughter Bill

Written evidence

Ordered by The House of Commons to be printed 13 October 2005
The Home Affairs and Work and Pensions Committees

The Home Affairs and Work and Pensions Committees are appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and the Department for Work and Pensions.

Current membership

HOME AFFAIRS: Mr John Denham (Chairman)*, Mr Richard Benyon, Mr Jeremy Browne, Colin Burgon, Mr James Clappison, Mrs Ann Cryer, Mrs Janet Dean, Nick Harvey, Nick Herbert, Steve McCabe, Mr Shahid Malik, Gwyn Prosser, Mr Gary Streeter, Mr David Winnick.

WORK AND PENSIONS: Mr Terry Rooney (Chairman), Miss Anne Begg, Harry Cohen, Mr Philip Dunne, Mrs Natascha Engel, Michael Jabez Foster, Justine Greening, Mrs Joan Humble, Greg Mulholland, John Penrose, Jenny Willott.

*Mr John Denham, Chairman for this inquiry.

Powers

The Committees are departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in Standing Order No. 152. The powers of the Committees to work together and agree joint reports are set out in Standing Order No. 137A. These Standing Orders are available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/home_affairs_committee/draft_corporate-manslaughter_bill.cfm.

Committee staff

The current staff of the Committee are Gosia McBride (Clerk), Jago Russell, (Committee Legal Specialist), Francene Graham (Committee Assistant), and Jenny Pickard (Secretary).

Contacts

All correspondence should be addressed to the Clerk of the Home Affairs and Work and Pensions Draft Corporate Manslaughter Bill Sub-Committees, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8387; the Committee's email address is homeaffcom@parliament.uk
<table>
<thead>
<tr>
<th>No.</th>
<th>Organization/Person</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Federation of Master Builders</td>
<td>Ev 1</td>
</tr>
<tr>
<td>2</td>
<td>Engineering Construction Industry Association</td>
<td>Ev 3</td>
</tr>
<tr>
<td>3</td>
<td>Union of Construction Allied Trades and Technicians</td>
<td>Ev 4</td>
</tr>
<tr>
<td>4</td>
<td>Gary Roberts</td>
<td>Ev 8</td>
</tr>
<tr>
<td>5</td>
<td>Occupational and Environmental Health Research Group, University of Stirling</td>
<td>Ev 8</td>
</tr>
<tr>
<td>6</td>
<td>British Vehicle Rental and Leasing Association</td>
<td>Ev 11</td>
</tr>
<tr>
<td>7</td>
<td>English Community Care Association</td>
<td>Ev 15</td>
</tr>
<tr>
<td>8</td>
<td>South East Employers</td>
<td>Ev 15</td>
</tr>
<tr>
<td>9</td>
<td>Trades Union Congress</td>
<td>Ev 16</td>
</tr>
<tr>
<td>10</td>
<td>Transport and General Workers’ Union</td>
<td>Ev 18</td>
</tr>
<tr>
<td>11</td>
<td>Transport and General Workers’ Union</td>
<td>Ev 26</td>
</tr>
<tr>
<td>12</td>
<td>Seren Group Ltd</td>
<td>Ev 29</td>
</tr>
<tr>
<td>13</td>
<td>Public and Commercial Services Union</td>
<td>Ev 30</td>
</tr>
<tr>
<td>14</td>
<td>Public and Commercial Services Union, Department for Work and Pensions Group</td>
<td>Ev 31</td>
</tr>
<tr>
<td>15</td>
<td>Councillor Gordon Graham</td>
<td>Ev 32</td>
</tr>
<tr>
<td>16</td>
<td>Professor G R Sullivan</td>
<td>Ev 33</td>
</tr>
<tr>
<td>17</td>
<td>Gary Brown</td>
<td>Ev 35</td>
</tr>
<tr>
<td>18</td>
<td>Niall Tierman</td>
<td>Ev 36</td>
</tr>
<tr>
<td>19</td>
<td>Association of Council Secretaries and Solicitors</td>
<td>Ev 37</td>
</tr>
<tr>
<td>20</td>
<td>Crime Committee of the Superintendents Association of England and Wales</td>
<td>Ev 38</td>
</tr>
<tr>
<td>21</td>
<td>The Railway Forum</td>
<td>Ev 39</td>
</tr>
<tr>
<td>22</td>
<td>Royal Society for the Prevention of Accidents</td>
<td>Ev 43</td>
</tr>
<tr>
<td>23</td>
<td>Institute of Directors</td>
<td>Ev 44</td>
</tr>
<tr>
<td>24</td>
<td>Risk Frisk Ltd</td>
<td>Ev 48</td>
</tr>
<tr>
<td>25</td>
<td>Business Services Association</td>
<td>Ev 52</td>
</tr>
<tr>
<td>26</td>
<td>NHS Confederation</td>
<td>Ev 54</td>
</tr>
<tr>
<td>27</td>
<td>Rebecca Huxley-Binns and Michael Jefferson</td>
<td>Ev 54</td>
</tr>
<tr>
<td>28</td>
<td>Brake</td>
<td>Ev 58</td>
</tr>
<tr>
<td>29</td>
<td>GMB</td>
<td>Ev 59</td>
</tr>
<tr>
<td>30</td>
<td>Rail Safety and Standards Board</td>
<td>Ev 62</td>
</tr>
<tr>
<td>31</td>
<td>Medical Defence Union</td>
<td>Ev 64</td>
</tr>
<tr>
<td>32</td>
<td>Local Authorities Coordinators of Regulatory Services</td>
<td>Ev 65</td>
</tr>
<tr>
<td>33</td>
<td>Dr Nigel Dudley</td>
<td>Ev 67</td>
</tr>
<tr>
<td>34</td>
<td>Lilly Lewy</td>
<td>Ev 67</td>
</tr>
<tr>
<td>35</td>
<td>4 U Recruitment Ltd</td>
<td>Ev 68</td>
</tr>
<tr>
<td>36</td>
<td>Norman Hutchings</td>
<td>Ev 69</td>
</tr>
<tr>
<td>37</td>
<td>Disaster Action</td>
<td>Ev 69</td>
</tr>
<tr>
<td>38</td>
<td>Robert Erskine</td>
<td>Ev 71</td>
</tr>
<tr>
<td>39</td>
<td>Independent Police Complaints Commission</td>
<td>Ev 76</td>
</tr>
<tr>
<td>40</td>
<td>Construction Confederation</td>
<td>Ev 76</td>
</tr>
<tr>
<td>41</td>
<td>British Retail Consortium</td>
<td>Ev 77</td>
</tr>
</tbody>
</table>
42 Ian Watson  Ev 79
43 Simon Jones Memorial Campaign  Ev 79
44 Parliamentary Advisory Council for Transport Safety  Ev 85
45 Association of Train Operating Companies  Ev 87
46 CMS Cameron McKenna  Ev 100
47 Lord Chief Justice, Lord Woolf  Ev 108
48 British Ports Association  Ev 109
49 Thompsons Solicitors  Ev 110
50 Heating and Ventilating Contractors' Association  Ev 112
51 Law Reform Committee of the General Council of the Bar  Ev 114
52 Association of Principal Fire Officers  Ev 122
53 Regional Airports Limited  Ev 125
54 Wrightington, Wigan and Leigh NHS Trust  Ev 126
55 Shires Safety Consultants  Ev 126
56 Roy Cotterill  Ev 129
57 Dr Simon Bennett  Ev 130
58 Greenwoods Solicitors  Ev 131
59 Unison  Ev 132
60 Royal Borough of Kensington and Chelsea  Ev 134
61 Royal Borough of Kensington and Chelsea  Ev 135
62 Ergonomics Society  Ev 135
63 London Criminal Courts Solicitors' Associations  Ev 137
64 Alarm  Ev 148
65 Catalyst 123 Ltd  Ev 150
66 Chartered Institute of Personnel and Development  Ev 150
67 Bernard Taylor  Ev 152
68 Bryan Wilson  Ev 152
69 Centre for Corporate Accountability  Ev 153
70 Dawn Oliver  Ev 185
71 Communication Workers' Union, Merseyside and South West Lancashire Branch  Ev 187
72 Eversheds  Ev 188
73 South Tyneside NHS Foundation Trust  Ev 191
74 UK Major Ports Group  Ev 191
75 Kevin McCloskey  Ev 192
76 Health and Safety Commission  Ev 192
77 Commercial Workers Union  Ev 192
78 Southlands Nursing Home  Ev 197
79 Beachcroft Wansbroughs  Ev 198
80 Zurich Financial Services  Ev 199
81 Food and Drink Federation  Ev 201
82 CORGI  Ev 202
83 Energy Networks Association  Ev 204
84 Institute of Occupational Safety and Health  Ev 205
85 County Surveyor's Society  Ev 208
86 Association of British Insurers  Ev 209
87 Institute of Electrical Engineers
88 British Rubber Manufacturers’ Association Ltd
89 Keoghs Solicitors
90 Gerard Forlin
91 Fire Brigades Union
92 Law Society
93 David Thomas
94 Royal Academy of Engineering
95 Bluefinger Limited
96 JRB Risk Identification, Assessment and Control Services
97 Warwickshire County Council
98 EEF—The Manufacturers’ Organisation
99 National Blood Authority
100 Road Haulage Association Ltd
101 Amicus
102 Institution of Civil Engineers
103 Linklaters
104 Association of Personal Injury Lawyers
105 DWF Solicitors
106 Confederation of British Industry
107 Communication Workers Union
108 Living Streets
109 Transport for London
110 Law Commission
111 David Thomas
112 Mike Shuker
113 Tim Midgley
114 Ford and Warren Solicitors
115 Martin Elliott
116 Asda Stores Ltd
117 British Energy
118 Zerrin Lovett
119 Centrica Plc
120 General Counsel 100 Group
121 Royal Institution of Chartered Surveyors
122 David Daniel
123 Simone Plant
124 Public Concern at Work
125 Mike and Martina Pansonly
126 Sandwell Metropolitan Borough Council
127 Oldham Metropolitan Borough Council
128 Police Federation of England and Wales
129 Prison Reform Trust
130 Prospect
131 Roy Thornley
132 Hampshire County Council Ev 290
133 Restorative Justice Consortium Ev 290
134 Norton Roe Ev 293
135 Chamber of Shipping Ev 295
136 Mr Justice Silber Ev 296
137 Confederation of Passenger Transport Ev 297
138 Royal Society for the Promotion of Health Ev 297
139 NAPO Ev 298
140 British Coatings Federation Ev 299
141 Electrical Contractors’ Association Ev 299
142 Victim Support Ev 301
143 Guild of Air Pilots and Air Navigators Ev 303
144 Employer’s Organisation for Local Government Ev 303
145 National Union of Rail, Maritime and Transport Workers Ev 305
146 Better Regulation Task Force Ev 309
147 JUSTICE Ev 309
148 Union of Construction, Allied Trades and Technicians Ev 315
149 Marchioness Contact Group Ev 316
150 National Patient Safety Agency Ev 317
151 British Air Line Pilots Association Ev 317
152 Merseyside Fire and Rescue Authority Ev 319
153 TUC Certificate in Occupational Health and Safety Students, Derby College, 2004–05 Ev 319
154 Specialist Engineering Contractors’ Group Ev 320
155 Association of Chief Police Officers of England, Wales and Northern Ireland Ev 322
156 University of Leeds Ev 326
157 British Maritime Law Association Ev 327
158 Serco–Ned Railways Ev 328
159 South Wales Police Ev 329
160 Dr Hazel Hartley Ev 330
161 Balfour Beatty Ev 332
162 Professor Frank B Wright Ev 334
163 Network Rail Ev 337
Written evidence

Taken before the Home Affairs and Work and Pensions Committees

The Committees have decided to publish written evidence to their inquiry into the draft Corporate Manslaughter Bill before their oral evidence sessions begin. The Committees will publish the transcripts of these oral sessions alongside their report.

Some respondents gave our Committees permission to use their responses to the Home Office’s consultation on the draft Corporate Manslaughter Bill as evidence. Others sent new submissions. Some respondents did both. Evidence is printed in the order such permissions or new submissions were received.

1. Memorandum submitted by the Federation of Master Builders

The Federation of Master Builders (FMB) is the recognised voice of small and medium-sized enterprises in the UK building industry. Founded in 1941 and with membership of some 13,000 small and medium sized enterprises, the Federation has a strong background in representing the interests and concerns of small businesses in the sector.

The FMB Position

The Federation of Master Builders (FMB) has a zero tolerance approach to deaths in construction as it does not accept the inevitability of work related fatalities in the sector. The FMB is committed to assisting the Government in achieving its aim of reducing the number of deaths in construction by 10% by 2010.

The FMB also welcomes the attempt by the Government to even the playing field in relation to the clearly uneven way in which justice is currently applied to those who operate with scant regard for human life.

The FMB also shares the concern of the CBI and Institute of Directors that the grossly negligent be separated from the genuinely responsible employers who do everything possible to ensure the safety of their workers and of the public.

However, while the intention to protect life and punish those who do not is welcomed, the FMB and its members have some considerable concerns relating to how the Government proposals would work in practice. Some of our members fear that, once enacted, the operation of the act may change from its apparent direction and become a tool for persecuting businesses trying their best in order to serve as a deterrent to others.

Small firms

The Federation is concerned about the position of small firms.

Small firms find it considerably more difficult to keep up with changes to health and safety legislation and have limited resources with which to minimise risks for their staff and the general public.

It seems unreasonable to proliferate regulation and changes to regulation, then potentially use non-compliance as the evidence to convict firms and expose them to unlimited fines even when no individual instance of gross negligence can be proven.

The FMB would like to see greater support for small firms to help them keep up with the latest legislation and best practice so that they can avoid tragedies on site happening in the first place.

Small firms also lack the resources to be able to adequately defend themselves against a charge of corporate manslaughter. There is the possibility of a firm being charged, acquitted and then subsequently bankrupted by the cost of mounting a justified defence. In an instance such as this, the firm would suffer the effects of the unlimited fine for being found guilty despite having being acquitted of the charge brought against them.

What legal assistance will be available to help small firms defend themselves against a corporate manslaughter charge?

Liability

The FMB is also concerned about the issue of trespassers.

Anecdotal evidence from one of the FMB members recalls an incident some years back where a 14 year old had fallen through a fragile surface on the roof of a building while attempting to break into the premises. He was found the next morning with a broken leg. The firm was subsequently prosecuted for not having
adequately warned the would be intruder of the hazard. A hazard which he would not have been exposed to had he not been trespassing in an attempt to commit a felony. This example illustrates how little responsibility lies with members of the public and how unjust the process of determining responsibility, and thus liability, can be on construction firms. With justice able to come to such conclusions, is it not inconceivable that, had the boy been killed by the fall, the firm could also have been charged with corporate manslaughter?

Incidents of trespass over fencing, clearly designed to keep the public out, and subsequent injury to the trespasser are all too common. Deaths are possible and, with the weight of responsibility firmly on the contractor could corporate manslaughter be another chapter in an already weighty book ready to be thrown at a firm for clear negligence on the part of the public?

Where does responsibility lie in relation to often complex chains of contractors and subcontractors? For example, a Local Authority hires a contractor. The contractor hires a sub contractor, the sub contractor hires a further sub contractor to do some carpentry and a carpenter dies. This is a simplified example to try and illustrate the complexity of the layering of clients, contractors and subcontractors which could be seen to mirror the complexity of the management structure of a large firm. Liability for taxation has to filter its way through the structure, how will criminal liability apply?

The above question also raises the question of general client liability, both in terms of domestic clients and the Crown. Both are very keen to cut costs and should, in the view of the FMB, bear greater responsibility when they hire firms without considering the health and safety implications of low cost tenders.

For example, what responsibility will local authorities carry for corporate manslaughter in instances where they have hired a firm based on the cheapest bid, often an indication that corners have been cut on health and safety, not checked the organisations health and safety practices, and a death has occurred. The FMB considers that local authorities should bear some responsibility for checking the health and safety practices of the firms they award contracts to. The FMB is aware of the recycling of money argument in relation to the unlimited fines and feels that, in these instances, the fine should be paid in compensation to the victims’ family.

Individuals within firms

There is considerable concern within the Federation that failings lower down the management chain could result in the firm as a whole being convicted of corporate manslaughter as a result of individual failings.

Application

The FMB has concerns relating to the prediction contained in the Regulatory Impact Assessment that there is the expectation of an extra five prosecutions per annum. Members are worried that this will become a target and that our more vulnerable members will fall prey to quota fulfilment or be harshly prosecuted in order to set an example to the construction industry. They are particularly fearful in light of HSE commitment to reduce fatal injuries by 10% by 2010.

There is also a concern that, in the future, the act may be routinely applied to all prosecutions in cases involving work related deaths in construction.

The FMB has a further concern about the use of the offence in practice. Between best practice and genuine, undeniable, gross negligence, many degrees of non-compliance with regulation exist. Some firms may be complying with all the regulations as they stood last year, some may be operating best practice in some areas but be unaware of it in others and so on.

What are the Government’s intentions towards those firms that lie between the two clearly defined extremes?

QUESTIONS FROM THE FMB

Certain issues remain unclear.

What will be the burden of proof required for a conviction for corporate manslaughter conviction?

Under what conditions will the Director of Public Prosecutions sanction a private prosecution for corporate manslaughter?

Will firms be liable for trial for the same crime twice? For example, if a firm are prosecuted, and acquitted, possibly on a technicality, would the firm be open to retrial for the same offence or to a private prosecution again for the same offence?

17 June 2005
2. Memorandum submitted by the Engineering Construction Industry Association

ECIA represents contractors who build and maintain large and complex process plant such as oil refineries, chemical plants, and nuclear installations. You will appreciate that the risks involved in such work are potentially high and usually complex as well. Despite this our industry is able to demonstrate substantially lower incidence rates than the wider construction industry taken as whole. You therefore may find our comments useful as indicative of the experiences of a high risk (and potentially very high profile) activity where relatively higher standards prevail.

ECIA recognises the existing law’s shortcomings in being able to bring serious organisational failings to account and the need to resolve them through new law.

In general terms we consider that the current draft has significantly addressed previous main concerns, particularly about the nature of gross failure. In practice (subject to our comments on 3(4) below) we doubt that there is much scope for significant “added value” improvements of principle on the face of the draft bill. Consequently existing uncertainties on important detailed practical implications will remain. Authoritative guidance on the more detailed practical intent of the legal wording (before the new law comes into effect) is therefore essential.

**The Meaning of “Conduct Falling far Below”**

Our principal concern on the previous proposals was that the nature of “conduct falling far below what can reasonably be expected” was not defined. This could have led to inconsistent and unfair convictions. In particular there was a real danger of conviction being driven by a public appetite for it rather than genuine culpability.

The new proposals are much enhanced in this respect. The elements in clauses 3(2)(a) & (b) provide a clear and authoritative basis for establishing the culpability or otherwise of those accused which seems fair and reasonable.

We are concerned though at the potential effect of clause 3(4). As drafted this provides a jury with unrestricted licence to have regard to any other matter. They should make their decisions on the basis of the evidence presented to them in court. 3(4) endorses them in taking account of any other matter they consider relevant whether it emerged in evidence or not—and this could be especially significant in high profile cases. Presumably special attention is drawn to the matters in 3(2)(a) & (b) because they are the most important and thus merit explicit reference on the face of the law.

There needs to a clear indication that the 3(2)(a) and (b) criteria are the principle ones and that others, if they are available, should not override them. This could be achieved if clause 3(4) read:

“Having due regard to paragraph 2, the jury may also have regard to any other matters they consider relevant to the question.”

Paragraph 18 of the explanatory notes summarise what a gross breach is. There is an equal need to describe what it is not. Paragraph 32 (on page 13) suggests that it does not mean cases where “appropriate standards are not quite met”. This could mean all things to all men. Take a company operating an inherently high risk activity which delivers 99.5% compliance but nonetheless experiences a fatal explosion. A literal interpretation of “not quite met” would exclude this organisation. On the other hand many would argue that the high risk environment meant that anything less than 100% was a gross failure. They might then be equally guilty as manifestly poor health and safety performers who only achieved 50% compliance in less inherently “risky” situations. That does not seem the underlying intention, but such expectations could well be provoked, particularly where high profile incidents are involved. (Perversely enough this could have the effect of making it appear more “cost effective” amongst the badly motivated to aim at 50% compliance rather than 99.5%)

An important part of the overall package should be more detailed explanation of phrases such as “when appropriate standards are not quite met”. Contrasting examples of what is gross and what is not would be particularly helpful. Since criminal health and safety cases are relatively rare in the Crown Courts, such explanation would be as helpful to the judiciary as it is to the public in clarifying the intentions of a new Act of Parliament.

**The Meaning of Senior Manager**

The underlying intention appears to be limiting scope to those who are genuinely responsible for deciding and ensuring that appropriate standards are delivered on an organisation-wide basis. This is undoubtedly correct in principle, but we anticipate much confusion in practice and paragraph 15 in the explanatory notes illustrates where it could arise.
We suggest that more detailed indications of who are and are not senior managers would be most useful in supporting the new legislation. If not we can foresee cases going to court and failing because of a mismatch between the seniority of the manager involved and what he or she could have been expected to do or know in respect of the harm that gave rise to the death. In the worst case such uncertainties could substitute for the difficulties in establishing a “controlling mind” in the existing corporate offence.

14 June 2005

3. Memorandum submitted by the Union of Construction Allied Trades and Technicians

The Union of Construction Allied Trades and Technicians (UCATT) represents 125,000 members employed in the construction industry throughout the United Kingdom and the Republic of Ireland.

There are 2.2 million people working in the construction industry.

The construction industry currently accounts for approximately 9% of GDP.

UCATT have long campaigned for safe sites and have consistently raised the issue of the disproportionate high level of fatalities, injuries and ill health which affects construction workers.

Since the beginning of April 2005 there have been 11 fatalities amongst construction workers an increase of two on the same period last year (2004).

Year on year there is consistently around 70 construction workers killed at work.

The Health and Safety Executive has acknowledged a majority of construction related fatalities occur because employers do not carry out risk assessments, yet all too often the fine does not reflect the crime.

Examples of Prosecutions for Construction Fatalities

<table>
<thead>
<tr>
<th>Date</th>
<th>Type of incident</th>
<th>Defendant</th>
<th>Fine</th>
<th>Costs £</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 2002</td>
<td>Trench collapse resulting in fatality</td>
<td>Lee Sayers and Ernest Ecclestone</td>
<td>3,500.00</td>
<td>Inc in fine</td>
<td><a href="http://www.bbc.co.uk">www.bbc.co.uk</a> 9/12/2003</td>
</tr>
<tr>
<td>15/10/2001</td>
<td>Contact with moving machinery</td>
<td>Steven Charles Worthington</td>
<td>185.00</td>
<td>0.00</td>
<td>HSE case No F130000358</td>
</tr>
<tr>
<td>3/5/2001</td>
<td>Contact with moving machinery</td>
<td>Phillip Sutton</td>
<td>3,500.00</td>
<td>730.80</td>
<td>HSE case No F130000360</td>
</tr>
<tr>
<td>25/6/2001</td>
<td>Fall from height</td>
<td>Brett Construction Ltd</td>
<td>4,500.00</td>
<td>3,266.00</td>
<td>HSE case No F030000387</td>
</tr>
<tr>
<td>5/9/2001</td>
<td>Contact with moving machinery</td>
<td>Richard Murray</td>
<td>5,000.00</td>
<td>0.00</td>
<td>HSE case No F210000380</td>
</tr>
<tr>
<td>7/6/2002</td>
<td>Contact with moving machinery</td>
<td>Envirowaste Services Ltd</td>
<td>6,000.00</td>
<td>1,360.40</td>
<td>HSE case No F250000147</td>
</tr>
<tr>
<td>27/6/2001</td>
<td>Fall from height</td>
<td>Alan Swift</td>
<td>10,000.00</td>
<td>0.00</td>
<td>HSE case No F030000367</td>
</tr>
<tr>
<td>16/8/2001</td>
<td>Contact with moving machinery</td>
<td>John Charles Parker</td>
<td>13,000.00</td>
<td>2,000.00</td>
<td>HSE case No F100000524</td>
</tr>
<tr>
<td>26/7/2001</td>
<td>Fall from height</td>
<td>Total Gutter Maintenance Ltd</td>
<td>12,000.00</td>
<td>7,800.13</td>
<td>HSE case No F030000384</td>
</tr>
</tbody>
</table>

Research published by HSE in 2000\(^1\) shows that the construction industry remains one of the highest risk sectors in the UK and calculated the fatal and major injury rates for a selection of trades as shown in the table below.

**Construction Trade Risk**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Scaffolders</td>
<td>1 in 5,357</td>
<td>1 in 115</td>
</tr>
<tr>
<td>Roofers</td>
<td>1 in 3,764</td>
<td>1 in 300</td>
</tr>
<tr>
<td>Steel erectors</td>
<td>1 in 3,016</td>
<td>1 in 232</td>
</tr>
<tr>
<td>Glaziers</td>
<td>1 in 11,956</td>
<td>1 in 360</td>
</tr>
<tr>
<td>Painters and floorers</td>
<td>1 in 19,000</td>
<td>1 in 522</td>
</tr>
<tr>
<td>Maintenance workers</td>
<td>1 in 23,000</td>
<td>1 in 300</td>
</tr>
<tr>
<td>General operatives</td>
<td>1 in 28,000</td>
<td>1 in 600</td>
</tr>
<tr>
<td>Electrical trades</td>
<td>1 in 52,000</td>
<td>1 in 600</td>
</tr>
<tr>
<td>Bricklayers</td>
<td>1 in 76,500</td>
<td>1 in 600</td>
</tr>
<tr>
<td>Carpenters</td>
<td>1 in 78,000</td>
<td>1 in 512</td>
</tr>
<tr>
<td>Plumbers</td>
<td>1 in 80,500</td>
<td>1 in 990</td>
</tr>
<tr>
<td>All construction industry</td>
<td>1 in 13,000</td>
<td>1 in 250</td>
</tr>
</tbody>
</table>

The accident and fatality statistics for construction make grim reading. The construction industry is responsible for about 30% of all industry fatalities despite accounting for 9% of GDP.

**Fatal Injuries in Construction**

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
<th>Members of Public</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>47</td>
<td>18</td>
<td>65</td>
<td>3</td>
<td>68</td>
</tr>
<tr>
<td>1999–00</td>
<td>61</td>
<td>20</td>
<td>81</td>
<td>6</td>
<td>87</td>
</tr>
<tr>
<td>2000–01</td>
<td>73</td>
<td>32</td>
<td>105</td>
<td>8</td>
<td>113</td>
</tr>
<tr>
<td>2001–02</td>
<td>60</td>
<td>20</td>
<td>80</td>
<td>5</td>
<td>85</td>
</tr>
<tr>
<td>2002–03</td>
<td>56</td>
<td>14</td>
<td>70</td>
<td>5</td>
<td>75</td>
</tr>
<tr>
<td>2003–04p</td>
<td>51</td>
<td>19</td>
<td>70</td>
<td>3</td>
<td>73</td>
</tr>
<tr>
<td>2004–05p</td>
<td></td>
<td>68</td>
<td>5</td>
<td>73</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>348</td>
<td>123</td>
<td>541</td>
<td>30</td>
<td>571</td>
</tr>
</tbody>
</table>

p = provisional

**Fatal Injury Rates (per 100,000)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>4.4</td>
<td>2.8</td>
<td>3.8</td>
</tr>
<tr>
<td>1999–00</td>
<td>5.5</td>
<td>3.2</td>
<td>4.7</td>
</tr>
<tr>
<td>2000–01</td>
<td>6.5</td>
<td>5.0</td>
<td>5.9</td>
</tr>
<tr>
<td>2001–02</td>
<td>5.3</td>
<td>2.9</td>
<td>4.4</td>
</tr>
<tr>
<td>2002–03</td>
<td>4.9</td>
<td>2.0</td>
<td>4.0</td>
</tr>
<tr>
<td>2003–04p</td>
<td>4.3</td>
<td>2.4</td>
<td>3.55</td>
</tr>
</tbody>
</table>

**Major Injuries in Construction**

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
<th>Members of Public</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>4,289</td>
<td>367</td>
<td>4,656</td>
<td>378</td>
<td>5,034</td>
</tr>
<tr>
<td>1999–00</td>
<td>4,386</td>
<td>363</td>
<td>4,749</td>
<td>403</td>
<td>5,152</td>
</tr>
<tr>
<td>2000–01</td>
<td>4,303</td>
<td>405</td>
<td>4,708</td>
<td>316</td>
<td>5,024</td>
</tr>
<tr>
<td>2001–02</td>
<td>4,055</td>
<td>540</td>
<td>4,595</td>
<td>381</td>
<td>4,976</td>
</tr>
<tr>
<td>2002–03</td>
<td>4,031</td>
<td>690</td>
<td>4,721</td>
<td>263</td>
<td>4,984</td>
</tr>
<tr>
<td>2003–04p</td>
<td>4,001</td>
<td>749</td>
<td>4,750</td>
<td>181</td>
<td>4,931</td>
</tr>
<tr>
<td>Total</td>
<td>25,065</td>
<td>3,114</td>
<td>28,179</td>
<td>1,922</td>
<td>30,101</td>
</tr>
</tbody>
</table>

---

2 www.hse.gov.uk/statistics
MAJOR INJURY RATES (per 100,000)

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>402.7</td>
<td>56.5</td>
<td>271.6</td>
</tr>
<tr>
<td>1999–00</td>
<td>395.9</td>
<td>57.7</td>
<td>273.5</td>
</tr>
<tr>
<td>2000–01</td>
<td>380.9</td>
<td>62.7</td>
<td>265.1</td>
</tr>
<tr>
<td>2001–02</td>
<td>356.1</td>
<td>79.5</td>
<td>252.8</td>
</tr>
<tr>
<td>2002–03p</td>
<td>354.9</td>
<td>99.1</td>
<td>257.7</td>
</tr>
<tr>
<td>2003–04p</td>
<td>335.1</td>
<td>96.1</td>
<td>240.7</td>
</tr>
</tbody>
</table>

OVER 3 DAY INJURIES IN CONSTRUCTION

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>9,195</td>
<td>381</td>
<td>9,576</td>
</tr>
<tr>
<td>1999–00</td>
<td>10,159</td>
<td>345</td>
<td>10,504</td>
</tr>
<tr>
<td>2000–01</td>
<td>9,367</td>
<td>429</td>
<td>9,796</td>
</tr>
<tr>
<td>2001–02</td>
<td>9,100</td>
<td>595</td>
<td>9,695</td>
</tr>
<tr>
<td>2002–03</td>
<td>8,949</td>
<td>629</td>
<td>9,578</td>
</tr>
<tr>
<td>2003–04p</td>
<td>8,162</td>
<td>737</td>
<td>8,899</td>
</tr>
<tr>
<td>Total</td>
<td>54,932</td>
<td>3,116</td>
<td>58,048</td>
</tr>
</tbody>
</table>

OVER 3 DAY INJURY RATES (per 100,000)

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Self Employed</th>
<th>Total Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998–99</td>
<td>863.4</td>
<td>58.7</td>
<td>558.6</td>
</tr>
<tr>
<td>1999–00</td>
<td>917.0</td>
<td>54.9</td>
<td>604.9</td>
</tr>
<tr>
<td>2000–01</td>
<td>829.2</td>
<td>66.4</td>
<td>551.7</td>
</tr>
<tr>
<td>2001–02</td>
<td>799.1</td>
<td>87.6</td>
<td>533.3</td>
</tr>
<tr>
<td>2002–03</td>
<td>788.0</td>
<td>90.4</td>
<td>522.9</td>
</tr>
<tr>
<td>2003–04p</td>
<td>683.6</td>
<td>94.6</td>
<td>451.0</td>
</tr>
</tbody>
</table>

UCATT has campaigned for legislation that will ensure that all employing organisations, whether they are public, private or voluntary, incorporated or unincorporated and the individuals who own and manage them can be held to account under the law in cases where workers die because of management failures.

The construction industry consists of approximately 175,000 companies.

The industry is highly fragmented in terms of construction output so that large companies account for approximately half of all work done and small companies account for approximately one third.

Nearly 99% of companies employ fewer than five people and account for approximately 60% of total employment in the industry.

By contrast, less than 1% of companies employ more than 250 people, but account for 22% of total employment. This fragmentation has made it difficult to hold those responsible for accidents and fatalities to account.

UCATT believes that only by holding individuals at the head of companies to account, with the threat of imprisonment for the most serious failures, will ensure a safer industry for everyone who works in it.

Senior Managers who are in control of sites where safety is taken seriously will have nothing to fear from these measures.

UCATT support for Stephen Hepburn’s Private Members’ Bill, “Health and Safety (Directors” Duties) Bill reinforced this union’s commitment to legislation that ensures when individuals cause the death of a worker, the full range of penalties, including imprisonment, are open to the courts.

The House of Lords and House of Commons Joint Committee on Human Rights in its Scrutiny: Final Progress Report of the parliamentary session 2004–05 welcomes the measures that were proposed as “enhancing the implementation of health and safety law” and they have drawn their support to the attention of both Houses.

UCATT warmly welcomes the Government’s publication of a Draft Corporate Manslaughter Bill and are pleased to be able to respond to this consultation paper.

It is now more than seven years since an incoming Labour Government promised legislation on this matter, so reform of the much-criticised corporate manslaughter laws is well overdue.
UCATT are aware that there is no guarantee of there being a final Bill, let alone legislation that makes it to the Statute Books. UCATT calls upon the Government to complete the draft scrutiny process as soon as possible and to introduce a final Bill into this session of parliament without any further delay.

Although UCATT is keen to see Corporate Manslaughter legislation on the Statute we have reservations about the draft Bill.

The Government must get this legislation right to prevent many more innocent workers losing their lives in avoidable work-related fatal accidents.

UCATT considers that in order to get this legislation right, corporate manslaughter law needs to target both corporate and individual guilt and that it should cover all employing organisations. UCATT’s analysis of the current proposals shows us that they fail to deliver on these key issues.

UCATT SUMMARY OF CONCERNS WITH COMMENTS

— The Draft Bill only addresses corporate liability. This is a step backwards from the 2000 proposals in which the Government was seeking views on whether officers of undertakings should be liable to imprisonment.

— The only penalty that is proposed is a fine against the company. Fines are already levied for health and safety offences and the very few cases of directors or senior managers being jailed for manslaughter has occurred in small companies. Given the high level of injuries and fatalities in construction, imposing fines does not appear to be a severe enough penalty to bring about safety improvements on construction sites.

— According to the Home Office’s own Regulatory Impact Assessment, this draft Bill in its current format will only lead to an additional five prosecutions for corporate manslaughter each year.

— UCATT has serious concerns about the “senior managers” test that is introduced by this draft Bill. These concerns centre on the way in which negligent organisations could delegate health and safety management to non-senior managerial levels and thereby escape prosecution. However, UCATT would not wish to see anyone other than senior managers individually prosecuted under this proposed legislation.

— In particular on construction sites there are usually a number of companies to who work is subcontracted. UCATT believes in these circumstances it will be very difficult to prove a gross breach of duty caused by the activities of a senior manager who played a significant role in the decisions or management of the activities of the company that led to the death. UCATT does not believe these proposals will make it any easier to bring a charge of corporate manslaughter than it is at present.

— The “gross breach” test itself, UCATT believes, could be difficult for juries to establish. It will require juries to consider whether senior managers knew or ought to have known that their organisation was in breach of health and safety legislation. Since there is no legal obligation on directors to ensure their organisation is complying with health and safety law it is difficult to see how juries are supposed to draw these conclusions.

— UCATT believes that the “profit from failure test”, that is proposed, opens up a loophole which could enable negligent organisations to avoid prosecution. UCATT thinks it is unlikely that a company will have documented an intention to profit from a failure that led to a work-related death.

— UCATT welcomes the extension of this proposed legislation to cover a number of Crown bodies. However, we still have concerns that given the exemption from prosecution of all decisions involving public policy, every Crown body could potentially escape prosecution for corporate manslaughter by invoking a “public policy defence”.

— UCATT considers there is a missed opportunity to remove Crown Immunity from health and safety offences.

— UCATT is disappointed that the draft Bill does not cover all employing organisations.

— UK companies that cause deaths abroad are excluded from the scope of the legislation. This is the case even when the workers concerned are UK citizens.

— UCATT is concerned that the only penalties that are proposed are fines against the company. We feel that an opportunity is being missed to introduce a wider and more innovative range of penalties such as custodial sentences for individuals and probation orders for companies.

— No firm commitments have been given about the timetable or details on the mechanics and structure of the pre-legislative scrutiny process that the draft Bill will undergo.
UCATT RECOMMENDATIONS

If this Draft Bill is to achieve its intention as both a deterrent and a punishment then it is essential that it is able to have the widest possible application. UCATT therefore recommends that the following provisions be included in the final Bill that is presented to Parliament.

— It is not enough to simply target companies and some Crown bodies. The Bill should include individual liability which can be achieved by:
  (a) Introducing legally binding health and safety duties on company Directors and their Crown body equivalents.
  (b) Allowing individuals to be prosecuted for, and convicted of, aiding, abetting, counselling or procuring the offence of corporate manslaughter. However, UCATT repeat our assertion that it should only be senior managers to which this should apply.

— The Bill should be amended so that work-related fatalities caused by every level of management are admissible for use in the consideration of corporate liability for manslaughter. In terms of the multiple sub-contracting that takes place on construction sites then this should reflect the practice that decisions about the overall standards on the site lie with the principal contractor and it is they who should be held accountable whether or not they actually employ any staff. This should not prevent senior managers of sub-contractors being held accountable in addition to the principal contractor.

— The “profit from failure” test must be removed from the Draft Bill.

— The “public policy” test must be removed from the Draft Bill.

— Crown Immunity must be removed for health and safety offences.

— The Draft Bill must be amended so that all employing organisations come within its scope. This will require:
  (a) Crown and Parliamentary immunity to be removed in such a way so that it ensures that all Crown bodies, including Parliament, government departments, government agencies, the prison service, regulatory agencies and the civil service are liable to prosecution for the offence of manslaughter; and
  (b) The extension of liability for the offence of manslaughter to unincorporated bodies.

— The scope of the Draft Bill must be widened so that companies that cause deaths abroad are liable to prosecution for corporate manslaughter.

— In order to encourage proactive health and safety management, provide a credible deterrent against negligence and deliver justice for victims, the fines system proposed must be supplemented by an innovative range of penalties, including custodial sentences.

— The pre-legislative scrutiny of the Draft Bill must begin as a matter of urgency and a final Corporate Manslaughter Bill should be introduced into parliament at the very earliest opportunity.

4. Memorandum submitted by Gary Roberts

I have read the draft Corporate Manslaughter Bill and would like to make the following observations:

— This bill is so weak I suspect it will be very rarely used in practice.

— A fine for corporate manslaughter on indictment is ridiculous. A charge of manslaughter when used against a citizen could result on conviction to a period of imprisonment.

— The CEO of a corporation should be held as the responsible officer when an employee dies as a result of any gross breach of a relevant duty of care.

Any senior manager should receive a community sentence for any breach.

8 June 2005

5. Memorandum submitted by the Occupational and Environmental Health Research Group, University of Stirling

The proposed bill aims to fill an important gap in UK justice. However, in our estimation, the draft has been framed in an unnecessarily narrow way. There are several areas, which we detail below, where the bill could be altered to ensure both clarity and greater justice and to extend culpability to protect employees from well recognised occupational diseases with specific and traceable causes without becoming too unwieldy, unworkable or burdensome.
1. Individual Liability

In the pre-amble to the Draft Bill, the Government’s concern in the 2000 Home Office consultation that reforming the criminal liability of companies without imposing new punishments upon company officers would be insufficient for the purposes of deterrence is noted. The Draft Bill further notes that “these proposals received a great deal of comment from respondents, with strong opinions on both sides and views evenly split”, and therefore rejects the call for an individual offence for senior officers. This is an unsatisfactory conclusion however, since the fact that there were two opposing sides on this issue is hardly surprising. In the consultation exercise, employers’ organisations argued vociferously against individual liability. Those groups with an interest in the protection of workers and members of the public (such as trade unions and victims organisations) argued equally vociferously for individual liability. The representatives of those likely to be prosecuted by a new law will rarely lend strong support to tough laws that expose their members to criminal penalties. Instead of skirting around the most controversial issues simply because there is no consensus, the reform process needs to remain focussed on the effectiveness of the proposed law.

The Draft Bill already expressly excludes individuals from culpability and stipulates that “an individual cannot be found guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter.” This stands in stark contrast to the Canadian government which noted that under their new legislation a corporate executive or board member can also be liable under the Criminal Code for aiding or abetting an offence, for counselling a person to be a party to an offence or being an accessory after the fact to an offence. The Australian Capital Territory (ACT) enacted a separate individual offence in the Crimes (Industrial Manslaughter) Amendment Bill 2003 to allow for the prosecution of “senior officers” if they negligently or recklessly caused the death of a worker. Senior officers face a maximum penalty of 25 years imprisonment if they are convicted. The exclusion of a specific offence for directors and senior managers in our view represents a major weakness in the bill because key decision makers in corporations are able to use the corporate shell to conduct unlawful business with impunity. The liability of individual senior officers is a crucial component of any law reform programme, because of its deterrent effect. Without individual liability, a company can be used to commit crime with relative impunity, especially if it is only exposing itself to fines (which expressed as a proportion of revenue often equate to exceptionally small sums for larger companies) or low-level remedial orders. Corporate deterrence is therefore likely to be weak unless it is linked to individual liability.

The importance of enabling individual liability is widely acknowledged by the wider public, where individual liability is supported in polls of the general public and senior executives and directors themselves when asked as part of a confidential survey. A UK-wide MORI poll commissioned by the Transport and General Workers Union in 2003 found that 65% of people agreed with the statement that “workplace safety will only improve if company directors can be prosecuted for a serious criminal offence like manslaughter.” The same proportion supported the introduction of corporate killing with directors being made personally responsible. A survey of directors and senior managers in England conducted by consultancy firm Norton Rose also found that 55% thought that an individual director should be made personally responsible and criminally liable for failings in the organisation.

The Government stresses that individuals will remain accountable under the existing common law offence of manslaughter. This route, however, is likely to remain inadequate for the purpose of prosecuting individuals. Despite a recent rise in the number of prosecutions, the current rate remains at about three or four prosecutions of individuals per year in England and Wales. No individual has ever been prosecuted for homicide in Scotland for causing a death at work. It may be that that the law in its proposed form will actually discourage prosecutions that take the common law route since the prosecuting authorities will now be expected to process corporate manslaughter cases using the new law. The opportunity to provide a more effective legal means of prosecuting both companies and individuals therefore may well be short circuited, albeit unintentionally, by the proposed bill. We would argue that the only way to ensure that the legislation acts as a more effective deterrent will be to introduce a secondary offence which enables individuals to be held liable for significant contribution to the offence of corporate manslaughter. At a minimum, we would argue strongly for the need to retain a lower level individual offence that approximates to “aiding and betting”.

2. Duty of Care

In order to specify when the new offence comes into play, it must be established that there is a relevant duty of care between the organisation and the deceased. In our opinion, demonstrating this relationship is likely to prove difficult in too many circumstances. Using a civil law concept of duty of care in this way does, as the Government suggest, clarify the position in relation to the circumstance under which the offence will apply. However, it also fails to clarify the relationship between this duty of care and existing statutory duties under, for example, the Health and Safety at Work Act 1974. Amending the offence in its current form to include gross breaches of statutory obligations is relatively easy to do, would make it much clearer exactly what the obligations on employers are, and would ensure consistency with existing statutory law.
3. ATTTIBUTING LIABILITY

In order to overcome the problems posed in several corporate manslaughter prosecutions (not least the Herald of Free Enterprise case—R v HM Coroner for East Kent ex parte Spooner [1989] 88 Cr App R 10) the conduct of managers and those in authority at a level lower than that of senior manager must be allowed to trigger liability. It appears from the wording of the bill that the “way in which any of the organisation’s activities are managed or organised” intends to capture a means of linking senior managers’ role in management and organisation to evidence of criminal conduct at lower levels of the organisation. We would draw two problems to the attention of the Government here. First, the drafting of the bill does not make this clear enough. Second, whilst the Draft Bill offers a means of escaping the straitjacket of corporate mens rea based upon the identification principle, it retains an overly strict means of identifying the conduct of senior manager(s) in order to attribute liability to the corporation.

In Canada, although there is a comparable method of attributing liability used, Canadian law makes it much clearer that criminal liability can be triggered at all levels of the organisation by anyone with sufficient authority. In the Canadian C-45 Bill which passed into law in November 2003, the conduct of the company’s “representatives” is the first consideration in determining the offence. Representatives can be employees, agents or contractors of the organisation. A corporate offence is committed if, at the same time, senior officers who have responsibility for the aspect of the organisation’s activities relevant to the offence have departed from a standard of care that could have been reasonable expected in the circumstances.

Under the Australian Federal Criminal Code Act 1995, the method of attributing liability by way of the identification route remains intact (to show that the corporation’s board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct). But significantly, intention, knowledge or recklessness can be also attributed to a corporation where it is established either that a “corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.” or where the corporation failed to create and maintain a corporate culture that ensured legal compliance. Corporate culture is defined in the Act as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.” In the corporate culture model, liability can be imputed where the individual who committed the unlawful act reasonably believed that an authoritative member of the corporation would have authorized or permitted the commission of the offence.

The draft Bill for England and Wales does not escape fully from the iron cage of identification, since in order to secure a conviction of the company, criminal conduct must be tied to the specific conduct of individual senior manager(s). This form of attributing liability is a much weaker one than that set out in the proposals outlined in the original 2000 Home Office consultation where there was no indication that a particular level of “senior” management was required for a prosecution.

The means of attributing corporate liability is too briefly set out in the Draft Bill. We would propose that the innovative approaches adopted in Canada and Australia are much more likely to provide a clearer and more workable model for the means of attributing liability.

We also draw to your attention to the rather vague definition of “senior manager” in the Draft Bill that creates another grey area. In the Draft Bill, it appears that the term is intended to apply to directors, but this is not entirely clear in the wording of notes which accompany the Draft Bill. We would therefore urge the Government to clarify the wording of the Bill in this respect.

4. THE “GROSS BREACH” THRESHOLD

The criteria that must be used to determine a gross breach creates a second major hurdle in the route to prosecution. In order to determine whether or not the conduct in question is gross, a jury is required to consider whether one or more “senior managers” knew or ought to have known about the failure to comply or that they were aware or ought to have been aware of the risk of death. More significantly, juries must consider whether senior managers “sought to cause the organisation to profit from that failure.” What this does is effectively introduce a requirement that may be very difficult to demonstrate. It is highly likely that juries will be asked to consider complex evidential arguments on the issue of whether or not a profit motive existed. This requirement effectively raises the bar to prosecution and introduces wholly unnecessary complexity into the process. Moreover, it is not clear at all how the bill might deal with cases involving public sector and non-profit organisations, or how juries might be directed in those cases.

The criteria set out in part 3(2)(b) of the Draft Bill is more likely to hinder, rather than to help a jury reach a decision.

5. SCOPE OF THE BILL

The Draft Bill is remarkably and we think unnecessarily limited in its scope. It has singled out the offence of manslaughter and in doing so has deliberately ignored other offences of corporate violence or endangerment. At the moment, if a company either recklessly endangers its workers or the public, or causes injury or disease to a person as a result of gross negligence/recklessness then it is prosecuted—if prosecuted at all—for a breach of health and safety law, rather than for an offence that properly describes serious
unlawful conduct. There is no logical reason for not including “injuries” offences that capture physical injury and occupational disease. Indeed, it may be sending out a confusing message to say that we will criminalise serious offences that result in death and not those that don’t, by virtue only of the good fortune that the offence caused injury rather than death. We do not anticipate that the incorporation of endangerment, injury and disease into this offence using the same form of attributing liability and the same legal tests would be a major drafting problem. We urge the Government to reconsider the inclusion of new criminal offences which prohibit the causation of endangerment, injury and disease.

6. LIMITED RANGE OF SANCTIONS

The Draft Bill stipulates two penalties that are available to the courts: remedial orders similar to those used in health and safety law cases, and fines at a level to be determined by the courts according to the seriousness of the offence. Similar laws in other jurisdictions impose a much wider and more imaginative range of penalties than those proposed in the Draft Bill. We should not restrict our options here, but consider the range of effective sanctions that can be imposed on companies, and indeed consider why organisations require specially designed punishments which recognise that achieving justice, deterrence and rehabilitation may require flexibility and imagination in sentencing. In the Australian Capital Territory Act mentioned previously, the courts can order the offence, the deaths or serious injuries or other consequences resulting from or related to the conduct and any penalties imposed, to be publicised on television or in a daily newspaper and to be notified in an annual report or another notice to shareholders of the corporation. We urge the Government to consider inclusion of a full range of penalties to include the public shaming provisions set out above; corporate probation (where companies are required to comply with a set of health and safety improvements for a set period of time or face stiffer penalties); confiscation of assets associated with the offending; prohibition of the corporation from business activities associated with the offending; dissolution (or the “corporate death penalty”); and equity fines which reduce the value of shares in the company (thus preventing the costs of large fines being passed on to workers, consumers or other smaller client firms).

7. LIMITED JURISDICTION

We also question the rationale for the de facto exemption of English and Welsh firms where operations are based abroad. This has particular implications for southern hemisphere countries where regulatory standards are driven down by the need to attract foreign capital. Any new law should not permit companies to establish lower standards of protection for workers in developing countries. Foreign liability is excluded in the Draft Bill on the basis that “the offence would in practice be unenforceable.” This is unconvincing and inconsistent with the common law rules for individual manslaughter offences. At the moment, UK nationals can be prosecuted in the UK for committing homicide abroad. In addition, there are a range of legislative provisions (not least those covering financial wrongdoing and corruption) that enable the prosecution of UK companies operating abroad. The granting of immunity to UK companies abroad for killing rather than embezzling for example an unnecessary anomaly in law. We urge the Government to amend the Draft Bill to include liability for UK companies that commit this offence abroad.

8. DEATHS RESULTING FROM EXPOSURE TO HARMFUL SUBSTANCES

In the UK at the moment there remains a woeful lack of enforcement for offences that cause deaths and diseases following exposure to harmful substances (such as the exposure of workers to asbestos or chemicals). Across the UK, only 1% of deaths resulting from occupational exposures, as opposed to sudden deaths from injuries, are currently prosecuted as offences. Any new law on corporate killing will by definition, cover many of those deaths caused by exposure to harmful substances. This is not so much a substantive issue of law, but an issue relating to the gathering of evidence and of the rules and procedures used in investigations. The Government should immediately review those aspects of evidence gathering and investigation used by the police and the HSE following deaths related to occupational health causes. Those aspects of the process are also resource intensive and we would urge the Government to provide resources immediately to reverse the unacceptable shortfall in occupational health related prosecutions.

17 June 2005

6. Memorandum submitted by the British Vehicle Rental and Leasing Association

EXECUTIVE SUMMARY

The British Vehicle Rental and Leasing Association (BVRLA) and its members share a wealth of experience to recognise the importance of ensuring that the UK continues to maintain its good record on health and safety within Europe. It is on this basis that we welcome the opportunity to offer our support for the introduction of clear and effective corporate manslaughter legislation. We also take this opportunity to
make specific references, which we believe go some way to help compliment and strengthen employers' role in promoting occupational road risk measures, which will contribute positively to address and improve the “at work” road safety issues.

The BVRLA shares the common objective of investigating ways to improve and help bring about a safer working environment for employees and the community. Our members through their end user customers seek to ensure that their employees driving at work adopt a responsible attitude towards safety on our roads. The BVRLA continues to work tirelessly to help raise awareness on this subject amongst a wide spectrum of employers, which included the launch of our “Driving at Work” guide with the sole aim of supporting the key recommendations made by the Work Related Road Safety Task Group (WRRSTG).

As road safety is constantly under public scrutiny, and in recognition of this fact, we believe that there should be a high level of clarity for businesses outlining the importance for them being held accountable for their actions which have an impact on society. It would only seem a prudent measure for businesses to be able to demonstrate that they have system and measures in place which recognise such responsibilities.

We remain confident that the Home Office will seek to ensure that the proposed draft Bill contributes positively towards improving public safety and that UK plc does not become wholly risk averse in outlook thereby stifling enterprise, and welcome measures to ensure that the approach adopted towards enforcement does not hinder these aims.

We feel it is sensible to ensure that the draft Bill is targeted at corporations and not individuals, especially as both directors and individuals are subject to existing company and health and safety laws, the potential for being charged with an offence under existing law of gross negligence manslaughter. It is on this basis that we seek assurance that this draft Bill will not lead to duplicity and would encourage the department to secure consistency and coherence in its implementation.

To ensure the offence of corporate manslaughter is clear, effective and fair, it should:

— apply to all activities applied to all UK undertakings, and that Crown Immunity is strictly limited to matters of national security;
— apply to behaviour that grossly or negligently disregards foreseeable risks to employees and the general public;
— related to a duty holder’s obligations for the reasonably foreseeable identification and evaluation of risks and the reasonably practicable control of risks;
— related to a continuing and systematic failure to assess and control risks rather than an isolated lapse within a well-established system, not be founded on aggregation of many unlinked faults, that had been appropriately managed, to paint a picture of systemic failures; and
— consistently applied across the UK.

Clarification is required on the following:

— the potential lowering of the status of person who might be classified as a senior manager compared to the type of person who might represent a directing mind;
— the increased level of responsibility for the acts of contractors.

Given our specific interests with these proposals, we are only too happy to be able to assist the Home Office in ensuring that this highly important and complex area of the law is made more effective so as to ensure that businesses can be held accountable for its gross failings.

GENERAL COMMENTS

We note that the primary stimulus to introduce a new offence of corporate manslaughter, whereby an organisation would be prosecuted for if a “gross failing by its senior managers to take reasonable care for the safety of their workers or members of the public caused a person’s death” is driven by the number of unsuccessful prosecutions over the years.

We agree that it is both right and proper that companies and other organisations must be held properly to account for gross failings by their senior management which results in fatal consequences. Equally, we remain encouraged that this proposed offence will be applied carefully and reserved for the very worst cases of management failure.

Indeed, with the Chancellor’s statement on a modernised approach towards better enforcement and implementation across government departments, we hope the Home Office will help to ensure that this offence does not act as a substitute to existing redress under health and safety laws, but should instead help to complement any future prosecutions.

On this related point, we note that the Secretary of State is commitment to ensure that this offence does not increase regulatory burden or create a risk averse culture and that businesses that already take their obligations seriously under Health and Safety law should have nothing to fear. It is therefore critical that a joined up approach is delivered to the existing and future steps being taken to improve at work related road safety concerns. Moreover, companies that already manage health and safety to achieve exemplary performance should be acknowledged and should not have to do more.
We believe that the proposed offence should not be clouded by the public appetite for someone to be held accountable and blamed for accidents involving fatalities. Ultimately, the courts are enshrined with powers to help deliver justice and the existing and future prosecutions should ensure that prerequisite evidence is obtained to help prove and enforce this area of the law, irrespective of what the offence is classified as.

Through improved dialogue and communication, business leaders fully recognise the importance of meeting the expectations from society. That said, business should not be expected to provide or be accountable for a risk-free environment, but instead be held responsible for systematic failures.

In today’s modern and global world businesses are motivated with securing compliance and embracing a high standard of health and safety performance. The laws aimed at promoting and improving health and safety law should ensure not only that the punishment fits the crime, but that lessons can be learned to help general improvement, but that it acts as a key deterrent.

As we indicated above, those directors that are grossly negligent in their own right, of causing the death of a person to whom they owe a duty of care, can be prosecuted under the common law offence of manslaughter. It would be wholly inappropriate for the burden of proof or standard to be lowered simply to satisfy calls for a corporate scapegoat or because it may be challenging to prosecute the individual for his own actions or inaction. As the department is aware the Health and Safety at Work Act 1974 (HSWA) already acknowledges the principle of custodial sentences for individuals held responsible for the most serious omissions or acts. The legal tests of failure to take reasonable care and consent, connivance or neglect are similar to those proposed for gross negligence. Individuals culpable of such failures leading to work-related fatal accidents should properly be dealt with under existing health and safety legislation.

Moreover, employees are generally expected to take reasonable care for their own health and safety and that of others to contribute to the organisation’s efforts. There is a danger that this law may concentrate on the responsibility of the individuals or level of management which could lead to an abdication of responsibilities, therefore eroding the principle of team work and stifling motivation.

**Specific Comments**

We make the following comments to the proposed draft bill, which we hope can work to help minimise risk of increasing regulatory burdens, stifling entrepreneurial activity or creating a risk averse culture.

**The Legal Framework**

We recognise the importance of understanding the legal complexities under existing laws, which includes the need to review the guilty mind or identification principle and instead work towards improved focus on management failures at senior level within an organisation. Whilst we understand the need to move towards a structure that better reflects the complexities of decision making and management processes within large corporate structures, we feel the proposed wording may not necessarily prove to be helpful for a vast range of corporate structures, together with it not being aligned with existing legal regimes, including company and health and safety legislative frameworks.

This may be of particular relevance where large organisations have a high degree of internal specialism and where it is difficult to identify the individual that may have played a significant role in the management decision or activity. This may lead to the historical difficulties under the identification principle being repeated here, which may be contrary to the aims of the new proposed offence being more targeted to corporate bodies. To help address this difficulty from arising, we recommend a much wider definition be adopted to help reflect the Home Office’s stated aims.

We note that the proposed offence contained in Section 1 deals with the way in which organisation’s activities are managed or organised by its senior managers, with the notes clarifying that this should not be deemed to be replacing the requirement to identify a single directing mind to that of several minds, or involving aggregating individuals’ conduct. Instead, it states that it involves a different basis of liability that focuses on the way the activities of an organisation were in practice organised or managed. However, it remains unclear to us how in practice the courts will interpret this, especially as in its current format it remains unclear. Further clarity is required on how the acts or omissions of more than one senior manager in any incident is to be examined and how liability will be imposed other than on the basis of some form of aggregation.

We note construction of the proposal requires the breach to be gross, and gross is defined as a failure, which constitutes conduct “falling far below what can reasonably be expected in the circumstances”. The draft Bill indicates that what is “gross” is a matter for the jury in line with existing common law, where the jury has to judge whether the evidence shows that the organisation failed to comply with any health and safety legislation or guidance and if so:

- How serious was the failure to comply.
- Whether or not senior managers:
  - knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;
were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;

— sought to cause the organisation to profit from that failure.

We remain concerned with the difficulty businesses will incur as they work towards attempting to implement risk and compliance processes. Indeed, we remain concerned how jurors will place emphasis on the various matters, with the possibility of ignoring areas entirely. It would be far more appropriate to link the interpretation of gross breach to reasonable foreseeability as it would help establish that there was knowledge of a risk and the company deliberately continued to run it.

There also seems to be in parts some confusing and inappropriate references to the existing health & safety law and guidance. For consistency and clarity we recommend that this is removed entirely as these references could not only remove the enforcement focus, but do not help to add any quality and relevance of the legislation.

The section 1 offence stipulates the manner in which companies should arrange their activities. However, it remains unclear whether this changes the position on causation from the current common law situation. As the Home Office is aware, there is already the difficulty of proving the legal concept of causation in any incident, this will continue under the proposed offence. Accident investigations to date have demonstrated that the causes are often not straightforward, and are shrouded by a multiplicity of linked events, which are reflected within the labyrinth of corporate structures. The proposals do not seem to address this problem or simplify future investigations.

On a more general point, the proposed duties do not appear to impose any additional duty of care than under existing health and safety legislation or the common law offence of manslaughter, yet it somehow becomes significant when considering corporate structures and levels of senior management.

We agree that the proposed offence should only be brought in serious cases and that the appropriate fine should be calculated by the Court consistently as stipulated in existing case law. It also is logical to empower the courts to make remedial orders within a specified time, as this already existing in health and safety legislation, but these should be linked with a strategy of improving safety across a whole industry.

We are pleased that the draft Bill does not introduce a new liability on individuals. That said, where an individual’s act or omission is judged to be serious and a direct causal link to the cause of death, the existing law of gross negligence manslaughter should be pursued. There is also the ability to pursue a similar duty in the case of employees to other employees and others affected.

As part of establishing evidential proof for corporate liability, the prosecution will be tasked with having to identify the senior managers whose acts or omissions caused the death. This will also require the need to examine whether or not a manager played a significant role in the decision making process relating to the organisation of the companies activities and whether these acts or omissions formed part of a gross breach of what could reasonably have been expected by the organisation as a whole. As a direct consequence, we believe individuals, whilst directly not culpable for this offence, will be examined as if they themselves were on trial. We assume the prosecution would reserve the right to pursue the lesser charge of manslaughter or under the HSWA as individuals and if so, how they would be expected to defend the parallel investigations.

We feel it is right for the police to investigate and the CPS to prosecute. We endorse the need for close co-operation between the police, the CPS, and HSE or other relevant enforcing authorities. It is imperative that the information is freely shared and exchanged amongst the bodies, as lessons can be learnt from such investigations.

We note that the bill does not include the general exclusion of Crown immunity, except insofar as those activities are directly relation to public interest. This remains somewhat wholly and is open for potentially varying interpretation. We feel that specific and clear exclusion is required.

CLOSING COMMENTS

The BVRLA remains a keen supporter of bringing in clear and effective corporate manslaughter legislation which we believe will help to promote a safe working environment. The proposal from our perspective should be introduced, especially as it is both a natural and logical step towards reducing at work road related incidents.

Annex

The BVRLA is the representative trade body for the companies engaged in the operating leasing of cars and commercial vehicles. Its members provide short-term self-drive rental, contract hire and fleet management services to corporate users and consumers. BVRLA Members operate a combined fleet of 2.3 million cars, vans and trucks of widely differing sizes from 3,300 locations throughout the UK.

BVRLA members provide a vital service to UK industry and commerce, facilitating the movement of goods and people for essential business purposes. Members buy around one million new vehicles every year, at a cost of nearly £14 billion, representing the biggest volume of purchases by any fleet sector. In making these purchases, members are a major support to the UK automotive industry. In addition, by way of ancillary services, our members spend an additional £2 billion.
Together the Rental, Leasing and Commercial Vehicle Membership provide the significant voice of an industry which purchases almost half the personal and company transportation in the United Kingdom. This is combined with the diversity of BVRLA members to create a unique organisation where one Association represents three combined sectors allowing members to share representation on committees and in the activities of the BVRLA.

BVRLA members subscribe to a Code of Conduct which sets out stringent standards in terms of the operation and quality of vehicles and the commercial propriety of members. The BVRLA adopts a strict process of vetting applications for membership.

7. Memorandum submitted by the English Community Care Association

The English Community Care Association (ECCA), the largest representative body for community care in England, welcomes the opportunity to respond to the Government’s Draft Corporate Manslaughter Bill.

Members of ECCA are drawn from the independent sector and represent a host of organisations of varying types and sizes that have cumulatively invested £5 billion over the last 20 years. Membership of ECCA encompasses a vast range of care home providers including single care homes, small local groups, national providers and not for profit voluntary organisations and associations. Members provide a variety of services for individuals and families, including older people and people with long term conditions, learning disabilities or mental health problems.

The political, economic and social landscape is expanding and there are many new challenges for the future. ECCA welcomes change and responds to challenges. It supports many of the innovate standards calculated to improve the quality of life, care and comfort of service users.

ECCA is not a protectionist body and is not afraid to condemn care homes or services that do not subscribe to the law, are sub-standard, or do not want to change in accordance with the needs and desires of citizens. ECCA does however call for fairness.

Given that the Bill will apply to those managing and running services it should apply equally to those commissioning and inspecting them and inspecting care. In its current state there is a danger that the Bill will single out people who cannot have day to day control over every aspect of care that is delivered and could end in a witch hunt.

Members of ECCA strive to provide high quality care at all times and have an unconditional commitment to the eradication of abuse. Members aim to ensure that standards measure up to external scrutiny and that policies and procedures are up to date and take account of changes in law and practice. However members should not have to shoulder the responsibility for actions brought about by commissioning. Commissioners need to be trained and subject to the same checks and balances as providers.

On the one hand the Green Paper on Adult Social Care (Independent, Choice and Well Being) encourages the sector to take more risks in order to be innovative and provide dynamic care solutions, but on the other hand the Draft Corporate Manslaughter Bill gives providers reasons to resist such risks. There is a fine balance to strike in order to ensure that residents, and those in receipt of care, have the best care available and that providers of care have the flexibility and funding to deliver it.

In response to the forthcoming legislation ECCA has entered into a partnership with the Centre for Hazard and Risk Management at Loughborough University. Members are able to take part in a series of risk management courses and make them more aware of the hazards, risks and implications.

17 June 2005

8. Memorandum submitted by South East Employers

South East Employers is the employers’ organisation for local government in the south and south-east of England, a voluntary association of 72 local authorities—County, Unitary, Borough and District Councils. Together our members employ over 280,000 people. In addition, our membership includes 120 smaller employers in the public service, education, and the charitable sector. The comments set out below were framed in consultation with personnel practitioners from across our membership, and with other expert advisers.

In the recent past, deaths have occurred to local government’s staff and its customers. Fortunately, these have been few. Each has been a personal tragedy. Each of them has been followed by considerable self-examination by both the corporate bodies concerned, and by individuals—Managers and Elected Members. That has been accompanied by unease from the uncertainty of the law, and the possibility of a prosecution. A feeling of vulnerability has not been allayed, and talk of “corporate manslaughter”—ill-defined and misunderstood—has caused alarm. This has been a particular issue in smaller authorities: the six convictions under the current law have all been noted to be in smaller organisations.
However, the proposals which have now been made have our support, since they focus upon the necessity to have in place required protective mechanisms to prevent any tragedy. By their focus on a failure to have these mechanisms in place, and by requiring that the failure must be “gross”, we believe that these proposals will correctly reward or penalise.

We welcome the conclusion that it is not appropriate that there should be any new liability for “unpredictable, maverick acts of an employee”, nor for “immediate, operational negligence”. We note that individuals could still face prosecution for the “old” common law offence, or for a breach of the Health and Safety at Work Act, but we support the idea that “it would not be appropriate for an offence that deliberately stressed the liability of the corporation itself to involve punitive sanctions for individuals”.

We would ask in this connection that thought is given by yourselves to the position of local government. The corporate body is “the Council”, Elected Members meeting together to manage the Council’s affairs. Elected Members give their time and work to a local authority voluntarily, save only an allowance designed to cover their costs. In the modern local authority political direction is through individual Elected Members with responsibility for a particular portfolio, for example “Leisure”. Collectively, those Elected Members with portfolios function together in “Cabinet”, and it is from the Cabinet that the modern local authority receives political direction. In other local authorities “Leisure” would be amongst the responsibilities of a Committee. Every local authority also, by law, is required to employ a “Head of Paid Service” who has the responsibility for managing service delivery. This role is most often labelled “Chief Executive”. He or she exercises corporate management through a team of employed “Chief Officers”. Those Chief Officers may have the day-to-day management of a service, or that task may be delegated to other employees. The person with day-to-day managerial responsibility has a close working relationship to the Elected Member with the portfolio that covers their service, or with the Chairman of the responsible Committee. Elected Members’ roles in management, particularly of the Council’s human resources, are circumscribed by Regulation. We could therefore have a Council, a Cabinet, the Member with the portfolio or Committee Chairman, the Chief Executive and line management, all with a greater or lesser responsibility for (as an example) the management of the municipal swimming pool, in which tragically a customer has drowned. We would be pleased to hear that legislators have taken the unique position of a local authority into account when drafting this legislation. It would be unfortunate if an effect of this legislation was that good people giving their time as Elected Members were in any way penalised—or, indeed dissuaded by its threat from standing for election.

We also think that in assessing whether the corporate body had done all that it could, one factor must be the resources available to it.

We think it right that there must be a demonstrable chain of events leading from the failure to the death, causing the death; which was not because of some intervening act. The focus is therefore not on the more immediate operational cause of the fatality.

We think it right that private prosecutions should require CPS support.

9. Memorandum submitted by the Trades Union Congress

The Trades Union Congress (TUC) welcomes the opportunity to comment on the proposals for introducing new legislation covering Corporate Killing. The TUC represents almost seven million employed people in 69 Trade Unions.

The TUC does have concerns over the draft Bill, which sets out proposals designed to tackle the difficulties that currently arise when prosecuting large corporations for the present offence of manslaughter.

The draft Bill will create a new offence that targets very serious failings in the strategic management of a company’s activities that have resulted in death. We note the Government’s aim is to focus on wider management failings within an organisation. At present, liability hinges on the conduct of one individual at the very top of a company. The TUC has, for many years been aware of the failings within the existing law and believes that this change is necessary if corporate responsibility on health and safety is to be improved, and the relatives of those killed as a result of corporate failings are to see justice done. However, in itself it will do little to prevent the 250 annual deaths from injury and the over 10,000 annual deaths from work-related illnesses which occur every year, unless action is also taken on both penalties and the duties of directors.

Scope of the Offence

At present it is necessary to show an individual director or senior manager of an organisation is liable. This requires evidence of “gross negligence”, and without that there is no case against a company. This means that unless a senior manager can be found guilty of manslaughter a company can get away without facing charges. The proposed new legislation will make it possible to prosecute an organisation if there is a gross breach of their duty of care and that a senior manager of the organisation new, or ought to have known, about this breach. The TUC believes that the current definition of “senior manager” is too imprecise and may lead to delegation of responsibility. The criterion has to be not the level of manager, but the authority
to act on behalf of the organisation. The TUC also has concerns that the current wording may not include all workplaces, in particular those that contract services or employ agency staff where the actual managerial relationship is unclear. While the TUC would not support an over-broadening of the definition to the extent that it would include all staff with a managerial role, we do feel the current definition could result in employers reorganising management structures to prevent them being covered.

The TUC is concerned that Subsection 2 (b) of Section 3 does not make it clear that any one of the three tests needs to be met rather than all three. The TUC is also concerned that the third test, which requires the prosecution to show that an organisation sought to profit from a failure, could lead to action being less likely against public and non-profit bodies. Instead we would wish to see the word “benefit” used instead of “profit”.

The new offence would cover deaths at work and is linked to the standards required under existing health and safety legislation. However the offence will not only cover workers, but also those affected by the work process. Hence it will cover both deaths in the workplace and also deaths to the public that result from the work process, such as major transport accidents. The TUC welcomes this and believes that it is the correct approach, although the TUC believes that the wording of 3(3) needs to be clarified to ensure that other health and safety legislation, such as the Working Time Regulations are also covered.

COVERAGE

The draft Bill applies to “corporations” and Government departments, not only as employers but also as suppliers. There is the question of whether it should apply to “un-incorporated” bodies such as partnerships. While recognising the difficulties, the TUC would like the offence to be as broad as possible. The Government has already indicated that it wishes to look at how the legislation can be applied to Police Forces (as opposed to Police Authorities).

The draft Bill has ruled out any jurisdiction over the operations of companies which are registered in the UK if a fatality occurs abroad. The TUC believes that there are some circumstances where the legislation should apply—in particular where an worker is killed overseas because of the failure of a UK based corporation to undertake a suitable risk assessment. We would also ask that consideration be given to extending the provisions to British Dependencies which are often used to register Merchant Shipping such as Bermuda, Cayman Islands, Gibraltar and the Isle of Man.

PENALTIES

The draft Bill will simply allow for an organisation to be fined, although remedial orders will also be able to be imposed. Because a company or public body cannot be sent to prison, the government sees no other alternatives to this. However it recognises that in some cases, such as Crown bodies, this is just recycling money from one department to another.

Although the TUC would like to see a range of more innovative penalties such as the removal of directors and “corporate probation”, we recognise that this issue relates to all corporate offences, not just Corporate Killing, and would hope that the Government will look at this issue generally.

We note that the Government has committed itself to increasing penalties for health and safety offences. The TUC would ask them to consider whether this Bill could be an instrument to achieve that.

INDIVIDUAL DIRECTORS

The draft Bill reflects the view of the Law Commission that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. However in its 2000 consultation paper the Government accepted that without punitive sanctions against company officers, there would be insufficient deterrent force to any new proposals. This is a view endorsed by the TUC.

The TUC is concerned that there are no proposals to clarify the duties of directors and to ensure they are individually liable for their actions, should they lead to the death or injury of an employee or member of the public. In the last Parliament a private members Bill was introduced, with wide support from Trade Unions, in an attempt to introduce a specific duty on Directors. Unfortunately this did not progress. In addition the Work and Pensions Select Committee report into the work of the HSE/C recommended that the Government look at the issue of Directors Duties. In their response to the report the Government asked the HSC to consider the issue, but they will not do so until December 2005 at the earliest.

The TUC believes that the Government must look at the responsibilities of directors with a view to tighter regulation. The TUC wishes to avoid scapegoating of front line employees or middle managers, but it is fundamental that criminal liability for management applies not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure.
Without a clear legal duty on Directors, backed up with appropriate penalties, it is unlikely that the Bill will make any significant cultural change in the safety regimes of organisations. The TUC believes that the Government must introduce legislation on director’s responsibilities, either as part of this Bill or in tandem to it.

**CROWN IMMUNITY**

It is also important that the new laws apply to everyone, including all public bodies. The TUC welcomes the fact that the Government has accepted that its own departments should be covered, and that the draft Bill will ensure that where a government department or agency is responsible for a death at work it is prosecuted. A successful prosecution can be important for the relatives of the victim of a workplace fatality. There is no logical, legal or moral case for leaving Crown bodies exempt from prosecution where they have caused a death and the removal of Crown Immunity will we widely welcomed.

The Government has previously indicated support for the removal of Crown Immunity for all Health and Safety Offences and the TUC hopes that this Bill could be used as a vehicle to achieve this end.

**SUMMARY**

The TUC believes that, while the bill may help provide a sense of justice to the families of those bereaved as a result of corporate failings, in itself it will do little to reduce the number of fatalities caused by work unless, as part of this bill, or in tandem to it, the Government considers the issue of director’s duties and the penalties available for dealing with Corporate Bodies.

We consider that, with the exceptions outlined above, the scope of the proposed offence is about right and welcome the proposals to remove Crown Immunity.

We hope that the Bill will be used as a vehicle to increase penalties and remove Crown Immunity for all health and safety offences.

---

**10. Memorandum submitted by the Transport and General Workers’ Union**

**INTRODUCTION**

The Transport and General Workers Union (T&G) is the UK’s largest industrial trades union with over 800,000 members working in every sector of the UK economy. We have long campaigned for effective legislation on corporate killing and for reform of the law to ensure that all employing organisations—public, private and voluntary, incorporated and unincorporated—and the individuals who own and manage them, can be held to account under the law.

So, for example, in June 2003 we published the report “A hard day’s work never killed anyone. Negligent bosses did” along with two draft bills on Corporate Killing and on Directors’ Duties. And, in 2005, working alongside the construction union UCATT and a broad coalition of supporters both inside and outside of the House of Commons, we gave our full backing to Stephen Hepburn MP’s Health and Safety (Directors’ Duties) Bill.

As a union with a long track record on this issue we warmly welcomed the Government’s publication of a Draft Corporate Manslaughter Bill on the 23 March 2005 and are pleased to have the opportunity to respond to this consultation paper.

It has been some eight years since this Labour Government promised legislation to reform the UK’s much criticised corporate manslaughter laws. So, while we are pleased that a Draft Bill has now been published, we are all too aware that a draft bill is no guarantee of a final bill, let alone a guarantee of legislation on the statute books. Which is why we call on the Government to complete the draft scrutiny process without delay and to introduce a final bill into this Parliament as a matter of urgency.

The reform of corporate manslaughter is, quite literally, a matter of life and death. Which is why we must not squander the valuable opportunity provided by the publication of this Draft Bill. We have to get this legislation right—because, if we don’t, innocent people will lose their lives in preventable work-related fatal accidents and victims and their loved ones will be denied justice in the courts.

And “getting the bill right” for the T&G means ensuring that corporate manslaughter law targets both corporate and individual guilt and that it covers every employing organisation. Having carefully studied its proposals we are dismayed that, in its current form, the Draft Bill fails on these key performance indicators. We have therefore outlined our concerns, comments and recommendations below.
SUMMARY OF CONCERNS

— The Draft Bill focuses only on corporate liability and completely fails to address individual liability.
— The Draft Bill fails to close the “justice gap” ie failure to hold negligent individuals to account under the law and reliance on fines as the punishment for corporate manslaughter denies justice to the victims of work-related deaths.
— The Draft Bill will, according to its accompanying Regulatory Impact Assessment, only lead to an additional five prosecutions for corporate manslaughter each year.
— The Draft Bill introduces a “senior managers” test that would open up a loophole through which negligent organisations could escape prosecution (ie by delegating health and safety management to non-senior managerial levels they would fall outside of the scope of the Bill and the reach of the law).
— The Draft Bill introduces a “gross breach” test which will require juries, when assessing corporate liability, to consider whether senior managers knew or ought to have known that their organisation was in breach of health and safety legislation. However, this could be impossible for juries to establish as, under current law, there is no legal obligation on directors to ensure that their organisation is complying with health and safety law.
— The Draft Bill introduces a “profit from failure test” that opens up a loophole through which negligent organisations could evade prosecution for corporate manslaughter (ie for corporate guilt to be established it would have to be proved that an organisation sought to profit from a failure that led to a work-related death).
— The Draft Bill exempts from prosecution all decisions involving public policy. As, by definition, any decision by a Crown body could be argued to be a public policy decision, every Crown body could potentially escape prosecution for corporate manslaughter by invoking a “public policy defence”.
— The Draft Bill does not remove Crown Immunity for health and safety offences.
— The Draft Bill fails to include all employing organisations within its scope (ie it excludes all unincorporated bodies and a large number of Crown bodies from its provisions).
— The Draft Bill does not apply the new offence of corporate manslaughter to UK companies that cause deaths abroad.
— The Draft Bill proposes a fines based penalty system rather than complementing corporate fines with a wider and more innovative range of penalties such as custodial sentences for individuals and probation orders for companies.
— The Draft Bill has been published but, as yet, there is still no timetable for, nor specific details on the mechanics and structure of, the pre-legislative scrutiny process that it will undergo.

SUMMARY OF RECOMMENDATIONS

— The scope of the Draft Bill should be widened to include individual liability. This could be achieved by:
  (a) allowing for individuals to be prosecuted for—and convicted of—aiding, abetting, counselling or procuring the offence of corporate manslaughter; and
  (b) introducing legally binding health and safety duties for company directors and their Crown body equivalents.
— The Draft Bill must be amended so that work-related fatalities caused by failures at every level of management—not just at senior level—are admissible for use in the consideration of corporate liability for manslaughter.
— The “profit from failure” test must be removed from the Draft Bill.
— The “public policy” test must be removed from the Draft Bill.
— Crown Immunity must be removed for health and safety offences.
— The Draft Bill must be amended so that all employing organisations fall within its scope. This requires:
  (a) the removal of Crown and Parliamentary Immunity in a way which ensures that all Crown bodies including Parliament, government departments, government agencies, the prison service, regulatory agencies and the civil service are liable to prosecution for the offence of manslaughter; and
  (b) the extension of liability for the offence of manslaughter to unincorporated bodies.
— The scope of the Draft Bill must be widened so that companies that cause deaths abroad are liable to prosecution for corporate manslaughter.
In order to encourage proactive health and safety management, provide a credible deterrent against negligence and deliver justice for victims the fines system proposed by the Draft Bill must be complemented by an innovative range of penalties, including custodial sentences.

The pre-legislative scrutiny of the Draft Bill must begin as a matter of urgency and a final Corporate Manslaughter Bill should be introduced into parliament at the very earliest opportunity.

**WHY A NEW CORPORATE MANSLAUGHTER LAW IS NEEDED**

In our view preventable work-related deaths are being caused by fundamental health and safety shortcomings within private and public organisations and by negligence and irresponsibility on the part of those who run them.

Evidence of this can be seen in data produced by the Health and Safety Commission (HSC) which shows that, on average, in the UK:

- Each and every day of the week one person dies in a work-related incident
- Each and every day of the week 16 people die from occupational cancers and illnesses

And according to research by the Health and Safety Executive (HSE) 70% of all those work-related deaths are the direct result of management failures.

However, not only is the current law failing to prevent work-related deaths, it is also failing to hold to account those who are responsible for manslaughter. Research by the Centre for Corporate Accountability shows that:

- Only 11 company directors have ever been convicted of manslaughter following a work-related death.

And, of those 11 convictions:

- Only five directors have ever been imprisoned as a result of a work-related death and a manslaughter conviction.
- Another five directors received suspended sentences for manslaughter.
- And one director was given a community service order for manslaughter.

We therefore believe that a new corporate manslaughter law is needed because work-related deaths are not being prevented, the guilty are not being held to account and justice is being denied.

**DETAILED CONCERNS, COMMENTS AND RECOMMENDATIONS**

Below, and in the pages overleaf, the T&G have outlined in detail our key concerns and our thoughts, comments and recommendations in respect of the proposals set out in the Draft Bill.

**THE BILL ONLY TARGETS CORPORATE LIABILITY**

The Bill only focuses on corporate liability and completely fails to address individual liability (for example, it does not introduce legally binding health and safety duties for company directors or for their Crown body equivalents). Individuals cannot even be charged with “aiding” or “abetting” an organisation that commits corporate manslaughter. In the words of the government, “the criminal liability of individual directors will not be affected by the proposals. Corporate manslaughter is an offence committed by organisations rather than individuals and will therefore carry a penalty of an unlimited fine rather than a custodial sentence.”

Consequently the Draft Bill will only make it a little easier to prosecute companies: it will not make it possible to prosecute and convict negligent directors who cause workplace deaths. However, it is those individuals directing and managing companies—and their crown body equivalents—who make workplaces safe or unsafe: not a legal entity know as “the company”.

The T&G have long campaigned for reform of the law so that an organisation can be prosecuted for corporate manslaughter without the need to prove guilt by reliance upon the identification of a negligent individual director or manager. But we have never ever argued that the two are mutually exclusive: instead we have said that, where individuals can be shown to be culpable they should be liable for prosecution, but that the inability to establish individual culpability—for example due to the complex management structure of a large organisation—should not mean that an organisation is able to escape prosecution for manslaughter.

Therefore, while we recognise that the reforms to the offence of corporate manslaughter were always going to focus upon the conduct of the organisation, we are dismayed that the Government has declined the opportunity to develop any alternative mechanisms to deal with individual liability and the lack of accountability for company directors.
Indeed, the failure to address these key issues appears to be a reversal of the Government’s original position as outlined in its May 2000 consultation document “Reforming the law of involuntary manslaughter: the Government’s proposals” which clearly stated: “the Government is therefore inclined to the view that action against individual directors or officers might be justified even in cases where a company found guilty of corporate killing could pay the fine imposed by the court and/or comply with a remedial order.”

We have serious concerns that, by focusing exclusively on corporate liability rather than complementing that focus with provisions designed to also cover individual liability, the Bill will do very little to encourage the proactive steps in the management of health and safety necessary to prevent work-related deaths.

One means of dealing with the issue of individual liability would be to widen the scope of the Draft Bill so that an individual could be prosecuted for—and convicted of—aiding, abetting, counselling or procuring the offence of corporate manslaughter. Another means of bringing individual liability within the scope of the Draft Bill is to amend it so as to introduce legally binding health and safety obligations for directors (and also for their Crown body equivalents).

The T&G believe that safety in the workplace—and indeed justice in the courts—requires responsibility in the boardroom. After all, there are no individuals within a company more important to ensuring safety in the workplace than directors: for example, company directors decide the level of resources that their company puts into health and safety; they decide the extent to which managers within their company prioritise health and safety; they decide whether or not their company is subject to proper health and safety audits; and they decide whether their company is proactive in identifying unsafe practices and how those practices can be changed.

The crucial role of directors in the prevention of work-related fatalities has been highlighted by the Work and Pensions Committee. Having examined all of the evidence and interviewed all of the experts for its report into “The Work of the Health and Safety Commission and Executive”, the Work and Pensions Committee concluded that the introduction of legally binding directors’ duties on health and safety would “positively impact on the current levels of preventable workplace death.”

The T&G endorse this view which is why, working with a broad coalition of supporters both inside and outside of the House of Commons, we gave our full backing to Stephen Hepburn MP’s recent Health and Safety (Directors’ Duties) Bill. This Private Member’s Bill had its Second Reading on 4 March 2005.

Regrettably, even though the House voted in favour of the Bill by 28 votes to zero, failure to reach the requisite 40 votes’ quorum meant that it was unable to proceed to Committee Stage. But, despite falling victim to parliamentary procedure, the “Hepburn Bill” on directors’ health and safety duties did win the debate and it did win the vote.

The T&G therefore call on the government to listen to the House of Commons on this issue and amend the Draft Corporate Manslaughter Bill to include a directors’ duties provision. This could be achieved by including within the Draft Bill the following amendment:

<table>
<thead>
<tr>
<th>T&amp;G suggested amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is the duty of the directors of a company to take all reasonable steps to ensure that the company acts in accordance with the obligations imposed on it by the relevant statutory provisions (and any statutory provision that is specified in any schedule accompanying this Act); any regulations, orders or other instruments of a legislative character made or having effect under any provision so specified that relates to health and safety.</td>
</tr>
</tbody>
</table>

The Bill Fails to Close the “Justice Gap”

Currently in the UK we have a situation in which at least one person is killed every day in a work-related accident, where 70% of those fatalities are directly attributable to failures by management, but where—as the conviction rates demonstrate—successful prosecutions for corporate manslaughter are difficult to secure at best and impossible to achieve at worst. Yet this Draft Bill will have a negligible impact in holding to account those responsible for work-related deaths because, as the Home Office’s own “Regulatory Impact Assessment” admits, the proposals in this Draft Bill will only “lead to a possible five extra prosecutions per year”.

We had hoped that the long awaited Draft Bill would address the problems with existing law in securing convictions. We believe that existing law is fundamentally flawed because the absence of legally binding health and safety duties on directors makes it virtually impossible to prosecute negligent directors for manslaughter: this is evidenced by the fact that only five directors have ever been imprisoned as a result of a work-related death. Put simply, by failing to hold individual directors to account the current law has opened up a massive Justice Gap for the victims of work-related deaths.
We are therefore disappointed that the Draft Bill fails to close this Justice Gap because, by only targeting corporate liability the Bill will simply rely on a fines based penalty system as it is impossible for a company to be sent to prison. But fines will never act as a credible deterrent, and fines imposed on companies can never deliver justice for the victims of manslaughter.

In particular, fines will not unduly concern large companies, unless they are imposed at levels previously unheard of in this country—and this seems highly unlikely as the Government’s Regulatory Impact Assessment estimates that the cost of defending prosecutions for all of UK industry will only be £2.5 million. In addition, fines will be of little deterrent value in respect of Crown bodies as the cost of meeting them will simply fall to the taxpayer. Ultimately it is not companies who kill—it is negligent directors. And that is why custodial sentences, rather than fines, are the only effective deterrent and the only means of delivering justice for the victims of corporate manslaughter.

The Draft Bill has actually exacerbated the Justice Gap because, by not including provisions for legally binding directors’ duties and individual liability the Bill leaves it entirely to a weak and unenforceable voluntary code to encourage responsibility on the part of individual directors. The Health and Safety Commission (HSC) published voluntary guidance on directors’ duties in July 2001. But research commissioned by the Health and Safety Executive (HSE) into the effectiveness of the HSC code shows that it is failing to prevent injuries and deaths because it is failing to change either the behaviour of directors or the culture of the boardroom in any meaningful way.

Since the HSC voluntary code was introduced:

— The board of directors of one third of large firms have not assumed any responsibility for ensuring their companies operate safely.
— Fewer than half of all boards ever discuss health and safety.
— And two thirds of all company boards have failed to appoint a health and safety director as recommended by the code.

In addition, even if every company and every director complied with the voluntary code:

— No negligent director can be held accountable under a voluntary code.
— No negligent director can be arrested and charged under a voluntary code.
— No negligent director can be prosecuted or convicted under a voluntary code.
— And no victim of workplace injury or death can receive justice under a voluntary code.

Only the law can do all of these things and, in this respect, the Draft Bill is very much a missed opportunity.

The “Senior Managers” Test

The Bill introduces a new basis for establishing corporate liability that requires consideration only of the “senior managers” of an organisation, rather than managers at all levels. The Bill defines a person as a “senior manager” of an organisation if he or she “plays a significant role in the making of decisions about how the whole or a substantial part of its activities are to be managed or organized, or he or she plays a significant role in the actual managing or organising of the whole or a substantial part of those activities”.

The definition of who is a senior manager is very narrow. So, for example, managers controlling a large construction site belonging to a particular company—which itself controls many other such sites—may well not be considered a ‘senior manager’ within the terms of the Bill. The T&G are concerned that the Bill encourages reduced supervision of directors and other senior company officers and increased delegation to managers at a more operational level. As a result organisations could escape manslaughter prosecution (ie if a death is the result of neglect by an individual who is not a senior manager then the company will not be able to be prosecuted for this offence).

In addition, while the Draft Bill proposes a move away from the current problematic “directing mind” test in corporate manslaughter prosecutions, we have concerns that the use of terms such as “senior manager” and “significant role” over at least a “substantial” part of an organisation’s activities are likely to pose similar problems in relation to gathering evidence in large companies—as well as in Crown bodies—to those which faced under the current law and the “directing mind” test—hence the admission by the Home Office that it only expects an additional five prosecutions for corporate manslaughter each year.

The “senior managers” test would also enshrine in law the principle that one death caused by negligence is more worthy of justice in the courts than another. And that’s because, as the government admit in the Regulatory Impact Assessment, “not every death will give rise to liability to the new offence, even where a health and safety requirement has been breached and a death occurs ... For example, the cause of death may be the responsibility of direct managers, rather than a failure at senior management level” In other words, deaths caused by negligent direct management will not qualify for prosecution: the only deaths that will be prosecuted for corporate manslaughter are those arising out of failures by senior management.
The Draft Bill must be amended so that work-related fatalities caused by failures at every level of management—not just at senior level—are admissible for use in the consideration of corporate liability for manslaughter.

The T&G therefore believe that the “senior managers” test—and the definition of a senior manager—should be replaced by a simple “management failure” test: this could best be achieved by deleting subsections (1) and (2) in Clause 1 together with all of Clause 2 in the Draft Bill and including in their place the clause below:

*T&G suggested amendment*

“A corporation is guilty of corporate manslaughter if:

(a) a management failure by the corporation is the cause or one of the causes of a person’s death; and

(b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

For the purposes of the sub-sections above:

(a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and

(b) such a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual.

*The “Gross Breach” Test*

In order for an organisation to be found guilty of the offence of corporate manslaughter a death must have occurred as a result of a failure by senior managers that “amounts to a gross breach of a relevant duty of care.” Moreover, in deciding upon whether or not this particular test has been met a jury must consider whether or not senior managers:

(a) knew or ought to have known that the organisation was failing to comply with any relevant health and safety legislation or guidance; and

(b) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply

While the T&G believe that failure to comply with health and safety legislation, or indeed a failure to be aware of the risks associated with such non-compliance, should certainly be grounds for prosecution for corporate manslaughter we are concerned that this particular test will be all but impossible to meet in actual court cases. And that is because, as the law currently stands, company directors have no legally binding duties in respect of health and safety.

So, since there is no obligation for directors to be informed of the health and safety performance of the company, it will be easy under this Draft Bill for directors to argue that they were unaware of failures—or the implications of such failures—within the company. In other words, because a director has no explicit legal obligation to ensure that their company is complying with health and safety law it will virtually be impossible for a jury to conclude that he or she knew or ought to have known that their organisation was failing to do so. The end result will be that prosecutions will fail through lack of evidence in respect of this crucial test.

The T&G would therefore argue that the only way in which the “gross breach” test can be made to work is if it is complemented by the introduction of legally binding health and safety duties for company directors and their Crown body equivalents.

*The “Profit from Failure” Test*

In their assessment of the “gross breach” test a jury must also consider another legal test imposed by the Draft Bill: namely that, for, an organisation to be found guilty of corporate manslaughter, the jury must be persuaded that there is sufficient proof to demonstrates that senior managers “sought to cause the organisation to profit from that failure” (ie to profit from a failure to comply with any relevant health and safety legislation or guidance that led to a death of a person, or persons, to whom the organisation owed a duty of care).

The T&G are concerned that this test opens up a potential legal loophole for negligent organisations: evidence would be extremely difficult to obtain and the absence of such evidence will be used by organisations to show that their conduct was not grossly negligent. Furthermore, we are unclear as to how this requirement would impact upon juries assessing organisations that do not have a profit motive—such as those delivering public services.
We can see an argument for allowing courts—once they have passed a guilty verdict and are determining the penalty to be imposed—to consider whether the offence of corporate manslaughter was further compounded by the fact that a company was deliberately negligent in order to make a profit or to gain some sort of benefit. But using the issue of profit to help determine a criminal penalty is very different from using the issue of profit to determine whether a company is guilty in the first place. We therefore believe that, in respect of its use as a means for determining corporate liability, the “profit from failure” test must be removed.

**Crown Immunity—Public Policy Test**

We are concerned that the Draft Bill opens up a legal loophole by exempting from prosecution any decision involving public policy. Arguably, a case can be made that any and every decision made by a Crown body involves, by definition, public policy—ergo all Crown body decisions, and the subsequent actions arising out of those decisions, could be exempt from prosecution.

Moreover, although these exclusions are most likely to apply to Crown bodies, under the proposals set out in the Draft Bill they can also apply to private companies (eg some prisons are operated by private companies).

The Draft Bill states that a prosecution can only take place if there is a “relevant duty of care”. However, by exempting from prosecution any decision involving public policy, the Draft Bill would enshrine in law the principle that a public body does not owe a duty of care to those who may be affected by its public policy decision-making. The T&G therefore believe that this public policy test should be removed.

**Crown Immunity—Health and Safety Offences**

The Draft Bill does not remove Crown Immunity for health and safety offences. If Crown bodies are to be incentivised to proactively manage health and safety in order to prevent work-related fatalities then their immunity from prosecution for basic health and safety breaches must be removed.

**Failure to Include all Employing Organisations**

The T&G are dismayed that the Draft Bill fails to include all employing organisations within its scope (ie by excluding all unincorporated bodies—eg schools, building societies, trade unions—and by excluding a large number of Crown bodies eg the armed forces and the prison service).

In fact, the decision to exclude unincorporated bodies appears to be a “u-turn” from the Government’s previous position on this matter: in its Home Office Consultation document on its original corporate manslaughter proposals, the Government declared that it did not wish “to create artificial barriers between incorporated and non-incorporated bodies.” Consequently the Government stated that any new corporate manslaughter offence “should apply to all undertakings rather than just corporations.” We agree.

In our view any organisation—regardless of whether it is a private company, an unincorporated body or a Crown body—can cause risk to its workers and to members of the public. Therefore, if a corporate manslaughter law is to be effective then it must apply to every employing organisation, including unincorporated bodies and all Crown bodies.

If the negligence or recklessness of a Crown body or unincorporated body—and, their equivalent of a company director/manager—leads to a workplace fatality, then that body, together with that culpable individual, should surely be liable to prosecution for corporate manslaughter in the same way that a company and a company director should be liable to prosecution if, through their negligence or recklessness, somebody loses their life in a work-related incident.

The T&G are also concerned that by leaving in place the current immunity from prosecution enjoyed by Crown bodies, Parliament and unincorporated bodies the Draft Bill will leave well over half a million workers, as well as the millions of ordinary citizens who come into contact with these various organisations, beyond the protection of the law. Furthermore, we believe that, by preventing criminal prosecutions for manslaughter, these blanket immunities also deny justice to the victims of work-related fatalities.

We also believe that the failure of the Draft Bill to include all employing organisations within its scope breaches human rights legislation. According to human rights lawyers at Matrix Chambers, Crown bodies and unincorporated bodies need to be included in any new corporate manslaughter law in order for the Government to avoid being in violation of its human rights obligations under the European Convention on Human Rights. This legal advice was given jointly by Tim Owen QC, Murray Hunt and Danny Friedman in December of 2003.

They stated that if any new offence of corporate manslaughter was restricted to incorporated bodies or subject to a defence of Crown Immunity, “it is in our view inevitable that the UK will, sooner or later, be found to be in breach of the procedural obligation in Article 2 and/or the obligation to provide effective remedies under Article 13, in the circumstances of a particular case.”
Consequently the T&G believe that a new corporate manslaughter law must apply to all employing organisations—private, voluntary and public. The Draft Bill must therefore remove Crown and Parliamentary Immunity so that all Crown bodies including Parliament, government departments, government agencies, the prison service, regulatory agencies and the civil service, can be liable to prosecution for the offence of manslaughter. The Draft Bill should also ensure that unincorporated bodies are liable to prosecution for the offence of manslaughter.

We would therefore suggest that the Draft Bill be amended to include the following definitions:

**T&G suggested amendment**

“For the purposes of this Act an “organisation includes:

(a) any body corporate wherever constituted but does not include a corporate sole. A body corporate includes a Crown body. A Crown body means a body which is a servant or agent of the Crown and includes a government department; and

(b) any other undertaking. An undertaking means any unincorporated body which undertakes any trade, business or profession or any other activity providing employment and includes a Crown body.

**UK Companies and Deaths Abroad**

The T&G are disappointed that the Draft Bill does not apply the new offence of corporate manslaughter to UK companies that cause deaths abroad. Among the arguments that the Government has used for this exclusion are that there would be practicable difficulties in prosecuting UK companies committing corporate manslaughter abroad; and that it would not be appropriate to extend jurisdiction because that would amount to the exporting of UK laws.

The T&G reject those arguments and believe that jurisdiction for corporate manslaughter can and should be extended because:

(a) Individuals who commit homicide abroad and companies that commit corruption abroad can be prosecuted by UK courts. Failure to extend jurisdiction in respect of corporate manslaughter would therefore create a legal inconsistency.

(b) Allowing UK courts to prosecute UK companies when the offence is committed abroad would not have the effect of exporting our laws as it would only affect companies registered in the UK—it would not impose obligations on companies or citizens of other countries.

(c) Unless jurisdiction is extended the new offence of corporate manslaughter would have no deterrent value for UK companies operating overseas. In other words, there would be no incentive for such companies to improve or maintain acceptable standards of health and safety in the activities they conduct abroad.

The T&G therefore call on the Government to widen the scope of the Draft so that companies that cause deaths abroad are liable to prosecution for corporate manslaughter.

**Penalties**

As we have stated in our comments concerning the “justice gap”, fines alone will fail to encourage organisations to properly manage health and safety; fines will not provide a credible deterrent to the negligent and the reckless; and fines will never deliver justice for the victims of work-related deaths.

The T&G are clear in our view that encouragement, deterrence and justice can only be delivered if fines for guilty organisations run parallel with custodial sentences for guilty individuals. However, we also recognise that organisations cannot, by definition, be sent to prison. Consequently, alongside custodial sentences for individuals and fines for organisations there should be a much wider range of “corporate/organisational” penalties. For example:

— Corporate Probation orders ie organisations found guilty of corporate manslaughter could be “put on probation” so that further breaches of the law could be monitored and dealt with harshly.

— Punitive damages ie in addition to fining guilty organisations courts should be able to punish those organisations further by awarding substantial damages to the relatives, partners and/or loved ones of the victims of corporate manslaughter.

— Equity stakeholdings ie where publicly quoted companies have been convicted the Government could take, as a penalty, an equity stake in that company in the form of shares: this would allow the Government—through the appropriate regulatory body—to influence the company’s development and its management of health and safety.
— Disqualification ie use of the existing powers to disqualify directors for breaches of health and safety laws needs to be the rule, rather than the exception as it is now (eg research by the T&G and the Centre for Corporate Accountability found that between April 2002 and March 2004 some 620 people were killed and 60,177 people suffered major injuries at the workplace yet not one single director was disqualified as a result of these deaths and injuries). The law must ensure that those who are so negligent that their employees lose their lives are never allowed to become repeat offenders.

— Negative advertising ie organisations found guilty of corporate manslaughter could be “named and shamed” in prominent adverts that they themselves are forced to pay for.

The Pre-Legislative Scrutiny Process

The Draft Bill will be subjected to pre-legislative parliamentary scrutiny. However, we are concerned that, as yet, there has been no decision as to the type of committee to be set up to consider the Bill, who will serve on that committee or how long it will take to consider and comment on the Bill.

In addition to—and arguably far more valuable than—this particular Home Office consultation the pre-legislative scrutiny process is a crucial means of tapping into, and making best use of, the knowledge, expertise and advice of key stakeholders, interested organisations and individuals. Therefore, in view of the fact the Government promised actual legislation on corporate manslaughter seven years ago, we would call upon them to ensure that Parliament scrutinises the Draft Bill as a matter of urgency and to introduce a final Corporate Manslaughter Bill into parliament at the very earliest opportunity. We would also urge the Government to work constructively with the devolved bodies so that there is early action to introduce corporate manslaughter legislation in Scotland and in Northern Ireland.

Conclusions

At best, this Draft Bill may make it a little easier to bring prosecutions against large companies and organisations. But, as the Government’s own research indicates, at most, that may amount to no more than five extra prosecutions each year. What the research neglects to do is to estimate how many of those prosecutions will result in successful convictions.

Our fear is that the answer to that question is “very few”. And that’s because, unfortunately, in seeking to replace the problematic “directing mind” test, the Draft Bill proposes a number of new tests—from the senior managers test, to the profit from failure test to the public policy test. We believe that these new legal tests open up so many legal loopholes that convictions will be as hard, or perhaps even harder, to obtain then at present.

The Bill also fails to ensure that every employing organisation is covered: unincorporated bodies are excluded from its scope and the provisions relating to Crown mean that, not only is Crown Immunity merely partially lifted, but every Crown body could potentially take advantage of a public policy defence in order to escape prosecution. If a new corporate manslaughter law is to be effective then it must apply to every employing organisation.

Arguably though, this Draft Bill’s greatest weakness is its complete failure to tackle individual liability. We have always argued that organisations don’t kill people—those who own and run them do. If any corporate manslaughter law is to be effective then it must do three things: it must prevent fatal accidents by providing a credible deterrent; it must hold the guilty to account; and it must ensure justice for the victims of negligence. And, in each case, that requires the law to target guilty individuals, as well as guilty organisations. Sadly, the Draft Bill completely ignores individual liability by focusing entirely on corporate liability.

The T&G believe that, in its current form, this Draft Bill is a missed opportunity. As a minimum, it must be amended so as to ensure that corporate and individual liability are covered and that all Crown bodies and unincorporated bodies are brought within its scope. We look forward to continuing to contribute to the debate on this Bill as it progresses through the draft scrutiny process in Parliament. We also look forward to the speedy publication of a final bill that recognises, and puts right, the faults and weaknesses we have identified in the Draft Bill.

11. Supplementary memorandum submitted by the Transport and General Workers’ Union

Summary

— Negligence by directors and their Crown body equivalents is causing preventable work-related deaths—Health and Safety Executive research shows that 70% of all work-related deaths are the direct result of management failure.
— The current law is failing to prevent work-related deaths and failing to hold to account those who are responsible for manslaughter.

— If corporate manslaughter law is to be effective it must target both corporate liability and individual liability.

— The Draft Bill is fundamentally flawed because it will only target corporate liability. Consequently it will not make it easier to prosecute and convict negligent directors—or their Crown body equivalents—who cause workplace deaths.

— Safety in the workplace and justice in the courts requires responsibility in the boardroom. This means placing legally binding health and safety duties on company directors and their Crown body equivalents. The case for legally binding “Directors’ Duties” is based on the following:

1. Directors matter—they make all of the key health and safety decisions in a company.

2. Directors have no legally binding health and safety duties in current law—yet workers and members of the public do have statutory duties.

3. Directors’ duties would save lives—this was the conclusion of the Work, and Pensions Select Committee based on written and oral evidence submitted to its 2004 report “The Work of the Health and Safety Commission and Executive”.

4. The voluntary code on directors’ duties isn’t working—research by the HSE shows that the code is failing to change either the behaviour of directors or the culture of the boardroom in respect of health and safety management.

5. Directors’ duties would close the justice gap—in the last 30 years 10,000 people have died in work-related incidents yet only five directors have been imprisoned for corporate manslaughter in that time.

— The Draft Corporate Manslaughter Bill should be amended so as to include a Directors’ Duties Provision.

Why a New Corporate Manslaughter Law is Needed

1. In our view preventable work-related deaths are being caused by fundamental health and safety shortcomings within private and public organisations and by negligence and irresponsibility on the part of those who run them. Evidence of this can be seen in data produced by the Health and Safety Commission (HSC) which shows that, on average, in the UK each and every day of the week one person dies in a work-related incident and each and every day of the week 16 people die from occupational cancers and illnesses.

2. And according to research by the Health and Safety Executive (HSE) 70% of all those work-related deaths are the direct result of management failures.

3. However, not only is the current law failing to prevent work-related deaths, it is also failing to hold to account those who are responsible for manslaughter. Consequently, we believe that a new corporate manslaughter law is needed because work-related deaths are not being prevented, the guilty are not being held to account and justice is being denied.

4. But, if it is to be effective, that new corporate manslaughter law must target both corporate and individual guilt. We are therefore deeply dismayed that, in its current form, the Draft Bill will only target corporate liability—it will not make it easier to prosecute and convict negligent directors—or their Crown body equivalents—who cause workplace deaths.

5. And why is that? Well, in the words of the Government it’s because: “corporate manslaughter is an offence committed by organisations, rather than individuals, and will therefore carry a penalty of an unlimited fine rather than a custodial sentence.”

6. The T&G believe the Government are just plain wrong on this fundamental issue; it’s not organisations that kill people—it’s those who own, direct and manage organisations who, through negligence, incompetence or sheer disregard for the law kill people.

Why a New Corporate Manslaughter Law Must Include Directors’ Duties

7. We believe that safety in the workplace and justice in the courts requires responsibility in the boardroom. In short, all directors should be held to account under the law. And that means placing legally binding health and safety duties on company directors and their Crown body equivalents. Which is why, working with the Union of Construction Allied Trades and Technicians (UCATT), and a broad coalition of supporters both inside and outside of the House of Commons, we gave our full backing to Stephen Hepburn MP’s recent Health and Safety (Directors’ Duties) Bill.
8. This Private Member’s Bill had its Second Reading on 4 March 2005. Regrettfully, even though the House voted in favour of the Bill by 28 votes to zero, failure to reach the requisite 40 votes' quorum meant that it was unable to proceed to Committee Stage. But, despite falling victim to parliamentary procedure, the “Hepburn Bill” on directors’ health and safety duties did win the debate and it did win the vote.

9. The T&G therefore call on the Government to listen to the House of Commons on this issue and amend the Draft Corporate Manslaughter Bill to include a directors’ duties provision because:

**Directors matter**

10. There are no individuals within a company more important to ensuring safety in the workplace than directors. It is directors, not companies, who make workplaces safe or unsafe: company directors decide the level of resources that their company puts into health and safety; they decide the extent to which managers within their company prioritise health and safety; they decide whether or not their company is subject to proper health and safety audits; and they decide whether their company is proactive in identifying unsafe practices and how those practices can be changed.

**Directors do not have legally binding health and safety duties**

11. While directors enjoy all of the privilege of power when it comes to workplace health and safety, they carry none of the burden of responsibility:

12. Under current law, while workers and members of the public do have statutory health and safety duties, company directors have no legally binding duties to ensure that their company is complying with health and safety law. Instead, all the principle duties under health and safety law are placed on employers (ie companies) and not on directors.

13. Placing legal duties upon a company does not place legal duties upon that company’s directors because a company has a separate legal identity from the directors who manage it and because duties placed upon the company do not require individual directors to take any particular action, even though their failure to act may mean that the company fails to comply with health and safety law.

**Directors’ duties would save lives**

14. Because 70% of all work-related fatalities are the direct consequence of failures by management then, by definition, 70% of all work-related deaths are preventable by management.

15. Moreover, domestic and international evidence compiled by the Centre for Corporate Accountability and submitted to the Work and Pensions Committee clearly shows that statutory regulation is a key motivator for directors in terms of preventing work-related fatalities.

16. It should also be noted that, having examined all of the evidence and interviewed all of the experts for its report into “The Work of the Health and Safety Commission and Executive”, the Work and Pensions Committee concluded that the introduction of legally binding directors’ duties on health and safety would “positively impact on the current levels of preventable workplace death.”

**The voluntary code on directors’ duties isn’t working**

17. The HSC published voluntary guidance on directors’ duties in July 2001. But research commissioned by the HSE into the effectiveness of the HSC code shows that it is failing to prevent injuries and deaths because it is failing to change either the behaviour of directors or the culture of the boardroom in any meaningful way.

18. Since the voluntary code was introduced:

   — The board of directors of one third of large firms have not assumed any responsibility for ensuring their companies operate safely.

   — Fewer than half of all boards ever discuss health and safety.

   — And two thirds of all company boards have failed to appoint a health and safety director as recommended by the code.

**Directors’ duties would close the “Justice Gap”**

19. Existing law is fundamentally flawed because the absence of legally binding health and safety duties on directors makes it virtually impossible to prosecute and convict negligent directors for manslaughter.

20. Research undertaken by the T&G reveals that in the 30 years since the Health and safety at Work Act 1974 came into force some 10,000 people have died in work-related incidents. Yet, according to research by the Centre for Corporate Accountability, in that same period:
— Only 11 company directors have ever been convicted of manslaughter following a work-related death.

21. And, of those 11 convictions:
— Only five directors have ever been imprisoned as a result of a work-related death and a manslaughter conviction.
— Another five directors received suspended sentences for manslaughter.
— And one director was given a community service order for manslaughter.

22. Put simply, by failing to hold individual directors to account the current law has opened up a massive Justice Gap. But the victims of negligence resulting in a work-related death will never get the justice they deserve if the Government’s Corporate Manslaughter Bill only makes a legal entity known as “the company” liable under the law for a manslaughter offence. It is not companies who make workplaces unsafe—it is negligent directors. And ultimately it is not companies who kill—it is negligent directors.

23. By only targeting corporate liability the Bill will simply rely on a fines based penalty system as it is impossible for a company to be sent to prison. But fines will never act as a credible deterrent, and fines imposed on companies can never deliver justice for the victims of manslaughter.

24. The Justice Gap is made even worse by reliance on the HSC voluntary code on directors’ duties. Because, even if every company and every director complied with the voluntary code:
— No negligent director can be held accountable under a voluntary code.
— No negligent director can be arrested and charged under a voluntary code.
— No negligent director can be prosecuted or convicted under a voluntary code.
— And no victim of workplace injury or death can receive justice under a voluntary code.

Only the law can do all of these things.

CONCLUSIONS

25. At best, this Draft Bill may make it a little easier to bring prosecutions against large companies and organisations. But, the Bill will do absolutely nothing to tackle individual liability—and that’s its greatest weakness.

26. If any corporate manslaughter law is to be effective then it must do three things:
1. it must help to prevent fatal accidents by acting as a credible deterrent;
2. it must hold the guilty to account; and
3. it must ensure justice for the victims of negligence.

27. In each case that requires that the law targets guilty individuals, as well as guilty organisations. However, to its detriment, the Draft Bill completely ignores individual liability by focusing entirely on corporate liability. The T&G therefore believe that, in its current form, this Draft Bill is very much a missed opportunity.

28. The law will only deliver safety in the workplace and justice in the courts if it ensures responsibility in the boardroom—and that means amending the Draft Corporate Manslaughter Bill so as to include legally binding health and safety duties for company directors.

21 July 2005

12. Memorandum submitted by Seren Group Ltd

I have read with interest the draft Corporate Manslaughter Bill.

I query whether the document is sufficiently clear in the case of Housing Associations (commonly Industrial and Provident Societies), which have volunteer boards. I am sure that these Boards will be very interested in this legislation. I guess a similar problem would exist with Governing bodies at schools or any other arena where volunteers act at governing body level with the best intentions, but are predominantly influenced by a professional staff.

The size of Housing Associations varies enormously, but all have a volunteer board. While not wishing to absolve such a Board from their Health and Safety responsibilities, I would not wish this legislation to cause a recruitment crisis.

In most cases, Associations have a significant executive that I would consider to be the senior management referred to in the document, but this is not the case.
More questions than answers, but I feel that there are a significant number of incorporated bodies with volunteer boards who would aim to seek clear guidance on this issue. Naturally, it would be useful if this guidance could form part of the legislation.

6 May 2005

13. Memorandum submitted by the Public and Commercial Services Union

The Public and Commercial Services Union (PCS) welcomes the opportunity to comment on the proposals for introducing new legislation covering Corporate Killing. PCS is an independent trade union representing over 310,000 members, many within central government employment.

PCS welcomes the fact that this long-awaited and much heralded measure has finally seen the light of day. We trust that the Government will move rapidly to bring forward a formal Bill and take it through its necessary processes and into law.

The draft Bill will create a new offence that targets very serious failings in the strategic management of an organisation’s activities that have resulted in death. We note the Government aim is to focus on wider management failings within an organisation. At present, liability hinges on the conduct of one individual at the very top of an organisation. This development is to be welcomed.

Scope of the Offence

It is clear from previous attempts at prosecutions resulting from serious incidents that the law as it presently stands offers too many loopholes through which organisations can escape liability for serious failings in their duties to workers and the general public. At present it is necessary to show an individual director or senior manager of a organisation is liable. This requires evidence of “gross negligence”, and without that there is no case against an organisation. The proposed new legislation will make it possible to prosecute an organisation if there is a gross breach of their duty of care and that a senior manager of the organisation knew, or ought to have known, about this breach. PCS agrees with the TUC that, on balance, the draft bill is correct on this point. To restrict the awareness to actual directors would be too restrictive, and to extend it to those below senior manager level would undermine the focus of the Bill, which is on corporate failings.

We would echo the TUC’s concerns that subsection 2 (b) of Section 3 does not make it clear that any one of the three tests needs to be met rather than all three. We are also concerned that the third test, which requires the prosecution to show that an organisation sought to profit from a failure, could lead to action being less likely against public and non-profit bodies. Instead we would wish to see the word “benefit” used instead of “profit”.

The new offence would cover deaths at work and is linked to the standards required under existing health and safety legislation. However the offence will not only cover workers, but also those affected by the work process. Hence it will cover both deaths in the workplace and also deaths to the public that result from the work process, such as major transport accidents. PCS welcomes this and believes that it is the correct approach, although we feel that the wording of three (3) needs to be clarified to ensure that other health and safety legislation, such as the Working Time Regulations are also covered.

Coverage

The draft Bill would apply to “corporations” and government departments, not only as employers but also as suppliers. There is the question of whether it should apply to “un-incorporated” bodies such as partnerships. While recognising the difficulties, PCS believes that the coverage for the offence should be as broad as possible. The Government has already indicated that it wishes to look at how the legislation can be applied to Police Forces (as opposed to Police Authorities). We are also keen to see how the legislation would apply in respect of civilian staff working for the Police—we firmly believe that they should be protected by the offence.

The draft Bill has ruled out any jurisdiction over the operations of organisations which are registered in the UK if a fatality occurs abroad. PCS is concerned how this might affect the position of Government departments and agencies with staff employed abroad—such as the Foreign Office, DFID and MoD. We believe that, if the management failures leading to a fatality were to occur within the UK then liability under the new offence should exist.

Penalties

The draft Bill will simply allow for an organisation to be fined, although remedial orders will also be able to be imposed. Because a company or public body cannot be sent to prison, the Government sees no other alternatives to this. However it recognises that in some cases, such as Crown bodies, this is just recycling money from one department to another.
PCS cannot see how this limited penalty can be effective as a deterrent—particularly for Crown bodies, who are not even subject to shareholder control over profits. We believe that a more innovative range of penalties needs to be developed.

We note that the Government has committed itself to increasing penalties for health and safety offences. PCS feels strongly that such increases need to come into force alongside this Bill—either as part of it or as simultaneous legislation.

**Individual Directors**

The draft Bill reflects the view of the Law Commission that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. However in its 2000 consultation paper the Government accepted that without punitive sanctions against company officers, there would be insufficient deterrent force to any new proposals.

Whilst PCS reluctantly accepts that this Bill may not be an appropriate vehicle with which to address the issue of director’s duties, we firmly believe that the Government must look at the responsibilities of directors quickly with a view to tighter regulation. Whilst we are keen to avoid scapegoating of front line employees or middle managers, it is fundamental that criminal liability for management applies not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure. We hope that the Government will consider the issue of director’s responsibilities separate from this Bill.

**Crown Immunity**

The vast majority of PCS members work for “Crown” bodies and we welcome the fact that the Government has accepted that its own departments should be covered, and that the draft Bill will ensure that where a government department or agency is responsible for a death at work it is prosecuted. As we are only too well aware from the incidents that have resulted in the death of our members in the past, seeing a prosecution take place can be important for the relatives of the victim of a workplace fatality. There is no logical, legal or moral case for leaving Crown bodies exempt from prosecution where they have caused a death and the removal of Crown Immunity will be widely welcomed.

We are, however, concerned that the draft bill does not also contain proposals to remove the Crown’s immunities from Health and Safety legislation in the same way. The Government has a long-standing commitment, made in their Revitalising Health & Safety strategy document, to the removal of these immunities and they certainly cannot continue once the Bill becomes law. We would urge the Government to use the Bill to repeal those sections of the Health & Safety at Work Act and other legislation that affords Crown immunity.

We are surprised to note the absence of the National Assembly for Wales from the list of Government Departments etc in the Schedule and presume that this is a simple oversight. We also believe that the Houses of Parliament need to be specifically written into the Bill, to ensure that they are also covered by this new offence.

**Summary**

PCS welcomes the Bill. We believe that it has the potential to improve health and safety standards across both the public and private sectors and help prevent deaths of both workers and members of the public. It will also help provide a sense of justice to the families of those bereaved as a result of corporate failings.

We consider that, with the exceptions outlined above, the scope of the proposed offence is about right. We hope that the Bill will be used as a vehicle to increase penalties and remove Crown Immunity for all health and safety offences.

We would ask that the Government should, as a matter of urgency, consider the issue of director’s duties and the penalties available for dealing with Corporate Bodies.

We hope that the Bill will be implemented at the earliest opportunity.

---

14. Memorandum submitted by the Public and Commercial Services Union, Department for Work and Pensions Group

I am writing to you on behalf of the Public and Commercial Services Union, (PCS), Department For Work and Pensions Group. On behalf of the Union I attended a Conference organised by the Centre for Corporate Accountability and the TUS on Monday, 13 June, 2005, which discussed the Draft Bill in detail.
My union is the largest one, representing 90,000 Civil Servants, in the Department For Work and Pensions, (DWP), and our members are particularly interested in the restriction on Crown Immunity for Corporate Responsibility in the terms of the draft Bill. Whereas we are pleased that some Government Departments will be considered as having a duty of care for staff under statute, and that the DWP is one of the Departments listed on the schedule as per Paragraph 2 (b), we are concerned about the opt-out clause of Paragraph 3, in that The Secretary of State may amend the Schedule by order. We are also concerned about Paragraph 4 (2), Relevant Duty Of Care. This reads “an organisation that is a public authority does not owe a duty of care for the purposes of this Act in respect of a decision as to matters of public policy, (including in particular the allocation of public resources or the weighing of competing public interests)”.

If this is read in conjunction with Paragraph 1 of the Draft Bill in that an organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised by its senior managers, and in conjunction with Paragraph 2 defining a senior manager, then, within the DWP, the elimination of crown immunity becomes somewhat meaningless.

As detailed in Government Reports, Civil Servants in the DWP, and in particular, within the business unit of Jobcentre Plus, do face violence and threats of violence from members of the public because of the nature of adverse decisions under the Social Security Acts. In the past, Civil Servants have been killed in the line of duty in the predecessor department to the DWP. Even now, my members are still facing attacks and suffering injuries because of their job. In most cases this is as a direct result of decisions made by senior management pursuing what is termed public policy. The reduction of staffing levels in the DWP, the remote processing of benefit, the provision of inadequate IT systems to deliver benefit, the deliverance of adverse decisions to the public in an open planned environment in Jobcentres, has increased the amount of hostility to staff caused by frustration felt by members of the public. If a member of staff is killed, because of inadequate safety control provision, despite the inadequacy being brought to the attention of management by accredited health and safety representatives, then the Draft Bill appears to grant crown immunity to the DWP management from prosecution of the offence of corporate manslaughter because the decisions were made at senior management level in pursuance of public policy. In essence, under this Draft, Crown Immunity is eliminated and then restored.

The PCS in the DWP would, therefore, wish to see a much clearer definition as to what constitutes public policy decisions and as to what decisions would come under the terms of the Bill, in which consideration of prosecution for corporate manslaughter, as applied to Crown Bodies, would take place.

16 June 2005

15. Memorandum submitted by Councillor Gordon Graham

I do not believe that the proposals go far enough in that the new offence would target the liability of organisations themselves and would not apply to individual directors or others. I therefore call for the inclusion of formal duties for all company directors.

Every worker should be able to expect a safe working environment, the law must change:

1. So that directors are clear that they have a duty to take steps to prevent death and injuries.
2. As an effective deterrent and as a driver to improved health and safety standards.

With regard to private prosecutions

It is the responsibility of the health and safety executive, local authorities and the procurator fiscal to prosecute organisations and individuals for health and safety offences.

This responsibility should clearly remain with these bodies, but the possibility for an injured worker or bereaved family to initiate a private prosecution is an important constitutional safeguard against possible allegations of abuse by these prosecution bodies.

Under the current law, individuals can initiate private prosecutions for health and safety offences—but they first need to obtain the consent of the director of public prosecutions or in Scotland the procurator fiscal. There is no justification for such a requirement.

The law commission have stated, “the right of prosecution should be unrestricted unless some very good reason for the contrary exists”—and in my view no such reason exists in relation to health and safety offences.

27 May 2005
1. **Aggravated Health and Safety Offences**

The proposals for an offence of corporate manslaughter in Cm 6497 assume that the current law of corporate manslaughter and offences relating to health and safety provide an insufficient deterrent for companies and other organisations whose activities are responsible for avoidable deaths. On that assumption, a straightforward way of increasing the deterrent force of the criminal law in the contexts of industrial, extractive and transportation deaths would be to create aggravated versions of current safety laws for situations when the failure of an organisation to comply with legally prescribed standards is a cause of death. There is a familiar precedent from road traffic offences as when, for example, the offence of dangerous driving is upgraded to the more serious offence of causing death by dangerous driving when the dangerous manner of driving is causally linked to a death. Accordingly, the Health and Safety at Work Act 1974 and cognate legislation could be amended to provide for aggravated offences with increased penalties whenever a failure on the part of the company or organisation to provide a reasonably practicable safe system of work constituted a cause of death. Prosecutions would be brought against the organisation and/or responsible individuals. The principal advantage of such offences is that they are merely additions to a long established body of law and practice and would be unlikely to give rise to the uncertainties, protracted trials and appeals that are likely to arise following the enactment of a refashioned offence of corporate manslaughter on the lines the Home Office proposes. Aggravated health and safety offences should be seriously considered as alternatives or supplements to corporate manslaughter. See further Glazebrook at [2002] Cambridge Law Journal, 405–422.

2. **Corporate Manslaughter Bill**

Below are comments on some clauses in the Bill.

Cl.1(2)(b). A notable omission from the organisations listed in the schedule are police forces. The explanation given in Cm 6497 are the difficulties arising from the current legal status of police forces. If possible these difficulties should be addressed prior to the enactment of the Bill to avoid this important matter lying indefinitely in the long grass.

Cl.1(4). Confining liability for corporate manslaughter to the organisation itself and limiting the sanction to a fine is bound to lessen the deterrent effect of the offence. Furthermore, the senior managers, the persons whose acts or omissions will trigger the organisational liability, may not suffer adverse consequences in any direct personal sense despite conduct causing death and falling far below what reasonably could be expected. If large fines and adverse publicity following a conviction for corporate manslaughter affects the economic value of the convicted company, harsh consequences may follow for rank and file employees, investors and other stakeholders who are entirely innocent of any responsibility for the errors and practices leading to death.

It is not suggested that these issues should be addressed by imposing liability for aiding, abetting, counselling and procuring corporate manslaughter. There are difficult technical matters and issues of fairness which get in the way of imposing such liability. Yet the need for adequate deterrence, the fundamental premise of Cm 6497, argues strongly in favour of aggravated health and safety offences referred to above. Where appropriate, charges in respect of these proposed offences could be brought against individuals alleged to be at serious fault, alongside a charge of corporate manslaughter against the organisation. Consequent on findings of liability for corporate manslaughter, disciplinary alternatives or supplements to fines should be provided. In particular, the judge should be given powers to disqualify directors found to be seriously at fault, extending the existing disqualification legislation. What must be avoided at all costs is a scenario such as follows. Let us say there is another ferry disaster and in the context of a future prosecution for corporate manslaughter, a cause of the sinking and casualties is found to be the impossibly tight sailing schedules imposed by the company on its maritime staff. A very large fine is imposed on the company. The senior managers responsible for the schedules remain in post without any adverse consequences for their current and future promotion and salary prospects. The impact of the fine and the guilty verdict is suffered by others within and outside the company. Such an outcome may arise under the Bill as it currently stands.

Cl.2. The definition of senior management gives rise to considerable uncertainty concerning the scope and application of the proposed offence of corporate manslaughter. At the outset, the only seeming certainty is that the class of person who may be found to be a “senior manager” within the meaning of cl.2 is a wider class than those persons who, under the current law, may be “identified” with the company in the context of corporate manslaughter. Beyond that supposed certainty lays much speculation.

We may illustrate these uncertainties by adapting the facts of the Lady Gwendolen [1965] Probate 294. Guinness transported stout from Dublin to Liverpool and Manchester using 3 tankers managed by a traffic department, an internal division of the company. One of these tankers collided with another vessel because the tanker’s master was speeding in fog and not consulting his radar. The company was found under relevant legislation to be at “fault” in causing the sinking of the other vessel. It was ruled that for the company to be at fault, a director or an officer sufficiently senior to be identified with the company,
had to be personally at fault in respect of the sinking of the other ship. If we suppose that the sinking had caused fatalities (fortunately that was not the case) we should be confronted with a case of corporate manslaughter under the Bill provided the fault was a “gross” breach of duty within cl3. We will look now at the individuals who featured in the judgments delivered in the Lady Gwendolen to see if their respective failings would have entailed, under the Bill proposals, liability for corporate manslaughter on the part of Guinness (had deaths ensued from the collision).

1. Williams was an assistant managing director of Guinness, one of three persons of that rank. One of his roles was to be responsible, at least in formal terms, for the management of the traffic department. He had not concerned himself with matters of safety and in particular had not ensured that ships masters were advised about speed limits in fog or appropriately instructed in the use of radar. His poor performance (non-performance) in safety matters constituted the necessary fault on the part of the company under the identification doctrine. One should assume that Williams would now be regarded as a senior manager within the terms of cl2 in the event, using our adapted facts, of a corporate manslaughter prosecution. Yet there are reasons for doubting whether this would be the case.

To be a senior manager within the terms of cl2, we must be able to say that Williams played a significant role in the making of decisions about how the whole or a significant part of Guinness’s activities were managed or organised. The company had argued that shipping was a very peripheral part of its central activity of brewing. The trial court and the Court of Appeal agreed that this was the case but insisted that if a company engages in shipping, even as a minor part of its activities, it must achieve the standards applicable to maritime companies. Under the proposed corporate manslaughter legislation, the company would be able to maintain that Williams was not a senior manager for the purposes of the company’s potential liability for corporate manslaughter because shipping was not a substantial part of the company’s activities. Possibly that argument could be defeated if Williams had other responsibilities lying beyond the traffic department sufficiently wide-ranging to make him a senior manager within cl2. But such additional responsibilities provide no discernible rationale for imposing liability on the company. Liability will ensue only if Williams has responsibilities beyond the management of shipping sufficient to make him a senior manager within the terms of cl2. Yet the gross breach of duty which must be proved against him within the terms of cl3 can only relate to the manner in which he failed to discharge his managerial role for shipping arising from his headship of the traffic department. The defendant company will have a strong argument that the activity to which the breach of duty relates must on its own accord be a substantial part of the company’s activities if there is to be liability for corporate manslaughter.

2. Boucher was the traffic manager for Guinness. He reported to Williams. He had operational responsibility for the land and sea transportation of Guinness products. He was at fault owing to his complete lack of involvement with matters of maritime safety. In the Court of Appeal, Wilmer J would have been prepared to attribute his fault to the company under the identification doctrine but no such need arose because of the finding against Williams. That leads one to think that should it prove necessary in the context of liability for the proposed offence of corporate manslaughter, any future court would readily find that someone in the position of Boucher was a senior manager within the meaning of cl2 by managing or organising a substantial part of the company’s activities. But the same problems relating to “substantial part of its activities” discussed in relation to Williams arise with respect to Boucher.

3. Robbie was the marine superintendent. He reported to Boucher. He was aware that the tanker master was “addicted to speed” (in the sense of motion) and also knew the master was, “wholly ignorant of the workings of radar”. Robbie was at fault in failing to supervise the master and in failing to report his concerns to his superiors. The Court of Appeal considered that Robbie’s faults could not be attributed to the company under the identification doctrine. It is unclear whether his day to day supervision (or lack thereof) of shipping matters can be regarded as a management role in the sense of “managing or organising … activities” within the meaning of cl2. Essentially he was applying or failing to apply systems rather than devising or modifying systems. Further, the difficulties arising from demonstrating that Robbie managed or organised a substantial part of the company’s activities are more acute than in the cases discussed above. His responsibilities were confined to maritime transport.

4. The ship’s master was guilty of “complete and inexcusable” negligence in causing a collision in fog with a ship at anchor. It is assumed here that he is not any form of manager for the purposes of cl2. That said, it would be useful to have more guidance on the position of persons such as ship’s masters, medical consultants, engineers, accountants, lawyers etc, whose principal role is to apply their professional skills to discrete tasks but who must also exercise some managerial and organisational capacities as an integral part of their work.

Conclusions from case study

If an incident of the kind involving the Lady Gwendolen causes fatalities, we should be faced with a very clear example of corporate manslaughter. The grave danger the master’s navigation and speeding practices gave rise to were known to Robbie for years. Williams and Boucher would have known of this danger had they done their jobs properly. Under the present identification doctrine, there would very likely be a conviction for corporate manslaughter. The same assurance cannot be given for the proposals
in Cm 6497. So much will depend on the particulars of corporate organisational structures. If Guinness had shipped its products through a subsidiary company rather than an internal division, the prospects of a conviction against the subsidiary company would be high. Such variables have no bearing on the general interest in using the criminal law to deter corporate failings such as those disclosed in the Lady Gwendolen. The approach taken in cl.2 to capturing organisational failures is deeply flawed.

Cl.3(2)(iii) The jury must consider whether the defendant organisation sought to profit from its failures to comply with legislation and guidance. This consideration is not logically linked to a finding of gross breach of duty unlike considerations (i) and (ii). It would be best if it were a factor to be considered at the sentencing stage. It would be unfortunate if the absence of proof of seeking to profit from neglect of safety were to be regarded as a weighty consideration against a finding of gross breach of duty.

3. AN ALTERNATIVE APPROACH TO CAPTURING ORGANISATIONAL FAULT—AN OUTLINE

The principal focus of these comments is to demonstrate the difficulties arising from cl.2 and to suggest an alternative approach to findings of organisational fault. This alternative way will merely be briefly outlined. The current Home Office proposals have been long in gestation and subject in their various formulations to much discussion and debate. They are unlikely to change in substance—hence the brief outline only. I would be happy to provide further details should there be any interest. Also further details can be found at Sullivan [1996] Cambridge Law Journal 546, particularly at 539–546.

Looking to identify persons within the organisation whose acts or omissions may be considered to be organisational acts or omissions is to perpetuate, with some adaptation, the current common law approach to corporate liability for serious crimes. A better way for a new law of corporate manslaughter would be, in the event of a death caused by an organisation’s activities, to determine whether anyone within the organisation had caused the death by some gross breach of a duty of care owed by him or her. Returning to the adapted facts of the Lady Gwendolen, it would seem that the ship’s master, Robbie, Boucher and Williams were each guilty of gross breaches of duty leading to fatalities (using our assumption that the collision caused fatalities). If we suppose a gross breach of duty related to causing death were proved with respect to one or more of these individuals, Guinness, under this proposal would be liable for corporate manslaughter unless it could demonstrate due diligence in the area of its activities wherein the deaths occurred. In our example, Guinness, would have to show that its policies and procedures for maritime safety were all that could be reasonably asked of it and that there were no reasonably avoidable failings in its policies and procedures exposed by the collision which, if corrected, would foreseeably have prevented the collision. As it is reasonable to ask organisations familiar with their own systems to prove due diligence, this reverse burden should withstand scrutiny under Art 6 (2), ECHR. Alternatively, the prosecution could shoulder the burden of proving a gross breach of duty causing death on the part of anyone within the organisation and of proving a lack of due diligence foreseeably giving rise to the incident causing death on the part of the organisation. Liability of the organisation for corporate manslaughter would not preclude charges of personal manslaughter against persons within the organisation and corporate and personal charges relating to health and safety offences. There would be no offence of aiding, abetting, counselling or procuring corporate manslaughter.

It may well be that scrutiny and debate would expose flaws in the corporate manslaughter scheme outlined here. None the less, to proceed with the scheme presented in Cm 6497 will lead to much speculation and litigation about the identification of senior managers whose failings may be counted as organisational failings. This would be of benefit principally to lawyers.

17. Memorandum submitted by Gary Brown

I would like to make comments regarding the wording of the Corporate Manslaughter Bill.

1. How does the Bill comply with the Human Rights Act? Is this something that has yet to be considered?

2. How would 2(iii) be quantified? Is “profit” defined in pure financial terms or could this be a wider interpretation. For example a charity is a not for profit organisation but could save money by ignoring its duty of care to employees and members of the public. This is a wider interpretation of the word profit and not necessarily profit in terms of for profit organisations.

3. Part 16 deals with extent and territorial application. How would this apply to an organisation that has business in the devolved administration of Scotland and also in England and Wales? How would the law be considered to apply to an organisation that is a subsidiary of one which has corporate officers outside the jurisdiction of the UK?

8 April 2005
18. Memorandum submitted by Niall Tierman

Suggestions and Improvements

1. Jurisdiction

In a global economy with ownership of companies often being separate from the location of the work, and the fatality, there is a problem with some aspects of the offence not occurring in England or Wales.

The Draft Corporate Manslaughter Bill is only applicable in England and Wales, s16. This means that in terms of territorial coverage the offence will apply if the injury that results in death occurs in a place where the English courts have jurisdiction. This will be the case if the management failure occurred either here or abroad, as might be the case with a foreign company operating in England. However, there is a problem in that there is no extra-territorial jurisdiction proposed. There would be huge practical difficulties in trying to extend jurisdiction over the operations abroad of English companies. Still, this means that if the company is managed in England and the fatality happens at an Eastern European site this legislation could not be used. The prosecution may not want to be stepping on the toes of the local laws yet many deaths could go unpunished.

What often happens in such a situation is that the English company will employ a local company and instruct them to comply with all local laws. This is a problem as it could effectively get around the legislation and means that a “Bhopal” situation would not be liable.

A more likely problem could be that if an English employee travelled to a foreign site and suffered a fatality, Corporate Manslaughter charges could not be brought. On the other hand, the Health and Safety at Work Act might still be used in this situation.

A situation such as Zeebrugge would be covered by s16(2)(b) if the deaths occurred on a British ship registered under the Merchant Shipping Act 1995. The Piper Alpha scenario would also be covered due to s16 (2)(e).

The intention of the Bill is that it is the decisions about processes that are punished, yet the lack of extra territorial jurisdiction means the decisions could be made within the court’s jurisdiction, lead to a death and still go unpunished.

2. Foreign companies

Another potential loophole is if the injury occurs in England and the company is based abroad then the legislation could not be used. It is unlikely that extradition proceedings would be brought to bring managers to England from abroad.

What can often happen in such a scenario is that the foreign parent company would set up operations in England or purchase an existing English company. The management decisions would thus be made within the jurisdiction and so a prosecution could be brought. Nonetheless, there are many potential fatalities that are not covered.

3. Changed ownership

Just as Railtrack changed to Network Rail, other companies may change ownership between the date of the death and the prosecution. There is a question about whether the new firm should be affected by the previous companies errors. This potential problem could be resolved by the fact that the judge can levy a fine to an appropriate level, or can issue a remedial order if the error has not been resolved by the new company.

4. Timing

Companies will not be able to be prosecuted for “anything done or omitted before it comes into force”, S15(2). However, there could be a potential problem if the management decisions are taken before the Act comes into force and yet the incident leading the fatality is after the Act is in force. The company could try to defend itself by showing that the “way in which the organisation’s activities are managed or organised” (s1(1)) occurred before the change in the law. The prosecution would have to show that there is a duty to change the procedures of the company after the Act even though the decision that is the actus reus of the offence occurred before it was illegal.

5. Gross breach and awareness

There would be merit in allowing non-disclosure to the prosecution of company procedures. Otherwise firms making an effort, but where managers did not follow their own company’s advice, could be more easily seen to commit a gross breach, and hence be more easily convicted, than a firm that does not even have procedures in place. In s3(2)(b)(i) the proposed test is conduct falling far below what can reasonably be
expected. This should probably be conduct that ought to be reasonably expected, so that a firm is not more harshly treated just because it has high in house standards. An example is that the HSE see most work place deaths as preventable, but some construction companies have taken the position that all work place deaths are preventable. This could make prosecuting these firms easier than a company that has lower standards in its procedures.

19. Memorandum submitted by the Association of Council Secretaries and Solicitors

It is quite evident that the current legal position on establishing corporate responsibility for death is unsatisfactory and needs revision and the Government is right that it is not straightforward to frame an appropriate offence. However, there must be some clarity in what behaviour would risk criminal penalty so that legal advisors to organisations can provide clear guidance as to what should be done to avoid those organisations causing death. A lack of clarity could well result in an overly-cautious approach which could unnecessarily restrict innovation and progress in developing products and services. Equally, a lack of clarity could amount to an invitation for speculative claims for compensation where there had been no negligence in the operation of a public function but where it could be argued that had the function been organised or managed differently then an unfortunate death would have been avoided.

Areas for Clarification

1. If it is the case that the Home Office intends that local authorities should be subject to the provisions of the Bill then this should be made clear. Local authorities are declared to be “bodies corporate” by operation of statute but the definition section in the draft Bill does not use that wording in respect of the bodies to which the proposed legislation applies.

2. Secondly, the proposed offence is specified in terms which do not readily identify what behaviour would be regarded as criminal. The proposed offence would be committed if “the way in which the organisation’s activities are managed or organised” causes death (so there has to be a causative link between the death and the way in which the organisation is managed or organised, not how it is “conducted”) which amounts to a “gross breach” of a relevant duty of care owed to the deceased: clause 3 suggests that a gross breach would be conduct which is “far below” what can “reasonably be expected of the organisation in the circumstances”. Will there be a different standard for “weak” authorities like Hackney than for “excellent” authorities like Kensington and Chelsea?

3. But this is only where the cause of death is a result of management or organisation by “senior managers”. The definition (clause 2) requires someone to have a “significant role” in making decisions about management or organisation or in actually managing the activity. It seems that any managers may fall within the definition of “senior manager” for this purpose! It certainly seems that executive councillors could well be “senior managers” for these purposes as they may have significant roles in making decisions about how services are organised or managed.

4. The “Public Authority” exemption. Local Authorities have a mixed role in that they are often responsible for establishing both the local public policy and then delivering that policy (either directly or through commissioning)—in education, for instance, it could be responsible for local policy on Outdoor Activity Centres or School Trips Abroad and also could be the employer of the staff supervising the activity and the occupier of the premises at which those activities take place. Should an unfortunate death occur, it might be far from clear cut as to whether causation stems from a policy decision as to what, say, safety precautions ought to be in place or, in the alternative, that the death arose from the manner in which the delivery of that policy was organised.

The Association of Council Secretaries and Solicitors is the professional body for the most senior advisors to local government in England and Wales on matters of corporate governance, law and propriety. Its members will be those who are advising local councillors and appointed managers how best to deal with the risk of a charge of corporate manslaughter. Uncertainty in legislation will lead to cautious advice and a dampening effect on innovation and enterprise in the delivery of public services. The Association would urge that further thought is given to clarifying the proposed offence.

2 June 2005
20. Memorandum submitted by the Crime Committee of the Superintendents Association of England and Wales

My methodology in formulating this response has involved considerations relating to the objectives of the Bill, highlighting how the proposed legislation will support the achievement of such objectives, identifying issues that still remain and making further recommendations/observations that you may feel it prudent to further debate.

I have consulted with other members of my association, senior detectives in other forces and relevant parties including the Crown Prosecution Service.

OBJECTIVES OF THE BILL

The objectives of the Bill are clearly to improve the standards of health and safety in respect of Corporate bodies (including Crown bodies) and holding such organisations to account for failing to reach satisfactory standards, when this failing results in a persons death. Such bodies would be liable for a conviction for the offence of corporate manslaughter (an organisational conviction) and an unlimited fine. In addition the court, on conviction, will be able to impose a Remedial Order directing remedial measures in respect of an organisations identified failures. Further fines can be imposed if an organisation failed to comply with such an order.

The background factors to the legislation include well publicised difficulties in prosecuting under the present law and unacceptable levels of work related deaths each year which the Health and Safety Executive considers are, in the majority of incidents, preventable.

HOW WILL THE BILL SUPPORT THE ACHIEVEMENT OF THE OBJECTIVES

The major changes proposed in the Bill are that:

1. The legislation will apply to Corporate bodies and a wide range of Crown bodies.
2. The threshold for liability is “changed” from conduct or failure that constitutes gross negligence to a position where management failure which must have been a gross breach of duty of care and, of most benefit, this is defined as conduct falling below what could reasonably be expected.
3. A change in the basis of liability. The identification principle (a senior member of the company must also be guilty of gross negligence manslaughter) is replaced by a failing in the way senior managers organised or managed the organisations activities.

The Superintendents Association have no doubt that these changes should be embraced as a significant step forward in driving forward health and safety issues within Corporate and Crown bodies. Such changes will simplify the process of prosecuting and convicting organisations that do not comply with the legislation.

ISSUES THAT MAY STILL PROVE A HINDRANCE TO PROSECUTION

Whilst accepting this is difficult legislation to develop, it may be there is a need to revisit the definitions of “senior manager” and “significant role”. It is foreseen, particularly by lawyers, that it may still be difficult to satisfy such criteria and less restrictive definitions giving more generic culpability to an organisation may be considered. This would provide a greater drive to compliance with regard to duty of care and health and safety responsibilities. The gross breach of duty of care is a far broader definition, which is fully supported.

Whilst the Remedial Order on conviction appears an attractive proposition, the Association has reservations about how this will be supervised. If processes are not in place with the Courts/Health and Safety Executive, the duty of care breach associated with a future death may be passed to such bodies. This needs to be considered before legislation is enacted.

OTHER CONSIDERATIONS/RECOMMENDATIONS

The Associations main recommendation here relates to the power to impose a Remedial Order and the offence of failing to comply with a Remedial Order.

The view would be that such Remedial Orders could be a real catalyst for achieving the objectives of the Bill. However, to be effective, the Government may wish to consider whether the use of such orders could be introduced in a more generic sense when health and safety issues/breaches are identified—not imposed on conviction when a death has occurred. The use of such an order for identified issues when death has not occurred may well present such deaths occurring in the future.

The only other recommendation would be that this legislation, prior to enactment, would need to be fully marketed, as liability for this offence would extend considerably (eg to the providers of street furniture and motor vehicles/parts, if it could be shown that these had a causative link to death). In addition, for law enforcement agencies, there would be a real need for raising awareness of the legislation and consideration given to the provision of training of our staff in respect of SIO’s (crime) and IO’s in respect of road death offences.
There is the potential to develop multi agency training and awareness between the Health and Safety Executive and the Police Service and for memorandums of understanding to be developed between Law Enforcement Agencies involved in such investigations.

The legislation will undoubtedly lead to more protracted and resource intensive investigations. This additional financial burden to Law Enforcement Agencies needs to be considered against a background of potentially diminishing operational budgets and increasing demand over the coming years.

**Summary**

The Government objectives in introducing this legislation are supported and the Bill is welcomed. There is no doubt the legislation will assist in the prosecution of organisation(s) who are responsible for corporate manslaughter.

The definitions are most helpful but some greater thought may be given to the definition of “senior manager” and “significant role”. Such definitions may still prove significant factors in deciding whether cases are prosecuted and may be liable to legal interpretation and case law judgements.

The power of the court to impose a Remedial Order on conviction, if properly supervised, is seen as a good initiative. It is felt, however, the use of such orders when lesser health and safety/duty of care issues are identified (and not associated with death) would be an even greater catalyst for the objective of reducing work related death.

There will clearly be more investigations into Corporate Manslaughter as a result of this legislation which will be increasingly resource intensive and costly. The additional financial and opportunity costs to Law Enforcement Agencies need to be considered as part of this ongoing debate.

---

**21. Memorandum submitted by The Railway Forum**

The Railway Forum is an industry-wide body sponsored by and paid for by most of train operating companies (and including ATOC), the rolling stock leasing companies, Network Rail, London Underground, the Passenger Transport Executives and many manufacturing and infrastructure companies, as well as other businesses connected with the railways. In all we have some 50 members. Our key role is to act as a think tank, information exchange and point of contact for those committed to and interested in the rail industry.

**General Comments**

1. The Railway Forum welcomes the improvements that have been made to the Bill compared to earlier versions. The draft Bill thus represents a significant step forward and provides a sensible platform for further debate. This is important given the complexity and emotion that often characterises the corporate manslaughter issue. In particular we welcome and support:
   - the recognition that the new offence is aimed at identifying organisational rather than individual liability; a distinction that has not always been clear in previous debate yet one that is crucially (and legally) separate;
   - the acknowledgement of the need to strike a balance between accurately identifying and punishing unsafe conduct and ensuring that businesses are not unduly burdened by legislation;
   - the requirement to set the Corporate Manslaughter offence within the context of existing health and safety legislation; and
   - the proposals relating to the Bill’s coverage of public bodies, although further consideration of how this might impact public policy decisions in relation to safety may be required.

2. However we have a number concerns over certain aspects of the Bill and how they might be interpreted and implemented. These are expanded upon in more detail in the relevant sections below. In summary:
   - definition of “senior manager”—this is somewhat unclear. Whilst we accept that reaching a catch-all definition is effectively impossible, this is an issue that requires further consideration in the pre-legislative stage;
   - “gross breach”—similarly the definition of a “gross breach” requires further clarification; as currently drafted it is not clear whether a combination of some or all of the heads under Section 3 (2) need to exist to determine a gross breach. Further, Section 3 (4) suggests that non-statutory—and potentially subjective or unreliable—guidance could be considered in determining whether a gross breach has occurred;
   - concurrent trials—the Health and Safety at Work Act (HSWA) requires a reverse burden of proof (ie shouldered by the defendant organisation) whilst a corporate manslaughter offence would require the burden of proof to fall on the prosecution. Thus, we believe it would be inappropriate
and unfair to run both offences concurrently; if an organisation is to be prosecuted for both offences then the trial for corporate manslaughter should precede any trial for health and safety offences;

— remedial orders—whilst the power to order remedy of a gross breach is, in principle, accepted we are concerned that judges are unlikely to be in the best position to evaluate the wide range of issues to be considered in setting remedial orders. This is particularly pertinent given the often multi-causal characteristics of railway accidents where the need to understand the interaction of complex systems and human factors is paramount. Alternative arrangements in this area would therefore be preferable; and

— corporate structures—we seek further clarification as to the extent to which parent companies could be sanctioned since there may be circumstances in which it is held that a parent company has a duty to individuals in a subsidiary (or to third parties engaged with it). The situation with regard to the duty owed by a contracting company to a third party affected by the actions of its contractor is similarly open to interpretation. This is particularly important given that the number of instances of such arrangements within the rail industry.

3. From a wider viewpoint the debate on public safety in recent times has had the unfortunate effect of increasing risk aversion within the railway industry.\(^3\) In particular the prevalence of a “safety at any price” approach in many areas has had serious consequences, particularly with regard to industry performance and cost. Although great strides have been made by the industry to tackle this issue in the past few years, risk aversion remains a problem. The Corporate Manslaughter Bill can be a useful step forward in shaping this debate however care need to be taken to ensure that it does not have the effect of encouraging further risk averse behaviour. This tends to occur when legislation or standards deriving from legislation become over complex and poorly defined and in particular where this leads to test cases that, though they may lead to acquittal, are seen to have a detrimental impact on individuals and their families.

4. As part of this process we therefore urge the Government to conduct a mature, wider public debate on safety policy in concert with these proposals. This debate must address in particular the basis for decisions on public policy and safety and what constitutes an acceptable level of risk.

COMMENTS ON THE CONSULTATION PAPER AND THE DRAFT BILL

The need for reform

5. The Railway Forum largely agrees with the assessment outlined in this section. The existing law as it stands does not enjoy general public confidence and the difficulties surrounding the “identification principle” mean that securing a prosecution is particularly problematic. Nonetheless the fact that only six of the 34 cases brought under corporate manslaughter since 1992 have resulted in a conviction does not, of itself, constitute a case for reform. In this context therefore it is important to ensure that any reform to the corporate manslaughter offence is not only effective in holding organisations to account but is also fair in the manner in which this is achieved. Only in these circumstances can the public have real confidence in the law and the unintended consequences of unclear and seemingly over-rigorous legislation on business be avoided.

The offence

6. The Railway Forum generally supports the proposals as outlined in this section and in particular the approach outlined at paragraph 14 of the consultation that “focuses on the arrangements and practices for carrying out the organisation’s work rather than any immediate negligent act by an employee”. However we do have some concerns regarding the exact nature of what constitutes a “senior manager” and these are expanded upon below.

The scope of the offence

7. The Railway Forum welcomes the acknowledgement that Crown immunity from the new offence would be inappropriate and supports the contention to extend the scope of the offence to cover the Crown based on the nature of the public service being undertaken.

8. Similarly we support the approach taken in identifying those areas that fall outside the scope, namely questions of public policy and prerogative. However we do not believe that the public policy exemption should be restricted solely to public authorities (as the Bill currently states it should). Private organisations, particularly utilities that oversee large networks (and that may be supported by Government), also make decisions involving public policy with regard to balancing competing public interests. In this sense then we

\(^3\) See Risk aversion in the UK rail industry, A D Little report to the Department for Transport, March 2005. It found the UK rail industry had developed a “pervasive and self-sustaining culture of risk averse behaviour” with its roots in the criticisms of the industry following the fatal accidents at Southall, Ladbroke Grove and Hatfield.
believe that a public policy exemption should, for consistency with the overall scope of the offence as noted in paragraph 7 above, be based upon the nature of the policy decision rather than the type of organisation that takes it.

**Management Failure by Senior Managers**

9. We are somewhat concerned that the definition of a “senior manager” is unclear as currently drafted. Clearly a comprehensive, catch-all definition is effectively impossible to attain however the following questions are, we believe, worthy of further consideration:

- what constitutes management of a “substantial part” of an organisation?
- what does a “significant role” in such management entail?

Whilst the intention behind these terms is described in the consultation this is not carried through into the drafting of the Bill. This is an issue on which we seek further clarification since it is clear that the offence will take effect at a lower level than is currently the case (where a “controlling mind” needs to be identified). Furthermore whilst the UK railway industry is characterised by a wide range of organisations, large and small, employing widely varying management structures. In this context it is crucial that the basis for identifying “senior management” must be robust and flexible enough to cope with the spectrum of different management organisation.

10. We have a particular concern that test cases to clarify the scope of legislation are highly undesirable. Previous prosecutions that have occurred following accidents have had a significant and unwarranted impact on individuals and their families even if the outcome is an acquittal. We would therefore press for clarification at the earliest stage. An observation on our part is that businesses with a turnover of approx. £25 million and above tend to have formal hierarchies and senior management (along the lines that were possibly in the minds of the drafters if the Bill). Below that figure organisational structures tend to reflect a wider range of influences: family relationships, informal hierarchies based on friendship and a blurring of management with the workforce in tackling problems. We are not at all certain that this category of business easily fitted into this model.

**Gross Breach and Statutory Criteria**

11. The Railway Forum supports the contention at paragraph 32 of the consultation that the offence should be reserved for the most serious management failings and that, as such, the threshold should be correspondingly high. In this context it supplements the already rigorous health and safety legislation and any extension of the corporate manslaughter offence into ground already covered by health and safety controls would, we believe, be counter-productive.

12. Whilst we welcome the addition of statutory criteria as a useful aid in the determination of whether or not a gross breach has occurred we nonetheless have some concerns in this area. In particular:

- as currently drafted it is unclear whether some or all of the heads under Section 3 (2) are required to be present for guilt to be established. This is important since some of the heads may not be relevant to the particular circumstances of a case (eg Section 3 (2)(b)(iii)).
- Section 3 (3) does not cover safety guidance from bodies that are not enforcing authorities. In the rail context this might preclude consideration of guidance from the Rail Safety and Standards Board (RSSB) that has a key role in safety and standard setting across the industry.
- Section 3 (4) implies that a jury could be directed to consider non-statutory guidance on health and safety. It is quite possible that such guidance could be shown to be unreliable and/or subjective and as such could in fact be detrimental to safety. The position of an organisation that (correctly) disregards guidance that can be shown to be detrimental to safety is therefore unclear.

The Railway Forum submits that these issues are addressed through further analysis and debate with the aim of refining Section 3 of the Bill.

**Corporations**

13. As already noted above we have some difficulties with the proposals as regards the relationship between parent companies and their subsidiaries. In particular the analysis at paragraph 37 of the consultation infers that a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care. How this meshes with the existing principle of limited liability in respect of corporate structures is unclear. For example if a parent companies' management systems have significant influence over the actions of the subsidiary it might be argued that this might be sufficient to establish a duty of care. We believe this is an area of the Bill that requires further scrutiny.

---

4 See for example the recommendation arising from the Ladbroke Grove Inquiry to install roof hatches in trains. This was subsequently shown to have a detrimental effect on safety.
The Crown

14. The Railway Forum supports the approach set out in this section subject to the comments made above at paragraphs 7 and 8.

Individuals

15. The Railway Forum fully supports the Government’s intention to focus on reforming the way organisations are held to account and not individuals. The latter issue has often, misleadingly, characterised debate on corporate manslaughter and to pursue such an approach in this Bill would have serious implications for risk aversion.

Causation

16. Rail accidents are, by and large, a result of a whole host of inter-related factors encompassing technological, management, system and human failings. The current case law on multi-causal fatalities is unclear and as a consequence establishing whether a “senior management failure” was a “substantial cause” in such a situation is likely to prove problematic. We are therefore concerned that the Bill does not offer any further lead on such a key issue—particularly in relation to rail where single-cause fatal accidents are rare—and seek further clarification of this section of the Bill.

Sanctions

17. The Railway Forum supports the contention that the appropriate sanction for a corporate manslaughter offence is a financial one. However the proposal to enable a judge to order remedial action in the rare case of a gross breach requires careful examination. In both cases—setting fines and implementing remedial orders—we believe appropriate parameters need to be laid down.

18. With regard to fines this requires:
   — clear criteria on which to base fines for corporate manslaughter offences.
   — clarity with respect to the link between fines for corporate manslaughter offences and fines for health and safety offences as a result of the same incident.

19. With regard to remedial orders it is crucial that the context of any incident is taken into account. As already noted, fatal rail accidents tend to be multi-causal. In light of this great care needs to be taken setting remedial orders and the wide range of contributory elements must be considered and carefully assessed if the order is not to be counter-productive. As we have already highlighted at paragraph 12 with regard to statutory criteria, the risk of implementing inappropriate remedial measures to the overall detriment of safety is significant.

20. We are not convinced that Judges are best placed to carry out this process alone. However if this proposal is to be retained we suggest that the following supporting measures are put in place:
   — matters of expert judgement should be referred to a relevant authority (eg the Office of Rail Regulation); and
   — adequate mechanisms for appeal of the remedial order.

21. On the question of appropriate sanctions for public bodies we would argue that, although fines may be “recycled”, they still send a powerful public message regarding the cost of failing to meet obligations. Similarly remedial orders could also be used innovatively to sanction public bodies and can better address particular systemic factors that may have contributed to the offence.

Risk aversion

22. We recognise that risk aversion is an intangible subject and that it is difficult to manage in legislative terms. It is however frequently an outcome when legislation or standards deriving from legislation become over complex and poorly defined. The situation is exacerbated if unclear legislation becomes the basis for test cases that, even though they may lead to acquittal, are seen to have a detrimental impact on individuals and their families. At present we think that much remains unclear and in such a situation it is worth considering a reverse test: can the scope of the new legislation be defined such that its key requirements can be readily understood by management at all levels?

23. In this context we also believe that the Government should begin to develop the wider debate with regard to public policy and safety. For the offence of corporate manslaughter to work most effectively it must be buttressed by a wider understanding of the decision-making process underlying safety policy and what constitute acceptable levels of risk across industry sectors. At present we see this as a debate that is in its infancy.

17 June 2005
22. Memorandum submitted by the Royal Society for the Prevention of Accidents

The Royal Society for the Prevention of Accidents (RoSPA) agrees that there is a need to reform the law so that bodies corporate can be prosecuted and found guilty of the offence of manslaughter. It has taken account of initial views expressed by other representative bodies (see annex one⁵).

RoSPA agrees that in practice prosecution for this offence should be reserved for the worst cases of criminal failure by such bodies to safeguard life. Criteria for this level of gross failure must be as transparent as possible.

RoSPA is concerned however that the new offence may in practice introduce three perceived levels of compliance with safety duties: just above “far below”, “so far as is reasonably practicable” and “good practice”. The Government must uphold the importance of good practice standards of compliance.

The majority of cases of death at work due to corporate safety failure should continue to be prosecuted, where appropriate, under the Health and Safety at Work (HSW) Act.

Successful prosecution for the proposed offence should also involve subsequent prosecution of relevant directors, where appropriate, under the HSW Act. In this context, where prosecutions are not being taken under Section 37 consideration should be given to prosecuting such directors for breach of their duties as employees under Section 7 of the Act (see recent article at annex two⁶).

The tests for “far below” should be based on a range of considerations, including the extent of non-compliance with legal safety requirements, implementation of relevant and authoritative guidance, response to internal safety advice, results of earlier investigations, alerts etc.

At the same time these tests should not be set at such a level that production, for example, of basic documents detailing health and safety management policy, organisation and arrangements would be all that was necessary for a defendant to mount a successful defence.

Organisations being prosecuted for the offence which had policy, organisation and arrangements on paper but chose not to implement these it practice might be regarded as guilty as those who had made no such provision (or even more so).

RoSPA agrees that determination of guilt should be based on the nature and extent of gross failure by senior managers to manage health and safety. This in turn however requires the Health and Safety Commission to provide greater clarity about the existing health and safety responsibilities of directors in law, including not only the effect of Sections 2 and 3 the Health and Safety at Work Act and directors’ liabilities under Section 37 of this Act but their duties under Section 7 as employees. Guidance on the role of directors and on the role of senior managers as set out in HSC’s “Director Guidance”, relevant parts of the ACoP to the Management of Health and Safety at Work Regulations and HSE’s guidance HS(G)65 all needs to be brought together into a new ACoP on directors’ health and safety duties. Agreement on such an ACoP however should not however be allowed to delay introduction of the proposed changes. Indeed the introduction of the changes would be an added reason for the ACoP to be produced.

Although manslaughter is a “harm” offence, a useful part of the test of “far below” might be a requirement to show, inter alia, that risk levels were well inside the “intolerable zone” of the ALARP triangle (see HSE’s “Reducing Risk Protecting People”).

The offence should apply to and enable penalties to be imposed on all guilty organisations, including partnerships and public sector bodies, including Government Departments and Agencies. Penalties for public bodies found guilty of the offence should involve greater use of remedy powers since large fines merely deplete funds available for public expenditure or represent the transfer of funds within the State.

For guilt to be established it should not have to be shown that senior managers were unaware of the risk or that the organisation had sought to profit from its failure to put appropriate safeguards in place.

The tests of guilt should focus on the nature and extent of senior management failure, both individually and collectively. As mentioned above, improved guidance is required to enable the legal profession to understand how failures in safety risk management systems can potentiate disasters and the extent to which failures in such systems can be attributed to the failings of senior managers. This is important in proving that specific or general management failure(s) caused the victim’s death.

It should be made clear that criteria for establishing senior management failure will apply to all senior managers within scope and not simply any board level director(s) with specific responsibility to champion safety within the organisation. The definition of what constitutes senior management needs closer attention to ensure that this concept is fully applicable to all forms of organisation within scope of the proposed offence.

The power to make remedial orders is strongly welcomed and should be extended to sentencing for all health and safety offences. These should not be used to remedy immediate shortcomings since these should already have been dealt with through the use of notices by health and safety enforcing authorities. Rather...
the powers should be used to require “health and safety management regime change”, with evidence being produced to the courts via independent and competent third parties of problems to be rectified and of the adequacy of action taken (at the court’s instruction) to achieve this.

Appropriate remedial action taken by the company in the light of the death(s) concerned should be taken into account in mitigation of sentence.

The offence appears to be constructed to deal with death due to accidents rather fatal damage to health due to sustained exposure to harmful agents or diseases caused accidentally but with long latency. This may require closer examination.

Clarification is needed as to which bodies will take the lead in investigations following deaths which might attract prosecution for the offence. The Health and Safety Executive have particular expertise in determining root cause in an organisational setting. It is important that this is harnessed in any co-operative arrangements to be established between enforcement bodies to deal with death that may have been attributable to a lack of care by an organisation.

14 June 2005

---

23. Memorandum submitted by the Institute of Directors

**BACKGROUND: INSTITUTE OF DIRECTORS (IoD)**

The IoD is a non party-political organisation of individual members, whose aim is to help directors to fulfil their leadership responsibilities in businesses and other important organisations, also including the public and voluntary sectors. The majority of the membership is drawn from right across the business spectrum—from start-up companies and small or medium-sized enterprises, to directors from 75% of The Times Top 1000 Companies. There are some 54 000 IoD members, in organisations that collectively employ over 10 million people.

**IoD Comments: The Need for Reform**

1. The IoD has consistently expressed support for the principle of reform of the law relating to corporate manslaughter, since it was first publicly announced by the Government. For example, the IoD was quoted in a Home Office news release of 23 May 2000:

   “We fully accept the need for tightening the law on this issue . . . We are happy to support these proposals which are a step in the right direction.”

2. The IoD subsequently responded by letter to a Home Office consultation exercise on the topic, on 1 September 2000, and sent written comments on an associated initial regulatory impact assessment on 28 September 2002. After that there was a number of discussions between IoD Policy Unit staff and Home Office officials. This culminated at an IoD seminar held on 2 June 2005 at the IoD’s premises 116 Pall Mall, London, at which two members of the bill team were present to address and explain the reform proposals to a gathering of IoD members and others. The IoD is grateful for the opportunity of having had continued contact over the period of development of the proposals and thereafter.

3. The IoD has long recognised the need for reform of the law, to enable convictions to be secured where the “identification” principle has proved inadequate, but where there have been very serious failings in the direction of the organisation in relation to the safety of employees and others, and the outcome of those failings is death.

**IoD Comments on the Government’s March 2005 Proposals: General Points**

4. In the following reference is made to parts of the March 2005 publication (Cm 6497). Referring to the Foreword by the Home Secretary (on page 5 of the Home Office publication), we agree with the statement that the current law neither commands public confidence nor “provides offences that are clear and effective”. What we wrote in September 2000 submission to the Home Office is still valid:

   “The IoD acknowledges that the current state of the law on involuntary manslaughter is unsatisfactory. Public confidence in parts of the business community has been damaged as a result of some tragic and heavily publicised accidents. These accidents include the Herald of Free Enterprise (1987), the Marchioness (1989) and Lyme Bay canoeing (1993) disasters and underground/rail accidents including the Kings Cross fire (1987), and the Clapham Junction (1988), Southall (1997) and . . . the Paddington Station (1999) disasters. Because of the current state of the law, which requires the presence of a “controlling mind”, it has proved extremely difficult, if not impossible, to bring the directors to book for the flagrant breaches of health and safety which have been clearly occurred in some companies.”
5. Referring again to the Foreword (p 5), we very much welcome the Government’s intention “not ... to propose legislation that would increase regulatory burdens, stifle entrepreneurial activity or create a risk averse culture”. The members of the IoD and enterprises in general have no desire for an increase in regulation, as the IoD has commented on many occasions.

6. The IoD also welcomes the intention not to set new standards, but to link the reform proposals to existing health and safety law (p 5). The IoD promotes high standards among its members, who are leaders in their organisations. For example, the IoD has worked with the Health and Safety Executive to promote the importance of leadership in health and safety performance, and in promulgating examples of good practice in health and safety performance.

7. It is surmised that the long delay between the year 2000 proposals and the current 2005 Draft Bill was at least in part due to trying to include Crown and other public bodies within the scope of new legislation. The IoD would not want a situation where organisations carrying out analogous activity in the public and independent sectors (for example in healthcare) would be treated differently under a new law. Therefore the idea that there is proposed to be no general Crown immunity (p 5) is also welcome.

8. The IoD welcomes the intention that, as a “corporate offence tackling the specific problem of holding organisations to account”, the offence would apply to the corporate body itself (p 7, paragraph 5 of the Home Office document). The deterrent of potential action against the corporate body would be entirely consistent within the range of reputational and corporate responsibility issues that are routinely faced by organisations, and which would be an appropriate “driver for ensuring safe working practices” (p 7, paragraph 6 of the document).

9. We concur with the Home Office view that “large companies with complex management structures have proved difficult to prosecute for manslaughter under the current law” (paragraph 9, p 8 of the document). The existing law means that manslaughter in cases of work-related deaths has been easier to prosecute successfully in small enterprises. The new proposals should lead to a more equitable treatment of incorporated enterprises of all sizes, even though there would still not be a level playing field because proving causation will still be easier in relation to small organisations, if only because the structures are simpler.

IoD Comments on the Government’s March 2005 Proposals: Some Specific Points

The offence

10. The IoD believes that the concept of management failure at a serious level is appropriate. It is essential that in adopting this approach it is clear that the law is not seeking to target any individual(s) within an organisation, but that the failure derives from organisational direction, policies and practices even if those are manifested in the actions of individuals.

11. It seems sensible to take as a starting point the current offence of gross negligence manslaughter and the applicability of a duty of care at common law: including those owed to employees, service users etc. [para. 17 of the Home Office document, pp 9-10, and as specified in clause 4(1) of the draft Bill, ibid, p 26]. It is appropriate that the offence requires there to be a duty of care owed to the deceased and also that the failure complained of amounts to a “gross breach” of that duty of care.

The scope of the offence

12. The approach that the new offence should apply in the same circumstances as the current offence of gross negligence manslaughter is the appropriate one. The change in the law is intended to close gaps in the application of that law, not to create a wider offence. Equally, it would be inappropriate if the offence were drafted to have a lesser scope.

13. The IoD welcomes the move away from blanket Crown immunity. It is appropriate that public sector bodies providing services are subject to the same regulatory regime as those in the private or voluntary sectors providing similar services. Equally, if a service, a “core public function”, is to be excluded from the scope of the legislation, we agree that the same treatment should apply whether the service is carried out by a public, private or voluntary body. We believe that the scope of “core public functions” and the remaining areas of immunity should be kept under regular review.

14. While accepting that there are areas of public activity where for policy reasons it is determined that it is not appropriate for corporate manslaughter legislation to be the appropriate way of holding Government or public bodies to account, the IoD is not convinced by the argument set out in paragraph 18 that the “range of accountability mechanisms” to which they are subject provides a convincing argument. Companies and others are also subject to a range of accountability mechanisms: civil courts, shareholders, customers or financial institutions who can effectively withdraw the company’s “licence to operate” even where there has been no prosecution. These are at least as potent as the measures available to investigate failings by public bodies.
15. It is not clear that some of the proposed exclusions from public sector liability should remain so excluded. The specific example cited—that of deaths of prisoners in custody (Home Office document, paragraph 22, p 11)—surely does not differ from deaths of people in the care of health or social services, which it is not proposed to be excluded from the scope of a new offence, notwithstanding the remarks in the Home Office document in paragraph 24 on page 11.

16. Since application to a public body is effected by inclusion in the Schedule to the Bill, where a new organisation is created that carries on a Crown function, it should be the norm that the statute establishing that body will include a provision applying the provisions of the corporate manslaughter legislation.

17. It does, however, appear reasonable to exclude the making of public policy decisions [Home Office document, paragraph 23, p 11 and draft bill, clause 4(2), ibid, pp 26-27]. It is inevitable that in the course of making decisions about allocation of scarce resources that trade-offs have to be made across the activity of an organisation. It would be wholly unrealistic to expect decision-makers to disproportionately allocate resources to one area of activity, without taking account of other policy aims and objectives. Indeed, were such a focus to develop it would not help tackle the risk-averse culture which many bodies, including the IoD and the Prime Minister, have advocated so doing with an eye to the success of the country within a global economy. Were a new offence to include reference to such allocative decision-making it could lead to a plethora of fruitless and ultimately unresolvable arguments as to which particular piece of policy-making (or indeed of the decision-making process itself) led to a death associated with an enterprise’s activities. In making this point note that we are not suggesting that due procedures of corporate governance be ignored in an organisation’s decision-making and accountability.

Management failure by senior managers

18. The definition of the appropriate level of failure to give rise to the offence is at the heart of the legislation. If this is not right the legislation will fail to be effective. The definition must be such that it achieves a better balance than the current law in the ability successfully to prosecute organisations of whatever size. We have pondered over whether it would be more appropriate to de-personalise the definition and refer to the level of the organisation at which the failure occurs, rather than to a “senior manager”. On balance we consider that the approach in the Draft Bill is appropriate. It is particularly important to be able to “sub-divide” the organisation, both to limit the ability of organisations to avoid liability by means of management structures, and to facilitate distinguishing between organisational failings and individual culpability.

Gross breach and statutory criteria

19. The IoD believes that the concept of “conduct falling far below” is appropriate. We do not subscribe to the view that this is too imprecise. It will be subject to judicial direction to juries and its interpretation will develop with case law precedent over time. This should be regarded as an advantage rather than as a failing.

20. Given this approach, we are not convinced that the “statutory criteria” are necessarily helpful. While health and safety legislation and guidance are factors to be taken into account, their specific mention could lead wider aspects of risk evaluation and management to be ignored. In relation to the specific items listed those in Clauses 2(a) and 2(b)(i) and (ii) cause no particular harm, but could simply come within the normal scope of judicial direction. It might be preferable to omit the specific reference to “health and safety legislation” and leave it as “legislation”. Duty of care arises not only from health and safety law but also from other legislation, for example product safety legislation and environmental legislation. Our main concern is with Clause 2(b)(iii). If interpreted narrowly to mean financial profit and regarded because of its endorsement by statute as a prerequisite condition for conviction this could of itself effectively exclude all Crown bodies and a wide variety of other organisations such as National Health Service trusts from liability. At the very least the word profit should be changed, possibly to something on the lines of “benefit financial or otherwise”. Our preference would be for the provision to be deleted.

21. As mentioned in paragraph 5 above the intention to not create new duties, but to make links with existing standards of health and safety legislation, is welcome. However as a body of case law develops it may help clarify any distinction between the new offence and existing health and safety law.

Application

Corporations

22. The law should apply in a manner such that the manner in which corporations structure their organisations does not permit them to avoid liability. The definition of the “relevant duty of care” will mean that many parent companies will not be liable in respect of the death of employees, since these will be employed at subsidiary level. However, this is not entirely negative in effect since it will in many cases be easier to prove the necessary senior management failure in the subsidiary company.
Unincorporated bodies

23. The area of omission that now causes us most concern is that of unincorporated bodies. We would have preferred the draft Bill to adopt the 2000 consultation paper approach of liability attaching to “undertakings”. As mentioned under “Scope” the reform of the law is intended to close gaps in the applicability of the current law of gross negligence manslaughter. We are not convinced that there is a fundamental difference between including types of organisation to which that law does not apply than in ensuring that the law can be applied equally across the range of a type of organisation to which the present law does apply. If the law were to apply to unincorporated bodies, it would be for those bodies to determine whether their structure and constitution provided an appropriate level of protection for individuals whom they did not wish to be subject to potential loss.

24. We consider that there are grounds for considering application of a new law to unincorporated bodies. Many of these employ people. Their operations are not, as far as their customers, employees or users of their services are concerned, distinguishable in kind from those of incorporated bodies. Their legal form is usually invisible and inconsequential as far as their operations are concerned. Other laws apply to unincorporated bodies, such as the Disability Discrimination Act 1995. Therefore we do not accept the proposition (Home Office document, paragraph 43, p 16) that incorporated bodies should not be included.

Individuals

25. The IoD fully supports the approach to individual liability.

OTHER ISSUES

Causation

26. The IoD fully supports the approach to causation.

Sanctions

27. We agree that the basic sanction should be a financial penalty, and that the fines should be very substantial in all cases.

28. We are not, however, convinced by the arguments that fining a Crown body serves little purpose. The same arguments about ability to continue to provide services apply to many other organisations that will be subject to fines under the Bill. Although there may be recycling of money back to HM Treasury when a fine is imposed on a public body, there should not be a presumption that the money is then recycled back to the Crown body that suffered the penalty. As with any other organisation it should have to meet the fine by effecting other savings. One problem that is being sought to be addressed by the legislation is the feeling that such a serious failing as causing death renders the perpetrator subject to nothing more than a slap on the wrist. It would be wrong if this were perpetuated for Crown bodies.

29. We welcome the ability for the courts to impose remedial orders. These should include the ability to impose specified training requirements on senior managers.

30. Another area that might be considered is community service type orders. Although the offence is directed at the organisation, not the individual, those identified as being part of the senior management failing could be required to participate in such schemes.

Extent

31. Although leading to lacunae in the application of the law, the IoD recognises the difficulties in extending the territorial extent of the legislation. One area that might be considered for possible extension would be where the employment was normally based in the United Kingdom or where the service was contracted for in England or Wales and subject to English law.

Investigation and prosecution

32. The IoD fully supports the approach to investigation and prosecution.

Scotland and Northern Ireland

33. It is hoped that directly comparable legislation will be brought forward at an early date in Scotland and Northern Ireland.
34. We do not have numerical estimates for a cost-benefit analysis of the Home Office proposals. Therefore we cannot provide these for the regulatory impact assessment of the Government’s draft bill. The supposition that any extra costs would lie with organisations that did not already have adequate health and safety management arrangements (paragraph 22 on page 7 of Corporate Manslaughter: A Regulatory Impact Assessment of the Government’s Draft Bill) seems reasonable.

35. The IoD is willing to take part in the planned Parliamentary pre-legislative scrutiny referred to in paragraph 64 on page 21 of the Home Office document.

17 June 2005

24. Memorandum submitted by Risk Frisk Ltd

To structure our comments we have posed several questions, some taken from the recent Institute of Directors Seminar, plus some of our own.

In general terms we have assumed that a duty of care is owed by the business to employees or others affected by its activities.

Our general themes are that:

1. The basis of the new offence must be clear. Relying on case law to identify how the tests will work in practice is not sufficient.
2. There is a need to “sell” the new offence to business so they appreciate the real motives behind the bill and what is covered and what is not. The need for a “conscientious approach” to health & safety must be spelt out; otherwise businesses will not know what is expected of them, different to what they are doing now.

IS THE DEFINITION OF THE TERM “SENIOR MANAGER” CLEAR?

Yes, we believe so—as far as it can be. The wide variety of different organisational structures and responsibility allocations are too numerous to describe in specific terms; so a general explanation is necessary. We believe that the tests currently included are valid:

— Play a role in making management decisions about, or actually managing, the activities of the organisation as a whole or a substantial part of it.
— The person to play a “significant” role.
— The person to be managing a “substantial” part of the organisation.

The draft bill is correct in its intention to criminalise under the new offence management failings that can be associated with the organisation as a whole. The offence is rightly targeted at failings in the strategic management of organisations activities, rather than failings at relatively junior levels. However, that is acceptable if those junior level failings are not the result of higher level “cultures” or a de-focus within the organisation on the management of health & safety risks.

There is an issue regarding the responsibilities of “senior managers”, which it is being stated is not a valid test further down the organisation. But “senior management” within that business unit and/or the parent business may heavily influence a decision taken further down the organisation or within a subsidiary or division. What the prosecutors will be looking for is a systemic failure throughout the business, and not an individual decision by a manager at a lower level. What will be the situation if the “senior managers” do not tackle the clear failings within a particular part of the business, where the actions of a “middle” manager may be contrary to corporate policies/processes? Will a failure to act by senior management be seen as a gross breach?

WILL THE NEW OFFENCE WORK SMOOTHLY ALONGSIDE EXISTING HEALTH & SAFETY LEGISLATION?

Yes, we believe so, provided as outlined above, the expected response from businesses is to create a better “safety culture” and manage health & safety risks as part of an overall risk management, corporate governance, business and operational process approach, rather than a risk averse “tick the box” approach.

Current specific requirements are as follows and should be clearly communicated to businesses, as being very relevant to the new offence:

HSWA Section 6 re the provision of goods and services to others re the health & safety of those goods and services (linked to Consumer Protection Act)
HSWA Section 7 re the responsibility of an individual employee to take care of their own health & safety as it affects himself or herself and other affected by their activities. What if they do something that is outside all the businesses policies/processes/training etc? There is also a link to Regulation 8 of the Management Regulations re serious, imminent and unavoidable danger and what management and employees have to do in response. Does industrial action, including “go slows” and “working to rule” infringe Section 7?

HSWA Section 37 re proceedings against “director, manager, secretary or other similar officer”

There needs to be consistency in the criteria applied by those initiating prosecution under s 37. Unjustified and poorly judged prosecutions of managers may lead to their refusal to accept explicit responsibility for overseeing health & safety.

WILL THE PROPOSED NEW OFFENCE CREATE A MORE LEVEL PLAYING FIELD?

Yes, in theory. The existing situation where the “controlling mind” in smaller businesses is much easier to identify than in larger businesses, hence the successful prosecution of individual directors in smaller businesses needs to be addressed. However, because the existing offence is not being removed, smaller businesses will still have “two offences” to concern themselves with; the existing offence and the new offence. Whereas, larger businesses will “only”, in reality have the new offence to worry about.

Additionally larger organisations will be able to apply resources to any new approach/programme that is required in response to the new offence (see below). However, the longer and more complicated chain of command in large organisations makes it much more likely that unseen/unknown management failures are in existence. A strict legal compliance approach will not identify potential management failures.

The bottom line is whether it is clear to all businesses what is actually required to remove the possibility of a prosecution. The draft bill talks about gross breaches and infers that only decisions/policies laid down by senior management will be relevant, rather than a symptomatic system/process/technical failure brought about as a result of senior management de-focus on health & safety that does not discourage a de-focus further down the management chain.

Although some do not agree with the notion of a description of good/best practice, we believe that a clear communication to all businesses is required if they are to understand what is expected of them. We all know that there are a wide range of approaches to health & safety. Ranging from at one end a complete disregard for regulations and no actual health & safety programme at all (apart from maybe a short “policy” copied from another organisation or web site, but not adapted to the business), to at the other end a full identification of how the business is creating health & safety risks, a health & safety risk management system that is related to the needs of the business and the integration of health & safety at all levels and in all aspects of the business.

Given that the draft bill says that there will not be any additional health & safety regulations and that any prosecutions will be related to existing requirements; at which end of the above spectrum will “compliance” be acceptable and the business deemed to have “done enough” to ensure that a senior management gross breach cannot have taken place?

SHOULD ANY NEW LAW APPLY EQUALLY TO THE PUBLIC SECTOR?

Yes, and we believe that it does. If any part of the economy is excluded, then there will not be a “level playing field” and the public sector should be a good/best practice reference point for other parts of the economy. However, in our experience the public sector adopts a more risk averse “tick in the box” approach rather than a robust management led “business” focused and integrated health & safety risk management system. Going forward this type of approach will not be sufficient.

SHOULD ANY NEW LAW APPLY TO UNINCORPORATED ENTITIES (PARTNERSHIPS, ETC)?

Yes. Unincorporated bodies eg trades unions and charities operate significant undertakings that can create health & safety and other risks, in the same way as incorporated bodies. It would not be a “level playing field” if they were excluded. As the draft bill is not imposing any new requirements, unincorporated bodies should be currently compliant with health & safety regulations, so no additional burdens are being imposed. Additionally, any attempt to exclude them would be seen as a statement that the activities of unincorporated bodies are not part of the normal economy and should a gross breach take place that is of no concern in the wider context. Other businesses may also decide to “outsource” “risky” activities to unincorporated bodies to avoid the consequences of any new offence.

IS IT CORRECT THAT THE PROPOSED NEW OFFENCE IS NOT TARGETED AT INDIVIDUAL DIRECTORS?

Yes, for the following reasons:

— The existing law covers those breaches related to a “controlling mind”.


— It is normally a management systems failure or a failure of leadership or management commitment—people, money, time—that causes a breach, not normally the actions of a single person acting totally outside the business systems/culture/directions etc.

— If a single person, even a senior manager commits a serious breach outside all actual/written management systems and training/guidance given to that individual, then the organisation should not be liable, unless it is evident that the manager was acting as expected ie the written rules etc say one thing, but in reality the action expected is the opposite.

**SHOULD CONSIDERATION BE GIVEN TO MORE INNOVATIVE PENALTIES THAN FINES AGAINST THE COMPANY?**

Yes and No.

No, as money talks, plus the reputation risks and business risks are follow-on penalties anyway. As many businesses are managed on the “numbers” only—turnover/profit/growth in sales etc—then hitting them with a financial penalty will generally affect the business results—it will almost always affect the performance payments of the senior managers.

Yes. The draft bill makes provision for the courts to impose remedial orders as currently. But, specific actions should be required eg to agree a plan of action and submit it for approval to the appropriate regulatory body. However, that would run the risk of those saying “ok” to the action plan eg HSE not being able to subsequently take action against that business if a breach occurred in the future. No two cases are alike, but it is possible to foresee a situation where the business has implemented everything that was agreed with the regulator, but then another serious breach occurs. That would place the regulatory authority in a very difficult position.

The action plan must not be just “comply with regulations”, but should approach the situation from a strategic risk management point of view, placing the management of health & safety within that business on an equal and integrated footing as with all other business processes. But do the regulators across the board understand what a strategic and integrated approach means and what actual “actions” should be prescribed? Additionally the “actions” should not just be related to the serious breach but should take a broader view looking at the way that the business is managing it’s health & safety risks at a corporate/senior management level for the whole business. A reactive action plan responding just to the serious breach is not appropriate.

**WILL THE CREATION OF A NEW OFFENCE OF CORPORATE MANSLAUGHTER RAISE THE PROFILE OF HEALTH AND SAFETY AT BOARD LEVEL?**

Yes. Provided that the communication of what a business has to do to comply with the new act is made clear. See above. Leaving it unclear—relying on the wording of the act—is not satisfactory, as businesses will only learn what is required as a result of case law ie a reactive approach, rather than a positive proactive approach. It is stated that the purpose of the bill is not to increase the number of prosecutions, but to encourage businesses to manage health & safety risks so that serious breaches (and therefore deaths etc) do not occur. However, without a clear description of the types of controls and management systems principles that are expected eg a strategic health & safety risk management approach, rather than a risk averse, “tick the box” approach, then businesses will not understand—and will not take steps to undertake the additional actions expected.

We question however whether a new “Code” is required, as HSG65 and other documents eg INDG343—Directors responsibilities; already make it clear what is required? In our experience many, many businesses are not even aware of those documents, yet still believe they are fully compliant. So under the draft bill is “compliance” related to specific requirements (eg undertaking risk assessments) or the more general requirements spelt out in the above documents? Would it be a gross breach if the above documents were not used to define a strategic health & safety management system for the business or only if a particular risk assessment was not undertaken, resulting in the risk of a particular activity not being identified and gross breach taking place?

The official view being expressed is that the bill does not “create any new standards… it is not about having to do different things… but about doing current things differently”. How a business manages and organises its activities, with particular reference to managing health & safety risks, is crucial. The introduction to the draft bill states “This is important for an offence that is likely to be based on what an organisation has failed to do”. How “differently” and what this means, needs to be spelt out, especially given the requirements of the 1974 HWSSA and the Management Regulations.
Is the Test for the New Offence Appropriate?

Yes, in theory. But it does not necessarily require a “gross breach, for someone to die! The difference between an “incident” (non injury accident or property damage) and a death can be “inches” or “seconds” or “being in the wrong place at the wrong time”, especially where the business knew that the risk existed but not at a very high level, as “they had been lucky”. However, both an incident and a death can be caused by a management failure; but not necessarily a gross breach.

We believe that a new concept of “gross carelessness” should be introduced because it is not necessarily a deliberate act/intent of the business to defocus on health & safety, but rather a general culture within the business not to focus on health & safety (and often other internal controls as well) and focus on “profit, profit, profit”, or something similar. We do however, agree that the new offence based on the current offence of gross negligent manslaughter is a valid approach, but believe that it could be widened to include “gross carelessness”.

The introduction to the draft bill states, “The offence is (however) designed to capture truly corporate failings in the management of risk, rather than purely local ones. It therefore applies to management failings by an organisations senior managers—either individually or collectively”. It is appropriate to introduce statutory criteria to assist in defining organisations culpability.

The “tests” being proposed are set out below and we have included comment where we believe improvements are possible:

— Conduct falling far below what can be reasonably be expected in the circumstances—this is consistent with current arrangements and is appropriate.
— Jury must decide if there is evidence that:
  — The organisation failed to comply with any relevant health & safety legislation or guidance—does this mean specific or general advice? We have made the point elsewhere that significant guidance eg HSG65 and INDG343 is available, but would an organisation be culpable if these documents had been not used to determine how health & risks were managed, or only more specific legislation/guidance eg a particular risk assessment or subsequent safe system of work had not been properly introduced?
  — How serious was the failure to comply—this would be very difficult to determine other than in each case, but would not help organisations understand what they should do in response to the new offence, as a pro-active approach.
  — Whether or not the senior managers of the organisation:
    — Knew, or ought to have known, that the organisation was failing to comply with that legislation or advice—again not clear as to whether specific requirements or general requirements would be included
    — Were aware, or ought to have been aware of the risk of death or serious harm posed by the failure—again not clear what general or specific requirements are relevant. If the senior managers had an upwards reporting process that detailed accidents/incidents and that health & safety compliance was “ok”, would senior managers be culpable if they did not have in place a monitoring/review process separate to existing upward reporting processes, as spelt out in HSG65?
    — Sought to cause the organisation to profit from the failure—as mentioned elsewhere we believe there are two choices with this test.
  1. Change the word “profit” to “benefit”, which is a more appropriate word for all bodies included under the draft bill.
  2. Delete the “test” completely as it is not necessarily a conscious decision to de-focus on health & safety to “profit/benefit” the organisation, that makes an organisation culpable. For example in the case of the Herald of Free Enterprise, was there a conscious decision to leave the bow doors open to “profit” the organisation, or was it a management failure that prevented warning mechanisms being installed/repairs that allowed the doors to be open, unknown to the captain? Would that “decision process” now fall within the scope of the new offence? If it does not then the draft bill “tests” need to be re-considered. In our experience businesses mostly do not deliberately decide to put people lives at risk and allocate resources—people, money, time—to other business activities, leaving clear potential risks that could cause accidents not controlled. The lack of focus is very often based on the assumption, unfortunately confirmed in many cases by the health & safety specialist, that the business is compliant and everything is covered! Removing the test completely would allow prosecutions in cases where no clear causal link could be established to still proceed with a prosecution.
WILL THE CREATION OF A NEW OFFENCE OF CORPORATE MANSLAUGHTER PROMOTE BETTER HEALTH AND SAFETY PERFORMANCE?

Yes, it has to otherwise the real intent of the bill has not been realised. If, as mentioned before the actions required as a result of the introduction of the new offence are communicated well and businesses are clear what they have to do. Otherwise the new offence will be seen by many businesses as another “stick to hit them with”, another burden/more red tape, rather than a positive proactive initiative that will run and responsible businesses have nothing to fear from. However, it must also be made clear whether “double jeopardy” could apply ie could the body corporate be prosecuted under the new offence and individual directors also prosecuted under the existing offence—for the same accident/loss.

The official view is that if a business has adopted a “conscientious approach” to health & safety, then that business will not be liable under the new offence. The bill is not intended to deal with every workplace death, only the worse cases where a business has “played fast and loose” (our term) with the health & safety of its employees and others to whom it owes a duty of care. But what is meant by a non-conscientious approach? Businesses need to know what that will look like. Our view is that a business should have to demonstrate that is has included health & safety as part of its strategic risk management of the business and integrated the management of health & safety risks with its organisational, people management, business, commercial and operational policies and processes. “Tick the box” risk averse approaches should not be regarded as “conscientious”.

17 June 2005

25. Memorandum submitted by the Business Services Association

The Business Services Association (BSA) is a policy group for major companies providing outsourced services to companies, public bodies, local authorities and government departments and agencies. The combined annual turnover in the United Kingdom of its 21 member companies is around £15 billion. Member companies employ directly and indirectly more than 500,000 people.

BSA member companies are among the leaders in providing services across the public sector. They are actively involved in the majority of PFI and PPP projects across the whole range of Government Departments and Agencies, NHS Trusts, Local Authorities and Local Education Authorities. As such they are engaged in implementing Government’s agenda for modernising public services.

The Association itself is closely involved in working with Government to develop and deliver the principles for modernising public services. As well as representing the providers of relevant services, all employees of BSA member companies are users of these services. This gives them and member companies a clear perspective on quality and end-user requirements. Those views are reflected in those of the Association in its submissions to Government across a whole range of issues.

MANAGEMENT FAILURE BY SENIOR MANAGERS

The fact that the Bill will now allow collective management failures to be considered in addition to individual management failures serves two functions: firstly it will redress the present inequity between prosecutions of small and large organisations by allowing for the causal link to be extended, thus allowing for the increased accountability of organisations with large numbers of senior managers. Secondly it will serve to ensure that directors with responsibility for Health and Safety within an organisation are less likely to be held individually liable and considered as automatic scapegoats.

We welcome the clear indication that cases may only be brought in cases of systematic failure in management rather than in the case of one off events. However, while the theory of capturing the organisation’s senior management is sensible in the sense that those with overarching, strategic responsibilities may be held to account for failing to ensure acceptable working practices, we question the parameters of the term “senior management”. It is clear that it would be difficult to list those roles which equate to senior management, especially in the wide context of organisations covered by this legislation, nonetheless it is felt that stated criteria—those who play a role in making management decisions, or actually manage the activities of an organisation as a whole or a substantial part of it, and that those individuals should play a “significant” role (ie decisive or influential)—will be a cause for dispute. The admission in the introduction to the bill that “The definition [of a substantial part of the organisations’ activities] will apply with different effect within different organisations” highlights these complexities. From the context of BSA, we would question whether it is intended that the Act places this responsibility on Board level executives engaged in contracts for the provision of outsourced services when it is clear that such individuals have a lesser ability to direct policies and activities on a site that is not under their control. In such situations senior management are not able to exert the same levels of influence as senior management responsible for a similar number of sites operated directly by an organisation. While the aim of redressing the inequities of the current situation with regard to smaller organisations is recognised, it is felt that the current drafting may result in prosecutions of high level groups or individuals who do not have direct influence on working practices because the size of the organisation would not allow for such a relationship. It is believed that the current
drafting may force parties to cite high level management (even if their responsibility for corporate manslaughter is ambiguous) in preference to not prosecuting at all for want of a group or individual who is senior enough. Clear guidance on this matter is required.

One of the key areas of concern for our members is the allocation of liability for those organisations performing outsourced services on behalf of another organisation. Whether contracts are based in the public or private sectors the divisions of responsibility and risk can be blurred. Typically employees from the two parties will work closely with each other and in those contracts that would be perceived to be the most successful, where the boundaries between the staff from the two organisations are imperceptible, the line of liability is unlikely to be clear. The difficulties of apportioning blame for the incident, let alone following the line of responsibility to senior management level in either organisation is likely to prove difficult.

One of the key questions concerns whether, if a service provider is complying with the terms of its contract and service level agreement it can be held liable for an event which may be the outcome of requirements attendant to the service they provide. In effect, could a contractor be held liable for a death caused by something that the client had decided not to include in the contract terms (either because of price or other strategic considerations) if it fell within the perceived scope of their activities? If this scenario were to become reality, future contracts would have to be written with this in mind, it may even mean that contractors will have to insist that potential clients make adequate health and safety provision during the bid process, with the realistic consequence that organisations may find themselves outbid as a result of exercising caution. For those contracts already in operation, many of which may span long periods of time, this would be an inequitable situation.

The inequity of the situation is also apparent when it comes to managerial liability. Where a contract is let, subject to the demands of a client, to an organisation carrying out hundreds of similar contracts across the UK it would be extremely unlikely that the national Health & Safety Director or any other individual at such a level would have any say in or impact upon the day to day running of an individual contract. Again, in the case of outsourced services a Board level director has even less influence than an individual in a similar position in an organisation with direct control over sites because it is not possible to have the same levels of oversight and active involvement. While the draft makes it clear that individuals or groups will not be prosecuted unless liability clearly exists, it also seems that one of the fundamental problems with the draft is that it seeks to place liability on those at the top of the organisational structure in order to fulfil the need to create a public scapegoat.

We welcome the fact that the Code of Practice proposed in conjunction with the Health Improvement and Protection Bill will not impact upon the remit of these regulations and the recognition by the Health Minister that it would be legally awkward to prove that a hospital had corporate responsibility for an infection that may have contributed to a death in which other factors were involved. If this undertaking had not been made it would not have been beyond the realms of possibility to envisage cases brought with the aim of establishing a link between standards in hospitals and deaths caused by hospital acquired infections in case law. Exposing cleaning contractors with public sector contracts to the risk of speculative claims being taken to the Director of Public Prosecutions and possibly ultimately to the courts would be a costly, and ultimately politically motivated move that could result in severe financial losses to contractors who are part of an entire team, all of whom impact upon the activities and outcomes in a discrete situation.

**GROSS BREACH AND STATUTORY CRITERIA**

Use of the Law Commission’s definition of gross failure as conduct that falls far below what can be reasonably expected in the circumstances is seen as sensible especially in light of the fact that statutory criteria providing guidance on what is recognised as “falling far below” is provided. However, the raft of subjective tests in 3(2) are considered imprecise and likely to give rise to an abundance of legal arguments.

**APPLICATION**

The extension of the proposals to include Crown bodies (with the exclusion of those carrying out an exclusively public function) is welcomed. There is no reason for such bodies’ entitlement to immunity from a piece of legislation relating to workforce matters. In fact, as the indirect employer of nearly six million individuals in the nation’s workforce it is only right that such bodies adhere to measures designed to improve on accountability.

When it comes to prosecution and sanctions, the issues become yet more clouded for contractors in the public sector. Would it be possible for a grouping of senior management to include individuals from both the private and public sector organisation? If so, how would any resultant fines be distributed, especially in light of proposals that public sector bodies would not be subject to financial penalties?

BSA is of the opinion that the application of the Bill should be limited to subsidiary companies. As has already been pointed out, it is felt that the obligation to prosecute a member of the “senior management” team may result in inappropriate prosecution, any attempts to prosecute board level individuals at group level (where direction and growth, rather than operational strategies are the main focus) is extremely
unlikely to result in the prosecution of an appropriate individual. Subsidiaries have responsibility to see that policies set either at board or subsidiary level are enforced, therefore it should be these individuals named in any prosecution.

LIABILITY

The decision to rest liability on the corporation rather than the individual is welcomed. As previously mentioned, provisions for individual liability have the potential to discourage individuals from taking up posts with direct responsibility for health and safety, resulting in a situation that could potentially contradict the overarching objective of Government to improve the health and safety environment in England. Reference in Clause 3(3) to the Health and Safety at Work Act (1974) is encouraging in that it confirms our assumption that individuals will not be liable under the Corporate Manslaughter Bill in conjunction with liability under the Code of Practice proposed as part of the Health Improvement and Protection Bill.

INVESTIGATION AND PROSECUTION

We are pleased to note that the expertise of the HSE will be made use of in the investigation of Corporate Manslaughter offences when appropriate. We also welcome the fact that the draft Bill specifically requires the consent of the Director of Public Prosecutions before proceedings can be instituted. However, we do not feel that this will be an adequate stop on those parties keen to harm the reputation of employers by instituting spurious claims.

CONCLUSION

As has been highlighted, while the aims of the bill are sensible, it is felt that the Government do not understand the correlation between these aims and the particular considerations of the outsourcing industry. We are of the view that if the Government does not take our concerns seriously it risks the process grinding to a halt when the Bill is finally enacted.

26. Memorandum submitted by the NHS Confederation

The NHS Confederation welcomes the proposed legislation which we believe is not unreasonable and addresses a failing in the current legislation.

However, we feel there should be further clarification of the term “Senior Managers” which can mean a variety of things depending upon the industry people work in. We believe that in the NHS it should include Directors and those who report directly to them and no-one else. At the same time we do wonder whether it is possible that the definition of a senior manager is irrelevant if a breach is to result in the whole Board being prosecuted. Clarification on this issue would be helpful if we can have it.

We recognise that this proposed legislation is, at least in part, a reaction to recent high profile cases that have attracted a wide ranging press coverage and have stuck in the minds of the public. It is therefore not likely that legislators are intending the legislation to lead to an increase in cases against NHS organisations. However, death is an everyday part of work in the NHS and we live in a society where the public are less inclined to accept that a bad outcome can exist without failure or blame. We are concerned about the likelihood of investigations into deaths in the NHS as a result of complaints by such relatives. It concerns us that once the new legislation has been introduced there will be a flood of complaints from relatives who believe their nearest and dearest need not have died. Whilst it is extremely unlikely that any such complaints and subsequent investigations would result in a prosecution they would never the less be very time consuming and stressful for staff and managers and we do not believe this is what the Home Office intended. We shall be happy to receive assurances that the police will act in a sensitive and sensible manner in such cases.

16 June 2005

27. Joint memorandum submitted by Rebecca Huxley-Binns and Michael Jefferson

We are grateful for the opportunity to comment on the Home Office’s paper Cm 6497, March 2005. We do not comment separately on the Regulatory Impact Assessment except to note that if the outcome of the bill is to make only an extra five or so companies liable per year the gestation period has been inordinately long and to mix metaphors completely a molehill has been created and perhaps an Aunt Sally instigated. There are also some aspects which fall beyond our concerns as criminal and employment lawyers such as the requirement that the consent of the DPP is needed for prosecutions. We comment in a series of points
in no particular order of importance but the order is one we see as logical in view of the drafting of the bill. A preliminary remark of ours would, however, be to say that the paper would have been easier to respond to had there been a series of questions and an attempt to express where policy issues had already been decided. Such is the norm in criminal law projects under the auspices of the Law Commission and this good practice was followed by the DTI earlier this year in respect of its second consultation on revision to the Transfer of Undertakings (Protection of Employment) Regulations 1981 SI 1981/1794. We recognise that not all consultation papers need be in the same format but the Home Office may receive more detailed responses in relation to the issues on which it desires commentary, and responses would not be directed at issues where policy but not, say, wording had already been agreed. We make these comments in a spirit of being helpful.

We fully endorse the views that current law based on the identification doctrine does not act in accord with public opinion as to how the law should be and that it is highly detrimental that the present law should find liability in small companies but not large ones. We do not comment on considerations with which we agree eg the proposal that “senior managers . . . were aware, or ought to have been aware, of the risk of death or serious harm” (cl 3(2)(b)(ii)), which we consider is a formulation which keeps the offence a serious one and in line with murder where a mental state of intent to cause serious harm suffices: certainly this proposal now makes it even more necessary for a revision of gross negligence manslaughter where only a risk as to death suffices. We found the table on p 44 very helpful and express the hope that similar tables could be provided in other law reform projects. We are pleased that the Government considers the topic, after nearly a decade of delay, to be of such importance that it formed part of the Queen’s speeches of November 2004 and May 2005.

1. While the draft bill probably had to be restricted to killings in light of its genesis (and we would criticise the Law Commission on the same ground), we strongly consider that it is inappropriate to reform one area of wrongdoing without dealing with others. The example we would use is that of a killing and a serious injury arising out of the same facts. To take a Sheffield example, if two workers suffer from a splash of hot metal at a steel foundry occasioned by a gross breach by a senior manager as defined in the bill (but not so high in the corporate hierarchy as to be identified with the company), then should the bill be enacted, it is absurd that if one died the company would be convicted of the proposed offence, but the company would not be liable for the other worker’s serious injury—who was saved in this hypothetical case from death only by the rapid intervention of a skilled paramedic—because the actions/omissions and state of mind of the manager in question were not identified with the company under the doctrine whereby a company is liable for the actus reus and mens rea of its directors and similar high officers (see Tesco v Nattrass for common law offences and Meridian for statutory ones). We consider that any judge will find great difficulty in instructing a jury on the law in a trial arising out of the same facts where liability is founded on wholly different bases.

2. This is not the place to call for a review of manslaughter by gross negligence or of any extension of gross negligence from manslaughter to non-fatal offences, and we bear in mind Misra, a Court of Appeal decision from last year to the effect that the crime of gross negligence manslaughter (whether committed by a natural or juristic person) is not contrary to the European Convention on Human Rights and therefore to the Human Rights Act 1998. Nevertheless in light of the recent House of Lords’ decisions in B v DPP and G among others expressing a very strong predilection for criminal liability to be based on subjective mens rea, we would have expected the paper to have defended its preference for objective (negligence) state of mind for this offence.

3. This point is linked with the first one and can be seen as a subset of it. The paper at paragraph 4 of the introduction says quite rightly that the proposed crime is “extremely grave”. It is we add aimed at extremely grave events such as transport “disasters” over the last 20 years. However, to use the example in point 1 we see no reason for basing liability for this form of manslaughter on the current gross negligence manslaughter but not having a similar non-fatal offence. In the instance given, if the proposed offence were enacted, the company would be liable for the killing but not for the harm short of death. Leaving aside the proposed offence and considering the current offence of gross negligence manslaughter and the current identification doctrine, even if the creator of the danger were a director, the company would not be liable for negligently injuring the victim even under the identification doctrine because there is no crime of grossly negligent or actual bodily harm. The same applies eg to the King’s Cross escalator fire (36 killed) and the sinking of The Herald of Free Enterprise at Zeebrugge (192 killed) as well as non-transport killings such as occurred in some of the (so far) six successful prosecutions for corporate manslaughter under the current identification doctrine.

4. We make three points about the name of the offence, though the effect goes much wider. First, we consider that “manslaughter” is a term which should not be used in a modern system of criminal law. It is outdated. “Actual” and “bodily” in actual bodily harm found in s47 of the Offences against the Person Act 1861 (“actual” has no meaning and “bodily” includes the psychiatric”). The Law Commission preferred “killing” and so do we. The Law Commission’s revised draft Criminal Code is due out later this year and we would hope that the language of the Code is fully modernised (in the same way that the outmoded term “conversion” was replaced by “appropriation” in the Theft Act 1968 and the term “malicious” by
“unlawful” in the Criminal Damage Act 1971). It cannot be right that a modern statute which has to be explained to a jury and to magistrates contains outdated language, language that is not used in ordinary parlance. We note that criminal law is replete with such inappropriate language, the principal one being perhaps “malice aforesight” as the mental element for murder despite the fact that neither malice nor aforesight is necessary. We think that the bill should mark a step in the modernisation of English and Welsh criminal law both as to the doctrinal basis of the proposed offence and as to its terminology.

5. The second point is that we would hope that the Home Office would look again at its decision to exclude unincorporated organisations from coverage. If it did so, the title of the bill would have to change from that of corporate manslaughter to something wider. If a person is killed as a result of a gross breach by a senior official, again as defined in the bill, but that official is an official of an unincorporated institution, why should it matter that the body does not take corporate form? To say that there is currently no difficulty invites the criticism that surely such an event will happen one day, perhaps soon. If one takes the facts of Zeebrugge, why should it matter that the ferry was operated by Townsend Thoresen (later P&O) rather than one person or an unincorporated body? We note that the 2000 proposals of the Government included unincorporated institutions and there is no policy-based reasoning the paper for excluding them.

6. Thirdly, to call the offence one of “corporate” manslaughter is something of a misnomer if for instance Government departments such as the Home Office itself are liable to prosecution. To say that the Home Office or another government body is being prosecuted for corporate manslaughter does not to us represent the public’s perception of “corporate” killing or manslaughter.

7. The work of Celia Wells, Professor of Law at Cardiff University and author of the standard text in the UK on corporate criminal liability, demonstrates, convincingly to us, that when the public speaks of “corporate manslaughter”, it does not mean (only) that the public wants the law of manslaughter to be fully extended to companies but that it wants directors (and presumably other senior officers) to be legally susceptible to going to jail for their wrongdoings. If the Home Office believes that it is acting in conformity with public opinion we suggest that that is only half the story. We would hope that in the near future it will investigate the personal responsibility of directors and other senior officers for killing and, we propose, for causing injury. There is a good deal of helpful law and comment in the USA and we think that English & Welsh law can avoid issues such as “Vice-President responsible for going to gaol” (“scapegoating”) found in the US literature. We note that the proposed offence cannot be aided by personal defendants (cl 1(6)), but we consider that there should be a separate offence of killing etc by directors and senior officers. We note that the 2000 HO document (Reforming the Law on Involuntary Manslaughter www.homeoffice.gov.uk/docs/invmans.html) did relate that the Government was concerned with the individual criminal liability of directors but no proposals have been brought forward. We recognise the concerns of bodies such as the CBI and the DTI (which apparently lead to the previous Home Secretary’s retreat from the commitment to legislate against directors who caused death) but hold that where such responsibility for actions and omissions is commensurate with the wrongdoing, individual directorial liability contrary to statute is well grounded in legal principle and theory. The crime of gross negligence manslaughter as currently formulated may not apply because for example there may not have been a risk of death. At present there is the possibility of a prosecution of a director under s37 of the Health and Safety at Work Act 1974 but the sanction is only a fine; there is the possibility of action under the Company Directors Disqualification Act 1986 but use has been minimal: eight in total, we believe, as of 2004. Perhaps more dynamic use of the full range of existing legislation in the past could have appeased some of the critics of the perceived inaction of the authorities as regards corporate criminal wrongs.

8. We note that the bill is different from the 1996 Law Commission’s proposals (Legislating the Criminal Code: Involuntary Manslaughter Law Com Report no 237, www.lawcommission.gov.uk/files/c237.pdf) in several regards, one of which is that the proposed test is restricted to senior management. In light of current HRM practices of delegating and empowering we consider that companies may be able to escape liability by introducing evidence that the management of health and safety matters has been delegated so far down the corporate hierarchy that they are not liable for the offence proposed.

9. While we welcome the recommended extension of remedial orders to corporate killing cases, again we see no difference between killing and injuring. To extend health and safety measures in one area but not in another—and this is exacerbated where the saving from death is fortuitous—is indefensible. The fact of death, while irreversible, is not conclusive as to which sanction or other “remedy” should be available. One of us has written in the UK perhaps the most searching examination of sanctions available in England & Wales and the USA (see the Journal of Criminal Law for 2001) and while loath to refer to such material, we think that the proposed reform can best be described as timid in comparison with that in other jurisdictions including Commonwealth ones. There is also no discussion whatsoever of “overspill”, ie the effect of fines against companies on their trading position including creditworthiness, on their employees and on consumers. Sentencing guidelines will have to be developed as they have been at least for Federal offences in the USA and we would refer the Home Office to s 718.21 (fines) and 732.1 (3.1) (probation) of the Canadian Criminal Code. There is also no discussion of the adverse effect of prosecution and conviction under the proposed law or of any effect on insurance. We see the possibility here of the Home Office giving a lead to States throughout the common law world.
10. Again, while we welcome the removal of Crown immunity (any line, for example, between deaths in private prisons and state-run ones would be indefensible), we criticise the failure to extend the offence to public policy matters. Whilst we accept there are sound policy reasons in the law of torts for such an exception to the duty of care relationships, we consider both that the same principles do not apply in this context and further that the possibility, and it is only a possibility, of judicial review with its three months’ time limit and with its requirement that only victims may commence proceedings not commensurate with the wrong done, namely, causing death. We note the clause which excludes the armed forces from liability for management failure at a senior level. If there is say a tactical exercise with troops, we do not see why the services should remain immune from prosecution if as a result of a gross breach by a senior manager a soldier is killed. We note the extension of sex discrimination law into the military and consider just as women were for a long time banned from serving on board Royal Navy ships but now do so, the exclusion of the armed forces is unacceptable in 2005.

11. We note the use of the word “substantial” in cl 2(a) and (b). The non-criminal law reader might expect, particularly in light of its context (“whole or a substantial part”) that “substantial” would mean something like “almost all” but its meaning in other areas of criminal law is that of “more than trifling or trivial”. This meaning is not intended in this paper but the context alone may be insufficient to make the term be read as meant. (For example, murder is very serious offence and one commits the actus reus if one substantially causes the victim's death; one might expect “substantial” in light of the severity of the offence and the mandatory life sentence to be read very narrowly as falling only slightly short of totally causing death but cases have for many years held that provided the accused has more than minimally caused the victim’s death, he or she has substantially caused it. See for example Notman.) Besides the definitions found in cl 2-5 we suggest that the concept of “substantial” also needs to be defined. We note the concerns of the CBI that who is a “senior manager” ought to be defined clearly.

12. We say similarly about “significant” in cl 2. If the question is for the jury as it is, one jury may say this actor’s role was significant and another jury may hold to contrary effect about another actor on exactly the same facts and neither determination is appealable.

13. Continuing our theme of coverage, we are unsure of the impact of the proposals on previous fact situations. As is well-known the assistant bosun was asleep at the time when the ship was sailing out of the harbour in the Zeebrugge incident. He is not in the bill’s terms a “senior manager”; the director who had heard about the demand for lights signifying to the bridge is a senior manager; what about the captain of the vessel? Surely it cannot matter in view of the origin of these proposals how large the company is as to whether the captain manages a substantial part of the activities? If it is uncertain whether such a person as the captain of a ship is a senior manager, surely this points to a defect in drafting? We think that the definition does cover the captain in the Zeebrugge facts (but we are uncertain) but we suggest that since the company as a whole was in the words of the maritime report by Sheen J infected by “sloppiness”, the company ought to be held liable for the proposed offence without the requirement for determining whether a certain person was a senior manager or not. We do not further consider the basis of this offence because we take it for granted that the policy or juridical basis of this offence is not to be changed at this stage.

14. We regret that the Home Office is proposing a restriction on the territorial extent of this offence. If a British subject is triable in the English and Welsh courts for murder or manslaughter committed anywhere in the world, we would expect an English company to be so triable too. No policy concerns are advanced for such a distinction.

15. We believe that proposals for reform of the law in Scotland are currently in stasis and we would hope that a joint England & Wales and Scotland approach would be appropriate, though we recognise that this issue is a devolved matter. It should not matter whether the company is based in Berwick or Dunbar, in Carlisle or Lockerbie. The Piper Alpha explosion should not be treated differently if it occurred in “Scottish” or “English” waters.

As a summary we quote Brendan Barber, the General-Secretary of the TUC, at the Centre for Corporate Accountability’s conference on the bill on 13 June 2005 as related in a TUC press release of that day: “I welcome the proposed legislation. It has been far too long in coming. Most of what has been proposed has a lot of merit but the main problem for us is not what is in the bill, but what is not in the bill. What we need is not just a technical clarification of manslaughter law, what we need is a whole cultural change which actually shows that both Government and society recognise that working people need justice and protection. A strong framework of laws is the hallmark of a civilised society. While this is a very important step in the right direction, there is still a long way to go.”

16 June 2005
28. Memorandum submitted by Brake

About Brake

Brake is a national road safety charity which, among other divisions, has a division, called BrakeCare, which provides national support services for road crash victims and a division called the Fleet Safety Forum, which provides risk management advice to fleet managers in companies.

Brake welcomes the opportunity it has been given to respond to this consultation. Brake has campaigned over the past decade for tougher penalties for companies who break safety laws that result in death and injury on the road.

This consultation response is prepared by Mary Williams OBE, chief executive of Brake. She has sat on a number of relevant committees, including the Health and Safety Executive’s committee the Work Related Road Safety Task Group, which looked at management responsibilities for health and safety while on the road.

Our Response

Brake welcomes this bill, particularly in light of appalling tragedies that have cost numerous lives on our roads and been directly caused by management failure, but have not resulted in justice against that management.

A case in point is the Sowerby Bridge disaster in 1993, which resulted in the deaths of six people. In this crash, a truck with no working brakes went out of control on a steep hill in West Yorkshire. The only successful charge against the company was a failure to maintain the brakes, resulting in a fine of just £5,000.

Particular points that Brake welcomes in the bill:

1. The scrapping of the need to find a directing mind.
2. The ability to inflict an unlimited fine on a company.
3. The ability to also continue to prosecute individuals for offences under other existing laws—this means, for example, that a director of a haulage company who is found to have asked his drivers to break tachograph regulations, and one of his tired drivers subsequently killed, could be charged with aiding and abetting death by dangerous driving and sentenced to a maximum of 14 years.
4. The inclusion of “wilful blindness” in the definition of gross negligence, which is vital in order to successfully prosecute companies who simply claim they had no idea of levels of risk.

As a word of caution, Brake also points out the following:

1. The new law will have to be accompanied with instruction to prosecutors to actively pursue charges such as aiding and abetting causing death by dangerous driving when a directing mind can be identified, rather than go for the “softer option” of the corporate manslaughter charge, which may be easier to convict upon, but which only results in a fine for a company, not custody for an individual.
2. The unlimited fines should be significant enough to put companies out of business if they have been proven to have killed through their wilful actions—only then will the fine be a deterrent of any worth, rather than just another insurance liability.
3. Aside from the unlimited fine, the bill does not prevent convicted companies from continuing in operation. While a bus or truck company is highly likely to have its operator’s licence revoked as a result of such a conviction, there is no requirement for an operator of a fleet of cars or vans to hold such a licence. There are many such operators in the UK. The Home Office needs to address this issue to prevent the new charge simply being viewed by managers, as stated above in 2, as just another insurance liability. Possible solutions could include an agreement with the motor insurance industry not to grant fleet motor insurance to companies that have been convicted of this new charge.
4. The proceeds from fines should be directed towards a Victim’s Fund, to fund services such as Brake’s road crash victim support work. At present, the only victims support services funded by central Government are those of the charity Victim Support, which is only contracted to support victims of crime, which excludes victims of road crashes and industrial accidents, for example. This is deeply unfair to these victims who have been bereaved violently and suddenly and who are very much in need of support, but often receive none due to lack of funding.
5. Brake would like to draw the attention of the Home Office to a current review by the Health and Safety Executive on the possible inclusion of road crashes in RIDDOR, the system for recording injuries at work. At present, there is no requirement for companies to record at work road crashes, nor a legal requirement for them to do risk audits on their at work road risk. It would be pertinent for the Home Office to respond to this current consultation by the HSE supporting clause 4 which relates to requiring companies to record road crash data.
29. Memorandum submitted by the GMB

INTRODUCTION

1. The GMB is one of Britain’s largest trades unions. As a general union, the GMB represents over 600,000 members in a wide range of occupations, working in almost every sector of the economy. Health and safety at work is a key concern of GMB members, and the nature of their work puts many of our members at serious risk on a daily basis.

2. As the law currently stands, the GMB believes that it is far too common for gross managerial failures leading to death and serious injury to pass without adequate sanctions being taken against those responsible. It is obvious and apparent that this represents a glaring failure of the legal system—a system that places a legal duty upon employers to take care of their employees, then provides a wholly inadequate remedy when the employer fails to uphold that legal duty.

3. The GMB therefore welcomes the opportunity to comment on these long overdue proposals to introduce new legislation covering Corporate Manslaughter. As long ago as 1988, the GMB called for reform of this important area of the law in our publication “Proposals to Reduce Risk to Workers and the Public”. This call was repeated in a further GMB publication, “The Freedom to Kill?”, published in 1993. Although the GMB acknowledges the complexity of this area of the law, we must preface our comments on the draft proposals by stating our concern that these have taken such an inexcusably long time to emerge. The GMB has been aware of—and expressing serious concerns about—the failings within the existing law for many years, and believes that major reform is imperative if corporate responsibility on health and safety is to be improved, and the relatives of our members killed as a result of corporate failings are to receive the justice that they deserve.

4. Whilst the GMB welcomes the publication of a draft Bill setting out proposals designed to tackle the difficulties that currently arise when prosecuting large corporations for the offence of manslaughter, we have a number of major concerns about the proposals, or perhaps more specifically, the lack of certain proposals. In other words, our primary concern is with the omissions from the draft Bill, which is silent on many important issues that the GMB believes must be addressed for the necessary reform of the law to be both comprehensive and effective.

5. If the draft Bill is to successfully create a new offence that targets the very serious failings in the strategic management of a company’s activities that have resulted in death, the GMB believes that the narrow coverage of the draft Bill must be significantly widened, and specific amendments made to incorporate the issues highlighted in our response below. The case for the current law to be reformed is inarguable, and what is needed is a comprehensive package of proposals that will result in those responsible for gross corporate and managerial failings being properly held to account for their actions.

THE SCOPE OF THE BILL

6. The GMB notes and supports the Government’s aim of focusing on the wider management failings within an organisation. However, the proposals will not achieve this aim, due to the very narrow scope of the Bill, in addition to a number of serious omissions. These are highlighted in more detail below.

THE OFFENCE

7. The GMB welcomes the proposal that an organisation could be found guilty of the offence of corporate manslaughter if the way in which any of the organisations activities are managed or organised by its senior managers causes a person’s death and amounts to a gross breach of a relevant duty of care (subject to our comments in paragraphs 11–15 about the limitations of excluding individuals).

8. However, we believe that the definition of the organisations at 1(2) to which this applies needs to be clarified, and the bill must be more specific about including “un-incorporated” bodies that employ people. For instance it appears that a company could be charged with an offence under the Bill, but not, for instance, an employer in the voluntary sector. Another example of where employees could be killed with impunity as a result of managerial failure would appear to be the Crown Estates, which are not listed in the schedule and are not under the control of a corporation. GMB members employed in these should be entitled to the same level of legal protection as other workers.

9. The draft Bill has ruled out any jurisdiction over the operations of companies which are registered in the UK if a fatality occurs abroad. The GMB believes that the legislation should apply in some circumstances where the fatality occurs outside of the UK—in particular where an worker is killed overseas because of the failure of a UK based corporation to undertake a suitable risk assessment.

10. In summary, the GMB believes that the application of the offence must be as broad as possible to ensure protection under the new law for all employees at risk.
INDIVIDUALS AND DIRECTOR’S DUTIES

11. The GMB is also dismayed at the proposal at 1(5) that “an individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter”. The legislation must have the capacity to extend beyond a finding of guilt against a corporate body, and should be extended by some means to hold individual directors and senior managers to account if their acts or omissions cause a person’s death.

12. As drafted, the Bill does not recognise or take account of the extent to which decisions made by individuals who hold power and responsibility within corporate bodies can result directly in the deaths of employees. This must be taken into account for any corporate manslaughter legislation to be an effective deterrent to those individuals who may otherwise make reckless decisions that could result in their employees paying a heavy price.

13. The GMB believes that it is essential that measures are taken to introduce an additional offence of “unlawful killing” that would allow the possibility of individual directors or senior managers being held responsible for failing to comply with their duties towards their employees where these have resulted in death. The sanctions for such breaches of the law should include, but not be restricted to, imprisonment. (See below for more information on the GMB’s viewpoint about penalties for breaches). Either by extending the provisions of the Bill, or separately, the issue of directors’ duties has to be addressed for the Government to have any credible claim that it is tackling the crime of people being killed at work through the negligence of employers.

14. The GMB recognises that the draft Bill reflects the view expressed by the Law Commission that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. However, in a previous consultation paper issued in 2000, the Government accepted that without punitive sanctions against company officers, there would be insufficient deterrent force to any new proposals. The GMB agrees with this position, and can see of no clear reason why that does not remain the Government’s position, and why that has not been reflected in the draft Bill.

15. For the sake of clarity, the provisions of the draft Bill should be extended to introduce clear legal duties for Directors in relation to health and safety at work. If it is the Government’s contention that this Bill is not the appropriate vehicle with which to address the issue of director’s duties, the GMB viewpoint is that as a complementary measure to this Bill, the Government must look at the responsibilities of directors separately with a view to tighter regulation. There is clearly a need to avoid the scapegoating of front line employees or middle managers, but it is of fundamental importance that criminal liability for management applies not only to the corporate body, but also to its owners, directors, and very senior personnel who are ultimately responsible for the management failure. We therefore urge the Government to consider the issue of director’s responsibilities either within, or separate from, this Bill. As a very minimum, the existing guidance on director’s duties on health and safety will need to be re-framed to place clear and specific legal health and safety obligations on directors.

INSTITUTING PROCEEDINGS

16. The GMB notes at 1(6) that proceedings for an offence under this section may not be instituted without the consent of the Director of Public Prosecutions. We have previously proposed in our submissions to other consultation documents (issued by the Health and Safety Commission, for example) that trade unions should be permitted to issue proceedings on behalf of our members injured at work if the enforcing authorities fail to prosecute for breaches of health and safety law. We would welcome clarification of whether 1(6) means that only the DPP would be able to issue proceedings for corporate manslaughter, or whether the Bill would give the GMB the right to do so (with the DPP’s consent) if the circumstances were to arise whereby we considered it necessary to do so in the best interests of our members.

SENIOR MANAGERS

17. The GMB believes that the definition of a senior manager as set out in the draft Bill is not clear enough and unhelpful. Additionally, the focus on senior managers alone is too narrow, and does not take into account the complex management structures that can exist in organisations, nor the complexities of much of the modern world of work, which is often characterised by the use of sub-contracting, the use of agency labour and a myriad of other forms of work organisation. An example of the kind of multi-contractor situation where it can be very difficult to attribute responsibility for health and safety failures, that all too often have fatal consequences, is the construction industry. Far too frequently (and by no means only in the construction industry) health and safety failures occur as a result of inadequate, obscure or opaque chains of command in which responsibility for health and safety is effectively evaded.

18. The GMB is concerned that the effect of this could be to make prosecutions no easier—or even more difficult—than they currently are. This could arise, for instance, where an individual does not “fit” the definition, or actively seeks to evade responsibility by passing the blame to others within the organisation who are lower down the chain of command, or where a blind eye has been knowingly turned to failures lower
down that chain. It should not be possible for less senior managers to be made scapegoats, and the Bill must take account of the existence of managers who have substantial decision-making responsibility, but who are not referred to by job title or classified within a company’s formal structure as “senior managers”.

19. Clarity on this matter is required in order to ensure that the Bill results in a reduction in the likelihood of those guilty of negligence evading prosecution, as has all too often been the case in the past.

GROSS BREACH

20. The GMB believes that the Bill must make it explicitly clear that for a gross breach to have occurred, any one of the three tests needs to have been met, and not all three. This could be achieved by inserting the word “or” at the end of each of the three clauses 3(2)(b) (i), (ii) and (iii).

21. Further, clause 3(2)(b)(iii) should be amended by deleting the word “profit”, and substituting the word “benefit”. The use of “profit” has the effect of limiting the intended gain to an organisation to one of monetary value, which may be both difficult to prove and result in unjustified acquittals in circumstances where the prosecution may otherwise have been able to show that other benefits stood to be gained from the failure. It may also exclude other bodies, such as non-profit making organisations etc. We believe that it is unnecessary when assessing whether a company is in breach of its statutory obligations to have to speculate whether a gross breach resulting in the death of an employee was committed with a specific motive—i.e in order to make a financial profit—and the effect of this could be to make securing convictions under the Bill very difficult indeed. Ideally, the criteria under this clause should be deleted completely, otherwise we believe that substituting the word “benefit” would go some way towards addressing this problem.

PENALTIES

22. The GMB is strongly opposed to the provision in the draft Bill that will simply allow for an organisation found guilty of causing the death of an employee to be fined, and/or a remedial order to be able to be imposed. Clearly, a corporation cannot be sent to prison, and it therefore follows that the proposal to impose fines as a sanction on companies or organisations that are found guilty is a consequence of the incorrect decision to exclude individuals from within the scope of the legislation. We have made reference to this omission already at paragraphs 11–15.

23. In our view, this draft Bill represents an opportunity, which has unfortunately not been grasped, to introduce a wide range of more imaginative and innovative penalties than those that are currently available to the courts. For many years, the GMB has been urging legislators to recognise that the sanctions currently available do not have a sufficiently deterrent effect to make a practical and demonstrable difference to the UK’s abysmal record of health and safety failures. The price for these failures is paid by employees who are killed, maimed or injured, and it is clear that many companies also do not recognise the additional economic loss that is suffered—by the victims, the economy, and the companies themselves. Despite the fact that the GMB is far from being the only organisation to call for a fresh look at the penalties that could be imposed—and the Government has committed itself to increasing penalties for health and safety offences—the draft Bill has not been used as an opportunity to introduce anything new. This must be remedied.

24. In conjunction with the inclusion of individuals within the scope of the Bill, the GMB would therefore wish to see the Bill introduce the option of imposing a range of additional penalties, up to and including imprisonment, upon corporations and individual directors, owners and senior personnel who are found guilty. Amongst these penalties should be:

— Corporate probation—giving the court powers to impose certain conditions on organisations that will require them to improve their health and safety management systems and practices. These could specify set periods of time during which organisations would have to meet specific requirements that would seek to ensure that the causes of the death were prevented from re-occurring. Examples could include conducting health and safety audits and risk assessments, changing working practices, investing in plant and equipment, employing specialist advisers, improving management systems, consulting and training employees etc.

— Imprisonment for individuals—the GMB believes that courts must have the option of sending offenders to jail for the offence of killing an employee. We believe that the knowledge that imprisonment could result from a serious failure would have an effect upon the decision-making and actions of directors and managers and help to engender a much-needed change in the management safety culture amongst UK employers.

— Other sanctions upon individuals and organisations—these could include disqualification from directorship, suspension from office, training orders, corporate community service orders and negative impact orders (which would effectively “name and shame” those responsible). Another measure that could help to mitigate the loss and sense of injustice that often afflicts the families of those killed at work would be to give the power to impose punitive compensatory awards to be paid by corporations to the family of the deceased.
25. The aim of our proposals would be to allow the court to pass an appropriate sentence from a “menu” of options, taking into account the circumstances of the case, the extent to which the individual or corporation stood to gain benefit from the health and safety failure, the profitability of the company, and the most effective method to remedy the health and safety failures and prevent any re-occurrence.

26. The GMB would also like to see the courts impose fines that are commensurate with the seriousness of the offence. To be an effective deterrent, one important effect of the Bill should be to send a clear message that this legislation will signal the advent of far larger fines being imposed for a death at work than has previously been the case with prosecutions taken under the 1974 Health and Safety at Work Act. When an employee is killed at work, it is very distressing for the family of the victim to see the kind of paltry fines imposed that leave them with the impression that the death of their loved one is of no more consequence than if the company had failed to lodge their VAT return on time.

CROWN IMMUNITY

27. It is important that the new laws apply to everyone, including all public bodies. The GMB welcomes the fact that the Government has accepted that its own departments should be covered, and that the draft Bill will ensure that where a government department or agency is responsible for a death at work it will be open to prosecution. There is no case whatsoever for leaving Crown bodies exempt from prosecution where they have caused a death and the removal of Crown Immunity is essential to ensure that the relatives of those killed at work have the same access to justice as everyone else. We have already commented in paragraph 8 about GMB members who work for the Crown Estates.

28. The Government has previously indicated support for the removal of Crown Immunity for all health and safety offences and the GMB believes that this draft Bill should be used as a means to remove this unjustified anomaly once and for all.

SUMMARY AND CONCLUSION

29. The GMB believes that it is essential for the Bill to achieve the desired outcomes of improving health and safety standards across both the public and private sectors, helping to prevent deaths of workers and members of the public and providing a sense of justice to the families of those bereaved as a result of corporate failings.

30. Whilst we hope that the Bill will be implemented at the earliest opportunity, especially in view of the inordinately long delay in bringing forward the draft Bill for public consultation, it is imperative that the legislation which is enacted is “fit for purpose” and effective. Unfortunately, the proposals as currently drafted offer only marginal improvements and will therefore provide a limited or negligible catalyst for real change. The GMB does not wish to see the Bill delayed any further, but neither would we wish to see long-awaited legislation enacted on corporate manslaughter that is rendered ineffectual through its limitations and omissions.

31. The draft legislation does not currently provide the comprehensive framework necessary to prevent or deter further deaths or serious injury. There are a number of positive proposals within the draft Bill, and as such it represents a step in the right direction. However, the proposals it contains need to be built upon through the inclusion of a wide range of additional measures, as outlined in this response above, in order to deliver the kind of significant change in managerial and corporate behaviour that will result in a much-needed reduction in the number of deaths and serious injuries at work.

32. We urge the Government to give serious consideration to the GMB’s comments, and make the amendments to the draft Bill that are necessary to ensure that a legislative package is developed that will act as an effective deterrent, and help to reduce the number of avoidable deaths at the workplace and beyond. The victims of corporate killing, and their families and loved ones, deserve nothing less.

30. Memorandum submitted by the Rail Safety and Standards Board

The Rail Safety and Standards Board (RSSB) welcomes the opportunity to contribute to the development of the Corporate Manslaughter Bill. The company’s prime objective is to lead and facilitate the railway industry’s work to achieve continuous improvement in the health and safety performance of the railways in Great Britain, and thus to facilitate the reduction of risk to passengers, employees and the affected public. Consequently we take a close interest in anything which will have an influence over the way in which health and safety issues are managed and the way in which legislation, and other external factors, might affect this.

Effective safety management is based on the principle that prevention is better than cure and we feel instinctively uneasy about legislation that is entirely focussed on obtaining revenge after the event, rather than encouraging best practice and responsible stewardship within organisations. Furthermore, this bill contains nothing fundamental that is additional to what is already in the Health and Safety at Work etc Act 1974. Nevertheless, we recognise the demand from many stakeholders for a high profile offence for the very worst cases of safety management systems failure.
We are pleased that the Government has not included individual criminal liability in this bill, although we note that it will still be possible to bring charges against individuals under existing legislation. We see the question of sanctions against individuals as a fundamentally different issue from corporate manslaughter, and it is therefore rightly omitted from this bill. We suspect that there will be strident demands for the bill to make individual directors criminally liable, and we very much hope that these will be resisted. Such an approach would dilute the principle of corporate responsibility, foster a blame culture and the search for scapegoats, and discourage individuals from taking senior posts within companies.

We do, however, have concerns that the new legislation has the potential to encourage excessively risk-averse behaviour, where there is no proper analysis of risk leading to the adoption of an ALARP position, but rather activities that are perceived to entail any risk are simply abandoned. It might reasonably be argued that there is nothing in this bill that should have such an effect, given that there is no proposal to change existing safety standards. Nevertheless, the perception may be different and it is not hard to envisage this legislation being quoted in the future as a reason for cancelling many types of activity; the reported reluctance of schools to arrange educational trips is one high-profile example. This is something that legislators and the Home Office need to be conscious of and we would suggest that a carefully targeted programme of stakeholder education would be appropriate following enactment. Risk-averse behaviour does not add to, and may even detract from, overall safety. In the railway context risk-aversion leads to escalating costs, which could ultimately force passengers to use alternative, but less safe, modes of transport.

We see the major benefit of this bill as bringing a degree of clarity to this area of legislation that has hitherto been absent—a point demonstrated by the number of prosecutions that have failed and the near impossibility of identifying a “directing mind” in a large organisation. This should make the legal process swifter. Nevertheless, it may be that, in practice, the bill will pose more questions than it answers. We set out below some of the significant problem areas that we envisage. This is not to say that there are easy solutions or that the draft bill in its current form is necessarily wrong, but we should not make the mistake of believing that this bill, assuming it becomes law in its present form, will settle all the issues permanently.

**Senior Managers**

The concept of a “senior manager” is key to this bill. We understand that this term is not used anywhere else in UK law and no doubt the meaning will become clearer as case law develops. As the consultation document reasonably points out, “senior manager” will have a different meaning in different organisations depending on their size and scope—as, indeed, the term does in everyday usage. We have tried to envisage what this might mean in the railway context. The railway industry consists of a large number of organisations that range in size from those operating throughout Great Britain and having thousands of employees, to small contracting companies with, perhaps, substantially fewer than 100 employees.

To illustrate the effects of this, consider an accident in which gross negligence was alleged on the part of both a large company and a smaller company working together in the same environment (a situation that could potentially arise in the railway industry). We suggest that it would be easier to secure a conviction against the smaller company because its “senior managers” (as defined in the bill) would be closer to the decision-making that led to the accident. Or, put in a different way, the larger company would be able to defend itself, on the grounds that the decision makers involved were only in junior positions, in a way that the smaller company could not. We wonder whether justice would be seen to be done in such a scenario.

In any case, the definition of “senior manager” in the bill poses a problem. The intention, we understand, is that the term “substantial” in clause 2 should be applied to a company as a whole, but we wonder whether juries might take this to mean a person with managerial responsibility for a substantial operation, even though this may only be a relatively small part of the company’s total undertaking. The effect of this might be to bring relatively junior management into the scope of the bill. Neither the terms “substantial” nor “significant” are defined, and whilst the consultation document explains what they are intended to mean, this is not carried forward into the legislation. Therefore these terms, whose natural meaning and scope is broader than the Government’s intended meaning, will be open to interpretation in the courts quite possibly to the advantage of the prosecution. We therefore suggest that it would be appropriate to reconsider the wording of this clause.

**Gross Breach**

Unlike the term “senior manager”, the language used here is more familiar and we are more comfortable with the concept. Nevertheless, we have concerns over how clause 3(4) might be interpreted. We do not doubt that prosecutors, in an effort to obtain a conviction, would want to present evidence to show that the defendants had failed to comply with all sorts of recommendations and suggestions that might have prevented the accident.

The railway industry is subject to something of a barrage of legislation, guidance, recommendations and suggestions. We have no difficulty with a jury being asked to consider whether the evidence shows that the organisation failed to comply with relevant health and safety legislation or guidance (clause 3(2)), as
qualified in clause 3(3). However, we would be unhappy about the principle of juries considering “any other matters” especially if this included recommendations from inquiries and other material submitted to the industry by third parties.

To put this into context, following major accidents a duty holder can expect to receive a large number of suggestions from the public as to how to improve railway safety. Many of these could be described as fanciful. Yet we wonder if some of these ideas might be unearthed at some future trial, following a death in similar circumstances, in an attempt to prove a gross breach of the duty of care.

**Remedial Orders**

Our third area of significant concern is around the issue of a remedial order by a judge (clause 6). We do not support the proposal and suggest that the powers to require reasonably practicable improvements are already vested in the safety regulator and appropriately covered by statute. Where the state wishes to impose particular requirements that go beyond the test as to that which is reasonably practicable, the state should bring forward Regulations. This approach was adopted in respect of the requirement to fit the Train Protection and Warning System (TPWS) and to eliminate Mark One rolling stock by a defined date. This approach enables the deployment of relevant professional expertise that we do not see as being available to a judge.

The risk to an industry such as the railway is significant. Judges do not have specialist safety knowledge, they are not engineers and it is unlikely that they have much practical knowledge of the railway. It is quite conceivable that a judge could make an order that is wholly inappropriate and totally incompatible with the principles of ALARP. Such a measure must only be taken following detailed research into the consequences and an assessment of the practicability; this is a matter for the safety regulator taking account of industry and other inputs. Yet, in the emotionally charged atmosphere following a major accident and a consequent high profile trial, it is not hard to envisage a judge, making such an order as a consequence of establishing a “gross breach”.

Even after a public inquiry, set up with the specific purpose of making recommendations, some of the recommendations are properly likely to be rejected, after careful consideration by the industry and its safety regulator, on the grounds of reasonable practicability or because technology has moved on. This is possible because inquiry recommendations are not, and should not, become legally binding. The situation would be wholly different in the case of a remedial order made at a corporate manslaughter trial, which could presumably only be challenged through the appeal courts, where the same problem would apply. Accordingly, we strongly recommend that you do not continue to develop your thinking in this area.

**Regulatory Impact Assessment**

We note that the regulatory impact assessment states that the proposals are expected to lead to five additional prosecutions per year (paragraph 31). We think that this is about the right figure given the high threshold at which this offence is intended to operate.

However, we are concerned that there may well be enormous pressure to charge companies with corporate manslaughter every time a work-related death occurs, whatever the circumstances, rather than use existing health and safety legislation (or take no action at all if the test of reasonable practicability has not been satisfied). We would hope that the Crown Prosecution Service will be sufficiently robust to resist these pressures—not least because the legislation will quickly lose credibility if there is a string of failed prosecutions.

**Conclusion**

In this response, we have tried to draw attention to the pitfalls we envisage, and we hope the Government will see this as a constructive contribution to the consultation process. We recognise that this has not been an easy bill to draft and that it is impossible to envisage every situation that might arise in the future, whilst not losing sight of the overall intent of the proposed legislation. Nevertheless, we think it is in the interests of all concerned that the greatest possible care is taken at this stage of the process to get it right.

31. Memorandum submitted by the Medical Defence Union

Our comments are made in the context of the Medical Defence Union’s experience in assisting our medical and dental members with a range of medico-legal matters that, from time to time, can include allegations of manslaughter if patients die unexpectedly as a result of medical or dental treatment.
2. **Senior Manager**

We note the definition of a senior manager in 2(a) and (b) as a person who plays a significant role in making decisions about how the whole or a substantial part of an organisation’s activities are to be managed or organised, or someone who manages the whole or a substantial part of those activities. We believe that the meaning of the terms “significant” and “substantial” are not entirely clear and may lead to confusion.

It is not clear if the term “substantial part of its activities” relates to the actual amount of activity for which the manager is responsible, as a proportion of the activity undertaken by the company as a whole. For example, for it to be substantial, does the manager have to be responsible for managing more than 40 or 50 or 60% of the company’s output? Or, is the measure to be used the relative importance of the work in terms of the company’s reputation, or quality of work, or services produced; or all of these factors? Similarly is a manager to be judged as playing a significant role in terms of the size of decisions they make, for example in terms of financial expenditure; or is the significance of what a manager does to be judged in the context of decisions which relate to matters which are important to a company for other reasons and, if so, what sort of reasons?

It is our view that the terms “significant” and “substantial” are rather wide and we believe that the definitions as they stand may lead to confusion.

To put our comments in context, a number of our members are clinical managers with responsibility for the delivery of clinical services within particular areas in the NHS. As such, they will not be Board members and are responsible only for managing their particular area. However, the decisions they take may have considerable consequences for patients’ health and safety. If the terms “significant and substantial” are defined merely in the context of the “size” of the manager’s responsibility in relation to the rest of the organisation, it would seem that these clinical managers would escape the definition of senior managers. By using this example, we are not seeking an answer to the question of whether clinical managers would be caught by the definitions, but are trying to illustrate our view that the definitions should be clearer to avoid misunderstanding.

9. **Transfer of Functions**

This section applies to the transfer of functions in respect of Crown bodies. It does not, however, address the question of transfer of functions in respect of other bodies corporate. For example, if one company that is subject to proceedings for an offence under the Act is taken over by another company, does the prosecution of the original company fall away, or does the prosecution transfer to the purchasing company that has assumed the functions that are the subject of the prosecution? A similar question arises in respect of a merger in which certain functions of one company that is subject to prosecution may be merged with another company.

25 July 2005

32. Memorandum submitted by the Local Authorities Coordinators of Regulatory Services

**Introduction**

1. This document is a coordinated response from the Local Authorities Coordinators of Regulatory Services (LACORS), the local government central body charged—on behalf of the local authority (LA) Associations of Great Britain—to support and coordinate LA health and safety enforcement. Our response encompasses comments and views reflecting the diversity of LAs’ interests in England and Wales—health and safety enforcement officers and managers, senior officers representing the LA Associations, as well as views from LACORS’ secretariat.

2. On behalf of local government, LACORS welcomes the opportunity to comment on this important Bill. The Bill should have a significant beneficial impact on companies’ management of health and safety and ultimately on the well-being of employees and the public more generally, whilst ensuring that the regulatory burdens on companies is not increased.

**Comments on the Draft Bill**

3. Overall, local government supports and welcomes the proposals. The Bill should act as an effective driver to ensure that companies properly protect the welfare of their employees and members of the public.
The offence

4. At present, action is sometimes less likely to be taken by LAs against culpable larger companies, because of the significant resources they have at their disposal. This proposal should ensure that there is a level playing field for both large and small companies, which would be fairer. The new offence will apply to senior managers whose management responsibilities bear on the whole organisation or a “substantial” part of it. A key aspect of ensuring the level playing field will be to define what is meant by “substantial” and carefully thought-through guidance will be required. The examples given in the Home Office’s introduction to the draft Bill would seem to be appropriate. However, there needs to be clarity to ensure that it is equally easy to bring a prosecution against the very largest national organisations as it is against smaller organisations under the new offence.

5. The statutory criteria for assessing an organisation’s culpability under the new offence include whether senior managers of the organisation: (i) knew, or ought to have known, that the organisation was failing to comply with relevant health and safety legislation or guidance; (ii) were aware, or ought to have been aware of the risk of death or serious harm posed by the failure to comply; and (iii) sought to cause the organisation to profit from that failure. Whilst (i) and (ii) are entirely appropriate criteria, the issue of whether an organisation sought to profit seems much less appropriate and might preclude some valid prosecutions from reaching court if too great an emphasis is placed on this criterion. The implications of including criterion (iii) need to be thought through carefully and consideration given to whether it is necessary or appropriate to include it.

Application

6. LACORS welcomes the fact that a servant or agent of the Crown—such as Government Departments—are not immune from prosecution under the proposals. Again this is positive in creating a fair system. There would not seem to be a reason to exclude executive agencies and other bodies that come under the scope of Departments although they are not included in the draft schedule of the Bill. Their inclusion within the Bill would seem to be appropriate to create a situation of greater equality in terms of duty of care.

7. The new proposals do not include new sanctions for individuals. In cases of manslaughter, individuals that have suffered the loss of a loved one often seek more than simply financial punishment of an organisation. If justice is seen to be done, it is necessary for those bereaved to see the responsible individual or group of individuals held accountable. Furthermore, it may be difficult to secure a prosecution of a culpable senior manager under other legislation and, as the new proposals do not tackle this issue, senior managers responsible for manslaughter may escape prosecution. Those lower in the organisational hierarchy may be held responsible in their place because it is easier to prove a link with those closer to the event and less easy to prove a link with management decisions that significantly contributed to the death. The difficulty of proving a “controlling mind” has been a barrier to bringing prosecutions against senior managers under existing laws relating to gross negligence manslaughter. The new proposals do not tackle the issue and therefore are unlikely to bring satisfactory redress in the eyes of the bereaved.

Regulatory impact

8. The conclusion of the Regulatory Impact Assessment (RIA) is that there are no new regulatory burdens or costs to enforcers. This is positive because it will be easier for companies to understand and for enforcement officers to gain compliance. However, it would have been helpful if the RIA had included consideration of the costs to LAs under the section on public sector costs as LAs and the Health and Safety Executive (HSE) are co-enforcers of the Health and Safety at Work Act. This is appropriate even if the conclusion is that the proposals are cost neutral for LAs. The protocol for liaison on work-related deaths that is mentioned in the RIA is between the police, the Crown Prosecution Service, HSE and local government. The absence of any mention of LAs under the costs section is puzzling.

9. There is a training implication for LA officers in dealing with possible cases under the proposed Bill. Training could be given to LAs in partnership with the HSE, perhaps with the purpose of creating regional LA specialists who could assist other LAs in their region where necessary.

10. Though the proposed offence is unlikely to increase the number of new cases brought by LAs in any significant way, there will be implications for LA H&S enforcement officers in terms of liaison work with the police and gathering evidence for investigations. Currently, a protocol for liaison exists between the CPS, the police and either the Health and Safety Executive or LAs (depending on the enforcement sector) for investigating work-related deaths. As the new offence is linked to existing health and safety legislation, following a death, the police will need to consult LAs (if they are the enforcing authority for health and safety) when health and safety failings are suspected in a company. Liaison will be crucial and LAs may need to collect more evidence to support the prosecution. This is perhaps an area that will need to be addressed through training as discussed above.

11. The work-related deaths protocol may need to be reviewed in the light of any new legislation.
Other issues

12. Powers for a court to order remedial action to remedy the gross breach of a relevant duty of care, or to remedy any matter that has resulted from the breach and has been a cause of death, is also welcomed.

13. The HSE’s current review of the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) will need to ensure that any recategorisation of injuries that are required to be reported under the Regulations does not compromise the collection of any evidence that may need to be gathered for a corporate manslaughter case. If an accident does not need to be reported under RIDDOR but subsequently leads to a death, valuable evidence may be lost because an investigation may not take place until much later.

33. Memorandum submitted by Dr Nigel Dudley

1. The recent Chester v Afshar7 House of Lords ruling raises the possibility that from the causation point of view in medically related cases there should be an alternative to the ordinary rules of causation as proposed in paragraph 49 on page 17.

2. Just as it is considered a hollow duty of care for a doctor not to warn patients of material risks that may result from an operation—in the case of Chester, this being the risk of paralysis after a spinal operation—similarly it would be a hollow duty for a trust not to warn a patient about a known unsafe system of care that has the foreseeable potential to place a patient in harms way. That harm could include the possibility of death. Trusts have a statutory duty to provide safe systems of care (section 18, Health Act 1999) as well as a common law duty to provide safe systems of care (Bull v Devon Area Health Authority8 and Robertson v Nottingham Health Authority9).

3. For example, a trust’s medical director under instructions from the chief executive may suspend a consultant neurosurgeon but not arrange any similar specialist to take over the ward work and operating work of the consultant or inform the junior staff who to contact in an emergency. No resource issues are involved in the failure to appoint an appropriate replacement. An unsafe system has been created. A patient may be admitted to the suspended neurosurgeon’s ward with an unusual presentation of a common problem that would have been recognised and acted upon by a consultant but not by junior, unsupervised, inexperienced staff with no senior to readily turn to for support and advice. As it is, the condition is missed and a delay in diagnosis and action takes place and when consultant help does finally arrive it is too late to save the day.

4. If the underlying neurosurgical condition was one where survival even with immediate diagnosis and action was 85%-90% then on normal causation principles it would never be possible to prove beyond reasonable doubt that the actions and omissions of the trust’s management caused the death of the patient. It would be a hollow duty of care on the part of the trust to provide a safe system of care. The patient who had not been informed of the consultant’s absence and lack of safe cover arrangements would have been denied the right to choose to go to a different hospital where there was a safe system in operation that could have saved his or her life.

5. Causation is easy to prove if it is a crane being knowingly operated under management instructions in an unsafe manner that drops a block of concrete onto the head of a passer by. It is less easy to prove causation through management failure if the system in the hospital is set up in a way so as not to be capable of reacting appropriately and safely to patients delivered into the care of the trust.

6. Should the corporate manslaughter bill causation section be modified to take on board the Chester v Afshar ruling in relation to medical manslaughter in view of the difficulties that there would otherwise be in those cases of clear management negligence but where survival from the underlying medical condition was less than 90%? Proving causation in relation to hospital acquired infection—including MRSA—may be almost impossible if the ordinary rules of causation are applied to medical cases. Should a trust’s duty of care be so hollow and patients be denied justice?

34. Memorandum submitted by Lilly Lewy

I attended the CCA/TUC conference on the Bill yesterday. One subject which was not raised by anyone is the subject of this submission:

In the Porton Down experiments the Ministry of Defence was in the position of “employer” to the Armed Forces and thus of National Servicemen, to most of whom—being under the age of majority—it was also their temporary guardian, charged with the duty of training them.

7 Chester v Afshar [2004] UKHL 41.
8 Bull v Devon Area Health Authority [1993] 4 Med LR 117.
9 Robertson v Nottingham Health Authority 8 Med LR 1.
The deliberate exposure of these young National Servicemen (duped into submitting under the pretext of research into the Common Cold) to substances known to be harmful (for full details see the accounts published in the course of the recent inquest on the death of Roland Maddison, Trowbridge, Wiltshire) was quite obviously in deliberate breach of all health and safety regulations, whether they existed at the time or not.

The death of Roland Maddison 50 years ago was therefore definitely corporate manslaughter by the Crown and its agents.

Such occasions were not imagined by the drafters and presenters of the Bill, or deliberately ignored for “policy reasons.” Please let me know which it was.

This form of CM requires to be incorporated and to be made retrospective in application (as in the “R v R” case, ca.1991, where it was at last made plain that no husband had the right to rape his wife: and when the Offender appealed, claiming that such rape had been no breach of the law at the time he committed the offence, the Court of Appeal ruled that the injuries inflicted on the victim were so grave that the conviction was fully justified).

The immediate death, more than 50 years ago, of one young National Serviceman, and the increased morbidity and mortality of the cohorts who underwent Porton Down processing and still survive (if they survive at all) the after-effects, have inexactly the same way had so grave an effect on the survivors that a prosecution must be undertaken.

14 June 2005

35. Memorandum submitted by 4 U Recruitment Ltd

I have received a draft copy of the above Bill from the CPA, a trade association that our company are members of.

I am the managing director of a recently established employment business specialising in providing construction plant operators throughout the UK. I have worked in the industry since January 1997, previous to this I was a student in university. I view myself to be a competent recruiter and expert in my chosen recruitment field.

As a new business the Bill worries me as to “where the buck will stop”. Our company are members of both the CPA (Construction Plant Hire Association) and REC (Recruitment and Employment Confederation) and I am sure that they will be providing feedback on an issue that has been in debate now for some time.

I fully understand my responsibilities as the person responsible for Health and Safety within my organisation and my premises, but without correct consultation with two industry sectors that “hire out people” (plant hire included as the operators are not working on their own employers premises) I believe that legislation will be passed that will make it impossible for these two sectors to function properly unless legislation is clearer on where we stand.

I have copied this memorandum to senior contacts at both the REC and CPA as the recruitment industry has already witnessed the McGinley/Balfour Beatty ruling last year that resulted in a higher fine for the recruitment agency than the main contractor. While there were clear issues with training and competence of the poor lad that lost his life, in this case with an inexperienced person put a severe risk without correct training and instruction we (recruitment and plant hire) are hiring people to clients every day without any control or supervision over what happens to them. All we make sure is that they have received the correct training and hold the CPCS (Construction Skills Competence Scheme) card for the plant that they are operating and that satisfactory work references as to their suitability to the clients requirements have been properly obtained. There is a danger that so much of what the Employment Agencies Act Regulations sought to attain could be taken away in the “grey areas” of health and safety law.

I have been involved with several near misses in my time in the industry and on occasion was informed that I was getting too involved by the client. However no one should go to work to die. Where do we draw the line on where responsibility lies? If I hire a plant operator to a client who works on the side of a canal and ground failure takes place due to the client failing to carry out an adequate risk assessment and the person drowns, am I guilty under the Health and Safety at Work Act? It is not reasonably practicable to ask the main contractor or subcontractor for every risk assessment before the hire commences. Indeed risk assessment is an ongoing process as the job changes and develops.

I do not want to shirk my responsibilities. All I want to know is what they exactly are?

31 March 2005
36. Memorandum submitted by Norman Hutchings

With long experience of promoting safety in the airline industry I wish to strongly object to this proposed legislation, on the grounds that it will undermine the successful system we have created.

The key feature of a successful safety conscious industry is to create a natural safety culture from top to bottom. The acceptance that human mistakes can be made, but that by open reporting systems, and frank discussion without fear, one can arrive at a cause rather than concentrate on blame, and by so doing produce improved procedures.

The case for this legislation seems to rest on the failure to achieve convictions in cases against the shipping and railway industries. Both these industries have a lot to learn from the airline industry in regard to safety.

Creating an atmosphere of fear of prosecution can only inhibit the free and open discussion of errors, omissions, and other mistakes relevant to incidents and accidents. Whenever human beings are involved we will always have to allow for human fallibility. Fear of punishment is not a sufficient deterrent. A safety culture, developing sound designs and procedures is much more likely to improve safety.

A law of corporate manslaughter can only inhibit this process. Cases of outrageous behaviour can be dealt with by our well proved British common law. Do not put our successful airline safety record at risk.

16 June 2005

37. Memorandum submitted by Disaster Action

INTRODUCTION

Disaster Action, an organisation formed as a result of many disasters in the late 1980s, has long been dedicated to encouraging safety in the behaviour of corporations. One of the ways in which this can be achieved is by providing a legal framework within which companies that break the criminal law are properly investigated and prosecuted.

We therefore welcome this Government’s proposal to legislate in this area, in the hope that the reform will not only bring to account those companies whose conduct has been the cause of loss of life, but also as a means of putting safety further up the boardroom agenda.

THE OFFENCE

We welcome the introduction of a new, specific offence, which is aimed at failings in the way activities are managed by the company at senior level, rather than focusing on the guilty mind of any individual in the company. It is our experience that many of the deaths with which we have been associated were the result of such poor management.

THE ORGANISATION’S ACTIVITIES

The Bill proposes that the way in which the organisation’s activities are managed or organised by senior managers must be the cause of the death. Generally this is a welcome provision, which quite rightly lays the emphasis on the company’s usual way of operating.

The clause could, however, be more explicit in terms of situations where the cause of death may not have been due to the way senior management had actively organised its activities, but simply failed to discourage a certain kind of behaviour, or allowed the existence of a culture of risk. It is notoriously difficult to establish liability for omissions rather than acts.

We would therefore support an amendment to the Bill which could be modelled on the Australian Criminal Code 1995, for example, that encompasses the notion that a corporate offence may be committed where “a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the non-compliance with the relevant provision.”

In the case of The Herald of Free Enterprise, it may have been difficult for the prosecution to prove, beyond any reasonable doubt, that the way in which the organisation’s activities were actively organised by its senior managers caused the deaths, rather than the act of the individual boson. It would have been possible to establish, however, the existence of a corporate culture that tolerated or led to non-compliance with health and safety provision.
The Cause of Death

It is right and proper that the new law should look to failures by senior managers rather than focus exclusively on the acts of individual employees. A number of government enquiries following disasters have identified that the “cultures” of risk or sloppiness within organisations originated from the highest levels of management.

We are, however, concerned that a jury may find it difficult to convict the organisation of manslaughter, or actually causing the death, without further guidance within the legislation itself.

In the Herald of Free Enterprise disaster of 1987 the 192 deaths were due, in terms of factual causation, to the ship sailing with its bow doors open, due to the omission of the assistant bosun. In the Kings Cross fire of the same year, the 31 deaths were due to a dropped match and the accumulation of grease and detritus under wooden escalators. In the Piper Alpha disaster, in 1988, the night staff failed to realise that the previous shift had removed a safety pump.

In each of those, then, the deaths had an "immediate cause". Extensive public inquiries later revealed that senior corporate behaviour was, in fact, to blame for encouraging or, at least, failing to discourage the risky behaviour of employees. The Sheen report, for example, stated: “A full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company.”

The difficulty with the present proposal is that, in the context of a criminal court, establishing, beyond any reasonable doubt, that the faulty behaviour of "senior managers" actually caused the death will be much more difficult than within the setting of a government inquiry.

The Law Commission’s report of 1996 raised these concerns, and recommended, at paragraph 8.39, that the legislation should “include an express provision to the effect that in this kind of situation the management failure may be a cause of the death, even if the immediate cause is the act or omission of an individual”. In the draft Corporate Killing Bill, this appeared both in clause 1(1)(a) “a management failure is the cause or one of the causes of a person’s death” and in clause 1(2)(b) “such a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual”.

Disaster Action is very familiar with the pattern of immediate causation and underlying corporate guilt, and we are therefore very concerned that this draft Bill contains no provision dealing with this issue. It is our view that it may be extremely difficult for the prosecution to persuade a jury to convict a corporation of manslaughter without the legislation containing the clause previously recommended by the Law Commission.

Awareness of Risk

The new Bill rightly focuses on senior management failure, in terms of finding the corporation itself guilty of an offence, and a senior manager is defined in clause 2 as a person who makes decisions about or actually manages the company’s activities.

Clause 3(2)(b) requires, however, that the jury, when considering whether they have committed the offence, takes into account whether such senior managers were “aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply” with any relevant health and safety legislation or guidance.

In many situations this may well be something that the prosecution is able to prove, due to reports and recommendations made to management as a result of previous failures. There may be a number of cases, however, where this provision may simply perpetuate the problems which exist in the current law, and which this Bill is meant to address.

The Law Commission, at para 8.2, in looking at the requirements for the offence of killing by gross carelessness (for individuals), that “the risk of death or serious injury would have been obvious to a reasonable person in her position”, stated that “it cannot appropriately be applied to corporations” (para 8.3). It went on to say that “this will not prevent juries from finding (in general terms) that the risk was, or should have been, obvious to an individual or group of individuals within the company in deciding whether the company’s conduct fell below the required standard. We are simply concerned, in formulating the new offence, to remove the legal requirement under the present law to identify individuals within the company whose conduct is to be attributed to the company itself.”

Whilst we recognise that the proposed legislation only requires the jury to consider this as one of a number of factors, it is reasonable to suppose that such a finding will be seen as a legal requirement and that it will always be open to the defence to argue that, where this requirement is not met, the jury cannot convict.

The danger here, therefore is clear: having the legal requirement for the jury to consider, and conclude positively, in order to be in a clear position to convict, that senior managers had, or ought to have had, an awareness of the risk of death, presents an additional evidential burden for the prosecution, and may return the law, to an extent, to the difficulties in finding a guilty “directing mind” that have caused the failure of most criminal prosecutions of companies.
Profiting from the Act

Clause 3(2)(b) also requires the jury to take into account whether the organisation sought to profit from its failure to comply with health and safety legislation or guidance. Whilst in many cases the desire to profit (financially or otherwise the clause is not clear) has been found to cause corporations to “cut corners” in terms of health and safety, the presence of this particular requirement also adds a burden for the prosecution to persuade the jury that this was indeed the case. If the prosecution is unable to do so, the jury may feel unable to properly convict.

Penalties

The addition, in the Bill, of remedial orders to possible unlimited fines, is welcome, as it will help to achieve one of the objectives that Disaster Action has long campaigned for, namely, that whilst the dead cannot be brought back, the living should do everything in their power to ensure that preventable tragedies do not re-occur.

In terms of the law’s other purpose, however, it is unlikely that large corporations will be deterred by the prospect of a fine or a remedial order. Whilst we recognise that the fact of prosecution alone is likely to punish a corporation by producing unwelcome adverse publicity, the opportunity for a court to order corporate probation could be an additional incentive for company management to avoid “slipping back” into unsafe ways of operating after public attention has shifted away from its activities.

Alternative Verdicts

The Law Commission established, quite appropriately, in our view, that there may be cases where a corporation is acquitted of the offence of manslaughter but guilty of an offence under the Health and Safety at Work Act 1974. It is our view that, in those cases, it should be made clear under the Bill that the jury, on a charge of manslaughter, has the power to convict the corporation, instead, of the lesser offence under the Health and Safety Act.

Conclusion

Disaster Action welcomes many of the provisions in the Corporate Manslaughter Bill. It is an important step towards recognising that the failings of senior management in large corporations can cause deaths, and that, where this has occurred, there should be an opportunity in law to successfully prosecute the corporations guilty of gross negligence.

It is also our view that only a small number of corporations conduct themselves in such a way, and therefore it is unlikely that the courts will be flooded with prosecutions. It is therefore absolutely crucial that, where the Director of Public Prosecutions does make the decision to indict a corporation, the law leaves no room for a guilty company to escape liability through technical difficulties in the wording of the legislation itself.

38. Memorandum submitted by Robert Erskine

Consultation in the Signet Library on Monday 6 June on the Draft Corporate Manslaughter Bill from Westminster, Report from Delegate, Robert Erskine

Although the context of the seminar in the Signet Library was on the possible adoption of the bill in Scotland, there were severe reservations expressed about the core rationale of the bill. You will see that the meeting voted overwhelmingly against adoption of this Bill in Scotland, but it emerged grossly tattered for its further progress in England without much greater emphasis on getting improvements to the quality of evidence in manslaughter trials and responses to the general criticism that this draft Bill was feeble and not worthy of Parliamentary Time.

1. Introduction

This was a meeting convened by solicitors Maclay, Myrray, Spens, ending with voting on a motion “That this House believes that the Corporate Manslaughter Bill is a positive development which will make organisations more accountable for fatalities and that the Scottish Executive should pass similar legislation without delay”. This report gives details of the Programme of consultation on 6 June, a Profile of those attending, a summary of what the platform speakers said, a summary of what was said by speakers in “open forum”; the outcome in the vote, in which by 86 to 2 the meeting rejected this proposed Bill. As an academic in anticipation of the meeting I researched the draft Bill and selected crucial quotes and added my own comments and a crucial case study from my own files on the Ford Pinto, illustrating the role of exemplary damages awarded in the USA to a case of indifference to human life.
2. **Programme**

4.30 pm registration, 5.00 pm Introduction to Bill, Debate and Open Forum, 6.15 Vote, followed by drinks and canapes, 7.30 finish.

3. **Profile of Those Attending**

There were 88 in this seminar. They were a mix of professionals, consultants, lawyers, academics, (criminology, risk management), representatives of City Councils, the Crown Office, Royal College of Surgeons, Procurator Fiscal’s Office, the Scottish Executive, (civil service), Scottish Criminal Records Office, Law Society of Scotland, Church of Scotland, Health and Safety Executive, Strathclyde Police, Offshore Industry Liaison Committee, Scottish Trades Union Congress, Faculty of Advocates.

4. **Outcome**

The programme went to plan with four main speakers on the floor from 5 pm till 5.45 pm, followed by 30 minutes of speeches from the floor and responses from the panel, and the vote at 6.15 pm.

The motion of support was lost in a show of hands by 86 to 2. The feeling of the meeting was that the Bill was deeply flawed, feeble, and not deserving of Scottish Parliamentary Time. On reflection, it would seem that the same mud would stick for our Westminster fraternity. The Bill needs a radical refabrication before absorbing any Parliamentary time.

5. **Reporting this Event**

I attempt to summarise what was said by the four main speakers from oral notes taken, and the printed notes of forthcoming speeches which had been prepared by hosts MMS, a firm of Solicitors, and add briefly the oral contributions from the floor in the “open forum” bit.

**Main Speakers**

*David Leckie*. He is a partner at Maclay Murray and Spens, Commercial, Litigation and advocacy with particular expertise in health, safety and environmental law.

He explained that English position was difficult with prosecution collapses for corporate manslaughter in all main large organisation disasters, Alpha Piper, Herald of Free Enterprise and more recently with the Hatfield Rail Track accident, and Scottish Company Transco. There were a few small companies who got convictions, but the identification of locating a directing mind was seemingly impossible in large corporations.

Under the proposed new Act “An organisation will be guilty of the new offence of corporate manslaughter if the way in which its activities are managed or organised by its senior managers causes a person’s death through a gross breach of a duty of care.” On conviction the organisation will be subject to an unlimited fine. There are no sentences of prison on individuals.

*Richard Keen QC*. He has appeared in many trials involving health and safety at work.

He spoke against the proposed new act. Scottish tradition has a preference for common law over statute law and the present common law of culpable homicide requires mens rea but a corporation does not have a state of mind. In Scottish civil law there is a doctrine of vicarious responsibility from which pecuniary damages may be laid. He raised issues of the aims of social policy. Were they aimed at retribution? In his view the present proposed new offence may deflect attention away from an individual.

*Dr Dave Whyte*, Criminologist, from The University of Stirling.

He picked up the issue of Social policy, deterrent etc. Can a tough punishment and likelihood of being caught, be deterrence if applied to corporations? The new act did not do enough to pin responsibility on individuals and there was no provision for jail sentences for breach of the offence. This was a very feeble act. In both Canada and Australia, countries with common law traditions, individuals within corporations can be convicted for death or injury for homicide and absorb custodial sentences, something beyond what we have with our Safety at Work legislation. But there are many variations among the different states in Canada and Australia, and no obvious “best model” to guide Scotland’s choice.

Ian Tasker of the Scottish Trade Union Congress was indisposed but his colleague *Ronald Donald* stood in at short notice.

He gave the meeting some horrific statistics on slides of the volume of 400 deaths a year in industrial accidents and no long term decline in the number/hundred thousand employees since 1966. Also the conviction rate at only 59% of cases brought was far short of that in England. He was appalled at the Scottish enforcement deficit for response to fatal death at work.
6. **Open Forum**

*Erskine* got the microphone first and made a contribution on experiences of teaching risk management for 20 years and having been exposed to 500 undergraduate presentations on the big disasters, Piper Alpha, Herald of Free Enterprise, Kings Cross Tube Fire. He said that there was a very definite pattern of learnable lessons emerging from the 500 presentations of the 19 year-olds, far superior in quality and conviction to the 115 unlearnable lessons to be learned from the distinguished Lord Cullen and other Enquiry Chairmen. The common factor was that around all those big disasters were employees who knew of the dangerous nature of their environment, but did not have a mechanism where they could whistle-blow without being victimised. The solution to this dilemma was really simple. Set up an Independent Authority, (IA), as the antennae of whistle-blowing complaints. Then via e-mail from IA, to the Health and Safety Executive, and the transaction would then be passed on to the company for response. The groundrule would be that the complaint reaches both local management and top management within a few hours. The complainer is anonymous until there is a subsequent judicial process. The tracing of this transaction flow *prima facie* is evidence of awareness and accountability. The local manager can only discharge his responsibility if he can prove that he pressed for remedial action at a higher level of management. Thus you can establish a chain of responsibility to the controlling mind of the corporation, enough to establish the crucial missing *mens rea* for common law culpable homicide. And the joy of this approach is that the evidence chain is immediately opaque. No need for enquiries to sit for months to find out what happened. Trial and conviction in just a few weeks, what an improvement over this feeble Westminster proposal which had nothing to say on ways of improving the quality of evidence.

The panel made a short response. Yes they liked the theme of quality of evidence, but were concerned that the mechanism might be expensive to get implemented, but there was soon other support expressed from the meeting.

(Expense should be very modest. The IA as conceived is no more that a post office feeding e-mail to Health and Safety Executive, who are obliged then to pass on to the offending company, another post office role, costs almost nothing in contemporary “wired society”.)

Another speaker extolled safety management as part of airline management already an established system for investigating “near misses” and any other life threatening events.

Another speaker regretted the prevalence of acceptance of a culture of killing employees, while other issues had not yet been sorted out and lessons shared. He pleaded for the legal profession to help engineers. The case referred to was one where a fatal accident had been caused by dodgy equipment. And other companies were denied the vital information so that they could respond to the danger, but were denied access. Grounds given for secrecy were clients not wanting to expose themselves to further civil liability.

7. **A Useful Learnable Implementable Recommendation from the Kings Cross Underground Disaster**

“At every month’s board meeting safety should be number one on the agenda, before any finance report”. This was to develop a sure safety culture in London Transport and has indeed been implemented. Anyone travelling on the tube can sense the amount that has been done to improve safety overall. A brilliant guideline for introducing safety culture, and should be applied in every organisation.

8. **Preparation for this Meeting in Exchanges with Other Academics**

In preparation for the event I downloaded the draft Bill, and from that material isolated a few key quotations and then added my own comments. The result is enclosed.

Without working for a much higher quality of evidence which pins accountability on local and senior management I don’t see the extensions of the existing law as particularly significant. Running the new definitions over the old cases, (I have in mind Zeebrugge ferry and Alpha Piper), I still doubt whether prosecutions would have been successful.

I did my degree in Law at Cambridge in 1956–59 and find developments in the law of negligence very slow after nearly 50 years.

9. **Case of the Ford Pinto from Sunday Times 12/2/68 The Arithmetic That Cost £66 Million in Civil Case**

This illustrates how a US jury in a civil action awarded very substantial exemplary damages against the Ford Motor Company for knowingly refusing a product recall on a dangerous vehicle. There is no reason except custom and practice why in Britain the civil law is not used to punish individuals who are aware of product danger.
**BENEFITS**: to Ford for doing nothing and paying the going rate of compensation

Savings—180 burn deaths, 180 serious injuries, 2,100 burned vehicles.

Unit cost—$200,000 per death, $67,000 per injury, $700 per vehicle.

Total Benefit—\[180 \times (200,000) + 180 \times (67,000) + 2100 \times 700 = 49.5 \text{ million}.\]

**COSTS**: of recall

Sales—11 million cars, 1.5 million light trucks.

Unit cost—$11 per car, $11 per truck

Total cost—\[11,000,000 \times 11 + 1,500,000 \times 11 = 137 \text{ million}.\]

*Calculations from a mole*

These are the confidential calculations that convinced a southern Californian jury that America’s giant Ford Motor Company had knowingly sold some 2 million of its Pinto sub-compact cars with a potentially lethal fault in its petrol tank. Last week the jury awarded 18 year old Richard Grimshaw more that $128 million, £66 million in compensation and punitive damages for the terrible burns he suffered when the Pinto he was in burst into flames after a minor accident.

The formula illustrated above is taken from an internal memo of 1972. At the top are Ford’s estimated “benefits” to society in financial terms, of saving the lives of the 180 people likely to be burned to death in a year and a further 180 people from receiving severe burns in accidents where the car rolls over and the fuel tank ruptures. Total Saving $49.9 million. Below this is set the cost to Ford of altering its cars and light trucks to conform to safety standards then being progressed through Congress to prevent petrol tanks exploding after an accident. Total cost $137 million.

Ford’s engineers concluded that the cost to Ford of the alterations were almost three times greater than the benefit to safety that would flow from such alterations, “even using a number of highly favourable benefit assumptions.” (Ford has never sold the Pinto in the UK).

*Risking life for profit*

Richard Grimshaw’s lawyers are convinced that the huge punitive damages resulted from the jury’s determination “to punish Ford for risking life for profit”.

(Comment from Erskine. Whereas it took a “mole” to flush out this dreadful case after he had retired, we should today have whistle-blower protection, so that all employees become potential policemen while they are still on the job).

10. **CORPORATE MANSLAUGHTER: THE GOVERNMENT’S DRAFT BILL FOR REFORM CM 6497**

Quotes from the above and comments from me in brackets. Paragraph numbering follows that of the draft Bill.

Foreword. Our proposals tackle the key difficulty with the current law: the need to find a directing mind of a company personally guilty of gross negligence. We propose a new test that looks more widely at failings within the senior management of an organisation. But this is not about new standards. It is not my intention to propose legislation that would increase regulatory burdens, stifle entrepreneurial activity or create a risk averse culture, and I am satisfied that these proposals do not.

3. A key part of these proposals is striking the right balance between a more effective offence and legislation that would unnecessarily impose a burden on business. The draft Bill achieves this by focussing on what is currently wrong with the law: the need to find a very senior individual personally guilty of gross negligence manslaughter before the company itself can be convicted. At the heart of the new offence, therefore, is a more effective means of attributing to an organisation failures in the way its activities are organised or managed at a senior level.

(Comment from Erskine. No, it is more than a matter of defining legally the personal liability of senior management, it is the further requirement to establish a sound audit trail from whistle-blower anticipating the life threatening condition to that senior person responsible).

8. As the law currently stands, before a company can be convicted of manslaughter proof is required that a directing mind that is, an individual at the very top of the company, who can be said to embody the company in his actions and decisions, is themselves guilty of manslaughter. Only then can the company be convicted. This is known as the identification principle. Without sufficient evidence to convict such an individual, the prosecution of the company must fail.

(Comment from Erskine. In the past published cases failure of prosecution has been primarily because of the quality of evidence available from those nearest the disaster. Yet the enquiry chiefs averred that employees were totally aware of the dangerous nature of their work environment, but whistle-blowing internally was
never an option if they wanted to keep their job. And there is no recognised mechanism to whistle-blow with protection to a competent external independent body. Without this warning of danger to senior management no prosecution either under existing law or under the developments in this draft law could be expected to bite. An effective whistle-blowing system is not just a luxury but the keystone to making advances in this area of manslaughter law).

44. The one exception that we propose to this approach is in respect of the police. Whilst the new offence would apply to police authorities, as incorporated bodies, police forces themselves are not incorporated and therefore would not be covered. Nor are they Crown bodies and so they are not covered by that aspect of our proposals either. We do not consider that, in principle, police forces should be outside the scope of the offence and our intention is that legislation should in due course extend to them. We are currently considering how best to achieve this, given their particular legal status.

(Erskine comment. Yes, indeed the police force should definitely be covered. Recently there have been awful instances of officers exceeding 150 mph and getting off from soporific crown courts. What if deaths had occurred, would the chief constable still retain no liability, unbelievable).

52. As an offence that applies to organisations, we consider that the appropriate sanction would be a financial penalty. The draft Bill makes provision for this and organisations found guilty of corporate manslaughter would face an unlimited fine. Where the circumstances of the case merit, a fine can be set at a very high level.

(Erskine comment A fine is not an appropriate sanction as it would be off-laid by insurance and anyway would generally not be paid personally by the negligent manager).

53. There is a good argument, however, that fining a Crown body serves little practical purpose and simply involves a recycling of public money through the Treasury and back to the relevant body to continue to provide its services. And regulatory legislation that currently binds the Crown has stopped short of providing for criminal proceedings and fines for Crown bodies. Whilst the draft Bill currently provides for a Crown body to be liable to a financial penalty, we would welcome thoughts on this issue.

(Erskine comment. It is obvious that the penalty should be a jail sentence for serious breach for this legislation to bite).

60. The consultation paper in 2000 also dealt with the question of consent to private prosecutions. It proposed that there should be no requirement for individuals to obtain the consent of the Director of Public Prosecutions to bring proceedings for the new offence. There was significant concern amongst respondents that this would lead to insufficiently well-founded prosecutions, which would ultimately fail, and would place an unfair burden on the organisation involved with possible irreparable financial and personal harm. The Government recognises these concerns and the draft Bill specifically requires the consent of the DPP before proceedings can be instituted.

(Erskine comment. No, in the past victims have been able to organise themselves and it is a scandal that they should not have the right to institute prosecution if they have credible evidence, and possibly insurance cover. However, it might be more questionable to grant legal aid.)

62. In summary, we have identified costs of some £14.5 million to industry. A 1% increase in compliance with health and safety measures would provide some £200–300 million in savings in the costs associated with workplace injuries and death. We will continue to develop the RIA in the light of comments on the draft Bill and would welcome further information from respondents on potential costs.

Clause 6. Power to order breach etc to be remedied

29. Clause 1 provides that the sanction for the offence is an unlimited fine. Clause 6 gives the courts a power to order an organisation convicted of the new offence to take steps to remedy the management failure leading to death. Clause 6 also enables a remedial order to specify that the state of affairs resulting from the management failure, and representing the more immediate cause of death, be addressed. For example, where the management failure related to inadequate risk assessment and monitoring procedures, the consequence of this might be inadequate safety precautions, leading to a death. The court would be able to order that both failures be addressed.

(Erskine comment. Yes, but a possible prison sentence for the responsible managers would be far more effective than other sanctions, save a very heavy fine.)

11. SERENDIPITY AFTER THE SIGNET LIBRARY CONSULTATION OF 6 JUNE

When I travelled back to Linlithgow, who should come and sit opposite me but Fiona Hislop, MSP for this area. She was intrigued to hear about our deliberations in the Signet Library and is determined to get the Scottish Nationalists to vote against the Corporate Manslaughter Bill when it comes to Holyrood. Wow, that is a double whammy for the lobbyist! I imagine the Tories will oppose it too.
Erskine CV. Retired academic in 2001, after 25 years in Glasgow Caledonian University, developing and teaching the first degree course in Risk Management in the EU. I absorbed £35,000 research funding between 1992 and 2004 in crucial field of disaster prevention, with academic conference papers delivered all over the world.

9 June 2005


We understand that the Bill Team expects to have draft provisions to apply the new offence of Corporate Manslaughter to the Police before the Bill is presented to parliament and look forward to considering the details of these.

The Independent Police Complaints Commission (IPCC) would also urge the Bill Team to examine whether excluding “uniquely public functions” from the scope of the offence is necessary. Enabling police forces to be prosecuted for corporate manslaughter around incidents such as deaths in custody does not necessarily conflict with existing accountability mechanisms. In fact, the IPCC believes that having the option of a corporate manslaughter prosecution may be vital to ensuring public confidence in the mechanisms by which the police are held to account.

If the Corporate Manslaughter charge were extended in some form to public functions, it would enable police forces to be prosecuted in the event of the most serious, systemic failures resulting in death. At present, there could be a disproportionality whereby a death occurs and the only sanctions available are minor disciplinary sanctions against individual officers. Families and communities will not have confidence in the policing system if there are serious management failings and the only possible outcome are words of advice to an individual officer who made a 15 minute check a few minutes late.

Excluding public functions from the scope of the corporate manslaughter offence limits the potential outcomes from an IPCC investigation. The consultation paper suggests that the reason for not applying corporate manslaughter to public functions is that this would conflict with existing accountability mechanisms. In fact, it would complement them. All deaths following police contact have to be referred to the IPCC, and some of these will be independently investigated. If the evidence from such an investigation showed the most appropriate way forward was a corporate manslaughter prosecution, it would cause serious public concerns about the effectiveness of public accountability if this was not an option.

Clearly there are complex issues to be considered about the role of police services in reacting to potentially dangerous situations and violent individuals which other organisations do not have to deal with. It may not be possible to blanket include public functions within the offence of corporate manslaughter, but perhaps to look at the specific areas such as custody where the public service may have a high degree of control over the environment. It will also be important to remember that the offence of corporate manslaughter will operate on a very high threshold and would not be something we would expect to see often in the area of policing. The IPCC would welcome being part of further exploration of this area.

Fining public services is not an ideal outcome. However, for families the most important outcome is the public statement that serious management failures had occurred resulting in an individual’s death. The fine could also be about strengthening accountability in a specific area where failings had been found—for example by accompanying it by remedial orders or granting rebates based on improvements.

17 June 2005

40. Memorandum submitted by the Construction Confederation

The Construction Confederation is the main representative organisation for building and civil engineering contractors within the UK construction industry, one of the largest and most diverse sectors within the British economy. The Confederation represents over 5,000 companies who between them carry out over 75% of the total turnover of the industry. Constituent members of the Construction Confederation are the British Woodworking Federation, Civil Engineering Contractors Association, Major Contractors Group, National Federation of Builders, National Contractors Federation and Scottish Building.

The Construction Confederation welcomes the opportunity to be consulted on this important draft Bill. Health and safety is of paramount importance to the UK construction industry. Whilst much still needs to be done, recent years have seen unparalleled improvements in the performance of our industry, and the Confederation and its members have been at the forefront of much of the underlying change.
GENERAL OBSERVATIONS

The Confederation is supportive of the provisions set out in the draft bill. The Bill strikes the right balance between meeting public demand for greater accountability in the event of a workplace fatality, and the need to encourage corporate ownership of health and safety responsibilities.

We are particularly pleased to see that the Bill does not seek to pursue new sanctions against individuals or to provide secondary liability. Extending punitive sanctions against individual managers and directors would increase a tendency for negligent individuals to distance themselves from the management of risk. The single most important principle that must be upheld is that health and safety is a collective responsibility within an organisation, with senior managers responsible for maintaining management arrangements that are robust and appropriate for the risk profile of that business.

The removal of Crown Exemption in all but a few cases is also something we welcome. In our sector, somewhere in the region of 50% of all construction activity is procured by public sector clients, and it is important that statutory provisions apply equally across the public and private sectors.

SPECIFIC ISSUES

Management Failure by Senior Managers. As noted, the Confederation agrees that the focus should be on arrangements and practices, rather than any immediate negligent act. However, whilst we support the focus on corporate failings rather than local ones, this approach is liable to pose some difficulties of interpretation. In particular, determining conduct that falls far below what can be reasonably be expected in the circumstances will require reference to reasonable benchmarks of management activity in any similar situation. Clause 3 quite rightly references existing health and safety legislation, codes, guidance, manuals or similar publications as “benchmarks”. Whilst this makes perfect sense, there is perhaps a need to tighten the meaning of Clause 3, and in particular subsection 3(4), to ensure that spurious standards, or guidance, are not cited by prosecution or defence. Current Government practice is resulting in the HSE seeking to avoid drafting Approved Codes of Practice and Guidance, and looking to stakeholder bodies to write their own guidance. It is our view that the only realistic and authoritative benchmarks in our sector for determining management failure in relation to such serious offences are health and safety legislation, HSE approved codes of practice, and HSE guidance.

Furthermore, Clause 3(4) appears to leave open the door to entirely subjective assessment of what can be reasonably expected in the circumstances. This subsection cases some concern and undermines the principle that the bill should reinforce the current statutory framework for health and safety.

Relevant Duty of Care. An area of particular concern in the construction industry is the role of clients in health and safety. Construction clients (although not domestic clients) have duties under the Construction (Design and Management) Regulations 1994. Consequently, it is important that the exclusions set out under Clause 4(2) do not prevent a case being made against a Government client in relation to a gross breach committed in relation to the procurement, planning and management of a construction project. Whilst it appears that this scenario is covered under Clause 4(1)(c)(ii), it is important that there is no defence available relating “allocation of public resources” in relation to an individual construction project.

15 June 2005

41. Memorandum submitted by the British Retail Consortium

In response to the consultation document on Corporate Manslaughter and our recent meeting at the Home Office we would make the following comments:

We welcome and support the principle of the draft Bill being aimed at corporations and not individuals; we believe that existing health and safety laws already adequately address the responsibilities for Directors and individuals within businesses.

We also welcome the intention that cases only be brought by the Crown Prosecution Service with the consent of the Director of Public Prosecutions as this should ensure that inappropriate cases are not brought under the legislation.

We do understand the perceived need in society to provide effective legal sanctions to deal with serious management failures in corporations that constitute gross negligence and cause death; but care should be taken to ensure that the bill does not result in burdens that stifle business development and forces businesses to be more risk averse. We agree with the principle that organisations who take their health and safety obligations seriously ought to have nothing to fear.

In this respect, we welcome the Home Office assurances that the legislation is intended simply to complement the existing extensive protection provided by the Health & Safety at Work Act and other legislation and as such would only be used in relation to a gross breach of duty; and in such circumstances should only be used in exceptional cases on a small number of occasions. This being the case, it is extremely important to ensure that this sentiment is effectively transposed into law.
In the main the retail sector is a relatively safe environment and one in which retailers take their responsibilities under the Health & Safety at Work Act extremely seriously. However, we do have real concerns that the need to respond to public pressure will undoubtedly lead enforcement agencies to take more cases under the legislation even when there are adequate powers and penalties (unlimited fines) under existing legislation. Even where cases do not proceed to prosecution, the publicity and uncertainty associated with such investigations can seriously harm business reputations. It is against this backdrop that retailers are keen to ensure that any new legislation is framed in a way that does not create an increased burden for business.

In relation to the specific wording of the draft Bill we would make the following comments:

1. **Gross Breach**

   It is important that legislation is restricted to a gross breach and in this respect, the wording of “conduct falling far below what can reasonably be expected of the organisation in these circumstances” is a good starting point. We believe that this could be clarified further by describing the failure as “grossly negligent, disregarding foreseeable risks and constituting a continuing and systematic failure”.

   Whilst Clause 3(2) is intended to provide guidance for the jury, we have concerns that it would be simply used as a checklist and is likely to bring more incidents in scope than is intended. We would therefore urge caution against this approach.

   We are extremely uncomfortable with linking the definition to “guidance” as this could be widely misconstrued. In our experience local authorities regularly issue informal guidance eg in the form of a letter, which may be inappropriate or not relevant to the business in question. It is conceivable that a tragic fatality may subsequently arise, which in reality may have little to do with the failure to follow this specific guidance, or the business may have applied other equally effective measures of controls to address the risk, and yet the guidance could be taken out of context. This would force businesses to have greater regard to every piece of informal guidance, irrespective of risk and the relevance.

   In addition, we do not think that it is appropriate to specifically direct the jury to consider “profit from that failure”. This judgement may be inappropriately applied to broader commercial activity and business profitability, even where the breach was not directly related to any corner cutting on cost grounds.

2. **Due Diligence Defence**

   Over a whole range of legislation, due diligence has proved to be a powerful incentive and driver for organisations to change behaviours and proactively manage risk better and, in doing so, genuinely improve compliance and standards.

   We would ask the Home Office to reconsider the scope for introducing a defence of due diligence in the legislation for an organisation where it can show that it has taken all reasonable steps to avoid the contravention in question. The legal formula on this is well tried and tested in the courts over many years and surrounded by a cohesive body of decided cases. We appreciate that if this defence were feasible, a prosecution under the new legislation could not be undertaken, as the concept of due diligence is not compatible with gross breach. Perhaps there might be scope for including due diligence as a test, which if passed could imply that an offence of gross breach of duty of care could not be proven and therefore would not be pursued.

   Above all business requires certainty in its operations—hence its preference for the due diligence defence.

3. **Senior Manager**

   We agree that it is important to focus on the way that a business manages/organises its health and safety responsibilities when assessing liability for death associated with work activities. However, we have concerns that the definition of a Senior Manager is too wide in that it includes not only those people who make the decisions but also encompasses those who manage those activities.

   A corporation should not be exposed to this charge where they have properly organised their policies and systems to comply and yet there has been a failure to effectively carry out those company policies, albeit by a “senior manager” who manages or organises a substantial part of those activities.

   The corporation’s culpability may be properly assessed by the adequacy of its systems to identify the significant non-compliance, and this is fair, but to be liable simply as a consequence of the action of an individual in the first instance, should not constitute a gross failure by the organisation. The systemic failure should only arise in these circumstances where the company either knowingly allowed such behaviours to continue or had completely inadequate systems to identify the problem, which would bring the management responsibility back to a level based on a definition suggested below.
This cannot be right and it is important that the focus should be on the decision making process and it would be better if the definition was based on “director, secretary of person appearing to act in such a capacity”, as this would provide a formulation that is already well established in other areas of law. In any case, the definition of a senior manager will vary dramatically in different organisations and the use of such a description does not provide clarity for business.

4. Remedial Orders

In relation to remedial orders, it would be helpful if the legislation clarified whether a remedial Order could be suspended pending the outcome of an appeal. We do not believe that the Criminal Court is the best place to impose standards of safety in the industry or to regulate the management of safety. This is the role of the HSE and we believe that the existing powers that enforcement authorities have are already adequate to deal with any remediation that is considered appropriate.

5. Application to Other Bodies

We are pleased that the draft Bill does not seem to take advantage of Crown immunity, with some notable exceptions, such as the armed forces, which are perfectly justifiable. However, we have concerns that agencies such as the Food Standards Agency and HSE, which do make significant decisions which impact on safety, are considered to be outside the scope of the legislation. This matter should be reconsidered. At the very least, retailers that follow advice given by these agencies should be able to use this as a defence, or as evidence that there is no gross breach.

6. Unincorporated Bodies

We remain of the view that the offence should still apply to unincorporated bodies and partnerships, particularly as these companies may be competing in similar markets to larger corporate bodies.

16 June 2005

42. Memorandum submitted by Ian Watson

The UK’s proposed corporate manslaughter Bill includes no new sanctions—jail sentences or fines—on bosses implicated in workplace deaths, and it should do so. Without the option of jail for individuals, experience in other countries has consistently shown that fines on a company alone are no deterrent.

16 May 2005

43. Memorandum submitted by the Simon Jones Memorial Campaign

FOREWORD

This response has been prepared on behalf of the Simon Jones Memorial Campaign. Simon was a 24 year old Sussex University student. He was spending a year out before taking his final exams. To support himself in this period he signed on at an employment agency. On 24th April 1998, regardless of his total lack of experience or training as a stevedore, the agency sent him to Euromin Ltd at Shoreham to help unload a ship. Within two hours of his arrival he had been killed. The Simon Jones Memorial Campaign was set up to get justice for Simon and to get better protection from negligent employers for others like him. After three years Euromin Ltd was prosecuted for Corporate Manslaughter. Notwithstanding compelling evidence of negligence, the company was found not guilty. A better drafted law could have made this a guilty verdict.

We welcome the fact that this long awaited Bill has finally appeared. There are some very good points in it: it applies to all corporate bodies and there will no longer be general Crown Immunity. It is a disappointment that non-incorporated bodies such as partnerships are not to be included. It is worrying that some organisations eg prisons still escape the effects of this Bill.

In his foreword Charles Clarke says:

“It is important that we get this legislation right: that people are free to go about their work safely and that those organisations that pay scant regard for the health and safety of workers and members of the public are held to account”
We agree with the general sentiment but wish to point out that it is not the organisation that has scant regard—it is the decision makers at the head of the organisation who are guilty of this omission.

**INTRODUCTION**

1. We are told that the Government is strongly committed to protecting workers and the public and enabling justice to be done. However, the draft bill does not reflect this and shows little heed to the findings and recommendations of the Work and Pensions select committee of July 2004. eg The committee recommended that commitments to legislate made in Revitalising Health and Safety in 2000 should be honoured by a Government Bill in the next session of Parliament and that the Government reconsiders its decision not to legislate on directors’ duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.

2. We agree that current law operates too restrictively and fails to deliver an effective sanction.

**THE NEED FOR REFORM**

3. The main reason for reform has been public outcry at the lack of accountability when companies and in particular large corporations cause the death of workers or members of the public. It is good that the new offence applies to all corporate bodies, including in certain instances parent or other group companies and that for the first time some Crown bodies are to be included.

4. We wholeheartedly agree with the need for reform. The identification principle has certainly stood in the way of successful prosecutions in many cases but hand in glove with this has been the failure to specify and clarify any obligations by senior managers/directors to the work force and the general public. This contrasts with very specific duties to safeguard the finances of the organisation. To be of any value reform must recognise that the right to life is a human right, to fail to take all reasonable steps to safeguard it is a crime and while taking risks with money in attempt to maximise profit can be acceptable, it is not acceptable to take risks with other people’s lives.

5. The consultation paper acknowledges that since 1992 there have been on average only three prosecutions per year. In this same period avoidable work related deaths have averaged some 300 per year. Only 20% of those prosecutions have ended in conviction. This is an outrageous record. Only 1% of crimes were prosecuted and only 0.2% ended in conviction. The identification principle has not been the only obstacle. The lack of clear health and safety obligations at board level and the failure to provide adequate resources for the HSE and training for the police in this complex area is equally to blame.

6. There has been understandable public concern that the law is not delivering justice. The major disasters have received ample media coverage to fuel this but the deaths of individual workers on sites where numerous subcontractors and agencies are involved have received less coverage but have also been failed by the present system. The new proposals theoretically might enable more prosecutions to take place but we understand that the Government’s own regulatory impact assessment of the proposed law estimates the annual increase in prosecutions would be as few as five. This indicates that the proposals are not sufficient to protect potential victims, will not improve access to justice for the bereaved and so would not act as a deterrent. If the figures we have heard are correct, the prosecution rate would only rise from 1% to 2.6%. Even if conviction rate rose to 50% this would still leave us with only 1.3% of avoidable deaths due to management failure leading to a conviction. On the present figures, this would mean four convictions per year instead of three. That would not be a great improvement.

**THE OFFENCE**

7. An organisation would be guilty of corporate manslaughter if the way in which its senior managers managed or organised its activities caused a person’s death and was a gross breach of a duty of care the organisation owed them.

Organisations which can be convicted of this offence are:

(a) a corporation;
(b) a government department or other body listed in the Schedule.

It is clear the Government recognises that it is the board of directors or senior management that is responsible for a company’s behaviour and hence any acts of negligence yet inexplicably only the company or organisation is to be held to account and not the people responsible for its activities. This would be like prosecuting a company for fraud but not placing any sanctions on the directors who carried out the fraud.

Key elements of the current law are retained: the need for an organisation to owe a duty of care to the victim and the high threshold that conduct must have been grossly negligent.
SENIOR MANAGER

A person is a “senior manager” if he plays a significant role in:

(a) The making of decisions about how the whole or a substantial part of an organisation’s activities are to be organised, or

(b) The actual managing or organising of the whole or a substantial part of those activities.

8. This means there is to be a new test for corporate liability, which focuses on management failure at a senior level within the organisation. This is a far more difficult test to prove than the 1996 Law Commission’s suggestion of “serious management failure”. The HSE has stated that the majority of work related deaths are avoidable and are the result of management failure. This failure within the organisation is not simply at one level. It pervades the whole organisation. It could be argued that as senior management have the power to insist that systems are run safely eg they can insist on adequate staffing, proper training and equipment, correct supervision and co-ordination, sufficient rest breaks or adjustment of working hours to avoid fatigue etc. that they are responsible for any general management failure. But statutory duties requiring such action are only placed on “the employer” ie the organisation. By specifying that the failure must be at a senior level without clarifying the duties at a senior level or even defining exactly what “a senior level” is could make it impossible to convict this offence. The abuses of the present system remain, where senior management delegate responsibility down the line and so avoid accountability by themselves or their organisation.

9. Where there are management failings throughout an organisation it may be as difficult to associate them with senior management as it is at present to identify a controlling mind. By specifying senior management rather than management failings throughout the organisation, this law would encourage directors and senior managers to delegate management decisions to more junior officers in the organisation so distancing themselves from the responsibility. More junior management often have to make decisions without the spending power that would enable them to organise the systems more safely. eg They might need to take on more staff, acquire better equipment or safety clothing, take on better qualified staff who require higher wages or install better systems of communication. If it can be shown that senior management have failed to supply the funding needed to allow safe systems of work to be organised and maintained, or if they have had a policy of constantly contracting out to companies without checking that their subcontractors are using safe systems of work, then they should be held accountable under this law.

10. We feel that defining a senior manager as someone who has a role in making management decisions about the whole or a substantial part of the organisation is too narrow. It should include all decision makers with the power to “hire and fire”, to award contracts for work to be done and who have the authority to decide how money is allocated to ensure systems of work are safe. It must be recognised that if there is a general lax attitude to the welfare of the workers and the safety of the public that this is a systemic failing and the whole organisation should be held accountable. The law should be encouraging a “hands on” approach to safety management from the top down. The narrowness of this definition would allow senior management to distance themselves from responsibility.

11. What amounts to a substantial part of an organisation’s activities is defined in such a way that very serious management failure by senior management at any one site or in any one branch of the organisation would escape the scope of this bill simply because there was not proven management failure by management at national or international level. This is setting the bar too high and makes accountability under this law as unattainable as under previous legislation requiring the identification of a controlling mind. It is essential that hand in hand with this legislation there is a statutory requirement for directors and senior management to ensure that their organisation is complying with all requirements under HSWA and MHSWR. In this way failings resulting in death can be associated with the organisation as a whole and the Bill then just might have some deterrent effect.

12. The proposed offence will not apply to individual directors or others. This is a retrograde step as it is impossible to divorce the behaviour of an organisation from the behaviour of the decision makers at its head who decide its actions and control its behaviour. It is also contrary to the promises stated in Revitalising Health and Safety 2000. Of itself the organisation cannot behave badly but there can be a general climate of negligence brought about by senior management prioritising profits/output/efficiency at the expense of the safety of the work force or members of the public.

13. The Law Commission’s 1996 report included a proposal that a director or senior manager could be prosecuted for assisting or conniving at an offence of corporate killing. The new draft Bill specifically leaves this out and thus weakens the legislation and removes any deterrent effect it might have.

14. The Government’s consultation paper of 2000 expressed concern that without punitive sanctions against company officers, there would be insufficient deterrent force to the new proposals and it proposed that there be an additional offence of contributing to a management failing that caused death. As the views from respondents were “evenly split”, we find it inexplicable that the Government should now state it is: “clear that the need for reform arises from the law operating in a restricted way for holding organisations to account . . . and this is a matter of corporate not individual liability. We do not intend to pursue new sanctions for individuals or to provide secondary liability.”
By this we understand that the Government has ignored the views of 50% of respondents and in its desire to protect the potential offenders from prosecution has decided to omit the one reform, which would have had a real deterrent effect and protected the potential victims.

**GROSS BREACH**

(1) The breach in the duty of care is regarded as “gross” if the failure in question constitutes conduct falling far below what can be reasonably accepted in the circumstances.

(2) In deciding that question the jury must consider whether the evidence shows that the organisation was failing to comply with any relevant health and safety legislation or guidance, and if so:

(a) how serious was the failure to comply;

(b) whether or not senior managers of the organisation:

(i) knew or ought to have known, that the organisation was failing to comply with that legislation or guidance;

(ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;

(iii) sought to cause the organisation to profit from that failure.

15. We agree that the offence should not target organisations that are making every effort as far as is reasonably practicable to conduct their operation in a safe and proper manner yet by the oversight or ineptitude of a junior member of staff, a death has occurred. Therefore we support the test for a gross breach as “falling far below what could reasonably be expected”.

16. We are concerned that in the effort to clarify situations, which would meet this criterion, that an additional test has been introduced is whether or not the organisation sought to profit from the breach. This is problematical because not all organisations covered by the bill are profit making and it fails to consider those organisations that simply do not care. The suggestion in 1996 by the Law Commission that the proposed offences should be reckless killing, killing by gross carelessness and corporate killing would have enabled this to be taken into account. The deaths would have been caused by gross carelessness. Indeed many of the cases that have reached public notice indicate that the main problem is a lack of care for the welfare of others rather than a direct profit motive; eg In the sinking of the Herald of Free Enterprise, it is unlikely that the company or any one within it, sought to profit directly by leaving the bow doors open but they failed to consider the possible consequences of such activity and failed to act to prevent it. This is no less culpable than driving at 60 miles per hour in a 30 limit and involuntarily killing someone. The failure to consider the safety of others and to modify behaviour appropriately is the crux of the problem. The grossly careless behaviour does not directly benefit the individual or the organisation. Nevertheless it is criminal and should be treated as such.

17. While compliance or failure to comply with Health and Safety Law and Guidance are reasonable criteria to consider, we feel that other standards should also be considered eg Compliance with the manufacturer’s safety instructions, British Standards, Construction Industry Training Board Standards, accepted industry best practise etc. according to what is relevant in a particular case.

18. It might be more appropriate to indicate at what level negligence is regarded as gross or criminal. eg Serious management failure might be defined as grossly negligent if neglect of one or more Health and Safety regulations had led to death. However, it is accepted that, as in the current position, whether conduct was simply negligent or grossly negligent is for the jury to decide.

**RELEVANT DUTY OF CARE**

(1) A “relevant duty of care”, in relation to an organisation, means a duty owed under the law of negligence by the organisation:

(a) to its employees

(b) in its capacity as occupier of land, or

(c) in connection with:

(i) the supply by the organisation of goods or services (whether for consideration or not), or

(ii) the carrying on by the organisation of any other activity on a commercial basis, otherwise than in the exercise of an exclusively public function.

19. When considering a duty of care to the victim although the draft Bill spells out the types of activities involved we feel there is still a loophole that allows agencies/contractors supplying workers to another employer to escape accountability. Many agencies are effectively subcontractors who simply provide labour. Few of them are aware of or take responsibility for their health and safety obligations (HSE research 2000). This consultation refers to risk management but as many agencies do no risk assessment of the work to which they send their labourers, even failing to visit the premises of the host employer to check if safe systems
of work are in operation, it is obvious they are failing in their duty of care. However, when such a worker is killed at the site of the host employer, as a general rule only the host employer is investigated and considered for prosecution.

20. I have sat in the Old Bailey and heard a host employer’s legal representative state that as the agency worker was not directly employed by the host employer responsible for his death that the host employer owed him no duty of care! This area needs clarifying particularly in our present climate of a “flexible” workforce, where not only are many workers in the most hazardous of jobs (construction and dock work) supplied by agencies but agencies often supply their workers to other agencies so that it can be very difficult to establish exactly who is the employer. In this case as in many others, the agency was not even investigated.

21. We agree entirely that the offence needs to be clear on the circumstances in which an organisation has an obligation to act. Clarity here would simplify compliance with the law and would also simplify proving the case following infringement of the law. It is also important that any definition be as comprehensive as possible in an effort to prevent clever argument by defence counsel allowing an offending organisation to escape justice.

22. We accept that as an alternative to a criminal investigation there may be other ways of investigating the omissions by public bodies. We do not accept that public inquiries are sufficient to hold the Government to account because the Government has to approve the public inquiry and has power to decide its terms of reference. This is a bit like the Government policing itself. Accountability to ministers, judicial review and other methods of accountability should complement the offence of corporate manslaughter not the other way round. The court of law we hope is truly independent of the Government. Moreover, if the Government fails to allocate funds appropriately and in sufficient quantity to ensure compliance of Health and Safety Law and taxpayers are killed as a result of this, then we as taxpayers have the right to hold the Government to account for its failure to provide adequate protection. In this instance, the Government should be as answerable to the taxpayer as a company has to be to its shareholders. If the Government persistently underfunds a body that has responsibility for enforcing safety law, then the Government is negligent.

**Remedial Orders**

23. The proposed sanction would be an unlimited fine. Such a fine is already available under HSWA yet rarely following a death is the fine imposed anywhere near large enough to have a punitive or deterrent effect. There is also the problem of ensuring payment of fines. Judges seem unwilling to impose a fine of sufficient magnitude—say 10% of annual turnover. Companies are very adept at presenting their accounts so as to appear poorer than they are and some companies simply go into liquidation to avoid paying the fine and then set up elsewhere under another name. The assets of a company under investigation would need to be frozen to prevent this last evasion.

24. Greater deterrence would be effected if an organisation found guilty of corporate manslaughter had to cease operating until all of the failings that led to the death had been rectified and an acceptable plan of action introduced to prevent future deaths. For very large corporations only the branch that caused the death would need to be sanctioned in this way but the financial loss incurred would punish the whole group.

25. Remedial orders would also be a better way of punishing Crown bodies but the problem would be less complicated and hopefully would never arise if individual decision makers were held liable for the managerial failings. It is wonderful how personal responsibility focuses the mind.

26. We agree that a time limit should be set for taking remedial action but feel the fine for failure to comply is set too low.

It may be the Home Secretary’s desire to relieve business of its “burdens” that is responsible for the commendable proposal—that courts can order an organisation that has been convicted of corporate manslaughter to take specified steps to remedy the breach in care which led to the death—being made worthless by the proposed maximum fine being set at £20,000 for failure to remedy the problem.

27. One of the many factors leading to Simon’s death was a failure to employ sufficient staff and in particular a supervisor. As the annual pay of a supervisor is likely to be more than a one off maximum fine, it is unlikely that a company in this position would take remedial action. When we consider the costs of rectifying problems on the railways to prevent further disasters, it is obvious that this fine would have no deterrent effect whatever. Any fine must be suitably large to ensure that the organisation will avoid incurring it or failure to comply should result in a seizure of an organisation’s assets.

28. Permitting the organisation to be granted serial extensions on the time allowed could lead to perpetual procrastination and the failings would never be put right. Preventing an organisation from operating and so making money during the remedial process would encourage it to expedite the remedial course of action.
29. The main reason for reform has been public outcry at the lack of accountability when companies and particular large corporations cause the death of workers or members of the public. It is good that the new offence applies to all corporate bodies, including in certain instances parent or other group companies and that for the first time some Crown bodies are to be included.

We agree that Crown Bodies should not receive blanket immunity. This is an outmoded concept with little to justify it.

30. We have some reservations however on those Crown bodies and other organisations that are to be exempt from the law. In particular it is possible, that exempting the Crown from this offence when it or a private company acting on its behalf in the care of prisoners is responsible for a death, may be in breach of Articles 2 and 14 of the Human Rights Act. It is difficult to see how an inquest or public inquiry could be sufficient. These investigations do not apportion blame and do not impose any sanctions. Therefore they are not an adequate means of redress.

31. The excuses put forward in paragraph 20 of the consultation for excluding Government bodies from the offence of corporate manslaughter bears a remarkable similarity to the arguments put forward by the directors of large corporations to distance themselves from the offence. If the Government procures services from a contractor that has a known track record for causing fatalities of members of the public and its workforce, it is culpable because it should have chosen a contractor with a good safety record and should have included the requirement to operate safe systems of work as part of the contract. In short the Government is failing to accept responsibility for the chain of events reaching down from its decisions. Perhaps if the Government were to be held accountable it might be more circumspect with how it discharges its duties and dispenses our taxes with benefit to us all.

32. We are particularly concerned that functions relating to the custody of prisoners should be exempt from this act. Prisoners are particularly vulnerable members of society. There have been a number of high profile cases where negligence by the prison service, companies running private prisons and the police have resulted in the untimely death of prisoners. The worry is that there are many more similar cases, which fail to reach the public notice. We can only stress in the strongest terms that those with responsibility for the care of people in custody should be held accountable under this legislation.

33. It is not good enough to rely on inquests because these are conducted by coroners who are for the most part untrained for the job. Some are doctors, who might be able to direct an inquest into a death from possible medical negligence, but when it comes to a death in custody, we need someone trained in law to analyse what duties were owed to the prisoner and to establish whether these duties were appropriately discharged.

The inquest should be retained and in future be carried out by coroners who have specialised in this area of law. This should be complementary to holding prison services and police to account under this law if the evidence indicates that management failings resulted in the death.

34. The offence does not apply to unincorporated bodies. While we appreciate that the structure of certain unincorporated bodies would make it difficult to prosecute them, we feel it would be better to have the law cover all employing organisations and to have a separate schedule of those types of organisation which are exempt.

We feel it is disingenuous to argue:

“extending the law to unincorporated bodies is not a question of reforming the current law, where it already applies ... It raises a question of whether the law should be extended to apply to a new range of organisations.”

Applying the law to Crown Bodies is already doing this; why should unincorporated bodies be treated differently?

35. We note that the draft Bill excludes the police forces from those bodies that come within the range of the Bill. Although a desire to include them at a later date is expressed we feel it is worrying that they are not included from the outset. There have been recent high profile cases of deaths in police custody and police exceeding their powers with regard to policing peaceful demonstrations. If corralling peaceful demonstrators and members of the public who were simply going about their lawful business and denying them access to food, water, shelter or toilet facilities results in the death of one or more of those people, then the police force responsible for this action should be held to account. It is also possible that denying people such basic human rights could result in a separate charge under ECHR.

36. We have little problem with the Government’s position on causation. It is reasonable that corporate liability should not ensue where an individual has intervened in the chain of events in an extraordinary fashion causing death, or the death was otherwise caused by an extraordinary or unforeseeable event.
EXTENT AND TERRITORIAL APPLICATION

37. The offence applies only to England and Wales. In common law manslaughter an individual can be prosecuted for a death which occurred abroad. We fail to see why employing organisations should be treated more leniently than individuals. While it might be difficult to prosecute in some circumstances we feel that if a senior management failure in England caused a death in say Northern Ireland or Germany, then the organisation should be prosecuted because the crime took place in England.

INVESTIGATION AND PROSECUTION

38. We are pleased to see that the new offence is to be investigated by the police but that the expertise of the HSE will also be used. It is good that the Protocol for Liaison has been further developed and that the CPS will be the prosecuting authority as it is for all laws of homicide.

Because of the complexity of the investigation for this offence and the lack of experience by police forces in its investigation, we would request that the Home Office would introduce specific specialist training for police to allow them to conduct investigations more effectively. This lack of training combined with the sparseness of previous cases for reference makes it more difficult to prepare an effective prosecution case.

PRIVATE PROSECUTIONS

39. We do not agree that removing the requirement to obtain the consent of the Director of Public Prosecutions to bring proceedings for the new offence would lead to spurious, insufficiently well-founded prosecutions being brought, which would ultimately fail. Once more it is the interests of the potential offender that are put to the fore—not those of the victims and the bereaved families.

It should be noted that there is already an unfair financial and emotional burden placed on the bereaved relatives. They have often lost their breadwinner. Where a single young person is the victim the family have huge financial burdens associated with the death and inquest for which no help is available and no financial compensation is payable by the company in these instances.

40. The financial hurdles alone are so great that only in exceptional cases could a private prosecution be considered. There is therefore virtually no chance of an insufficiently well-founded private prosecution. For this reason alone it is unreasonable to add the additional obstacle of requiring the consent of the Director of Public Prosecutions.

SUMMARY

41. We reiterate that we are pleased that a draft Bill has finally been produced but feel that as it stands it will not protect workers or members of the public from being killed as a result of work related activity. We do not feel it places sufficient responsibilities on organisations and the decision makers who control the activities of those organisations. As it stands it would be difficult to convict any organisation of the proposed offence and the penalties need to be more innovative and effective to provide an adequate deterrent.

44. Memorandum submitted by the Parliamentary Advisory Council for Transport Safety

The Parliamentary Advisory Council for Transport Safety (PACTS) is a registered charity and associate Parliamentary group, advising and informing MPs and Peers on road, rail and air safety issues. Its charitable objective is “To protect human life through the promotion of transport safety for the public benefit”.

PACTS welcomes the opportunity to respond to the draft Bill. It also welcomes the decision by the Government to publish the Bill in draft form to ensure adequate pre-legislative scrutiny by Parliament. This relatively new approach towards the making of legislation allows for more considered law-making and for the eventual result to be better framed and more likely to succeed in the longer term.

PACTS recognises that the proposal to establish a new offence of corporate manslaughter is a legitimate and appropriate response to a number of high profile events which were not accompanied by successful prosecutions. As the consultation paper points out, these have “given rise to public concern that the law is not delivering justice”. The new offence is an attempt to satisfy this public concern.

At the same time, PACTS wishes to point out that the prosecution of a case after the event is a recognition of failure. Long-term improvement in safety is more likely to be assisted by the comprehensive investigation of the background to an accident in order to prevent repetition and by developing a safety culture within an organisation. A charge of corporate manslaughter is an admission of failure; it is unlikely to improve the safety performance of a specific company.
PACTS therefore welcomes the comment in the consultation document in paragraph 59 that “nothing in the Bill affects the role and powers of the independent accident investigation branches who undertake the investigation of air, marine and rail accidents”. The work of these bodies is vital to help to improve the safety of transport and those who use or work in it. It is through their investigations that safety is most likely to be improved.

This assurance, however, does not specifically cover the vexed issue of potential prejudice to subsequent criminal proceedings arising out of the publicity given to the findings of such investigations. In the case of the Watford Junction rail collision, although the Health and Safety Executive (as the predecessor of the RAIB in this role) carried out a technical investigation, its findings could not be released until after the conclusion of the trial of the driver held to be responsible. In the case of the Southall collision, which was deemed to be of sufficient seriousness to merit a full public inquiry, the start of this had to be deferred until the trial of both the train operating company and the driver had ended. Because proceedings against a number of railway officials charged with offences related to the Hatfield derailment are still under way, the final outcome of the HSE’s investigations into that accident has still not been published.

The difficulties here are that the provisions of the Contempt of Court Act come into effect as soon as any arrest has been made, irrespective of whether or not charges have been laid. This effectively silences any publication of evidence or more general comment which may be held to be capable of influencing a jury and therefore of prejudicing the right of any defendant to a fair trial. It is an important safeguard to ensure the objectivity of the criminal justice process but it has the potential greatly to hamper the equally important requirement to ensure that lessons learned from such events are speedily learned. It is likely that a charge of corporate manslaughter would be vigorously contested by any body against which it was brought and that the resulting trial would be protracted. PACTS is concerned to know whether and how the Government believes that the consequential suppression—for an indefinite period—of proper public knowledge of and comment on the causes and circumstances of the event giving rise to the trial can be avoided.

PACTS recognises that one of the more difficult areas of the new offence will be the identification of those senior managers to whom the Act will apply. The two threshold tests that need to be passed, outlined in paragraphs 29 and 30, mean that a manager must make decisions about a substantial part of the organisation and that he must play a significant role within it. While accepting that the key issue is to ensure that those with suitable levels of expertise and responsibility are caught within the confines of the law, PACTS urges the Government to ensure that companies are not able to avoid due process by setting up complex management structures that reduce individual management responsibility.

Clause 1 creates the offence with a punishment of an unlimited fine. While welcoming the proposal that an organisation can be found guilty of the new offence, PACTS believes that further clarification of the relationship between this clause and the comments in paragraph 48 that individuals “will remain liable for prosecution for individual offences” is necessary. Once the Bill receives Royal Assent, both companies and individual employees will be liable to prosecution for different offences with different punishments. PACTS would urge the Home Office to give further guidance on this package in due course.

Clause 2 defines the position of “senior manager”. PACTS would urge caution about the use of the word “substantial” on the face of the Bill. It appears highly likely that lawyers will spend some time debating the exact extent of responsibility. PACTS believes that government will need to give clear guidance as to the meaning of both “significant” and “substantial” in this context.

PACTS welcomes the inclusion of statutory criteria for consideration by the jury. The wording of the relevant section of the Bill (3 (2) (b)), however, may be somewhat ambiguous. It is presumably the case that there must be evidence that senior managers were guilty of one or more of the three elements and not of all three. If the latter were to be the case, then the standard for proof of culpability would be extremely high.

As a comment on Clause 12, PACTS recognises that it will always be the case that certain aspects of law-making have to be undertaken through secondary rather than primary legislation. This Bill is no different. However, it would be more appropriate if orders made under section 1(3) were by affirmative resolution of both Houses. This would mean that Parliament would have to make a positive decision about amendment to the Schedule to the Bill rather than by default as the draft currently stands. Decisions about the inclusion or exclusion of Government departments or agencies should be taken by Parliament in full knowledge of the facts.

PACTS welcomes the opportunity to take part in this debate about a significant piece of legislation and looks forward to further opportunity to comment as the Bill makes its way through Parliament.
45. Memorandum submitted by the Association of Train Operating Companies

We write on behalf of the Association of Train Operating Companies (ATOC) and its members, the names of whom appear in the appendix to this letter.

ATOC Members welcome the opportunity to respond. They remain committed to a close and constructive participation in the maturing debate on all related aspects of public and worker safety. ATOC has, for example, recently been closely involved in discussions concerned the relationship of economic and safety regulation as part of the Government’s Rail Review, now enacted through the Railways Act 2005 including the transfer of safety policy and enforcement to the Office of Rail Regulation.

The submission has been prepared by the ATOC Safety Coordination Group and endorsed by the Board of ATOC.

Some five years ago members of ATOC caused the Safety Coordination Group to be formed to give guidance to our legal teams at the Joint Rail Inquiry and Ladbroke Grove II Inquiry. The group formed of Directors and senior managers nominated by their TOC owning group then went on to examine the recommendations from these inquiries and to oversee the implementation of the actions agreed. Subsequently the group has given advice to the Board of ATOC on the implications of the European Rail Safety Directive, the proposed HSE Safety Regulations and the arrangements to establish the Rail Accident Investigation Branch.

This response falls into two parts:

(a) this letter sets out the essence of our submission on the key points; and
(b) those points are developed in the separate consultation response enclosed.

We have commented upon both the draft Bill and also the wider context. The debate about public safety and safety offences has proved (for understandable reasons) to be a difficult and emotive one. It is in the national interest that the debate is resolved effectively and in a way which satisfies all of the key stakeholder groups. We believe that the draft bill has the potential to form one key part of that resolution.

ATOC Members however agree with the Home Secretary’s foreword that the wider issue to address is that of risk aversion. Risk aversion creates significant problems for the UK economy and society, does not increase levels of safety and does not help any stakeholder group.

The issue therefore is how the law as a whole can:

(a) provide workers and the public with appropriate levels of protection from physical harm;
(b) identify and punish unsafe behaviour; whilst
(c) avoid discouraging innovation and sensible judgement calls by organisations and by individuals upon which any successful society depends.

We comment first on the draft Bill and then briefly upon the wider context relating to safety offences.

THE CORPORATE MANSLAUGHTER BILL

1. ATOC Members welcome the draft Bill. They recognise the policy development that has taken place since previous consultations and welcome both the balance in content and the measured tone adopted.

2. The consultation paper recognises that corporate manslaughter is about how best to make organisations criminally liable—particularly larger organisations with complex management structures. The debate had however become confused with the (separate) question of the liability of individual members of senior management. That is also a crucial debate but is legally distinct.

3. We believe that the clear statement that this is an offence directed at organisations for which there can be no secondary liability is essential and constructive. We comment at section 3 of our response paper upon the position in relation to safety offences committed by individuals.

4. ATOC Members also welcome and support the proposed approach in relation to public authorities and the distinction to be drawn between delivery and matters of policy/prerogative. It is submitted that this links into the issue of the framework for decisions on public safety and public policy, again dealt with under the wider context below.

5. We anticipate that issues will arise in specific cases around the definition of “senior manager”. However, we agree that a prescriptive definition that will fit any circumstance is not achievable. Accordingly this is a matter which will have to be developed and refined by case law. ATOC Members would, however, welcome greater clarity as to whether that question will in each case be a question of law for the Judge to decide or alternatively a question of fact for the jury. We believe that it should be dealt with by the Judge as an issue of law.
6. We submit that the definition in section 3 of “gross breach” also needs to be clarified. The drafting is not currently clear as to whether all, some or none of the heads within section 3(2) need to be present for there to be a finding of gross breach.

7. The position on group companies is more complex than it appears at first sight. The need for effective sanction in the rare cases of gross management failure is recognised. However, there is a danger that the principle of limited liability that underpins corporate and group structures will be inadvertently undermined. ATOC Members submit that this is an area that requires more detailed investigation and analysis (particularly in relation to potential impact).

8. We agree with the Government that the new offence should complement existing health and safety legislation. However, if a company is prosecuted both for corporate manslaughter and under the Health and Safety at Work Act both offences should not be tried together. The HSWA has a reverse legal burden of proof. Under it an organisation is guilty if it cannot demonstrate that it has done everything except actions that are grossly disproportionate. Corporate manslaughter will however rightly continue to place the burden of proof firmly upon the prosecution. It is not procedurally appropriate and would be materially unfair, to place both, and very different, offences simultaneously before the same jury in the same trial. A company should be open to prosecution under both sets of offences but if that is done then a split trial is required to avoid fundamental unfairness.

9. In terms of remedial orders, it is right that in the rare cases where gross breach has been established that there should be a mechanism to require the breach to be corrected to prevent repetition. However, care is needed as large accidents tend to result from a mix of systemic and human failings. Judges are not experts in safety management systems or particular industries, nor would it be appropriate to ask them to rule on societal issues that may have far reaching effect. Accordingly alternative mechanisms should be looked at. If the Court’s power to order remediation is retained, clear sentencing guidelines and a prescribed right of appeal on the terms of the remedial order are needed.

10. The position of ATOC Members in relation to further drafting points is set out in the response document attached.

THE WIDER CONTEXT

11. The way that the debate around punishment for safety offences has developed over the last decade has increased risk aversion. This assertion is made upon the basis of the direct experience of ATOC Members and also specific evidence. These issues are expanded in the response attached. Risk aversion creates problems for society as a whole. It does not increase safety levels and indeed may detrimentally affect safety.

12. It is submitted that the key to unlocking risk aversion lies in a cohesive approach to safety policy and safety related offences. ATOC Members note, and welcome, the Government’s assertion in the Consultation Paper that it is strongly committed to modernising the criminal justice system. An effective justice system requires:

(a) clarity (of both law and perception) on the level of conduct by an organisation in respect of safety that will be treated as criminal;

(b) clarity (of both law and perception) on the level of conduct by an individual in respect of safety that will be treated as criminal; and

(c) a clearly understood and effective framework for taking decisions on matters of public safety and public policy. In particular this must not confuse the setting of safety parameters for a particular industry or area of activity with the obligation to deliver safety within those parameters by organisations.

None of these requirements is currently met. The Corporate Manslaughter Bill (if enacted) has significant potential to address the first of the issues\(^\text{10}\) and should therefore be progressed. However, it is not intended to address, of itself, the further issues at paragraph 13(b) and (c).

We hope therefore that, in parallel with the progress of the Corporate Manslaughter Bill, a constructive and informed debate can take place upon these vital related issues.

We hope that these views are seen as constructive and are of interest and would welcome the opportunity to engage further with Government on these important issues.

13 June 2005

\(^{10}\) Providing that the introduction of the new offence is supported by clear policy guidance on the way in which investigation and enforcement should take place when both it and HSWA offences are under consideration. Please see Paragraph 2.38 of the full response attached.
Response of Members of the Association of Train Operating Companies

1. PURPOSE AND OVERVIEW

1.1 This is the response of ATOC and ATOC Members to the Home Office’s March 2005 Consultation Paper “Corporate Manslaughter: The Government’s Draft Bill for Reform”.

1.2 The ATOC Members on behalf of whom this response is submitted are listed at appendix 1.

1.3 This submission has been prepared by the ATOC Safety Coordination Group on behalf of the members of the Association of Train Operating Companies representing the 27 train operators (listed in Appendix 1). These train companies combined in 2002–03 to operate 87% of national route kilometres, if freight operations are added this rises to over 96%. The Home Office is respectfully asked to consider this response submission as if each of the 27 train operators had made a separate submission.

1.4 This paper should be read together with the letter dated 13 June 2005 from David Weir of ATOC to the Home Office Consultation Team.

1.5 ATOC Members welcome the draft Bill. They believe that it represents a positive development in an important debate.

1.6 It is submitted that the drafting can, and should, be refined in certain respects but that the overall approach is logical. The Bill:

(a) properly distinguishes the liability of an organisation from the potential liability of individuals within that organisation;

(b) advances constructive proposals in relation to the formulation of the test of liability and the liability of public authorities.

1.7 This paper:

(a) sets out at section 2 the views of ATOC Members on the Consultation Paper and the drafting of the Bill; and

(b) comments at section 3 upon the wider context.

2. COMMENTS ON CONSULTATION PAPER AND THE DRAFT BILL

2.1 This section sets out comments against each of the main sections of the Consultation Paper. The concluding table contains relevant drafting comments.

Foreword and Introduction

2.2 ATOC Members note the Home Secretary’s Foreword and agrees with the overall analysis set out in the Introduction to the Consultation Paper.

2.3 ATOC Members particularly welcome:

(a) the confirmation that the proposals need to strike a careful balance between the need to hold companies and other organisation to account for gross failings (which ATOC Members support) and the need to avoid increasing the regulatory burden, stifling entrepreneurial activity or creating a risk averse culture;

(b) given that need for balance, the avoidance of any emphasis placed upon “opprobrium” or using the impact of the offence upon reputation as a form or criminal sanction in its own right. For the reasons stated in the ATOC response to the draft 2001 impact assessment, that emphasis would potentially have discouraged capable companies with respected brands and reputations from entering some important areas of public service delivery; and

(c) the need for any corporate manslaughter offence to complement health and safety legislation.

The need for reform

2.4 ATOC Members agree with the analysis in the Consultation Paper.

2.5 On one level it is possible to argue that no safety offences other than those arising under the Health and Safety at Work etc Act 1974 (“HSWA”) are required. An organisation can only be subjected to a fine and an unlimited fine is already possible under the HSWA regime. At a conceptual level therefore corporate manslaughter represents a duplication of offences.

2.6 However the offence of corporate manslaughter does already exist and can be criticised on two counts:

(a) it is perceived not to be capable of holding large organisations to account so does not enjoy public confidence;
the need to identify a “controlling mind” leads to investigations by necessity being personalised upon individuals and (partly as a result) becoming prolonged. Senior individuals face the threat of being prosecuted inappropriately for manslaughter in order to try to secure a conviction against the organisation. The analysis of major safety events demonstrates that they tend to be attributable to a combination of circumstances and multiple faults of varying degrees of seriousness at different levels. The current legal formulation therefore does not reflect practical reality.

2.7 Perception and practicality dictates that the offence of corporate manslaughter will continue to exist. It is therefore important that it is restructured to be fair and effective in dealing with the small minority of cases of gross breach.

The Offence

2.8 ATOC Members support the approach proposed. A comprehensive statutory definition which will be capable of being applied to all businesses is unlikely to be achievable due to the large number of different corporate structures routinely encountered in UK businesses. Case law will therefore be necessary to refine the test of who will and will not fall within the definition of senior manager. This test will develop and be focussed as cases come before the courts. In order to ensure consistency and in order to provide some certainty to companies as to what the law requires them to do, decisions in such cases will form part of the law which will need to be applied by the court in future cases. As such the definition of who is a senior manager will be a matter of law as developed in decided cases.

2.9 ATOC members operate their businesses using a range of management structures each of which has a different division of responsibility in relation to different aspects of the business. For example different managers may have responsibility and decision making control over operational and engineering aspects of the business due to the experience and competence necessary for these roles. It may not be clear in this case whether all those of a senior level in the company or only those with control and competence in the relevant area are to be defined as senior managers. This is a matter of law which will be determined in light of decided cases as explained above. It is important for certainty of understanding the law that the case law develops in a consistent manner which will be best achieved by the standards required being developed by judicial assessment of its requirements.

2.10 It is therefore strongly submitted that the test as to whether somebody is or is not a senior manager must logically be a question of law for the Judge rather than a question of fact for the jury. This should be made clear in the drafting of the Bill. If it is not so then inconsistent decisions are likely. Inconsistency is not in the interests of any stakeholder group. It is also likely to add to the factors driving risk aversion.

The Scope of the Offence

2.11 With respect to culpability for discharge of public functions ATOC Members support the approach of basing such culpability on the nature of the activities being discharged rather than the identity of the body discharging them.

2.12 Significant debate is anticipated upon the definitions of the activities by public bodies that should be susceptible to prosecution. The delineation has however been carefully drawn and it is right that matters of policy and prerogative should fall outside the scope of the offence.

2.13 Decisions on public policy are not however confined to public authorities. Private utilities, for example, are called upon to take policy decisions. In line with the principle of looking at the action involved rather than the body taking that action the public policy exemption should not be restricted to public authorities.

2.14 Conversely commercial (or similar) activities not falling under prerogative or policy that might ordinarily be provided by either a private organisation or a public authority should fall to be dealt with under the same legislative framework and it would be inappropriate to grant a blanket Crown immunity.

2.15 The intention to support a “broad level playing field between public and private sectors” is strongly supported. ATOC drew attention in its previous response to the anomaly that would arise if this were not the case. For example large scale movements of people at times of national celebrations or major events (for example large sporting events) would potentially be distorted if private companies and public authorities cooperating on the arrangements were subject to different standards and different offences.

Management failure by Senior Managers

2.16 ATOC Members refer to their comments above (2.8) relating to the definition of senior management. The principle is supported as is the proposed definition but as noted above the matter should be a question of law for the Trial Judge in each case.
Gross Breach and Statutory Criteria

2.17 ATOC Members agree that a high threshold must be retained for any offence of gross manslaughter. Health and safety legislation exists (and includes a reverse burden of proof) to deal with and punish system failures falling outside this category. It would create duplication and inconsistency for the separate offence of manslaughter to extend itself beyond the small category of cases summarised in the foreword as “the very worst cases of management failure”.

2.18 ATOC Members agree that the original formulation of the test by the Law Commission required clarification. They also support the inclusion of a range of statutory criteria to provide a clearer framework for assessing culpability. Without that the definition of the offence becomes circular in that conduct would be defined, in effect, as criminal if it is deserving of being treated as criminal. Such a definition is likely to lead to inconsistency in its application.

2.19 Objective criteria are therefore needed to add balance and consistency. However, ATOC Members submit that the draft of Clause 3 is not as clear as it could be and does require redrafting. It is not, for example, clear as to whether all of the limbs of section 3(2) must be present to create a finding of guilt.

2.20 It is inferred that they need not be so. The requirement within section 3(2)(b)(iii) which requires the jury to look at whether the organisation sought to profit from its failure will not always be relevant. Even for the small minority of organisations which pay little heed to safety, profit may not be a motive. Rather the cause may be ignorance or recklessness. Similarly a public authority which does not operate on a commercial or for profit basis would rarely be driven by a profit motive but may still neglect its safety responsibilities.

2.21 It is submitted that Clause 3 needs significant clarification for the reasons given in the preceding paragraphs. The redrafted clause should also be clear as to whether:

(a) all, any or none of the states of knowledge and intent in subparagraph 3(2)(b) must exist for the offence to be committed; and

(b) the breach must necessarily be “gross” if any one of the states of knowledge and intent does exist.

2.22 ATOC Members support the proposal that the offence should not apply to unincorporated bodies but should apply to corporations and to a wide range of Crown bodies.

Corporations

2.23 The position on group companies is more complex than it appears at first sight. ATOC Members recognise the need for an effective sanction in the rare cases of gross management failure. However there is a danger that the principle of limited liability that underpins corporate and group structures will be inadvertently undermined. It is not clear to what extent companies in a group structure (in particular parent companies) may be deemed to have duties of care to individuals who work for subsidiaries or other group companies. In normal company structures each company is responsible for its own management and has duties to its employees and third parties affected by its business. In certain circumstances however there may be a legal argument that parent companies adopt duties to individuals due to their influence over the management of the subsidiary.

2.24 There is a risk that the pressures that result from any major event will lead investigating and prosecuting authorities to seek to spread the net widely to encompass other group companies even where that is not appropriate. The effects of that happening would be potentially significant in terms of both risk aversion generally\(^\text{11}\) and, more specifically, UK inward investment.

2.25 ATOC Members submit that this is an area that requires more detailed investigation and analysis (particularly in relation to potential impact). If parent companies are to be susceptible to prosecution then more detailed guidance will be essential in relation to:

(a) The nature of the duty of care that must be shown to exist;

(b) The limited circumstances in which it will be appropriate for investigating authorities and Prosecutors to pursue parent or group companies.

\(^{11}\) Section 3 below expands upon the wider issues relating to risk aversion.
2.26 ATOC Members support the analysis (paragraph 38–40) of the Consultation Paper and the balance which it seeks to strike.

Unincorporated Bodies

2.27 ATOC Members support the analysis at paragraphs 41–43 of the Consultation Paper. ATOC Members do not have a view on the position of the police set out at paragraph 44.

Individually

2.28 ATOC’s Members strongly support the analysis on individuals set out at paragraphs 45–48 of the Consultation Paper. They noted in early consultation responses that the Law Commission had identified that it would be “entirely contrary to our purpose” to provide for secondary liability.

2.29 Public and media aspects of the corporate manslaughter debate have, unhelpfully, previously confused the issues of the culpability of organisations and the culpability of individuals. The current Consultation Paper rightly distinguishes those two elements.

2.30 Both aspects need to be taken forward and we comment further on this in section 3 below—criminal offences relating to safety for individuals also need to be looked at. However, that should not be looked at within a Bill dealing with the liability of organisations as to do so is unhelpful to all stakeholders.

Causation

2.31 ATOC Members endorse and welcome the analysis at paragraphs 49—51. It was a matter of great concern in relation to the original consultation proposals that the risk of death need not be foreseeable. That would have created an offence which would be potentially made out by reference to severity of consequence and not by the underlying culpability of the act concerned. The present proposals address that issue and this is supported.

Sanctions

2.32 The principle that the appropriate sanction for organisations is a financial penalty and that there should be the ability to impose remedial orders for offending organisations is supported. Due to the complexities of the rail industry and the detailed regulatory framework in which it operates ATOC members believe that it is important that sentencing criteria are provided to Judges which ensure that all relevant factors relating to the particular industry are looked at and sentencing is done after analysis of the safety management issues.

2.33 In order for fines to be set at the correct level Judges will require clarity when sentencing in relation to:

(a) the criteria to be used to set fines for the new offences. In particular it should be clear whether the aggravating and mitigating features set out in R v Howe (1999) and R v Friskies Petcare UK Limited (2000) which apply in relation to health and safety offences would apply to the new offences. If not the court should be clear with respect to what criteria it should apply when sentencing;

(b) the relationship between the fine imposed for corporate manslaughter and any simultaneous or subsequent fine for health and safety offences arising from the same or a related incident (if, as discussed below, prosecutions for the new offences and for breaches of existing Health and Safety law are brought sequentially). If two actions are brought which address the same underlying culpability, it should be clear whether the defendant should pay fines with respect to each offence or whether credit should be given for fines already assessed. Alternatively it should be clear whether one of the criteria on which fines are calculated should be fines already paid for the same underlying culpability; and

(c) whether fines calculated on the basis of these criteria for each offence must necessarily be the same if the same sentencing criteria are to be applied to both new offences and offences under Health and Safety law.

2.34 ATOC Members appreciate the conceptual difficulty with imposing a fine upon a public authority given the “recycling” issue that such fines will both be paid to derive from public funds. A fine does however send a message as to the level of culpability and therefore still serves a purpose. Also the scope of a remedial order for a public authority may require additional elements targeted to the underlying systemic failures. For example restrictions could be made upon future budgets or additional supervisory arrangements could be put into place for the public authority in question.
2.35 In terms of remediation orders, it is right that in the rare cases where gross breach has been established that there should be a mechanism to require the breach to be corrected to prevent repetition. It would be unusual for a breach to continue through to the late stage of trial but if that is the case there needs to be some recourse.

2.36 However, care is needed as large accidents tend to result from a mix of systemic and human failings. Some aspects of the failure may be self-evident; some may be more subtle and some may cross (de facto) into issues of wider public policy. For example past incidents at football grounds (the Bradford stadium fire; Hillsborough; Heysel) involved safety management issues but also questions of the intrinsic design of stadia and the societal behaviour of football supporters. Where an industry (as is the case with the Railway industry) operates in a highly regulated environment, standards of safety required are often influenced by public policy and legislation. The extent to which incidents are therefore dependent upon culpable actions of companies should be considered in light this framework. If this is not done then remedial orders may inadvertently have significant societal or national economic effect. It would also be appropriate to consider the degree to which existing regulatory requirements should be or would need to be amended to implement any remedial actions.

2.37 Also ideas can be put forward that look attractive but in fact inadvertently increase risk overall. For example, one of the central recommendations of the inquiry into the Southall rail crash was that risk assessment of roof hatches be undertaken and if appropriate they be included in trains. Careful analysis, however demonstrated that the impact upon structural integrity of the vehicles involved and the risk of passengers exiting vehicles would have unnecessarily increased risks to passenger safety overall. A balanced view of actual culpability in complex industries such as the rail industry will therefore depend upon consideration of both the existing safety guidance and the requirement to make legitimate safety judgments based on the best available information. Where such guidance is not reliable legitimate decisions made which contradict the guidance should not be considered to be culpable.

2.38 Judges are not experts in safety management systems or particular industries, nor would it be appropriate to ask them to rule on societal issues that may have far reaching effect. ATOC Members therefore submit that:

(a) consideration be given to alternative mechanisms by which remediation could be achieved, for example by giving the Judge the ability to refer certain matters to the safety regulator designated under the HSWA (which should have specialist knowledge and experience in this area) to consider if improvement or prohibition notices should be served; or

(b) if the ability of the Court to make an order is retained then both a clear appeal mechanism and clear sentencing guidelines in relation to the intended scope and use of remediation orders are essential (see also above at 2.33).

Extent (including Scotland and Northern Ireland)

2.39 ATOC Members recognise the issues created by devolution and the separate legislative arrangements for Northern Ireland. It would, however, be sensible for a single regime to apply. It would be inconsistent, for example, for different criminal regimes to apply to the management of a single train service running from London to Edinburgh depending upon the precise point of its journey.

Investigation and Prosecution

2.40 ATOC Members agree that the police and CPS should be the main prosecution and enforcement bodies for corporate manslaughter. However, they submit that significant further work is required to ensure consistency in such investigations, notwithstanding the existence of relevant protocols. In particular:

(a) it should be made clear to organisations at all stages what offences are being investigated and by whom;

(b) it should be made clear to individuals who are being asked to provide witness evidence whether they are under suspicion individually and if so for what offence(s);

(c) companies should be encouraged to provide witnesses who are being interviewed as company employees with full support including corporate legal representation at interviews;

(d) corporate manslaughter and health and safety offences should not be tried at the same time (ATO members believe that health and safety offences should be tried after conclusion of any corporate manslaughter trials); and

(e) the inter-relationship of penalties imposed for separate offences but for the same underlying facts should be specifically set out.

12 Recommendation 83.
13 In practice, as any fatal event will usually trigger an HSWA investigation also, this will presumably have been done where needed much earlier than trial.
2.41 Where a corporate manslaughter investigation is undertaken it should be swift and efficient. By definition the “the very worst cases of management failure” should be relatively readily apparent. Some corporate manslaughter investigations have extended—often inconclusively—over a long period of years. This is unsatisfactory for all involved—victims, state funders and potential defendants.

2.42 ATOC Members strongly support the conclusion of paragraph 60 that private prosecutions should require the consent of the DPP before being initiated. The earlier proposal to the contrary would have had the potential to cause significant injustice.

Regulatory Impact Assessment

2.43 In principle the offence should not add to cost significantly for those organisations that are managing safety appropriately. However there is the potential for very significant additional (but avoidable) cost if the relationship between enforcement and prosecution of the new offence and HSWA offences are not aligned.

2.44 We refer to our comments at Paragraph 2.38 above and to Section 3 below which deals with the wider dependencies. There is a need for clarity on the issues set out at paragraph 3.12 below. If Corporate Manslaughter is progressed in isolation of those wider factors then the potential for additional indirect cost is very significant. That aspect is not addressed by the Regulatory Impact Assessment.

Corporate Manslaughter Bill—Drafting

2.45 ATOC Members comment below on the drafting of the Bill:

<table>
<thead>
<tr>
<th>Clause No</th>
<th>Clause Content</th>
<th>ATOC Member’s comment</th>
<th>Suggestion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>The Offence</td>
<td>No comments on the drafting</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Definition of Senior Manager</td>
<td>The definition is likely to lead to contested applications in specific cases depending upon the facts if middle ranking members of management are charged. For example a manager in charge of a single but a substantial facility. The prosecution of middle management in connection with corporate manslaughter charges has become more prevalent in recent years. The analysis within the Consultation Paper is endorsed however. It is not possible to anticipate and define every combination of circumstances in the definition. This will be a matter to be refined by case law. It is submitted, however, that it needs to be made clear whether the question is any issue of law to be decided by the Trial Judge or an issue of fact for the jury. The former is supported.</td>
<td>Add additional wording to confirm that the question is a matter of law for the Trial Judge.</td>
</tr>
<tr>
<td>3.</td>
<td>Definition of Gross Breach</td>
<td>The approach of having a series of statutory criteria against which conduct can be judged as a question of fact by the jury is endorsed. However, as currently drafted clause 3(2) would cause significant difficulties. It is not clear as to whether all of the limbs of clause 3(2) must be satisfied or only some of them or none of them in particular circumstances. This does require clarification.</td>
<td>Suggest redraft clause 3(2) to make it clear that the jury must conclude that the failure to comply was fundamental and serious and that the conditions contained in both clause 3(2)(b)(i) and (ii) were both made out.</td>
</tr>
<tr>
<td>Clause No</td>
<td>Clause Content</td>
<td>ATOC Member’s comment</td>
<td>Suggestion</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------</td>
<td>-----------------------</td>
<td>------------</td>
</tr>
<tr>
<td>3</td>
<td>In addition the question within clause 3(2)(a) “how serious” is an open question. It should be made clear that it is an essential requirement that the failure to comply was serious.</td>
<td></td>
<td>Suggest that the requirement within clause 3(2)(b)(iii) should be a matter which could be taken into account but which need not be present in deciding whether conduct falls far below that which could be reasonably expected. It is difficult, for example, to see its applicability to a not for profit or public authority.</td>
</tr>
<tr>
<td>4</td>
<td>Relevant duty of care</td>
<td>Under the present safety system organisations other than public authorities (in particular utilities) are required on occasions to take public policy decisions, including the allocation of public resources or the weighing of competing public interest. Those are not decisions that are confined to the public sector. For example, decisions by infrastructure managers on the use of level crossings involve a strong public policy element (the operation of the national transport system).</td>
<td>Delete the words “that is a public authority” from the drafting of this section.</td>
</tr>
<tr>
<td>5</td>
<td>Corporation</td>
<td>Please see comments at Paragraphs 2.22 and 2.23 above.</td>
<td>More analysis is needed of potential impacts (for example upon inward investment). If pursued the extension to holding companies should be accompanied by clear enforcement and prosecution guidelines. Otherwise the criminal law may in practice undermine the principle of corporate identity.</td>
</tr>
<tr>
<td>6</td>
<td>Power to order breach etc to be remedied</td>
<td>Judges are not experts in safety management systems or particular industries, nor would it be appropriate to ask them to rule on societal issues that may have far reaching effect.</td>
<td>Consideration should be given to alternative mechanisms by which remediation could be achieved, for example by giving the Judge the ability to refer certain matters to the safety regulator designated under the HSWA to consider if improvement or prohibition notices should be served. If the ability of the Court to make an order is retained then both a clear appeal mechanism and clear sentencing guidelines in relation to the intended scope and use of remediation orders are essential.</td>
</tr>
<tr>
<td>7</td>
<td>Application to Crown Bodies</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Criminal procedure</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Transfer of functions</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Armed forces</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Crown application</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>Clause No</td>
<td>Clause Content</td>
<td>ATOC Member’s comment</td>
<td>Suggestion</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------</td>
<td>-----------------------</td>
<td>------------</td>
</tr>
<tr>
<td>12.</td>
<td>Borders</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>Abolition of liability of corporations for manslaughter of common law</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>14.</td>
<td>Consequential amendments</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>Commencement and savings</td>
<td>No comments</td>
<td></td>
</tr>
<tr>
<td>16.</td>
<td>Extent and territorial application</td>
<td>For the reasons set out above ATOC Members believe that it would create difficulty and inconsistency if different regimes apply in Scotland as opposed to England and Wales given that (for example) transport operations are conducted on a cross border basis.</td>
<td></td>
</tr>
</tbody>
</table>

3. **Submissions on the Wider Policy Context**

**Safety Improvements on the Railway**

3.1 Britain’s railway is safer than it has ever been. Its safety compares well both with other European railways and other modes of transport. ATOC members believe that the new offences should form part of the framework under which this improvement will continue and must complement rather than detract from current safety law.

3.2 ATOC members are keen to ensure that current improvements in the standards of safety are continued and welcome the new offences as an additional tool to achieve this aim. However, ATOC members are also conscious of the societal benefit from the efficient and practical operation of rail services. As such developments in safety and company law should be seen in a wider public and policy context.

**Reason for Inclusion**

3.3 ATOC Members believe that risk aversion has increased in the UK over recent years and that:

(a) this is a direct result (in part) of the profile and temperature of the debate concerning criminal liability for safety offences;¹⁴

(b) the risk aversion produces distortions in decision making both within private companies and public authorities; and

(c) it produces perverse effects which are not helpful either to the national interest, to society or to individuals within society.

3.4 These comments are made based upon the direct experience of the responding companies and also external evidence. Risk aversion is a difficult concept to capture but two recent reports in January 2005 have provided evidence of it.

3.5 The Department for Transport has recently published a study on “Risk Aversion in the UK Rail Industry” by Arthur D Little. Its conclusion is that:

“There is a pervasive and self-sustaining culture of risk averse or over cautious behaviour in the UK rail industry which increases cost and reduces performance. It has arisen from and been reinforced by the magnitude of the criticism brought on the industry following the series of major accidents at Southall, Ladbroke Grove, Hatfield and Potters Bar, including recent and pending prosecutions”

---

¹⁴ It is also partly a factor of the perception (well founded or otherwise) of an increase in the numbers and types of civil claims about which a separate debate is ongoing. That issue is outside the scope of this response.
3.6 This is not though a concern limited to rail. It affects many other aspects of public policy and public safety. In reporting on Education Outside the Classroom, the House of Commons Education and Skills Committee reflected that:

“Many of the organisations and individuals who submitted evidence to our inquiry cited the fear of accidents and the possibility of litigation as one of the main reasons for the decline in school trips. It is the view of this Committee that this fear is entirely out of proportion to the real risks.”

3.7 A D Little summarise risk aversion as:

“a shift in the balance of judgement in safety related decisions towards an overly cautious position . . . evidenced by the adoption of more expensive technological solutions, or by the introduction of measures that curtail . . . operation . . . in circumstances that previously would have been regarded as making them unnecessary”.

3.8 They identify the consequences of fearing the “wrong” decision—over-elaborate analysis, multiplying the numbers of people involved in decisions or reluctance to make a decision at all”. The report gives a number of examples.

3.9 Applied across all industries risk aversion affects spending at a macro-economic level. If risk aversion can be addressed at its cause therefore the resulting resources released could support new infrastructure and optimise existing capacity more effectively. Society would benefit. Safety would not however be affected as risk aversion is not about increasing safety but about a trend toward doing things less efficiently.

3.10 Risk aversion can also act to the detriment of safety—for example by causing modal shift between different forms of activity.

3.11 As the Select Committee report on education shows, however, this is not just about the best use of national investment. If schoolchildren are denied out of school activities education overall is diminished and the ability of individuals themselves to identify risk is removed. The concern is that future generations will become progressively more risk averse.

3.12 However, it is obviously the case that organisations and individuals that unreasonably risk the safety of others should be accountable.

3.13 The issue therefore is how the law can:

(a) provide appropriate protection from physical harm;
(b) identify and punish unsafe behaviour;
(c) whilst, at the same time, avoid discouraging innovation, the benefits of responsible risk taking and sensible judgement calls (including some that will turn out to be wrong)?

3.14 It is submitted that the issue has three main elements:

(a) the need for clarity (both in the content of the law and the perception of it) in defining the categories of failings by organisations that deserve punishment?
(b) the need for clarity (both in the content of the law and the perception of it) in defining the categories of failings by individuals that deserve punishment?
(c) Whether the UK legal framework is suitable for all decisions that involve public safety and public policy issues?

3.15 In summary the position of ATOC Members on those issues is that:

**Liability of Organisations**

(a) the linkage of the issues of corporate liability and director liability within the wider manslaughter debate has created significant confusion;
(b) the Corporate Manslaughter Bill has the potential (if enacted) to help clarify the position significantly in relation to organisations as it properly focuses upon the liability of organisations; and
(c) clear guidance is needed on the way in practice HSWA and corporate manslaughter offences are prosecuted when both are in contemplation.

**Liability of Individuals**

(d) individuals are however confused about their own liability position as the law imposes two separate and very different test of wrongdoing. The test under the HSWA s37 covers simple negligence (as well as “consent or connivance”). Negligence can catch a single error or judgment call made in good faith that proves with hindsight to be wrong. In contrast manslaughter requires gross negligence to be proven;
(e) all agree that culpable behaviour should be punished. For organisations culpability is relatively easy to identify—a system failure. However, the question as to where the bar should be set for an individual has not been clearly debated:

(i) If it is set too low it will punish “normal” human error and risk aversion increases;

(ii) If it is set too high those who are genuinely careless of the safety of others will unjustifiably go unpunished;

(f) There is an argument therefore that a clearer and more readily understood standard is needed for individuals somewhere between these two levels that would leave an understandable error or valid judgement call unpunished but would punish persistent poor behaviour, disregard for safety or true incompetence.

(g) That is not, however, currently the law. It may (or may not) reflect current enforcement practice given the relatively limited numbers of individual prosecutions. However, enforcement practice is unpredictable and may always be susceptible to the need to be seen to act in a particular case.

(h) Wherever the bar is set, there is a need for individuals carrying out (often difficult or challenging) activities to understand clearly the test by which their behaviour will be judged. In addition enforcement must be consistent and avoid analysis by hindsight. That does not always happen.

The Legal Framework for Safety Decisions

(i) The legal framework for safety decisions is based upon the HSWA, old 1949 case law and the policy guidance developed by the Heath and Safety Commission based upon that. That framework was intended primarily to improve workplace safety. Whilst it extended to protecting the public against risks from workplace activity, it was never intended as a framework for delicate decisions of public policy. Those who originally created the HSWA regime clearly stated that it should not be used in that way but it has come to be so.

(j) The HSWA is based upon the principle of reasonable practicability. That principle requires every measure to be implemented unless its cost is “grossly disproportionate”. The obvious consequence is that the law currently does require measures that are disproportionate (providing they are not “grossly” so). The HSWA also imposes a reverse criminal burden of proof. An organisation is literally guilty unless it can prove innocence.

(k) The logic is clear when looking at a workplace safety issue within a closed environment but less so when looking at public policy decisions. Should the law require measures that are disproportionate when evaluating delicate decisions on public policy? The logic of the exclusion of such matters from the scope of the Corporate Manslaughter Bill is that it should not.

(l) In addition the HSWA has no policy dimension mechanism to evaluate differently decisions concerning those who are careless or reckless as to their own safety. The duty holder (including individual employees conscious that they may be tested by the full rigour of the criminal law against a standard of negligence) must regard the innocent and the willfully reckless in the same way.

3.16 On this last point the ruling of Mr Justice Burnton of 26 April 2005 is welcomed. In looking at the issue as to whether swimmers seeking to use an unsupervised natural pool exposed the owner of the pool to prosecution under the HSWA the Judge concluded that:

“Any risk created by members of the Club swimming in the Pond would be the result of their deciding to do so with full knowledge of the risks involved. Their exposure to such risks would not have been caused by the conduct of the Corporation’s undertaking, but by their own action” and:

“In my judgment, for the purposes of section 3 of the 1974 Act, if an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, the risks he incurs are the result of his decision and not of the permission given to him to swim. And it follows that those risks are not the result of the conduct by the employer of his undertaking, and the employer is not liable to be convicted of an offence under that provision.”

3.17 This echoed the conclusions of the House of Lords in 2003 in dealing with civil liability in Tomlinson v Congleton Borough Council:

“It is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. ‘They [the arguments for the claimant] attack the
liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.’ [Tomlinson v Congleton 2003].

3.18 However, the position is still unclear with respect to other categories of voluntary risk taking. For example:

(a) HWSA prosecutions or enforcement action have been brought (and have succeeded) in many cases where the injured party has been engaged in serious and deliberate misconduct;¹⁵

(b) the position of minors obviously remains a sensitive and challenging issue; and

(c) it is uncertain as to whether the Tomlinson v Congleton/Hampstead Heath ruling is confined to voluntary recreational activities by adults or goes further—particularly in respect of voluntary or unsafe conduct by employees or members of the public whilst commercial activities are taking place.

3.19 The issues are not straightforward. However, ATOC Members submit that—whatever decisions are ultimately taken—public policy should shape the law in this area.

3.20 Currently the converse is true. The law (specifically the 1949 case of Edwards v the National Coal Board) dictates and shapes public policy. When, 56 years ago, a Judge ruled, in a case dealing with pit props, that employers must make:

“a computation in which the quantum of risk . . . [is] placed in one scale and the sacrifice . . . involved in measures necessary to avert the risk (whether in money, time or trouble) [is] placed in the other, and if there [is] a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the [employer] discharge[s] the onus which is on him.”

he would not have anticipated that his words would shape issues of societal behaviour and the treatment of public policy in the 21st Century. Yet that has happened.

Conclusion

3.21 The practical effect of these three related issues can be illustrated by a hypothetical example:

A road haulier runs a goods yard that is used on a 24 hour basis with heavy trucks moving in and out on a regular basis. It is well run.

It is on private land and not open to members of the public. However, some members of the public (both adults and teenagers) use a cut-through the site for convenience. Fences are erected but are vandalised to allow access even to the extent that when heavy-duty fences have been erected bolt cutters and tools have been used to reopen access.

In the dark in particular this creates a limited but nonetheless conceivable risk of those using the cut-through being run over. There have been one or two close calls and one minor injury. The only further practicable option available to limit this risk is to install lighting at an installation cost of £125,000 and an annual running and maintenance cost of £3,000. There is however, no need to do this in connection with the operation of the business itself.

The decision falls to the site manager. He knows that the business runs on tight margins in a competitive industry and the cost will represent a significant amount of the operating profit for the year and if he spends that money he will have to freeze recruitment and lay off two employees. As the site is only marginally profitable it may even be that the site will close.

What decision should the law require that manager to make?

This is the type of dilemma that faces individuals across many areas of activity—business and non-business.

3.22 For these reasons ATOC Members believe that it is appropriate and constructive—indeed essential—for a reasoned debate to take place on these wider issues.

¹⁵ For example in one case two teenage boys removed the chocks and handbrake from a water bowser being used to supply emergency drinking water and rolled it down a hill. One of the boys was injured in the process. The chocking and handbraking was in accordance with published HSE guidelines. The water company’s contractor was prosecuted by HSE and fined £10K plus £18K costs on the basis that it was not grossly disproportionate to have wheel-clamped every piece of mobile plant in use. In other cases rail companies have been fined in relation to fencing issues where trespassers vandalised fencing to enter rail goods yard to play “chicken” with trains. [In many cases safety regulatory pressure has required the fitting of window bars to every window of (old and shortly to be retired) rolling stock at material cost. The issue is the protection of those not following instructions not to put their head out of the window.]
### APPENDIX 1

<table>
<thead>
<tr>
<th>TOC Owner Group</th>
<th>TOC Duty Holder</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARRIVA</td>
<td>Arriva Trains Wales</td>
</tr>
<tr>
<td>First Group</td>
<td>First Great Western</td>
</tr>
<tr>
<td></td>
<td>First Great Western Link</td>
</tr>
<tr>
<td></td>
<td>First ScotRail</td>
</tr>
<tr>
<td></td>
<td>Hull Trains</td>
</tr>
<tr>
<td></td>
<td>Transpennine Express GB Rail Freight</td>
</tr>
<tr>
<td>Go Ahead Group</td>
<td>South Central Ltd</td>
</tr>
<tr>
<td></td>
<td>Thameslink Rail Ltd</td>
</tr>
<tr>
<td>Laing Rail</td>
<td>Chiltern Railways</td>
</tr>
<tr>
<td>London &amp; Continental Railways Ltd</td>
<td>Eurostar (UK) Ltd</td>
</tr>
<tr>
<td>National Express Group</td>
<td>Central Trains</td>
</tr>
<tr>
<td></td>
<td>Gatwick Express</td>
</tr>
<tr>
<td></td>
<td>London Lines—c2c</td>
</tr>
<tr>
<td></td>
<td>London Lines—Silverlink</td>
</tr>
<tr>
<td></td>
<td>London Lines—WAGN</td>
</tr>
<tr>
<td></td>
<td>Midland Main Line (MML)</td>
</tr>
<tr>
<td></td>
<td>One Railway</td>
</tr>
<tr>
<td></td>
<td>Wessex Trains</td>
</tr>
<tr>
<td>Sea Containers Limited</td>
<td>Great North Eastern Railway Ltd (GNER)</td>
</tr>
<tr>
<td>Serco/Ned Rail</td>
<td>Merseyrail</td>
</tr>
<tr>
<td></td>
<td>Northern</td>
</tr>
<tr>
<td>Stagecoach</td>
<td>South West Trains Ltd</td>
</tr>
<tr>
<td></td>
<td>Island Line</td>
</tr>
<tr>
<td>Strategic Rail Authority</td>
<td>South Eastern Trains</td>
</tr>
<tr>
<td>Virgin Trains</td>
<td>Virgin Cross Country</td>
</tr>
<tr>
<td></td>
<td>Virgin West Coast</td>
</tr>
</tbody>
</table>

---

**46. Memorandum submitted by CMS Cameron McKenna**

CMS Cameron McKenna LLP is an international law firm headquartered in London, ranked in the top 10 in Europe. We advise businesses, financial institutions, governments and public sector bodies. The firm has a leading reputation in the UK in the area of health and safety law and has been involved in several major public inquiries and many fatal accident prosecutions.

**The Need for Reform**

1. This proposed legislation is premised on there being widespread public concern at the lack of successful prosecutions of large companies, and there being strong support for reform in previous consultations. Both of these justifications should be looked at critically to ensure that new statutory offence targets valid concerns in the most effective manner.

2. It is unclear how the public concern has been measured, or that it is voiced by many truly representative groups. Our own survey, involving clients and contacts of the firm\(^\text{16}\) gathered individual opinions on the Bill (as opposed to the “official” positions of their companies). It points to some support for reform in principle with 49.2% versus 40.1% of respondents considering that the Bill will promote better health and safety performance by companies. But 43.8% versus 39.7% felt that it did not provide a workable standard that distinguished serious cases from cases which should be dealt with as health and safety offences, and considerably more (71.6% versus 20%) believed it could have a negative impact in terms of encouraging risk averse behaviour and bureaucratic systems in businesses. It was the avowed intention of the government in this reform not to create a risk averse culture or stifle entrepreneurial activity\(^\text{17}\).

---

\(^\text{16}\) See Appendix 2.

\(^\text{17}\) Rt Hon Charles Clarke MP, Foreword to the Consultation Document.
3. Of the 150 formal responses to the Government’s previous consultation in 2000, the majority apparently favoured the principle of the Bill. If it was simply “ballot” counting that was relied on to reach this conclusion we would question the approach to a consultation like this. Although there are exceptions, businesses on the whole do not take a public stance on this issue and prefer instead to channel their formal positions through their trade associations or bodies such as the CBI. It is understandable that there will be many more submissions from diverse sources including trade unions, pressure groups and concerned individuals, expressing their own opinions. If our survey is anything to go by individual opinion is rather more cautious about reform than appears from counting the formal responses to consultations.

4. There can be no doubt that the common law offence of involuntary manslaughter has developed in a way that would now benefit from the clarity of codification. However, the proponents of a new corporate manslaughter offence appear to overlook the fact that the problematic doctrine of identification is not unique to manslaughter law and is of general application to other criminal offences involving corporations. It is unsatisfactory that corporate manslaughter should be subject of piecemeal reform.

5. Whatever the merits or demerits of the identification theory it does at least serve the useful function of balancing the very unspecific and circular nature of the test of gross negligence as set out in R v Adomoko. It probably does operate too restrictively and needs modification, but the linking of the current offence with a “directing mind” does mean that it homes in on the most fundamental management failures and at the highest level of a company. The acid test for successful reform of the law is whether it maintains this focus on failure at the core of safety management.

6. The proposed Bill seeks to retain a “senior management” element of the offence and that is welcome, but is not yet sufficiently clear or certain in its application to the potentially very wide range of management structures that are encountered in modern business. It will—as the Consultation Document frankly acknowledges—apply quite differently to large and small organisations, and that is an undesirable feature of the existing law. Coupled with the failure to eliminate elements of circularity in the test of “gross negligence” we suggest that the Bill is missing an important opportunity to introduce more clarity into the offence of corporate manslaughter.

7. There also seems to be an assumption underlying the campaigns for reform that the UK has a poor record in terms of fatal accidents due to the conduct of companies. As can be seen from figure 1, work related fatal accidents have been in steady decline, although regretfully there has been a levelling out in improvement in recent years and achieving further improvements presents a major challenge. It is far from clear that the Revitalising Health and Safety programme (already struggling to achieve its targets) will be assisted by a Bill which does not have the widespread support of business.

8. In contrast with the rest of Europe, the UK has notably low incidents of fatal accidents among the workforce. This is demonstrated by data accumulated by EuroStat shown in figure 2. (The UK rate is also better than that of the US)\(^{19}\).

---

\(^{18}\) Summary of Responses to the Consultation Paper on Corporate Manslaughter, Home Office.

\(^{19}\) Statistics of workplace fatalities and injuries in Great Britain—International Comparisons 2000 (HSE).
Figure 2: Standardised* Incidence Rate of Fatal Injuries at Work in 2000 for Great Britain and EU Member States

Source: Eurostat E3/ESAW

9. We would hope to see, as part of the evaluation of the reform, a fuller examination of how differences in enforcement approach, corporate and personal liabilities impact on the performance of different countries. For instance, France has corporate homicide prosecutions (as well as individual prosecutions) for work related deaths, yet it has double the UK’s fatal accident incidence rate. What are the implications of this?

THE PURPOSE OF AN OFFENCE

10. Much of the discussion of these proposals, including contributions by a number of influential players,\(^{20}\) asserts boldly that there will be a deterrent effect from increased use of corporate manslaughter against organisations which fail to meet proper standards. Again, the assumption needs to be questioned.

11. There is a notable dearth of evidence supporting the deterrent effect in individual offending generally, and in the health and safety sphere for companies in particular\(^{21}\). We question whether deterrence can operate at all at the level of inadvertence and unconscious risk taking which is the typical characteristic of workplace accidents. Claims about deterrent effect beg serious questions about the individual and collective behaviour of individuals in large organisations. There seems to be a confusion here with the issue of pursuing “compliance” strategies, which are conceptually quite distinct from deterrence and form part of complex regulatory structures (like that of the HSWA). Even more questionable is how there can be a “marginal deterrent” effect from an offence which carries the same unlimited maximum fine as a serious health and safety offence\(^{22}\). Certainly no evidence has been put forward to help understand how such an effect would work, or what other (less desirable) consequences might also arise.

12. Our survey indicated that a large majority felt that the Bill could encourage risk averse behaviour and bureaucratic systems. We suggest that there is a potential—but not well-understood—behavioural impact (distinct from deterrence) that could come into play if corporate manslaughter offences are more widely used. It was certainly perceived by survey respondents that there could be a more negative effect than the RIA which has been carried out in connection with the Bill might suggest.

13. The government should consider the opportunity to look more deeply into the issues of efficacy of compliance strategies, and specifically the range of potential sentencing powers in cases involving companies. It is well recognised that with large companies very substantial fines which are proportionate to their size and profitability affect mainly shareholders who will very often be unconnected with the running of the business, or small investors indirectly linked through pensions and insurance funds. With smaller companies the impact of a significant penalty can be very damaging to the business and employees. The time is right for a more imaginative look at sentencing powers which, we suggest, would have a much more important and beneficial impact than this Bill which is (according to the RIA) only aimed at approximately five additional offences per year.

\(^{20}\) “Our strong support is based on the fact that we consider it will increase the deterrent effect already offered by the existing health and safety penalties” (Bill Callaghan, HSC Chairman). See also paragraph 6 of the Consultation Document.

\(^{21}\) HSE research report 135 entitled “Health and Safety Responsibilities of Company Directors and Management Board Members” (2003) discusses factors influencing board decision-making. This does not discuss the deterrent effect of prosecutions for corporate manslaughter specifically. It ranks “fear of prosecution” by a prosecution generally only seventh in the list of factors found to influence the way in which companies structure their boards.

\(^{22}\) See generally on deterrence theory Andrew Ashworth “Sentencing and Criminal Justice” (Butterworths, 2000). “Thus, all the indications are that it is naive to assume the kind of hydraulic relationship between court sentences and criminal behaviour that some find intuitively appealing”.
14. Another potentially adverse consequence of the Bill is the prospect that managers in industries with higher risks inherent in their operations could be put off from accepting positions of responsibility, particularly ones involving health and safety accountability. Any such effect is extremely hard to measure, but a slight majority of our survey respondents (42.1% versus 41.5%) felt that some industries could struggle to attract top level managerial talent in the face of corporate manslaughter prosecutions. It was felt that construction, oil and gas and manufacturing could be particularly affected. If this is representative of more widely held views in industry, it suggests that those sectors which undeniably need the greatest injection of commitment to health and safety from talented individuals at the highest levels could be disproportionately affected by the impact of more prosecutions.

GROSS BREACH

15. Our survey indicated some dissatisfaction with gross breach of duty as the test for liability. 47% versus 43.3% favoured instead an offence based on failure to address risks which were or should have been obvious to the defendant. This is a formulation that Law Commission in 1996 recommended for an individual offence of “reckless killing” and it is perhaps unsurprising that most people intuitively seemed to favour a formulation that imports notions of reckless disregard for the safety of others for the corporate offence.

16. The “gross breach” requirements in the Bill would continue to be a circular test of liability, albeit less obviously so than the R v Adomako formulation. Almost by definition conduct causing death could be said to be conduct which “falls far below what can be reasonably expected” if one judges it by reference to consequences. There is nothing to prevent the jury from drawing such an inference, particularly when under Clause 3 (2) the jury would not be bound to consider any particular standard or benchmark in reaching its conclusions.23

APPLICATION OF THE OFFENCE

17. Our survey indicated overwhelming support from respondents (97.2%) for public bodies to be accountable in the courts in the same way as the private sector. We do not think that the argument made in the Consultation Document (to the effect that the Crown and other public bodies should be primarily accountable through parliament and other non-judicial processes) is in tune with public opinion, nor is it consistent with the jurisprudential approach taken in the Bill that liability for the offence would be rooted in duties of care in negligence. Under the civil law the courts have regularly had to address the question of whether public bodies have a duty of care (or perhaps more precisely whether the duty of care should be circumscribed by public policy considerations) and there is no reason in principle why any public body should be in a different position when it comes to consideration of its duties in terms of the offence of corporate manslaughter24.

18. We recognise the considerable difficulties of applying a new law of corporate manslaughter to non-corporate organisations. However, in principle we believe any new offence should apply broadly to “undertakings” so that they can be prosecuted in the capacity of the undertaking (rather than proceedings being brought against their individual members or partners who might have no personal connection with the breach of duty).

DIRECTORS OFFENCES ETC

19. We strongly support that Government’s decisions not to pursue its earlier proposals for ancillary offences against directors, managers and related corporate entities of defendant company. As regards the individual offences, nothing could be more calculated to undermine efforts of the HSC and others to gain recognition of health and safety as an important issue and support from individual managers (particularly managers at the most senior levels) for closer involvement in health and safety matters. Further, any form of ancillary offence which enabled an individual (or related company) to be convicted without having themselves being proved guilty of a gross breach of duty causing death (or whatever else the main offence consists of) would be manifestly unfair and would raise serious issues under human rights legislation.

23 “Such circular reasoning as unsatisfactory and effectively constitutes an open invitation to the jury to find the defendant guilty where their gut reaction is that the defendant is guilty”. Grahan Vergo “Reconstructing Manslaughter on Defective Foundations” [1995] CLJ 14.

24 See Thames Trains Limited v Health and Safety Executive [2002] EWJC 1415 (QB), 23.07.02. The High Court refused to strike out a claim made by Thames Trains over the HSE’s alleged responsibility for the 1999 Ladbroke Grove train disaster. The judge held that it was arguable that the HSE owed either a direct duty under health and safety legislation or the common law to victims of the disaster. This case usefully also considered the state of the law relating to other public bodies such as the police and ambulance services.
INVESTIGATION OF A PROSECUTION

20. We support the position that the offence should be primarily the responsibility of the police and the CPS. We would share the many concerns already expressed if there were not a requirement for proceedings to require the consent of the DPP before being instituted.

UK PERSPECTIVE

21. It is regrettable that there is a separate process underway to review the law in Scotland. The Scottish law of culpable homicide for companies is already different to that of England and Wales. The Government should endeavour to promote a consistent UK-wide reform.

INTERPRETATIONS POINTS

22. Please see Appendix 1 for some more detailed observations on the wording of the Bill.

17 June 2005

APPENDIX 1

INTERPRETATION ISSUES WITH THE DRAFT BILL

1. On the face of it the prosecution would have to prove that a person’s death had been caused by the “way in which the organisation’s activities were managed or organised...”. However, in situations where there is any duty of care owed to the deceased, when the defendant has caused the death it will usually be self-evident that this has not been prevented by the defendant’s management or organisation. H&S prosecutions are routinely brought on this basis.

2. The wording of the offence in the Bill is not apt to deal with what are, in virtually all work related fatality cases, acts of omission rather than commission. It too readily enables prosecutors to allege measures which, with hindsight, could have been prevented the circumstances of the accident arising, which then would force defendants to rebut these allegations. The Bill, we suggest, needs to be re-cast in terms that reflect public opprobrium for omissions to address and control serious risks which should have been obvious, and not simply omissions which fall within the scope of the civil law of negligence.

3. We consider that it is helpful that the offence would be linked to failures at senior management level, and that this would not necessarily showing an individual was at fault. However, it is apparent from the detailed explanation of the provision in the Consultation Document25 that this is potentially a very difficult test to apply in practice. It is also likely to require very substantial judicial elaboration in the direction of juries which is most unsatisfactory in an offence of this gravity. Judging from the explanation in paragraph 30 of the Consultation Document an offence structured in this way would continue to have an impact predominately on the smaller companies. The wording should be clearer that the offence concerns only failures by those who are the principal decision-makers for a corporation.26

4. Clause 3(2)(a) seems to merely re-state the issue of grossness. It is also unsatisfactory that the jury are not required to give any weight to the absence of the factors in Clause 3(2)(b)—they could apparently choose to disregard such absence and still be entitled to convict.

5. Clause 3(2) also focuses too exclusively on HSWA criteria, when the “relevant duty of care” extends widely into other areas such as product safety and transport.

6. References to “HSE guidance” in Clause 3 are unfortunate: the HSE is required to state in its guidance that it does not have the force of law27, and juries should not be confused into thinking that it somehow does have that status.

---

26 This would correlate with the personal liability principles for directors under Section 37 JSWA. See also R v Bowl [1996] QB 591 on the level of management seniority involved.
27 The standard HSE wording on guidance is required to be “This guidance is issued by the Health and Safety Commission. Following the guidance is not compulsory and you are free to take other action. But if you do follow the guidance you will normally be doing enough to comply with the law...”
APPENDIX 2

**Survey Conducted by Email between 19 May–15 June 2005. 320 Respondents Completed a Web-based Questionnaire.**

Do you believe this is a workable standard that will clearly differentiate criminal cases of the utmost seriousness from cases which should be prosecuted as offences under health and safety legislation?

![Pie chart showing responses to the question](image)

What do you consider to be the most appropriate basis for definition of liability for a corporate manslaughter offence?

![Pie chart showing responses to the question](image)
Do you believe the proposed new offence of Corporate Manslaughter will promote better health and safety performance by companies?

- Yes: 49.2%
- No: 40.1%
- Don't Know: 10.7%

Do you believe the proposed new offence could encourage risk averse behaviour and bureaucratic systems?

- Yes: 71.6%
- No: 20%
- Don't Know: 8.4%
Will those top industries which are traditionally exposed to health and safety issues struggle to attract top-level managerial talent in the face of corporate manslaughter prosecutions?

If so, which industries do you think would be most vulnerable to missing out on staff?
Should the public sector be accountable in the courts for manslaughter offences in the same way as the private sector?

- 1.3%
- 1.6%
- 97.2%

1. Memorandum submitted by the Lord Chief Justice, Lord Woolf

1. This letter presents an analysis of the technical aspects of the draft Corporate Manslaughter Bill; it does not represent my personal views on the policy considerations that lie behind the Government’s legislative proposals.

2. The present proposals follow (with some amendments) a Home Office consultation paper in 2000; they are based on part of the Law Commission’s report *Legislating the Criminal Code: Involuntary Manslaughter*, published in March 1996, which in turn was preceded by the Commission’s Consultation Paper no. 135. It is 15 years since the acquittal on the direction of Turner J in the *Herald of Free Enterprise* case (*R v P&O European Ferries (Dover) Limited* (1990) 93 Cr App Rep 72) gave impetus to the calls for reform.

3. Perhaps the most obvious anomaly in the present law is that it is easier (or at least somewhat easier) to convict the sole proprietor of a one-man business than the directors or senior managers of a major corporation with unlimited resources. As Silber J, the principal author of the Law Commission report, has pointed out, that does not meet the aim of the criminal justice system to treat wrongdoers equally. The proposals for reform would go some way to removing the anomaly.

4. Clause 1, which creates the new offence, broadly follows clause 4 of the Law Commission Bill except for the concept of “senior managers” (see the discussion of clause 2 below), and for the requirement of the Director of Public Prosecution’s consent to the bringing of a prosecution which is in my view justified. The definition requires the way in which any of the organisation’s activities are managed or organised by its “seniormanagers” to cause the death and to amount to a “gross breach” of a “relevant duty of care”.

5. “Senior manager” is defined by clause 2 as someone who “plays a significant role in the making of decisions about how the whole or a substantial part of [the organisation’s] activities are to be managed or organised, or [in] the actual managing or organising of the whole or a substantial part of those activities”. This is a rather more detailed and slightly more restrictive definition than that of the Law Commission bill, which used the term “management failure”, defined as being where the way in which the corporation’s affairs were managed or organised failed to ensure persons’ health and safety and caused death. But the greater degree of definition is desirable in order to assist judges in framing questions for the jury to consider.

6. However, there may be some difficulty created by the word “substantial”, in the phrase “substantial part of its activities”. Is it different from “significant” (as in the phrase “plays a significant role”)? Does it mean major, or only “more than trivial”? It may be thought inappropriate for judges to offer further definitions of their own when summing up if the word is incapable of further definition in the statute; but if they do not, it will be left to each jury to define them themselves. Unlike the issue of whether conduct falls far below the standard to be expected, which is a jury question under the present law of gross negligence manslaughter (see *R v Adomako* [1985] 1 AC 171) and would remain so under the current proposals, the question of whether a business unit represents a substantial part of the organisation’s activities does not involve a value judgment, and the answer should not vary from case to case in respect of broadly similar organisations. I cannot offer a definition myself, but this phrase warrants further scrutiny.
7. Clause 3 defines what is a “gross breach” of the duty of care. The basic test, as in clause 4(1)(b) of the Law Commission draft bill, is whether the conduct falls far below the standard to be expected. Clause 4(2) requires the jury to have regard to failures to comply with health and safety legislation or guidance demonstrated by the evidence; how serious they were; and whether or not senior managers knew or ought to have known of the failures, were aware or ought to have been aware of the consequent risk of death or serious harm, or sought to cause the organisation to profit from the failure. This is a welcome and imaginative piece of drafting.

8. I note that under the present proposals individual liability to prosecution for all existing offences (but not the new one of corporate manslaughter) will remain; and that health and safety legislation imposes quite wide liability on directors and managers who are guilty of connivance or neglect where health and safety legislation has been infringed. Whether liability to disqualification might or should be widened in such circumstances is a matter for legitimate debate. But in rejecting the creation of new imprisonable offences in this area it is understandable that the Government seek to move forward with a broad consensus and along the lines proposed by the Law Commission. Beyond that it is not for a judge to comment.

9. Clause 6 provides for remedial orders. It may be desirable for specific rules of court to lay down the procedure to be followed, which will occur after a plea of guilty or conviction by the jury: in the former case the issues will not have been ventilated in evidence, in the latter case they may or may not have been. The defendant should have the opportunity to introduce evidence as to what has already been done and what further steps are practicable, and the Crown should be able to test that evidence and itself call evidence on issues of practicability.

10. Failure to comply with a remedial order is made an offence by clause 6(4), punishable by a fine whether on indictment or summary conviction. It is rather surprising that such a failure should not be treated (or at least be capable of being treated) as a contempt of court. That would enable individuals who caused the failure to comply, even after the original fatal accident has highlighted the problem, to be liable to imprisonment in certain circumstances. It would also enable the matter to be brought back before the same judge who imposed the original order. A smaller point is that, if the sanction is to be a fresh prosecution rather than contempt proceedings, it is odd that the offence of failure to comply with a remedial order made by the Crown Court in a case of corporate manslaughter should be triable either way. It should surely return to the Crown Court, not be dealt with by the magistrates’ courts.

11. Clauses 7 and 8 refer to a Schedule of Government departments and similar bodies. The list in the Schedule seems remarkably short. On the face of it the suggestion in the main text that more work needs to be done on this list is justified.

12. I hope my comments are of use to you.

6 June 2005

48. Memorandum submitted by the British Ports Association

We support measures which are intended to improve levels of safety and indeed, the ports industry has dedicated considerable effort, especially since the setting up of the Safer Ports Initiative in September 2002 to setting targets whereby it can measure its progress in protecting lives and improving safety.

We note that the Bill is intended to focus on “management failings” and requires evidence of “gross failure” whereby conduct “falls far below” what could reasonably be expected. This approach, carefully defined in legislation, is one that we can support. Equally, we support the switch of the focus from individuals to corporations.

We appreciate that this initiative is to address public concern, particularly about very high profile cases. If a prosecution were to be mounted, this would no doubt require considerable resources and would presuppose a systematic management failure over a significant period of time. This would be in spite of the efforts by the HSE to spread effective safety guidance to the industry. We hope that resources will continue to be dedicated towards preventative measures and to encouragement and training rather than resorting to complex and expensive prosecutions.

We support the approach outlined in the consultation and wish to see these intentions clearly transposed into the draft.

15 June 2005
49. Memorandum submitted by Thompsons Solicitors

INTRODUCTION

Thompsons Solicitors is the UK’s largest trade union and personal injury law firm. It has a network of 20 offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland.

Thompsons only acts for the victims of injury, never for employers or insurance companies. Thompsons has acted for the families of the victims of a number of major public tragedies that have occurred in the last two decades and which prompted demands for a new law of corporate manslaughter, including the capsizing of the Herald of Free Enterprise in 1987, the Kings Cross fire, Southall, Ladbroke Grove and Hatfield train crashes and the Piper Alpha oil platform disaster.

Thompsons responded jointly with the Fire Brigades Union and ASLEF to the previous Home Office consultation on Reforming the Law on Involuntary Manslaughter in 2000.

ANALYSIS OF THE PROPOSED LEGISLATION

Thompsons welcomes the fact that after almost eight years since the then Home Secretary Jack Straw promised that those who caused the death of innocent people through criminal negligence should be made to pay, the Government has at last honoured that commitment.

For the first time it will be possible to have companies charged with a specific charge of manslaughter because of the failings by the company’s senior management.

Giving powers to order convicted organisations to take remedial steps will be an additional weapon in the courts’ armoury. Where there are remedial steps that need to be taken which led to the death, the court can order remedial action be taken. Failure to comply will presumably be a contempt of court.

We very much welcome the abolition of Crown immunity for many government bodies and agencies. This has been a long-standing anachronism. Industry has felt aggrieved for many years that they were subject to laws to which government bodies were exempted.

However, there are a number of areas of the draft bill that we and the trades unions say need to be looked at again if the legislation is to be as effective as possible. We set these out below:

The legislation is too minimalist

The bill provides the bare minimum to justify calling it a corporate manslaughter bill. It creates the offence only. It appears to make no pretence at being legislation whose purpose is to provide a comprehensive framework within which deaths and serious injuries at work can be prevented or deterred.

It doesn’t introduce any greater penalties than could already be imposed under existing legislation for lesser offences

Companies committed to crown court for offences under the Health and Safety at Work Act 1974 are already subject to unlimited fines. There is legal precedent for the level of fines which should be imposed. There is no directive within the legislation to require a higher level of fine for convictions for corporate manslaughter than for criminal breaches under the Health and Safety at Work Act.

Consequently companies convicted of corporate manslaughter may find that they are fined at the same level as before. Existing fines are grossly inadequate. This will undermine the deterrent effect of the legislation.

The power of the court to order remedial action is little different to the powers of the Health and Safety Executive who issue some 11,000 enforcement notices each year. It is difficult to see what real difference this power will make other than the remote possibility of companies being brought back to the court by the DPP for contempt of court.

It doesn’t impose any specific health and safety obligations or duties on company directors

The Directors’ Duties Bill brought by Stephen Hepburn MP sought to impose important duties on company directors. Firstly it required the appointment of one of its directors as a health and safety director. It then proposed a duty on directors to take all reasonable steps to comply with its various health and safety obligations and also to take account of information and advice provided by the health and safety director.

Importantly, the bill set out clearly the duties of the health and safety director. They would be required to assess the activities of the company and how the activities affected the health and safety of its employees and to consider the safety measures in place and their effectiveness.
The health and safety director was then charged with reporting to the Board of Directors on safety issues, measures, performance, statistics and to make proposals on safety which the board would have to consider.

The bill also required the company to make available to the health and safety director the necessary information and resources to do his job.

These proposals are an essential part of any corporate manslaughter legislation if it is to be effective.

The definition of senior managers is confusing and restrictive

For an organisation to be charged and convicted it is necessary to prove that its activities caused death, that there was a gross breach of duty and that this was caused by the activities of a senior manager who played a significant role in the decisions or management of the activities of the company which led to the death.

In larger companies where there is a complex management structure or, for example on construction sites where there may be a number of companies to whom work is subcontracted, it may be no easier to bring a charge of corporate manslaughter than it is at present.

The focus on senior managers is too narrow

The term senior managers is narrow and confusing. Who is a senior manager? The definition is unclear and very restrictive. There are likely to be managers who have an important role in the carrying out of activities and the implementation who are not categorised as senior managers. If their acts or omissions result in a death the company still won’t be able to be prosecuted.

Just as often happens at present, senior management may turn a blind eye to failures lower down the chain of command. Consequently, many organisations may unjustifiably escape prosecution.

The criteria for determining a gross breach is confusing and restrictive

The definition is sufficiently clear. However, the questions to be put to the jury will make it difficult to convict. For a jury to convict they will have to be certain that:

— senior managers knew or ought to have known that the organisation was failing to comply with legislation or guidance;
— were aware or ought to have been aware of the risk of death or serious harm posed by the failure to comply; and
— sought to cause the organisation to profit from that failure.

Where there is a complex management structure, or a multi site operation or a site with a number of subcontracted companies operating this will be difficult.

Why should it be necessary to show the senior managers sought to cause their organisation to profit from the failure? This will be difficult to prove and confusing.

Presumably profit can amount to more than financial profit. However, this is not clear. Surely all that should be required is that the organisation be in breach of its health and safety obligations, that the breach in the whole be a gross breach, the consequence of which was death or serious harm. The limitation of these obligations to senior managers is a significant weakness in the legislation.

The bill fails to consider other more imaginative forms of penalty which could be imposed

The bill only provides two sanctions. One is an unlimited fine. The other is a remedial order. There are already unlimited fines for lesser offences. There may be no difference in fine for offences of corporate manslaughter than there are for breaches under the Health and Safety at Work Act 1974 and the Health and Safety Executive already have the power to make remedial orders.

Consideration should be given to significantly expanding the armoury of penalties available to the court:

— requiring fines to be commensurate with the offence and significantly higher than for convictions under the 1974 Act;
— linking fines with profitability of the company;
— retaining the option of imprisonment;
— disqualification of directors;
— probation orders; and
— punitive awards of compensation to be paid by the company to the families of the deceased worker.

The current level of fines are grossly inadequate and have little if any deterrent effect. It is often more cost effective to ignore safety obligations and to pay a fine. Consequently, some organisations do profit, directly or indirectly from their failure to implement safety obligations.
Fines should be significantly increased for corporate manslaughter and the legislation should specifically require this.

Consideration should be given to fines which are linked to the profitability of the company. For example a company could be ordered to pay 10% of its profits for the next three years with a minimum amount being specified. This would have the effect of creating a significant deterrent but would also require directors to have to explain to their shareholders why profits and dividends were being adversely affected due to the company’s failure to implement its safety obligations.

Directors of companies with poor safety compliance should not be allowed to be directors.

Consideration should be given to giving the court the power to make probation orders against organisations. A company could therefore be put on probation, and required to ensure it is compliant with its safety obligations and is operation in accordance with those obligations. The Health and Safety Executive could be given the role of “probation officer” and required to report back to the court periodically for the duration of the order.

Consideration should be given to giving the courts power to award punitive damages to be paid by the court to the victims family. The level of damages could be determined by the Jury as is the case currently with claims against the police. This would be in addition to any civil damages entitlement the family might have.

All too often the victims of a fatal accident are the surviving family. Punitive damages is not only a deterrent it is also a way of providing some justice to the victim’s family who are all too often forgotten.

CONCLUSIONS

The main objective of any legislation such as the corporate manslaughter bill must be to achieve some degree of change in behaviour which will result in a reduction in the number of deaths and serious injuries at work.

It can seek to achieve this by making companies and their directors accountable for their actions. Encouragement and self regulation have had some effect in the past but on their own are clearly inadequate. Many companies do take their safety obligations seriously and continually work with trades unions to improve safety. This legislation is primarily aimed at those who do not.

Consequently the bill has to have regard to all the different aspects of a company’s activities that it is seeking to effect in order to achieve those objectives. That must include the role of the directors of companies, accountability for breaches of safety at every level, not just senior managers, and a proper range of penalties which will have proper impact on the company and if necessary provide a significant deterrent.

The bill as it stands is unimpressive. It is unlikely to have any significant impact on health and safety compliance or on the number of accidents and deaths at work.

However, with significant amendment it has the capacity to be an important and effective piece of legislation.

17 June 2005

50. Memorandum submitted by the Heating and Ventilating Contractors’ Association

1. We represent the interests of some 1,400 contracting companies and firms within the heating, ventilating, air conditioning and refrigeration contracting industry in the United Kingdom. Our members are involved in the provision of these services to the industrial, commercial and public sectors. A proportion of members provide domestic heating and ventilation (including gas installation) services directly to the private consumer.

2. The opportunity to respond to the consultation paper on the draft Bill is greatly welcomed. We have considered the paper very carefully bearing in mind that its proposals, if taken forward, may touch and concern the activities of our members.

3. On safety, and other matters, the Association has close working relationships with other trade bodies in the building services sector, including the Electrical Contractors’ Association with whom we undertake joint initiatives on safety matters. We are also members of the Specialist Engineering Contractors’ Group and the Confederation of British Industry. We support the submissions that they—and our other fellow industry trade associations—have made to the Home Office on this matter.

THE NEED FOR REFORM

4. The Association welcomes the proposed legislation. We feel that the new draft Bill is a significant improvement to the Home Office’s previously published proposals. It provides clarity on the law relating to the common law offence of gross manslaughter which, at best, has been opaque to the public, the Courts, enforcing authorities and businesses.
5. We therefore agree with the Government’s view that reform is necessary and, so far as the construction industry is concerned, we feel that the new measures contained in the Bill will reinforce many of the safety initiatives currently underway.

6. We believe that an offence of corporate manslaughter should be related to a major or continual and systematic failure to assess and control risks to safety, rather than a temporary gap in an established management system. Businesses that already engage effectively with the requirements of UK safety law will not be unfairly prejudiced by the proposed offence in the event of a death linked to their activities.

7. As a trade association representing a wide range of organisations in the construction industry we believe recent years have seen substantial improvements to the safety record within our sector. This has been enhanced by the introduction of inspection and assessment requirements, such as our own, which seek to verify the technical competence (including health and safety systems) of all members. Such arrangements can only be strengthened by the framework of proper corporate responsibility and accountability as proposed by the Home Office.

8. We acknowledge, however, that difficulties remain with a small, but potent “rogue trader” element, that continues to flaunt current safety procedures. The additional statutory framework will be welcomed by all legitimate trading concerns in the industry as a further measure towards the re-education of those operating on its fringes.

THE OFFENCE

9. We recognise the difficulties that the courts experience over the application of the “identification principle”, and we believe that the proposal to introduce a new test related to “management failure” is the correct approach. We feel that the introduction of the test will encourage all businesses (even those where safety is accorded a low priority) to focus on the need for senior management to ensure that there is an endemic culture and practice of safety throughout their organisations.

10. We believe that the scope of the definition is correct. The consultation document identifies that there may be concerns about the relationship between the proposed new offence and existing health and safety legislation. It seems sensible to us that the new offence should be firmly based on the current offence of manslaughter by gross negligence.

11. We welcome and support the proposal that the draft Bill is aimed at corporations and not individuals. We agree therefore with there should be no offence of “aiding and abetting”.

Management failure by senior managers

12. We agree that there is a need to link accountability of the company with the actions or failures of “senior management” within the organisation. However, the UK construction industry is extremely diverse and it is not always easy to identify those whose roles at any particular time will bring them within the ambit of the definition of “seniormanager”; this is particularly the case with SMEs. We would urge that upon enactment the Home Office issues appropriate guidance on this matter.

Gross breach and statutory criteria

13. Section 3 of the draft Bill seems to us to be unclear. Subsection (2) in particular will give rise to considerable difficulty in determining what factors need to be taken into account by juries when reaching their verdict. The phrase “whether or not” seems to us to be particularly open to wide interpretation. It is also not clear whether a jury must take into account all or only some of the factors relative to the senior manager’s knowledge, or imputed knowledge, of the failure to comply. It is unclear whether an objective or subjective test is to be applied in such cases.

APPLICATION

Corporations, Unincorporated Bodies and Individuals

14. We support the proposal that the new offence will apply to all corporate bodies. The difficulties of identifying the legal personality of unincorporated bodies are acknowledged, and we feel that the Home Office has adopted a sensible approach to this matter.
The Crown

15. The difficulties over the scope of the offence relative to the Crown are also acknowledged although we should prefer a more consistent approach to both the public and private sectors. Inevitably, there will always be conflicting views over where to draw the line; however, it seems to us that Crown Immunity should not provide a technical loophole that can be used to avoid liability in circumstances where other organisations would be found culpable. We support the view taken by the Confederation of British Industry that the draft law has gone too far in this respect and that it should be limited to matters of national security.

Other Issues

Causation

16. We support the Home Office conclusions that the ordinary rules of causation should apply.

Sanctions

17. We have some concern about the proposals in relation to sanctions. We agree that the courts should have the power to impose a financial penalty on companies found guilty of the offence; allowing the power to impose unlimited fines in the most serious of cases is also sensible, and is consistent with other safety legislation. However, we feel that there may be a lack of clarity over the issues surrounding remedial powers. We believe that the Health and Safety Executive is best placed to make such orders and that the courts may duplicate this role or impose inappropriate penalties.

Extent

18. Although there are practical limits to the scope of the Bill, the international nature of employment should also be actively considered. This is a growing issue for the construction and service industries, with many foreign-based contractors now working in the UK. Joint ventures (sometimes with no direct employees) or other arrangements are set up in organisations that are not UK-based. In addition to developing this Bill, we believe that the Government should work within the European Commission to ensure that foreign-based companies can also be properly held to account.

Investigation and prosecution

19. While we accept the general tenor of the proposals for the enforcement provisions we feel that in practice there is scope for confusion over the roles of the various enforcing agencies, particularly in relation to the investigation of an alleged offence. While this may not be a matter for Parliament we have some sympathy with the views of earlier respondents and hope that the proposals to involve the Director of Public Prosecutions will be sufficient to avoid the inevitable “fuzzy edges” of agency jurisdictions.

Regulatory Impact

20. Since our sector has a strong commitment to maintain continual improvement of its good safety record; we believe that there will be little financial impact to the industry where employers are already engaged effectively with the requirements of health and safety legislation.

17 June 2005

51. Memorandum submitted by the Law Reform Committee of the General Council of the Bar

The Background

1. There has been public concern for many years that corporate responsibility for death has not been met by successful prosecution of any large corporate bodies. The same concern has been expressed in respect of the lack of accountability of the Crown and other public bodies.

2. The attempts to take action over the years stuttered to a halt at various stages following a number of disasters including the Herald of Free Enterprise Disaster, The King’s Cross Fire, the Clapham Rail Crash and The Southall Rail Crash.

3. In 1987 the Herald of Free Enterprise capsized as it left the harbour at Zeebrugge, 150 passengers and 38 crew were killed. A coroner’s inquest jury returned verdicts of unlawful killing. Many of the victims’ families made it clear they wished to see the company directors of the shipping line (P&O which had taken
over Townsend Thoresen) face prosecution, and not individual employees. Following a public inquiry Mr Justice Sheen published a report in July 1987 which identified a “disease of sloppiness” and negligence at every level of the company’s hierarchy.

4. Charges of manslaughter were laid against the company. A welcome confirmation of the law was achieved when the trial judge, Turner J, ruled that the company could be held criminally liable for manslaughter, that is, the unlawful killing by a corporate body of a person.

5. However, the prosecution of P & O for corporate manslaughter ultimately failed, as it has done in subsequent prosecutions of large companies, since the Courts have ruled that a prosecution can only succeed if within the corporate body a person who could be described as “the controlling mind of the company” could be identified as responsible, and that the identified person was guilty of gross criminal negligence.

6. The Law Commission, after a consultation period, reported in March 1996: Legislating the Criminal Code: Involuntary Manslaughter. Law Commission Report No 237. A large part of the report was devoted to corporate manslaughter.

7. The Law Commission proposed a draft Bill in 1996, broadly similar in effect to the present draft Bill now to be laid before Parliament, and proposing an offence of “corporate killing”. It was based on the premise that a death should be regarded as having been caused by the conduct of a corporation if it was caused by a failure in the way in which the corporation’s activities were managed or organised to ensure the health and safety of persons employed or affected by those activities and that such conduct fell far below what could reasonably be expected of a corporation in the circumstances.

8. The Law Commission recommended that the offence of corporate killing should be capable of commission by any corporation, however and wherever incorporated (ie including abroad) other than a “corporation sole”, but not to unincorporated bodies or by an individual even as a secondary party. It made further recommendations as to jurisdiction, consent to prosecution, mode of trial, alternative verdicts and powers on conviction.

9. In 1997, over a year after the Law Commission had reported, a high speed train from Swansea crashed into a freight train at Southall. Seven people were killed and over 150 injured. The train company operating the high speed train (Great Western Trains) was indicted on seven counts of manslaughter, but, after a ruling by Scott Baker J, no trial took place. The decision was referred to the Court of Appeal.

10. In February 2000, the Court of Appeal was constrained to rule “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.” The Court referred to the Law Commission’s analysis of the law (by then four years after the Law Commission had reported) and declined to alter the law in the way sought by the Attorney-General, indicating that such a change in the law was clearly a matter for Parliament.


(a) bringing within the ambit of a new offence of corporate manslaughter all “undertakings” which would have included a number of organisations: schools, partnerships, unincorporated charities and small businesses;

(b) that the health and safety enforcing authorities, and possibly others, should have the powers to investigate and prosecute the new offence in addition to the Police and CPS;

(c) a proposal that individuals responsible for the management failures should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain; and

---

29 DEPARTMENT OF TRANSPORT (UK)—MV Herald of Free Enterprise. Report of Court No. 8074—at paragraph 14.1
31 Consultation Paper 135.
33 Parts VI, VII and VIII.
34 para 8.35 and Clause 4(1) and 4(2)(a) of the Law Commission’s draft Bill, LC 237.
35 not a corporation of a single person, but a legal device for differentiating between an office holder’s personal capacity and capacity qua holder of that office for the time being— eg a government ministers and archbishops.
36 Recommendations 13,14 and 15.
37 Recommendations 16 to 20.
39 Home Office http://www.homeoffice.gov.uk/docs/invmans.html
40 para 3.2.5.
(d) an invitation to comment on whether it would be possible to freeze assets to prevent directors of companies evading fines or compensation orders.\textsuperscript{41}

12. Over 150 responses were received by the Home Office. These came from a wide range of organisations covering industry, unions, the public sector and victims’ groups, as well as from the Bar Council and members of the public. A summary of the responses has been published.\textsuperscript{42} There was strong support for reform of the law; support for a wide application of the offence to cover all undertakings, including the Crown; divided views on the issue of individual liability; and little overall consensus on the issue of investigation and prosecution, save that it was agreed that whichever agency took the lead in investigating and prosecuting the new offence, there would need to be detailed working protocols in place to ensure effective partnership.

13. In January 2005 the trial began of five rail managers and the company Balfour Beatty Rail Maintenance (which employed two of the managers), charged with manslaughter over the death of four men in the Hatfield Train Crash of 2000.\textsuperscript{43} The Crown opened its case against the company on the basis that one manager, a civil engineer, was sufficiently senior that his acts were acts of omission of the company.\textsuperscript{44} The trial continues and we are unable to comment further.

DRAFT BILL TO CREATE A NEW OFFENCE OF CORPORATE MANSLAUGHTER


15. The Bill is in draft, and accompanied by a Consultation Paper, to allow for a further period of consultation and comment “in this complex area affecting the criminal liability of organisations”.

16. The accompanying introduction to the Bill sets out the intended proposal for a new offence of corporate manslaughter:

— the starting point is the current offence of gross negligence manslaughter, which applies where a duty of care is owed at common law (in the context of the tort of negligence); and

— such duties include the duties owed by employers to employees, transport companies to passengers, manufacturers to the users of products, the duties owed by construction companies and those owed by a range of other service providers.

17. The proposal is for an offence that applies if the way in which any of the activities of an organisation are managed or organised by its senior managers so as to cause the death of a person and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

18. An organisation is defined as a corporation or a government department or other body listed in the Schedule to the Bill.\textsuperscript{46}

19. The organisation owes a relevant duty of care—which means a duty owed under the law of negligence:

— as employer\textsuperscript{47} or occupier of land\textsuperscript{48},

— in connection with the supply of goods or services (whether for consideration or not)\textsuperscript{49} or when engaged in other commercial activities\textsuperscript{50}.

20. Whether for the purposes of the new offence an organisation owes a duty of care to a particular individual is a matter of the law of negligence, and by clause 4(3) is a question of law, and the judge must make findings of fact necessary to decide that question.

21. The new offence is reserved for cases involving a gross failure that causes death. The test for “gross” is where the conduct falls far below what can reasonably be expected of the organisation in the circumstances\textsuperscript{51}. Lesser failures can be adequately dealt with under the Health and Safety legislation.

22. We submit that, subject to the rare case when a Judge may intervene to rule that no jury properly directed could conclude that the conduct fell far below what can reasonably be expected, the decision is rightly one for the good sense of the jury.

23. We recognise that the concept of behaviour falling “far below” is often difficult to define in the abstract, but the essence of the test is applied daily in respect of dangerous driving and causing death by dangerous driving. Whilst most jurors either as drivers, passengers, or pedestrians are familiar with a

\textsuperscript{41} para 3.4.14–3.4.16.
\textsuperscript{42} link through http://www.homeoffice.gov.uk/docs4/con—corp—mans.html
\textsuperscript{43} Trial opened 31 January 2005.
\textsuperscript{44} http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/422465.stm
\textsuperscript{45} cl 1(2) and Schedule.
\textsuperscript{46} cl 4(1)(a).
\textsuperscript{47} cl 4(1)(b).
\textsuperscript{48} cl 4(1)(c)(i).
\textsuperscript{49} cl 4(1)(c)(ii).
\textsuperscript{50} cl 3(1).
standard applicable to road users, and can seek guidance from the Highway Code, they are capable of applying the standard without expert evidence; clearly they may need considerably more help with the standard applicable in a corporate environment, whether factory or shop, train or ship.

24. That assistance is helpfully provided in clauses 3(2) to 3(4).

25. Clause 3(2) directing that the jury must consider evidence of failure to comply with any relevant health and safety legislation or guidance, (this is defined in clause 3(3) to include not only the Health and Safety at Work etc Act 1974 but also all other legislation and guidance on health and safety) and if so:

(a) how serious was the failure to comply; and
(b) whether or not the senior managers of the organisation:
   (i) knew or ought to have known that the organisation was failing to comply with that legislation or guidance;
   (ii) were aware, or ought to have been aware of the risk of death or serious harm posed by the failure to comply;
   (iii) sought to cause the organisation to profit from that failure.

26. We are unsure if the sub-clauses (a) and (b)(i) to (iii) are intended to be cumulative or separate. We submit that each is sufficiently serious to be regarded as significant, as well as it being right for the jury to consider two or more together, and clarification is therefore required as to how these matters are to be treated.

27. It is suggested in the Consultation Paper in respect of clause 3(2)(b)(i) of the draft Bill that the knowledge, or imputed knowledge, of the failure to comply, might be evidenced by warnings from health and safety enforcement authorities, prohibition or improvement notices or previous convictions for health and safety offences related to the activities causing death. We respectfully agree.

28. We would submit that to give effect to the use of previous conduct as relevant material for the jury to consider, provision will need to be made for Part 11 Chapter 1 of the Criminal Justice Act 2003 (sections 98–113) to apply where the Defendant is not a person but is an organisation, within the meaning of this Bill.

29. Clause 3(2)(b)(ii) provides the test of foreseeability. The Law Commission51 had rightly pointed out that the corporate body can have no mens rea, but that would not prevent juries finding in appropriate circumstances that the risk was or ought to have been obvious to an individual or group of individuals within the company who were, or should have been, responsible for taking safety measures.

30. We agree that the jury should be able to consider the evidence not only in respect of those senior managers who were aware of the risk of death or serious harm posed by the failure to comply, but also in respect of those senior managers who ought to have been aware, but turned a “blind eye” to such risks.

31. Clause 3(2)(b)(iii) raises an important consideration, and follows the warning given by the Law Commission that although businesses are run with a duty to shareholders, this should not be at the expense of the duty to run a safe business: “A company must not cut corners in its desire to make profits for its shareholders, and in particular it must not cut overhead costs at the expense of safety.”52 This sub-clause considers the motive behind the breach, and whilst it may often be a case of inferences being drawn from other evidence, for example a reduction in staffing, there may be direct evidence of a cut in the budget for a particular area of the business, following which the standards of safety are reduced.

32. In addition to the provision of matters the jury must take into account, a wide discretion is conferred by Clause 3(4) which provides that the jury may have regard to “any other matter they consider relevant to the question”.

— The jury might, therefore, think it right to take into account the extent (if any) that the organisation’s conduct diverged from practices generally regarded as acceptable within the trade or industry in question. The Law Commission suggested that this could not be conclusive, since the fact that a given practice is common does not in itself mean that the observance of that practice cannot fall far below what can reasonably be expected; but it might well be highly relevant. The weight to be attached to it, if any, would be a matter for the jury.53 Applying the test to the facts of the Herald of Free Enterprise, whilst it may have been generally accepted practice to sail out of the inner harbour with the bow doors open, the company may nevertheless still have been at fault for not considering and devising a fail-safe system.

— There has been much debate about the cost of introducing train protection systems and the time and disruption it may take to install such a system into a fully operational activity. In this regard, in relation to a particular train protection system there may be no health and safety legislation or guidance. Nevertheless, it would appear to be open to the jury to consider the failure to install such a system as one of “any other matters they consider relevant to the question” under clause 3(4). A

51 LC 237 para 8.3 and 8.4.
52 LC 237 para 7.24.
53 LC 237 para 8.7.
business making very large profits and failing to upgrade its safety systems may find a jury is less sympathetic than it would be to an organisation that is barely making ends meet and simply does not have the capital or investment opportunity to upgrade.

33. The type of body liable for an offence is described as an “organisation”:
   — Such an organisation would be prosecuted for the offence if a gross failing by its senior managers to take reasonable care for the safety of their workers, or members of the public, caused a person’s death.
   — The new offence would apply (as now) to all companies and other types of incorporated body (including many in the public sector, such as local authorities).
   — Some government departments and other Crown bodies will also be liable to prosecution.54
   — Action against parent and other group companies should be possible but only where their own management failures were a direct cause of death.

34. The offence is based on “management failure”:
   — failures in the way an organisation’s activities were managed or organised, rather than any immediate negligent act by an employee (or potentially someone else) causing death;
   — the offence is designed to capture truly corporate failings in the management of risk, rather than purely local ones;
   — it therefore applies to management failings by an organisation’s senior managers—“either individually or collectively”;
   — the management failure must amount to a gross breach of the duty to take reasonable care—a high threshold; and
   — the management failure must have been a cause of death, more than a minimal contribution to the death.

35. The draft Bill has not followed the recommendation of the Law Commission that there should be a clause to deal with a concern that an intervening act would break the chain of causation.
   — The Law Commission proposed that it should be possible for a management failure on the part of a corporation to be a cause of a person’s death even if the immediate cause is the act or omission of an individual.56 The reason given for not specifying this in the draft Bill is that “case law has changed”.57
   — We suggest that the inclusion of such a clause in the Bill would give statutory effect to the development in the case law and have the merit of clarity within the provisions specifically drafted for the purpose of corporate manslaughter.
   — Further, we suggest that the inclusion of such a clause would also underline the proposed aim set out in paragraph 26 of the Introduction to the Bill. The stated aim is that the test for management failure “focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or indeed for the unpredictable, maverick acts of its employees. Instead, it focuses responsibility on the working practices of the organisation.

36. The management failure is the failure by senior managers, not the failings at junior level. The intended focus is “not limited to questions about the individual responsibility of senior managers, but instead considers wider questions about how, at a senior management level, activities were organised and managed.”58 We agree that this allows senior management conduct to be considered collectively as well as individually. The intention is to target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity.

37. Clause 2 provides:

A person is a “senior manager” of an organisation if he plays a significant role in:
   (a) the making of decisions about, how the whole or a substantial part of its activities are to be managed or organised, or
   (b) the actual managing or organizing of the whole or a substantial part of those activities.

   — The term “significant” is intended to capture those whose role in the relevant management activity is decisive or influential, rather than playing a minor or supporting role.

54 Introduction para 2, clause 2(b) and 11 and departments listed in the Schedule to the Bill.
55 The offence para 14.
56 para 8.39 and Clause 4(2)(b) of the draft Bill proposed by the Law Commission. LC 237.
— It is to be presumed that it will be a matter of law for the Judge to determine whether a person within an organisation is capable of being a senior manager within the definition of clause 2, in relation to any particular organisation, and then for the jury to determine whether such a person was a senior manager.

— We welcome the wider definition of such a person, which is a significant move away from the concept of a “controlling mind” at common law, and the avoidance of a narrow definition allows for the full assessment of the role of such a person within the whole of a particular organisation thus preventing the purpose of the proposed statute being defeated.

38. It follows that the decisions for the court, on the issue of identification of a senior manager, should be taken in the following order:

(a) what are the activities of the organisation;
(b) does the individual under scrutiny play a significant role:
   (i) in making the decisions about how the activities are managed or organised, or
   (ii) in the actual managing or organizing of the activities of the organisation
(c) is that significant role in relation to either (a) or (b), in respect of the whole or substantial part of its activities.

39. This definition of senior manager would appear to be sufficiently wide to encompass the relatively low level manager “on the ground” who permits a train to depart on a journey without a fitted fail-safe system in full operation, but would enable the liability behind that decision to be examined as to the structures operated by the senior managers within which that local manager decision had been taken. This might include operating pressures set by senior managers as to timetabling, staffing levels, maintenance etc. It would also attach liability to the senior managers if the structures of the organisation place too much responsibility on lower level employees without proper supervision.

40. We suggest that the proposed definition in the Bill of “senior manager” is a necessary safeguard for the junior employee, and appears to meet the public concern that the junior employee should not be “a scapegoat”.59 We respectfully agree.

Potential Defendants

41. As set out in the Consultation Paper with the draft Bill, the new law, rightly in our view, will apply to all corporate bodies, those incorporated under statute or Royal Charter including local authorities, NHS trusts and many non-departmental Public Bodies.60 Clause 1(2) identifies the organisations to which the offence should apply:

(a) a corporation; [which is further defined in Clause 5 as including any body corporate wherever incorporated]; and
(b) a government department or other body listed in the Schedule.

— We suggest that, either by way of amendment to clause 5, or by use of a Schedule to the Bill, specific reference to incorporation by whatever means, including by statute or by Royal charter, could be made, so as to leave no doubt that all those public bodies that are identified in the Consultation Paper at paragraph 36 are to be included in the definition of “organisation”.

42. As the issue of the failings of the current law on corporate manslaughter has been directed at the large corporate bodies, the exclusion of unincorporated bodies is, on balance, a fair conclusion. It is consistent with the original proposal of the Law Commission. Further the use of this new law would generally be unnecessary for the smaller undertakings, such as the small gas fitter business61, where the individual responsibility for gross negligent manslaughter, which existed before, remains62. As has been illustrated by the conviction in Kite and OLL Ltd63 where the company was a one man concern whose “directing mind” was plainly its managing director: the company’s liability was established automatically on his conviction.

43. As set out in the Consultation Paper64: “Whilst the new offence would apply to police authorities (as incorporated bodies), police forces themselves are not incorporated and therefore would not be covered. (Nor are they Crown bodies and so they are not covered by that aspect of our proposals either). We do not consider that, in principle, police forces should be outside the scope of the offence and our intention is that legislation should in due course extend to them. We are currently considering how best to achieve this, given their particular legal status.”

59 This was the concern expressed following the inquest verdicts re Herald of Free Enterprise.
60 See Consultation Paper accompanying the draft Bill, at para 36.
61 Example in the consultation document May 2000 at para 3.2.5.
63 unreported, see Law Commission 237 para 6.48.
64 at para 44.
44. We suggest that it is not necessary to delay the inclusion of police forces within the ambit of the proposed offence. The inclusion in the Bill of some government departments or other body by way of the Schedule, and the exclusion of “corporation sole” and certain activities of the armed forces, provide examples of the selection of organisations, or activities within an organisation, to which the proposed offence should apply. We respectfully submit that a new clause (2)(c) could specifically include the Police Forces of England and Wales, the Metropolitan Police and the City of London Police.

45. The Crown is included as such an organisation when it owes the duty of care as employer or occupier of land or supplier of goods or services or operating commercially. To that extent it is fair to say that the effect is to create a broad level playing field between public and private sectors.  

46. There is an exemption provided in clause 4(2):  
   “An organisation that is a public authority does not owe a duty of care for the purposes of this Act in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests).”  

47. In our view the public policy exemption, developed in the law of negligence since the decision in Anns v London Borough of Merton [1978] A.C. 728 HL, creates a degree of tension where the safety of lives is at stake. A careful judgment needs to be made as to which functions of government should fall within the exemption and those that do not.

48. If a company such as Railtrack made a decision on the allocation of resources and as a result failed to allocate sufficient resources into a safe system of work resulting in a death, the directors as senior managers would have no exemption from the relevant duty of care. We pose the question as to whether, if that same company was taken into public ownership, it should suddenly be right for an exemption to apply to a similar decision as to the allocation of resources?

49. A further exemption from the “relevant duty of care” is expressed at the end of clause 4(1) where the organisation is conducting its activity “otherwise than in the exercise of an exclusively public function”. “Exclusively public function” is defined in clause 4(4), and therefore, in respect of other activities performed by Government, under the prerogative or of a type of activity that requires a statutory or prerogative basis (examples of this might include the Government providing services in a civic emergency or functions relating to the custody of prisoners), it is intended that the organisational failings will therefore fall to be dealt with by wider forms of public and democratic accountability. These other lines of accountability, include through Ministers in Parliament, remedies under the Human Rights Act, public inquiries and other independent investigations, judicial review and Ombudsmen.

50. We respectfully agree with the observation in the Consultation Paper that the personal liability of individuals undertaking such functions should remain as it is under the present law.

51. The Consultation Paper accompanying the draft Bill contains observations, by way of example, that deaths in prisons are already subject to independent investigations through inquests and through independent reports capable of ranging widely over management issues.

52. The view expressed in the Consultation Paper is that “cases under the law of negligence already make it clear that public authorities will rarely owe a duty of care where a decision involves weighing competing public interests dictated by financial, economic, social or political factors, which the courts are not in a position to reach a view on”.  The draft Bill makes clear that the principle applies to the new offence which would not therefore apply to deaths resulting from such public policy decisions.

53. We submit that any diminution in the responsibility for the relevant duty of care in relation to deaths in custody is a cause for concern and requires appropriate justification. If, for example, the management of the prison service or a relevant part of it is identified as having “negligence at every level of the hierarchy”,  we raise the question why should that hierarchy be exempted from criminal liability for a death arising as a result?

54. A further exclusion is provided for the Armed forces by clause 10 in respect of:

(a) activities carried on by members of the armed forces of or in preparation for, or directly in support of, any combat operations; and

(b) the planning of such operations.

55. We submit that the exemption is too widely drawn. Preparation for any combat operation may well include elements of basic training, rather than specialised activities directly in support of combat operations as defined in clauses 3(a) and (b). The removal of the words “or in preparation for” in the clause would not alter the effect of clause 1(a) in respect of specialised preparation for the combat operations, because training for such operations is covered by clause 3(b). It would, however, remove the exemption from the level of basic training and other activities peripheral to the training for combat operations. This may go some way towards allaying the public concern particularly in respect of the responsibility for the implementation of standards of safety of young recruits entering the armed forces.

---

65 Draft Bill: The scope of the offence para 24.
66 Draft Bill, The scope of the Offence para 23.
Investigation and prosecution

56. The Bar Council position remains as quoted in the Summary of Responses document:

“There is no reason why, in an appropriate case, a Health and Safety Enforcement Agency ought not to prosecute for the new offence of corporate killing.” Bar Council [2000]

57. The essential requirement is co-operation between agencies, including the use of expertise in investigation, and smooth compliance with disclosure duties; joint agency prosecution will need allocation of responsibility and clear guidelines to ensure all material, including third party material is identified and disclosed in a full and timely manner. However, no statutory provision would appear to be required to enable a protocol to be devised and implemented to enable smooth co-operation and wise use of resources.

Extent and Territorial application

58. The new offence would apply to a death resulting from harm caused in England and Wales; or within United Kingdom territorial waters; on British registered ships; on British controlled aircraft and hovercraft; and offshore installations. All companies, including foreign registered companies, would be subject to prosecution. The proposal in the Consultation Papers is that the offence should apply provided that the injury that results in death occurs in a place where the English courts have jurisdiction. This would be the case whether the relevant management failure took place here or, as might be the case with a foreign company, abroad.

59. We accept that the proposal as to jurisdiction is consistent with the rules relating to the territorial extent as now apply to the offence of gross negligence manslaughter, and we agree that there are insuperable problems with regard to investigation and enforcement if the territorial application were to be extended to operations abroad of companies registered in England and Wales.

Sentence and Remedies

60. The sentence for the offence is an unlimited fine. [cl 1(4)]

61. The draft Bill provides no exemption from the imposition of a fine on a Crown body. Whilst it is accepted that there will be an element of the “recycling” of public money, we suggest that there should be no exemption. The discretionary imposition of a fine has the merit that the public can see, by the level of the fine, that an assessment of culpability has been made. Further, within the relevant department, the financial penalty will carry with it issues of accountability.

62. A welcome addition to the orders available to the sentencing court is the power to order breaches to be remedied. [71]

63. Failure to comply with the remedy will result in a further offence being committed, which in turn will incur a further financial penalty. No guidance is given as to how the specified steps are to be monitored.

64. We suggest that an enforcement body should be identified, and be given the duty to report back to the court that compliance with the remedy has been effected, or not, as the case may be. Alternatively or in addition, the enforcement body could be vested with powers to issue a certificate of satisfactory compliance. In the event of failure to comply, the enforcement body should have the power to prefer a charge pursuant to clause 6(4).

65. Although proposed in the Consultation Paper in 2000, there are no specific powers included in the Bill to enable the court to disqualify a senior manager of the organisation, on conviction of that organisation, from acting in a management role. In appropriate cases the remedies remain available in the Company Directors Disqualification Act 1986 section 2 where a person as an individual is convicted of an indictable offence in connection with the management of a company, and may be so disqualified. The prosecuting authority will therefore have to consider carefully whether individual charges should be laid against the identifiable senior managers, either for gross negligence manslaughter or under other health and safety legislation.

66. Where no individual director has been prosecuted, but the court having heard the evidence is satisfied that individual failings have been sufficient to warrant disqualification, we submit that the court should be given the discretion to order such disqualification subject, of course, to hearing representations from or on behalf of the individual concerned.

67. The Law Commission indicated that following a conviction the court would also have its ordinary powers to order compensation. We recognise that the power to order compensation would be rarely used because of the likely complexity of the assessment. It is suggested that, if the intention is to provide the court

---

68 s3 CPIA as amended by the CJA 2003, and Attorney General’s guidelines 29 November 2000.
69 cl 16.
70 Consultation Paper with the draft Bill at para 53.
71 cl 6.
72 cl 6(4).
with such powers in appropriate circumstances, then it should be clearly spelt out that the relevant powers provided by the Powers of Criminal Courts (Sentencing) Act 2000 which are stated in that Act to apply to a person, should be extended to apply to any organisation convicted of an offence under the Corporate Manslaughter Act.

Conclusion

68. The new offence of corporate manslaughter will now permit the effective prosecution of those large organisations who have, through their senior managers, shown gross failures in the conduct of their activities as a result of which a death has been caused.

69. This Bill is long overdue and, subject to our proposed modifications, it is to be welcomed.

24 June 2005

52. Memorandum submitted by the Association of Principal Fire Officers

The Association of Principal Fire Officers (APFO) recognises the need for reform in relation to the issue of Corporate Manslaughter, and we therefore welcome the principals of the proposals in the draft Bill. We also welcome the opportunity to contribute to the debate on behalf of our members, and our more detailed observations and concerns are enclosed in our formal Response. It is appreciated that it is now nine years since the first consultation exercise in relation to such a Bill, and we recognise the need and desire to move the process forward.

The Association of Principal Fire Officers (APFO) represents Chief Fire Officers, Assistant Chief Fire Officers and Deputy Chief Fire Officers in office in Local Authority Fire Brigades constituted under the provisions of the Fire and Rescue Services Act 2004 and previous legislation and the Chief Fire Officers and Assistant Chief Fire Officers of the Fire Authorities for Northern Ireland, the Isle of Man and the Channel Islands.

APFO exists to provide support to its members in terms of negotiation, consultation, legal representation, and personal assistance in matters involving pay, pensions, conditions of service, grievances and disputes, and as such wishes to respond on behalf of its members to the content of the draft Corporate Manslaughter Bill.

By the very nature of the work undertaken by the principal fire officers they will face circumstances which involve fatalities. Principal fire officers are properly and understandably interested in these legislative provisions.

APFO’s concerns about the Bill are explained below.

Preliminary Points

Prior to examining in detail the provisions of the Bill, it is appropriate to deal with several preliminary issues.

We would argue that it is not appropriate for fire authorities to be included within the remit of this Bill. There are several reasons.

Fire authorities have little or no control over the “work” environment to which their employees are often subject. For example, when a fire brigade is called out to attend upon a fire, the fire authority has no control over the safety of the premises in which the officers will be required to work. Equally, when a fire brigade is called out to cut someone from a car, the fire authority has very little control over the location of the car crash and of the dangers present at that location for its employees.

Equally, application of this Bill to the fire service may have an impact on civil resilience. In the event of a terrorist attack or a natural disaster, the fire service has a very important role to play. This Bill may well impact on the ability or willingness of fire brigades to play a full and vital role in such public emergencies.

Perhaps most importantly, as the Bill is currently drafted, it is exceptionally difficult to see how it will apply to the fire service. Our comments on the problems inherent in the Draft Bill are explored fully below. Amendment of the Bill would result in the resolution of some of the issues we raise; however, the fundamental problem with the Bill is not it’s drafting, but its stated aims. Quite simply, the Bill was not created with the special needs of the fire service in mind.

Finally, we note from paragraph 44 of the Introduction to the Home Office Consultation Paper “Corporate Manslaughter: The Government’s Draft Bill for Reform” that police forces are not included within the list of corporations/public bodies affected by the Bill. The Home Office is considering how best to achieve legislation which “should in due course extend” to police forces.

There has been wide recognition of the exceptional position of the emergency services and in particular the police and fire brigades.
We fully agree with the comment of the Association of Chief Police Officers as set out in the “Summary of Responses to the Home Office’s Consultation on Corporate Manslaughter” that:

“... there is a need to ensure that protection for those who take on a duty or role which in turn protects society against life threatening situations ...”

Given that separate legislation is being considered for police forces and that in relation to the public emergency response role there is no difference in principle between the police and fire services, that bespoke process would seem to be more appropriate for the emergency services rather than inclusion within unsuitable legislation.

THE OFFENCE

The Offence can only be understood when the constituent elements of the offence are explained and understood. Accordingly we will seek to explain our concerns by reference to the constituent elements of the offence below. However, it is worth setting out the offence as contained in schedule 1(1) of the draft Bill here to provide a reference point:

“An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised by its senior managers:

(a) causes person’s death; and

(b) amounts to a gross breach of a relevant duty of care owned by the organisation to the deceased.”

Management Failure by a Senior Manager

We are concerned that the “management failure” test is poorly worded. Given the content of the Introduction to the Home Office Consultation Paper “Corporate Manslaughter: The Government’s Draft Bill for Reform”, we are concerned that the wording of the “management failure” test will not achieve the Government’s stated aims for the scope of the new offence.

It appears to us that the management failure test is designed to catch those corporations who fail to have in place the correct risk assessments, health and safety policies, training programmes and the like (which is affirmed by the implications of section 2(2) of the draft Bill). The reason that the law relating to health and safety is successful is that it sets industry specific targets and standards. We fail to see why the corporate manslaughter offence should not be specifically linked in section 1 to a gross failure to comply with applicable health and safety law by senior management. Such amendment would not undermine the offence and would provide much needed clarity.

Currently, the content of section 2(2) hints at the offence being made out where there is a gross failure to comply with relevant health and safety legislation or guidance. However, the more general wording of section 1 could be interpreted to have been deliberately left more vague than section 2(2) and could therefore persuade judges to interpret section 1 widely. Even if there is a desire to keep breach of health and safety laws and corporate manslaughter separate, further clarification is required on the intended scope of the offence.

If further clarification is not provided, we fear that risk averse practices will ensue until the Courts provide clarification on the extent of the offence.

Clarification is also required because it is wrong as a matter of principle that those managers whose evidence is essential to making out the offence should be subject to an overly lengthy criminal investigation and court case. Under the current legislation investigations are extremely lengthy, primarily because the law is uncertain and the offence is difficult to make out. Equally, court cases are brought which collapse, or run for long periods of time before their final resolution.

It is wrong that a manager’s career and personal life (certainly in the case of a dedicated public servant such as a fire officer) should be so utterly disrupted while circumstances with which that person is linked only in a management sense are tested before a judge and jury as to whether they constitute a “management failure”. Greater clarity is essential.

Gross Breach

Section 3(1) of the draft Bill provides that the offence will only be made out if any breach of a relevant duty of care is a “gross” breach. A breach is a gross breach if “the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the circumstances”.

Again, we are concerned that the test as to what constitutes a gross breach is not certain enough.

The requirement that behaviour falls “far below” what is reasonably expected requires further clarification. The test in Adomako; that an act was so grossly negligent as to be criminal, has been criticised for being too uncertain. In our view the new “far below” test is no more certain. Whether behaviour is “criminal” or falls “far below” what is reasonably expected are both uncertain yardsticks for assessing
behaviour. If a loose test is preferred, the Adomako test should be retained. There is at least some case law on what constitutes “criminal” behaviour and in our view juries are more likely to be able to assess whether behaviour is “criminal” than whether it falls “far below” a standard which they themselves have to establish.

Presumably, in recognition of the difficulty juries may have in ascertaining whether behaviour has fallen “far below” what is reasonably expected, section 3(2) of the draft Bill sets out matters that the jury must consider when considering whether a breach of a duty of care constitutes a gross breach. The jury is required to consider “whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation and guidance”. If the jury finds that the evidence does show that the organisation failed to comply with the relevant health and safety legislation/guidance it must go on to consider the extent of that failure.

As already mentioned above what is not made clear in section 3(2) is whether it is a requirement of a finding of a gross breach of duty that the organisation failed to comply with any relevant health and safety legislation, or whether such failure is merely one way of identifying a gross breach of a relevant duty. The section requires the jury to “consider” any failure to comply with any relevant health and safety legislation but does not make it clear whether a jury can go on to find a gross breach of a relevant duty of care without evidence of a failure to comply with any relevant health and safety legislation.

If section 3(2) is a list of indicators of a gross breach of duty and such a breach cannot be made out without evidence of those indicators, the requirement in section 3(2)(b)(iii) that the senior managers “sought to cause the organisation to profit from that failure” is at odds with section 4(1)(c)(i) which provides that a relevant duty of care comprises “the supply of goods or services (whether for consideration or not)”.

The “Introduction” to the Consultation Paper provides that the bill is intended to apply to organisations like the NHS who provide services for nil consideration. However, if it is a requirement that an organisation sought to profit from a breach of a relevant duty of care to prove that such breach was a gross breach and thus make out the offence, we cannot see how organisations like the NHS would ever be found to have grossly breached a relevant duty of care. Clarification is required.

Since the intention appears to be that the Section 3(2) list is no more than to aid and guide the jury, then we request that a separate factor be introduced which illustrates the invidious position of the emergency services when responding to the multitude of different life-threatening situations with time critical decisions to be taken.

Relevant duty of care

Firstly, as the Bill is currently drafted, it appears to us that there are two possible interpretations of section 4(1) as follows:

1. Those corporations involved in an “exclusively public function” will not have a relevant duty of care where that duty arises from “the supply by the organisation of goods or services (whether for consideration or not), or the carrying on by the organisation of any other activity on a commercial basis” (ie those duties under section 1(c) of the draft Bill); or

2. The fact that the statement “otherwise than in the exercise of an exclusively public function” is placed at the end of section 4(1) points to an intention to indicate that those organisations which carry out an exclusively public function will not have a relevant duty of care howsoever that duty arises (ie whether by a liability in negligence to its employees, in its capacity as an occupier of land or via the carrying on of an activity on a commercial basis or the supply of goods and services).

A court may well favour the latter interpretation given the definition of “an exclusively public function”.

“An exclusively public function” is defined in section 4(4) of the Bill as follows:

“...exclusively public function” means a function that falls within the prerogative of the Crown or is, by nature, exercisable only with authority conferred:

(a) by the exercised of that prerogative; or

(b) by or under any enactment.”

It is a principle of public law that if a body created by statute (such as a fire authority) acts outside its statutory remit, it is acting *ultra vires*. Therefore, any and all activities undertaken by public bodies are carried out “by or under any enactment”, unless the body is acting *ultra vires*.

Given the public law principle outlined above, it is easy to see why the Courts may well prefer the second interpretation of section 4(1) as outlined above.

Section 4(1) therefore requires clarification.

Secondly, assuming that the first interpretation of section 4(1) as outlined above is the correct one, it seems to us that the fact that the offence is made out by reference to a specific duty of care and that breach of only certain duties will result in liability, means that the Bill is inherently unsuitable to apply to the fire service.
The ability of the fire service to provide a fire fighting service is inextricably linked to its employees. Therefore to separate criminal liability so that the fire service will not be guilty of corporate manslaughter when it has a duty of care based on the provision of a service, but can be guilty of corporate manslaughter when it has a duty of care based on employers liability is a false separation and will not work in practice.

Take for example a fire fighter who dies whilst fighting a fire. Would it be the case that by virtue of section 4(1) the fire service may be guilty of corporate manslaughter via its duty of care to its employee, the fire fighter? Or, would it be the case that because the fire service was providing a service which was an exclusively public function (fighting fires), that it could not be guilty of corporate manslaughter?

Although this separation of the relevant duties of care may work for bodies like local authorities when they are, for example, carrying on a leisure centre business, it is not appropriate in circumstances where the provision of the service is inextricably linked to the employees of the organisation, and where those employees risk their lives on a daily basis to provide that service.

In our view, this inherent difference between the fire service and other public bodies makes it untenable for the Bill in its current form to apply to the fire service. Equally, we believe that it would be exceedingly difficult to amend the Bill to ensure that it fulfilled the Government’s aims in relation to private corporations and other public bodies, and also for it to realistically provide for the fire service. Accordingly, we believe strongly that this Bill should exclude the fire service from its remit.

CONCLUSION

1. APFO feels strongly that the Bill as currently drafted lacks clarity and will be likely to lead to further confusion in the area of Corporate Manslaughter.

2. Further, and more importantly, APFO does not feel that it is appropriate for the fire service to fall within the remit of the Bill, given its unique role.

3. It is noted that the current Bill has not addressed the position of the police and there are substantial analogies between their incident response role and that of the fire service. APFO would like to know why the police have received separate attention and specifically request that proposals for the police (which may be suitable for, or applicable to, the Fire Service) should be consulted upon with APFO prior to public consultation.

4. If there is a determination to retain fire services within the ambit of this legislation, then a specific clause is sought which properly illustrates what kind of default on the part of fire service officers could ever amount to a “gross breach”.

5. Notwithstanding the reservations advanced in this response, the Association supports effective reform of the law relating to corporate manslaughter.

15 June 2005

53. Memorandum submitted by Regional Airports Limited

Regional Airports Limited is a private company that owns and operates two small commercial airports—London Southend Airport and London Biggin Hill Airport, together with operating the passenger handling facilities at RAF Northolt.

We object to the introduction of this Draft Bill on the grounds that it will actively discourage SME’s from operating businesses in this country. The long term effect on the economy of this country is likely to be counter productive to the development of an entrepreneurial and full employment society where risk is managed not eliminated.

The drafting makes it quite clear than an offence is likely to be based on what an organisation has “failed” to do—so it is a sin of omission and not a sin of commission.

SME’s are the most important yet economically vulnerable businesses in the UK, usually employing less than 50 or so staff. In such small businesses, sins of omission are more likely to arise and for a “guiding hand” to be more readily identifiable. In larger companies, as has been evidenced from legal cases on this matter the “guiding” hands are less evident. This Bill will therefore place an unfair burden on the SME’s without resolving the problem you seek to solve by this legislation.

The proposed legislation is, therefore, unfair for those employed in SME’s and it is also unfair to exclude any section of Government, a Minister or Secretary of State should be just as accountable as a director of a large company. Both are almost certainly remote from the event but no doubt a link can be found, a decision identified, a request considered and denied.

I believe that this bill will discourage leadership, enterprise, innovation and employment and sends the wrong message to foreign companies thinking of investing in the UK. It is another element of the blame culture and should be avoided at all costs.
A more positive step would be better and more frequent Safety Campaigns, urging individuals to think for themselves and to make their own risk judgements. Employee support to speak up when they think things are wrong and to say when people’s lives are being put at risk would be far more constructive.

13 June 2005

54. Memorandum submitted by Wrightington, Wigan and Leigh NHS Trust

I note that it is intended that the provisions of the Bill will apply to NHS Trusts and that, in determining whether the failure of an organisation constituted conduct falling far below what can reasonably be expected, a jury must, in accordance with proposed Clause 3(2)(b)(iii), consider whether the Senior Managers of the organisation “sought to cause the organisation to profit from that failure” [to comply with health and safety legislation/guidance].

As an NHS Trust does not seek to make a profit but simply provides health care on the basis of the funding allocations it receives, I do not see how it can be said Senior Managers of an NHS Trust “sought to cause the organisation to profit from that failure”.

In view of the above, I am uncertain as to how a successful prosecution could be brought against an NHS Trust under the proposed legislation, as it would appear to me that it could not be proved that the terms of proposed Clause 3(2)(b)(iii) had been breached.

I should, therefore, very much welcome your comments and any further guidance on this particular issue which you are able to give.

18 April 2005

55. Memorandum submitted by Shires Safety Consultants

INTRODUCTION

Corporate crime that results in death is one of the most sensitive and evocative subjects that has been pre-occupying the public, media, politicians, police and lawyers for decades. Like the drunk behind the wheel, companies generally don’t intend to kill people. Yet they do kill people—sometimes by reckless and negligent acts or omissions. And while almost without exception, individuals will be prosecuted for involuntary manslaughter in drink driving deaths cases, in the vast majority of work related deaths companies are not prosecuted for involuntary manslaughter.

It is now nearly nine years since legislation was first recommended\textsuperscript{74} and the UK’s record of safety at work is making scant progress towards meeting the government’s target for reducing the scale of work related death. Some 5 years have passed since the present Government published its first consultation document.\textsuperscript{75} After years of headline making announcements about the fate of company directors who are connected with fatalities at work the Deputy Prime Minister John Prescott said:

Health and Safety is a priority for those at the top of all organisations and they must be prepared to face the consequences of ignoring the law; in future that could well mean prison.\textsuperscript{76}

Fatal accidents at work during 2003–04 showed no significant improvement on the previous year’s figures and the trend continues to rise. There were 233 fatal accidents at work in this period.

In early 2005 the Government announced a new draft Corporate Manslaughter Bill. Because of the general election the Bill could not be progressed during the tenure of the Government and it remains to be seen if the ashes of the proposed legislation can be re-kindled.

This response addresses what I believe are the fundamental flaws in the draft Bill.

THE PROPOSED DRAFT BILL

Clause 1: The Offence

This is misleading. An incorporated company is a legal person, and can therefore be liable for strict liability offences defined in such a way that the company satisfies the definition of the offence.\textsuperscript{77} However the personality of the company is a legal fiction and a company does not itself have a mind. It has no soul either and therefore cannot commit manslaughter.

\textsuperscript{74} Legislating the Criminal Code: Involuntary Manslaughter L.C. 237 HMSO London.
\textsuperscript{75} Reforming the Law on Involuntary Manslaughter: The Government’s Proposals. Home Office.
\textsuperscript{76} John Prescott BBC News 7th June 2000.
\textsuperscript{77} See for example Alphacell Ltd v Woodward [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320.
It must be noted that a company can sometimes be guilty of offences requiring a state of mind under a principle, which identifies the acts and state of mind of the senior employee or officer of the company with a company itself where the agreement and intention of the managing director were regarded as those of the company. Precisely, which employees or officers are identified with the company for those purposes is a matter of some judicial and academic debate.

In Meridian Global Funds Management Asia Ltd. v. Securities Commission, the Privy Council took the view, were the offence is a statutory one that is a question of construction of the particular statutory provisions. This illustrates that the employee identified with the company in respect of the commission of the statutory offence (although still quite senior on the facts), need not to be classified as the “directing mind and will” as is still required for the primary rule of attribution, applicable to common law offences including manslaughter.

To talk of an offence of corporate manslaughter is in fact, very misleading, because it implies that there is an offence of manslaughter for a corporation, which is distinct from the offence of manslaughter for individuals. This is not so. Only a living person can commit manslaughter.

Clause 1 (4): *An organisation that is guilty of “Corporate Manslaughter is liable on conviction to a fine*

A corporation guilty of an offence under this clause is liable on conviction on indictment to a fine and possibly a remedial order. The fine has always been a problematic sanction. Ashworth describes fines as the standard penalty for summary offences. In his view, they are the “normal response to offences committed by companies” since:

The fine is often presented as the ideal penal measure. It is easily calibrated, so that the courts can reflect different degrees of gravity and culpability. It is not intrusive since it does not involve supervision or the loss of one’s time.

Brent Fisse has observed that:

“Criminal sanctions have an advantage over civil penalties in achieving objectives other than deterrence. The moral, symbolic, retributive, rehabilitative and incapacitated aspect of criminal sanctions provides a rationale for criminal sanctions, which civil penalties are unable to match.”

Several criticisms of fines can be advanced. Fines can be regarded as merely business losses or purchasable commodities for bailing a company out of trouble. They may get swallowed up in the year end accounts and be written off as simply a cost of doing business. Fines only have an impact on the finances of the company rather than on managerial motivation and other non-financial concerns of the company which might shape the activities, policies on procedures for the safety at work. The fine may also punish innocent parties such as employees and shareholders or result in increased prices for consumers. Fines do not ensure that corporate offenders will instigate an internal inquiry, and will take disciplinary action against those responsible for the act or omissions, which led to the offence. This is particularly so in cases where any disciplinary action may encourage whistle-blowing within a company. It may also be the case that the fines will usurp any monies set its side or allocated to reform and improve safety within the company.

Fines do not compensate the victims or their families (although they will add to the consolidated fund— a nice little earner for the Government).

Companies may dissolve themselves, or simply not pay the fines levied on them as there is no mechanism to recover fines from entities other than those from which the fine is levied.

The ineffectiveness of fines is in the large part due to the fact that the amount of any fine must be sufficient to influence future decisions made by a company yet cannot be so large as to do real damage to that company. This uneasy balance has been described by Fisse as the “deterrence trap”.

Even high fines can sometimes appear paltry when measured in context. Consider the fine of £750,000 imposed on British Petroleum (BP) in 1988, following an incident involving three fatalities at its Grangemouth oil refinery. In the same year, BP’s profits amounted to £1.391 billion. The fine therefore equated to only 0.05% of their annual profits.

---

78 ICR Haulage Ltd (1944) KB 551, [1944] 1 ALL ER 691.
81 They are also the most common sentencing options for corporate or offenders in the USA and in Australia. See Australian Law reform Commission, Issue Paper 20 (2001) “Sentencing Corporate Officials”.
Following the Southall crash in 1999 Great Western Trains was fined £1.5 million. It represented the largest ever fine for breaches of the Health and Safety at Work etc Act 1974. Scott Baker LJ explained:

“The fine is not intended to reflect the value of the lives lost or the injury sustained, but it is intended to reflect public concern at the offence committed. Although it has not been suggested that the accident was a result of a deliberate risk taking in pursuit of profit, the accident was the result of senior management failure. The fine reflects the fact that the defendant is a large and profitable enterprise: the number of deaths and injuries and the need to alert those running substantial transport undertakings of the need for eternal vigilance.”

This seemingly high sum amounted to only eight days profit of the company.

Curiously the government proposals contain no indication of the appropriate level of fine for the offence of corporate killing.

David Bergman advances a cogent case for an improved system of fining companies. He notes:

“that when sentencing convicted companies the courts do not have sufficient detail information of the offending company as they do for individuals awaiting sentence; in the case of the latter—educational details, income, expenditure, and antecedents are known and often social inquiry reports will be furnished with an assessment of the offenders’ likely response to probation”.

Whereas:

“no such care is taken in relation to corporate offenders. No police officer or similar person gives evidence and there is no document available to the court similar to the social inquiry report. The court remains unaware of the most basic information on the company—its turnover, annual profits, history of relationship with the regulatory agency or its general health and safety record.”

Clause 6: Remedial Orders

One way the courts can achieve the dual objectives of punishing management and ensuring corrective action is taken is by way of the remedial orders proposed in the draft Bill. This enables the court to require a corporation to remedy a failure within a specified time, upon an application by the prosecution. This device is potentially the most constructive addition to the sentencing armoury of the courts. On a pragmatic basis it is important that the HSE control the terms of such an order to ensure its specification is precise and its implementation can be monitored. However, on close analysis this proposal provides its own weaknesses. Unlike similar orders that can be made under the Health and Safety at Work etc Act 1974 there is no right of appeal.

Remedial orders are reactive in nature—they do not operate before the event. A case of bolting the door after the horse has galloped. If the prosecution authority is the CPS it is unlikely that they will have the technical knowledge or expertise to draft the terms of any remedial order. Remedial orders will therefore be narrow and constrictive, will not address the management systems, nor could they order a safety audit or a change in the safety culture that may have contributed to the death. It is also absurd to think that waiting for a prosecution to take place (sometimes many years after a workplace death) the company can operate within impunity the system that gave rise to the fatality in the first place. Paradoxically a company may be under sanction for the same period and be found not guilty of any wrongdoing.

It is difficult to draw a distinction between the proposed remedial orders, and the sanctions already at the disposal of the Health and Safety Executive in the form of improvement notices and prohibition notices. According to the HSE some 11,000 such enforcement notices are issued each year. Local authorities also issue improvement notices and prohibition notices. The new orders will be meaningless if served by a HSE Inspector wearing a policeman’s hat.

This clause doesn’t introduce any greater penalties than could already be imposed under the Health and Safety at Work etc Act 1974 for lesser offences.

Under the Health and Safety at Work etc Act 1974 companies committed to the Crown Court for health and safety offences are already subject to unlimited fines.

The proposed Bill does not seek to impose any specific health and safety obligations or duties on the company directors. Companies found guilty of corporate killing will be fined, but there is to be no criminal liability of company directors. If custodial sentences can be given for cruelty to animals, or the killing of bluebells or killing someone outside work, there is no reason why the same penalty should not apply to a death at work.

84 R. v Great Western Trains Limited— The Times 27th July 1999.
85 Bergman, D. Corporate Sanctions and Corporate Probation. 1992 NLJ Vol. 1444 P.1312/
CONCLUSIONS

The draft Bill is unimaginative, unimpressive (except for corporations) and woefully inadequate. It is just a political reaction to appease public outcry and can have no benefit to the families of the victims of death at work- or indeed to society at large. If the link and evidence are strong enough to show a director knew what was going on, he can be prosecuted now under section 37 of the Health and Safety at Work etc Act 1974. If there is not enough evidence, and the company is prosecuted and a director suffers, there is a question of human rights. The proposed new process weakens the burden of proof of finding directors guilty, which cannot be right.

The proposed new offence may correct many of the problems that are presently thwarting the conviction of errant directors. Clearly, if the proposed forms are intended to assuage public opinion, then new legislation is needed. However, to punish individuals and organisations appropriately, the existing law together with proper enforcement of an amended Health and Safety at Work etc Act 1974 to permit more jail sentences would seem to be wholly sufficient.

It is my belief that "corporate manslaughter" is a dubious proposal, which can be avoided by adopting and enforcing the existing criminal sanctions under the Health and Safety at Work etc Act 1974. The Bill as currently drafted is hopelessly flawed and cannot be commended.

56. Memorandum submitted by Roy Cotterill

I was a Transport Engineer for many years, retiring at the end of 1994. From 1962 I had some responsibility for fleet maintenance, and over the years I progressed to Chief Engineer, and Engineering Director status, on varying size fleets up to 320 coaches and buses operating local and International services. In that time I dealt with many tragic deaths, and this has given me what may be seen as opposing views in some cases to those represented in your draft. Nevertheless they are matters of real concern by someone who has been in the position of defending a Companies reputation in such cases.

PARAGRAPH 17

The questions are:

(a) Who would have been responsible for the football tragedy in Sheffield? If I remember rightly the scapegoat eventually selected was a Police officer but if the ground had not been modified to the standards required by the FA who insisted barriers be erected to keep the spectators off the pitch, those at the front who were crushed could have got out onto the pitch.

(b) Are Hospitals and Care Homes who have patients rather than customers within the ambit of the bill?

(c) Who is responsible if there are deaths at a mass rally, or indeed on a picket line? I do not see the Trade Unions being happy with this.

(d) If a Fire Officer made a wrong decision which resulted in deaths and a subsequent investigation considered sometime later, and with the benefit of hindsight, and of course considered in a calm atmosphere without any pressures, found he had been wrong, what would happen to him?

A glaring example of how this happens occurs every Saturday when football pundits do innumerable replays to prove a case against a referees decision. I have been under similar pressure at road accidents where someone has been trapped underneath a vehicle and the Fire Service have sought advice.

(e) For example, it is not always the Transport operator who is at fault when a number of accidents and deaths occur. In 1970 a traffic management scheme was implemented in Stockton on Tees, part of which was to have a contra flow bus lane. This scheme resulted in a number of fatal accidents, and others with serious injuries, as pedestrians did not think to look behind them. Would the County Engineer be held responsible.

(f) If a train driver fails to stop at a red signal, that cannot be the fault of the management, however in my experience in similar circumstances on the road there is a swift movement of TU support towards the driver in many instances on the basis that he has to be protected. In doing so the result is a great many diversions, blaming everything from vehicle condition to pressure to keep to time, the man being made to come to work when he had personal problems, anything to deflect the blame from where it should lie.

(g) Who would be responsible for a disaster at a nuclear plant, the designers, the operator, the site engineer, or those who decided that was the system by which energy should be produced.

(h) If a car is serviced and someone is killed later as a result of a faulty repair, should not the blame rest with the qualified man who did the work, to blame the management does not seem right.
Paragraph 28 see 17d

Paragraph 29
(a) It is going to be difficult to determine at what level responsibility should rest, indeed in complex organisations it will be difficult to find the line of command because in fact in some companies the position changes during the day. At my last company the position over three depots and a central workshops was that the maintenance staff came under the control of the Area manager who in every case was a traffic specialist. Most of the maintenance staff drove for an hour morning and afternoon and he dealt with all discipline except where it was of a technical nature.

The hidden problem in all of this is that regardless of who is nominally in charge of one aspect of an operation, he is generally in turn controlled by some accountant who is restricting the budget and therefore out of the firing line.

What I am inferring is that although there will be a specialist in every organisation for every aspect of their operation and he will turn out to be the person who will be held responsible but he, in many cases, will not be able to do it to his satisfaction because of other pressures.

Paragraph 52
(a) The matter of sanctions and fines is one which does concern me, if only because there can be gross unfairness. If a large company is convicted and fined it would still carry on and no doubt manage to recover that loss over the next few years. A smaller company, convicted of the same type of offence and given the same level of fine could have to close down causing hardship to it’s workforce when they may not have been at fault.

One way to balance this out would be to base the penalty on annual turnover of the entire Company. Thus the conglomerates would pay on the entire group of companies, the smaller one just on it’s own.

On the basis of personal responsibility the person should be dismissed without the usual support of pension rights etc. there are so many rolling contracts these days though that this may be extremely difficult to do, but I feel that in many cases a working man is thrown onto the street whereas the man who told him what to do gets off with a much higher payment, if indeed he is dismissed at all.

Paragraph 57
(a) When I was involved in many investigations in the past, the Police attended an accident, took the statements, measurements, and photographs and decided on the level of investigation. If there was any suspicion that the vehicle condition had contributed, then we were authorised to return the vehicle to a depot and the Department of Transport local vehicle examiner would come to check the vehicle thoroughly. I cannot recall any case where the condition of my vehicle contributed to an accident, or where the wrong decision was made by the Police. Nowadays there seems to be an absolute army of so called experts all trying to place the blame, the Police call it a crime scene, and close the road for long periods all supposedly in search of the truth, I doubt if their results are any different to those of my day, when we would all have left the scene within an hour or so. It must be worrying to people who are confident that there is no responsibility on their shoulders to see all these people, who really to justify their involvement, have to blame someone, it is almost “if the Devil don’t get you Satan will”. The Police should be in charge of the investigation, others should only be invited to attend for a specific reason to offer expert advice where the police feel it necessary, thus the persons under investigation would know who to speak to. It must be remembered that those who stand accused have some rights and deserve to be treated in a reasonable, courteous, and considerate manner, because anyone who vaguely feels they have some responsibility for a death is under terrible personal pressure.

I trust that you find the above of interest, I am sorry if it seems too long but I wanted to express my views as someone who has been involved from the other side of the problem.

19 April 2005

57. Memorandum submitted by Dr Simon Bennett

Clearly the Government is seeking to provide greater protection for the general public. The Government is to be congratulated for pursuing this objective. I fear, however, that in establishing a charge of corporate manslaughter the Government may reduce rather than augment margins of safety.

I have spent the last six years studying the UK commercial aviation industry. The industry has an exemplary safety record. This can be attributed to the industry’s dynamic safety culture, non-blamist approach to incident and accident reporting and investigation and commitment to active learning (that is, to the application of lessons learned). Because those who work in the industry know they will not be subjected to a witch-hunt, they are more inclined to report incidents and accidents.
In UK commercial aviation incidents and accidents are investigated with a view to learning and applying lessons in the hope of avoiding a repeat. Incidents and accidents are not investigated with the primary purpose of blaming, prosecuting and incarcerating. In terms of preventing future incidents and accidents, prosecution and incarceration serve no useful purpose whatsoever. Indeed, in creating an atmosphere of suspicion, fear and dread in which persons are reluctant to speak out, the threat of prosecution makes incidents and accidents more, not less likely. Recourse to law and the individuation of blame make society not more safe, but less safe.

The more sensible alternative to the government’s current proposal is to require that all enterprises whose activities have implications for public safety introduce confidential (i.e. anonymised) incident and accident reporting systems. Enterprises should then be required to investigate and act on all verified reports. They should also be required to share their new knowledge with other enterprises (as far as is reasonably practicable). Where appropriate they should disseminate this information to industrial sectors other than their own (that is, they should disseminate new knowledge horizontally as well as vertically).

Blaming, prosecuting and incarcerating serve only to satisfy society’s baser instincts. This is, in my opinion, Tabloid Justice. While a desire for retribution is understandable, it serves no rational or constructive purpose. Retribution—the product of raw emotion—is an illogical and animalistic response to misfortune. Investigation, calculation and active learning—products of intelligence, education and intellect—constitute a logical response to misfortune.

At Linate Airport on 8 October 2001 a passenger jet collided with a business jet that had crossed the live runway. All on board the aircraft were killed. Victims’ relatives demanded that those responsible be held to account. Employees were prosecuted. Custodial sentences were passed. Linate’s Director, for example, was sentenced to eight years. Victims’ relatives and the press were satisfied. But did this make the Italian air navigation service safer?


I look forward to the new government evidencing a logical approach to that most perplexing of problems—how to protect the public without creating a dysfunctional atmosphere of fear amongst those responsible for public safety.

3 June 2005

58. Memorandum submitted by Greenwoods Solicitors

I am head of Greenwoods health and safety department and lead one of the teams dealing with the defence of the Hatfield rail crash prosecution. I therefore have a detailed knowledge of the present law and the difficulties that face prosecutors seeking evidence of individuals who represent the controlling mind of a company who have allegedly acted with gross disregard for the safety of others.

That difficulty is often mistakenly understood to be failure to identify a person who exists but escapes prosecution through lack of evidence, when in reality I believe that in the vast majority of cases there is no such person.

The proposed new crime seeks to overcome that difficulty but contains one glaring error. It requires a prosecution to prove that the organisation has committed the offence as a result of the management failure of its senior manager or managers. It follows that in the indictment and in the prosecution evidence, the senior managers will have to be identified. It is quite possible that the Defendant organisation, having regard to the totality of the evidence, may decide to plead guilty, or at the end of a trial may be found guilty. Either way the press will be free to report the details of the case, including the roles played by the individual managers.

What is objectionable is that the individual managers will not themselves be Defendants. They will have no say in the way that the Defence is conducted, or in the wording of any basis of plea. They will have no locus standi in the proceedings and will therefore be unable to clear their names in Court. They will not be entitled to criminal Legal Aid or to cover for legal costs under any employer’s policy of insurance. They will effectively be tried in their absence at a trial which could render them unemployable and severely damage their reputation with family, friends and former colleagues.

Once upon a time when disaster struck it was blamed on the anger of the gods or a witch was burned at the stake. Now it seems we must find sacrificial “senior managers”. They are usually able to demonstrate, inconveniently, at trial that they are no more than individuals doing their best in a high risk industry. It seems that the proposed solution is to deny them a place at trial.
In my view the new law is entirely unacceptable and will be open to challenge under the provisions of the Human Rights Act.

After seven years of trying the Government ought to have come up with something better than this.

31 March 2005

59. Memorandum submitted by Unison

INTRODUCTION

UNISON is Britain’s biggest trade union with 1.3 million members. We organise in the public sector, primarily in local government, the health service, the privatised utilities, and education. We welcome this legislation which we hope will ensure that companies and other bodies are accountable for the manslaughter of their workers and members of the public. We consider that workplace fatalities are avoidable and are usually caused by failures in health and safety systems. We therefore support any new offence which makes it easier to prosecute a company, or other employing organisation, where a death occurs as a result of a work activity. This demonstrates justice to both the relatives and colleagues of the worker.

In recent years we have seen unsuccessful attempts to secure convictions against front line workers where fatalities have occurred due to juries unwillingness to convict such individuals. We believe the overwhelming view of the British people is that responsibility for such tragedies lies with owners, directors and very senior personnel.

SCOPE OF THE OFFENCE

On average five workers are killed at work each week. Almost all of these are a result of management failures, and all of them are avoidable. These are killings that are caused by employers and we believe that it is high time that something was done to bring to account the people who cause these deaths.

At present it is necessary to show a director or senior manager of an organisation is liable. This requires evidence of “gross negligence”, and without that there is no case against an organisation. This means that unless the person who is prosecuted is found to be the “directing mind” of company and guilty of manslaughter a company can get away without facing charges. This is a particular problem with large organisations.

We welcome the proposal in section 3, which will make it easier to prosecute an organisation where there is a gross breach of their duty of care and a senior manager of the organisation knew or ought to have known about this breach. As the Bill relates to failings in the strategic management of organisations, rather than failings at junior levels we are pleased to see that responsibility is set at the senior management level and believe that this sets the right balance. However we would hope as the emphasis is rightly placed on senior management there is also acknowledgement that delegating to more junior staff will not allow such managers to circumvent the offence (as can happen with the current legislation). This should be seen as inappropriate action/senior management failure in itself.

UNISON would like to see greater clarity in subsection 2 (b) of section 3 so that it is easier to understand. It is by no means clear whether all or just one of these tests needs to be met. In any event, UNISON does not feel subsection 2(b)(iii) should have to be an integral part of the offence. If an organisation fails to comply with appropriate legislation and knew/ought to have known and was aware of the risks that should constitute the offence. The fact an organisation also sought to profit from that failure is important but more relevant to the issue of the penalty imposed.

More importantly, we believe that concerns previously raised by workers and/or their representatives’ should be taken into account. Under health and safety legislation, both safety representatives’ and individual workers have a legal right to draw their employers attention to concerns relating to bad health and safety practices Where these are ignored by employers and a work-related death occurs, we believe that this should be considered a corporate failing.

In subsection 3 of section 3 it is proposed that the new offence be linked to the standards required under existing health and safety legislation. This is acceptable to UNISON. However, as legislation related to health and safety can be enacted outside of the Health and Safety at Work Act, for example, the Working Time Regulations, clarity is needed to ensure that these are also covered within the drafted bill itself. In addition, whilst health and safety regulations sets out the principles, Approved Codes of Practice, guidance as well as British and Industry Standards gives the details on which compliance should be met. The Bill should therefore clarify that the standard to meet may also be achieved in this way.
APPLICATION

UNISON believes that this legislation should cover all undertakings. There are no good reasons why overall organisational health and safety should be less of a priority within such bodies. We accept that there may be difficulties in applying the legislation to certain unincorporated bodies. However, many of the bodies listed in the draft Bill can and should liable, for example schools, as these do not have most of the potential problematic characteristics identified by the Home Office. In 2000 the Government proposed that the legislation apply to the widest range of bodies and respondents supported this. UNISON believes there is great public support for the bill to be widened in this respect, rather than this matter simply being reviewed after the Bill’s introduction.

The Bill has ruled out any jurisdiction over the operations of companies, which are registered in the UK if a fatality occurs abroad. UNISON believes that in some circumstances the legislation should apply—in particular where a fatality occurs overseas because of the failure of a UK based corporation to undertake a suitable risk assessment. We consider without such steps some UK companies may see this as sanctioning lower health and safety standards (which may be cheaper for them) when carrying out activities abroad.

SANCTIONS

As a company or organisation cannot be sent to prison, the Bill proposed sanction is unlimited fines. We agree with the recognition that in relation to Crown bodies, this is just recycling money from one department to another.

We therefore recognise the difficulties faced by the Government in this area and suggest that a full review be considered to identify alternative ways of effectively sentencing organisations. Innovative sanctions such as corporate probation ie where organisations are monitored and forced to provide safety cases and risk assessments for a specified period and more frequent inspections during that period, the removal of Directors as well as naming and shaming initiatives could also be considered.

We welcome the Government’s commitment to increasing penalties generally for all health and safety offences and would hope that the draft Bill could be used to achieve this. We hope fines within this bill would be much higher than those previously imposed to reflect the severity of the offence and also be directly linked to company profits.

INDIVIDUAL DIRECTORS

The draft Bill reflects the view of the Law Commission that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. However in it consultation in 2000 the Government accepted that punitive sanctions are more likely to be a deterrent than simply fines.

We know that it is not companies that are responsible for killing workers it is the action of people. Clearly we would want to avoid scapegoating of front line employees or middle managers. However, we believe that it is fundamental that criminal liability for management applies not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure.

We accept that the draft Bill cannot be used to address this issue, but hope that the Government will consider the issue of director’s responsibilities, in a parallel process.

We believe that legislation covering such individuals within organisations must be part of an overall strategy to ensure a proper health and safety culture in workplaces, particularly as the sanctions proposed in this draft bill will in most cases be a fine.

CROWN IMMUNITY

We believe that the new laws should apply to everyone and can see no justification for allowing worse standards in the public sector than the private sector. For this reason we very much welcome the proposal to extend this Bill to cover government departments.

We would hope that this Bill is used as the impetus to remove crown immunity from all health and safety offences.
60. Memorandum submitted by the Royal Borough of Kensington and Chelsea

INTRODUCTION

The Royal Borough of Kensington and Chelsea takes health and safety issues seriously. It understands the Government’s desire to ensure there is accountability for accidents when they occur. The present difficulty in proving the “directing mind” of a company in order to secure a conviction of manslaughter is well known. However, the Royal Borough strongly objects to the inclusion of local authorities in the proposed legislation. Local authorities do take health and safety issues seriously.

Risk assessments are carried out regularly with relevant procedures put in place to address any concerns.

The Council would comment on the proposals as follows:

THE OFFENCE

The Government is proposing to shift responsibility for alleged breaches of health and safety from the organisation to senior managers. The notion that it is human failings rather than “bricks and mortar” which causes accidents is clearly understood. However, the difficulty which the proposed responsibility will create is identifying which manager and at what level responsibility lies. Would it, for example, extend to the Councillors who make policy decisions? If it does it will cause unease for Councillors if they are drawn into the consequences of the Act.

It seems to us the organisation itself must be held responsible.

We agree with the proposal that in order for liability to ensue, there must be a duty of care owed to the victim.

THE SCOPE OF THE OFFENCE

The Council welcomes the Government’s approach that in the case of public bodies like local authorities, an offence will only be deemed to have been committed where there is a duty of care owed:

— as employer or occupier of land
— when supplying goods or services or when engaged in other commercial activities.

The proposal therefore to exclude from the Bill matters of public policy which result in death is sound.

MANAGEMENT FAILURE BY SENIOR MANAGERS

It is agreed that working practices should be the main focus of the offence. However, it is difficult to understand how “immediate, operational negligence (our underline) causing death . . .” can be excluded. Any negligence which results in breach of the Act should be actionable.

We are not convinced that making the organisation’s senior management responsible for any offence committed will necessarily secure a conviction. It is likely that any alleged failures by junior staff will in practice be caught by the act with the senior manager being held liable. In such a situation senior managers may seek to defend their position using the “due diligence” principles and argue that a junior manager failed to follow approved practices.

Furthermore the emphasis on procedure is regrettable, as this will stifle innovation. It should be a defence in the proposed legislation to say that we had established evidence that a particular way of working was safe in practice even if it was not standard procedure. An example could be a design which did not comply with Government guidelines on streetscape design.

GROSS BREACH AND STATUTORY CRITERIA

The intention to reserve the “offence” for cases of gross negligence is welcomed. However, the legislation would need to be very clear about excluding from the Act, those cases where genuine efforts are made to operate in a safe or responsible way but where appropriate standards are not quite met.
APPLICATION

It is agreed that the proposed Act should apply to companies so that profit is not put before health and safety on their list of priorities.

CAUSATION

It is right that corporate liability should not arise if the intervention by an individual was significant which caused the death.

CONCLUSIONS

We would reiterate our concerns that the legislation should not extend to local authorities as the existing health and safety legislations are adequate.

Such an Act would have a negative impact on innovation in local authorities for fear of prosecution if an accident should occur. Furthermore such an Act would cause recruitment difficulties when seeking to attract both Councillors and staff to local government.

61. Supplementary memorandum submitted by the Royal Borough of Kensington and Chelsea

The Royal Borough of Kensington and Chelsea is concerned that the proposed Corporate Manslaughter Bill as currently drafted will stifle innovation.

In particular, one major concern is that the Bill is likely to have an adverse impact on improvements to the highways as authorities would be less likely to undertake an experimental approach as the Royal Borough has done.

The specific example in our case to assist your understanding of the concerns, relates to our recent improvements to Kensington High Street. In this case we undertook a radically new design approach and this involved disregarding Department for Transport design prescriptions whilst at the same time closely monitoring the consequences of deviation from DfT design, for personal injury accidents. To date the accident record has in fact shown an improvement. Furthermore the new improvements have received accolades and awards.

Such a Bill if it becomes law could adversely affect such innovation. The proposed legislation only allows a defence to a charge of corporate manslaughter on the grounds that the defendant fully complied with health and safety requirements. This proposal in the Bill is also likely to encourage legal advisers and insurance managers to advise elected Members that they should not run the risk of departing from DfT or other Government design or other guidance.

The Bill, if it becomes law should address these concerns and encourage innovation whilst also protecting the public. There is a fine balance which needs to be struck to achieve both outcomes.

28 July 2005

62. Memorandum submitted by the Ergonomics Society

1. Ergonomics and the Ergonomics Society

Ergonomics is concerned with the interactions between people and technological systems. The ergonomist is involved in the design of human tasks and jobs, the usability of equipment, procedures and training for human tasks, management and organisation, and the general working environment. In effect, this is the practical application of the knowledge and methodologies of the human sciences (psychology, physiology, anatomy) to the design of systems. The understanding of human behaviour, with some emphasis on human error, contributes to assuring the desired performance of a system that includes humans, equipment, procedures and processes.

The objectives of ergonomics are improved performance, reduced human error, greater job satisfaction and reduced risk of injury. Typical applications of ergonomics principles and techniques are in systems of transport, industrial processes, communications, and computerised operations. Ergonomics is applied across a spectrum of activities, ranging from high-hazard environments to more routine undertakings. The synonym “Human Factors” sometimes is used in place of “Ergonomics”.

The Ergonomics Society, founded in 1949, is the professional body of ergonomists, with an international membership in excess of 1400 practitioners in the field. Its aim is to promote the awareness, education and application of ergonomics in industry, commerce, the public sector and government. It maintains professional standards and a Register of Ergonomics Consultancies.
2. The Society’s Response to the Draft Bill

2.1 General

2.1.1 The Society welcomes the general tenor of the Draft Bill, that is, to replace the current “identification” principle by exposing “management failure” in organising and/or managing the activities of the organisation. There is considerable evidence that such management failures are a key feature, and often the dominant feature, in the causation of serious accidents. Over the past twenty years, ergonomists, and other specialists in human aspects of technology, have changed the focus of accident investigation and prevention, from concentrating solely on the individuals immediately involved, to much broader analysis of the organisational context. The now established phrases “management of safety” and “safety culture” represent this approach. Typically, the immediate actors in an accident scenario are dependent on the design of equipment, procedures, documentation, and training which may be inimical to the demands of a particular situation—The ultimate responsibility for the design of such support lies with management.

2.1.2 The Society welcomes also the extension of the scope of the Draft Bill, to include the Crown and other government bodies. Such bodies often have considerable responsibility for potentially hazardous situations, and it is proper and fair that they should be subject to such a Bill, along with commercial enterprises.

2.1.3 The Society commends the “Power to order breach etc. to be remedied” (Sec. 6 of the Draft Bill). This will make a constructive contribution to future safety, both for the organisation concerned and, through publicity, for cognate organisations. However, please note our further recommendation in 2.2.7 below.

2.2 Requests for further consideration by the Government

2.2.1 Clauses 4(1)(c) and 4(4) of the Draft Bill: The Society notes the exclusion of “exclusively public function”, and recommends that this be considered further. In order to make the application of this legislation as comprehensive as possible, such activities should be included.

2.2.2 Clause 4(2) of the Draft Bill: Similarly, the Society recommends that the exclusion of “matters of public policy” be reconsidered. The Draft Bill cites, as justification, that such processes involve the allocation of resources and the weighing of competing interests. Such issues of resource allocation and other matters are not unusual in the management of safety in commercial and industrial contexts, and so we cannot accept this as an argument for excluding “matters of public policy”.

2.2.3 Clauses 10(1) and 10(3)(b) of the Draft Bill: The Society accepts the exclusion of combat operations by the armed forces (Clause 10(1)), but it is concerned that the definition of combat operations includes associated training (Clause (10)(3)(b)). Such training should be designed so as to avoid excessive risk to the participants, and hence should not be excluded from the compass of the Draft Bill.

2.2.4 Clause 1(2) of the Draft Bill: The Society is concerned by the exclusion of unincorporated bodies, as implied in Clause 1(2) of the Draft Bill. We note the arguments set out in paras. 41–43 (pp. 15–16) of the Introduction to the document, and the assurance (para. 43) that the matter will be kept under review. Nevertheless, the intent is to include police forces (para. 44). We believe that there are many more unincorporated bodies, with extensive management structures and with responsibilities for safety of staff and others, which ought to be included in the proposed legislation.

2.2.5 Section 5 of the Draft Bill: The Society is concerned also by the exclusion of “corporations sole”. We see that note 42 (p. 41) of the Explanatory Notes implies that corporations sole will continue to be subject to the legislation on gross negligence manslaughter. It seems possible that some such entities have support personnel necessitating safety management systems, where the cardinal principle of the Draft Bill has application. Thus, the exclusion of corporations sole should be re-considered.

2.2.6 Clause 1(4) of the Draft Bill: We are disappointed by the restriction of sanctions to a fine only. We note the Introduction’s history of previous consultations on individuals’ involvement—we are very sympathetic to the Government’s previous view, that the deterrent force of the proposed legislation would be weakened by a lack of punitive sanctions against company officers. Notwithstanding the continuation of the legislation on gross negligence manslaughter, we urge re-consideration of individual prosecution and/or disqualification of the responsible company officers where corporate manslaughter has been proved. It is arguable that company officers may feel insulated, as individuals, by the proposed Bill in its present form.

2.2.7 Section 6 of the Draft Bill: We welcome the “Power to order breach etc. to be remedied”, but we are convinced that this section must contain also provision for the involvement of HSE or a similar body, to track and approve the “remedial steps” taken by the convicted organisation.
2.3 Responses to specific questions in the document

2.3.1 Definition of “a senior manager”. The Society accepts the arguments in paras. 25–31 (pp.12–13), and has nothing to add. However, it would be helpful if such discussion were to be made available in a supplement to the Bill, such as a code of practice.

2.3.2 “Gross breach and statutory criteria” (paras. 32–33, pp. 13–14) We judge that the definition of “gross breach” as “...conduct falling far below what can reasonably be expected.” is still rather vague. Indeed, the qualification “far below” seems unaccountably lenient for a Bill that focuses on incidents where death has occurred in a work situation. Analysis of such incidents shows often that fatal accidents result from an interacting array of organisational failings, where the array could have been foreseen and defences planned. Furthermore, effective management of safety requires continuing awareness and monitoring of likely hazardous situations. Thus, we would recommend a more comprehensive and stringent formulation, such as—“...conduct, particularly in failures to plan, resource, execute, and monitor safety systems and procedures, that could reasonably be expected to subject employees or others to unacceptable risk.”

Rather less important, we feel that clause 3(2)(b)(iii) is superfluous. The motivation for the breach is irrelevant—only the duty of care is pertinent. Indeed, there might be sources of motivation other than profit,

2.3.3 “Statutory criteria” Further to the above comments, we accept that the inclusion (Clauses 3(2) and 3(3) of the Draft Bill) of reference to statutory criteria is helpful. However, there is a very wide range of guidance on safety and ergonomics, in addition to statutory documents. The Bill, or supplementary information, should acknowledge this, and reference might be made also to “any other relevant legislation or guidance’. We suggest that HSE could advise on the range of eligible publications. Other specialists, such as The Ergonomics Society, also might help in this.

2.3.4 Fines for Crown bodies? (para. 53, p. 18) We accept that such fines would serve little practical purpose. The imposition of remedial orders, and the attendant publicity, would be much more effective and fitting. Please note also our comments at 2.2.6 above.

2.4 Further recommendations

2.4.1 Ergonomics as applied to the design of equipment, procedures, tasks, training, working environments, and organisational issues makes a cardinal contribution to safety. This should be emphasised in the Bill, if allowable, but certainly in any supplementary codes of practice or guidance notes.

14 June 2005

63. Memorandum submitted by the London Criminal Courts Solicitors’ Association

The London Criminal Courts Solicitors’ Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 1000 members including Crown prosecutors, defence practitioners, freelance advocates and many honorary members who are circuit judges and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interests of the members on any matter which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts, including those who are in the course of their training.

We anticipate that there will be a range of views expressed by our members in relation to the Department of Constitutional Affairs (DCA) consultation paper as the arguments in favour and those that weigh against changes to the current law need to be finely balanced and therefore we do not realistically anticipate all members will share the same view. We have however sought to put the views of those preparing the response as succinctly as possible in order to contribute positively to the current debate regarding corporate manslaughter.

INTRODUCTION

The need to reform the law of corporate manslaughter has been highlighted in recent years by a series of high profile cases in which companies have escaped conviction despite serious loss of life.

A fundamental difficulty has been the requirement that, before a company can be prosecuted for manslaughter, an individual who can be said to be a ‘directing mind’ of the company must first be convicted of gross negligence manslaughter. This hurdle has proved very high indeed and in many cases insurmountable.
Only those people at the top of the company who can be said to embody the company in their actions and decisions are capable of being considered as 'directing minds'. In practice this means a very small number of senior directors and managers. The prime difficulty is proving that such a senior director or manager is also personally responsible for a grossly negligent act or omission, which results in loss of life.

These difficulties are compounded in cases against large companies. Complex management structures make it more difficult to identify a 'directing mind' and the delegation of responsibilities means one individual at the top is less likely to be proved to be the cause of the death or deaths in question.

The very low number of prosecutions brought against companies, and the even lower conviction rate, reflects these problems. Of the 34 manslaughter prosecutions for causing deaths in the workplace brought since 1992, only six, small, companies have been convicted. A major corporate defendant is yet to be convicted. The two major prosecutions brought in recent years against large companies for disasters outside the workplace—the Great Western Trains and P&O Ferries cases—both failed in their early stages. Great Western Trains escaped conviction following the deaths of seven people in the Southall train crash, when the trial judge ruled that the prosecution could not proceed without a conviction of an individual director or manager. A decade earlier, the prosecution failed to get off the ground in the case against P & O European Ferries following the sinking of the Herald of Free Enterprise, in which 192 people died. Here, the judge ruled there was insufficient evidence of wrongdoing by a director or senior manager.

The failure of such high profile cases has led to widespread public concern that the law is unable to hold large organisations to account, and has so far failed to deliver justice.

It is against this backdrop that the government has now set itself the challenge of creating a viable criminal offence, which more adequately reflects the grave consequences of a company’s failings. Central to its proposal is “striking the right balance between a more effective offence and legislation that would unnecessarily impose a burden on business”. The core of the new offence is therefore a more workable scheme where a company's failures can be more easily attributed to the way those at the top of the organisation organise and manage its activities.

The question that falls to be asked is: does the draft Bill achieve these aims? We raise three areas of concern:

1. Are the terms of the Bill sufficiently precise?
   We question:
   (a) The requirement for the activity in question to have been managed or organised by senior managers;
   (b) The requirement to prove that gross negligence was in pursuit of profit;
   (c) The limitation of the “duty of care”;

2. Should it extend to all Government bodies and unincorporated associations?
   We question:
   (a) The excessively broad application of the proposed exemptions;
   (b) The apparent exclusion from liability of public bodies carrying out an exclusively public function;
   (c) The exclusion of The Prison Service;
   (d) The exclusion of unincorporated associations;

3. Should there be sanctions available other than fines on conviction?
   We question:
   (a) The inadequate financial penalties;
   (b) The insufficiency of other sentencing powers;
   (c) The necessity of disqualifying individual managers from acting in a similar role in any future undertaking;
   (d) The failure of the legislation to provide greater powers to ensure the effectiveness of investigations, prosecutions, and the promotion of safe systems of work;
   (e) The limited effectiveness of the proposed Remedial Orders;
   (f) The failure of the legislation to provide greater powers to ensure the avoidance of the frustration of criminal proceedings.
1. **Is the Proposed Legislation Sufficiently Precise?**

1. **The Proposed Legislation**

   1.1 An organisation will be guilty of the new offence if the way in which its senior managers manage or organise its activities causes a person’s death, such that the activity constitutes a gross breach of a duty of care that the organisation owed them as their employer, or as the occupier of a building, or in supplying goods or services or performing a commercial activity.

   1.2 The organisation’s conduct will be assessed against a number of statutory criteria, to include the extent to which the company has breached relevant health and safety legislation, whether senior managers were aware of the risks that the company was running and whether they sought to profit from that breach.

   1.3 The offence will apply to all corporate bodies. There will be no general Crown immunity and the offence will apply to a wide range of Government departments and other Crown bodies, as well as other parts of the public sector.

   1.4 The new offence will target the liability of organisations themselves and will not apply to individual directors or others. Individuals will however remain liable to prosecution for existing offences where they are personally to blame.

   1.5 The offence will be tried in the Crown Court and the penalty will be an unlimited fine.

   1.6 The Court will have the power to make remedial orders. Private prosecutions will require the consent of the Director of Public Prosecutions. The offence will apply in England and Wales and will not carry extra territorial jurisdiction.

2 **Who is liable?**

2.1 Clause 1(1)—"An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised by senior managers:

   (a) causes a person’s death; and

   (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”.

2.2 Sub section 2 states that “The organisation to which this section applies are:

   (a) a corporation; and

   (b) a government department or other body listed in the Schedule”.

   This offence is therefore limited to corporations only, which contrasts with the previous proposals which had suggested the offence apply to “undertakings”, a much wider class of potential defendants.

2.3 The term “organisation” doesn’t include unincorporated associations. Currently, because gross negligence manslaughter is a common law offence and, at common law, an unincorporated association is not a legal person, an unincorporated association cannot be convicted of gross negligence manslaughter. However, the position might be different if the offence of gross negligence manslaughter was created by statute because the Interpretation Act 1978 defines “person” to include “a body of persons corporate or unincorporate”. We believe that there is no good reason why unincorporated associations should not be included within the term “organisation” and, therefore, subject to the proposed Bill. The justification that many unincorporated bodies do not have a distinct legal personality and have transient structures and personnel is not accepted. Such assertions may be true of some unincorporated organisations but certainly not all.

3 **Definition of Senior Manager**

3.1 One of the primary criticisms of clause 1 of the proposed legislation is the requirement for the activity to have been managed or organised by senior managers. In clause 2, a senior manager is defined as follows:

   “A person is a ‘senior manager’ of an organisation if he plays 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.”

3.2 According to the consultation document, this principle of identifying the senior manager is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which will also be relevant for smaller bodies. The consultation document confirms that the offence is targeted at failings in the strategic management of an organisation’s activities.

3.3 However, to come within the definition of a senior manager, a person must play a role in managing or making management decisions about the activities of the organisation as a whole or a substantial part of it. Therefore, the role must be “significant”. The consultation document acknowledges that the requirement that a senior manager’s role extends to the whole or a substantial part of the organisation will mean that
the definition will affect organisations differently depending upon their size. “Management responsibilities which might be covered by the offence within a smaller organisation . . . may well be too low a level within an organisation that operates on a much wider scale” (consultation paper—paragraph 30). This replicates one of the key criticisms of the existing legislation, by creating a two-tier system of liability and is inequitable in its operation. In reality, the effect will be that two people doing much the same job within different organisations of differing sizes will have a greater or lesser potential for corporate liability, depending upon whether they work in a larger company where the organisation of the company is more complex, or within a smaller business enterprise. In our view, it would be more appropriate for the legislation to require the management failures to be those of managers rather than senior managers, which would avoid the incongruity created between smaller and larger organisations, and would mirror the current health and safety legislation, where it is not necessary to show that the directors or senior managers have personally failed to ensure health and safety procedures are complied with.

3.4 If the legislation is altered to require the management failures to be those of managers rather than senior managers, it should no longer be necessary for the prosecution to have to prove that those managers played a role in managing or making management decisions about the activities of the organisation as a whole. It would be sufficient for the definition to require that a person be defined as a manager of an organisation, ie if he plays a significant role in the organisation. Such a definition would be easier for a jury to comprehend, thereby simplifying the directions that would need to be given to a jury at trial. The jury would have to consider the function the manager played in the organisation and determine whether he/she played a significant role.

3.5 One of the main objections to the current law is that large companies escape prosecution because of the ongoing difficulty in proving the involvement of a “controlling mind”. However, the Draft Bill’s requirement to identify “senior managers” carrying out a “significant” role may be equally problematic in achieving successful prosecutions for corporate manslaughter.

4. Definition of Gross Breach

4.1 Gross breach is defined in Clause 3(1) as a failure constituting “conduct failing far below what can reasonably be expected of the organisation in the circumstances”.

Clause 3(2) gives some statutory criteria, which are intended to provide a clearer framework for assessing an organisation’s culpability. These require the jury to consider:

“whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance and if so:

(a) how serious was the failure to comply;
(b) whether or not senior managers of the organisation:
(i) knew or ought to have known, that the organisation was failing to comply with the legislation or guidance;
(ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply; and
(iii) sought to cause the organisation to profit from that failure.”

4.2 Clause 3(4) entitles a jury to take account of other matters that they consider relevant.

4.3 “Profit” is not defined in the Bill. We would submit that having to prove that gross negligence was in pursuit of profit constitutes an additional unnecessary burden for the prosecution. Although profit isn’t specified to be purely pecuniary, there will be an obvious inference that financial gain was intended. The inclusion of this element in the definition of the offence seems to raise the possibility of excluding not for profit organisations and to a large extent government departments. In our view, the issue of whether the organisations sought to profit from its failure is a matter for sentencing. In any event, it will be very difficult to prove the motive of economic profit and in the absence of such evidence, a loophole may be inadvertently created whereby organisations will be able to show that their conduct was not grossly negligent, simply because there was no intention to create a profit from that conduct. This clause is ambiguous and unnecessary and is not a relevant issue in negligence law.

4.4 The directions to the jury will inevitably be both complex and too vague and may make it extremely difficult to mount a successful prosecution.

4.5 Clause 3(2)(b)(ii), as proposed, concerns the risk of death or serious harm. However, current thinking in the area of gross negligence manslaughter is that the risk should be an obvious and serious risk of death.

5. Definition—Relevant Duty

5.1 The new offence is drafted to apply only where an organisation owes a duty of care to the deceased “under the law of negligence”. Clause 4(1) also requires the duty of care to arise out of certain specific functions or activities performed by the organisation, so that the offence will only apply where an organisation owes a duty:
(i) As employer.
(ii) As occupier of land (premises).
(iii) When the organisation is supplying goods or services, whether or not for consideration. The consultation document cites examples such as the duty owed by transport companies to their passengers and further notes that services that are provided to the public by public bodies such as NHS trusts will also be covered, as well as those provided on a private basis.
(iv) When carrying out on a commercial basis other activities, that are not the supply of goods and services.

5.2 We question whether it is necessary to define and limit “duty of care”. Should this not be left to the judge to direct to the jury? We believe that there should be a clear indication as to whether the fact that a duty of care was owed is a question of fact for the jury or a question of law for the judge. Alternatively, it may be more appropriate for the question as to whether the circumstances were capable of creating a duty of care to be a question of law for the judge, and whether such a duty was owed to be a question of fact for the jury.

6. Conclusion

6.1 The aim of the new Bill is to provide an offence which is “clear and effective” to replace the current law of corporate manslaughter, which has been so fraught with problems as to make successful prosecutions in many cases impossible. The draft Corporate Manslaughter Bill contains a new offence, which is substantially different from to the proposals in the 2000 Consultation Paper. Specifically, there are no proposals for new offences creating individual liability. The drafting of the new offence is in our view both too rigid and, in parts, too vague, with the effect that the wording of the new offence may act as a barrier to a successful prosecution.

6.2 If the Government is seeking to move away from individual liability towards management failures of companies, where their conduct falls “far below what could reasonably be expected of the corporations in these circumstances” thereby imposing a largely objective test, it is ill conceived in our view to require a management failure by senior managers, defined to be only those who play a role in management of the organisation as a whole. The appropriate test is the one identified in the 1996 Law Commission recommendation which considered failures by “managers” not failings by “senior managers” to be sufficient to give rise to a prosecution. In large organisations the requirement for the failure to be that of a senior manager would incentivise the delegation of responsibility down the management chain, thereby avoiding any potential for a manslaughter prosecution. Additionally, the reference to senior managers will inevitably result in smaller organisations being held to account and more easily prosecuted than larger organisations, which is one of the primary criticisms of the current law.

6.3 The fact that the bill requires a “gross failure” to establish liability, should justify a prosecution proving a management system failure of even junior managers. This in turn would avoid the need to give complex directions to the jury on whether the senior manager was responsible for the whole or a substantial part of the business, which requirement in our view is a further unnecessary hurdle that in reality may prove to be the final stumbling block to any future successful prosecution for corporate manslaughter.

2. SHOULD THE BILL BE EXTENDED TO ALL GOVERNMENT BODIES AND UNINCORPORATED ORGANISATIONS?

7. Crown Immunity

7.1 The current draft Bill makes the offence of corporate manslaughter applicable to an “organisation”. Clause 1(2) specifies that the organisations to which clause 1(1) applies are corporations and “a government department or other body listed in the Schedule.” Clause 1(3) allows the Secretary of State to amend the Schedule by order.

7.2 Clause 5 defines “corporation” and clause 7 removes Crown immunity from “an organisation that is a servant or agent of the Crown”. This therefore explicitly removes Crown immunity. The Government in its commentary on the draft bill at paragraph 38 states that it “recognises the need for it to be clearly accountable where management failings on its part lead to death. There will therefore be no general Crown immunity providing exemption from prosecution.”

7.3 This is subject to exceptions such as for the armed forces in relation to combat operations to include simulated combat exercises (clause 10) and also in the exercise of an “exclusively public function”. The terms of clause 4(1)(c)(ii) limits the duty of care owed by an organisation to “the carrying on by the organisation of any activity on a commercial basis, otherwise than in the exercise of an exclusively public function.” Clause 4(4) goes on to define “exclusively public function” being “a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred by the exercise of that prerogative or by or under an enactment.”

7.4 The current Bill gives no satisfactory definition of “exclusively public function”. Its remit would seem to include police forces insofar as they are carrying out their public functions—and so would include those who die in police custody or those killed as a result of police operations which go wrong. This is despite the
Government’s signalled intention (see below at paragraph 8.3) to extend the legislation to them in due course. If it does not extend to them in the exercise of their public functions, then it would be to omit an area, in which, we would argue, it is perhaps particularly important to ensure accountability.

7.5 The Government’s commentary indicates (at paragraph 22) that the exemptions are designed to exclude examples such as “the Government providing services in a civil emergency or functions relating to the custody of prisoners.” The Government considers that “organisational failings in these areas are more appropriately matters for wider forms of public and democratic accountability through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest.”

7.6 We would argue that organisational failings in these areas are not more appropriately matters for other fora. Rather, it is in these areas, where there can be serious risks to life, that it is most important for Crown bodies to be held to account. The same applies to other Government bodies such as the military who, subject to certain proper exceptions in states of emergency and combat, should be properly held to account for deaths arising out of their management failures. If such bodies are not properly accountable under the law, it is arguable that the UK may be in breach of Article 2 of the European Convention on Human Rights which protects the right to life and Article 13 (the obligation to provide an adequate and effective domestic remedy in respect of breaches to the right to life under Article 2).

7.7 Too frequently deaths in circumstances involving a Crown body are not subject to the scrutiny many believe they should be and this has been an area of considerable public concern.

7.8 In the case of Edwards v UK (2002), which involved the death of a prisoner by the other cell occupant, the European Court of Human Rights, held that the internal enquiry that had been held failed to comply with the requirements of Article 2 to hold an effective investigation into Mr Edwards’ death. The Court held that as a general principle, “The essential purpose of such an investigation is to secure the effective domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”

7.9 We would argue that the fact that the Prison Service as a body cannot be held to account under the criminal law for any criminal failures which may be found, may therefore breach Articles 2 and 13.

7.10 It is fundamental in any democratic society to ensure the accountability of State agents in circumstances where there exists a power imbalance such as in the case of prison officers and prison inmates. In our view, they should be included within the scope of the new law on corporate manslaughter. The application of the law to the military is plainly more difficult and may require more detailed consideration but in principle we do not see why the law should not also apply in that arena.

8. Unincorporated Bodies

8.1 In its previous consultation paper in 2000 the Government indicated its preference would be for the law to apply to “undertakings” on the basis that it did not wish to create “artificial barriers between incorporated and non-incorporated bodies” and also to prevent enterprises being deterred from incorporation, which might be the case if the offence only applied to corporations. This was contrary to the Law Commission’s recommendation that the new offence should not apply to unincorporated bodies despite the fact that “many such organisations are for practical purposes indistinguishable from corporations, and it is arguable that their liability for fatal accidents should be the same.” The Law Commission argued that it would be wrong to extend the law to all unincorporated bodies given that some (for example a two person partnership employing no one) would be unfairly disadvantaged by being charged with the corporate offence rather than the individual offence.

8.2 The justification for excluding unincorporated bodies from the current proposed legislation is set out at paragraphs 41-43 of the Government’s commentary. Reference is made to the problems in bringing a prosecution against a body without a distinct legal personality where the concept of management failure has less ready application in the absence of a recognised structure where designated post holders must be appointed and formally represent the company. In light of the perceived practical difficulties of bringing such prosecutions, the Government has suggested not changing the law in this area “although we will keep this position under review.” It states that the inability to bring a prosecution against an unincorporated body itself for manslaughter, as opposed to any of its members individually, has not created a problem in practice.

8.3 The commentary refers to the fact that police forces are excluded on the basis that they are not incorporated (unlike police authorities) but that the Government does not consider that, in principle, police forces should be outside the scope of the offence “and our intention is that legislation should in due course extend to them.”

8.4 We would argue that applying the law differently dependent upon whether a body is incorporated or not will result in a wholly arbitrary and unsatisfactory distinction. To make the application of the law dependent upon the legal form of a body which bears no relation to the function it is performing is an arbitrary criterion and one which undermines one of the purposes for the law being reformed. The justification set out in paragraphs 41-43 is not convincing. We do not accept that the potentially changing

membership of unincorporated bodies is a relevant consideration; the same is true of companies. Most unincorporated bodies have a formal structure with recognised and defined positions and posts in the same way that companies do. Furthermore, the legislation should be able to be drafted in a way which allows for the practicalities of identifying the management failure within different structures. We consider that a distinction on this basis may breach Article 14 of the European Convention of Human Rights. Article 14 provides a guarantee against discrimination in the enjoyment of the rights and freedoms set out in the Convention unless there is objective and reasonable justification for such discrimination. In most cases, we would argue that there will be no such justification.

3. ARE THE PENALTIES ON CONVICTION SUFFICIENT?

9. Introduction

9.1 Organisations are systems, not just aggregations of individuals. Accordingly, it is only right that the organisation itself should be held to account for the consequences of its acts or omissions. However, the stigma of an organisation receiving a criminal conviction alone is not enough. The Court ought to have adequate and proportionate sentencing powers both in relation to the organisation and the culpable individuals within.

9.2 The proposed legislation would provide the Court with two powers in relation to dealing with an organisation convicted of the new offence of corporate manslaughter, but there are no proposals for dealing with the culpable individuals within the organisation. The powers are as follows:

(i) Sentencing the organisation to a fine.87
(ii) Make a remedial order against the organisation.88

9.3 In relation to the fining of a convicted organisation, the fine could be unlimited due to the fact that the offence could only be tried on indictment.

9.4 In relation to the making of a remedial order, the Court could order the convicted organisation to take specified steps to remedy the breach and/or any matter that appears to the Court to have resulted from the breach and to have been a cause of the death.

9.5 We set out below our comments on the proposed legislation and our proposals for amendment. In doing so, we have not concentrated solely on the effect of the proposed legislation on large organisations; we have also considered its effect on smaller organisations. We are aware that the proposed legislation is directed at the perceived inability of the current law to deliver a successful prosecution of a large company with complex management structures. However, we note that the proposed legislation applies to a corporation89, which is defined as any body corporate wherever incorporated not including a corporation sole90, and abolishes the common law offence of gross negligence manslaughter in its application to corporations91. Accordingly, a small company would not be liable to prosecution for the common law offence of gross negligence manslaughter and would have to be proceeded against under the proposed legislation.

10. Financial Penalties

10.1 In relation to corporate accountability generally and corporate manslaughter specifically, financial penalties levied against organisations are problematic and lack sufficient teeth. We set out below a variety of reasons why we believe that other forms of sentencing powers ought to be available:

(i) A fine fails to provide a sufficient deterrent to an organisation: a fine of several hundred thousand pounds diminishes next to profits of billions of pounds. That is particularly the case in relation to a large or wealthy organisation or an organisation that is part of a group of organisations. In reality, fines only really punish the innocent shareholders, creditors or employees who suffer redundancy as a result. In addition, as unattractive as it may seem, organisations, especially those that operate in high-risk industries, may be compelled to factor into their running costs the possibility of a very large fine.

(ii) Offences under the Health and Safety at Work Act 1974 can attract very heavy fines. However, such offences are investigated by the Health and Safety Executive and the fines are generally viewed in a regulatory context. It is proposed that corporate manslaughter will be a criminal offence investigated by the Police and prosecuted by the Crown Prosecution Service or with the consent of the Director of Public Prosecutions. Accordingly, a distinction should also be made in the penalties available on conviction for such a serious criminal offence.

87 Clause 1(4) of the Corporate Manslaughter Bill.
88 Clause 6 of the Corporate Manslaughter Bill.
89 Clause 1(2) of the Corporate Manslaughter Bill.
90 Clause 5 of the Corporate Manslaughter Bill.
91 Clause 13 of the Corporate Manslaughter Bill.
(iii) The Powers of Criminal Courts (Sentencing) Act 2000\(^\text{92}\) states that the Court, when imposing a fine, shall make an order fixing a term of imprisonment in default of payment. Obviously, the threat of a sentence of imprisonment in default of the payment of a fine has no deterrent effect on an organisation and the sentence of imprisonment in default would be unenforceable against the organisation. However, in default of payment, the Magistrates' Court enforcing a fine can issue a warrant of distress; apply to the County Court and/or the High Court for attachment of debts or garnishee proceedings, a charging order, or the appointment of a receiver for land or rents and profits; and, where a warrant of distress has been issued against a company and it appears that the company’s assets are insufficient, apply under the Insolvency Act 1986 for administration or winding up. (It is worthy of note that such procedures are rarely, if ever, invoked, partly, no doubt, because they require a great deal of resources.) Nonetheless, a convicted organisation may still be able to escape liability to pay the fine by ceasing to exist (voluntary liquidation, dissolution etc.). In addition, the culpable individuals within a convicted organisation would be able to escape liability to pay the fine by starting a new company, as the fine would be the liability of the convicted organisation alone, and be able to continue business without having a criminal conviction or the burden of a heavy fine.

(iv) A fine would not prevent culpable individuals within a convicted organisation from setting up a new business or managing another organisation, which would leave the public exposed to the consequences of possible future similar conduct by the same individuals. This raises the issue as to whether there ought to be provisions in place to deal with the culpable individuals within the organisation and even when they leave the organisation (see below for further discussion on this point).

(v) There is little or no practical purpose in fining government departments, as it would effectively involve the recycling of public money through the Treasury. However, in the event that such an organisation was convicted of corporate manslaughter, the Court ought to be able to pass a sentence that would have a punitive effect on the organisation and a deterrent effect on like organisations.

11. Remedial Orders

11.1 As stated above, the proposed legislation would provide the Court with the power to issue a remedial order requiring the convicted organisation to take specified steps, within a specified time, to remedy the breach in question and/or\(^\text{93}\) to remedy any matter that appears to the Court to have resulted from that breach and to have been a\(^\text{94}\) cause of the death. Failure to comply with such an order would render the organisation liable to a fine (see above for discussion on the problems associated with fines).

11.2 It is imperative that the Court has access to powers to deal with identified risks. However, it is the common experience of practitioners in the area of the prosecution of organisations for gross negligence manslaughter that the investigations and prosecutions can take a very long time. Under the proposed legislation, the Court’s power to make remedial orders would only become effective after conviction, long after the death had occurred and, significantly, the risk identified. Such delay could result in the unnecessary further loss of life and injury.

12. Our Proposals

12.1 In summary, in order that organisations and the individuals within such organisations take seriously their responsibility to guard against the avoidable and unnecessary loss of life, we believe that the Court requires more effective sentencing powers to strike at the heart of the organisation and the individuals within. In addition, we believe that other ancillary powers and proceedings are required to ensure that investigations and prosecutions are effective and that safe systems of work are maintained, implemented and promoted. We set out below our proposals, which can be separated into four categories, as follows:

(i) Extension to the power to make remedial orders.

(ii) Disqualification proceedings and individual liability.

(iii) Other new powers.

(iv) Avoiding the frustration of criminal proceedings by dissolution etc.

\(^{92}\) Section 139.

\(^{93}\) We assume that the semicolon in Clause 6(1) can be interpreted to mean “and/or”.

\(^{94}\) We assume that the phrase “a cause of the death” in Clause 6(1)(b) is the equivalent of “the cause or one of the causes”.
13. Extension to the Power to Make Remedial Orders

13.1 As stated above, under the proposed legislation, the Court’s power to make remedial orders would only become effective after conviction. In order to avoid unnecessary further loss of life and injury, it might be said that it would be preferable for the power to make a remedial order to be available to the Court right from the start of the investigation. The ensuing investigation and possible prosecution could then uncover the cause and attribute liability in the knowledge that interim measures had been taken to address the risk. However, we have very real concerns about the Court having such a power prior to a conviction, as follows:

(i) It is likely that the power would be viewed as disproportionate and in breach of Human Rights law.
(ii) It would create an overlap of powers between the Health and Safety Executive and the Court, which in turn would create uncertainty.
(iii) As a supervisory, regulatory and enforcement authority, the Health and Safety Executive is far more experienced and qualified to exercise such a power.
(iv) It is likely that a significant amount of time would pass before an organisation was charged and the matter came before the Court.

13.2 Therefore, we believe that the responsibility to ensure that unnecessary further loss of life and injury is avoided should remain with the Health and Safety Executive; informed action could be taken immediately. However, we believe that the Court ought to be able to make recommendations early on to ensure that the necessary action has been taken by the Health and Safety Executive.

13.3 In addition, further types of orders may be required, as follows:

(i) The power to issue an improvement notice after conviction requiring the organisation to improve specified conditions.
(ii) The power to issue a prohibition notice after conviction prohibiting the organisation from undertaking a specified activity.
(iii) The power to recommend after conviction the revocation of any relevant licence or statutory authorisation allowing the organisation to undertake its respective business activity.
(iv) The power to order the seizure of dangerous or defective equipment etc prior to conviction and the forfeiture and destruction of such equipment etc after conviction.

14. Disqualification Proceedings and Individual Liability

14.1 As stated above, a fine would not prevent culpable individuals within a convicted organisation from setting up a new business or managing other organisations, which would leave the public exposed to the consequences of possible future conduct by the individuals who had already been integral in the management and/or running of an organisation convicted of corporate manslaughter. Therefore, it may be worth considering the introduction of a regime similar to that currently in force under the Director’s Disqualification Act 1986 that would enable separate proceedings to be brought against culpable individuals within the organisation after the organisation had been convicted of corporate manslaughter.

14.2 Any individual who could be shown to have had some material influence on, or material responsibility for, the way in which the relevant activity of the organisation was managed and/or organised, which was a substantial (not minimal) cause of the death should be subject to disqualification from acting in a similar role in any undertaking, carrying on business or activity in England and Wales. Normally, the disqualification should be for a limited time, but, in the most serious cases, it could be unlimited. Acting in contravention of a disqualification should be a criminal offence punishable by an unlimited fine, imprisonment or both.

14.3 Disqualification would protect the public and provide a meaningful deterrent for individuals, as it would have a direct effect on their personal income. It may also be worth considering the possibility of being able to bring disqualification proceedings against individuals within the parent organisation or of other organisations in the group who exercised control or influence over the management of the company that was convicted of corporate manslaughter.

14.4 However, disqualification would still only be a regulatory matter and not a criminal conviction. A further step could be to criminalise the acts or omissions of individuals in a similar way to Section 36 and Section 37 of the Health and Safety at Work Act 1974.

14.5 Section 37 states:

(1) Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body

---

95 It may also be necessary to show that the senior manager was aware of, consented to, or connived to the way in which the organisation’s activities were managed or organised.
96 We note that the Bill refers on a number of occasions to the cause of the death, as opposed to one of the causes.
97 The term “undertaking” may need to be defined in far broader terms than the term “organisation” to include unincorporated associations.
corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, the preceding subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

14.6 Section 36 states:

(1) Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-mentioned person.

14.7 The penalties available upon conviction for such an offence should be an unlimited fine, imprisonment or both.

15. Other New Powers

15.1 Clearly, the Court will have its ordinary powers to make a compensation order and a costs order. However, we suggest that other powers that may be worth considering are as follows:

(i) The power to make a restraint order over the organisation’s assets to ensure the availability of funds to pay any resultant fine.
(ii) The power to direct the use of restrained funds to pay a fine.
(iii) The power to order the appointment of a temporary health and safety consultant, director or management receiver to ensure the implementation, promotion and/or administration of a safe system of work.
(iv) The power to order monthly reports on the adequacy of any relevant safe systems of work.
(v) The power to disqualify the organisation from undertaking certain activities for a limited time or, in the most serious cases, for an unlimited time.

15.2 In addition, in order to aid in the investigation of suspected offences of corporate manslaughter, we believe that it would be beneficial for the Police to have additional investigatory powers such as being able to apply to the Court for an order for the provision of documents, an order for the attendance at interview, an order for the provision of information etc.

16. Avoiding the Frustration of Criminal Proceedings by Dissolution etc . . .

16.1 It is also worth noting that it may be possible to frustrate criminal proceedings against an organisation for an offence of corporate manslaughter by its individuals dissolving the company, deliberately making it insolvent etc Before charge or trial those same individuals could then go on to set up a new organisation undertaking exactly the same business as the earlier organisation (a “phoenix” organisation). Such conduct would leave the public exposed to the consequences of possible future conduct by individuals who had already been integral in the management and/or running of an organisation suspected of corporate manslaughter.

16.2 In such circumstances, any powers available to the Court after conviction would be useless, including any power to instigate disqualification proceedings, as they would necessarily require a conviction. Therefore, provisions may need to be put in place to enable proceedings to be instigated or continued against an organisation despite its insolvency or dissolution and/or against the phoenix organisation. Alternatively, it may be necessary to ensure that an organisation remains in existence for a prosecution by making its assets the subject of a restraint order with the appointment of a management receiver. The Court would need to be able to make such restraint orders and appoint such management receivers in the very early stages of an investigation, as is possible under the new asset restraint regime under the Proceeds of Crime Act 2002.

17. Conclusion

17.1 We believe that the proposed penalties available on conviction are inadequate. They do not provide an effective deterrent or a sufficiently punitive effect. In addition, we believe that the proposed legislation does not provide the Court with sufficient and effective powers to ensure that individuals and organisations take seriously their responsibilities to guard against the avoidable and unnecessary loss of life. Further, we believe that the proposed legislation should provide the Court with more powers to ensure that investigations, prosecutions, and the promotion of safe systems of work are effective.
CONCLUSIONS

1. Are the terms of the Bill sufficiently precise?

(a) The requirement for the activity in question to have been managed or organised by senior managers

Our foremost concern is that this requirement is likely to be as problematic as the existing law in achieving successful prosecutions for corporate manslaughter. We would suggest that it is too restrictive to limit the application of the Bill to senior managers who play a role in management of the organisation as a whole. The concern is that in large organisations this requirement would incentivise the delegation of responsibility down the management chain, thereby intentionally circumventing potential liability. Furthermore, the reference to senior managers will inevitably result in smaller organisations being held to account and more easily prosecuted than larger organisations. The creation of a two-tier system of liability is not only inequitable, but replicates one of the key criticisms of the existing legislation.

We therefore suggest that the legislation requires management failures to be those of managers rather than senior managers, with a manager being defined as someone who plays a significant role in the organisation.

(b) The requirement to prove pursuit of profit

The draft Bill’s requirement that prosecutors must prove that the gross negligence was in pursuit of profit is an additional unnecessary burden. Our concern is that the difficulty of proving a motive of economic profit may create a loophole whereby, despite serious failings, organisations escape conviction because an intention to create profit could not be proved.

(c) Limitation of the “duty of care”

We question whether it is necessary to define and limit “duty of care”.

2. Should it extend to all Government bodies and unincorporated associations?

(a) The broad application of the proposed exemptions

Our key criticism is that although the draft Bill explicitly removes blanket Crown immunity, the exceptions created in its place are too broad and will still preclude many Crown bodies being properly held to account for deaths arising out of their management failures.

(b) The apparent exclusion from liability of public bodies carrying out an exclusively public function

The limitation of the duty of care in Clause 4 would appear to exclude from liability public bodies where they are carrying out an exclusively public function. The definition contained in the draft Bill is unsatisfactory and would, inter alia, appear to extend to police forces insofar as they are carrying out their public functions. We consider that the legislation should extend to police forces in the exercise of their public functions. To limit the liability of police forces in this way would be to fail to ensure accountability in an area where it is vitally necessary.

(c) Inclusion of the Prison Service within the scope of the new corporate manslaughter legislation

We would suggest that failure to include the Prison Service within the scope of the new legislation would not only result in inadequate scrutiny, but may well constitute a breach of Articles 2 and 13 of the European Convention of Human Rights.

(d) Inclusion of unincorporated associations within the scope of the new corporate manslaughter legislation

We make the case that unincorporated associations should be included within the term “organisation” and, therefore, subject to the proposed Bill. We would argue that applying the law differently, depending upon whether a body is incorporated or not, will result in a wholly arbitrary and unsatisfactory distinction, which may breach Article 14 of the European Convention of Human Rights.

3. Should there be sanctions available other than fines on conviction?

(a) Inadequate financial penalties

We believe that the proposed penalties available on conviction are inadequate. The financial penalties available lack sufficient teeth and therefore fail to act as an effective deterrent or to provide a sufficiently punitive effect.

(b) Insufficiency of sentencing powers

We consider that the proposed legislation does not provide the Court with sufficient and effective powers to ensure that individuals and organisations take responsibility to guard against avoidable and unnecessary loss of life. We therefore suggest that other forms of sentencing powers ought to be made available.

(c) Disqualification from acting in a similar role in any future undertaking

We argue that any individual who is shown to have had a material influence on the management of the organisation in question should be subject to disqualification from acting in a similar role in any undertaking in the future.
(d) Powers to ensure the effectiveness of investigations, prosecutions, and the promotion of safe systems of work

We believe that the proposed legislation should provide the Court with more powers to ensure that investigations, prosecutions, and the promotion of safe systems of work are effective. We would suggest that such powers may include the power to make a restraint order over an organisation’s assets, the power to direct the use of restrained funds to pay a fine and the power to appoint a temporary health and safety consultant. We also consider that it would be beneficial for the police to have additional investigatory powers.

(e) The limited effectiveness of the proposed Remedial Orders

We consider that the proposed remedial orders would only become effective after conviction, long after the death had occurred and, significantly, the risk had been identified. However, we believe that the responsibility of ensuring the avoidance of further loss of life remains with the Health and Safety Executive. Nonetheless the Court ought to have the power to make recommendations early on in proceedings to ensure the Health and Safety Executive take any necessary action.

(f) Avoidance of frustration of criminal proceedings.

We consider it may be possible to frustrate proceedings by dissolving the company or making it insolvent. We therefore suggest that provisions be put in place to enable the instigation or continuance of proceedings in relation to such defunct companies.

64. Memorandum submitted by Alarm

In my capacity as Chairman of ALARM, the UK’s leading public sector risk management association representing over 1,800 members, I am responding to the Government’s Draft Bill for Reform of Corporate Manslaughter, as published for comment by stakeholders and interested parties.

Whilst wishing to state at the outset that ALARM fully supports the intentions of the draft Bill in seeking to address the problems experienced with the current laws on corporate manslaughter, there are nevertheless several issues of concern that I wish to raise in terms of the implications of the proposals for the public sector and how it manages its enterprise risk management arrangements.

ALARM strongly believes that it is necessary to restore public confidence in the laws relating to corporate manslaughter by holding organisations properly to account for gross failings by their senior management where fatal consequences have occurred, and supports any efforts to achieve this. However, despite such clear objectives of the proposals, the practical implications arising from the Bill’s implementation are far less clear and of considerable concern to our members.

Although the Bill generally presents more opportunities for risk management than problems and should provide an excellent driver for promoting the benefits of a risk managed approach at a senior level to support governance standards throughout the organisation, there are increasing concerns amongst the risk management profession that the Bill could give rise to uncertainties and more risk avoidance as a response.

We have consulted with our membership and with other risk organisations and the general consensus is that risk avoidance is a very real possibility and of major concern to our members.

Too many examples of the public sector engaging in risk avoidance activities have made the headlines in recent years. These greatly distort the true picture and are extremely detrimental to the enormous skill and hard work that has been undertaken to improve service delivery and customer satisfaction through proactive risk management. One such example is the recent problems with school outings and the decision by teachers to cancel outings for fear of prosecution. Although relatively small scale, it nevertheless serves as an example of an underlying trend within the public sector and one that our members fear will increase as a result of the Bill.

Anything that gives rise to increased risk avoidance at a time when the need is for organisations to risk manage its operations from the top down will create enormous difficulties for senior management and serve only to further erode public confidence with the public sector.

This is a strong, consolidated view expressed by our members during the consultation process and I am attaching as an appendix to this letter, a précis of other main specific issues raised.

16 June 2005
Precis of Main Issues Raised by Alarm Members

1. What is clear in the draft Bill is that it does not introduce new standards nor is it intended to introduce new regulatory burdens on organisations rather, it is from a risk management point of view directed at identifying ownership of the risks to which the organisation is exposed. In short, because an organisation only operates through its people, to rely on the old principle of “vicarious liability” will in effect ensure that every time an individual does something, it will be attributed to the organisation, which would then be judged guilty of an offence. What we will get is that organisations that are entirely blameless will stand convicted of offences each time and this naturally brings the law into disrepute (Tesco v Nattrass (1972)).

2. The new offence will be where there has been “gross negligence” and will be the same for manslaughter committed by an individual or a corporation and this is defined in the celebrated R v Adomako (1994) by Lord McKay in the House of Lords.

3. The issue of causality will not change and this has been recognised by the CPS to be “proximate cause” as we know it in insurance involving a link between an act or omission by the “controlling mind” in an unbroken chain of events that lead to the death of another and that act or omission should be a breach of the duty of care characterised as “gross negligence and therefore as a crime” (Lord McKay in R v Adomako 1994).

4. I query whether the document is sufficiently clear in the case of Housing Associations (commonly Industrial and Provident Societies), which have volunteer boards, as do the Governing bodies at schools or any other arena where volunteers act at governing body level with the best intentions, but are predominantly influenced by a professional staff.

The size of Housing Associations varies enormously, but all have a volunteer board. While not wishing to absolve such a Board from their Health and Safety responsibilities, I would not wish this legislation to cause a recruitment crisis.

In most cases, Associations have a significant executive that I would consider to be the senior management referred to in the document, but this is not the case.

There are a significant number of incorporated bodies with volunteer boards who require clear guidance on this issue. Naturally, it would be useful if this guidance could form part of the legislation.

5. Other main concerns identified, specifically by chief officers, relate to the impact of the Indemnity to Members and Officers Order 2004. Under this new legislation, members and officers may not be compensated for costs associated with trying to defend a successful H&S prosecution nor for that matter in respect of any charge of manslaughter.

At the moment, liability policies grant cover for H&S prosecutions and until the advent of this order, members and officers would not have to repay the costs where the prosecution was successful. Now they would have to. In addition, liability policies are unlikely to provide cover for manslaughter charges, leaving officers to face these prosecutions alone.

Whether cover will be available in the market to pay for the expenses incurred in either event, it is nevertheless vital that those facing such charges have access to funds to help them defend charges brought under this legislation (if that is appropriate), for the sake of a fair trial.

6. Another aspect is that funds will have to be made available to meet required expenditure on loss control/H&S matters—that’s a good thing but yet another pressure on local authority funds. There will be some overreaction—there is some talk of the need for external accreditation of systems and procedures (more cost!) in order to gain assurance—and there has never been a better time to understand properly the standards required for risk management and health and safety and the key priorities.

7. One of the important issues that needs to be impressed upon senior managers is that whilst the proposed new offence makes it easier to prosecute an organisation for failings, it does not remove the ability to prosecute individuals under existing laws. It has been interesting to witness senior managers panicking because they perceive that it will be easier for them to be personally prosecuted and face the prospect of a prison sentence. The clear need is for continued adherence to good management of health and safety risks and support for risk management.

8. If we take the draft Bill at face value, the new offence would be based on failures in the way an organisation’s activities were organised and is referred to as “management failure” rather than an immediate negligent act by an employee. I think that it is therefore a largely demonstrative response to public opinion and is littered with get out clauses. No manager is going to prison because of a successful prosecution under the new corporate manslaughter legislation.

9. The “public policy” issue will no doubt be used to advantage in many areas and lawyers will have an interesting time arguing this applies. This is of particular concern over highways where there have been recent anxieties about the Police investigating fatal road accidents and looking closely at the highway authority and whether it may have a case to answer in terms of road layout, design and maintenance.
10. There is a perception that the proposed Bill is all about prosecuting organisations for management failings, such as not having a proper procedure or safety policy and more importantly not employing management controls to ensure the monitoring of those procedures and policies and is therefore a new means of punishing an organisation in addition to existing H&S law.

11. The proposal to remove the general Crown Immunity exempting Government bodies from prosecution will have enormous implications for local authorities, especially the fire and police services, the NHS and armed forces. The likelihood is that these organisations will become risk averse rather than risk empowered and this will have a detrimental effect on their services.

65. Memorandum submitted by Catalyst 123 Ltd

1. Senior Managers
   Definition is too vague and needs further clarification.

2. Bill should apply to Crown and Public Sectors.

3. Have concerns that Partnerships are/or could be exempt and do not think they should be exempt.

4. Noticed that a good number of clients are already looking at their organisation’s approach to Health and Safety and looking for ways of fully integrating health and safety into their business . . . as a result of knowing about proposed Bill. So proposed Bill seems to already being having a positive effect at board level.

5. Encourages health and safety to be accepted as a core business activity and not a side issue.

15 June 2005

66. Memorandum submitted by the Chartered Institute of Personnel and Development

INTRODUCTION

The Chartered Institute of Personnel and Development (CIPD) is the leading professional institute concerned with the management and development of people in organisations in the UK and Ireland. We have over 120,000 members covering all specialisms and levels in the field, ranging from HR Directors in FTSE 100 companies and Government departments, to training and remuneration specialists and consultants.

We are a charity with the mission to lead on the thinking and practice of people management and development and to promote the public good.

GENERAL COMMENTS

The CIPD is not convinced that the Corporate Manslaughter Bill 2005 as drafted would have an impact on improving health and safety management in the UK.

We entirely agree that organisations should place the highest priority on ensuring the health, safety and welfare of all employees and any other people who may use their premises or be affected by their business.

However this principle is already underpinned by extensive health and safety law and the challenge for those drafting this bill is ensuring that it complements rather than duplicates the existing legislation.

There is a danger that the Corporate Manslaughter Bill 2005 could be regarded as yet another layer of legal process that might serve to confuse rather than clarify.

There is also a risk that the legislation could inadvertently create a blame culture within organisations, making it harder to learn lessons where there has been a health and safety failure resulting in death. The bill’s focus on establishing senior management failure is likely to make those involved so guarded in giving their account of the facts that it becomes more difficult to ensure that vital lessons are learned.

It is vital that the actions required of employers as a result of the new legislation are made clear and communicated to businesses effectively.

CLAUSE 2

Senior manager

The CIPD is concerned that the definition of a senior manager will be difficult to apply in practice. There is significant scope for interpretation and legal argument in the definition:

A person is a senior manager if he plays a significant role in:

(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

(b) the actual managing or organising of the whole or a substantial part of those activities.
The terms “significant” and “substantial” are subjective and open to different interpretation.

The explanatory note on this point states that the definition identifies two strands to management responsibility: the taking of decisions about how activities are managed or organised and actually managing those activities. Managers who set and monitor workplace activities and those providing operational management, are covered by the bill.

This means that there could be ambiguity over which strand of management, and which manager/s played the significant role or whether both/all are culpable of management failure.

In the CIPD’s view this definition needs to be clarified if it is not to prove as hard to apply in practice within large organisations as the concept of identifying “a controlling mind” has proved under the existing manslaughter law.

**Clause 3**

**Gross breach**

The CIPD believes that the definition of what constitutes a gross breach of a duty of care is generally sound but there are a number of points where amendments may be appropriate.

1. The draft bill states that the jury must consider “whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation and guidance”.

   Significant guidance eg HSG65 and INDG343 is available, but would an organisation be culpable if these documents had not been used to determine how health and safety risks were managed, or only more specific legislation/guidance eg a particular risk assessment or subsequent safe system of work had not been properly introduced?

2. The draft bill states the jury must consider “whether or not the senior managers of the organisation knew, or ought to have known, that the organisation was failing to comply with that legislation or advice”.

   Again it is not clear as to whether specific requirements or general requirements would be included.

3. The draft Bill states that the jury must consider whether or not senior managers of the organisation “Sought to cause the organisation to profit from that failure”

   The CIPD believes that there are two choices with this test:

   (i) Change the word “profit” to “benefit”, which is a more appropriate word for all bodies included under the draft bill.

   (ii) Delete the “test” completely as it is not necessarily a conscious decision by an organisation to switch its focus from health and safety to what will “profit/benefit” the organisation. For example in the case of the Herald of Free Enterprise, was there a conscious decision to leave the bow doors open to “profit” the organisation, or was it a management failure that prevented warning mechanisms being installed/repaired that allowed the doors to be open, unknown to the captain? Would that “decision process” now fall within the scope of the new offence? If it does not then the draft bill “tests” need to be re-considered.

   Businesses mostly do not deliberately decide to put people’s lives at risk and allocate resources— people, money, time—to other business activities, leaving clear potential risks, which could cause accidents, not controlled. The lack of focus is very often based on the assumption, unfortunately confirmed in many cases by health & safety specialists, that the business is compliant. Removing the test completely would allow prosecutions in cases, where no clear causal link could be established.

**Clause 4**

**Relevant duty of care**

The CIPD believes that the bill should be applied to public sector organisations in most circumstances.

We agree that the Crown and other public sector bodies are not in an identical position to private industry and that it is therefore appropriate that accountability for strategic policy decisions and activities that are peculiarly a function of the state are not covered by the bill.

**Comments on the Applicability of the Bill**

The applicability of the Bill is limited to England and Wales and little reference is made to parallel legislation in Scotland. This raises a fundamental question about the application of the bill throughout the United Kingdom.

Would a company registered in Scotland be subject to the legislation if the manslaughter occurred in England, or vice versa? This is not clear.
There needs to be a clear indication of the comparability of the law in England and Wales, and Scotland. As drafted it would appear there are differing standards within the United Kingdom. This is an area in the bill that needs to be addressed to provide clarity.

17 June 2005

67. Memorandum submitted by Bernard Taylor

I am replying to the draft bill consultative document on corporate manslaughter. I would ask you to note that I am a member of the Labour Party. I am self-employed as a health and safety consultant. I am also a Magistrate on the Plymouth bench, hence I do support the need for a good Corporate Manslaughter Bill to be in place that firstly is fair and on a par with other individuals in business that may be liable to a manslaughter charge.

I would ask you look at the view the same as a court legal adviser would do when points or queries are raised as perhaps the document may have been mis-understood by me and I need correcting.

I believed the bill to make Senior Directors in a Corporate Business liable for prosecution for Manslaughter the same as in a small enterprise. I did believe this was a result of the negligence over the loss of life to passengers of the Herald of Free Enterprise.

All the points raised in the bill other that a change to the Criminal Justice Act 1925 where an individual of a company may be prosecuted within a company where they have been responsible for health and safety and have failed due to a level of “culpability” to be determined as per the Court Sentencing Guidelines Council.

There is already in practice Improvement Notices and Prohibition Notices which carry an imprisonable sentence or fine of £20,000. These would be issued by the HSE/EHO’s if applicable. This includes the Fire service and Environmental Agency? It would appear the system is already in place for a much earlier intervention time than waiting months for a Crown Court trial.

Any business can be prosecuted up to £20,000 each offence for a single breach of the Health and Safety at Work etc. Act 1974.

As previous history has shown the severe loss of life caused by negligent corporate management as opposed to a single loss of life when a prosecution is undertaken to send a less wealthy with less supporting staff employer. I believe it would be a crime in itself if a different approach was undertaken when in essence the company are going to pay an unlimited fine, which can and does happen in the Crown Courts. The difference being the proposed bill will be seen as a revenue raising activity as opposed to a deterrent to someone losing their liberty for killing several people. If the bill is to go ahead the it should be a while before the Crown becomes a party to it. It could apply to the HSE or HM Customs and Excise otherwise with “failing in their duty.” The HSE still get blamed for nearly everything that goes wrong in industry or outside activities.

It may be of interest to parties promoting health and safety that the insurance world has taken a large step in making business safer in the UK.

My plea would be that this bill is abandoned due to the fact it will never meet with the same levels of justice applied to much smaller business or individuals.

68. Memorandum submitted by Bryan Wilson

I have read and examined the draft proposed Corporate Manslaughter Bill and would make the following comments. The need for a review and a Corporate Manslaughter Bill is long over due, the perceived inability to secure prosecutions against large companies has done little in the minds of the public to deliver justice. The historic problem of identifying a directing mind has in many cases proven problematic and contributed to the overall failure to deliver justice in the appropriate cases to the victims.

The proposed bill addresses this problematic area by introducing the new concept of management failure at a senior level within the organisation under investigation. Whilst individuals may still be liable personally for gross negligence manslaughter the organisation employing the individuals may itself be responsible for corporate manslaughter without the identification of the “directing mind” or the guilt of an individual. The proposed bill enhances investigators abilities to impact in those cases that warrant such intervention if there are gross failurs in the organisations management structures and practices.

The issues that I believe may still prove problematic are those of definition of “senior manager” and “significant role” and this may well be subject to case decisions as the law develops in this area.

The new offence will still require the guiding principles within gross negligence manslaughter to be adhered to namely duty of care and a gross failure that then causes death. The ordinary rules of causation will apply in determining this question.
Overall my view is that this proposed legislation fills a gap in current legislation which will enhance the investigators abilities to deliver justice to the victim. I believe that such investigation should be jointly conducted between the police and the Health and Safety Executive. However the Police should retain primacy in such investigations.

The bill and guidance notes are clear and I support fully the proposed bill. Whilst the number of prosecutions emanating from its use may be small they will in all probability be cases that are in the media spotlight. The bill will assist in restoring confidence in our abilities to deliver justice on behalf of victims, victims who were owed a duty of care and through gross negligence by an organisation at the highest levels their death ensued.

With regard to road death the investigator will now have to consider the issues of corporate manslaughter in relation to the provision of road furniture that may have caused the death of a road user, organisations that are involved in the supply of motor vehicles or parts which it can be shown were a causative link in the death through gross negligence.

Both crime SIO’s and road death IO’s will require updating when the bill becomes law to ensure that the staff dealing with road death, work related death or cases of gross negligence manslaughter consider the organisation providing the service to the deceased, employing the deceased, or are connected to the provision of services, with a duty of care, that has been breached by gross negligence and is shown to have been a causative link to the death.

69. Memorandum submitted by the Centre for Corporate Accountability

SUMMARY OF RESPONSE OF THE CENTRE FOR CORPORATE ACCOUNTABILITY

1. We support the general thrust of these proposals. However, in this response, we do propose changes to the Bill to which we attach great importance.

2. The Centre for Corporate Accountability (CCA) will not, in this response, deal with the absence in the Bill of any secondary offences for company officers. However it is important to note that the evidence concerning the lack of accountability of company directors for existing offences is overwhelming—and the Government needs to consider as a matter of urgency what changes are required to deal with this continuing failure.

3. In relation to whom the offence should apply:
   — We are supportive of the decision by the Government to remove Crown immunity—though concerned about how other sections of the Bill restrict the extent to which the offence will actually apply to them.
   — We think that the offence should apply to all employing organisations.
   — support the Government’s position that the new offence should apply to police forces; though concerned that other sections of the Bill restrict its application to deaths of employees.
   — do not accept that it is necessary for activities of the armed forces “in preparation for” combat to be excluded from this legislation.

4. In relation to the requirement that there to be a breach of a relevant “Duty of care”
   — We accept the Home Office’s argument that the management failure must be linked to existing “duties” to act.
   — We think, however, that there is a strong argument that the gross breach in question should not only be a breach of a “duty of care” but also a breach of the main statutory obligations relating to safety, in particular breaches 2-6 of the Health and Safety at Work Act 1974.
   — We think that only reason to specify a list of relevant duty of care relationships—as set out in section 4(1) of the Bill—would be to provide greater certainty, not as a way of limiting the duties of care that currently exist or may develop in the future. We propose, therefore that there need to be another sub-clause with words to the effect: “or any other duty of care”.
   — In particular, the exemption of public bodies involved in providing a service to members of the public—but not “supplying” a service—should be removed.

5. In relation to specific exemptions relating to deaths arising from “public policy decision-making” and “exclusively public functions”
   — We think that these exemptions are likely to be found in breach of the Human Rights Act 1998. A legal opinion states the exemptions are:
     “potentially so widespread as to introduce a substantial species of crown immunity “through the back door”. . . and we believe that such a limited and arbitrary availability of the new offence would be incompatible with the European Convention on Human Rights and the Human Rights Act”
Specifically in relation to public policy decision-making we think that the immunity given to those public bodies causing deaths when the management failure involves a decision about matters of public policy is far too broad. When a public authority has a duty of care or a statutory obligation and it makes a grossly negligent management failure involving public policy decision making—it is our view that the new offence should apply.

Specifically in relation to the “exclusively public function” exemption, we have real principled concerns that this clause will allow the police and the prisons and other law enforcement bodies (including private ones) exemption.

We do think that the Home Office is correct in arguing that existing mechanisms of accountability are adequate and can in any way be seen as replacements of the need for corporate manslaughter investigation and prosecution in appropriate cases.

6. In relation to the “senior management failure” test

— We support to wording of “the way in which any of the organisations activities are managed or organised” as the basis of the offence.

— We accept that the original Law Commission offence was probably drawn too widely and could have meant that any serious failure at any level of management—including at supervisory level—could have resulted in the company being prosecuted for manslaughter.

— It is our view however that the offence is not so restrictive that the failure in question must have been the responsibility of a too narrow band of individuals. This would risk a situation where companies would delegate safety responsibilities to those within the organisation that could not be deemed to be a “senior manager”. We think that the Home Office should consider the following two changes to the offence:

(a) widening the definition of senior manager so that in effect individuals who manage large units, construction sites, or factories set up by the company fall within the definition of “senior manager”. We are suggesting that this could be done by changing the word “substantial” in clause 2(a) and (b) to “significant”; and;

(b) having an additional basis of liability by which a company can be found guilty of an offence—where it would need to be shown that there was (a) a management failure within the organisation; (b) that this failure was a very serious one and a cause of the death and (c) that a senior manager knew or ought to have known that there was a management failure and did not take reasonable steps to rectify the failure. This proposal has some similarities to one of the tests in the new Canadian principle of liability.

7. In relation to the issue of “causation”, we think that the Home Office position is probably sound but we have not been in a position to seek legal advice on this matter.

8. In relation to “assessing the breach;:

— we support the test of “falling far below what could reasonably be expected”.

— we accept that there may be room to set out criteria to assist juries in determining whether or not an organisation’s conduct has fallen far below what could reasonably be expected. However we are of the view that the criteria “sought to cause the organisation to profit from that failure” is problematic. We propose that it could be changed to asking the juries to consider “the reason for the failure”

— we support the general definition of “health and safety legislation or guidance” as set out in the Bill—though we are of the view that it should also include other guidance—industry or otherwise (ie British Standards) that is supported by the HSE or relevant authority.

9. In relation to jurisdiction, we think that the rules should be widened to allow the offence to apply to situations where the management failure took place in Britain and the death took place abroad.

10. In relation to State investigation and prosecution, the CCA supports the Government position that investigation responsibility should remain in the hands of the police and prosecution in the hands of the Crown Prosecution Service

11. In relation to the right to a private prosecution, we think that the Home Office should revert back to the position as set out in the Law commission 1996 report—that there should be no requirement to obtain the consent of the DPP.

12. In relation to sentencing , the CCA does not respond to this issue in any detail—since we feel that the Home Office has not given any proper consideration to the many alternative options of sentencing organisations.
INTRODUCTION

1. This is the Centre for Corporate Accountability’s (CCA) response to the Home Office’s Draft Corporate Manslaughter Bill. The CCA is a charity concerned with worker and public safety focusing on issues of law enforcement and corporate criminal accountability. We are the only national organisation in Britain providing free and independent advice to families bereaved from work-related deaths on investigation and prosecution issues. In addition we undertake research on the criminal justice system’s response to death and injuries resulting from corporate activities.

2. The CCA has been involved in arguments for reform of the law of corporate manslaughter since we were established in 1999. In 2000 we sent in a detailed response to the Home Office Consultation document and, in 2003, we were involved in a more informal consultation process with the Home Office as part of which we submitted an additional written response.

3. As part of preparation for this response we sought expert legal advice from a number of lawyers. In relation to the application of the Human Rights Act 1998 to the proposed legislation, we sought an opinion from Tim Owen QC and Henrietta Hill at both Matrix and Doughty Street Chambers; in relation to certain issues involving “duty of care” we sought an advice from David Travers. These are attached and form part of our response. We have also sought advice more informally from a wider network of lawyers.

4. We would like to make three general points in introduction to our response.

5. We support the general thrust of these proposals. However, in this response, we do propose changes to the Bill to which we attach great importance.

6. The Second, point relates to the individual accountability of directors and senior managers. In this regard it is worth repeating the words of the Home Office in its 2000 consultation:

“The Law Commission’s report argued that punitive sanctions on company officers would not be appropriate in relation to its proposed corporate killing offence, since the offence would deliberately stress the liability of the corporation as opposed to its individual officers. The Government is, however, concerned that this approach:

(a) could fail to provide a sufficient deterrent, particularly in large or wealthy companies or within groups of companies; and

(b) would not prevent culpable individuals from setting up new businesses or managing other companies or businesses, thereby leaving the public vulnerable to the consequences of similar conduct in future by the same individuals”.

7. As a result it proposed that:

“any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person’s death, should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain.”

and went on to say that:

“However, it has been argued that the public interest in encouraging officers of undertakings to take health and safety seriously is so strong that officers should face criminal sanctions in circumstances where, although the undertaking has committed the corporate offence, it is not (for whatever reason) possible to secure a conviction against them for either of the individual offences.”

It then went on to add that the Government was also considering—though it had itself no firm view—whether

“it is right in principle that officers of undertakings, if they contribute to the management failure resulting in death, should be liable to a penalty of imprisonment in separate criminal proceedings.”

8. The Bill does not include either of these individual reforms. It should be noted that, as far as we know, the Government has nowhere explained why it does not now support these proposals or what its view is of its own analysis that had underpinned them.

9. The Government has also made it clear that there is a separate process by which the issue of directors’ responsibility/accountability is being dealt with at a Government level—and the Health and Safety Commission will be reporting to the Department of Work and Pensions in December on whether it considers that legal duties should be imposed upon directors in relation to safety. The CCA supports the introduction in law of safety obligations upon directors.

98 We are a company limited by guarantee with a Board of nine directors comprising lawyers, academics, NGO workers, and bereaved families.

99 We have recently been awarded a Legal Services Commission Quality Mark. We have, at the time of writing about 100 active cases as part of our Work Related Death Advice Service.

100 From Matrix Chambers and Doughty Street Chambers respectively.

101 From 6 Pump Court.

102 A note from John Halford, Bindmans Solicitors, is attached as part of this response and is referred to in para 51(i)(b).
10. In this context the CCA will not, in this response, deal with the absence in the Bill of any secondary offences for company officers. However it is important to note that the evidence concerning the lack of accountability of company directors for existing offences is overwhelming—and the Government needs to consider as a matter of urgency what changes are required to deal with this continuing failure.

11. The CCA accepts that the relationship between corporate and individual accountability is a complex one—and whilst sometimes it is easy to recognise that a particular failure should be put down to the organisation, rather than any individual (or vice-versa), in many cases difficult judgments have to be made about whether a particular failure is primarily an individual failure, a corporate one or both. In addition there are arguments on both sides about whether it is “better” in terms of justice and deterrence to prosecute the organisation, or the individual. When individuals are prosecuted, people may ask why the company itself can continue its activities untouched by the death; and when the company alone is prosecuted people may ask why individuals have got off “scot-free”. These are difficult questions.

12. It is however the CCA’s view that for reasons of justice and deterrence, effective means of establishing both “corporate” and “individual” culpability, where appropriate, is crucial. We also recognise that corporate prosecution should not, as now, depend upon individual ones. It is also the CCA’s view that there are many cases where there are very serious failures within organisations that cause death that cannot result in prosecutions of individuals. This draft Bill deals only with changing the law in relation to the prosecution of the organisation—and the CCA therefore reluctantly accepts the need to respond on those terms whilst making it clear that the Government must tackle the issue of director accountability as a matter of the urgency.

13. The third point relates to the question of Crown and public bodies. As is clear from our full response, we are very concerned about the exclusions contained in the Bill. The Bill does indeed take a very important (though long overdue) step in removing Crown immunity—but then hedges this with a great many restrictions. This will result, for example, in prison authorities and the police being immune from prosecution in relation to deaths of people in their custody. This is in our view totally unacceptable. One must ask whether the Home Office is genuinely able to make objective and proper decisions in relation to the application of this offence when it comes to the police and prisons, when it is the Home Office itself that is responsible for both these bodies? This is the most stark of the issues relating to Crown immunity—where deaths are not uncommon, and investigations have often illustrated clear negligence by the authorities.

14. Corporate Bodies: The Bill intends for the offence to apply to “corporations”\(^{103}\)—whether they be private companies or corporate bodies set up by statute (eg NHS Trusts and Local Authorities). The only type of company that could not be prosecuted is a corporate sole.\(^{104}\)

15. Crown Bodies: The offence is intended to apply to those Crown bodies that are corporate bodies or those set out in a schedule to the Bill.\(^{105}\) It should be noted that, if enacted this would be the first offence ever in England and Wales for which a Crown body could be prosecuted. The Home Office consultation document states that:

> The schedule currently focuses on Ministeral and non-Ministerial Government Departments. Further work is required to develop this list, particularly to consider the position of executive agencies and other bodies that come under the ambit of Departments.”\(^{106}\)

16. The Ministry of Defence is included in the schedule but certain activities of the “armed forces”—defined to include naval, land or air forces—are immune. These are activities carried out in the “course of or in preparation for, or directly in support of any combat operations” or the “planning of any such operation”. Combat operations includes simulated training. This could be interpreted very widely indeed—meaning that deaths resulting from activities in support of planning, of the preparation of simulated combat activities could not result in a prosecution! The Home Office consultation document states that:

> “It is... important that the ability of the Armed forces to carry out and train for combat and other warlike operations is not undermined. The law already recognises that the public interest is best served by the Armed forces being immune from legal action arising out of combat and other similar situations and from preparation of these and this is recognised in the offence. We also consider it important that the effectiveness of training in conditions that simulate combat and similar circumstances should not be undermined and these too are not covered by the offence.”\(^{107}\)

\(^{103}\) See section 1(2)(a) and section 5.

\(^{104}\) In the Home Office 2000 consultation, a corporation sole was defined as “a corporation constituted in a single person in right of some office or function, which grants that person a special legal capacity to act in certain ways. Examples of corporations sole include many Ministers of the Crown and government officers eg the Secretary of State for Defence and the Public Trustee and a bishop (but not a Roman Catholic bishop), a vicar, archdeacon, and canon. The Law Commission proposed they be excluded because a corporation sole is a legal device for differentiating between an office holder’s personal capacity and in the capacity of the holder of the office.” (footnote 8, p.15).

\(^{105}\) See section 1(2)(b) and section 11.

\(^{106}\) Para 39.

\(^{107}\) Para 40.
17. Crown bodies that the Home Office says will not be included at all in the schedule are the security and intelligence agencies. The consultation document states that:

“It is important we do not adversely affect matters of national security or the defence capability. Investigation into and prosecution of the security and intelligence agencies run a high risk of compromising the necessary secrecy under which they must operate and we do not prose that the new offence should apply to these bodies.”

18. Unincorporated Bodies: The offence however does not apply to unincorporated bodies—that is to say partnerships or unincorporated associations—for example, schools, clubs, parish councils, or business partnerships, including many solicitors firms and trade unions. The reason given by the Home Office for this exclusion is that, unlike corporate bodies, unincorporated bodies do not have a distinct legal personality. Although the Home Office acknowledges that there is no procedural problem in prosecuting unincorporated bodies, the consultation paper goes on to say that the lack of legal personality

“has implications for the proposed offence. Care needs to be taken when considering what duties of care could and should be assigned to an unincorporated body itself for the purposes of the offence. The concept of manslaughter failure has less ready application in the absence of a recognised structure where designated post holders must be appointed and formally represent the company. And there are questions about the appropriateness of prosecuting a body with no separate status and with a potentially changing membership for an offence that seeks to identify failings within the organisation that can be considered as failings of the body itself”.

19. It should be noted that the initial Home Office consultation document proposed that the new offence should apply to all employing organisations—“undertakings” as they called them—whether or not they were incorporated. It made the following comments in its consultation document:

“3.2.2 The Law Commission accepted that many unincorporated bodies are in practice indistinguishable from corporations and, arguably, their liability for fatal accidents should be the same. However, they concluded that it would be inappropriate to recommend that the offence of corporate killing extend to unincorporated bodies at present. Unincorporated associations which include partnerships, trusts (including hospital trusts), registered Friendly Societies and registered trade unions, would not be caught by the Commission’s proposals. The Law Commission took the view that under the existing law, individuals who comprise an unincorporated body may be criminally liable for manslaughter—as for any other offence—and so the question of attributing the conduct of individuals to the body itself does not arise. If the Law Commission’s proposal in this respect were accepted, it would not alter the present position of such organisations”.

“3.2.3 The Law Commission’s proposals are straightforward and would bring within the ambit of the offence the main subject of public concern—companies incorporated under the Companies Act. However, as the Law Commission acknowledged, there is often little difference in practice between an incorporated body and an unincorporated association. The Law Commission’s proposal could therefore lead to an inconsistency of approach and these distinctions might appear arbitrary. The Law Commission recommended limiting the proposals to corporations in the first instance before deciding whether to extend it further.

“3.2.4 An alternative is that the offence could apply to “undertakings” as used in the 1974 Act. Although an “undertaking” is not specifically defined in the 1974 Act, HSE have relied on the definition provided in the 1960 Local Employment Act where it is described as “any trade or business or other activity providing employment”. This definition could avoid many of the inconsistencies which would occur if the offence was applied to corporations aggregate but not to other similar bodies.

“3.2.5 Clearly, the use of the word “undertaking” would greatly broaden the scope of the offence. It would encompass a range of bodies which have not been classified as corporations aggregate including schools, hospital trusts, partnerships and unincorporated charities, as well as one or two person businesses eg self-employed gas fitters. In effect the offence of corporate killing could apply to all employing organisations. We estimate that this would mean that a total of 3.5 million enterprises might become potentially liable to the offence of corporate killing. However, such organisations are already liable to the provisions of the 1974 Act.

“3.2.6 The Law Commission did not consider in detail which bodies might fall outside the definition of a corporation and have commented that they would like the offence of corporate killing to be as inclusive as possible. The Government too does not wish to create artificial barriers between incorporated and non-incorporated bodies, nor would we wish to see enterprises deterred from incorporation, which might be the case if the offence only applied to corporations. The Government is therefore inclined to the view that the offence should apply to all “undertakings” rather than just corporations.”

108 Published in the summer of 2000.
109 Para 40.
110 Para 42.
20. Police forces: The Home Office believes that Police forces should be the one exception to the lack of application to unincorporated bodies.111

“We do not consider that in principle, police forces should be outside the scope of the offence and our intention is that legislation should in due course extend to them.”112

CCA’s Position

21. Our views are as follows:

(i) Crown Bodies: We are very supportive of the decision by the Government to remove Crown immunity. However, as we discuss below, we are concerned about how other sections of the Bill restrict the extent to which the offence will actually apply to them.

(ii) Unincorporated Bodies: We think that the offence should apply to all employing organisations for the following reasons—some of which the Home Office set out in its first consultation document.

(a) There is often very little difference in practice between an incorporated and unincorporated body;

(b) To distinguish between the two would represent an arbitrary distinction and is likely to fall foul of the Human Rights Act 1998. See para 25 and 26 of the legal opinion attached as an appendix to this document;

(c) We do not think that the Home Office arguments against application are persuasive.

— unincorporated bodies have no existing duty of care. It is correct to say that since unincorporated bodies have no separate legal identity—they have no recognised duty of care as an organisation. However, it would be quite straightforward to deal with this problem by inserting a clause to the effect that “for the purposes of this legislation, the management board of any unincorporated body has the same duties as those of corporate bodies”.

— unincorporated bodies have no permanent personnel and an ever changing membership. This may be the case with some bodies, but for many if not most, the organisation has as much permanence as a company—law firms, large partnerships, trade unions, and schools for example. In our view it would certainly be appropriate for the new offence to apply to these organisations, as they have the same permanent characteristics as a company.

(d) the Government accept that there is no procedural reason against reform in this manner.

(e) At a meeting CCA had with the Home Office, the CCA was asked whether or not it was really important to ensure that the offence applied to unincorporated bodies. It was stated that the background for this offence emerged out of the difficulty in prosecuting large companies and that extending the offence to unincorporated bodies was as a result perhaps not necessary. We were asked for examples where a death arose as a result of conduct of the part of an unincorporated body—and problems of accountability arose. Although, the CCA is not itself aware of any such deaths, we are sure such deaths do take place and the failure of this legislation to apply in these situations—where had the organisation been a corporate body it would have been prosecuted—may well cause great injustice. If Government is to create this law it should all encompassing, rather than exclusionary.

(iii) Police forces: we are supportive of the Government’s position on police forces; however, as is set out below, we are concerned that they would be exempt from the application of the offence involving deaths of members of public. (see paras 23-51)

(a) In relation to the general issue of the offence’s application to police forces, we would like to make the following comments. At present police forces have no legal obligations of any kind in relation to safety. Indeed it was not until the Police (Health and Safety) Act 1997 that the “police” had to comply at all with health and safety legislation. This had the effect of making, for the purposes of health and safety legislation, each force’s “Chief Officer of the Police” the “employer” of constables in the force.113 As a result all health and safety duties were imposed upon the Chief Officer of the Police, and it was he who personally could be held responsible for any breaches. If prosecutions were necessary, it was he who would be personally charged. This Act has subsequently been amended so that the Chief Officer of the Police was not individually responsible as an employer; only the position of the Chief Officer of the Police.

111 Police forces are neither corporate bodies nor are they Crown bodies. Police Authorities are corporate bodies and could in principle be prosecuted—though they are not “employers” and do not have the obligations of employers.

112 Para 44.

113 This was necessary due to the complicated employment relationship of police constables—where neither the police force nor the police authority was “the employer”.
In the CCA’s view this is highly artificial and inappropriate—it is the police force (as an organisation) that should have the duties, and the police force that should be prosecuted if necessary for any organisational breaches.

(b) It is important to understand this background, as if police forces are to be able to prosecuted for corporate manslaughter it would be necessary for the above legislation to be further amended so that health and safety duties are imposed upon police forces. The easiest way to do this would be to change the law so that for the purposes of the application of health and safety and corporate manslaughter law, police forces would be a corporate body.

(iv) Training and armed forces: we do not accept that it is necessary for activities of the armed forces “in preparation for” combat to be excluded from this legislation. This is for the following reasons:

(a) The definitions used in the bill are simply too wide and could be used by the armed forces to cover too wide amount of training activities that they undertake;

(b) the armed forces currently have to comply with the health and safety law in relation to these activities—so it seems entirely inappropriate to make them immune from prosecution when these activities cause a death following a management failure that constitutes “gross negligence”;

(c) Such an immunity in our view reflects a relationship that the Ministry of Defence has with its employees that is simply not appropriate for the 21st century. Soldiers and others should simply not be put at such risk through grossly negligent management failures prior to combat during training;

(d) It would be in breach of the Human Rights Act 1998—see para 32 of the attached legal opinion.

(v) Clarity: Discussions with lawyers indicate that there is a lack of clarity in relation to the relevant sections dealing with which bodies the offence applies. Section 1(2)(a) states:

“The organisations to which this section applies are:

(a) a corporation;

(b) a government department or other body listed in the Schedule

Section 5 states that:

“Corporation” does not include a corporate sole but include any body corporate wherever incorporated.

It has been stated—and we agree—that these sections lack clarity. Whilst we understand that it is the intention of the Home Office to apply the offence to corporate bodies as set up by statute, the use of the term “corporations” and the way it is defined make it uncertain. The confusion comes with the way corporation is defined in section 5 to include “any body corporate wherever incorporated”—which may not include statutory corporate bodies since they are not “incorporated” as such. Perhaps this clarification can be made by simply defining corporation to include “any body corporate wherever incorporated as well as those established by statute.”

As a result of this and the way section 1(2) is drafted, it is not crystal clear whether the offence applies to corporate bodies that are also statutory bodies but which are not listed in the schedule to the Bill.

THE OFFENCE

22. The constituent parts of the offence are as follows:

— the organisation must owe a “relevant duty of care” to the person who dies;

— the way in which any of the organisation’s activities are managed or organised by senior managers:

— causes a person’s death

— amounts to a gross breach of the duty of care”.

RELEVANT DUTY OF CARE

23. Under the Bill, in order for there to be a prosecution, the first issue to be determined is whether or not there was a “relevant duty of care” between the organisation that might be prosecuted for the death and the person who died. If the organisation is found not to have owed a “relevant duty of care” the offence will not apply.

24. The Bill states that it is a question of law as to whether there is a relevant duty of care—and is therefore a matter that will be decided by the judge and not the jury.
What is a “duty of care”?

25. In civil law, whether or not there is a “duty of care” is generally determined by reference to three broad criteria: (a) is the damage foreseeable? (b) is the relationship between the defendant and victim sufficiently proximate? (c) is it fair just and reasonable to impose such a duty?

26. The courts have set down categories of relationship where it is clear that a “duty of care” exists. As the Home Office consultation paper states:

Duties of care commonly owed by corporations include the duty owed by an employer to his employees to take reasonable care for their health and safety and by an occupier of buildings and land to people in or on, or potentially affected by the property. Duties of care are [also owed] by transport companies to their passengers. 114

Duties of care are also owed in certain circumstances by public bodies to members of the public—particularly where a service is being provided to the public.

27. In situations where the relationship between the defendant and the claimant is not straightforward, the courts assess whether there is a duty of care by reference to the principles set out above. These are continually evolving. Some of the more difficult cases involve compensation claims against public bodies and the circumstances in which the courts consider it appropriate that a public body should pay compensation. In relation to these sorts of cases judges will in particular consider the questions: “Is it fair, just and reasonable to impose such a duty of care?” Determining what is “fair, just and reasonable” seems to involve (amongst other things) weighing the total detriment to the public interest in holding a class of potential defendants liable against the total loss to all prospective claimants if they do not have a cause of action in response of the loss they have suffered as individuals. 115

Implications of using duty of care

28. The requirement of a “duty of care” relationship hitches the criminal law of corporate manslaughter to the civil law of negligence. This is because the “duty of care” concept is one that is fundamental to whether or not a compensation claim due to negligence is to succeed. No claim can succeed unless the defendant can be shown to have owed the claimant a “duty of care”.

29. It should be noted that the adoption of a “duty of care” requirement is already part of the current offence of manslaughter—that is to say in order to prosecute an individual for manslaughter you have to show that s/he owed a “duty of care” 116. Since the prosecution of companies for manslaughter, at present, requires the prosecution of an individual for the offence, the linkage between duty of care and corporate manslaughter is therefore not a new one. As the Home Office says in its consultation document, 117

“We think [using duty of care] provides a sensible approach because organisations will be clear the new offence does not apply in wider circumstances than the current offence of gross negligence”.

30. However, it should be noted that the Law Commission in its 1996 report on involuntary manslaughter stated that:

“It is however clear that the terminology of negligence and duty of care is best avoided within the criminal law because of the uncertainty and confusion that surround it”. 118

As a result the Law Commission proposed offences—reckless killing, killing by gross carelessness and corporate killing—avoided linking the offence to the language or concepts of negligence. Indeed the Law Commission did not state against what duties the conduct of the organisation should be judged.

31. In relation to this, the Home Office says in its consultation document:

“The Law Commission proposed that a new offence be based on a failure to ensure the health and safety of employees or members of the public. However, the relationship between this and duties imposed by health and safety legislation as well as duties imposed under the common law to take reasonable care for the safety of others, was left undefined. We do not consider that this is satisfactory; the offence needs to be clear on the circumstances in which an organisation has an obligation to act”.

32. The issue of clarity is important. The law of manslaughter has been criticised in the past for uncertainty and it is important that any new offence should, as much as possible, provide clarity. However, it is important to recognise that the offence need not have centred solely upon there needing to be a breach of “duty of care”. It could also have been linked to statutory duties like the Health and Safety at Work Act 1974 (which imposes duties on employers to take reasonable and practicable steps to ensure the safety of their employees and others affected by their activities) or the Merchant Shipping Acts. There was no need to use “duty of care”—or at least “duty of care” alone. The relevant part of the offence could therefore have stated that there must be “a gross breach or a duty of care or other statutory obligation set out in appendix”.

114 Page 37, para 20.
116 R v Adomako.
117 Para 17.
118 Para 3.14.
33. Pinning the duty by which the failure will be judged to key health and safety statutes has important advantages. It is clearer. Health and Safety at Work Act 1974 has been around now for more than thirty years. Organisations are constantly being judged by it and should have a good understanding of the requirements.\textsuperscript{119} It therefore provides a level of certainty that is not provided by duty of care principles.

34. The Home Office’s concern about using health and safety legislation appears to surround section 3 of the Health and Safety at Work Act 1974 and it’s broad implications for public bodies. However, Crown and other public bodies have had to comply with section 3 since the introduction of the legislation (though Crown bodies could not be prosecuted for a breach).

\textit{When is a duty of care “relevant”}

35. In the Bill, however, not only must there be a duty of care—but a “relevant” duty of care. These are defined in the Bill as duties of care owed by an organisations in their role:

- as an employer towards the safety its employees
- as an occupier of land and premises towards the safety of those affected by the land and buildings
- as a supplier of goods or services—whether paid for or not—to the safety of those who use them. This would include services provided by public bodies—such as local authorities or NHS Trusts where the service is provided free
- of carrying out of any activity on a commercial basis.

36. So a relevant duty of care would arise in the following circumstances:

- a death of an employee as a result of conduct on the part of an organisation which is his or her employer;
- a death of a person as a result of conduct of an organisation which is an occupier of land (ie member of the public falling down a hole on a construction site; or tenant dying as a result of defective maintenance of a building);
- a death of a person as a result of a defectively manufactured product.

37. Whilst the duties of care that are deemed to be “relevant” are wide and pretty comprehensive—it does appear to exclude certain activities. This is principally in the way that it deals with “services” provided by the state. Section 4(1)(c)(i) states that there is a relevant duty of care in connection with “the supply by the organisation of goods or services (whether for consideration or not)”. The key word here is “supply” of goods or services. This has the effect of excluding a great deal of activities undertaken by public bodies—since whilst the police and prisons and social services for example might provide a service, they do not “supply” a service. As a result this excludes:

- deaths of members of the public resulting from police conduct
- deaths of members of the public in a Government prison\textsuperscript{120}
- deaths resulting from failures by social services
- Government inspection regimes.

38. In addition, by defining the circumstances of a “relevant duty of care” in such a circumscribed manner, the offence will not be affected by evolving definitions of “duty of care”—which is somewhat odd in relation to an offence that has been defined around that concept.

\textbf{SPECIFIC EXEMPTIONS}

39. There are in addition two specific exemptions. The first exemption states that those organisations which either:

\begin{itemize}
\item[(a)] supply goods or services or
\item[(b)] carry out any activity on a commercial basis
\end{itemize}
do not owe such a “relevant” duty of care—when it is undertaken “in the exercise of an exclusively public function”.\textsuperscript{121}

40. An exclusively public function is defined as:

\textquoteleft\textquoteright a function that falls within the prerogative of the Crown or is by its nature exercisable only with authority conferred—

\begin{itemize}
\item[(a)] by the exercise of that prerogative, or
\item[(b)] by or under an enactment\textsuperscript{122}.
\end{itemize}

\textsuperscript{119} Please note for example presentation of Mark Tyler from Cameron McKenna LLP who made this very point at the TUC/CCA conference on Corporate Manslaughter in June 2005.

\textsuperscript{120} Private prisons would be caught by “other activities on a commercial basis”. However they are exempted by another exclusion “otherwise in the exercise of an exclusively public function” (see below).

\textsuperscript{121} Section 4(1)(c) It should be noted however that the way the Bill is drafted makes it unclear whether this exemption has wider effect to “employers” and “occupiers of land”.

\textsuperscript{122} Section 4(4).
41. An example of (a) could be the provision of vaccines by Government in a civil emergency; an example of (b) could be the function of lawfully detaining individuals by the police or by the prison service.

42. The Home Office emphasises that the function in question must “by its nature” be carried out by statute and states that the exception “would not cover an activity simply because it was one that required a licence or took place on a statutory basis. Rather the nature of activity involved must be one that requires a particular legal basis”.123

43. It should be noted that this clause does not just concern Crown or other public bodies but any organisation (public or otherwise) performing that particular kind of function. This would mean that private prisons and private prisoner escort agencies, which carry out an activity on a commercial basis, would not owe a relevant duty of care. This is because the nature of their function—lawful detention—is one provided for only by law.

44. However, it is important to note that the activity in question must “by its nature” be exercisable by or under an enactment. The Home Office say that a private prison—for example—would still owe a relevant duty of care towards someone who died as a result, for example of an “e-coli” outbreak from the prison kitchen or from Legionnaires’ disease. Though a public prison would not.

45. The second exemption relates to those bodies that are a “public authority”. The definition of public authority is taken from section 6 of the Human Rights Act 1998—and so includes not just public bodies but other organisations some of whose functions are those of a “public nature”.124

46. The exemption states that these bodies do not owe a duty of care:

“in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests)”.

47. So where a death is the result of public policy decision-making then the organisation, even if the organisation owes a duty of care to the person who died under the ordinary civil law of negligence, cannot be prosecuted. An example of this might be where a primary care trust purchased one kind of medicine rather than another for cost reasons—and someone died because there were not enough appropriate drugs to go around.

HOME OFFICE JUSTIFICATIONS FOR EXEMPTIONS

48. There are two basic justifications given by the Home Office for these two exclusions. The first is that these exclusions ensure that there is a level playing field between private and public bodies:

The effect is to create a broad level playing field between public and private sectors. Both are treated in the same way in their roles as employer and occupiers of premises and when providing goods and services or operating commercially”.

49. The second justification is that deaths resulting from such circumstances are more appropriately matters for “wider forms of public and democratic accountability”. In relation to this the consultation document states that:

“There are important differences between public bodies and bodies in the private sector and the new offence must apply in a way that recognises this. In particular, an offence of corporate manslaughter is not an appropriate way of holding the government or public bodies to account for matters of public policy or uniquely public functions. Government departments and other public authorities are subject to a range of accountability mechanisms including through Ministers in Parliament, the Human Rights Act, public inquiries and other independent investigations, judicial review and Ombudsmen. These provide the appropriate forum for the scrutiny of such issues. A new offence needs to complement, not compete with, this accountability.” 125

“[W]here government bodies are not themselves providing front line services, but are setting the framework within which these must operate or are centrally procuring goods or services supplied by others, then it must be possible to explore and debate the wider policy issues involved”. (para 20)

50. In relation to detention activities, the document says:

“[T]he offence does not apply to activities that the private sector either does not do, or cannot do without particular lawful authority which are areas more appropriately subject to other lines of accountability.”126

“Deaths in prisons are, for example, already subject to rigorous independent investigations through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest.” 127

---

123 page 38, para 35.
124 Section 4(4).
125 Para 18.
126 Para 24.
127 Para 22.
CCA Views

51. Our views are as follows:

(i) Duty of care: We accept the Home Office’s argument that the management failure must be linked to existing “duties” to act. We think, however, that there is a strong argument that the gross breach in question should not only be a breach of a “duty of care” but also a breach of the main statutory obligations relating to safety, in particular breaches 2–6 of the Health and Safety at Work Act 1974. We do not understand why, if there is a gross breach of a statutory obligation relating to safety—and not one of “duty of care”—a manslaughter charge would not be appropriate. Such an amendment would not impose any new duties upon organisations—since these duties currently exist in law and have done for over thirty years. Breach of these duties already allows for prosecution. In our view therefore, the new offence should apply not only to gross breach of duties of care that result in a death, but also gross breaches of statutory obligations. In addition to this and the points discussed above (paras 28–34), we would add the following in support of this change:

(a) a failure to provide for a prosecution in such circumstances could be in breach of the Human Rights Act. As stated at paras 29(2)–(3) of the legal opinion attached:

“Article 2 authorities we cite above make clear that the availability of a criminal law remedy is not determined by whether a civil claim would also lie, but whether the nature and gravity of the breach in question requires a criminal remedy in of itself. Indeed Ramsahai would indicate that the lack of availability of an effective civil remedy is a reason which militates in favour of there being a criminal remedy, rather than against it;

. . . there may well be situations where Convention jurisprudence requires a criminal law remedy to be available even if, under domestic law, the balancing exercise dictates that no civil claim need lie;

(b) a failure to allow such a prosecution would in effect turn the principles underlying Article 2 of the European Convention—the right to life—on its head. Matters which fall directly within the responsibility of the State are considered to be those where Article 2 protection (in all it forms) need to be at their highest, because typically these are areas of life where there is a very significant imbalance of power and because this may be exacerbated by the vulnerability of the individual. However, a death resulting from a public body could be deemed a breach of health and safety law and prosecution/Crown censure could result—but a manslaughter prosecution could not.128

(ii) “Relevant” duty of care: This clause would have less impact if the Home Office accepted that a breach could relate to certain duties under statutory law. However, in our view the only reason to specify a list of relevant duty of care relationships—as set out in section 4(1) of the Bill—would be to provide greater certainty, not as a way of limiting the duties of care that currently exist or may develop in the future. If a duty of care in negligence exists—then, in our view, the new offence should apply.129 There would therefore need to be another sub-clause with words to the effect: “or any other duty of care”.

In particular, the exemption of public bodies involved in providing a service to members of the public—but not supplying a service—should be removed. As set out above, this allows certain public bodies—police, prisons, and regulatory bodies in the context of their relationship with the public, to be exempt from prosecution.

(iii) Assessment of Government justifications for exclusions: the CCA appreciates that when public demands were first articulated about need for reform in this area—after the failed prosecution of P&O European Ferries for the Zeebrugge disaster in 1991—they were centred around the difficulty in prosecuting medium- to large-sized private companies and were not focused around State bodies. However the environment in which the Bill is now being discussed has changed—and there is now a legitimate view that deaths resulting from the kinds of activities that Crown and other public bodies perform, whether or not private bodies undertake them or not, should, in the most serious cases, result in criminal accountability. Simply saying that there is a “level playing field” between private companies and public bodies is not enough when certain activities of public bodies are being given immunity even if they cause death through very serious management failures.

We do not think that extant mechanisms of accountability—set out by the Home Office in its consultation documents—can be seen as replacements of the need for corporate manslaughter investigation and prosecution in cases where the most serious failures have taken place in circumstances where there is a duty of care or where there are statutory safety obligations upon those who have failed, and a death has resulted. In relation to these “alternative” mechanisms of accountability, we would like to make the following points:

128 This point is made by John Halford, a Solicitor at Bindman and Partners in note attached to this document.
129 Or, the gross breach was of either statutory obligation or duty of care, then if there was no statutory obligation but there was a duty of care—the offence should apply.
— Ministers may or may not be questioned in Parliament about a particular death—but when this does happen it is hardly a forensic and searching forum to find out the level of failure that has taken place. Those asking the questions may well have extremely limited information about the circumstances of the death. Whether or not ministerial “accountability” takes place in a particular set of circumstances is entirely arbitrary and accidental;

— We are not sure how judicial review would be an appropriate remedy following a death—and how that might bring accountability. If the offence does not apply, there is no decision in such a case not to investigate or not to prosecute that could be subject to a public law remedy;

— It is only rarely that deaths will be subject to public inquiries and independent investigations, and indeed a Government (including the current one) may often do all it can to prevent these taking place. New legislation on public inquiries has been passed recently, about the adequacy of which many people—including judges—have serious concerns.

— Ombudsman inquiries are of last resort and will only take place following other inquiries which are considered by the family as inadequate. They are concerned with maladministration and not the level of gross failure that would be the subject of manslaughter inquiries. In relation to prison ombudsmen, it is only recently that inquiries are undertaken by people “independent” of the prison and discussions with lawyers and the organisation INQUEST indicate that these inquiries can be cursory and overly favourable to the prison.

(iv) Implications of Human Rights Act 1998: In relation to the exclusions set out in the Bill—that primarily affect public bodies—it appears that the Home Office has failed to give proper consideration to the implications of the European Convention on Human Rights. A legal opinion that we have sought and which is attached to this document states that the exemptions are:

“potentially so widespread as to introduce a substantial species of crown immunity ‘through the back door’ and we believe that such a limited and arbitrary availability of the new offence would be incompatible with the European Convention on Human Rights and the Human Rights Act”.

It goes on to state:

“We cannot accept that the premise of these exemptions that prerogative or policy decisions should be exempt from prosecution for the new offence—is sustainable in Convention terms. In simple terms, if the State is culpable for a death in the circumstances set out in Oneryildiz, the Strasbourg jurisprudence requires that a criminal remedy be available in order to ensure proper vindication of Article 2, 3, 8 and 13 rights, regardless of whether the State’s “mitigation” is one based on prerogative or policy.

There is again an Article 14 issue, because what is being created is a further arbitrary two-tier system of justice where the availability of a criminal law remedy can turn on something as finely balanced as whether the function in question stemmed from prerogative or from policy, and we do not believe that such a distinction can be objectively justified;

We cannot accept the Government’s comment that as there are other remedies available, such as inquests and inquiries, an offence of corporate manslaughter is not “an appropriate way of holding the government or public bodies to account for matters of public policy or uniquely public functions” (paragraph 18 of the Consultation Paper). This ignores the fact that (a) as we have said, on some occasions Article 2 requires a criminal remedy regardless of the other remedies available, and regardless of whether the Government considers it “appropriate”; and (b) in several recent high-profile cases the domestic courts have held that the other principal remedy, the inquest regime, is not a sufficient means of the state discharging its Article 2 liabilities . . .; and

We are very concerned that many deaths in breach of Article 2, 3 and 8 can in fact be categorised as deaths which occurred during the exercise of the prerogative or a power under “an enactment”; or “explained” by policy or resources issues, which means that these two exemptions may well have the effect of removing the vast majority of deaths at the hands of public authorities from the remit of the new offence.”

(v) Public body decision making: In our view the immunity given to those public bodies causing deaths when the management failure involves a decision about matters of public policy is far too broad. When a public authority has a duty of care or a statutory obligation and it makes a grossly negligent management failure involving public policy decision making—it is our view that the new offence should apply.

130 para 31.
131 para 31(ii)—(iv).
(a) It should first be noted that there are limited circumstances where a ‘duty of care’ arises. Indeed the Home Office itself states that:

“Cases under the law of negligence already make it clear that public authorities will rarely owe a duty of care where a decision involves weighing competing public interests dictated by financial, economic, social or political factors which the courts are not in a position to reach a view on.”

(b) The Home Office appears to want to set in stone the current state of the law on this point. If the courts do not develop this principle then there is no purpose to this provision within the Bill itself. If the courts, however do progress this principle, with the effect of widening or narrowing the duty of care, it would seem to us appropriate that the offence reflects these developments.

(c) We do appreciate that public policy decision making raises sensitive questions. Decisions involving the use of limited public funds can involve a difficult balancing of public interest factors in which the use of limited funds will need to be considered. But as long as the Government bodies have policies to ensure that decision makers take into account relevant factors so that a balanced decision on the basis of the facts known to him/her (or which should have been known to him/her) can be taken into account—which we assume the Home Office and other public bodies consider to be the case in these decisions —then there would simply be no chance of a prosecution. There is a very high threshold before prosecution can take place—the failure must be one that ‘falls far below what could reasonably be expected’. It would seem to us that any set of decisions that did fall as low as this and did result in death should not be immune from prosecution. If this was not the case a very inappropriate message would be sent out: that public bodies who either have a duty of care (or a statutory obligation), can make decisions that result in death in a grossly negligent manner but would remain immune from prosecution.

(d) It may be the case that the Home Office is concerned not about prosecution in such circumstances, but the impact that investigations would have. In relation to this, the current experience of the police in the investigation of work-related deaths is relevant. In most cases, the police very quickly come to a decision that there is no gross negligence involved—and don’t continue their investigation beyond a few hours or days. This would surely be the case in relation to almost all deaths reported following public policy decisions. One must assume that only in a small number of cases will the police need to carry out more extensive investigations—and such inquiries would in our view be justified if there was evidence to support a contention that very serious management failure had taken place.

(vi) Exclusively public function: As stated above, we have real principled concerns that this clause will allow the police and the prisons and other law enforcement bodies (including private ones) exemption. A large number of deaths result from the activities of the police and prisons—some of which raise serious issues about the way in which police forces and prisons are managed. Both bodies already have to comply with existing health and safety law. In addition to our position in principle we have the following concerns:

(a) it will appear to result in differing application to a death resulting from the police and private security bodies. The police would be immune, but a death arising from citizens powers of arrest on the part of a private security body would appear not to—as citizens power of arrest are not exercisable ‘under an enactment’ and as a result have no immunity’;

(b) there are a number of activities undertaken by the Local Authorities which can only take place because they have legal authority to do so—and therefore they would be excluded by the provision.

(c) the Home Office emphasises that the function, must ‘by its nature’ be exercisable under an enactment—however it is very unclear how this would work. If a death takes place in a prison as a result of an e-coli outbreak from the kitchen, would the prison be able to be prosecuted because “provision of food” is not by its nature exercisable under an enactment? Surely the people who died could only have been in prison because they were detained under lawful enactment.

**Senior Management Failure**

52. In the Bill, once a judge rules that a “relevant duty of care” exists it is then necessary to show that:

“the way in which any of the organisations activities are managed or organised by senior managers
— causes a person’s death
— amounts to a gross breach of the duty of care”.

It would seem to be necessary to show that a death:

---

132 Para 23.
(a) was caused by the way the organisation was managed or organised—ie lack of training, supervision, proper delegation, instruction etc—or combination of such factors;

(b) that the particular failure or failures in question were the responsibility of a person or persons deemed to be a senior manager;

(c) any failures that may have contributed to the death that were not the responsibility of senior managers would not in themselves be relevant to the offence”.

53. What is being judged by this offence is “the way in which any of the organisation’s activities are managed or organised”. Although the manner of management of the organisation must be that of the senior managers, the emphasis in this Bill is on how this is done, not on their individual conduct as such. The Home Office document states:

“The heart of the new offence lies in the requirement for a management failure on the part of its senior managers. This is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies.

The test for management failure focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or indeed for the unpredictable maverick acts of its employees, instead, it focuses responsibility on the working practices of the organisation. It also ensures that the offence is not limited to questions about the individual responsibility of senior managers but instead considers wider questions about how at a senior manager level, activities were organised and managed.

In particular this allows senior management conduct to be considered collectively, as well as individually. This does not mean that we have replaced the requirement to identify a single directing mind with a need to identify several, nor does it involve aggregating individuals’ conduct to identify a gross management failure. It involves a different basis of liability that focuses on the way the activities of an organisation were in practice organised or managed.

“The proposals require a management failure by the organisation’s senior managers. This ensures that the new offence is targeted at failings in the strategic management of an organisation’s activities, rather than failings at relatively junior levels. Our intention is to target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity. It is in these circumstances that the Government considers it appropriate for liability for causing death to be attributed to the organisation.”

54. It goes on to say that:

“The offence is designed to capture truly corporate failings in the management of risk, rather than purely local ones. It therefore applies to management failing by an organisation’s senior managers—either individually or collectively”.133

55. Crucial to the above is who is defined as a senior manager. Managers must have a “significant” role over at least a “substantial” part of the organisation’s activities—either in the actual managing of them or making decisions about them. The Home Office consultation document states that:

the definition of a senior manager is drawn to capture only those who play a role in making management decisions about, or actually managing the activities of the organisation as a whole or a substantial part of it. The term “significant” is intended to capture those whose role in the relevant management activity is decisive or influential, rather than playing a minor or supporting role.

What amounts to a “substantial” part of an organisation’s activities will be important in determining the level of management responsibility engaging the new offence. This will depend on the scale of the organisation’s activities overall. It is intended to cover, for example, management at regional level within a national organisation such as a company with a national network of retail outlets, factories or operational sites. And where an organisation pursues a handful of activities in roughly equal proportion (for example, a company that has manufacturing, retail and distribution operations), those responsible for the overall management of each division. Levels below this will potentially be covered depending on whether business units can sensibly be said to represent a substantial part of the organisation’s overall activities. The definition will apply with different effect within different organisations, depending on their size. Management responsibilities that might be covered by the offence within a smaller organisation, such as a single retail outlet or factory, may well be at too low a level within an organisation that operates on a much wider scale. This reflects the intention to criminalise under this offence management failings that can be associated with the organisation as a whole, which will capture different levels of responsibility depending on the size of the organisation.”134

133 Para 14.
134 Para 29 and 30.
CCA’s View

56. Focus on Management Failure: The wording of “the way in which any of the organisations activities are managed or organised” is taken from the 1996 Law Commission report and in our view is an appropriate form of words. Although (as is discussed below) the management failure must be that of a senior manager—it is not necessary to show that the conduct of the senior manager was a cause of the death, or that the conduct of the senior manager was grossly negligent. It is the way in which the activity was organised and managed that must be a cause of the death and be grossly negligent. This is a very important distinction and we welcome the new focus of the offence.

57. The wording however differs from the Law Commission offence in that it requires that the management failure must be that of “senior managers”. We accept that the Law Commission offence was probably drawn too widely. It appears that its loose wording could have meant that any serious failure at any level of management—including at supervisory level—could have resulted in the company being prosecuted for manslaughter. If a failure takes place which is solely the responsibility of a supervisor should the company be prosecuted? This is a difficult position to justify.

58. At the same time however, it is important that the offence is not so restrictive that the failure in question must have been the responsibility of a too narrow band of individuals. This would risk a situation where the company would delegate safety responsibilities to those within the organisation that could not be deemed to be a “senior manager”. The Home Office’s response to this is that if decision to delegate or the supervision of the delegation was in itself not grossly negligent then the company could not be prosecuted however serious the management failure was within the company.

59. It is useful to consider hypothetical cases in analysing how this aspect of the legislation might work in practice. Imagine there was a company that employed 5,000 people and they were evenly split between ten different factories. In one of the factories a person died and investigations showed that there had been a very serious management failure that caused the death, which was the responsibility of the most senior people within that particular factory. In addition, although there were some failings of managers higher up within the company at head office level, none were so significant to justify a description of gross negligence. Should the company escape prosecution for corporate manslaughter?

60. The Home Office’s answer is “yes”—it should not be prosecuted. The Home Office would not categorise even the most senior managers of the individual factories as “senior managers” under the Bill. It argues that unless the delegation/supervision of safety responsibilities by the senior managers at head office to a factory level could itself be deemed grossly negligent, the company should not be subject to prosecution for manslaughter.

It should be noted that whether or not the example set out above would or would not be captured by the offence depends on how the courts will define “substantial”. Is one of 10 equally sized factories a substantial part of a company’s activities? It is difficult to know how the courts will define substantial—but there is certainly a risk that it could be defined quite narrowly.

61. In our view this is not satisfactory. There are two ways in which this can be dealt within the Bill.

(c) by widening the definition of senior manager so that in effect individuals who manage units, construction sites, factories set up by the company fall within the definition of “senior manager”;

(d) by having an additional basis of liability by which a company can be found guilty of an offence—where it would need to be shown that there was (a) a management failure within the organisation; (b) that this failure was a very serious one and a cause of the death and (c) that a senior manager knew or ought to have known that there was a management failure and did not take reasonable steps to rectify the failure.

In relation to (a) and a wider definition of senior manager, we would argue that the word “substantial” be changed to “significant”. In our view the word “significant” is broader in its meaning than substantial and would be likely to cover the “factory” example set out above.

In relation to (b) it would be necessary to identify two failures:

(a) a serious management failure within the organisation that was a cause of the death and;

(b) a failure by a senior manager, who either knew or ought to have known about the failure and was in a position to take action to rectify the situation.

In our view both changes are required\(^\text{135}\). If we take another example—where a serious management failure within one supermarket (which is part of a 100 strong chain) causes a death. We would accept that this in itself should not result in the company being prosecuted.

— If, however, the serious management failure was (a) the responsibility of senior managers of that particular supermarket but (b) was not known and should not have been known about by senior managers at a company level—should a prosecution take place?

\(^{135}\) It should be noted that the additional basis of liability is similar to the new liability as part of the new Canadian reforms—Bill C-45. Amendment to Canadian Criminal Code. See: http://www.corporateaccountability.org/international/canada/ lawreform/main.htm
In our view a single supermarket may or may not be deemed to be a “significant” part of the whole company, and it is right that this be an issue for the jury and the courts to determine.

— If however a senior manager at a higher level within the company was aware of, or ought to have been aware of the serious management failure, should the company be prosecuted? In our view the answer is yes.

In conclusion, our view on this point is:

— in section 2 of the Bill, the word significant should replace substantial; and
— there should be an additional basis for the offence similar to the effect of the wording below:

“An organisation . . . is guilty of the offence of corporate manslaughter if either:

(a) the way in which any of the organisation’s activities are managed or organised by its senior managers—
   (i) causes a person’s death, and
   (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, or
(b) the way in which any of the organisation’s activities are managed or organised:
   (i) causes a person’s death, and
   (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, and
   (iii) is known or ought to have been known by a senior manager or managers who could have rectified the failure.”

**Causation**

62. In its 1996 recommendations the Law Commission had stated that there should be the following clause—“such a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual.” The Home Office in its first consultation supported this position.

63. The Law Commission considered that this clause was required at that time as otherwise it might be easy for companies to argue that negligence on the part of a “shop floor” employee was the cause of the death and not the management failure—that in effect the conduct of the shop floor worker broke the “chain of causation”.

64. In the current Bill the Home Office has not included this clause. The consultation document states:

“When they reported the Law Commission were concerned that the rules that at the time governed when an intervening act would break the chain of causation meant that it would be very difficult to establish that a management failure had caused death, as opposed to the more immediate, operational cause. . .

The case law in the area has, however developed since the Law Commission reported and we are satisfied that no separate provision is now needed. An intervening act will only break the chain of causation it is extraordinary—and we do not consider that corporate liability should arise when an individual has intervened in the chain of events in an extraordinary fashion causing the death, or the death was otherwise immediately caused by an extraordinary and unforeseeable event.”

65. The Home Office points to the cases of Empress Car Co (Abertillery) Limited v National Rivers Authority and R v Finlay136 as justification for this approach. We think that the Home Office position is probably sound but we have not been in a position to seek legal advice on this matter.

**Assessing the Breach**

66. Section 3 states the following:

(1) A breach of a duty of care by an organisation is a ‘gross’ breach if the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the circumstances.

(2) In deciding that question the jury must consider whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance, and if so—

(a) how serious was the failure to comply;
(b) whether or not serious managers of the organisation—
   (i) knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;

136 [1998] 1 All ER 481 and [2003] EWCA 3868 respectively.
(ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;

(iii) sought to cause the organisation to profit from that failure.

(3) In subsection (2) “health and safety legislation or guidance” means

(a) any enactment dealing with health and safety matters including in particular the Health and Safety at Work Act 1974, or any legislation made under such an enactments;

(b) any code, guidance manual or similar publication that is concerned with health and safety matters and is made or issued (under an enactment or otherwise) by an authority responsible for the enforcement of any enactment of legislation for the kind mentioned in paragraph (a)

(4) Subsection (2) does not prevent the jury for having regard to any other matters they consider relevant to the question.

67. In the consultation document, the Home Office states that:

“The new offence is targeted at the most serious management failing that warrant the application of a serious criminal offence. It is not our intention to catch companies or others making proper efforts to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation but appropriate standards have not quite been met. The proposals do not seek to make every breach of a company’s common law and statutory duties to ensure health and safety liable for prosecution under the new offence. The offence is to be reserved for cases of gross negligence, where this sort of serious criminal sanction is appropriate. The new offence will therefore require the same sort of high threshold that the law of gross negligence manslaughter currently requires—in other words, a gross failure that causes death. We have adopted the Law Commission’s proposal to define this in terms of conduct that falls far below what can reasonably be expected in the circumstances. A number of respondents to the consultation exercise in 2000 were concerned that the term “falling far below” was sufficiently clear that further clarification or guidance was needed in respect of this. The draft Bill therefore provided a range of statutory criteria for providing a clearer framework for assessing an organisation’s culpability. These are not exclusive and would not prevent the jury taking account of other matters they considered relevant”.137

CCA’s View

68. The CCA has the following views:

(i) we support the test of “falling far below what could reasonably be expected”. It is currently the test for the offence of “dangerous driving” and it is appropriate to reflect that wording.

(ii) we accept that there may be room to set out criteria to assist juries in determining whether or not an organisation’s conduct has fallen far below what could reasonably be expected. However we are of the view that the criteria “sought to cause the organisation to profit from that failure” is problematic. It would be very difficult to prove that senior managers of an organisation wished to profit from a particular failure—and absence of proof might make juries simply acquit. It would be particularly difficult for juries dealing with the prosecution of public bodies. We understand from the Home Office that this subsection was supposed to capture the motive of senior managers. However senior managers may have lots of motives for failing to take action to comply with health and safety law—profit may be one, but not caring could be another. We would suggest that a jury should be simply asked to take into account “the reason for the failure”. This would allow them to assess the relative importance of a senior manager failing to do something for profit or failing to do something because he could not care less. Although the rhetoric of “profits before safety” is a common one — it should not be part of the offence itself.

(iii) we support the general definition of “health and safety legislation or guidance” as set out in the Bill—though we are of the view that it should also include other guidance—industry or otherwise (ie British Standards) that is supported by the HSE or relevant authority. This is important as increasingly the HSE, for example, are not producing guidance but are working with industry bodies who publish their own.

Jurisdiction

69. The Bill states that the offence will apply if “harm resulting in death is sustained in England and Wales”. It is important to note that it is not where the death took place but where the initial harm occurred.

70. Any company, based in any country, can be prosecuted as long as the harm that caused the death took place in England and Wales. So if the management failure of the company took place outside England and Wales but the harm took place inside, the company could be prosecuted. However the offence will not apply in either of these two situations:

137 Para 32.
71. The Home Office consultation document states that:

"the new offence would not, however, have extra-territorial jurisdiction. As we set out in the consultation paper, there would be very considerable practical difficulties if we were to attempt to extend our jurisdiction over the operation of companies registered in England and Wales. Such difficulties would mean that the offence would in practice be unenforceable."

CCA’s View

72. The CCA has the following view:

(i) It is important to consider the issue of jurisdiction for this new offence within the context of the current principles of jurisdiction for the offence of manslaughter as it applies to individuals. The English/Welsh courts have very wide jurisdiction over the offence of manslaughter as it applies to individuals. Any British citizen who commits manslaughter outside England and Wales can be prosecuted in England and Wales. That is to say the individual could be prosecuted for the offence in the following situations:

— gross negligence inside England and Wales, death outside;
— gross negligence outside England and Wales, death outside.

(ii) Since corporate manslaughter is a sister offence to the individual crime of manslaughter, the Home Office should give much more consideration to how the question of jurisdiction should apply. The CCA accepts that there are probably insurmountable difficulties to applying corporate manslaughter to situations where both the management failures and the harm took place abroad; this would in effect mean that UK health and safety legislation would have to apply outside Britain.

(iii) However in our view it is realistic to allow the offence to apply to situations where the management failure took place in Britain and the death took place abroad. This we think would in most cases be easier to investigate than the situation where the death takes place in England/Wales but the management failure takes place outside—where the offence would apply as set out in the Bill. For example, there would be real difficulties in both investigating and prosecuting a company when it is abroad. With the organisation based in England/Wales—these problems would be dramatically minimised.

(iv) Clearly, when the death takes place outside England/Wales the case may be dealt with by the country where the death took place or there may well be evidential difficulties in proving causation—where the crime scene was not secured. However these issues should be dealt with on a case by case basis. The Bill should not, in principle, exclude the jurisdiction of English/Welsh courts. There are sound public policy reasons for this: the British government should want to clamp down on companies, who in effect use England/Wales as a base for causing deaths abroad.

INVESTIGATION AND PROSECUTION

73. In its original consultation document, the Home Office proposed that health and safety enforcing bodies should be given powers to investigate and prosecute the new offence in addition to the police and Crown Prosecution Service. The draft Bill however does not change the current position. The Home Office now says:

"the Government recognises the importance of police involvement in clearly signalling the position of the new offence as a serious offence under the general criminal law, rather than an offence that might be characterised as regulatory. The draft Bill proposes no change to the current responsibility of the police to investigate, and the CPS to prosecute, corporate manslaughter. It is of course important for the expertise of health and safety enforcing authorities such as HSE to be effectively harnessed in an investigation, not only to pursue questions of liability under more specific legislation, but also to provide advice and assistance to the police in investigating corporate manslaughter. The police already work jointly with the HSE and other enforcement authorities when investigating work-related deaths and protocol for liaison between agencies has been developed. The Government will continue to keep the adequacy and effective implementation of these arrangements under review."

CCA’s View

74. The CCA supports the Government position on this point—though it is clear that the police should be given more and better training in relation to corporate manslaughter than they currently receive to enable them to investigate effectively.

---

138 para 58.
PRIVATE PROSECUTION

75. The Home Office Bill states that:

“Proceedings for an offence under this section may not be instituted without the consent of the Director of Public Prosecutions”

This is a reversal of both the position of the Law Commission recommendation in 1996 and the Home Office’s own consultation document in 2000 which stated that there should be no requirement for individuals to gain consent from the DPP before bringing proceedings. The Law Commission stated in its 1996 report that:

“[T]he right of a private individual to bring criminal proceedings, subject to the usual controls, is in our view an important one which should not be lightly set aside. Indeed in a sense it is precisely the kind of case with which we are here concerned, where the public pressure for a prosecution is likely to be at its greatest, that that right is most important: it is in the most serious cases such as homicide, that a decision not to prosecute is most likely to be challenged. It would in our view be perverse to remove the right to bring a private prosecution in the very case where it is most likely to be invoked.”

76. In its current consultation document the Home Office states that “there was significant concern” amongst those that responded to the Home Office 2000 consultation document that:

“This would lead to insufficiently well founded prosecutions, which would ultimately fail and would place an unfair burden on the organisation involved with possible irreparable and personal harm. The Government recognises these concerns.”

CCA’s View

77. We have the following view:

(i) For the principled reasons set out by the Law Commission in its 1996 report—and for reasons of access to justice—we think that the Home Office should revert back to the Law Commission’s position.

(ii) We do accept that since the Law Commission report there have been a number of changes in the policy of the Crown Prosecution Service.

(a) providing written reasons of any decision not to prosecute;

(b) meeting with the family to explain those reasons and responding to any points made; and

(c) reconsidering decisions on basis of points made by families if they are considered in some way significant.

In addition, it is also the case that the High Court has shown an increased willingness to review decisions made by the Crown Prosecution Service.

(iii) However, we are unaware of any evidence at all that removal of the need for the DPP’s consent would lead to “insufficiently well founded prosecutions”. Indeed there has only ever been one private manslaughter prosecution following a work-related death. In the absence of such evidence, we urge that the Home Office revert back to the position as set out in the Law Commission 1996 report. There are many obstacles in the way of private individuals initiating private prosecutions—access to the evidence and witnesses and the huge cost. In any case, if a private prosecution is so manifestly unfounded, the case can be quickly quashed by the Crown court at an early stage.

(iv) Indeed, it is arguable that if crown bodies can be prosecuted it is all the more important to have the right of private prosecution—since the Crown Prosecution Service, though theoretically independent, may well be under great pressure not to prosecute a crown body for the offence.

SENTENCING

78. There are two sentences available to the court. An unlimited fine or a “remedial order”. In relation to the fine the Home Office consultation document says, “Where the circumstances of the case merit, a fine can be set at a very high level.” In the Bill however no guidance is given to the court on what the level the fine should be. In relation to Crown bodies convicted of manslaughter the Home Office states:

“There is a good argument, however, that fining a Crown body serves little practical purpose and simply involved a recycling of public money through the Treasury and back to the relevant body to continue to provide its service. . . . Whilst the draft Bill currently provides for a Crown body to be liable to a financial penalty, we would welcome thoughts on this issue.”

79. A remedial order enables the court to make an order requiring the company to take steps to remedy the failure that was the subject of the offence, or any matter that “appears to the court to have resulted from that breach and to have been a cause of the death.”

139 Section 6.
CCA View

80. The CCA will not respond to this issue in any detail—since we feel that the Home Office has simply not given any proper consideration to the many alternative options of sentencing organisations. Five years have gone by since the 2000 consultation document—yet no thinking at all has been done by the Home Office on this crucial issue. We will simply make the following points:

(i) It is important to note that the Financial Services Authority imposes on companies fines (without trial) that can amount to close to 10% of the overall turnover of the company. Whilst courts would be able to impose an “unlimited fine” following conviction for the new offence of corporate manslaughter—the courts are given no guidance on this issue and it is perfectly reasonable to assume that the courts will continue to impose fines that fail to reach the levels of fine imposed by the FSA—even though they are dealing with far more serious offences.

(ii) In addition there are many alternative sentences that can be imposed upon companies—many of which are used in other jurisdictions—like corporate probation, community service, publicity impact orders, or equity fines. In our view the Home Office should immediately set up a committee that considers all the many alternative penalties for sentencing organisations—the CCA would be willing to consider being part of such an initiative.

INDIVIDUAL LIABILITY

81. The draft Bill does not have any impact on the accountability of individuals within an organisation. There are no secondary offences, and the possibility of prosecuting an individual for “aiding, abetting, counselling or procuring” the offence of corporate manslaughter is specifically excluded.140 As indicated in the introduction, this is a reversal of the Home Office’s position in 2000 when in its contemporary consultation document it expressed concern that without punitive sanctions against company officers there would be insufficient deterrent force to the new proposals. It suggested that individual officers contributing to a management failure could either be prosecuted or disqualified.

CCA View

82. There is a clear problem about individual accountability—in particular at a Board and senior manager level. In relation to this the CCA has previously proposed the need for the Government to legislate on directors’ responsibilities, and we think this is the most effective way forward. The CCA accept that this Bill may not be the best vehicle for such a reform—but is strongly of the view that the Government should legislate in this area as they had promised to do so in a strategy document141 published in 2000.

Annex 1

ADVICE

INTRODUCTION

1. In March 2005 the Government published its draft Corporate Manslaughter Bill142 (“the draft Bill”) and is currently consulting on the contents of the same. With their responses to the consultation process in mind, the Centre for Corporate Accountability (“the CCA”) and INQUEST have instructed us to advise on certain aspects of the draft Bill. We also understand this Advice may be forwarded to the Parliamentary Joint Committee on Human Rights.

2. We are specifically instructed to advise on the compatibility of the “Crown immunity” parts of the draft Bill with the European Convention on Human Rights (“the Convention”) and the Human Rights Act 1998 (“the HRA”). We refer to Crown immunity in inverted commas because as will become clear the draft Bill does not include a general principle of Crown immunity, but rather several other provisions which we are concerned will have a similar de facto effect.

3. Much work has already been done on this area. On 1 December 2003, I (Tim Owen QC) together with Murray Hunt and Danny Friedman advised the CCA on the issues as they appeared to be at the time of the proposals in the Government’s 2000 consultation on the corporate manslaughter issue143. In preparing this Advice we have also been provided with comments drafted by John Halford and Louise Christian on the draft Bill, an Advice from David Travers of 6 Pump Court dated 31 May 2005 on the duty of care aspects of the draft Bill, and the CCA’s Briefing on the draft Bill as discussed at the recent TUC/CCA Corporate Manslaughter conference. All of this material has been of great assistance in understanding this complex area.

140 Section 1(5).
141 “Revitalising Health and Safety: a strategy document”, Action point 11. Department of Transport and the Regions. For further details of the views of the CCA on directors duties contact us.
142 Corporate Manslaughter: The Government’s Draft Bill for Reform (Cm 6497, March 2005).
THE CONVENTION AND RIGHT TO LIFE PRINCIPLES

4. The relevant right to life principles which flow from the Convention are set out in some detail at sections II and III of the 2003 Advice, to which we refer, but which we summarise here for ease of reference.

5. In essence, Article 2 imposes on the State (i) a negative duty not to deprive a person of his/her life save in the limited circumstances outlined in Article 2(2); (ii) a positive duty to take reasonable steps to safeguard the lives of individuals, especially in circumstances where there is a known real and immediate risk to their lives; and (iii) a procedural duty to investigate a death where it is arguable that either the negative or the positive duty to protect life has been breached.

6. Moreover the Convention can have consequences for criminal law in that: (i) in certain circumstances a serious violation of Articles 2, 3 (the protection from torture or inhuman or degrading punishment or treatment) and 8 (the right to privacy) ought to give rise to a criminal liability, because in those circumstances a civil remedy is not enough; (ii) the terms of domestic criminal law, including defences and exceptions, may give rise to a breach of Article 2 and/or Article 3; (iii) the criminal law must provide adequate protection for individuals against human rights violations by other private individuals; (iv) vulnerable individuals (such as children, people in care, prisoners or those at risk of environmental harm, racism, sexual abuse etc) are entitled to “protection by way of effective deterrence” against serious breaches of their personal integrity or right to life; and (v) criminal proceedings can be part of the process of ensuring the bereaved see an effective investigation and appropriate punishment for those responsible for human rights violations.

7. The issue of when Convention rights require that a criminal remedy be available for full vindication of those rights (issue (i) above) is a thorny one in that the short answer given by the Strasbourg authorities is “sometimes, but not always”. In Yo v France [GC], App No 53924/00, Calvelli and Ciglio v Italy [GC], No 32967/96, ECHR 2002-I, Mastromatteo v Italy ([GC], No 37703/99, and most recently, Rowley v UK (App No 31914/03) (Decision, 22 February 2005) for example, the Court has held that if the infringement of the right to life or to physical integrity 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.

8. In certain circumstances, however, the case law dictates that the availability of a civil remedy leading to compensation is not enough, and that the procedural obligation under Article 2 may require the setting up of a criminal law mechanism. The case of Oneryildiz v Turkey, App No 48939/99 (Grand Chamber Judgement of 30 November 2004) is particularly interesting in this regard. In that case several inhabitants of a shanty town on edge of slum land were killed by a fatal mudslide. The local mayors were prosecuted for negligent omissions in the performance of their duties (under paragraph 230 of the Turkish Criminal Code) but were not prosecuted for negligently causing the deaths. Significantly, the Strasbourg Court concluded that the imposition of criminal liability per se was not sufficient for the purposes of Article 2; rather it must be criminal liability which establishes the violation of the right to life and which reflects the seriousness of the conduct causing death.

9. At paragraphs 92-94 of its judgment in Oneryildiz, the Court explained the sorts of factors which might require there to be such a criminal law mechanism in the circumstances of a particular case. These included the area in which the risk to life has arisen, the number and status of the authorities in breach of their duties, and the nature and seriousness of the risk. The Court’s commentary at paragraph 93 indicates that in the following cases the failure to ensure that those responsible are criminally prosecuted, irrespective of the

144 See Oneryildiz v Turkey, App No 48939/99 (Grand Chamber Judgement of 30 November 2004), at para 90; X and Y v The Netherlands, 8 ECHR 235 and further discussion below.
145 See, for example, A v United Kingdom (1999) 27 EHR 611 where the European Court of Human Rights found that the availability of a lawful correction defences in relation to a charge of assaulting a child was found to constitute a violation of Article 3. The common law defence was subsequently refined in R v H [2002] 1 Cr App R 7, CA, in order to bring it into line with the requirements of Article 3.
146 See A v UK (ibid); Osman v UK (2000) 29 EHR 245.
147 See Z v UK (2002) 34 ECHR 3; A v UK (ibid); (2002) 35 ECHR 19; Oneryildiz v Turkey (ibid); Merson v UK App No 47916/99 (Decision of 6 May 2003); and X v Y v The Netherlands, (ibid).
148 See Oneryildiz v Turkey, (ibid), at para 91.
149 See, for example, McCann v UK (1996) 21 EHR 97.
150 See, for example, Edwards v UK (ibid).
151 Such as in Oneryildiz v Turkey, (ibid).
152 The Rowley case is of particular interest because the applicant challenged the current definition of corporate manslaughter in domestic law. Her son was killed learning and physical disabilities, died in a residential care home owned by Salford City Council as a result of drowning in his bath when a carer left him unattended. The applicant argued that the definition of corporate manslaughter in domestic law rendered it almost impossible to apply to large organisations. The European Court held that there was no absolute right to recourse to criminal law. It stated that it was “not persuaded” that the alleged defect in the law of corporate manslaughter enabled the local authority to hide behind an inadequate safety system with impunity, not least because they had been convicted and fined a substantial sum for health and safety offences.
other remedies that may be available, may amount to a violation of Article 2: (i) homicide caused by use of lethal force by the State; (ii) deaths “... in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents ...”; and (iii) deaths “... where it is established that the negligence attributable to State officials or bodies on that account 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 ...”.

10. The issue was considered again very recently in the admissibility decision of Ramsahai v Netherlands, App No 52391/99 (Decision, 3 March 2005). The applicants were the relatives of an 18 year-old shot by the police in the course of his arrest. The applicants raised a number of complaints under Article 2 of the Convention. They submitted that a civil action was an inadequate remedy since it was not possible to claim for non-pecuniary damage, and was not a remedy capable of ensuring “the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility” (Finucane v UK (2003) 22 EHRR 29), the less so since the costs and the risk of a favourable outcome would have to be borne by the applicants themselves. The applicants were not interested in obtaining financial compensation but wished the death to be properly investigated with their involvement and with the opportunity to seek information on their own account. The European Court found that the Government’s objection that the applicants had failed to exhaust domestic remedies failed. It found that the applicants had been entitled to seek a remedy in criminal law, which was “appropriate to their grievances as subsequently presented to the court”. The Court declared the matter admissible, thereby further illustrating an inclination to consider the necessity of a criminal investigation in cases where a civil remedy provides inadequate redress.

11. The issue of when Article 13 requires an effective remedy was also recently considered in the case of Bubbins v UK, App No 50196/99 (Judgment, 17 March 2005). The applicant was the sister of the deceased, Michael Fitzgerald, who had been shot dead by a police officer. The Court found that the applicant was excluded from the scope of the Fatal Accidents Act 1976 since she was not a dependent. The applicant had no prospect of obtaining compensation for non-pecuniary damage suffered by her if the court were to rule in her favour. The impossibility of recovering compensation for non-pecuniary damage would almost certainly have a negative bearing on any application by her for legal aid to take civil proceedings against the police. Consequently, the Court found that there was a breach of Article 13.

12. Article 14 is also of relevance to this debate. This Article provides for the enjoyment of the other Convention rights without discrimination on any ground. It is not necessary to show that there has been a breach of the substantive Convention right; rather what is required is that the action in question falls “within the ambit”153 or the “subject-matter”154 of another Convention right. Then, if there is discrimination in the enjoyment of that right, as between those in analogous situations, and the same cannot be objectively justified, a breach of Article 14 is made out.

13. A relevant recent example of this principle in operation was the case of Kanchova v Bulgaria (Appn No’s 00043577/98 and 00043579/98, 26/2/2004). In that case two Roma men had been shot and killed by the Bulgarian military police as they sought to abscond from military service. Their families alleged violations of the Article 2 right to life and Article 14 before the European Court. The Court held that there had been a breach of both the substantive and the procedural obligation under Article 2 (ie. in both the taking of the men’s lives and the defective State investigation into the same), but then went on to conclude that Article 14 had also been breached. The decision is notable as it is understood to be the first case where a breach of Article 2 and Article 14 taken together has been found, and for the fact that the Court appeared to impose a reverse burden of proof on the respondent State, to show that the violations of Article 2 were not caused by a racial motive. Kanchova also appears to build on earlier European Court jurisprudence such as Mensen v UK (Appn No 47916/99, ECHR, 6 May 2003155), stressing the importance of non-discrimination in the investigation into a death or violence which is said to be racially-motivated. It may be that in light of this jurisprudence arguments could be mounted that apparently racially-motivated deaths are a category which should be added to those in Oneryildiz as ones of such gravity that a criminal remedy should be available.

CROWN IMMUNITY, DUTY OF CARE AND HUMAN RIGHTS

14. Crown immunity is an established domestic common law principle by which Crown bodies enjoy a general immunity from criminal liability. The immunity applies both to common law crimes (including gross negligence manslaughter and to regulatory offences (such as breaches of the health and safety legislation), even where death has occurred. As to the latter the Health and Safety Executive has developed a process of “crown censure” which although not a trial in any sense, seeks to engage Crown bodies, so as to “seek acknowledgment of the problem and to obtain an undertaking to improve standards of health and safety”.


154 See X v Germany (1976) 19 Yearbook 276.

155 In Mensen, the Court had held that where an attack is racially motivated, it is particularly important that the investigation is pursued “... with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence ...” (pages 13-14).
15. The fact that at common law the Crown has historically enjoyed this immunity does not, of course, mean that such a position is consistent with the Convention and the HRA. There are several cases in which it has been argued that similar immunities from suit in civil law (whether strictly categorised as immunities from suit, or situations in which it is accepted no duty of care is owed by a Crown body, which for a Claimant would amount to virtually the same as an immunity from suit) are unsustainable in the light of the Convention/ HRA, sometimes successfully. We consider some of these briefly below (i) because the civil issue of a “relevant duty of care” is central to the criminal offence in the draft Bill; (ii) because there would plainly be cases where a criminal offence and a breach of civil duty of care arise on the same facts; and (iii) because we are aware that the Government relies on the legal principles in at least the Brooks case as justifying part of its position on Crown immunity in the draft Bill.

16. The most relevant example under this head for present purposes is that of the police. Historically the police have enjoyed a broad immunity from suit in negligence both from the victims and the suspects of crime (see, respectively, Hill v Chief Constable of West Yorkshire [1989] AC 53 and Elguzouli-Daf v Commissioner of Police for the Metropolis [1995] QB 335), except in some circumstances such as where an individual in their custody is a known suicide risk and that risk is not managed properly (see, for example, Reeves v The Commissioner of Police of the Metropolis [2000] 1 AC 360). However in Osman v UK (2000) ECHR 245 at paragraphs 151-4, the European Court of Human Rights ruled that the blanket immunity of the police for negligence in Hill was not compatible with Article 6(1) of Convention (the right of access to a court). In his concurring opinion, Sir John Freedland, said plainly: “For me the [Hill immunity] exception, operating in this way, is an inappropriately blunt instrument for the disposal of claims raising human rights issues such as those in the present case” [emphasis added]. Although in Z v UK (2002) 34 EHRR 3 at paragraphs 57-8 and 100, the Strasbourg Court re-categorised the inability to sue local authorities in negligence as flowing from “the applicable principles governing the substantive right of action in domestic law” rather than any immunity, the Osman case nevertheless illustrates the willingness of the Court to subject an apparent immunity from suit to close scrutiny for compliance with human rights standards.

17. Post-Osman there were certain significant, but narrowly defined, inroads into the Hill immunity insofar as victims/witnesses are concerned. The common theme in all these cases was that on the particular facts a “special relationship” between the police and the Claimant was found to have existed, so as to take the claimant beyond the position of the “average” Hill victim or Elguzouli-Daf suspect. This could be borne out by an assumption of some positive responsibility on the part of the police, or where the individual was known to be particularly vulnerable to harm from a particular source (whether as a victim, or informer etc). This special relationship was held to create a greater “proximity” between the police and this individual than members of the public at large, to whom harm was foreseeable, and it is on that basis that it was deemed fair, just and equitable to impose a duty of care.

18. The most direct challenge to the police’s immunity from suit for negligence came in Brooks v Metropolitan Police Commissioner. The Claimant was Duwayne Brooks, the surviving victim of the murderous racist attack on himself and Stephen Lawrence on 22 April 1993. He sought damages in negligence (among other claims) for the post-traumatic stress disorder he suffered as a result of the manner in which he was dealt with by the police and by the failure to apprehend the alleged assailants. The Court of Appeal at [2002] EWCA Civ 407 was sympathetic to the arguments advanced on Mr Brooks’ behalf to the effect that whatever policy reasons may have justified the Hill decision in 1988, they did not apply so strongly in 2002, partly because of the advent of the HRA. However the Court held that despite those changing considerations, it was still not appropriate to impose on the police a general duty of care in the investigation of crime. Mr Brooks did not appeal that finding, and so the current state of the law is that the police owe no general duty of care in relation to the investigation of crime. The Court of Appeal did feel that it was arguable that the police owed Mr Brooks duties of care in their treatment of him as a victim of crime and a key eye-witness and to afford reasonable weight to the account which he gave. However the House of Lords at [2005] 2 All ER 489 disagreed and concluded that the duties of care put forward by Mr Brooks were conclusively ruled out by the principles in Hill. Lord Bingham acknowledged that the application of the Hill principle would sometimes leave citizens, who were entitled to feel aggrieved by negligent conduct of the police, without a private law remedy for psychiatric harm. However, as he commented at paragraph 31, “...domestic legal policy, and the Human Rights Act 1998 sometimes compels this result ...”. The Brooks litigation nevertheless illustrates the very fine balancing act which must be performed in order to decide whether duties of care should be imposed on particular bodies, and for what

---

156 See, for example (a) Costello v The Chief Constable of Northumbria [1999] ICR 752—where the Court of Appeal upheld a refusal to strike out a claim in negligence against a Chief Constable by a female police officer who had been attacked and injured by a prisoner in a cell; (b) Donnelly v the Chief Constable of Lancashire (unreported, Gray J, 26 July 2000) at paragraphs 24-27—where an informant was permitted to sue the police not for the conduct of the subsequent trial, but for their disclosure of his identity during the course of an interview with a suspect (and see also Swinney v The Chief Constable of Northumbria [1997] QB 464 at 485-70; (c) Waters v the Commissioner of Police for the Metropolis [2000] 1 WLR 1607—where the House of Lords restored a claim by a female police officer against a Chief Constable whose officers had failed to investigate her complaints of sexual assault by a fellow officer (distinguishing Hill on the grounds that the Chief Constable owed her a duty of care similar to an employer’s liability to his employees, which in this case included a duty to investigate crime); and (d) L v Chief Constable of Thames Valley [2001] 1 WLR 1575 at paragraph 32—where it was held that the police could be liable to a father suspected of child abuse and his daughter (the alleged victim) for the manner in which the abuse interviews were conducted.
functions. It is also notable that part of the reasoning of the Court of Appeal was that Mr Brooks did have other remedies available to him, namely under the Race Relations Act 1976. It has nevertheless had the effect of continuing the broad immunity from suit for negligence enjoyed by the police since Hill.

19. That said, attempts to challenge immunities from suit in other fields on a Convention/HRA basis have been slightly more successful. Like Hill, X v Bedfordshire County Council and others [1995] 2 AC 633 had afforded local authorities a wide de facto immunity from suit in negligence by holding that they did not owe common law duties of care, to, for example, children in their care. Yet that “immunity” has also been chipped away—decisions following X including the House of Lords’ decisions in Barrett v Enfield London Borough Council [2001] 2 AC 550 and Phelps v Hillingdon London Borough Council [2001] 2 AC 619 restricted the effect of the decision to the core proposition that decisions by local authorities whether or not to take children into care were not reviewable by way of a claim in negligence.

20. Most recently, in JD v East Berkshire Community Health and others [2004] QB 558 at paragraphs 79-84, the Court of Appeal heard three appeals from the dismissal of damages claims by parent/s and/or their children for psychiatric harm arising from false allegations made against the parents by child welfare professionals. The Court accepted that following the coming into force of the HRA, and the need for children to have a viable remedy for violations of their Articles 3 and 8 rights, X v Bedfordshire no longer applied and, depending on the facts of a particular case, local authorities could owe such children a duty of care. No such duty was owed to the parents who were falsely accused (and their appeal against this finding recently failed—see [2005] 2 All ER 443).

21. In summary, then:

(i) At common law the Crown has enjoyed immunity from suit for criminal liability; and
(ii) The Crown in guises such as the police and local authorities has also enjoyed a broad immunity from suit for civil liability in negligence (either as a legal immunity or because no duty of care is owed), but Convention/HRA principles have resulted in several significant inroads into this immunity.

We turn now to how Crown immunity is addressed in the draft Bill.

CROWN IMMUNITY IN THE DRAFT BILL

22. In the 2000 Consultation Paper, the Government proposed that conventional Crown immunity would be available to Crown bodies, who could never therefore be prosecuted for the proposed offence. The Government proposed instead that a declaratory “remedy” would be made available against Crown bodies which would be prospective only in its effect.

23. The Government has now shifted from the position adopted in the 2000 Consultation Paper, and now accepts that in certain circumstances it should be possible to prosecute Crown bodies (including Government departments) for the new offence of corporate manslaughter provided by s.1(1)157. Accordingly the draft Bill specifically states that Crown bodies are not immune from prosecution for that reason (s.7(1)).

24. However, although there is no blanket immunity from suit for Crown bodies, the draft Bill makes a number of provisions which will—we believe, seriously—limit the applicability of the new offence to them in practice. These provisions are:

(i) Not all Crown or government bodies will be capable of committing the new offence of corporate manslaughter, but only those listed in the Schedule (s.1(2)(b)). Although the Consultation Paper acknowledges that work is to be done on the Schedule158, at present it includes just over 30 government departments, ranging from the Department of Health, the Home Office and the Ministry of Defence to other less “obvious” examples of departments whose actions might endanger life, such as the Export Credit Guarantees Department and the Legal Secretariat to the Law Officers (“the Schedule provision”);
(ii) The draft Bill provides that no unincorporated bodies are to be bound by it, as the offence can only be committed by “a corporation” (in addition to a body listed on the Schedule) (s.1(2)). The only exception the Government proposes in this regard relates to the police (paragraph 44 of the Consultation Paper), although an amendment to reflect the same does not yet appear on the face of the draft Bill (“the unincorporated bodies provision”);
(iii) No organisation will be capable of committing the offence of corporate manslaughter unless it breaches a “relevant duty of care” (s.1(1)(b)). That is defined as being a duty of care owed in negligence by the organisation to its employees, in its capacity as occupier of land, or in connection

157 The new offence is defined as follows: “An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised by its senior managers (a) causes a person’s death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”.

158 See paragraph 39 thereof which states “The schedule currently focuses on Ministerial and non-Ministerial Government Departments. Further work is required to develop this list, particularly to consider the position of executive agencies and other bodies that come under the ambit of Departments”.
with the supply of goods or services or the carrying on of any other activity on a commercial basis, otherwise than in the exercise of an exclusively public function (s.4(1)) (“the duty of care provision”);

(iv) An “exclusively public function” is defined by s.4(4) as being “a function which falls within the prerogative of the Crown or it, by its nature, exercisable only with authority conferred (a) by the exercise of that prerogative, (b) by or under any enactment” (“the exclusively public function provision”);

(v) A public authority will not owe a duty of care in respect of “a decision as to matters of public policy (including in particular the allocation of public resources for the weighing of competing public interests) (s.4(2)). For the purposes of this exemption, “public authority” is defined in the same way as for the purposes of the HRA (s.4(4)) and so it applies much more widely than just to Crown bodies. Accordingly in so far as a death has been caused by any of these bodies as a result of such policy decisions, no prosecution can lie as no “relevant duty of care” will have been made out (“the policy decision provision”);

(vi) The Government wishes to treat intelligence and security bodies differently from all other Crown bodies and do not propose that prosecutions of them should ever be possible. Accordingly it is to be assumed that no intelligence or security bodies will feature on the final version of the Schedule. Moreover insofar as death results from “activities carried on by members of the armed forces in the course of or in preparation for, or directly in support of, any combat operations” or “the planning of any such operations” the same will not fall within the new offence (s.10(1)—as the word “activities” in the s.1(1) definition section is deemed by s.10(1) not to include these activities) (“the intelligence, security forces and armed forces provisions”);

(vii) The draft Bill extends largely to England and Wales only (s.16(1)) (“the territorial jurisdiction provision”); and

(viii) Proceedings for the new offence will not be able to be instituted without the consent of the Director of Public Prosecutions (s.1(6)) (“the DPP consent provision”).

We turn now to consider the compatibility of these provisions with the Convention and the HRA.

COMPATIBILITY OF THE CROWN IMMUNITY PROVISIONS WITH THE CONVENTION AND THE HRA

(i) The Schedule provision;

(ii) The unincorporated bodies provision

25. The net result of these two provisions is that unless the body in question is either (i) a corporation; or (ii) a government department or other body listed on the Schedule, the body is not capable of prosecution for the new offence. We deal with these provisions together because we are concerned that they raise similar issues in terms of limiting the number of bodies to whom the new offence can apply.

26. While it is of course to be welcomed that the Government has moved away from its original intention to apply “conventional” Crown immunity to the new offence, we have the following concerns about the approach that the Government has taken to defining the bodies to whom the new offence applies:

(i) The approach adopted in the draft Bill is inconsistent with:

(a) The approach taken in the Health and Safety at Work Act 1974, ss.2-3 which is deliberately inclusive, embracing almost all “undertakings” whether commercial in nature or otherwise. The net result of this is that a much wider category of bodies can be prosecuted for general health and safety violations than those who can be prosecuted in the most serious cases when such violations have led to death, and when the Convention requirements are all the stronger;

(b) The approach taken in the HRA itself which is similarly inclusive on the public body question159, which approach has been adopted in other legislation such as (such as the Race Relations Act 1976, s.19B); and

(c) The approach taken in the only other statutory regime of which we are aware where such a Schedule of public bodies has been used—that in relation to those bodies required to produce a Race Equality Scheme as a specific duty under the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000—where the statutory instruments which bring that duty into force160 apply it to a much more substantial range of public bodies, by, for example describing them as “A county council, a London borough council or a district council”;

---

159 In that it embraces (ii) “pure” public bodies—such as central and local government departments, police officers, prison officers, immigration officers, the NHS, licensing authorities and probation officers; and (ii) “hybrid” bodies “certain of whose functions are functions of a public nature”, including any private or voluntary agency carrying out public functions such as running schools, prisons or immigration detention centres, enforcing parking controls, assisting with immigration control or providing residential care.

(ii) Most fundamentally, we consider that the Government’s proposals raise very real concerns about compatibility with Articles 2 and 13 the Convention. We say this because:

(a) As we have explained above, \textit{Oneryildiz} provides that in certain situations Article 2 requires the availability of a criminal law remedy. The approach in \textit{Oneryildiz} was to determine the need for a criminal remedy not by the identity of the public body in question but by the nature and gravity of the breach of duty.

(b) Similarly \textit{Ramsahai} indicated that a criminal remedy can be required in situations where there is no other effective remedy available. In other words the criminal remedy is provided as part of the State “package” of remedies for a breach of Article 2 and if no other remedy in that package is effective, a criminal one can be necessary. Again this does not determine the need for a criminal remedy by the nature of the organisation which committed the breach, but by the nature of the other remedies available. Accordingly there may well be cases where death has occurred at the hands of one of the bodies not covered by the new Bill, where there is no other effective remedy available, so that Article 2 can only properly be discharged by the availability of a criminal remedy;

(c) We have separate concerns about the exclusion of the security and intelligence services and certain activities of the armed forces which we deal with below, but for present purposes it is sufficient to note that these exclusions provide further areas, arguably some of the most dangerous and sensitive areas, where Article 2 protection is not going to be met by a criminal remedy;

(d) Accordingly by choosing to make the proposed new criminal remedy available only against certain public bodies, we are very concerned that the Government is acting incompatibly with Articles 2 and 13;

(iii) Moreover we are concerned that the Government’s proposals are quite likely to lead to a breach of Articles 2 and 13 read with Article 14. We say this because:

(a) The Government’s proposals will immediately create a two-tier system of justice whereby only the victims of Article 2 breaches by corporations or those bodies listed on the Schedule will have access to the new criminal law remedy;

(b) Article 14 provides for the enjoyment of the other Convention rights without discrimination on any ground. Under the system proposed by the Government the victims of breaches of Article 2 by bodies which are not corporations or not on the Schedule would have a good argument that they were being discriminated against in the attempt to vindicate those rights, when compared with the victims of Convention breaches by incorporated bodies or those on the Schedule;

(c) It would be hard to see how such a distinction could be objectively justified, especially as in the 2000 consultation the Government had accepted that the new offence should apply to the broader category of “undertakings”\textsuperscript{161}, and accepts that there is no fundamental procedural problem with prosecuting unincorporated bodies (paragraph 43 of the Consultation Paper); and

(d) It is no answer to this issue for the Government to say that there is no Convention “right” to a corporate killing offence because (i) in some circumstances there is—see \textit{Oneryildiz} and \textit{Ramsahai} above; and (ii) once the State has chosen to provide a particular system or benefit it (even if the Convention does not require such a system or benefit) it must do so without discrimination (see the \textit{Belgian Linguistic Case (No 2)} (1979-80) 1 EHRR 252, at paragraph 9 in relation to the provision of an appeal court system)\textsuperscript{162}.

27. In light of these difficulties we wonder whether those instructing us would consider it appropriate to lobby the Government to move away from the Schedule approach, and revert to their original approach of applying the new offence to all relevant “undertakings”. Another alternative might be to apply the new offence to all bodies deemed to be public bodies for the purposes of the HRA. There is a growing body of case law in relation to that issue, and although there have been some notable cases in which an apparently public body has been held to fall outside the HRA\textsuperscript{163}, such an approach would at least have the benefit of consistency. As we indicated above, that was the approach taken when the Government chose to extend the Race Relations Act 1976 to all public bodies by the Race Relations in the light of the Macpherson report into the death of Stephen Lawrence\textsuperscript{164}. Such an approach would therefore have the benefit of (i) providing greater clarity, accessibility and consistency; and (ii) ensuring a structural approach to the draft Bill which was more likely to be Convention and HRA compliant.

\textsuperscript{161} In the 2000 Consultation Paper, the Government agreed that there was often very little difference in practice between an incorporated body and an unincorporated association, so that to restrict the scope of the offence in this way “could lead to an inconsistency of approach and these distinctions might appear arbitrary” (paragraph 3.2.3). The Government therefore proposed a more inclusive approach—it proposed that the new offence should apply to “undertakings” as defined in the \textit{Health and Safety at Work Act} 1974, which would catch unincorporated as well as incorporated bodies.

\textsuperscript{162} See further on this point, Tim Owen QC, Murray Hunt and Danny Friedman’s Advice at paragraphs 31-45.

\textsuperscript{163} See, for example, \textit{Heather and others v Leonard Cheshire Foundation and others} (2002) UKHRR 883.

\textsuperscript{164} See the Race Relations Act 1976, s.19B(2)(a) (as inserted by the Race Relations (Amendment) Act 2000).
28. On a technical level, if the Government is to maintain this approach we consider that greater clarity as to which bodies are in fact corporations would assist advisers and individuals in understanding the true scope of the draft Bill. Perhaps there could be a separate Schedule of the “types” of bodies which frequently have incorporated status? We would also urge those instructing us to ensure that the Government do indeed press on to include the police in the Bill.

(iii) The duty of care provision

29. We do not propose to deal at length with this provision as it has been the subject of careful consideration by David Travers in his Advice, but we would make the following observations:

(i) While we understand the Government’s intention to align the availability of the new offence of corporate manslaughter with those cases in which an action for negligence would lie, we are concerned that the present drafting does not do so. For example, would the Government accept that a suspect at risk of suicide to whom a duty of care would be owed (see Reeves above) was in fact receiving a service from the police for the purposes of s.4(1)(c)(i)?

(ii) In any event, Oneryildiz, Ramsahai and the other Article 2 authorities we cite above make clear that the availability of a criminal law remedy is not determined by whether a civil claim would also lie, but whether the nature and gravity of the breach in question requires a criminal remedy in of itself. Indeed Ramsahai would indicate that the lack of availability of an effective civil remedy is a reason which militates in favour of there being a criminal remedy, rather than against it;

(iii) The law relating to duty of care is notoriously complex and ever-changing as is clear from the brief discussion above. Whether a duty of care is found to exist in a particular set of circumstances is often determined by balancing the competing public interests of (a) allowing public bodies to continue with their work unhampered by litigation; and (b) the need of the victims of any breaches of Convention rights by those bodies to a remedy. This is often a finely balanced exercise, and there may well be situations where Convention jurisprudence requires a criminal law remedy to be available even if, under domestic law, the balancing exercise dictates that no civil claim need lie;

(iv) By way of example, the final outcome of the Brooks litigation discussed above is that the “typical” suspect, victim or witness will find it very hard to establish that the police should owe him or her a duty of care in negligence. Yet if such a suspect, victim or witness dies as a result of grave misconduct by the police, per Oneryildiz and Ramsahai, his or her family should be entitled to a criminal law remedy regardless of the fact that there is no civil one.

(iv) The exclusively public function provision;

(v) The policy decision provision

30. Again we deal with these provisions together because they raise similar concerns. The net result of them is that the family of an individual who dies in breach of Convention rights will not be able to secure the new criminal law remedy where (i) the function which led to the death was “an exclusively public” one (s.4(4)); or (ii) the death flowed from what was essentially a policy decision (s.4(2)).

31. The drafting of the “exclusively public function” provision is not clear and it is hard to tell whether it is intended to “bite” on sub-paragraphs 4(1)(a) and 4(1)(b) or just 4(1)(c). Be that as it may, we have the following concerns about this and the “policy” exemption at s.4(2):

(i) Again we feel that the draft Bill is creating an unduly complex remedial system, because:

(a) The scope of the prerogative (broadly that residue of the Crown’s power which remains unregulated by statute) is notoriously unclear. As John Halford points out, although some state actions such as signing treaties are clearly within the prerogative, many others have an ambiguous status, involving a combination of private law powers, common law powers enjoyed exclusively by the State, statute and the prerogative. He also points out that the House of Commons Public Administration Select Committee has argued that the case for bringing prerogative powers under proper parliamentary scrutiny is “unanswerable” not least because of the ambiguity about their scope;\footnote{Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Fourth Report of Session 2003ı04, HC 422.}

(b) Application of the prerogative exemption is likely to lead to arbitrary decisions—for example we understand that as the power to detain prisoners is a prerogative one, a death in a prison could not result in the prison or the Home Office being subject to prosecution, but the death of an employee (and possibly an ordinary member of the public) in a prison may do so;

(c) The second part of the prerogative exemption addressing powers exercised under “any enactment” is similarly both unclear and potentially very wide-ranging indeed; and

(d) The scope of “matters of public policy” under s.4(2) is going to be similarly hard to define. Does it mean Government policy? Does it mean local policy? What if the policy is itself unlawful?;
Accordingly we are concerned that it will be very difficult for any lawyer or individual to know whether the acts in question fall within the prerogative/policy exclusions or not, such that we agree with John Halford to the effect that “[if certain functions are to be excluded, they should be identified in clear terms, not by reference to an amorphous legal concept]”. Although he made these comments in the context of the prerogative exemption, we consider that they have equal force to the policy exemption;

(ii) More fundamentally, we cannot accept that the premise of these exemptions that prerogative or policy decisions should be exempt from prosecution for the new offence—is sustainable in Convention terms. In simple terms, if the State is culpable for a death in the circumstances set out in Oneryildiz, the Strasbourg jurisprudence requires that a criminal remedy be available in order to ensure proper vindication of Article 2, 3, 8 and 13 rights, regardless of whether the State’s “mitigation” is one based on prerogative or policy.

(iii) There is again an Article 14 issue, because what is being created is a further arbitrary two-tier system of justice where the availability of a criminal law remedy can turn on something as finely balanced as whether the function in question stemmed from prerogative or from policy, and we do not believe that such a distinction can be objectively justified;

(iii) We cannot accept the Government’s comment that as there are other remedies available, such as inquests and inquiries, an offence of corporate manslaughter is not “an appropriate way of holding the Government or public bodies to account for matters of public policy or uniquely public functions” (paragraph 18 of the Consultation Paper). This ignores the fact that (a) as we have said, on some occasions Article 2 requires a criminal remedy regardless of the other remedies available, and regardless of whether the Government considers it “appropriate”; and (b) in several recent high-profile cases the domestic courts have held that the other principal remedy, the inquest regime, is not a sufficient means of the state discharging its Article 2 liabilities (see, for example, R v Secretary of State for the Home Department ex p Wright (2001) Lloyd’s Med Rep 478; R (on the application of Amin v Secretary of State for the Home Department [2004] 1 AC 653 and R (on the Application of D)v Secretary of State for the Home Department [2005] EWHC 728 (Admin)); and

(iv) We are very concerned that many deaths in breach of Article 2, 3 and 8 can in fact be categorised as deaths which occurred during the exercise of the prerogative or a power under “an enactment”; or “explained” by policy or resources issues, which means that these two exemptions may well have the effect of removing the vast majority of deaths at the hands of public authorities from the remit of the new offence. This is especially so when one considers that for the purposes of the policy exemption, “public authority” is defined in the same way as for the purposes of the HRA (s.4(4)) and so applies much more widely than just to Crown bodies. We are concerned that the effect of these exemptions is potentially so widespread as to introduce a substantial species of Crown immunity “through the back door”. This does not sit well with the Government’s stated intention of applying the new offence in principle of a wide range of public authorities, and we believe that such a limited and arbitrary availability of the new offence would be incompatible with the Convention and the HRA for the reasons set out above.

(vi) The intelligence, security forces and armed forces provisions

32. The Government proposes simply to exempt the security and intelligence agencies from the new offence, and thereby grant them the “conventional” Crown immunity. We also have concerns about this because:

(i) The cases at paragraphs 16-20 above illustrate that Convention principles require a more considered, case by case, approach than the imposition of such blanket immunities;

(ii) Again there is a risk of incompatibility with Articles 2, 13 and 14 for the same reasons as are set out at paragraph 31 above; and

(iii) We consider that in practice the national security concerns which have partly led to this proposal apply with equal force to other bodies such as the Home Office and police forces, yet the draft Bill appears able to regulate the sort of situations in which such bodies will be susceptible to the new offence without recourse to a blanket immunity.

We therefore believe that it may be hard for the Government to justify such a blanket exemption for the security and intelligence agencies in Convention terms.

33. We are also concerned at the Government’s proposals in s10 of the draft Bill which essentially exempt the armed forces from the new offence where a death results from combat operations or the planning of any such operations. We do not accept the Government’s statement that “... the law already recognises that the public interest is best served by the Armed Forces being immune from legal action arising out of combat and other similar situations ...”. We say this because:

(i) A death in apparent breach of Article 2 by the direct use of state force is perhaps the most obvious situation in which a criminal remedy is appropriate, as Oneryildiz specifically recognises;
(ii) In *R (on the application of Al Skeini) v MOD* [2004] EWHC 2911 (Admin) the Divisional Court (Rix LJ, Forbes J) specifically held that the death of an Iraqi civilian in the custody of British forces in Iraq came within the scope of the Convention and the HRA, and there had been a breach of the procedural investigative obligation arising under Articles 2 and 3 of the Convention in relation to that death; and

(iii) Such a broad exemption could have the effect of creating a potentially serious anomaly for those in training with or in the service of the armed forces. The employment relationship is broadly accepted by the draft Bill as being one in which a relevant duty of care is owed (see s 4(1)(a)), such that the new offence could lie as a result of breach of it. However, given the fairly broad form of the s.10 exemption (“activities carried on by members of the armed forces in the course of or in preparation for, or directly in support of, any combat operations . . . [or] . . . the planning of any such operations”) we would be concerned that this could be interpreted as covering a substantial part of the “work” a soldier does, such that no prosecutions could lie if death occurred while the soldier was engaged in that “work”. This could mean that, for example, the families of the soldiers who died in apparently controversial circumstances at the Deepcut Barracks in Surrey would be denied the criminal remedy of the new offence. This could again create issues under Articles 2 and 13 but especially under Article 14, as soldiers could validly argue that there was no basis for treating them differently to other employees in this regard.

We therefore consider that serious compatibility issues are also raised by the Government’s attempts to limit the applicability of the new offence to the armed forces.

(vii) The territorial jurisdiction provision

34. We note from the CCA’s briefing that they already have concerns about this provision and propose inviting the Government to reconsider whether it would be more appropriate for the new offence to apply to situations where a management failure takes place in Britain and the death took place abroad. We would add to this the fact that in the *Al Skeini* case referred to above, the Divisional Court held that the death of an Iraqi civilian was within the jurisdiction of the British courts because it occurred within a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities. This would appear to provide a Convention basis for arguing that limiting the applicability of the new offence in the way proposed is unduly restrictive. We suspect this issue could be resolved by adding a new category to s16(2).

(viii) The DPP consent provision

35. This provision has been introduced into the draft Bill despite both the original Law Commission report and Home Office 2000 consultation document stating that there should be no such pre-condition to a prosecution for the new offence. We share the CCA’s concern about this provision because the Crown Prosecution Service (and implicitly its head, the Director of Public Prosecutions) has a notoriously poor record for prosecuting police or prison officers for deaths which have occurred at their hands, even where inquest juries have returned unlawful killing verdicts.

CONCLUSIONS

36. For the reasons set out above, we consider that there is a real risk that the following aspects of the “Crown immunity” parts of the draft Bill will be found to be incompatible with Articles 2, 3, 8, 13 and/or 14:

(i) The drafting and structure of the Bill (which is not clear and accessible);

(ii) The limited number of bodies to whom the new offence would apply (only corporations or those listed in the Schedule);

(iii) The duty of care provision;

(iv) The potentially wide application of the “exclusively public function” and policy decision exemptions;

(v) The intelligence, security forces and armed forces exemptions; and

(vi) The territorial scope of the new offence.

We have also raised a concern as whether the consent of the Director of Public Prosecutions should in fact be necessary for a prosecution of the new offence. We hope that these comments are of assistance to the CCA and INQUEST and would be happy to assist further in the drafting of any submissions in the consultation process.

16 June 2005
ADVICE

1. The Government has published for consultation\(^{166}\) its proposals in respect of a Corporate Manslaughter Bill to reform the law relating to workplace death and create a new offence of Corporate Manslaughter.

2. I am instructed on behalf of the Centre for Corporate Accountability (a charity) and David Bergman, its Executive Director, in relation to the Government’s proposals regarding the nature scope and extent of the provisions dealing with the “duty of care”.

3. I am asked to consider three issues, which I set out in a slightly recast form below.

   A. Other than those specifically excluded are there any duty of care relationships in the law of negligence which could involve an organisation’s responsibility for a death not mentioned in clause 4 (1) (a) to (c). Put another way; are the duties in clause 4 (1) (a) to (c) a comprehensive set of the duty of care relationships?

   B. Clause 4 (2) provides there is no duty of care in relation to “decisions as to matters of public policy”. To what kind of decisions does this relate and what kinds of deaths would be excluded?

   C. Having regard to the Home Office’s justification for its position that the existing law of negligence does not usually give rise to a duty of care where competing public interest issues are involved\(^{167}\); in what circumstances (if any) does a duty of care arise from policy decisions?

PREAMBLE

4. The duty of care is the first component of the tort of negligence. For an action in negligence to succeed the defendant must owe the claimant a duty of care, must have failed to attain the appropriate standard of care required in law and must have caused damage of a sort which is recognised in law.

5. The adoption of a duty of care in the Bill as an essential element of the new offence makes the new offence congruent in part with the law of negligence. It is of note that by being cast in this way the draftsman has deliberately chosen to depart from the approach in the Health and Safety at Work etc Act. Although sometimes concepts from the law of negligence (for example in terms of foreseeability with respect to establishing a safety deficit) are drawn on in that Act and the cases in which it is considered; liability under the Act does not derive from common law notions of negligence. Both these features are consistent with the Home Secretary’s declared intention that the proposed offence “must compliment, not replace, other forms of redress such as prosecutions under health and safety legislation.”\(^{168}\)

6. It is neither necessary nor appropriate here to trace the, at times troubled, development of the duty of care at common law from \(Donohage v Stephenson\)^\(^{169}\) through \(Anns v Merton LBC\)^\(^{170}\) to \(Murphy v Brentwood DC\)^\(^{171}\) and beyond. It is now sometimes said that the question of the existence of a duty of care is determined by reference to three criteria:

   (a) Is damage foreseeable?

   (b) Is the relationship between alleged tortfeasor and victim sufficiently proximate?

   (c) Is it fair, just and reasonable to impose such a duty?

7. Determining what is “fair, just and reasonable” involves (amongst other things) weighing the total detriment to the public interest from holding a class of potential defendants liable against the total loss to all prospective claimants if they do not have a cause of action in respect of the loss they have suffered as individuals. (Per Lord Browne-Wilkinson in \(Barrett v Enfield LBC\)^\(^{172}\))

THE DUTY OF CARE

8. The relevant concept of a duty of care for the purposes of this Bill falls to be considered against the background of negligence and its statutory bedfellows the Occupiers Liability Act and the Defective Premises Act. It does not relate to the other occurrences of the phrase “duty of care” in law such as the “duty of care” imposed in respect of holders of waste. This does not affect the scope of the Bill, for example a waste holders activities would, insofar as they may affect the safety of others, be caught by the relevant duty of care defined in clause 4 (1).

\(^{166}\) “Corporate Manslaughter: The Government’s Draft Bill for Reform” Cm 6497 March 2005.

\(^{167}\) paragraph 23 ibid.

\(^{168}\) “Forward” ibid.

\(^{169}\) [1932] AC 562.


\(^{172}\) [2001] 2 AC 550.
9. It is evident that the approach of the authors of the bill has been to start with the offence of gross negligence manslaughter at common law. That offence was expressed in *R v Adomako* as requiring the Crown to prove a duty of care owed to the victim by the defendant and breach of that duty causing death in circumstances where the acts constituting the breach of duty were so lacking in care as properly to be characterised as gross negligence constituting a crime.

10. It is the declared intention of Government to cast the scope of the proposed offence neither wider nor less wide than the scope of manslaughter at common law.

11. Subject to what I say below as to the public policy exemptions, in this the draft bill appears to me to have succeeded.

12. In consequence the answer to the first question: Other than those specifically excluded are there any duty of care relationships in the law of negligence which could involve an organisation’s responsibility for a death not mentioned in clause 4(1) (a) to (c). The answer is: I cannot think of any.

**THE EXEMPTIONS**

13. I am asked “To what kind of decisions does the exception in clause 4 (2) relate and what kinds of deaths would be excluded.”

14. The exception in clause 4 (2) is in terms that an organisation “that is a public body” does not owe a relevant duty of care “in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests)” it can easily be seen this exception echoes the approach adopted by Lord Browne-Wilkinson in *Barrett v Enfield LBC*.

15. The explanation given by the Government is that the draft bill addresses the protection of public bodies making decisions, for example as to issues of “distributive” justice and the allocation of resources, by exempting from the scope of the relevant duty of care. It says this is because government departments and public bodies are otherwise accountable through “Ministers in Parliament, the Human Rights Act, public inquiries and other independent investigations, judicial review and Ombudsmen. These provide the appropriate forum for the scrutiny of such issues”. Some might find the logic as expressed not easy to follow. The mechanisms listed include recourse to the Courts in the form of Judicial Review. In consequence why is it necessary to limit the scope of the duty of care—particularly when the consent of the DPP is needed to commence proceedings? In my view (and with respect), the logically consistent answer lies less in the fact that these alternative means of accountability are the appropriate way to deal with these matters but rather that as no corresponding duty exists in respect of gross negligence manslaughter if this limitation was not present it would not be consistent with the Government’s declared aim to align liability for corporate killing with gross negligence manslaughter.

16. It is a matter of policy that the Government has chosen to approach the problem in this way and it is plainly entitled (although by no means obliged) to do so.

17. Notwithstanding that caveat the exception is unlikely, in my judgement, to create a problem. The most straightforward examples which would come outside the duty of care as a consequence of the exception in clause 4(2) are as I opine above issues of “distributive” justice. A public body does not at present, in negligence, and should not under this bill, face proceedings as a consequence of a death arising because of a policy as to the provision of treatment to those needing medical treatment, or how food is distributed in a crisis, or in respect of the allocation of winter fuel payments. These are, I contemplate, the sort of situations the draftsman had in mind when writing the clause.

18. All that said it is germane to look at clause 4(1) which also seeks to limit the scope of the duty of care. Firstly the proviso “other than in the exercise of an exclusively public function” which appears at the end of the sub-clause. On its face the scope of this important proviso is ambiguous. It is not clear whether it qualifies (a) (b) and (c) or just (c). I appreciate there are cannons of statutory construction which would help answer this question but for the sake of clarity more pellucid drafting would mean it did not have to be asked.

19. An “exclusively public function” is itself defined in clause 4(4) as “a function that falls within the prerogative of the Crown or is by its nature exercisable only with authority conferred: (a) by the exercise of that prerogative; or (b) by or under any enactment.”

20. While, as I have said above, the text of the consultation document deals with those reasons for the exempting of policy matters from the scope of the new offence I am unclear as to the rationale of the proviso in clause 4 (1). The exclusion of functions carried on under the prerogative is clear and (as a matter of policy

---

174 “The scope of the offence” paragraphs 16 to 24 (Cm6497).
175 Supra.
176 Paragraph 18 et seq.
legitimately a question for the sponsor of the bill). Less clear is the reasoning and scope behind the alternative ground of exemption; namely a function which by its nature is “exercisable only with authority conferred by or under an enactment”.

21. A number of points arise:

22. In respect of the exception for the exercise of an “exclusively public function” is this exception not unnecessary by reason of the wording of clause 4(1) which defines “duty of care” as “a duty owed under the law of negligence . . .”? 

23. If, on the other hand, it is not unnecessary—what duty which is owed under the law of negligence does it seek to exclude? I have in mind that one of the declared aims of the legislation is to create an offence congruent with the current offence of gross negligence manslaughter.177

24. These issues appear to be important and it will be seen the same objections apply to the exception in clause 4(2). 

25. Turning next to the specific definition of the second ground of the public function exemption as defined in clause 4 (4). Namely a function which is “by its nature, exercisable only with authority conferred . . . by or under an enactment”. The consultation document refers, as an example to the prison service (whether operated by a commercial or a non commercial organisation), because there is no right other than by statute to incarcerate people.

26. As drafted there are some difficulties as to the scope of the exemption, for example, the police service act by virtue of statute but many of their functions are not so limited “by their nature” and can be carried out outside those statutory limitations. For example while a private security company cannot exercise statutory powers of search and seize its employees can patrol, keep order and—like any citizen—arrest in appropriate circumstances. It would be helpful if the nature and scope of the activities intended to be excluded were clarified.

27. A further issue is this: the functions of a local authority (or at least many of them) are functions which are by their “nature, exercisable only with authority conferred . . . by or under an enactment”.

28. It cannot be the intention of the draftsman to exclude the activities of Local Authorities from the scope of the Bill. It is at least arguable that the exclusion as currently drafted is far wider in scope than the declared intention of the Government.

29. In the absence of such clarification in the Bill litigation to clarify this issue seems inevitable.

30. The final question I am asked is: Having regard to the Home Office’s justification for its position that the existing law of negligence does not usually give rise to a duty of care where competing public interest issues are involved in what circumstances (if any) does a duty of care arise from policy decisions?

31. The scope of the public policy issue is one without specific definition and is a matter for judicial interpretation. I can not at present think of an example where a duty of care arises from a policy issue properly so described. The question neatly reinforces my puzzlement as to why the Bill expressed the exemptions herein discussed at all—rather than relying on the way the matter is expressed in clause 4 (1) defining a relevant duty of care as “a duty owed under the law of negligence”.

32. I am most obliged for my instructions in respect of this interesting set of issues.

31 May 2005

Annex 3

NOTE ON DRAFT CORPORATE MANSlaughter BILL

1. Besides a number of points of detail, there are two structural problems with the bill: the discriminatory regime of protection it creates; and the use of problematic/subjective language in respect of key concepts.

2. Art 2 ECHR obliges the state to secure the protection of “everyone’s” right to life by means of the law. There are various elements to this: the creation of an effective legal system with appropriate penalties, adequate resources and the will to ensure that prosecutions leading to the imposition of those penalties take place when appropriate; and, where State action or failure may have led to a death, an adequate investigation is required. Art 14 prohibits discrimination between similarly placed classes of persons in respect of the way in which the State ensures the substantive rights (including Article 2) are protected.

3. Considered against this framework, the approach taken in the Bill to State liability is highly questionable. It appears that a number of statutory bodies that are neither corporations nor scheduled bodies will not fall entirely outside the scheme of the Bill. This approach contrasts starkly with that taken in sections 2 and 3 of the Health and Safety at Work etc Act 1974 which is deliberately inclusive, embracing

177 Paragraph 20.
almost all “undertakings” whether commercial in nature or otherwise. In effect, the Bill envisages those responsible for such undertakings as being potentially liable for lesser health and safety offences, but not for the most serious failings of all, which are those where logically Art 2 would be most expected to require effective legal protection.

4. This incongruity is reinforced through the explicit exemption of “exclusively public functions” from the Bill’s regime, these being functions exercisable only with statutory authority or in the exercise of the prerogative. This is a completely novel definition (as far as I know) and problematic for three reasons.

5. First, it is clearly based on a dividing line drawn between those bodies that can be sued in negligence in domestic law and those that are exempt on public policy grounds: see clause 4(1). That dividing line has little meaning, or justification, in domestic law terms in relation to a criminal penalty.

6. Second, from an Art 2 perspective, matters which fall directly within the responsibility of the State are considered to be those where Art 2 protection (in all its forms) needs to be at its highest, because typically these are areas of life where there is a very significant imbalance of power and because this may be exacerbated by the vulnerability of the individual. The Bill turns this principle on its head.

7. Third, even if it were right in principle to exclude certain public functions from the scope of the Bill, the mechanism used in clause 4(4) is wholly unsatisfactory. The scope of the prerogative is extremely unclear: broadly it is the residue of the power of the Crown which remains unregulated by statute. Some state actions (ie signing treaties) are clearly within the prerogative. Many others have an ambiguous status, involving a combination of private law powers, common law powers enjoyed exclusively by the State, statute and the prerogative. The House of Commons Public Administration Select Committee178 has argued that the case for bringing prerogative powers under proper parliamentary scrutiny is “unanswerable” not least because of the ambiguity about their scope. If certain functions are to be excluded, they should be identified in clear terms, not by reference to an amorphous legal concept.

8. Turning to language, there are clearly serious problems with the concepts of “gross breach”, “substantial part” and “significant role” in terms of legal certainty. Gross breach is further defined as “falling far below what can reasonably be expected”, a concept which has its roots in professional regulation. Dame Janet Smith’s Shipman Inquiry Fifth Report is extremely scathing about the problems language of this kind has caused in respect of protecting the public from the actions of ineffective or dangerous doctors: essentially the words encourage a subjective approach lacking in any consistency.

25 April 2005

70. Memorandum submitted by Dawn Oliver

COMMENT ON THE PROPOSALS IN CLAUSES 7,4(1)(2)(4) IN THE DRAFT CORPORATE MANSLAUGHTER BILL

The Bill proposes to remove crown immunity for the statutory offence of corporate manslaughter (cl7). However, it is currently proposed that the effect of this removal would then be significantly reduced as a result of two provisions:

— First, any body carrying out certain activities “in the exercise of an exclusively public function” would effectively be exempt from the offence (cl4(1)). The draft Bill attempts to define “exclusively public function” exhaustively as: “a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred by—(a) the exercise of that prerogative; or (b) by or under an enactment” (cl4(4)).

— Secondly, an exclusion for “public authorities” in s6 HRA terms (excluding courts), in respect of their decisions “as to matters of public policy” (cl4(2)&(4)).

This comment is concerned with the legal interpretation of phrases such as “the prerogative of the Crown”, “exclusively public function”, “public authorities” and “matters of public policy”.

The intention of the Government seems to be that Crown immunity for corporate manslaughter should only extend to cases where the Crown is exercising special powers of the kind that ordinary bodies do not enjoy, whether they derive from the prerogative or from statutory provisions. This assumes in turn that the prerogative only covers special powers and that all statutory powers granted to the Crown are also special. If the Crown is engaging in ordinary everyday activity of the kind that private bodies engage in, it will be liable for corporate manslaughter. The problem is that the above assumptions are not necessarily accurate.

The other intention is that “public authorities’ should be immune in respect of a decision as to matters of public policy. Public policy is not defined.

Prerogative

1. The meaning/s of the prerogatives of the Crown: there are different views in legal circles as to what functions fall within the prerogative/s of the Crown. Therefore there could well be uncertainties in litigation as to whether a particular function fell within the prerogative and therefore whether immunity applied.

2. The uncertainty is illustrated by the fact that the PASC was unable to extract a comprehensive list of prerogative powers from the government when it prepared its Fourth Report HC 422, 2003–04 Taming the Prerogative. In any event the government’s own list of prerogative powers or any list drawn up by parliamentary committees would not be binding on courts, which would have to review the case law and other material on the matter and decide for themselves whether a particular function fell within the prerogative in a case.

3. In sum, it is not entirely clear what the courts would take to fall within the prerogative of the Crown and so fall outside the scope of liability for corporate manslaughter.

4. To elaborate, on one, narrow, view, the prerogative only covers the “special pre-eminence” of the Crown over and above other persons, and so includes such obviously exclusively public functions as the making of treaties, disposition of the armed forces, mercy and pardon, dissolution of parliament, appointment of ministers and so on. Of these powers, those that could involve liability for corporate manslaughter if there were no immunity are very few—decisions as to the use of the armed forces are the obvious ones. However, they might also include decisions to arm the police eg with tear gas, baton rounds or other weapons, which has been held by the courts to be a prerogative power within the prerogative of the Crown to maintain the peace (R v Secretary of State for the Home Dept, ex parte Northumbria Police Authority [1989] QB 26, CA). If what the government has in mind is to continue immunity from corporate manslaughter in these areas, it might be simpler to spell it out rather than to adopt a rather opaque definition of the exemptions from liability for corporate manslaughter.

5. On another, broad, view however, the prerogative covers all the common law powers of the Crown. Sometimes these are referred to as “Ram doctrine” powers. These include matters which also fall within the powers and capacities of private individuals and bodies. For instance, contractual and property owning capacity and possibly the powers in relation to the making and changing of civil service terms of employment and the organisation of the civil service (eg the introduction of Next Step agencies in the early 1990s). If a court were to hold that the concept of prerogative includes these matters, then the Crown would enjoy continued immunity as to their exercise. For example, it would not be liable for corporate manslaughter attributable to culpable neglect in the running of the civil service.

6. In fact, if the courts were to hold that the prerogative covers all the common law powers of the Crown, the removal of Crown immunity would have virtually no effect since the exceptions for these common law powers would cover much of what the Crown does.

7. Activities of this “Ram doctrine” kind, being also performed by private bodies, are not “by their nature” exercisable only with the authority of the prerogative. So if they are not within the prerogative they would not be immune.

8. In sum, the bill should clarify what is included in the prerogative in some way to avoid unnecessary litigation and to avoid the removal of Crown immunity being narrowed to a greater extent than is intended.

9. The bill provides that “exclusively public function” alternatively (note the “or” in the clause) includes a function that is, by its nature, exercisable only with authority conferred by—(a) the exercise of that prerogative. It is not clear (to me at least) what would be covered by this and it ought to be clarified.

Function exercisable only with authority conferred by or under an enactment

10. Assuming that it is the intention of the government that there should be Crown liability for corporate manslaughter in the exercise of ordinary common law “Ram doctrine” powers of the kind exercised by private bodies as well as the Crown, the assumption behind the exclusion for functions performed under statutory authority assumes that statutory authority only covers extra-ordinary powers. I simply do not know if this is the case in relation to the Crown, but it needs checking. If in due course the civil service were put on a statutory footing care would have to be taken that the Crown did not thereby become immune under this bill/Act in relation to the management etc of the civil service.

11. As far as non-Crown public bodies such as local authorities are concerned, their powers all derive from statute and many of these are not of the “extra-ordinary” kind. It is presumably not intended that they should be immune in relation to all that they do.

“Public function” and “public authority”

12. The concept of “exclusively public function” under clause (4)(4) is exhaustively defined in clause 4(4). So the problems, noted below, associated with the differing meanings of “public function” under the Civil Procedure Rules and “function of a public nature” under the Human Rights Act 1998, section 6 do not arise in relation to the Crown. I could elaborate on this if required, but it does not seem to be relevant.
13. Problems could arise however in relation to non-Crown bodies such as local authorities. To explain: under clause 4(1) an “organisation” owes duties of care under the bill in certain activities of a broadly commercial kind (clause 4(1)(c)(i)and (ii) “otherwise than in the exercise of an exclusively public function.”. At first sight this makes sense: it would mean that local authorities etc were liable when doing ordinary things such as what private bodies do, but immune when exercising public functions as commonly understood.

14. However, “exclusively public function” covers everything that statutory bodies (and other bodies exercising powers under an “enactment” which might include an order in council or a statutory instrument) do. As indicated above local authorities owe all their powers to enactments and it would seem to follow that local authorities and other statutory bodies are immune under the bill as it places all activities exercised under statutory authority in the category of “exclusive public function.” I think this must be an error.

15. The concept of “public authority” is explicitly based on HRA section 6. There is some uncertainty in the case law on this section as to what bodies are standard public authorities, or where the line can be drawn between standard public authorities (who are immune under the bill when carrying out exclusively public functions as defined there) and private bodies “certain of whose functions are functions of a public nature” in the terms of the HRA section 6, who fall within the definition of “public authority” under the bill. (“Standard public authorities’ is the term used in the case law to refer to obviously public bodies such as the government, local authorities, the police, the armed forces, regulators etc etc.)

16. It will be for the courts to determine whether bodies are standard public authorities, since this is not defined in the bill or in the HRA. For instance, it is not clear whether the BBC or universities are standard public authorities. (They may well be exercising functions of a public nature from time to time but it does not follow that they are standard public authorities.)

17. So whether universities, for instance, are immune from or liable to corporate manslaughter law may depend on the view taken by the courts as to whether they are standard public authorities: if they are standard public authorities they are immune in relation to decisions as to matters of public policy (clause 4(2)) or if they are exercising “exclusively public functions” within the tight definition in the bill.

18. If they are private bodies they are prima facie liable unless exercising functions of a public nature within the HRA section 6, which is not well defined, or making decisions “as to matters of public policy” under clause 4(2).

19. First, the meaning of “function of a public nature” in this context, drawn from the HRA. There is considerable uncertainty about the meaning of this. For instance, a decision to close a care home may be considered to a “function of a public nature” under the Human Rights Act if taken by a housing association that is closely intertwined with a local authority (see Poplar Housing and Regeneration Community Association v. Donoghue [2002] QB 48). However, if such a decision is taken by a private charity it is not a “function of a public nature (R (on the application of Heather and others) v Leonard Cheshire Foundation and another [2002] 2 All ER 936, CA.) (See my article “Functions of a public nature under the Human Rights Act” [2004] Public Law 328.) Consideration should be given to clarifying this. For myself I see no reason why public or private bodies managing care homes should not be liable for corporate manslaughter.

20. Turning to “decision as to matters of public policy” in clause 4(2), this ground of immunity would apply both to standard public authorities and to private bodies exercising functions of a public nature (who in any event would enjoy immunity). I think the courts would be able to deal with issues as to the scope of this phrase given the examples in the sub clause.

September 2005

71. Memorandum submitted by the Communication Workers’ Union, Merseyside and South West Lancashire Branch

Generally the focus on senior managers could allow a firm to escape prosecution if they ignore poor working practices of lower level managers. The lack of accountability of company directors—this does not appear with director accountability as did the H & S (Directors Duties) Bill.

(30) Decision makers must take responsibility as well as the cash rewards.

(32) Why the need for “far below” reasonable? Reasonable by definition “reasonable” and therefore any lower is unreasonable and causing death is unreasonable and should be punished accordingly.

(52) Financial penalties are too restrictive—improvements in community issues, like restoring a local park, would highlight the company’s failings. However individuals take decisions and those individuals should be punished.

10 June 2005
72. Memorandum submitted by Eversheds

INTRODUCTION

This paper is the response of the Regulatory Group at Eversheds LLP to the Government’s draft Bill for Reform of the Law of Corporate Manslaughter (CM6497). The views expressed are those of the authors as practising lawyers in the field of health and safety and related work acting on behalf of many corporate clients. Eversheds has over the years advised many corporations and individuals in relation to health and safety liabilities and has handled (and continues to handle) many cases involving single or multiple fatalities every year. The comments made are not made on behalf of specific clients although we imagine that many clients and indeed non-clients would echo at least some of the views. We feel that, in common with other lawyers genuinely undertaking work in this area of the law, we are qualified to comment upon what is likely to happen in practice with the advent of any new law of corporate manslaughter.

IS THERE A NEED FOR A NEW OFFENCE OF CORPORATE MANSLAUGHTER?

There is of course an existing law of corporate manslaughter. It has been systematically criticised due to the difficulty in securing successful convictions in relation to large organisations. Whilst as a matter of principle, a lack of successful prosecutions does not warrant a new offence which is easier to prove, we recognise that politically a decision was made some time ago that the identification principle was not a satisfactory basis upon which to found corporate liability for at work fatalities.

As the sanction in respect of a corporation for any new offence will be that of an unlimited fine (as is the case with corporate killing under the law as it presently stands) and as is also the case in relation to other health and safety offences, any new law is plainly not to be introduced purely to provide an alternative sanction to those that currently exist. An organisation convicted in relation to offences surrounding a workplace fatality already faces an unlimited fine. That will still be the case after the new offence is created. The rationale behind the new offence, therefore, is presumably a combination of political, moral and social factors. We believe that introducing the new offence can therefore be understood and even justified, but only if it is reserved to the most serious and therefore appropriate cases.

THE MOST SERIOUS CASES

In the Introduction to the draft Bill, it appears to be made plain that the new offence will be “targeted at the worst cases of management failure causing death”. If a new law of corporate manslaughter is to be comparable to the extreme disapproval and even opprobrium attaching to individuals convicted of manslaughter, there does indeed need to be clarity that the new offence will be reserved for the most serious cases. We are concerned that, in the initial period after the introduction of the offence, any work-related fatality will prompt a greater prospect of a corporate manslaughter prosecution than should be the case, without some clear and published guidance to those making enforcement decisions in all likelihood the Crown Prosecution Service in liaison with the Health and Safety Executive and/or Local Authorities.

It is noted from the Introduction to the Bill that “the extra deterrent effect of a possible corporate manslaughter conviction for organisations which consistently fail to meet proper standards of health and safety will also provide a further driver for ensuring safer working practices.” It should follow, therefore, that any new offence is not aimed at those companies that consistently try to meet proper standards of health and safety.

This danger exists precisely because of the way in which fatalities are investigated under the existing Work-Related Deaths Protocol. As only the Crown Prosecution Service can presently decide to instigate proceedings for manslaughter, it will fall to the Police and the CPS to consider initially (as happens presently) whether manslaughter proceedings are appropriate. With the advent of the new offence, and a clear perception that the threshold is in some way lower than presently exists (whether by accident or design) the number of cases in which a decision may be made to prosecute the new offence and leave it to the Courts to decide where the line should be drawn, will in our view be potentially greater than is intended or right.

THE OFFENCE

We note that the new offence is not intended to apply in wider circumstances than the current offence of gross negligence manslaughter (as it might apply to an individual). In fact, unlike other health and safety legislation, it is proposed to define the new offence by reference to duty of care criteria applicable in the law of civil negligence as already transposed into the existing criminal offence of gross negligence manslaughter. That will provide a degree of consistency but whether it will be appreciated by those investigating fatalities that the new law will not in fact apply in wider circumstances we somehow doubt. Whilst in many cases the position may be relatively clear in relation to duty of care, a view is nevertheless going to be reached by those investigating not only as to the existence of a duty of care, but also whether there has been a breach, whether that breach is gross in nature and whether as a result there ought to be a prosecution for the new offence. The organisation concerned will be subject not only to the investigation process (which would have occurred in any event) but also potentially to a prosecution for the new offence and the determination of whether
there was a duty of care, whether it was breached and the scale of that breach, will come at the end of a process every bit as damaging to that organisation, and certainly as time consuming and expensive, as a prosecution leading to a conviction—at least that seems to us a potential situation. The investigations will be entirely proper and inevitable. The avoidance of unnecessary trials for corporate manslaughter under the new law, which would also have the effect of distracting attention from the Government’s declared wishes as to those cases to which the new law would most specifically apply, make the case in our view for very clear and published guidance to the Enforcing Authorities as to how appropriate cases for prosecution for the new offence should be selected.

We note the intention to make the new offence applicable to bodies other than private corporations as to which we have commented further below. We have some concern that the distinctions being made in relation to the scope of the offence as it applies to certain public bodies, however, do not necessarily have the stated effect of producing a “broad level playing field between public and private sectors”. Organisations in the private sector also make decisions dictated by financial, economic, social or political factors and they will (as they have always been) be judged on those decisions under the new law. Neither are we necessarily convinced that activities exempted from the proposals and described as “core public functions” should necessarily extend as presently intended. Why, for example, should a death in prison be investigated differently? The argument that Public Inquests before Juries provide “rigorous independent investigations” surely misunderstands the purpose of an Inquest? Any work-related fatality is the subject of an Inquest and the extent and limitations of the Coroner’s powers in conducting those Inquests are well-known. This is not a convincing rationale for including e.g. the custody of prisoners as an exempt activity for the purposes of the new law in our view.

**Management Failure by Senior Managers**

There seems to us a difficulty in drafting the provisions of the new offence in such a way that it will be clear to a particular organisation at what level the offence would bite if there were serious failings. It is said at paragraph 26 of the introduction that the test will focus on the way in which a particular activity was being managed or organised. The focus would be on the working practices of the organisation and not on any immediate operational negligence causing death or the unpredictable acts of employees. Is there not a risk that in the event, for example, of immediate operational negligence leading to death, it would be suggested that, in fact, there was a management failure at a senior level precisely because circumstances were allowed to exist in which such operational negligence could take place leading to such severe consequences? Suppose two employees are working to service a piece of machinery such as a power press and depart from their training in relation to carrying out the task whilst the machine is fully switched off, in one sense that could plainly be regarded as unpredictable behaviour.

We have been involved with many cases, happily not all fatal, where properly trained employees have inexplicably departed from their training and undertaken a task in an inappropriate and highly dangerous way. It is our experience that the employer is tackled quite directly about how such circumstances could arise and whether in fact it was implicit that the particular activity (in this example maintenance) was not managed or organised properly, because there was no sufficient preventative system to protect the employees from themselves. How in such examples will the new offence be investigated differently? Will those investigating really analyse in anything other than a precautionary manner, whether the outcome is the result of the organisational management of a particular activity or disregard the potential for prosecuting the new offence in favour of, perhaps, traditional health and safety offences? Plainly, it is right to fix an organisation with a corporate liability in circumstances where those responsible for, and capable of directing, the strategy and “behaviour” of the corporation meet the relevant test for culpability (“gross breach” discussed further below).

Another area where there may be some difficulty in enabling an organisation to understand what will and what will not be covered is the application of the test to a “substantial” part of an organisation’s activities. According to the introduction (paragraph 30) this will depend upon the scale of the organisation’s activities overall. As the commentary says: “the definition will apply with different effect within different organisations”. Will the “substantial” test be applied by reference to the number of employees employed in relation to a particular activity, the turnover or profit generated by it, the space occupied by it or—if every organisation is going to be different—what better guidance could be considered (albeit not as part of the Act itself) which would provide greater certainty to organisations in understanding where responsibility will lie?

**Gross Breach and Statutory Criteria**

We are pleased to note the emphasis that is placed upon the high threshold that will apply to the new offence. In our view it will be necessary for some further emphasis to be placed on this when the Bill eventually becomes law, assuming that the central tests remains as proposed. The draft Bill provides a range of statutory criteria to assess the degree of culpability. We have looked at these criteria and note that the jury will have some difficult issues to assess, such as the extent to which the organisation fail to comply with any relevant health and safety legislation or guidance. Whilst this is partially measurable, we know from our experience that health and safety inspectors frequently provide written guidance in the form of advisory letters to organisations. We have known of prosecutions (for ordinary health and safety breaches) where
letters written 18 years earlier have been produced as “evidence” that an organisation had been warned about an issue previously. Whilst this may be an extreme example, without more clarity it is not clear whether this reference is intended to include purely guidance in the form of Approved Code of Practice or HSG as opposed, for example, to specific letters. Plainly if there is an ACOP an organisation has little excuse for not acting in accordance with it. Where the guidance is of a different kind it may be more difficult to be quite so dogmatic. We question whether Crown Court Judges will or should be encouraged to give juries as much specific guidance as possible on how to apply the statutory tests that are proposed.

**APPLICATION**

We note that the new offence will apply to corporations, and that will include statutory corporations such as Local Authorities as well as others. It is not however intended that it will apply to unincorporated associations thus professional partnerships, for example, will not be subject to the new offence and in the event of a fatality the law would address that scenario only by a gross negligence manslaughter charge against an individual or individuals absent the availability of the new offence. The likely hesitation before charging an individual partner or partners with gross negligence manslaughter seems to us to make the point quite powerfully that there is a need to emphasize the high threshold before the new offence bites because we think that there is a real likelihood that the threshold will not be operated in terms of the decision to prosecute (and even perhaps conviction by juries) at the high level anticipated in the consultation.

We do not agree with the proposition that parent or other group companies should be liable to the new offence in addition to the operating or trading subsidiary. If the parent or group company is the place where the gross breach resides, then it should be subject to the offence. It should not be possible for two companies within the same group, or a parent and subsidiary, each to be prosecuted in relation to the same facts.

In relation to the Crown, we think that there is some potential for confusion by incorporating a schedule within the draft Bill listing a number of Crown bodies which are subject to the new offence but omitting those Crown bodies which are already incorporated and thus covered by the offence without being expressly mentioned. We believe that the position of the Crown and Crown bodies ought to be set out in a definitive schedule or annex for the avoidance of any doubt.

In relation to disqualification of directors, or the potential for directors to be disqualified as a result of a relevant conviction, we urge caution and clarity. An individual personally convicted of gross negligence manslaughter is likely in our view to be perceived as quite properly the subject of potential disqualification proceedings. We do not think the same position should automatically be assumed in relation to a director who is not personally prosecuted but whose conduct, whether by act or omission, is found to have contributed to a gross failing by the organisation. It is important that each case is determined on its own merits and we believe that there will be significant pressure from respondents to find ways of effectively attributing personal liability or highlighting the conduct of an individual in a culpable sense. As we do not inhabit an era of total media responsibility and objectivity when it comes to reporting proceedings we think that in many ways there cannot be too much emphasis on the fact that the proposed offence will not apply to individuals and nor should there be readily available means to subvert Parliament’s intention.

**Remedial Orders**

We are concerned about the suggested power for remedial orders and in fact have concluded that it is a key area for concern. There is already a well developed enforcement mechanism under health and safety legislation which enables the service of improvement notices and prohibition notices requiring organisations to change or halt the way in which they behave. There is a prospect that a Crown Court Judge might make a remedial order which could have a huge (and unintended) consequence upon the operation of an organisation or indeed industry. An example might be to suggest that an organisation ought to carry out more manual checks of a particular process, which was largely automated or controlled by computer, leading to resource implications for that organisation in terms of a need to employ more people, operational implications in terms of an inability to carry out a process competitively with the level of scientific and technological knowledge available etc In our view a better approach would be to recognise that a Crown Court Judge might express views or make recommendations to be considered by the appropriate Enforcement Authority (usually the Health and Safety Executive), a process which would also be commensurate with observations made by Coroners at Inquests. If there were desirable changes or improvements to be made, those could then be managed and policed through the existing Notice mechanism which would have the appropriate checks and balances automatically in place.

**Prosecution**

We are not presently persuaded that power to prosecute for the new offence should be extended or allocated to the Health and Safety Executive. We believe that the necessary involvement of the Police and the Crown Prosecution Service makes it plain where the new offence is intended to lie in terms of seriousness.
We do feel that the Police might benefit from appropriate investment and training in relation to the proper investigation of at work fatalities which in our experience is very different from other serious crime. The work-related deaths protocol assumes that the partnership approach with the HSE or other Enforcement Authorities should largely achieve the right balance but, again in our experience, there are still Police Forces whose experience of such investigations is extremely limited and whose approach to investigations is not consistent. That seems to us to make the point that the protocol is not working to its full potential at the present time. The decision to prosecute the new offence should properly be that of the Crown Prosecution Service, applying the usual criteria in the Code for Crown Prosecutors as well as the statutory criteria suggested for the new offence. We also note the proposal that the consent of the Director of Public Prosecutions will be required for every prosecution of the new offence and we agree with that suggestion.

JURISDICTION

Concern has been expressed by some commentators that the position regarding jurisdiction is not entirely clear or satisfactory and that there will be situations involving non-domiciled organisations involved in workplace fatalities, or organisations with non-domiciled senior managers responsible for taking decisions relied upon as indicative of gross failings. Clearly the English Courts have jurisdiction only in relation to matters arising (broadly speaking) in England and Wales. It seems inconceivable that there should not be similar legislation applicable to Northern Ireland and Scotland. Clearly if an organisation has a domicile in England and Wales, then presumably even if some or all of the senior managers are outside the jurisdiction it would not preclude the successful prosecution of the organisation under the new law? Equally, there would be no question of the personal liability of those senior managers unless there was evidence sufficient to satisfy the usual gross negligence test. As that is not the subject of the proposed offence, no further consideration or comment is needed in relation to whether such individuals might be subject to extradition proceedings in appropriate cases. However, it would not surprise us if a number of respondents do raise precisely that point.

We trust that our observations are felt to be constructive and helpful. We have spent some considerable time looking at the draft legislation and listening to the views of our lawyers as well as our clients.

73. Memorandum submitted by South Tyneside NHS Foundation Trust

I am writing on behalf of the South Tyneside NHS Foundation Trust which considered the draft bill on Corporate Manslaughter at its board meeting on 25 April 2005. The Trust has no specific comments to make on the detail within the proposals but is extremely supportive of the overall approach and believes the public will be reassured that organisations will be properly held to account for their actions.

We are grateful for being afforded the opportunity to comment.

26 May 2005

74. Memorandum submitted by the UK Major Ports Group

I am the Director of the United Kingdom Major Ports Group, the trade association which represents most of the major commercial seaports in the UK. I have been studying your recently published consultative document and draft Bill on corporate manslaughter.

I should be grateful if you could clarify one aspect of the proposals. The paper says that there will be no general Crown immunity from prosecution under the new proposals, but paragraph 28 says that the draft Bill specifically exempts certain functions “that might be regarded as core public functions”, and an example given is the provision of services in a civil emergency. Does this mean that services such as the fire service and the Coastguard will be regarded as “core public functions” and hence exempt? My reason for raising this is that many ports, which are private sector bodies, provide police, fire, search & rescue and other similar emergency services, and we would wish to argue that they should be put on the same footing, for the purposes of the Bill, as their counterparts in the public sector.

5 May 2005
75. Memorandum submitted by Kevin McCloskey

I am concerned about Section 3 (2) (b) of the Bill, in particular part (iii):

- Parts (i), (ii) and (iii) appear to all need satisfying in order to meet the criteria.
- However, part (iii) is an active clause ie the organisation positively sought to cause themselves to profit from that failure.
- If an organisation is “ignorant” and under parts (i) and (ii) are in the “ought to have known” category, then part (iii) is likely to fail, as if you are ignorant of a duty then you can’t actively seek to profit from non-compliance with that duty.

I would therefore delete (iii) altogether because of the difficulties raised in the points above and after all the general assumption is that “ignorance is no defence” rather than some connection to profits which may be impossible to prove.

23 May 2005

76. Memorandum submitted by the Health and Safety Commission

The Commission would like to express its strong support for the proposal for a new offence of corporate manslaughter. We share Government concern about the unsatisfactory common law position, this makes it very difficult for a prosecution to succeed because of the need to identify a single “guiding mind” as culpable. Whilst prosecutions are likely to be infrequent, the proposed new offence will be an important addition to the range of enforcement options that are available when a fatality results from particularly serious management failures, and will add to their overall deterrent effect.

As you know, HSE officials have worked with the Bill Team over a considerable period in support of this reform, and we are pleased to see that the proposals reflect our thinking. We are especially pleased to see that it would, in general, apply to the Crown. However there are certain exceptions, where Crown immunity is preserved. The Commission view is that any such exceptions should be as limited as possible, and we would like HSE officials to discuss with your team the implication of and reasoning behind the exceptions in the current draft Bill.

As you know, the Commission wishes to pursue a number of policy changes in relation to health and safety offences, specifically the removal of Crown immunity and increases in maximum penalties. HSE officials will continue to discuss with the Home Office ways of securing these objectives, and the possibility of using this Bill as a vehicle. The desirability of consistency in how the law applies to the Crown should be part of these discussions. The Commission also believes it important to consider whether any of the Bill’s provisions require re-examination to provide greater clarity and certainty. Lastly we should try to ensure that Scottish law in this area moves forward in a similar timetable to that in England and Wales.

The Commission looks forward to seeing effective new legislation in place which raises the profile of health and safety and has a real deterrent effect. HSE officials will continue to support the Bill Team in its efforts in whichever ways it can, and we look forward to seeing the Bill being introduced into Parliament as soon as possible.

26 May 2005

77. Memorandum submitted by the Commercial Workers Union

INTRODUCTION

The Communication Workers Union is one of the UK’s largest Trade Unions with 250,000 members. Along with the TUC and other Trade Unions the CWU has been campaigning for new laws on corporate manslaughter and directors health and safety responsibilities since 1997 when the present Government first came to Office. Last year 235 workers were killed at work in this country, including CWU members and workplace deaths actually rose by 4%. Reform of the law is therefore long overdue. The proposals are a step in the right direction but at best, we can only give a “cautious” welcome to the publication of the long-awaited draft corporate manslaughter bill as the CWU has serious concerns over just how effective it will be. Many feel that the lack of progress over the last eight years on introducing a new corporate manslaughter Law highlights the Government’s contempt for workers and for the victims of workplace injuries and deaths. During that time around 2000 people have been killed at work many of them due to serious management failures with those responsible evading justice and the families of those who died denied justice.
BACKGROUND

The draft Corporate Manslaughter bill is a “watered-down” version of the original 1996 proposals which in our view will not bring about any significant change unless it is amended to deal with the lack of accountability for company directors and senior managers which the Government itself admitted was a major concern back in 2000. Death at work caused by carelessness and negligence will remain a mundane part of industrial life until those exercising ultimate boardroom power know that they could be held accountable for the maladministration of safety in their company. When all those who are responsible for workers health and safety are truly held to account, there will be a significant improvement in the safety and occupational health of workers. The Longer Government backs away from those changes the longer we will return to events each year like Workers Memorial Day, commemorating unacceptable numbers of deaths and injuries at work including Postal and Telecommunication workers. We wish to stress our determination to see new effective laws on “Corporate Manslaughter” and “Directors Duties” brought early by a third term Labour government. The CWU calls upon the Prime Minister and Government to “Start Listening” and be “Tough on Crime—Tough on the Causes of Crime”

HISTORY

In 1996, after the courts had failed to deal with the collective management failures responsible for such high-profile disasters as the sinking of the Herald of Free Enterprise and the Marchioness, the Piper Alpha fire (on which two CWU members were killed) and King’s Cross fire and the Clapham and Purley train crashes, the Law Commission proposed a new law of “corporate killing”. While in opposition and then immediately on its return to government in 1997, Labour backed this proposal with loud and vigorous rhetoric. Proposed legislation was the subject of a 2000 consultation document, a 2001 manifesto commitment, and further consultation in 2002. In May 2003, then Home Secretary David Blunkett announced that “a timetable for legislation with further details to be announced shortly thereafter. No timetable followed and Home Office promises of a draft bill were made and promptly broken with monotonous regularity for a further two years, leading up to the publication of the Government’s draft bill in March 2005 with a consultation period ending in June 2005.

In early 1997, prior to the Labour Election victory a CWU delegation met the then shadow Health and Safety Minister at Westminster to discuss CWU policies and the Health and Safety intentions of a new Labour Government. We received a number of assurances that a new Labour Government would introduce a range of new Health and Safety Laws and Regulations including a new Corporate Manslaughter Law, harsher penalties for Health and Safety Offences including imprisonment, greater powers and protection for Safety Representatives, the proper implementation of EU Health and Safety Directives not carried out by the Conservative Government and increased funding for the Health and Safety Commission and Executive. Following their election in 1997 the Labour government pledged to improve safety by ensuring that companies and directors would be held to account more easily for negligent or reckless conduct. To date none of those promises and commitments have been carried out and in fact Treasury spending reviews have led to reductions in HSE Inspectors and more recently the HSE considering proposals to reduce its vital inspection and regulation activities as a result of the “Hampton Review”.

OVERVIEW OF THE “DRAFT BILL”

Positive Points:
— The government has at last honoured its commitment to bring forward a corporate manslaughter bill after eight years of prevarication over corporate killing legislation.
— The bill introduces a charge of corporate manslaughter for the first time, which can be brought against companies and organisations for cases of management failure causing death.
— The court will be given powers to order convicted organisations to take remedial steps.
— Crown immunity is abolished for many government bodies and agencies.

Negative Points
— The Bill doesn’t introduce any greater penalties than can already be imposed under existing legislation for lesser offences.
— It doesn’t impose any specific health and safety obligations or duties on company directors.
— The definition of senior managers is confusing and restrictive.
— The focus on senior managers is too narrow.
— The criteria from determining a gross breach is confusing and restrictive.
— The Bill fails to consider other more imaginative forms of penalty which could be imposed.
STATISTICS

In the past five years to 2003–04 there has been 2,157 death at work. On average there are approximately 240 workplace deaths each year. Despite these figures only 11 Directors have ever been convicted of manslaughter. Five of the directors were sentenced to imprisonment and another five had suspended sentences. One was given a community service order.

During the period 2003–04 there were 159,809 accidents which did not result in a death but which resulted in injury.

Each year around 11,000 enforcement notices (Improvement Notice/Prohibition Notice) are issued by HSE Inspectors and Local Authority (EHO) Inspectors.

The number of prosecutions is around 1,000 a year.

Considering that prosecution is a last resort, the fines resulting from prosecution are generally low. The average fine for a breach of health and safety law was £4,036 in 2003–04.

Each year there are many hundreds of accidents which narrowly avoid death but which often result in severe disabling injury.

The HSE reported a 4% increase in deaths at work during 2003–04, and that the rate of fatal injury to workers increased from 0.79 deaths per hundred thousand workers to 0.81, an increase of 3%.

CROWN IMMUNITY

We welcome the removal of Crown Immunity and that the new offence will apply to the Government’s own departments who will be prosecuted where they are responsible for a death at work. As the largest employer in the land, it is vital that the Government sets the lead on workplace health and safety. There is no logical, legal or moral case for leaving Crown bodies exempt from prosecution where they have caused a workplace death and the CWU would like to see the draft bill used as a vehicle to remove Crown immunity from all Health and Safety Offences. We note there are a number of exemptions listed in the draft bill in areas such as for the security and intelligence services and for the Army in combat and combat preparations. Beyond a limited number of such areas however the Government must ensure that any exemptions for the Crown do not mean that the existing immunity is removed only to be replaced by others.

JURISDICTION

The “draft bill” rules out any jurisdiction over the operations of UK companies if a fatality occurs abroad.

The CWU believes that where a worker is killed outside the UK because of the failure of a UK based company to undertake suitable and sufficient risk assessments the company should be able to be prosecuted in the UK for the new corporate manslaughter offence.

SENTENCING & PENALTIES

The Government has failed to give any proper consideration to how to sentence companies and other organisations convicted of the new Corporate Manslaughter offence. The new Corporate Manslaughter Law will only allow the courts to impose fines on companies and organisations plus remedial orders and not Jail sentences like other killing offences. This is because a company or public body can not be sent to prison and the Government apparently see no alternative to this. However, even huge fines on Companies have a limited effect. Unless the Government establish a tough sentencing regime for companies, the new Corporate Manslaughter offence will have little impact.

For example the £1.5 million fine imposed on Great Western Trains following the Southall Train Crash was only 5.6% of Annual Profit and this compares poorly against Competition Law Offence Fines eg Sotheby’s £12.9 million and Genzyme Ltd £36.8 million.

When Royal Mail was convicted in 2003 for three Health and Safety offences following the death of a member of the public in a horrific accident at the Bridgend Delivery Office the Court imposed fines of £200,000 and this compares poorly with the power of the Postal Regular who may impose massive fines. After missing its 2004 targets, Royal Mail paid out £50 million in compensation fines for failing to meet quality of service delivery targets which never hurt anyone. When the Royal Mail Board sits down to decide their priorities, taking these comparisons into account, how on earth will an organisation like Royal Mail and its Directors and Senior Managers ever take their safety responsibilities seriously enough, bearing in mind their key role is to maximise Royal Mail’s profits and minimise losses. The new draft Corporate Manslaughter Bill may have little effect on their decision making if the “unlimited fines” proposed in the draft bill reflect those being imposed by the courts currently for health and safety offences connected with convictions associated with fatal accidents like at Bridgend.
The CWU strongly supports the view that penalties for health and safety offences should be much harsher. Fines should be significantly increased for Corporate Manslaughter and the “draft bill” should be amended to specifically require this. Consideration should also be given to fines pegged to the profits or turnover of a company or organisation. For example a company could be ordered to pay 10% of its profits for a three year period.

Directors of convicted companies should suffer automatic disqualification from being a director as a secondary penalty additional to any Fines on the company.

Probation Orders against organisations should be included within a range of penalties available to the courts. The probation order would contain an onerous requirement to ensure the companies compliance with its safety obligations. The HSE would play the role of Probation Officer, reporting back to the court periodically with any breach of the order subject to heavy fines and extension of the probation order.

The Courts should be allowed to award punitive damages to the victim’s family which would be in addition to any Damages awarded to the family via Civil Litigation. All too often the victims are the surviving family who are all too often forgotten and this would provide some direct justice to them.

DIRECTORS & SENIOR MANAGERS—INDIVIDUAL LIABILITY

The Government’s “draft bill” consultation document has concentrated on making it easier to prosecute companies. Although we support the change proposed in relation to the accountability of “companies”, the Government has failed to give sufficient thought and attention to the accountability of company directors. Government therefore does not propose to invoke individual liability against Directors and senior managers. Under the “draft bill” therefore there will be no means of holding company directors and managers accountable for contributing to corporate killing. In Government’s initial consultative document on reform of the manslaughter law it was envisaged that individual directors who had contributed to safety management failure by their connivance, consent or neglect could also be targeted for prosecution but the Government’s “draft bill” now excludes this possibility and this is a retrograde step in our view as it shields the decision makers, who have the power to make the necessary changes to secure a safe working environment.

In our view, it is crucial that the Government give serious consideration to the area of influencing and motivating the conduct of directors. It is often forgotten in discussions about safety and “corporate accountability” that company directors control companies, they decide what companies can and cannot do, and it is their conduct and decision making that ultimately determines whether or not a company operates safely. In our view, although the accountability of “companies” is important, criminal sanctions should be directed at the criminal conduct of company directors because a fundamental public concern about the current law is that it allows culpable company directors to escape prosecution for manslaughter. The CWU strongly supports the view therefore that making corporate leadership personally responsible for serious breaches of health and safety law within their organisations is the key to motivating directors and senior managers in a company, making real the threat of personal liability upon directors and senior managers.

The Government and Health and Safety Commission (HSC) gave a commitment in the “Revitalising Health & Safety” Strategy published in 2000 to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers which currently doesn’t exist. The Revitalising Health & Safety Strategy Statement confirmed the intention of Ministers, to introduce legislation on these responsibilities and that the HSC would develop a code of practice on Directors’ responsibilities for health and safety and would advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. This has never been implemented.

Voluntary codes and guidance just do not work! The HSC/E have produced some excellent guidance, leaflets and research about the savings to industry of good health and safety. However it is apparent that industry does not take notice of this advice, information and guidance. It is therefore clear to our Union that the statutory health and safety responsibilities for Directors and Senior Managers are vital in order to stop the present situation where they can legally insulate themselves from what is going on in the company despite those individuals being the people with the most power. This is bad for Safety and bad for accountability.

The Health and Safety Executive (HSE) estimates that up to 70% of workplace deaths are the result of serious management failures. It is not companies that are responsible for killing workers, it is people. Workplace fatalities are avoidable and are usually caused by fundamental safety shortcomings throughout the organisation which can properly be laid at the door of the Chairman, Chief Executive, and Board of Directors etc as appropriate.

In Royal Mail the CWU has seen a number of recent examples where the Chairman, Chief Executive and Director Operations have not acted responsibly and have made various fundamental decisions by “dictate”, without consulting the Trade Union and which indirectly affect the health and safety of the workforce,
exposing workers to a higher risk of injury. The effects of their decisions were subsequently linked to enforcement action by the Health and Safety Executive (HSE). Under the Government’s “draft bill” Directors will effectively be allowed “off the hook” once again and will not be made to act responsibly.

Ironically, Directors and Managers can be imprisoned for Companies Act or Taxation Offences eg “Cooking The Books” but not for killing workers and members of the public. Additionally, around 60 people were imprisoned for Animal cruelty offences last year but under the new “draft” Corporate Manslaughter bill, for committing the gravest health and safety offence of all, killing a person, the Government propose to continue to exclude from liability Directors and Senior Managers whose actions and decisions may have been in serious breach of health and safety law and which ultimately leads to a fatality.

In view of the fact that the proposed new Corporate Manslaughter Bill will exclude individual liability, it is vitally important, that government acts to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers as part of or alongside this legislation. Workers and the public do expect the law to be effective in holding those individuals responsible to account and sentencing must be appropriate and effective and in this respect the case for reform is overwhelming.

It is our view that the “draft bill” as it stands will not in itself achieve effective accountability and improved standards of work related health and safety via the introduction of such legislation. Most recently, the CWU backed Stephen Hepburn MP’s “Health and Safety at Work (Directors’ Duties)” private member’s bill which in spite of receiving unanimous support in the Commons at its second reading stage fell due to the House not being quorate. The Government should therefore consider supporting a similarly worded amendment to this “draft bill” in our view.

**Victims**

The key aim of the Health and Safety at Work Act 1974 which amongst other things established the Health & Safety Commission and Executive (HSC/E), is to prevent deaths and injuries, at work and so reduce victims. The view of the CWU is that the balance of power and influence needs to be redressed in favour of victims as our Union’s view is that currently, industry has far too much influence on the government and the HSC. Baroness Scotland Minister responsible for criminal law reform said on 29 April 2004 “the Government is engaged in an ambitious and extensive modernisation of the criminal justice system, to rebalance it in favour of the victim and the community”. The Government’s proposed draft Corporate Manslaughter Bill as proposed however will fall well short of redressing the balance of power unless alongside the new Corporate Manslaughter Law, the Government impose statutory safety duties upon directors, as promised by the Deputy Prime Minister in 2000 in the “Revitalising Health and Safety” Strategy document.

**Pre-Legislative Scrutiny**

After eight years of delays and around 2,000 deaths at work in the mean time the Government should announce the timetable and set up the Parliamentary Scrutiny Committee to consider the “draft bill” and submissions without further delay. Further delays will see further deaths and further cases of culpable companies and their managements escape justice. Over the last year our own Union has sadly witness several members killed at work and the employers evade real justice.

**Conclusions**

The legislation as proposed in the “draft bill” falls well short of our Union’s expectations, leaving the UK with inferior legislation to that in countries like Australia, Canada and Ireland.

From our point of view the purpose of the new Corporate Manslaughter law should be:

— To motivate Directors and Senior Managers and so deter organisations from exposing people to unnecessary dangers,

— To ensure that individual Directors and Senior Managers understand that they can expect to be held to account for their conduct, where their actions or omissions result in death of a worker or member of the public,

— To provide a practicable and just framework where the criminal law can be applied to serious misconduct which causes death with penalties that fit the crime, and

— To regain and maintain public confidence in the law and in the accountability of corporations, companies and other organisations as well as the people to run them and make the crucial decisions.
RECOMMENDATIONS SUMMARY

— The Government has got to “start listening” and be “tough on crime—tough on the causes of crime”.
— Ensure the Treasury provides sufficient resources to employ additional Inspectors enabling HSE to provide the crucial support and expert assistance to the Police in Corporate Manslaughter investigations.
— The Government must redress the balance of power in favour of victims as currently Industry and the CBI has far too much influence on the government and the HSC.
— Government must ensure that any exemptions for the Crown do not mean that the existing immunity is removed only to be replaced by others.
— Where a worker is killed outside the UK because of the failure of a UK based company to undertake suitable and sufficient risk assessments the company should be able to be prosecuted in the UK for the new corporate manslaughter offence.
— Fines should be significantly increased for Corporate Manslaughter convictions and the “draft bill” should be amended to specifically require this. Consideration should also be given to fines pegged to the profits or turnover of a company or organisation eg 10% of company profits for a three year period. Directors of convicted companies should suffer automatic disqualification. Probation Orders against organisations should be included within a range of penalties. The Courts should award punitive damages to victims families.
— It is vitally important that the government acts to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers as part of or alongside this legislation.
— Government should announce the timetable and set up the Parliamentary Scrutiny Committee to consider the “draft bill” and submissions without further delay.

78. Memorandum submitted by Southlands Nursing Home

I understand that the bill covers a (i) Gross failure of working practices, set by (ii) Senior Management, to cover (iii) a duty of Care.

Turns on definition of a Gross Breach—“conduct falling far below what can be reasonably expected of the organisation in the circumstances”. We should not allow “far below” to be removed or diminished in the wording of the bill, or owner-operated homes will face disproportionate levels of admin to ensure compliance.

We should resist any attempt to expand this from Ltd Co’s to include individuals or partnerships. For the same reason.

The irony is that by aiming at senior management to catch larger organisations, it actually focuses on smaller firms where the actions of managers are more closely linked to the outcome for those covered by the duty of care. We should seek clause to enforce the “guidance” being issued by the HSE. (HSE says: Should be applied in extreme cases only. Companies need to manage risk, not eliminate it).

Again, because the penalty is a fine, it will cause greater damage to smaller co’s than big corporations, if there are fixed penalties or “tariffs” for a death. We should seek inclusion of guidance on the damage the penalty does to the company, and seek sliding scales proportionate to the company size.

TUC is pressing to include individual directors, which should not be covered in this legislation.

Malicious Referrals

Care Homes, residential and Nursing, expect deaths each year. A 30 bedded nursing home may have 30 deaths a year. The relatives always experience a range of emotions, as well as the expected grief. Anger at not being able to help. A desire to understand the circumstances. Disbelief. A percentage will be looking for someone to blame, other than natural causes, and do already instigate investigations.

If the government wants a to maintain a private element supplying (400,000 ?) beds in this sector, the proposed Corporate Manslaughter Bill must only be applied after all of the current investigative routes have been proven adversely.
79. Memorandum submitted by Beachcroft Wansbroughs

Beachcroft Wansbroughs is a full service UK commercial law firm employing more than 1,200 people with a turnover of 87 million, approximately half of which is generated from litigation services, principally for insurance and health sector clients. Operating from offices across the UK in London, Leeds, Birmingham, Bristol, Manchester and Winchester as well as Brussels, our clients include business sectors as diverse as financial services, retail, construction, telecommunications, education, health and local government.

In putting together this response, we have canvassed the views of clients, and have the following specific comments:

1. Definition of Senior Manager

The proposed definition is vague, and can mean substantially different things in different organisations. Arguably, it will still be much easier to identify a senior manager (and one who manages a substantial part of activities) in a smaller organisation than a larger organisation, and therefore the current definition presents the same problems encountered with the common law offence of gross negligence manslaughter, where smaller organisations are likely to be more exposed to prosecution than larger ones.

There is a risk the present definition could have a negative impact by encouraging delegation of responsibilities to more junior managers to avoid responsibility under the proposed offence, so driving responsibility for risk management down, rather than up the management chain.

The broad consensus view amongst our Clients was that the definition should be more activity based.

2. Definition of Gross Breach

(i) The concept of “falling far below what can reasonably be expected of the organisation in the circumstances” is too imprecise and open to a wide range of interpretation. For example, our experience is that the HSE when prosecuting health and safety offences all too commonly seek to argue offences have been aggravated by organisations falling far below the standards even in “run of the mill” cases. Whilst a fatality is not necessarily evidence of the seriousness of the breach, any breach that does lead to a fatality will naturally be regarded as serious. Given that the grossness of the breach is to be a jury question, we consider that further clarification is required regarding standards to be applied, so that the threshold for the proposed offence is clearly set at a high level to limit use of the offence to only the most serious cases, as is intended.

(ii) The reference in Section 3 (2) and (3) to “guidance” should be removed, or at the very least limited to an Approved Code of Practice. As it is presently drafted, guidance could mean any document or advice issued by either the Health & Safety Executive or Environmental Health Office or other Authority responsible for the enforcement, and this could lead to unnecessary disputes as to whether the guidance was accurate, appropriate or necessary in the circumstances. If it is intended that a gross breach should have a high threshold before it is established, the inclusion of the work guidance lowers that threshold.

3. The Application to Public Authorities and Crown Bodies

One of the stated aims of the proposed Bill is to introduce a level playing field between the public and private sectors. Whilst it is to be welcomed that Crown immunity has been removed, if there is an intention that there should be limitations on any financial penalty that could be imposed on the Crown, then we cannot see how that broad level playing field can be achieved unless an appropriate sanction is to be applied to the Crown either by way of financial penalty or some other method, to include the removal of office holders from their position, akin to the powers against company directors under the Company Directors Disqualification Act 1986.

4. Liability of Parent Companies

We anticipate that the intention to make a parent company or other group companies liable is likely to be plagued with difficulty when seeking to identify who is the senior manager for the purposes of the Act. We anticipate particular problems in respect of parent companies which are based abroad, where for instance UK based operations may be managed at a junior level.

5. Definition of the Offence

The offence refers to senior managers. We presume therefore that it is not sufficient for one senior manager to be shown to have failed to manage or organise the activities to such an extent that it amounts to a gross breach of the relevant duty. This perhaps should be spelt out clearly in the Bill. At present, whilst it is made clear that an individual cannot be guilty of aiding and abetting, counselling or procuring an offence of corporate manslaughter, there will be a real fear among those regarded as senior managers that if
individually they are responsible, then they may also face a personal prosecution, and this could lead to real conflict between the senior managers and the organisation when it comes to any plea which may have to be entered.

6. Regulatory Impact Assessment

Whilst the regulatory impact assessment anticipates that there would be a modest increase in cost of the new offence, our experience has shown that this is always notoriously difficult to estimate accurately, and often the costs of compliance with any new regulatory regime, particularly relating to health and safety, is part of a “hidden cost”. Whilst we do not have any direct evidence that the cost would be substantial, we would urge careful consideration of assessment impact, which would have a knock on effect in relation to the ability of business to continue to compete in a competitive environment on a broad level playing field.

80. Memorandum submitted by Zurich Financial Services

Zurich Financial Services is an insurance based financial services provider with a global network that focuses its activities on its key markets in North America and Europe. We also have extensive operations in Latin America and Asia/Pacific. Founded in 1872, Zurich is headquartered in Zurich, Switzerland. Zurich has offices in more than 50 countries and employs about 57,000 people.

The core of our business is General and Life Insurance. We provide insurance and risk management solutions and services for individuals, small and mid sized businesses, large corporations and major multinational companies. We distribute third-party financial services products.

General Comments

We support the Government’s commitment to protecting people in the workplace and the public. As both a large employer and also the provider of insurance and risk management services, we welcome the opportunity to review the proposals aimed at increasing safe working practices, modernising the law to reflect modern corporate life and making the existing legislation more relevant. We therefore appreciate the chance to review and to provide feedback to the Corporate Manslaughter draft Bill.

We agree that the proposed new offence should be for the most serious cases of management failure causing death and warranting a serious criminal offence. We are pleased that the new offence will continue to complement existing legislation and accountability, such as specific health and safety offences, rather than replacing them and will take into consideration the rules of causation that management failure must have had more than a minimal contribution to the death. We also agree with the evidence-based approach, taking into consideration evidence of true corporate risk management failings to reflect serious situations with the wider focus on working practices or systems and not “one-off” failures of an embedded HSE policy.

We approve the proposal to remove the requirement of the “identification” principle in having to find a senior individual personally guilty of gross negligence manslaughter before the company itself can be convicted. The taking away of the need to identify a sole “controlling mind” will remove the need for representation for an employee under the insurance contract in a high percentage of cases.

The proposal for corporate manslaughter to maintain the penalty of an unlimited fine and the possibility of remedial action as opposed to imprisonment is a fitting punishment against a company and we are pleased that remedial actions are to be considered. The detrimental effect on the company “brand” and damaged reputation with a corporate manslaughter conviction as well as an unlimited fine being imposed is a deterrent in itself. The continuation of individuals being liable for prosecution and possible imprisonment under existing Health and Safety law for gross negligence manslaughter remains. However, we feel that the new process could be clarified:

- What happens where both the corporation and an individual are charged at the same time?
- Are the cases heard together and would each outcome affect the other and or any appeal?
- How will the “unlimited” fine be determined should a company be found guilty of corporate manslaughter? Will there be a pre-determined “level” of severity against the size/turnover of the company and how would this level of severity be determined in order to be fair?

We accept the proposal to maintain the process of investigation for possible offences via the Police, CPS and health and safety expert advice. The addition of requiring the Director of Public Prosecutions’ consent prior to prosecution for this serious offence is agreeable in order to prevent unfounded or unsuccessful prosecutions, especially with the current debate on the perceived “compensation culture” in the UK and the potential public pressure following an publicised unfortunate tragedy.

We feel the true impact of the Bill will not be determined until it is in force and further statistics are provided on health and safety aspects and court case outcomes and interpretations are in evidence. However, taking into account the information provided at the present time, we agree with the view that firms should already be complying with the required health and safety requirements and impact should be minimal.
towards legal/resource required to review the consultation and company health and safety compliance. We are pleased that it is noted that the regulatory impact assessment will continue to be looked at following completion of the consultation. As a major insurer and risk management adviser, we welcome all improvements to companies reviewing health and safety compliance and public safety.

We welcome the extension of the new offence to apply to all companies and other incorporated bodies, including local authorities but, as discussed below, would welcome further clarification to the proposed effect on such organisations.

**Clarification of Proposed Wording**

We would welcome further clarification as to how the definitions and tests contained in the draft Bill will be applied to local authorities and public bodies in practice, as well as companies.

**Senior Manager**

Further clarification in the Bill wording as to the definition of “Senior manager” would be recommended. We feel the proposed definition is still unclear and could allow for certain scenarios such as of senior managers delegating health and safety responsibilities to lower management to avoid possible prosecution. The existing definition of the making of decisions and organising whole or “substantial” part could allow for delegation to lower levels.

— Therefore, would any employee delegated with health and safety responsibilities and who is not at “senior manager” level still be held responsible for the offence or does the responsibility remain with the senior manager who delegated the task?
— Can the current definition in its form take into account accurately the difference in small/large companies or will this be subject to individual court opinion?
— How would this distinction work in the local authority sector as to the responsibility of salaried Council officials and elected members. Who will be responsible if it is a public authority committee decision? Will responsibility be with the elected members or committee and if there is a monetary fine, how will this be a benefit with circulation of monies in the public sector?

**S.3 “Gross breach” tests**

— How will this apply in a public authority with the pressure of publicity and the possibility of a higher number of people involved?
— How will there be control and consistency to prevent action taken due to publicity of an event?

**S.4 “Duty of care”**

Could you please clarify the “Duty of Care” further? Would a corporate manslaughter charge be brought against a local authority if it had been grossly negligent, even if no duty of care existed?

— For example, if a local authority had taken no action following complaints made to them of child abuse (in that they have no direct duty to the child if he is not in care) and the children had been killed or so neglected that they died, would we see a corporate manslaughter charge against the Local Authority if it had been grossly negligent, even though no duty of care exists?

**Local Government bodies**

We agree that local government bodies who are not providing the frontline services themselves should be considered separately and should continue to be excluded from the new offence as they are not currently considered under gross negligence manslaughter. We would appreciate concrete, real life, examples such as a local authority that has contracted out public services such as home help, to clarify what is included/excluded from the draft legislation.

**The exemption of certain functions regarded as “core public functions” such as custody of prisoners**

This is discussed in the consultation paper. Please could we have clarification of other areas of exemption during this consultation to prevent time and resource spent on debates when the Bill is enacted?

— For example how would this differ for the scenario of children in care? Will this be to exclude in the same way as people under detention?
— We would also like clarification on the position of a local authority when acting in its duty as highway authority for the repair and maintenance if they have not complied with the guidelines set down in the code of good practice.
The exemption of “decisions of matters of public policy”

Could you clarify further?
— For example, when a local authority has competing budgetary demands and has taken a decision not to spend in a certain area such as fencing an open area of water to prevent the risk of drowning.

We hope this feedback from both an employer and service provider perspectives assists the consultation and look forward to being informed in due course of any developments or further consultation in the draft Bill.
17 June 2005

81. Memorandum submitted by the Food and Drink Federation

The attached annex outlines the activity and scope of the Food and Drink Federation (FDF).

Concerns expressed to FDF regarding the new offence of corporate manslaughter relate to death arising from the consumption of a food product. It appears to us, however, that death arising from a product which has been manufactured, packaged and labeled/presented by means that would be recognised as Good Manufacturing Practice, and such as would provide a defence of due diligence under the Food Safety Act, would not be embraced by this new offence, in terms of gross breach of the duty to take reasonable care. So, for example, it would appear that death due to an allergic reaction would not be covered if “reasonable” systems and procedures were in place to address the potential problem.

At the same time it would appear that persistent management failure to adopt good practice, against sound and consensus-based, expert advice, could render that management liable under this new offence if it could be demonstrated that a death had arisen as a direct cause of that failure.

We do have some concerns at the uncertainties occasioned by lack of detail or guidance as to how the various elements of the offence will be determined—eg how senior does a manager have to be for their management/organisation to be scrutinised? What will constitute conduct falling far below what can reasonably be expected? Potentially any company’s management and organisation of its affairs can always be criticised, particularly with the benefit of hindsight, where a serious incident such as a death has occurred.

Except for the reference to health & safety legislation, there is no link to existing legislation that lays down the relevant duty of care. So for example, the well developed and regulated requirements laid down under the umbrella of the Food Safety Act are not referred to in the Bill, so industry cannot really anticipate how the court will measure ‘conduct falling far below’. We can only guess that reference will be made to the statutory requirements, and that evidence that the statutory requirements have been met will be relevant to a defence. There is, however, no guarantee of that.

In addition there are no statutory defences specified in the Bill—there is no defence of due diligence for example. Therefore it is far from clear as to how a defence may be made out. So, although it would seem common sense that compliance with the Food Safety Act, and having a defence of due diligence under that Act, as referred to above, would help defend an allegation under the new Bill, the Bill itself does not guarantee it.

If you do not believe the above to be a fair assessment, we would very much welcome your advice and clarification in order to be able to advise our members accordingly.
14 June 2005

Annex

THE UK FOOD AND DRINK MANUFACTURING INDUSTRY

The Food and Drink Federation (FDF) represents the food and drink manufacturing industry, the largest manufacturing sector in the UK, employing over 500,000 people. The industry’s annual turnover is over £69 billion. It purchases some £11 billion worth (about two thirds) of UK agricultural produce and imports a further £21 billion worth of food and drink products, of which £4 billion is unprocessed and £10 billion is lightly processed. UK food and drink exports in 2003 were almost £10 billion.
The following organisations are members of the Food and Drink Federation:

- ABIM: Association of Bakery Ingredient Manufacturers
- ACFM: Association of Cereal Food Manufacturers
- BCA: British Coffee Association
- BCCCA: Biscuit, Cake, Chocolate and Confectionery Association
- BOBMA: British Oats & Barley Millers Association
- BSIA: British Starch Industry Association
- CFA: Chilled Food Association
- CIMA: Cereal Ingredient Manufacturers’ Association
- EMMA: European Malt Product Manufacturers Association
- FA: Food Association
- FOB: Federation of Bakers
- FPA: Food Processors’ Association
- FF: Frozen Food Group
- GPA: General Products Association
- ICF: Ice Cream Federation
- IDFA: Infant and Dietetic Foods Association
- LDT: Lifestyle and Dietary Trends Group
- MSA: Margarine and Spreads Association
- MG: Meat Group
- NABIM: National Association of British and Irish Millers
- NACM: National Association of Cider Makers
- OHG: Out of Home Group
- ORG: Organics Food and Drink Manufacturers’ Group
- SB: Sugar Bureau
- SG: Seafood Group
- SIBA: Society of Independent Brewers
- SMA: Salt Manufacturers’ Association
- SNACMA: Snack, Nut and Crisp Manufacturers’ Association
- SPA: Soya Protein Association
- SSA: Seasoning and Spice Association
- UKAMBY: UK Association of Manufacturers of Bakers’ Yeast
- UKTA: UK Tea Association
- VEG: Vegetarian and Meat Free Industry Group

82. Memorandum submitted by CORGI

1. INTRODUCTION

CORGi is the national watchdog for gas safety. It is the body charged by the Health and Safety Executive (HSE) to maintain a register of competent gas installers in Great Britain, Northern Ireland and the Isle of Man.

It is a legal requirement for businesses carrying out gas work in Great Britain, Northern Ireland and the Isle of Man to be registered with us. We also operate a voluntary registration scheme in the Channel Islands.

CORGi’s principal representative body is its Council, which consists of organisations with a real interest in gas safety, including trade associations, trade unions, safety bodies, charities and consumer groups. CORGI will investigate complaints about the safety of gas work undertaken by both registered installers and non-registered installers free of charge to the consumer.

We hold a database of some 47,000 registered gas installation businesses employing around 100,000 gasfitting operatives, helping consumers locate a local registered installer.

Our mission is to lead standards in safety. We manage complex registers of competence, advise on regulation to deliver improved levels of safety and promote consumer awareness. Safety drives everything we do—from administration and registration through to training and inspection, we have developed over the years an expertise in gas safety that is also applicable to other issues of consumer protection. In addition, we have built a strong reputation providing guidance on operational and management safety standards, and inspection and reporting to ensure that standards are met and maintained.

Carbon monoxide (CO) poisoning is entirely preventable. The UK has a strong gas safety record, and the mandatory registration of gas installers which CORGI maintains is the cornerstone of the UK’s safety regime. It has led to improvements in gas safety and our figures show that work undertaken by non-registered installers has a significant chance of containing serious safety defects.
However, every year about 30 people die from carbon monoxide (CO) poisoning caused by gas appliances and flues that have not been properly installed or maintained, often the result of negligence on the part of landlords and property management groups.

We therefore welcome the Government’s proposals for a new, clearer regime for tackling corporate manslaughter and the opportunity to respond to this consultation.

2. The Need for Reform—Protecting the Public

Although gas is a safe fuel if used correctly, poor installation and lack of maintenance can lead to safety issues. When a gas system fails, for example through pipework leakage, or the flue failing to function, it can present a potential hazard.

The United Kingdom has a good gas safety record, built upon a strong legislative framework that, as well as establishing a mandatory registration scheme for competent gas installers, imposes rigorous duties on landlords to undertake regular safety checks on gas appliances they own in properties they let. Both CORGI and the HSE take regular action to raise levels of public and landlord understanding of this duty.

CORGI notes that the complications resultant from the current law to tackle corporate manslaughter has in turn led to too few convictions. The identification principle has proven difficult to overcome in the court, particularly in larger companies, which has made it hard to find an individual guilty of direction (or misdirection) which has led to the criminal death of a person.

We agree with the Home Office’s guiding principle that this must change. It is essential that a corporation can be held accountable for the lives for which they are responsible so that the criminal action of the individual can be de-coupled from the liability of a corporation.

CORGI works closely with the Health and Safety Executive and others to secure justice for victims and the families of victims where criminal negligence has caused death. We firmly agree with the Home Office that the new offence should focus on the management failures at a senior level within the organisation, to engender an approach which is focussed on safety from the top through to the bottom of an organisation.

Strong penalties act as a deterrent and we believe that the proposals in the Draft Corporate Manslaughter Bill will therefore result in still higher standards of gas safety.

3. The Scope of the Offence

We agree with the Government’s proposal that the new offence should link into duties which companies are already obliged to comply with, notably the Health and Safety at Work Act (1974) and all other legislation and guidance on health and safety, such as the Gas Safety (Installation and Use) Regulations (1998) which places specific duties on gas users, installers, suppliers and landlords.

This ensures both that the scope of the offence is suitably comprehensive to be effective, but does not create a new regulatory burden which might prove difficult and prohibitively expensive for business, as well as complicated for consumers.

CORGI also supports the Government’s proposal that the new regime should cover Crown bodies.

The Government’s proposals also seek to extend the offence of corporate manslaughter to those companies which have a “duty of care” for the victim of their management failures. This includes those who supply goods or services and would therefore apply to those providing gas installation services, such as those registered with CORGI.

The proposals state that the new law would not make an organisation liable for “an immediate, operational negligence causing death, or indeed for the unpredictable, maverick acts of its employees. Instead [the new law] will focus on the working practices of the organisation”.

Any organisation which fails to ensure that appropriate staff are adequately trained and registered competent with CORGI for doing relevant gas work are negligent and already breaking the law. We welcome the Government’s proposal to further deliver a new and tougher sanction to tackle corporate negligence which results in someone’s death, as this is likely to offer a deterrent and save lives in the future.

4. Inspection and Reporting

The Government is proposing no change to the current responsibilities of the police to investigate, and the CPS to prosecute, corporate manslaughter. This should be complimented by the “expertise of health and safety enforcing authorities such as the HSE in an investigation, not only to pursue questions of liability under more specific legislation, but also to provide advice and assistance to the police in investigating corporate manslaughter.”

CORGI has a robust inspection regime. We work closely with the Health and Safety Executive to secure justice for the victims of criminal negligence which results in injury or death from unsafe gas appliances.
CORGI would welcome the opportunity to become an inspection authority, working more closely with the police to ensure that investigations are grounded on the right evidence and provide the highest level of safety for consumers.

5. GUIDANCE AND SUPPORT

CORGI believes that the Government has taken a clear step to protect consumers and workers by introducing proposals to strengthen the law to tackle corporate manslaughter. These measures will work as a deterrent only if people are aware of the new penalties, and have the necessary guidance and support to ensure that their activities are compliant and safe. The Home Office will need to ensure that adequate resources are made available to communicate this thoroughly.

CORGI already provides this kind of communication to landlords and tenants and would welcome the opportunity to discuss with the Home Office how we could support in the communication of a new penalty of Corporate manslaughter in the future. Below are a few examples of the way we are doing this already:

— Landlords—CORGI already works closely with local authorities to advise them on best practice in managing their own housing stock. We work with the ODPM, Local Government Association and other stakeholders to ensure that landlords are made aware of their duties to protect tenants through safe management of homes.

— We also provide landlords with access to a database of legal, registered gas installers via our website and customer service helpline and have prepared a leaflet, including a “frequently-asked-questions” section, which offers tailored advice to landlords.

— Tenants—As the national watchdog for gas safety, CORGI runs regular campaigns, including those alongside the Health and Safety Executive, to raise public awareness of gas safety and the duties which tenants can expect of their landlords.

83. Memorandum submitted by the Energy Networks Association

The Energy Networks Association (ENA) represents the licensed gas and electricity transmission and distribution companies in the UK.

Our mission is:

— To promote the interests, growth, good standing and competitiveness of the UK energy networks industry in the UK and overseas.

— To provide a forum for discussion among Company members and others of issues which concern or may affect the interests of the UK energy networks industry and to disseminate and transmit informed opinion on these matters to the energy regulator, Ofgem, Government and other institutions.

— To promote and protect the common interests of the members of the ENA.

— To monitor, influence and campaign for or against policies, proposals, decisions, and legislative or regulatory instruments, of Government and other institutions which may affect the UK energy networks industry.

GENERAL COMMENTS

ENA welcomes and supports the principle that draft Bill targets corporations and not individuals. Directors and individuals are already subject to existing health and safety legislation and already could be potentially liable for a separate offence under the existing law of gross negligence manslaughter.

We strongly support the fact that the new Bill compliments other forms of accountability rather than replacing them.

We also support the intention that the Bill aims to address the worst cases that involve the most serious management failures. Other cases should continue to be dealt with under existing legislation.

SPECIFIC COMMENTS

Section 1(2): The offence of corporate manslaughter should be applied to all undertakings; Crown Immunity should be limited to matters of national security only. This would remove the need for the schedule. If this is not possible then the schedule should explicitly include all Government Regulators such as Ofgem, Ofwat, Ofcom etc. Whilst section 4(2) refers to an exclusion where balancing competing demands, ENA does not believe that Regulators should have an escape route—Ofgem have duties as well as powers under the Electricity Act for example.

Section 2: Clarification is needed on what constitutes a “senior manager”.

Section 3(2): “... the organisation failed to comply with any relevant health and safety legislation or guidance. ...”

This appears to imply that “guidance” now has the status of a statutory requirement which is not acceptable to our members.

Section 6 (remedial orders): The Draft Bill as worded means that an organisation can only be asked to remedy breaches which led to the manslaughter once it has actually been convicted. This could take some considerable period of time which could potentially mean that the circumstances which led to the death could remain in place for this same length of time. This should be reviewed as improvements could also be effected via the Health and Safety at Work Act (improvement notices etc).

84. Memorandum submitted by the Institute of Occupational Safety and Health

INTRODUCTION

Established in 1945, the Institute of Occupational Safety and Health (IOSH) has around 28,000 members, is Europe's largest occupational safety and health (OSH) professional body and has strong OSH links worldwide. Principally a UK-based organisation, it also has an expanding international membership, with members in over 50 other countries and Branches in Hong Kong and the Republic of Ireland. Incorporated by Royal Charter and a registered charity, IOSH is the guardian of OSH standards of competence in the UK and provider of professional development and awareness training courses. The Institution regulates and steers the profession, maintaining standards and providing impartial, authoritative guidance on OSH issues. Advancing research and disseminating knowledge is key to the IOSH mission of promoting work-related safety, health and sustainability.

IOSH members work at a variety of strategic and operational levels across all employment sectors. The Institution recognises the benefits to society, organisations and individuals of policy and practice that is underpinned by scientific evidence and our mission is:

“A world of work that is safe, healthy and sustainable”

The Institution has long lobbied for a new offence of Corporate Manslaughter as a necessary additional lever to improved corporate accountability and health and safety standards and we welcome the opportunity to comment on this important, landmark statutory instrument: The Corporate Manslaughter Bill.

In summary, IOSH broadly welcomes the Draft Bill, its extension to certain Crown bodies and its power to impose remedial orders, however, we would like to see some amendments and wider application, including: less Crown immunity; application extended to non-incorporated bodies; a wider definition of relevant duty of care; the removal of “profit” from the test for gross breach; and also consideration of the use of additional/alternative penalties.

In the response that follows, we outline our main reasons for supporting the Bill and then make detailed comments and recommendations concerning applicability; the ‘test’ for gross breach; prosecutions; penalties; and suggested additional legislative changes.

BACKGROUND

IOSH believes a new offence of “Corporate Manslaughter” is a necessary additional lever to improved corporate accountability and health and safety standards and that it will help in the following areas:

— to address the current unsatisfactory situation in which only small firms are likely to be successfully prosecuted for causing death, due to the need to prove gross negligence by a “directing mind”: the so-called “identification” principle;
— to signal society’s disapproval of serious corporate failures that lead to death and to improve public confidence in the legal system;
— to give those affected by such deaths some sense of justice in seeing culpable organisations convicted of the serious offence of manslaughter;
— to provide stronger deterrence to the minority of organisations who would otherwise disregard their health and safety responsibilities, through increased likelihood of successful prosecution and associated reputational damage; and importantly
— to improve health and safety standards by raising awareness of the importance of effective management and positive culture and by making mandatory and timely remediation a part of sentencing.
However, IOSH believes that legal sanctions are only a small element in an overall failure prevention strategy, based on improving national competence in the management of occupational safety and health. We believe this strategy should include increased awareness, commitment, resourcing and worker involvement, so that positive health and safety cultures are developed, and also that this should all be supported by higher levels of enforcement.

**COMMENTS ON THE DRAFT CORPORATE MANSLAUGHTER BILL**

**Applicability**

We welcome the fact that there is to be no general Crown immunity for the new offence of Corporate Manslaughter. We also believe that, in addition to those organisations listed in the consultative document, this offence should also apply to prisons, police forces, armed forces training establishments and all government departments where national security is not an issue. We believe the offence should equally apply to non-incorporated bodies, such as partnerships, to the extent those organisations owe “a relevant duty of care” to the deceased. Whilst we understand the principle that certain “activities” may be performed under statute or prerogative and so the organisations concerned should not be held liable for the consequences of their diligent discharge, we also believe that it should be for the Director of Public Prosecutions to decide whether a death may have occurred other than as a result of such diligent discharge and should therefore come before the courts.

We note that the new offence does not apply to British companies that cause death abroad. We understand the difficulties of enforcing the legislation to operations in other countries. However, we believe those organisations responsible for deaths abroad caused by gross negligence in their operations should be prosecuted, where those activities are organised or managed by senior managers operating within England or Wales.

**Test for “gross breach of duty of care”**

We agree that failure to comply with any relevant health and safety legislation and guidance should be part of the “test” and believe that the definition of relevant guidance should be extended to include authoritative guidance produced by trade or advisory bodies that have Health and Safety Executive endorsement or recognition.

In respect to the “test” element 3(2)(b)(iii), we are opposed to the need to show an organisation sought to profit from its breach, in order to secure a conviction for Corporate Manslaughter, as we do not believe a “profit motive” to be necessary for establishing culpability. Additionally, we feel that such a motive may be unreasonably difficult to prove, particularly in the case of non-commercial organisations. However, in situations where organisations are found to have sought to profit, we believe that this should form part of sentencing considerations.

We note the duty of care for this offence is to exist where an organisation is acting as an employer or occupier of land; when supplying goods or services; or when engaged in other commercial activities. However, we believe that section 3 of the Health and Safety at Work, etc Act 1974 is relevant, in order to cover situations where a duty of care is owed to others who may be affected by an organisation’s activities. This could apply for example, in cases of negligence with respect to control of Legionella or other toxic emissions to atmosphere or the management of occupational road risk, that cause fatalities among the general public. We therefore recommend the definition be extended to cover the same situations that are covered by section 3, along the lines of “duty owed by an organisation in control of an activity to the extent of its control, to those affected by the activity”. It is unclear (in paragraph 22) where the duty lies in the case of public bodies/local authorities providing services via third parties eg as part of partnership arrangements, private finance initiatives or through contracts and clarification should be given as to whether it rests with the public body/authority or the supplier.

We note that among the examples of possible sources of health and safety “warnings” which may have been ignored in the course of the offence (explanatory notes, paragraph 18, second bullet point), there is no mention of the competent health and safety assistance (internal and/or external) which every employer is obliged to have access to under the Management of Health and Safety at Work Regulations, regulation 7. In his report following the Piper Alpha Public Inquiry (Cullen, 1990, paragraphs 14.21, 14.23), Lord Cullen judged “the management were remiss” because they paid little attention to an internal assessment by a young engineer of possible large-scale pressurised gas fires. The availability of a range of competent internal advice is typically greater in larger organisations, at which this legislation is specifically directed and we believe ignoring competent advice (internal or external) should be highlighted as a compounding factor in the offence. Other sources of “warnings or alerts” that may have been disregarded as part of the gross breach could include for example: lessons from previous accidents or near misses; audit and inspection reports; and employee complaints or concerns.
PROSECUTIONS

We believe that for most cases it will be necessary to charge organisations with both Corporate Manslaughter charges and offences under the Health and Safety at Work, etc Act, in order to ensure appropriate convictions of culpable organisations, should the more serious offence not succeed.

We also believe that the Health and Safety Executive, with its extensive expertise in occupational safety and health management and key role in investigating work-related deaths, will have an invaluable part in determining whether a Corporate Manslaughter case should be brought and where appropriate, in helping to prepare such cases, and so will need to be adequately resourced for this function.

PENALTIES

In addition to unlimited fines, we welcome court powers to require remedial actions, within a specified time, addressing failures that led to the death. We would recommend that courts take a broad view of this and in addition to other measures, also consider requiring the compulsory training or retraining of senior managers in the management of occupational safety and health and that the organisation obtains appropriate health and safety advice. We believe it is essential that remedial orders ensure both immediate and root causes are remedied and that health and safety system failures and deficiencies in health and safety culture are addressed. We strongly recommend that the Health and Safety Executive should advise on the content and timescales of remedial orders.

When sentencing, we suggest consideration could be given, in appropriate cases, to suspending an element of the fine, subject to satisfactory completion of the remedial measures, as an economic incentive to offenders to demonstrate their timely compliance. With regard to possible non-compliance with remedial orders, we note the proposal is to impose a fine. However, in view of the important preventative nature of such remedial orders, we feel an additional sanction may sometimes be appropriate, such as a prohibition notice ie a notice requiring cessation of operations until satisfactory remediation has been demonstrated.

In respect to the prosecution and conviction of public bodies, where fines are ultimately paid by the public, we suggest an additional or alternative penalty could be to ensure that the conviction affects their “Comprehensive Performance Assessment” or leads to an Audit Commission Inquiry. We also suggest that consideration be given to the use of the Health and Safety Executive’s ‘naming and shaming’ website (HSE Public Register of Convictions) and to the careful/limited use of “adverse publicity orders”, where appropriate, possibly requiring convicted organisations to report their performance in their annual reports. Additionally, we note in the recent HSE commissioned research report An evidence-based evaluation of how best to secure compliance with health and safety law (Wright et al, 2005), that reference is made to the possibility of exploring “restorative justice” in respect to health and safety offenders. The restorative justice process allows victims/victims families to impress upon offenders the real impact of their actions and to receive an explanation. As reported on the Home Office “restorative justice” webpages, research suggests that at least 75% of victims who take part in this process are glad they did so. Though early evidence on the effects on re-offending seems encouraging, it is inconclusive and there needs to be more research into its efficacy with respect to particular offences (Home Office, 2005).

Additional legislative change

In addition to the new Corporate Manslaughter offence, we propose that deaths in armed forces training establishments and work-related road fatalities should both be reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 and be investigable by the Health and Safety Executive, in conjunction with the Police. We also believe that the Health and Safety Commission’s guidance (HSC, 2002) on directors’ health and safety responsibilities should be revised and re-issued as an Approved Code of Practice.

Additionally, we suggest that consideration be given to harmonisation of Corporate Manslaughter and equivalent offences in Scotland, Northern Ireland and England and Wales, as many organisations operate across these borders.

REFERENCES:
Cullen J (1990), The Public Enquiry into the Piper Alpha Disaster, Department of Energy, Report Cm1310, London, Her Majesty’s Stationery Office
HSC (2002), Directors’ Responsibilities for Health and Safety, INDG343, Sudbury, HSE Books
HSE Public Register of Convictions http://www.hse-databases.co.uk/prosecutions/default.asp
85. Memorandum submitted by the County Surveyor’s Society

The County Surveyor’s Society represents local authority chief officers with responsibility for Strategic Planning, Transportation, the Environment, Waste Management and Economic Development. Whilst this response deals primarily with the impact of the Bill on our highways and transportation work, it is relevant to all of our activities.

The consultation document places considerable emphasis on existing Health and Safety law in respect of Corporate Manslaughter of employees. The area relating to Corporate Manslaughter of the public has less emphasis. However, it is the impact of the Bill on Corporate Manslaughter of the public that has the greatest potential impact on our members.

The consultation document gives two examples of prosecutions under existing law and indicates that the Bill is designed to make prosecution easier in cases such as these. Both these cases (Herald of Free Enterprise and Southall) involve transport but both are forms of transport used by a relatively small number of people and a particularly small minority in the case of ferry transport. On the contrary, local roads and footways transport services provided by our members are used by virtually the entire population on almost every day of their lives.

The dangers posed to members of the public from use of local roads and footways relate, in the main, to standards of maintenance where there is an acknowledged backlog of funding for local roads and footways. However, there can also be significant issues with regard to network improvements and the management of the highway network generally, where risk have been identified but implementation has had to be prioritised due to limited funding.

The Government has set a target to halt the decline in condition of local roads by 2004. Whilst there is evidence that the decline may have indeed been halted, local roads remain in very poor condition and non built-up unclassified roads have continued to decline significantly in condition. Footways have continued to decline in condition although the number of trips has been reduced.

The reasons for the poor condition of local roads and footways are the limitations in funding provided for highway maintenance both by central government and locally. The construction industry has long been used by central government as a tool for economic adjustment and it is a regrettable fact that the highway maintenance budget is often seen as the only one available for local authorities to cut when there is pressure in other service areas, such as social services and education. The result of these pressures has been a long history of local roads and footways receiving less investment than necessary. Indeed, the latest National Road Maintenance Condition Survey demonstrates that the level of defects in 2004 was considerably higher than it was 20 years earlier in 1984. (NRMCS 2004, Fig3.1)

You will appreciate that the combination of a service used constantly by almost all members of the population and a history of under funding leaves our members in a position where the possibility of Corporate Manslaughter proceedings relating to highway maintenance and network management generally is a major concern. It is from this background of major concern that our comments on the Bill are made.

We welcome the principle that decisions involving matters of public policy are outside the scope of the new offence since this provides some degree of safeguard against the dangers posed by inadequate provision of funding for areas such as highway maintenance. We consider that this principle should also be extended to individuals such as our members since their ability to act is constrained in exactly the same manner.

We note that the heart of the new offence lies in the requirement for a management failure on the part of senior managers. Given the Cabinet style of administration now adopted by most local authorities we believe that this would inevitably also involve local authority cabinet members with executive responsibility for these particular areas of service. They would consequently fall within the definition of senior managers of local authorities as identified in this Bill. Such cabinet members do, we feel, fall within the definition proposed in paragraph 29 of the consultation document.

The proposed definition of gross breach relies very heavily on health and safety legislation or guidance. Such legislation or guidance is only of limited value in considering Corporate Manslaughter of the public, which is the primary concern of our members. We consider that it would be most helpful if paragraph 3 of the Bill could be widened to provide indications of what would constitute a gross breach beyond the confines of health and safety legislation.

We consider that a weakness of the Bill is that it does not apply to the Police. We believe that the Police should be covered by the Bill as it is readily possible to conceive of circumstances where their actions (or inactions) with regard to speed enforcement for example could lead to Corporate Manslaughter. Of particular concern is the fact that Police investigations often reveal information which, if shared widely, could be of benefit in avoiding similar incidents occurring elsewhere. Provision of such information by the Police falls properly into their primary role of preventing crime. However, we are unaware of any systems for the proactive dissemination of such information by the Police in a timely manner.

The proposed sanction of an unlimited fine for Corporate Manslaughter is of concern to us. As outlined above, any local authority convicted of corporate manslaughter and fined may well take that fine out of the highway maintenance budget irrespective of whether the offence took place within the highway service or elsewhere. Whilst the money would be recycled into the Treasury, recent history reveals that there is scant
chance of it re-emerging into highway maintenance funds! A better sanction might be for intervention by government in the management of the authority or government department in a similar manner to that undertaken by the Audit Commission in the case of local authorities it seems to be failing.

86. Memorandum submitted by the Association of British Insurers

The Association of British Insurers (ABI) is the trade association for the UK’s insurance industry. We represent around 400 members.

The insurance industry is committed to improving risk management and promoting health and safety standards. The ABI therefore welcomes the proposed Corporate Manslaughter Bill given its aim to drive up standards further by ensuring accountability and responsibility at a senior level within organisations.

As you may be aware, it is standard insurance industry practice for relevant insurance products to include cover against the legal costs of defending prosecutions and we would expect the market to offer similar cover against the risk of being prosecuted if this proposed Bill becomes law. The industry would not provide indemnity for any penalties if the prosecution is successful as that would undermine public policy objectives. We do not anticipate that this proposed new offence would have a substantial impact on the price of relevant insurance products, such as employers’ liability insurance, as the financial impact is likely to be minimal across the economy.

20 June 2005

87. Memorandum submitted by the Institute of Electrical Engineers

The Institute of Electrical Engineers (IEE) is made up of 120,000 members, covering a broad range of engineering disciplines and representing a wide range of technical and business expertise. It is expected that the majority of the membership will be affected either directly or indirectly by this legislation.

Many of the most experienced members of the IEE, and their sector peers, voluntarily participate in a variety of IEE policy guidance groups. The IEE has formulated this submission by combining contributions from the membership with the independent expertise of the IEE’s Health and Safety Policy Advisory Group.

The IEE broadly welcomes the draft bill. The current version is a satisfactory outcome, which takes account of many of the serious difficulties raised by earlier attempts to address the issue. The IEE’s concerns now only relate to an important aspect of interpretation. In particular, the IEE believes that the legislation to create an offence of Corporate Manslaughter for cases where organisations are grossly in breach of their duty of care should be supported, so long as clarification is given on the way that a gross breach is to be interpreted in the context of real working situations. This will determine whether fair and transparent legislation can result from the current proposals.

The application to corporate bodies, rather than individual directors, the absence of general crown immunity and the definition of the context in which the offence would apply in the public sector, together with the proposal that the penalty on conviction could be an unlimited fine, are all broadly supported by the IEE.

The IEE would like to raise the following concern regarding the draft bill. This relates to the statutory criteria against which conduct would be assessed. The draft Bill properly includes such issues as the extent to which relevant health and safety legislation has been breached, whether senior managers were aware of the risks being run by the organisation and whether profit had been sought. These are all proper and supportable criteria, however we believe that interpretation in actual situations would be extremely difficult unless further and clearer guidance is provided. To illustrate this, consider two hypothetical situations:

I. An organisation fails to implement systematic processes to minimise the risk of death from industrial accidents to its workforce. Senior managers are aware that practices leading to substantial risk are being pursued and do nothing to minimise such risks. In our view, it would be entirely appropriate for a charge of Corporate Manslaughter be brought against the company should a fatality occur. However, in practice, such situations are very rarely black or white.

II. At the other extreme we can easily envisage a scenario in which an organisation has put in place good policies and processes for minimising the risk of accidents and carries out assessments and audits to scrutinise their effectiveness. In real situations, the results of such scrutiny will inevitably find flaws or areas for significant improvement. Indeed such learning is strongly to be encouraged and is one of the basic requirements for a good safety culture. However, in the real world, managers are confronted day-to-day with the need to make decisions about priorities and resource commitments. There is a therefore a significant risk that post-hoc analysis of a situation leading to a fatal accident, will be able to establish failures to take action about which it will be much easier to establish blame with the benefit of hindsight. The key question may then be whether the decision maker at the time was attempting to behave responsibly, even if subsequent events suggest that a judgement made in good faith was, in fact, flawed.
In our view unless issues of this sort are foreseen and guidance given at this stage, situations may arise which would not only be potentially unjust, but could seriously limit learning and reporting and thus actually leads to a degradation in safety. An added regrettable consequence of a failure to provide clear guidance on issues of this sort is that, in practice, organisations may seek to ensure that senior managers are not in receipt of “guilty knowledge”, which may later be construed as a gross breach of their duty of care and this would, again, not work in the interests of improving safety.

In summary, the IEE broadly supports the proposals but remain concerned that application in the courts may lead to prosecution of organisations and further distress to otherwise conscientious managers which is not based on a fair consideration of the context in which decisions were actually taken, but from analysis based on the benefits of hindsight. We suggest that further discussion and guidance on these issues is sought before the act comes into effect.

13 June 2005

88. Memorandum submitted by the British Rubber Manufacturers’ Association Ltd

The British Rubber Manufacturers’ Association (BRMA) and its members welcome the opportunity of commenting on the draft Corporate Manslaughter Bill. We represent the interests of large multinational companies as well as small and medium sized enterprises involved in the manufacture and distribution of tyre and other rubber products operating within the UK.

We welcome the draft Bill provisions focusing on the responsibility of an organisation’s working practices rather than limiting investigations to individual company directors. We believe that company and health and safety laws already address the responsibilities of directors and individuals and accountability for gross negligence leading to a death is covered under existing law of gross negligence manslaughter. Consequently, we are of the view that if additional duties and penalties are intended to be placed on directors, it would be necessary to engage in an assessment of the effectiveness of any proposed sanctions prior to their introduction. However, we do appreciate that as a result of the proposed Bill there is no intention to place new burdens on companies that comply with the requirements of existing health and safety legislation.

Our specific concerns and suggestions for improving the workability of the proposed Bill are noted below

1. We are concerned that an organisation may be charged with both corporate manslaughter and breach of the Health and Safety at Work Act 1974, ie, it is arguably a breach of process and unfair to the organisation to face two offences arising out of the same circumstances. This aspect should be clarified.

2. We are concerned about the lack of clarity as to type of failing(s) that will be covered by the new offence both with regard to gravity and nature of failing(s). Although section 3(1) speaks of a “gross breach” involving “conduct falling far below what can reasonably be expected of the organisation in the circumstances,” it remains unclear whether a single “innocent” failing, or a single isolated incident, even if producing fatal consequences, can and will be covered. It would thus be appropriate that the Bill be amended to clarify that the offence will apply only where there has been shown to be a consistent, systematic grossly insufficient culture of care as demonstrated by a consistent, systematic gross lack of policies and actions, or by consistent, systematic gross inactions, to address adequately the duty of care resulting in a serious failing from which a fatality would be reasonably foreseeable.

3. We are also concerned that there is a lack of clarity in the Bill about who will be regarded as “senior management” and be held responsible. Company structures and management functions, including day to day oversight of H&S management, vary considerably. Some organisations have a relatively flat management structure as compared with others. It would thus be appropriate to clarify what the Bill would regard as “senior management.”

4. We are also concerned that the proposed fines are potentially unlimited. A judge could react punitively and disproportionately and impose an overwhelming fine, threatening an otherwise law-abiding, productive and useful company’s very economic existence over one instance of breach. Some guidelines and limitations as to amount of exposure to damages should be included in the Bill including considerations of proportionality (as well as mitigating circumstances such as past compliance with H&S guidelines and recommendations, risk assessments undertaken, H&S training undertaken, senior management meetings and actions to address safety, policies and practices to address safety, costs and expenses incurred by the organisation relating to safety, etc) when taking into account the quantum of the fine. This request seems all the more justified as organisations are unable to insure against fines. Indeed the Bill should add that such “good actions” circumstances by the organisation will also be admitted and considered when deciding whether an offence should be deemed to have been committed at all.

5. We are concerned that the Bill has the potential to encourage pressure groups and media to alter the course of investigations and place additional burdens on law enforcers resulting in a risk averse approach to dealing with offences under the proposed Bill. Even if we share the optimistic expectation by the Home Office, that the offence will attract no more than five prosecutions a year, it is our considered view that the Bill will give rise to several orders of magnitude more cases being highlighted by public and pressure groups
as deserving of being considered under the Bill. The increased publicity and public debate has the potential to seriously alter perceptions of those considering inward investment into UK and having the flexibility to choose global locations.

10 June 2005

89. Memorandum submitted by Keoghs Solicitors

KEOGHS’ CREDENTIALS

Keoghs is a law firm that defends personal injury claims on behalf of most major insurance companies. Many companies also instruct us directly to defend accident claims on their behalf.

Our Crime and Regulatory team deal with all aspects of criminal and regulatory prosecution arising from personal injury or death at work, on the road or in a public place.

We have much experience of acting for individuals and companies facing allegations of corporate manslaughter and gross negligence manslaughter, as well as regulatory prosecutions.

The clients of the Crime and Regulatory team are primarily small and medium sized companies (SMEs).

OUR RESPONSE TO THE DRAFT BILL

We support the need for reform and broadly agree with the focus of the draft Bill. However there are areas which we believe warrant further attention.

We would like to make comment in reference to some specific areas, as follows:

Section 14: “The offence is designed to capture truly corporate failings in the management of risk, rather than purely local ones. It therefore applies to management failings by an organisation’s senior managers—either individually or collectively”

and Sections 25—31: Management Failure by Senior Managers

We question how this will apply in practice. In most organisations, there is a blurring of the lines between corporate and local responsibility and it can be difficult to differentiate between the two.

We recognise the difficulties presented by the current legislation in identifying the “controlling mind” and accept the need for reform in this area. However we question why the draft Bill concentrates on senior management.

The overall spirit of the draft Bill appears to be to move away from individual responsibility towards collective responsibility. If this is the case, why focus on senior management only?

We believe this will lead to internal conflict. Responsibility will be passed down the line from senior management to those at lower levels in the organisation in order to avoid prosecution.

We also believe that the definition of “senior manager” which is set out in Section 2 of the draft Bill requires further clarification.

Section 2 says: “a person is a senior manager of an organisation if he plays a significant role in...”.

The term “significant role” is open to wide interpretation. Unless this is defined further, it will only lead to more confusion when it is applied in practice, and so further guidance is needed.

Section 33: “The draft Bill provides a range of statutory criteria for providing a clearer framework for assessing an organisation’s culpability”

We recognise the difficulty in defining wording to cover every eventuality. This needs to be considered on a case by case basis, and precedents will then be set. We agree it is important that juries are able to take account of other matters that they consider to be relevant.

Section 35: “The draft Bill applies the new offence to corporations and to a wide range of Crown bodies but not to unincorporated bodies”

We agree that unincorporated bodies should not be included within the scope of the Bill.

We also believe that the draft Bill should include further provisions to differentiate between large and small companies. In particular, we think that micro companies (i.e those with less than 10 employees, according to the DTI definition) should be excluded.
Under this provision, the new offence will not apply to any micro companies which are unincorporated. We believe that many such companies will be deterred from incorporating in the future so that they remain excluded from the new offence.

It is much easier to prosecute smaller companies for corporate manslaughter. The current legislation demonstrates this as all convictions to date relate to small companies. This does not present a “level playing field”.

In a micro company, the senior management are much more likely to be the owners or controllers of that business. This means they will be personally liable if the company is prosecuted for an offence. The offence of gross negligence manslaughter can, therefore, still be used to successfully prosecute micro companies. Consequently, the draft Bill is not necessary for this category.

One of the principal reasons for changing the current legislation is to make prosecution of substantial companies easier to secure, so it would seem logical for the Bill to focus on these organisations only.

If the draft Bill is introduced in its current format, it will still remain far easier for the HSE to prosecute micro and small companies than larger companies. We are concerned that this will discriminate unfairly against micro companies in particular. This is not good for the economy, free trade and enterprise in general.

By removing micro companies from the equation, the HSE can focus its resources and energies on those companies which the legislation is really intending to target.

The Bill could set out the definition of a large company by reference to number of employees and/or turnover band. For example, companies with 10 or more employees and turnover in excess of £1 million.

Section 37: “Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior manager caused death”

We agree that a parent company should be liable to prosecution if it can be shown that its own management failures are a cause of death.

However, the ownership of the subsidiary company will need to be taken into account in these circumstances. If both the parent company and subsidiary have shareholders in common and both companies are found to be liable, this will result in shareholders being penalised twice. This is not equitable or fair. Provision needs to be made for this scenario.

Section 52: Sanctions

We agree that a financial penalty is necessary for this offence. However, we believe that other penalties could also be considered alongside.

The purpose of the draft Bill is, first and foremost, to improve health and safety within the workplace. This is not reflected by simply applying a fine.

Other measures could be introduced which are designed to reflect a company’s commitment to improvements within the workplace. For example, a suspended fine related to its health and safety record.

This way, if the company is found guilty of breaching health and safety regulations within a set period of time after their manslaughter conviction, they will become liable for an extra fine.

Conclusion

As stated at the outset, we do support the need for reform and broadly agree with the focus of the draft Bill. However we do not believe that the needs of smaller companies, and micro companies in particular, are adequately taken into account.

The draft Bill in its current format will still mean micro companies are more liable to a successful prosecution for corporate manslaughter than larger, more substantial companies.

The current offence of gross negligence manslaughter is much more applicable to micro companies. In addition, they are more likely to be liable for prosecution under Section 37 of the Health & Safety at Work Act 1974.

Further regulations to increase the likelihood of prosecution are therefore not necessary for micro companies. The draft Bill should take this into account and focus on larger companies at the opposite end of the spectrum.

16 June 2005
90. Memorandum submitted by Gerard Forlin

This is the personal view of Gerard Forlin. It does not intend to set out each and every consideration of the Draft Bill, and the author has been consulted by numerous parties, both in response to this Bill and in the previous consultation processes. It represents only some points for consideration and further debate.

1. **RELEVANT DUTY OF CARE**

The test of “relevant duty of care” appears to state that only certain relationships between organisations and the deceased will trigger a relevant duty of care thereby enabling a prosecution to take place. Further, taken to its conclusion, arguably therefore deaths resulting from a public policy decision, or lawful detention may forestall a prosecution. Although, mainly affecting Crown Bodies, it may impact onto the private sector such as prisons. This is bound to trigger great interest and debate, especially from certain “pressure” groups.

2. **THE FOCUS ON SENIOR MANAGEMENT**

This will continue to trigger a lot of debate.

Arguably the test is too narrow and might risk a Nelsonian approach to the rules/conduct in lower management. Further, it may encourage certain companies etc., to cascade decision making to a more operational level thereby arguably circumventing the Act.

3. **GROSS BREACH**

This is a very wide definition which will almost exclusively stay in the Jurors domain.

Further, the definition in the third limb of “...sought to cause the organisation to profit from that failure” will be extremely difficult to prove. Further, it is difficult to see how this aspect would feature in Crown bodies.

4. **INDIVIDUALS**

I agree that there needs to be no change as more and more individuals are already being prosecuted for both manslaughter and sections 7 and 37 of the Health and Safety at Work Act 1974. This trend is accelerating and intensifying. The author has submitted this to the Government on previous occasions.

5. **SENTENCE**

There is bound to be calls for more innovative types of sentences. The main prosecution “prize” will be in larger companies in addition to the fine, a knock on effect in higher insurance premiums and general stock market disapproval.

6. **UNINCORPORATED BODIES**

This is bound to create calls for there to be no exemption for such bodies. On one hand, there is clear evidence that without such an exception, there will be a stifling of, for instance, the voluntary sector. On the other, it will lead to some absurd consequences. For instance one traditional firm of solicitors who retained a usual partnership structure would be exempt (although the partners could be individually prosecuted) in another law firm who had recently become a limited company (which many are doing) could not.

7. **ARMED FORCES**

The present author has advocated that there may be arguably a special position relating to the training of special forces. To some in the military, to widen this to all forces may be seen as a bridge too far!

8. **GOVERNMENT IMMUNITY**

To many this is too wide. It is also felt in certain quarters, that ministerial immunity should be revisited. In France for instance there is no such concept thereby allowing Monsieur Fabius to be prosecuted over the Blood Bank’s fiasco in the early 90s.
9. **Parent Companies**

This is bound to generate cries of unfairness. The advantage is that parent companies will need to be far more vigilant about health and safety etc, inside their subsidiaries than ever before. This may encourage financial and other support.

One disadvantage is that it may divert foreign investment from the UK.

10. **Geographical Scope**

In my view this stance may change over time. There is a growing trend towards “long arm” criminal statutes. Further the CJA 2003 already allows for retrials after foreign acquittals.

11. **The Consultation Document**

Specifically asks for opinions on whether fining a Crown Body serves any useful purpose. In a recent case when I was representing a large local authority after a fatality the learned Judge stated that fines need to be high enough to make people sit up and pay attention. It is highly debatable whether a high fine (or even a fine) does this and more research is needed on this thorny subject.

This is a short overview of certain of the provisions.

---

91. **Memorandum submitted by the Fire Brigades Union**

**Introduction**

The Fire Brigades Union has led the campaign in pressing for greater employers’ responsibility for workplace fatalities in the Fire Service.

Where Fire Service deaths have occurred, Fire Brigades have generally admitted negligence in the context of civil proceedings either by a formal admission of liability or by paying compensation when faced with health and safety allegations. Despite this, only one criminal prosecution has been brought in respect of a Fire Service workplace fatality. That was a health and safety prosecution and yet a conviction could not be secured in the face of compelling evidence of inadequate and wholly unacceptable health and safety.

Recent years have seen a dramatic rise in the number of firefighters killed on operational duty. In the four years from 1998 to 2001, there was only one such fatality. This led to the prosecution referred to. The four year period since then (2002 to 2005) has not yet ended and yet there have been eight fatalities in six separate incidents.

More recently, a disturbing trend has emerged with firefighters being attacked whilst attending operational incidents. In some cases these attacks have been organised with arson fires set up and those responsible lying in wait to mount an attack once the crew arrives at the scene. Whilst Fire Brigades have health and safety guidelines to protect firefighters in such circumstances, these guidelines are not always followed and firefighters have been placed at risk of death or serious injury in these circumstances.

**Health and Safety Culture**

In August 2000 we contributed to the joint response to the Home Office paper: Reforming the Law on Involuntary Manslaughter. In the introduction to that paper, we set out our position in detail:

We welcome legislation designed to make corporations and other bodies accountable for the manslaughter of their workers and members of the public and which recognises the need to hold very senior individuals responsible for the safe working and operating practices of such corporations.
We wish to avoid scapegoating of front line employees or relatively junior managers. We consider that workplace fatalities are avoidable and are usually caused by fundamental health and safety shortcomings throughout the organisation which can properly be laid at the door of the Managing Director, Board of Directors, Chief Executive, Chief Fire Officer etc as appropriate. This is consistent with the HSE position on the relationship between human factors and wider organisational. The HSE Guide HSG65 sums this up:

“Accidents, ill health and incidents are seldom random events. They generally arise from failures of control and involve multi-contributory elements. The immediate cause may be a human or technical failure, but they usually arise from organisational failings which are the responsibility of management.”

This is further confirmed by HSE in HSG48:

“Many accidents are blamed on the actions of or omissions of an individual who was directly involved in operational or maintenance work. This typical, but short-sighted response ignores the fundamental failures which led to the accident. These are usually rooted deeper in the organisation’s design, management and decision making functions.”

Workplace fatalities can be avoided by employers injecting significant investment into health and safety. Such investment can never be purely financial. What is required is a new emphasis giving workplace health and safety top priority, allocating specialist personnel to the task and giving such personnel adequate resources, authority and the full backing of the organisation. Legislation to facilitate the prosecution of organisations and those in charge is central to the establishment of such a safety culture amongst employers. The existence of specific workplace health and safety legislation and enforcement by the HSE must not detract from the importance of establishing and enforcing legislation on workplace fatalities designed to underpin workplace health and safety. Serious failings of organisations causing death should result in long prison sentences for those with responsibility. Even short periods of imprisonment of those concerned may result in a significant impact on those in authority taking proper care and seeking to avoid behaving illegally (as they do now) in relation to their obligations under health and safety legislation. Fines, even large fines, paid by the impersonal corporations can have a very limited effect. Profits from cutting corners with issues of safety may be vast. Fines paid by public authorities may not significantly affect the behaviour of those in senior positions within an authority.

That remains the position. Indeed, the recent dramatic rise in firefighter workplace fatalities has underlined the importance of this approach combining a health and safety culture and robust enforcement mechanisms.

**History**

For many years trades unions have led the campaign for law reform on corporate killing. The deaths of workers and members of the public in numerous major public tragedies have highlighted the issue and supported the calls for a new law of corporate manslaughter.

The major public disasters included the Herald of Free Enterprise, the Kings Cross fire, Piper Alpha, the Marchioness and the rail tragedies at Hatfield, Clapham, Paddington and Potters Bar.

Since 1997, 2,000 workers have died in workplace accidents and tens of thousands have been seriously injured at work.

As long ago as 1996 the Law Commission recommended a reform of the law by proposing the creation of a specific offence of Corporate Killing. This recommendation was incorporated into the 1997 Labour Party Manifesto. When elected in 1997, the new Home Secretary, Jack Straw, promised that those who caused the death of innocent people through criminal negligence should be made to pay. But movement on this was painfully slow. It was not until 2000 that the Home Office issued its consultation paper: Reforming the Law on Involuntary Manslaughter.

In that same year, Andrew Dismore MP, now Chair of the FBU Parliamentary Group, introduced a Ten Minute Rule Bill to create an offence of corporate killing for companies and company officers. But the Government did not support this and the Bill was unable to proceed. Again, all that was forthcoming was a commitment to introduce new legislation.

So the first term of the present Government came and went with nothing more than a commitment and a consultation paper.

In the 2001 General Election, the Labour Party Manifesto again repeated the commitment to reforming the law:

Law reform is necessary to make provisions against Corporate Manslaughter.
This was repeated again in June 2001, by Keith Bradley, Minister for Criminal Justice Sentencing and Law Reform. He stressed the Government’s commitment to introducing an offence of corporate killing, confirmed that the Manifesto commitment would be honoured and indicated that final proposals would be published as soon as the responses to the consultation exercise had been considered. He stressed:

We are determined to bring forward clear and workable legislation that will hold undertakings to account for serious wrongdoing and we will legislate when Parliamentary time allows.

But again there were delays. Attempts to introduce an offence by amendments to the Criminal Justice Bill in 2002–03 led simply to a further commitment but there was no commitment to a timetable.

In January 2005 there was a further attempt at a Private Members Bill on the issue of directors’ duties. This had the support of TGWU and was sponsored by Stephen Hepburn MP but it again failed without Government support.

With the end of the second term approaching and the Government again aware of their failure to deliver on the Manifesto commitment, the draft Bill was finally published in March 2005. This was a repeat of the first term with nothing happening for most of the term and then a belated consultation exercise within the last year of the Government.

Still, there has been no legislation.

**Statistics**

In the past five years to 2003–04 there have been 2,157 deaths at work. On average there are approximately 240 work place deaths per annum. Despite these figures only 11 directors have ever been convicted of manslaughter. Five of the directors were sentenced to imprisonment and another five had a suspended sentence. One was given a community service order.

During the period 2003–04 there were 159,809 non-fatal accidents.

Each year around 11,000 enforcement notices are issued by HSE. The number of prosecutions is around 1,000 per annum.

The average fine is currently approximately £13,000.

**The Proposed Legislation**

The draft Bill is aimed at corporations and certain Government Departments. It does not apply to individuals, including senior managers such as Chief Fire Officers.

An offence of corporate manslaughter is committed by an organisation if the way its activities are managed or organised by senior managers results in a person’s death due to a gross breach of its duty of care. “Gross breach” is defined as the conduct of the organisation falling far below the standard reasonably expected of it.

In considering whether there has been a gross breach, the Court would take into account the seriousness of the breach and, in respect of senior managers,

— What they knew or ought to have known in respect of complying with legislation/guidance;
— Whether they were aware or should have been aware of the risk of death/serious harm;
— Whether they sought to facilitate the organisation to profit from its failure.

A senior manager is defined as a person who plays a significant role in the decisions as to how the organisation’s activities or a substantial part of them are to be managed or who actually manages those activities or a substantial part of them.

Crown bodies, including Government departments that are listed in the schedule to the Bill will be capable of prosecution for the first time. These departments include the Office of the Deputy Prime Minister (ODPM) which is responsible for the Fire Service.

The penalty on conviction is an unlimited fine although the Court will also have power to order a convicted organisation to remedy the breach.

Proceedings can only be brought by the Director of Public Prosecutions.

**The Draft Bill**

To some extent the draft Bill is to be welcomed in that, at least the Government have taken another step towards honouring its commitment to bring forward legislation. The Bill does introduce a charge of corporate manslaughter which can be brought because of the failings of senior management. The power to order remedial steps is a welcome measure. Failure to comply will presumably be a Contempt of Court which can lead to powerful sanctions which unions are fully familiar with such as sequestration.

It is also welcome that Crown immunities are abolished from many Government bodies and agencies.
But, overall, the Bill is a huge disappointment. It is too little, too late. Numerous shortcomings are evident.

*Failure to impose specific Health and Safety Obligations/Duties on Company Directors and Senior Managers*

The Directors Duties Bill sponsored by Stephen Hepburn MP provides a good example of what can be done to ensure responsibility rests firmly with senior managers, such as Chief Fire Officers. It required the appointment of a health and safety director. In addition, the other directors would be under a duty to take all reasonable steps to comply with health and safety obligations and to take account of information and advice provided by the health and safety director.

In the context of Fire and Rescue Authorities, this model should include responsibility on both senior managers such as the Chief Fire Officer and upon senior officers of the Fire and Rescue Authority.

The duties of a health and safety director should be as set out in the Private Members Bill. This would include a requirement to assess the activities of the company and how the activities affect the health and safety of its employees and to consider the safety measures in place and their effectiveness. The health and safety director would then be required to report to the Board on safety issues, performance, statistics, measures etc and to make proposals on safety which the Board would have to consider.

There would also be a requirement that the necessary information and resources are made available to the health and safety director.

These proposals are an essential part of any corporate manslaughter legislation if it is to be effective. They are not included in the Government’s draft bill. This is a serious shortcoming.

*Limited Proposals*

The draft Bill is very limited in extent. It simply creates the offence. It does not attempt to legislate to provide a comprehensive framework within which deaths and serious injuries at work can be prevented or deterred. It fails to deal with the responsibility of senior personnel such as Chief Fire Officers and senior Fire Authority Officers and the penalties to be imposed upon those senior personnel in respect of serious breaches of duty.

*Definition of Senior Managers*

The draft legislation requires that the gross breach of duty was caused by the activities of a senior manager who played a significant role in the decisions or management of the activities of the organisation which led to the death. In large organisations such as Fire and Rescue Authorities, there can be a complex management structure. To a considerable extent, the difficulties encountered with existing laws are being replicated in the new legislation. Direct responsibilities are required as provided for in the Private Members Bill sponsored by Stephen Hepburn MP.

In addition, the definition of senior manager is unclear and restrictive. It is anticipated that there will be senior personnel in Fire and Rescue Authorities who may have significant responsibilities but would not be categorised as senior managers. If their acts or omissions resulted in a death, the Fire and Rescue Authority would escape prosecution. Again, this is a repeat of current problems where senior management can turn a blind eye to failures lower down the chain of command.

*Territorial Extent*

It is noted that the proposals are limited to incidents arising in England and Wales, within the seaward limits of the territorial sea adjacent to the UK or on a ship registered under the Merchant Shipping Act. This potentially leaves gaps in respect of firefighters attending incidents at sea, particularly on foreign-registered vessels. There appears to be lack of joined up Government in that the Office of the Deputy Prime Minister has been encouraging Fire Authorities to provide firefighting at sea services and yet this is not adequately provided for in the proposed Bill.

Also, there is no provision for the circumstances where firefighters and other emergency personnel are sent abroad as part of a specialist crew to carry out emergency rescue activities at major incidents, another service which is being actively pursued and encouraged by the ODPM.

*Definition of Gross Breach*

Whilst the definition itself is clear, the questions to be considered by a criminal jury are such that it will be too easy for culpable organisations to avoid conviction. Before the Court can convict, the jury has to find that:

- Senior managers knew or ought to have known that the organisation was failing to comply with legislation or guidance.
- Senior managers were aware or ought to have been aware of the risk of death or serious harm posed by the failure to comply.
Senior managers sought to cause the organisation to profit from that failure. The complex management structures often applicable in Fire Authorities may create a protective screen behind which Brigades can escape responsibility for serious health and safety failures. And, in the context of a public body such as a Fire and Rescue Authority, profiting from the relevant failure to comply with legislation or guidance will be unlikely. Confusion will arise. The only requirement should be that the organisation is in breach of its health and safety obligations and that the breach generally is a gross breach leading to death or serious harm. These limitations are a significant weakness in the legislation.

**Penalties**

Employers, including Fire and Rescue Authorities, committed to Crown Court for offences under the Health and Safety at Work Act 1974 are already subject to unlimited fines. Legal precedent has been established as to the level of fines to be imposed. The proposed legislation does not issue guidance or directions to ensure a higher level of fine for convictions for corporate manslaughter compared with breaches under the 1974 Act. As a result, employers convicted of corporate manslaughter may find that they are fined at the same level as before. Existing fines are grossly inadequate. This is another serious weakness in the legislation.

In addition, the sanction of remedial orders is after the event. The fatality will have occurred by then. For too long health and safety has been based upon only learning lessons after an event has occurred. This legislation repeats that mistake. In any event, the HSE can make remedial orders under the Health and Safety at Work Act 1974. Remedial orders under the new legislation may be more effective than those made by the HSE as contempt of Court presumably applies. But HSE remedial orders are before the event and they do not require a death to have already occurred. They are preventative, unlike those under the proposed legislation which can only arise after workers have been killed.

We would suggest the following should be considered by way of expansion of the penalties available to the Courts:

- Imprisonment of senior managers such as Chief Fire Officers where appropriate.
- Disqualification of senior managers. In the case of the Fire Service, this should amount to disqualification from employment in a senior role within the Fire Service.
- Probation orders.
- Punitive awards of compensation to be paid by the organisation to the families of the deceased worker.
- More specific provisions to ensure fines are significantly higher than those for convictions under the 1974 Act.
- Linking fines with the turnover of the organisation.

The current level of fines are inadequate and it is often more effective for a company to ignore safety obligations and pay a fine. Some organisations are profiting, directly or indirectly, from their failure to implement safety obligations.

Sanctions for corporate manslaughter should be applied to ensure a clear deterrent effect. The primary sanction should be imprisonment for senior personnel in appropriate cases.

It is noted that the position adopted in the draft Bill reflects the view of the Royal Commission that it would not be appropriate for an offence of corporate manslaughter to apply to individuals such as company directors. However, this is not accepted and indeed was not accepted by the Government in its 2000 Consultation Paper which stressed that without punitive sanctions against company officers, there would be insufficient deterrent force to any new proposals. Directors of companies with poor safety compliance should not be allowed to be directors. Likewise, senior Fire Service managers should be disqualified from that role. The same consideration should apply to other public organisations.

In terms of probation orders, an organisation could be put on probation and required to ensure it is complying with its safety obligations and is operating in accordance with those obligations. The HSE could act as probation officer with a requirement to report back to the Court periodically for the duration of the probation order.

Punitive damages awarded to the family should be decided by the jury as is the case presently with claims against the police. This would have to be in addition to any civil damages and any other entitlements the family may have in respect of the fatal accident. Punitive damages would not only be a deterrent but would also be a way of providing some justice to the victims family who are too often forgotten.

In terms of fines, clearer guidance is required and a link to the profits or turnover of the company. In the case of public bodies, the link should be to the overall budget of that public body.
SUMMARY

The draft Bill does very little to prevent companies and public bodies from disregarding their health and safety obligations. Neither is there any attempt to legislate upon the key issue of the duties of senior personnel and directors who will escape liability under these proposals.

In accordance with our submission in 2000, we would repeat that real progress can only be made when an effective safety culture is established. There is nothing in the proposed legislation to take forward that fundamental issue.

The net result is a weak Bill that does little to advance the present legal position. Culpable companies, organisations and senior personnel will escape prosecution under the proposals. Even where convictions are obtained, the penalties will be weak and ineffective.

The draft Bill, therefore, requires substantial root and branch re-writing. As re-formulated, to take into account this response and those of other trade unions, the legislation could significantly improve workplace health and safety and ensure accountability for those disregarding workers safety. The fact that the Government is now moving forward with the legislation is a positive step. This opportunity should not be missed but the draft Bill needs extensive surgery to ensure this is an important and effective piece of legislation.

92. Memorandum submitted by the Law Society

INTRODUCTION

1. The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors profession, and has a public interest role in working for reform of the law.

2. The Home Secretary Charles Clarke declares in the foreword to the draft Bill that the aim of the new Bill is to provide an offence which is “clear and effective” to replace the current law of corporate manslaughter which he says is neither. The current common law requirements for proving corporate manslaughter have been widely criticised for requiring an individual person who is a controlling mind of the company to be successfully prosecuted for manslaughter before a company can itself be prosecuted. Charles Clarke states that the proposals need to strike a balance between the need for companies and other organisations to be held properly to account and on the other hand “as an offence of homicide, corporate manslaughter charges must be reserved for the very worst cases of management failure”.

3. In 1995 the Law Commission produced a report “Legislating the Criminal Code- Involuntary Manslaughter” which suggested that the laws surrounding corporate killing should be completely reformed, including the creation of a new offence.

4. The Government published a consultation paper on reform of the law on involuntary manslaughter in May 2000. The delay in producing the draft Bill has been attributed to the complexity of the legal issues involved.

5. The draft Corporate Manslaughter Bill contains a new offence which is substantially different to the proposals in the 2000 consultation paper. In particular, there are no proposals for new offences creating individual liability and the new offence is much more narrowly defined, giving rise to fears that it will be challenging, if not impossible, to prove. In addition, prosecution under the draft Bill only applies to corporations and not unincorporated associations and there are important exceptions to crown liability. The proposal in 2000 that the new offence be investigated and prosecuted by the Health and Safety Executive has been dropped and there is recognition that the seriousness of it demands the involvement of the police and Crown Prosecution Service. The draft Bill also introduces a requirement for the Director of Public Prosecutions to give consent before any prosecution.

DEFINITION OF THE OFFENCE

6. The declared aim of the Government in relation to corporate manslaughter is to provide an offence which is more “clear and effective” and therefore easier to prosecute than the current law. Human rights jurisprudence also requires the criminal law to be clear and effective and for criminal offences to be properly defined and applicable in a non discriminatory manner.

7. The Society understands the Government’s rationale in abandoning the attempt to fix responsibility on individual directors. The current offence of gross negligence manslaughter would remain in respect of the prosecution of individuals and if a company has been successfully convicted, this could make it easier for a civil action to be brought against an individual director.

8. However, we are concerned that the way in which the new offence is defined could make it difficult to prosecute successfully. In particular, the proposals require a management failure by senior managers defined to be only those who play a role in management of the organisation as a whole.
9. The test set out in the 1996 Law Commission recommendations considered failure by managers, not only senior managers should be sufficient to give rise to a prosecution. We are concerned that this distinction could lead to a delegation of responsibilities down the management chain to avoid any potential manslaughter prosecution, for example delegating to a regional level or lower level.

10. Whilst we appreciate that the working practices of an organisation—including those who are responsible for a “substantial part” of an organisation’s activities—will be taken into account when considering charges, we are concerned that this distinction between managers and senior managers may create additional challenges in calling large organisations to account as easily as smaller ones. Making large organisations accountable was one of the original intentions of law reform in this area and one area in which the draft Bill fails. The way the draft Bill is written, it is conceivable that activity of the same size in economic terms would be more likely to be caught in a smaller organisation than a larger one.

11. One of the main objections to the current law is that large companies escape prosecution because of the difficulties of proving the involvement of a “controlling mind” but the draft Bill may be just as problematic. Given that the Bill requires “gross failure” to establish liability we believe that proving a management system failure should suffice. The further hurdles of proving that the manager was a senior manager and that the person in question was managing the whole or a substantial part of the business seem to run contrary to the intentions of the legislation, by making it potentially more difficult to bring action against larger companies. We believe the legislation requires greater certainty in order to make it easier to interpret and apply in practice.

12. Lastly, we are also concerned that the new offence would not have extra-territorial jurisdiction and therefore not apply to British companies operating abroad. Consideration should be given to whether British companies should be treated differently than British citizens who cause death abroad and can be prosecuted in the British courts.

GROSS BREACH—CLAUSE 3

13. We find the drafting of the guidelines for proving a gross breach of the duty of care in clause 3 of the legislation ill-defined and nebulous.

14. Guidelines for proving a gross breach were defined in the 2000 consultation as “conduct falling far below what can reasonably be expected of the organisation in the circumstances”. The commentary on the draft Bill states that this definition was met with criticism as being too vague. However, instead of referring to the elements required for proving gross negligence manslaughter set out in the leading case of Adamako\(^\text{264}\) the draft Bill provides for guidelines to the jury which are likely to make it extremely difficult to mount prosecutions.

15. In addition to the jury having regard to whether senior managers knew or ought to have known that the organisation was failing to comply with legislation or guidance and whether they were aware or ought to have been aware of the risk of death or serious harm, clause 3(2)(iii) states that a jury must also consider whether or not senior managers “sought to cause the organisation to profit from that failure”.

16. Whilst we agree that such a provision seems relevant for sentencing, we believe that motive of economic profit would be extremely difficult to prove and absence of such evidence will be used by organisations to show that their conduct was not grossly negligent. We are uncertain whether, as drafted, an absence of evidence on this point would remove liability. At best, this clause is unclear and unnecessary as such a motive has never been a relevant issue in negligence law.

UNINCORPORATED BODIES

17. The Government originally agreed in its consultation document in 2000 that the new offence should apply to all employing organisations. However, the draft Bill does not extend to unincorporated bodies.

18. It has been argued that its absence is because many unincorporated bodies “do not have a distinct legal personality” and have shifting structures and personnel. This may be true of some unincorporated bodies but it clearly is not true of all of them. Partnerships and trade unions do have distinct legal personalities, and the change of personnel at the top may be no more frequent than in a company. As the commentary points out, this would also exempt police forces and although the explanatory notes state that the “intention is that legislation should in due course extend to them (ie police forces)” as presently drafted, the draft Bill does not cover the police. The exemption of unincorporated bodies therefore appears to be discriminatory and unjustifiable.

CROWN LIABILITY

19. We have consistently lobbied for legislation in this area to remove Crown immunity and are pleased that the proposals do apply to Crown bodies without a general immunity. However, the Society is concerned over the undermining of the application of the legislation to the Crown by the number of exemptions provided by the draft Bill creating, in our view, a discriminatory regime of protection.

20. Art 2 ECHR obliges the State to secure the protection of “everyone’s” right to life by means of the law. There are various elements to this: the creation of an effective legal system with appropriate penalties, adequate resources and the will to ensure that prosecutions leading to the imposition of those penalties take place when appropriate; and, where State action or failure may have led to a death, an adequate investigation is required. Art 14 ECHR prohibits discrimination between similarly placed classes of persons in respect of the way in which the State ensures the substantive rights (including Art 2 ECHR) are protected.

21. Considered against this framework, the approach taken in the draft Bill to State liability is highly questionable. The exclusion of certain bodies contrasts starkly with that taken in sections 2 and 3 of the Health and Safety at Work Act 1974 which is deliberately inclusive, embracing almost all “undertakings” whether commercial in nature or otherwise. In effect, the draft Bill envisages those responsible for such undertakings as being potentially liable for lesser health and safety offences, but not for the most serious failings of all, which are those where logically Art 2 would be most expected to require effective legal protection.

22. This incongruity is reinforced through the explicit exemption of “exclusively public functions” from the draft Bill’s regime (these being functions exercisable only with statutory authority or in the exercise of the prerogative). This definition is problematic because it is based on a dividing line drawn between those bodies that can be sued in negligence in domestic law and those that are exempt on public policy grounds. We believe that this dividing line has little meaning, or justification in domestic law terms in relation to a criminal penalty.

23. The definition of duty of care in clause 4(1) exempts a duty owed “in the exercise of an exclusively public function”. This is then defined as a function which falls within the prerogative of the Crown or is by its nature only exercisable with the authority conferred by the prerogative. The consultation’s commentary explains that this will have the effect of exempting the government from liability for functions relating to the custody of prisoners or the provision of services in a civil emergency. It goes on to state that “Deaths in prisons are, for example, already subject to rigorous independent investigations through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest”.

24. The Government’s Fundamental Review and the Shipman Inquiry highlighted concerns about the ability of the inquest system to serve as an effective remedy. This was the finding in the recent case of ex parte Amin265 in which the basis of ordering the government to hold a public inquiry into a death in prison was that the inquest was not capable of meeting the requirements of Art 2 of the ECHR.

25. Matters which fall directly within the responsibility of the State are considered to be those where Art 2 protection (in all its forms) needs to be at its highest, because typically these are areas of life where there is a very significant imbalance of power which may be exacerbated by the vulnerability of the individual. The draft Bill turns this principle on its head.

26. Even if it were right in principle to exclude certain public functions from the scope of the draft Bill, the approach of exclusion used in clause 4(4) in our view, is unsatisfactory. The scope of the prerogative of the Crown is extremely unclear: broadly it is the residue of the power of the Crown which remains unregulated by statute. Some State actions (ie signing treaties) are clearly within the prerogative. Many others have an ambiguous status, involving a combination of private law powers, common law powers enjoyed exclusively by the State, statute and the prerogative. The House of Commons Public Administration Select Committee266 has argued that the case for bringing prerogative powers under proper Parliamentary scrutiny is “unanswerable” not least because of the ambiguity about their scope. If certain functions are to be excluded, they should be identified in clear terms, not by reference to an amorphous legal concept.

Penalties

27. Whilst we recognise that a major penalty for a company would be the public shame of a conviction for manslaughter, the only penalty available through the draft legislation is an unlimited fine. We are concerned that companies can escape paying fines by putting themselves into liquidation and escape accountability by the same personnel starting a new company.

265 R v SSHD ex parte Amin, [2003] UKHL 51.
28. As the consultation paper’s commentary identifies, there is little point in fining Crown bodies and the police since public money is just being recycled. Even if no new individual liability is created, serious consideration should be given to whether company directors should be subject to a regime similar to that currently in force under the Directors’ Disqualification Act 1986. This would also provide accountability in relation to Crown bodies.

93. Memorandum submitted by David Thomas

This legislation has been anticipated for upwards of 5 to 6 years and is no doubt welcomed by some. Unfortunately however, many of those who have waited for such legislation will be disappointed, as one of their motives was to make it easier to personally punish an individual or individuals following the death of a loved one. This was their main motivator and this legislation does not make this desire more achievable.

The reality is that this legislation is aimed to fill a current gap in the law. The HSE state that “Following a successful prosecution, the courts will decide what penalty to impose, if any. As well as fines the courts also have the power to imprison offenders for certain health and safety breaches. To date five people have been sent to prison for health and safety offences since January 1996; none in the last four years. HSE believes that the current general level of fines does not properly reflect the seriousness of health and safety offences. However, it is up to the courts to decide appropriate fines.” The question has to be should existing legislation be beefed up or new legislation brought in.

The latter is the choice and it appears that the draft Corporate Manslaughter bill adds nothing to this process with a more sensible and easier process to raise the penalties for Health and Safety offences rather than introduce duplicitive legislation. Does it matter if a firm is fined and prosecuted £40,000 under Health and Safety legislation or this new Corporate Manslaughter legislation?

Indeed, with a prison sentence available under Health and Safety legislation it can be argued that if a death has happened then a stricter penalty will be available under existing H & S legislation than the new bill. There is no criminal record to any individual and no professional disqualification with everything being hidden by the “corporation” under a Corporate Manslaughter offence.

I am also concerned that such legislation may not address the issue of foreign firms operating within the UK where a non English/Welsh firm may be found guilty, possibly in their absence, and where it is impossible to find a foreign based “directing mind” to pursue extradition and a prosecution in our courts.

The prime case of this where an accident involving a foreign company comes to mind is the accident at Ramsgate, Kent, in September 1994 where a walkway fell 30ft while passengers were boarding a ferry. The severest penalties of £750,000 and £250,000 were on two Swedish companies, Fartygsentreprenader AB (FEAB) and Fartygskonstruktioner AB, (FKAB) whose “gross design defects” were the main cause of the tragedy. They were also ordered to pay £251,500 costs. However there was doubt about whether the money has ever been recovered as the firms did not attend the trial and there is no mechanism in place to force them to pay. It was basically not possible to identify a directing mind as sometimes the serious UK official can have sufficient authority to put in place appropriate actions.

I notice that Crown Immunity has been lifted from certain government departments and for certain strategic public policy decisions which could be considered core public functions. However there may be confusion regarding its application within Local Government and a possible conflict between this retained immunity and 36 and 37 of the Health and Safety at Work Act etc.1974 where members do have explicit responsibilities for any outcomes arising out of their decisions.

I welcome the introduction of “sanctions” where there is the option of sanctions, for example local authorities, where there is not the profit motivation for cutting corners. Fining a council only penalises the Council tax payer and feel that this should be extended to other areas of existing health and safety legislation where local authorities do receive fines for breaches of H&S legislation. Is it right that the council tax payer should pay for mistakes by individual officers (I question whether this use of council tax payers money has actually been fully tested in law.)

In summary I do feel that:

(i) this new legislation does not address the key issue of bringing a responsible person to trial which is what organisations such as the CCA and the TUC have been asking for;

(ii) it adds little in practical terms to existing health and safety legislation and in many cases is inferior;

(iii) it introduces the provision of sanctions which should be extended to existing health and safety legislation such as enforcement notices with imprisonment amongst the sanctions then levied against individuals who fail to implement such sanctions;

(iv) foreign organisations may not be made accountable, something becoming increasingly more common due to globalisation;

(v) consideration should be given to revising the provisions of crown immunity for what would be prosecutions under Health and Safety Legislation; and
(vi) consideration should be made to combine this new bill with the existing Health and Safety at Work Act with the current “Gross Negligent Manslaughter” remaining for existing serious offences when individual punishment is sought.

I believe however that it is more likely that the Bill is a knee jerk reaction to recent high profile rail disasters and is for political reasons rather than practical reasons.

94. Memorandum submitted by the Royal Academy of Engineering

INTRODUCTION

The Royal Academy of Engineering is pleased to respond to the Government’s draft Corporate Manslaughter Bill. Within the draft Bill are several areas of particular relevance to Fellows of The Academy which have been highlighted. The Academy’s response is given below.

On the whole, the draft Bill was well received by The Academy. The majority of those who responded felt that the draft Bill was an improvement on existing legislation and that any corporation which already takes health and safety matters seriously should have little to fear from it. Some strong opinions were expressed that corporate manslaughter cases should be brought against the body corporate and not individuals, as should any penalties.

There were however some individuals who were unsure as to the need for such legislation. The objections raised covered two main points:

Firstly, there is already extensive legislation governing health and safety in British industry and it was suggested that this draft Bill is simply an attempt to pander to public sentiment. Any attempt to change the law in this area should involve a more wholesale review of all health and safety legislation with a greater emphasis on education and personal responsibility rather than the allocation of blame.

Secondly, this draft Bill will have little or no effect as any situation where it might apply will already be covered by existing health and safety legislation. However, this may not be the case if the fines imposed were significantly higher than those imposed due to a breach of the Health and Safety at Work Act. For this reason it was felt that it would be useful if the Government were to produce draft sentencing guidelines for the draft Bill.

The need to include the second sentence of section 4.3 was questioned as it is a fundamental tenet of the English criminal justice system that underlying facts should always be a question for the jury and not for the judge. For a judge to rule on underlying facts relating to the duty of care when they inevitably consist wholly or partly on the facts of the case before the court could potentially deny the defendant some of the basic human rights.

COMMENTS ON SPECIFIC QUESTIONS

Sections 25–31—Management Failure by Senior Managers

The heart of the new offence lies in the requirement for a management failure on the part of its senior managers. The definition of a senior manager is drawn to capture only those who play a role in making management decisions about, or actually managing, the activities of the organisation as a whole or a substantial part of it . . . The definition then requires the person to play a “significant” role . . . The term “significant” is intended to capture those whose role in the relevant management activity is decisive or influential, rather than playing a minor or supporting role . . . What amounts to a “substantial” part of an organisation’s activities will be important in determining the level of management responsibility engaging the new offence. This will depend on the scale of the organisation’s activities overall . . . We look forward to receiving comments on this key aspect of our proposals. We would in particular welcome views on whether the proposals for defining a senior manager, in terms of the management of the whole or a substantial part of the organisation’s activities and playing a significant role in such management responsibilities, as illustrated above, strike the right balance.

The aim of such a Bill should be to embrace both those who define the company’s policy and those who have to ensure that it is followed ie those playing a “significant role”. The definition of a senior manager in the draft Bill does, on the whole, strike the right balance. There is however some concern that difficulties could arise in certain situations. For example, in the case that a single, maverick senior manager is at fault it is unclear as to whether it would then be the individual or the organisation that would be liable.

It is possible that an individual may have a directing role within a company but not be formally recognised as such. Hence, the seniority of the individual in the organisation was raised in questioning the concept of a “significant role” in the management of the organisation. It was argued that the correct test should be
aligned to the concept of directorship and of de facto or “shadow director”, being an individual with whose instructions or directions the directors of a company are accustomed to act, as laid out in the Companies Act 1985 S741(2).

Overall the Draft Bill rightly seeks to lay the blame with senior management but when the failure occurs at a relatively junior level it may be difficult to prove this in a criminal court.

Sections 32 and 33—Gross Breach and Statutory Criteria

The new offence is targeted at the most serious management failings that warrant application of a serious criminal offence. It is not our intention to catch companies or others making proper efforts to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation but appropriate standards not quite met. The proposals do not seek to make every breach of a company’s common law and statutory duties to ensure health and safety liable for prosecution under the new offence. The offence is to be reserved for cases of gross negligence, where this sort of serious criminal sanction is appropriate. The new offence will therefore require the same sort of high threshold that the law of gross negligence manslaughter currently requires; in other words, a gross failure that causes death. We have adopted the Law Commission’s proposal to define this in terms of conduct that falls far below what can reasonably be expected in the circumstances.

A number of respondents to the consultation exercise in 2000 were concerned that the term “falling far below” was insufficiently clear and that further clarification or guidance was needed in respect of this. The draft Bill therefore provides a range of statutory criteria providing a clearer framework for assessing an organisation’s culpability. These are not exclusive and would not prevent the jury taking account of other matters they considered relevant. We are very much interested in further debate on whether the criteria proposed are appropriate or whether further or different criteria would be helpful.

The terms “gross failure” and “falls far below what can reasonably be expected” are both considered to be sufficiently adequate. Although they are somewhat subjective, the consensus of opinion is that they are already well understood and that any remaining uncertainty will be clarified by case law.

The range of statutory criteria is also felt to be adequate and that any attempt to write exhaustive criteria would not be comprehensive and may lead to technical acquittals, although some definition of best practice, by sector, could prove useful. It was also thought important that there should be a focus on demonstrating that appropriate processes are in place to manage Health and Safety issues.

Section 37—Corporations

The Government’s consultation paper in 2000 invited comments on whether action should be possible against parent or other group companies if it could be shown that their own management failures were a cause of the death concerned. A large majority of respondents agreed with this proposal, but in most cases on the basis that the parent company should only be liable where their own management failings had been a direct cause of death. Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death.

The proposal to make a parent company liable to prosecution is, on the whole, acceptable. If the parent company ignores the behaviour of a subsidiary, or even pressures it to cut corners, the parent company is as much the cause as if it had been the senior manager. There are, however, two main concerns as regards this section of the draft Bill.

Firstly, that the parent company only be held liable when they are “directly” to blame for a cause of death. This distinction is already in the Bill but must be emphasised. It is important that the management of any subsidiary company are aware that they themselves have a duty of care to their employees and clients and hence may be liable to prosecution.

Secondly, that this clause should not be used merely to access the funds of the parent company or allow “double recovery”.

Sections 38–40—The Crown

The Government recognises the need for it to be clearly accountable where management failings on its part lead to death. There will therefore be no general Crown immunity providing exemption from prosecution. However . . . it is important that the ability of the Armed Forces to carry out, and train for, combat and other warlike operations is not undermined. The law already recognises that the public interest is best served by the Armed Forces being immune from legal action arising out of combat and other similar situations and from preparation for these, and this is recognised in the offence. We also consider it important that the effectiveness of training in conditions that simulate combat and similar circumstances should not be undermined and these too are not covered by the offence. However, the offence would otherwise apply to the Armed Forces.
The question of whether the Armed Services should be subject to the draft Bill received a variety of responses. Generally it was felt that the draft Bill should not interfere with the Armed Forces' ability to carry out their functions effectively. However, in training situations they should not be allowed to let their health and safety standards fall below what would be reasonably expected of any other body.

For this reason the majority of Fellows considered it appropriate for the Armed Services not to be excluded from the draft Bill when carrying out training exercises as they owed a duty of care to the public in these situations.

A small number of respondents thought that there is already enough legislation in place without further restricting the Armed forces while others felt that specifically excluding the Armed services was unnecessary and that each case could be dealt with on its own merits.

The definition of “exclusively public function” in section 4.4 of the draft Bill seems ambiguous and uncertain. It is thought illogical to argue that these public functions are subject to other legal regimes; the companies who are liable under the draft Bill are also subject to the Health and Safety at Work Act and the common law. Applying the draft Bill to either the Armed Services or public functions such as prisons would not conflict with democratic accountability. The decision to allow activities to be managed in a way that falls far below a reasonable standard and which results in death should be judicable.

Sections 45-46—Punitive Sanctions

The Law Commission in its 1996 report argued that it would not be appropriate for an offence that deliberately stressed the liability of the corporation itself to involve punitive sanctions for individuals. Secondary liability for the new offence should only extend to individuals in circumstances where they were themselves guilty of manslaughter.

In its consultation paper in 2000, the Government expressed concern that without punitive sanctions against company officers, there would be insufficient deterrent force to the new proposals. The paper therefore asked for views on whether individual officers contributing to a management failure should face disqualification. It further sought views on whether imprisonment should be available in proceedings for a separate offence of contributing to a management failing that had caused death, and the sort of sanctions that should be available.

The proposal that the Bill should not pursue new sanctions against individuals is generally supported. The intention begins to duplicate that which already exists under existing law relating to a director failing any aspect of statutory duty. Also, it is felt that if this was the case it may lead to corporations being overly risk adverse and encourage management to conceal the facts.

The Bill is designed to deal with corporate failings and as such should encourage organisations as a whole to put in place the proper procedures and resources to ensure the health and safety of its employees and clients. The Bill should also be primarily concerned with finding out what went wrong in the case of a fatality and preventing future similar failings. Any singling out of an individual within a corporation may simply provide a scapegoat and prevent either of these objectives being fulfilled.

It is however of some concern that the Bill may indirectly lead to individual prosecutions. In the case where a Corporate Manslaughter charge is upheld, this will clearly provide strong evidence for action against the individual senior managers under Section 7 of the Health and Safety at Work Act.

Section 57—Investigation and Prosecution

The consultation paper in 2000 invited views on whether health and safety enforcing authorities in England and Wales should be given powers to investigate and prosecute the new offence, in addition to the police and Crown Prosecution Service. This attracted a range of comment, and little consensus of opinion.

As regards investigation and prosecution there is some conflict of opinion. The majority of Fellows believe, some strongly, that the HSE and police should be responsible for investigation and that prosecution of any offences should be handled by the CPS. This will leave the HSE free to concentrate on improving health and safety standards within industry and public life rather than getting involved in individual prosecutions. Others believe that, given the potentially complex nature of the offence, the HSE enforcing agencies should have authority as they have more expertise in this area that the CPS or the police.

Although there is some discrepancy in the views of Fellows on this question it is clear that the final Bill should be clear and consistent on this matter in order to remove any conflict of interest between the relevant bodies.

Section 62—Costs

...we have identified costs of some £14.5 million to industry. A 1% increase in compliance with health and safety measures would provide some £200–300 million in savings in the costs associated with workplace injuries and death. We will continue to develop the RIA (regulatory impact assessment) in the light of comments on the draft Bill and would welcome further information from respondents on potential costs.
The question of costs was deemed relatively unimportant by most respondents. On the whole it was felt that any reasonably competent company should already have sufficient health and safety measures in place and hence not incur any further costs.

If further regulation is deemed necessary then efforts should be made to mitigate the effect by simplifying and removing unnecessary regulation.

95. Memorandum submitted by Bluefinger Limited

With regard to this draft legislation. I have a particular interest in the technology which allows vehicle owners to monitor the way that those vehicles are being used. Data such as position, speed, mpg, driver hours can be monitored and reported back in almost real time to a company’s headquarters. It is therefore perfectly feasible to monitor driver behaviour from a health and safety point of view.

I would be interested to know how either of the following scenarios would be affected by this proposed legislation.

(1) A transport (haulage) company has a number of HGV drivers on the road. Notwithstanding the availability of technology it fails to monitor how those drivers are driving the vehicles. There is a fatal accident caused by excessive speed. Would this constitute corporate manslaughter?

(2) A pharmaceutical company with a number of reps on the road routinely schedules them to make more calls in a day than they can safely achieve with due observation to speed limits, driver fatigue etc. Trying to make time a rep is involve in a crash in which someone else is killed. Does the company’s duty of care extend to that other person?

I would be interested to hear from you on this. If there is any information that you would like on how technology may be used to prevent these types of accident I would be pleased to provide it to the Parliamentary Committees considering the legislation.

17 June 2005

96. Memorandum submitted by JRB Risk Identification, Assessment and Control Services

The purpose of this note is to thank the team for their major contribution to this important debate which I am aware has attracted a number of responses.

As a professional Health and Safety Practitioner since 1961, part of my task in a wide range of organisations, in both the public and private sectors, has been to provide managers (all levels from the Board to first line supervision) with an understanding of the role of health and safety legislation as an aid to setting standards and in the prevention of accidents and ill-health at work.

Over the years this has involved ensuring an understanding of the link between some of the absolute requirements as previously contained in the Factories Act 1961 and, for example, the move from the implicit requirements of the Health and Safety at Work Act 1974 to the more explicit requirements of the Management Regulation 1999 and other relevant statutory provisions. In addition, managers were made aware of the Common Law Duty of Care and the fact that the standard of care is based on what would be regarded as reasonable under the circumstances. However, in practice it was stressed that the court will take account of:

— The magnitude of the risk.
— The practical possibilities.
— The general practice of competent persons.

Clearly today the general practice of Employers (via their management teams/ competent persons) includes having in place an effective Health and Safety Management System which in turn will provide a clear link between each employers:

— General Statement of Health and Safety Policy.
— Accident Prevention Programme.
— Competent Advice (Professional Support Services).

A key element in the accident prevention programme will be the standards which are developed, based on suitable and sufficient assessment of risk. Also the controls which include compliance with relevant statutory provisions and approved codes of practice etc.
I make the above points because this is the framework against which the Health and Safety Executive and the Courts will make a judgment about offenses under the Health and Safety at Work Act 1974 and/or other relevant statutory provisions. Accordingly, I fully support the concept that the new offence will complement and not replace prosecutions under health and safety legislation. Likewise, I fully support the message that organisations who have effective health and safety management systems in place and being monitored have nothing to fear from this specific offence. However, the fact that the offence is available may add a further driver to the cause of accident prevention and as illustrated in the consultation papers will provide justice for victims’ families in a wider range of cases than at present.

While talking about the consultation papers can I return to my main reason for sending this note which is to congratulate the team on a comprehensive set of papers which were easy to read and understand.

The press releases and my own involvement as a member of RoSPA’s National Occupational Safety and Health Committee confirms that there will be many points of detail for the team to consider and resolve. However, having been involved in the investigation of several fatal/major injury accidents, including deaths associated with Legionnaires’ Disease; some of which involved the prosecution of the employer and individual managers, I can fully appreciate the potential impact of this new offence. Thus, even if there are a low number of prosecutions in any one year my experience is that it will help provide a positive influence on employers to establish and maintain effective health and safety management systems.

My experience as illustrated on the attached summary confirms the need for the employer base line to be as wide as possible and for Government Departments and Executive Agencies to be exemplars of best practice.

I appreciate that the new offence relates to England and Wales and that there will be a separate consultation in Scotland where I am currently based.

16 June 2005

97. Memorandum submitted by Warwickshire County Council

The Council acknowledges the difficulties with the existing common law framework for corporate manslaughter which requires an individual with a “directing mind” to be found guilty of gross negligence manslaughter before the company can be convicted. The Council can therefore understand why the Government wishes to move away from this position which potentially avoids large companies with complex management structures from being prosecuted due to the absence of an individual at the very top of the company who can be said to embody the company in his/her actions and decisions.

The Council welcomes the proposal that the new offence would not apply to deaths resulting from public policy decisions nor would it apply in cases where an organisation is exercising an exclusively public function.

Dealing with the specific requests for views contained in the consultation paper:

(i) Management failure by senior managers

Under the new proposals, for a company to be prosecuted there needs to be a management failure by the organisation’s senior managers such that only failings where the corporation as a whole has inadequate practices or systems are targeted. The Council feels that the definitions are appropriate.

(ii) Gross breach and statutory criteria

The Council generally welcomes the range of statutory criteria for providing a clearer framework for assessing an organisations' culpability. However, the Council is concerned that clauses 3(2)(b)(i) and (ii) will have the effect of imputing knowledge to its senior managers, of which they might ordinarily be unaware and could not be expected to be aware (for example, an operational decision taken under appropriate delegated authority by a third tier manager to terminate a maintenance contract). Any prosecution of the organisation would of course have a serious effect on the reputation of its senior managers. With this in mind, the Council is concerned that successful prosecutions can be brought only where there have been truly grossly negligent corporate failings of which the organisation’s senior managers were aware and failed to address.

The Council welcomes the provision at clause 3(4) of the Bill (entitling the jury to have regard to any other relevant matters) but feels that either greater clarity in the drafting or further guidance is required around the meaning of clause 3(2)(b)(iii) (“sought to cause the organisation to profit from that failure”).

(iii) Unincorporated Bodies

The Council agrees that the Bill should not apply to unincorporated bodies and is interested to know what proposals are intended for Police Forces who under the provisions of the draft Bill would be outside the scope of the offence.
(iv) Individuals

The Council supports the Government’s proposal that the new offence should focus on the liability of the corporation and should not include punitive sanctions for individuals, nor provide secondary liability to individuals.

(v) Sanctions

The Council supports the proposals in the draft Bill which provide for Crown Bodies to be liable to a financial penalty if found guilty of an offence. Whilst there is an argument that this involves recycling of public money, this is not necessarily the case and individual Government Departments may be more aware of their corporate responsibilities if they were subject to potential financial penalties.

As a final comment, the Council’s general view is that there also needs to be a corresponding review of the gross negligence manslaughter provisions in so far as they affect individuals. There is a wider issue as to whether “third tier” council managers should be properly held liable for common law manslaughter offences.

24 June 2005

---

98. Memorandum submitted by EEF—The Manufacturers’ Organisation

About Us

EEF, the manufacturers’ organisation, has a membership of 6,000 manufacturing, engineering and technology-based businesses and represents the interests of manufacturing at all levels of government. Comprising 11 regional Associations, the Engineering Construction Industries Association (ECIA) and UK Steel, EEF is one of the UK’s leading providers of business services in health, safety and environment, employment relations and employment law, manufacturing performance, education, training and skills.

Executive Summary

EEF welcome the draft Bill on Corporate Manslaughter as the culmination of a protracted period of work. We support the need to modify the law so that it is easier to hold organisations accountable where gross negligence results in a fatality. We also support the assertion that a prosecution under this Bill would only be appropriate in the most serious of cases, and that it is intended to supplement rather than replace actions under established health and safety legislation. Consequently the proposed legislation is likely only to give rise to a handful of cases each year.

The explicit exclusion of individual liability is a key strength of the draft Bill, focusing attention on the corporate nature of the offence and so allowing action only against the legal entity. This addresses a key weakness of existing legislation namely the so called identification principle. Additionally the commentary to the draft Bill suggests that corporate liability should not result where an individual has intervened in the chain of events in an extraordinary fashion. This provision should be formalised within text of the Bill.

EEF members do have a number of concerns associated with the detail of the draft Bill, namely:

— The limitations of the definition of a Senior Manager.
— The effectiveness of the statutory criteria for evaluation of the breach of a duty of care.
— Reference to guidance published by the enforcing authority as a benchmark for acceptable performance.
— Inclusion of provision for remedial orders.

The application of the draft Bill to Crown Bodies is welcome, particularly as this will ensure a level playing field with private sector organisations engaged in PFI initiatives and the delivery of statutory services. However this application should extend to cover all crown bodies, including quangos.

Financial penalties are entirely appropriate for this offence, although the Bill should include some definition around the scale of these. Our members feel that it is appropriate for crown bodies and the private sector to be treated equally in terms of sentencing.

EEF members feel that it will be essential to ensure that a code of practice document is produced to provide an appropriate level of commentary and definition of this legislation for the business community.
**INTRODUCTION**

EEF have participated actively in this consultation process and welcome the publication of this Draft Bill as the culmination of previous efforts.

In our response to the previous consultation document we expressed our support for a change in the law which will make it easier to hold undertakings properly accountable for deaths in the workplace, which arise as a result of gross negligence. At the time we raised a number of concerns related to specific aspects of the Government’s proposals, and we are pleased to see that the new draft Bill has addressed some of these.

We welcome assurances in the commentary to the draft Bill that this offence is intended to cover only the most serious of cases. However, there is a fine line between implementing legislation which will make it easier to hold organisations to account and ensuring that the provisions of the legislation are such that it will apply in only the most serious of cases. If this finely balanced position is to be achieved, the definitions and the tests set out in the legislation must be specific and precise, and we do not feel that the draft Bill achieves this objective.

**Corporate Liability**

1. EEF members welcome the exclusion of individual liability from this draft Bill and the consequent application of the offence only to the corporate entity. This is a key development in the evolution of the legislation and a primary strength of the draft Bill. We acknowledge that this clause is not universally popular, but urge the Government to remain firm in its position. The “corporate” nature of this Legislation can only be maintained through the application of accountability to the legal entity of the organisation, without specific offences for individuals or officers. There are existing provisions for individuals to be held to account, where appropriate, through the wider offence of Gross Negligence Manslaughter.

**Management Failure**

2. The principle that the offence should be linked to the way in which an organisation’s activities are managed or organised, is one which we support. EEF advocate good, proactive management of health and safety as an essential element of a successful business. This concept is widely accepted in the business community. It will, however, be essential to ensure that this test does not focus merely on the way in which processes are documented, but also on the custom and practice of the organisation. Investigations must take account of the whole reality of each situation beyond whatever might be recorded in systems or procedures. This will ensure that culpable organisations cannot hide behind their paperwork, but on the other hand will ensure that organisations are not deterred from producing written procedures by any perception of increased liability.

3. It will be necessary to ensure that cases can only be brought against an organisation where there has been a fundamental failure of the management system, and not where an individual manager “on an excursion of their own” has operated outside of the established management system. The commentary to the draft Bill suggests that corporate liability should not result where an individual has intervened in the chain of events in an extraordinary fashion. This provision should be formalised within the Bill.

**Senior Management**

4. Responsibility for such a fundamental failure should lie at a senior level within a business. However the definition of a Senior Manager set out in the draft Bill focuses at a very high and strategic level of management, making decisions about how the whole or a substantial part of the organisations activities are managed or organised, or actually managing or organising the whole or a substantial part of those activities.

5. Modern corporate structures are typically flat so there are very few people operating at such a level. Beneath these strategic individuals in the structure there can be a large number of other managers with decisive responsibility for a smaller section of the business. In a situation like this, where targets are set at strategic level, but implementation systems are decided locally, the local management team could be in a position to commit an offence that ought to be covered by this legislation. However they would be unlikely to be covered by the definition as set out in the draft Bill. This definition should be reviewed to ensure that it encompasses all managers who have the freedom to act in a decisive manner within an organisation, however we are anxious to avoid devolution of accountability in highly systemised businesses where all aspects of operation are decided at a strategic level.

**Gross Breach**

6. In our response to the previous consultation, we expressed concern about the interpretation of the test “conduct falling far below what can reasonably be expected”. The draft Bill introduces a set of statutory criteria which, whilst not tests in themselves, set out areas which should be considered by the Jury in assessing an organisation’s conduct. The criteria refer to health and safety legislation and guidance issued by the enforcing authorities as a measure of performance. We feel that this represents a significant change.
in status as most health and safety guidance documents currently have no legal standing, and employers are under no obligation to follow them. Consequently we feel that these criteria should refer only to compliance with health and safety legislation and Approved Codes of Practice.

7. The criteria will require juries to consider whether senior managers knew or ought to have known that the organisation was failing to comply with legislation, whether they knew or ought to have known that such a failure could result in death or serious injury, and whether they sought to cause the organisation to profit from that failure.

8. This seems to move away from consideration of “negligence”, which would imply a failure to effectively ensure health and safety, into the realms of a deliberate and calculated disregard for life in favour of material gain. We do not believe that this meets the intent of the draft Bill, and would therefore suggest that the Government consider adopting instead the defining criteria proposed by the Law Commission in earlier consultation, and direct the jury to consider:

— Likelihood and possible extent of harm.
— Cost and practicability of taking steps to eliminate or reduce the risk of harm.

9. We believe that it would be more meaningful and effective to assess the “reasonableness” of and organisation’s conduct in this way, by considering the likelihood of harm in line with the principles of risk assessment, the practicability of addressing the risk in line with health and safety legislation, then benchmarking actions against compliance with legislation and established good practice.

Duty of Care

10. We agree that part of the test should involve breach of an established duty of care owed by the organisation to the deceased and we feel that the circumstances of such a duty, as set out in the draft Bill are appropriate. We also support the requirement in the Bill for the Judge to define this relationship for the jury as it is defined in law.

11. The commentary to the draft Bill suggests that holding or parent companies may also be subject to proceedings under this legislation. However we feel that it may be difficult to establish duty of care in this situation and would welcome further information and guidance on this matter.

Application

12. We support the application of this legislation to all Corporations, however they are incorporated. We also welcome the position on the Crown, and agree that it is wholly appropriate for the Bill to apply to crown bodies as if they were incorporated as this creates a level playing field for public and private sector organisations.

13. We accept that certain public policy functions carried out by, or on behalf of, the Crown are effectively regulated under statute or Royal prerogative, and will therefore be outside the scope of the legislation. We do however have some concerns about the schedule to the regulations which lists a limited number of named crown bodies which would be subject to the legislation. The draft Bill should apply to all crown bodies, including quangos, and any list should be for indicative purposes only and not exhaustive, as there are regular reorganisations of such bodies and any exhaustive list would quickly become out of date. We see no reason why this should not be the case and urge the Government to demonstrate its commitment to the accountability of crown bodies by ensuring that the legislation is universally applicable.

14. We welcome the inclusion of a clause in the draft Bill which requires the consent of the Director of Public Prosecutions before the instigation of any proceedings under the draft Bill. We feel that this will ensure that the legislation cannot be used inadvisedly when the defined tests are unlikely to be met, and that proceedings can only be brought when there is a real possibility of securing a conviction. Further to this point, we understand that in cases where three or more years have elapsed between the causatory management failure and the death, proceedings could only be brought with the consent of the Attorney General and would be subject to a public interest test. We feel that this is a sensible control to impose on cases where there is a long latency period, such as those involving occupational ill health.

Remediation

15. In our response to the previous consultation we expressed our concern over the inclusion of a remediation clause with this legislation. We are concerned to see that these proposals are largely unmodified in the draft Bill.

16. It can take many months to bring complex proceedings against a corporate entity to court. In our opinion the situations which led to the breach that forms the basis of the case should be dealt with expeditiously as soon as they have been identified, in order to prevent any potential reoccurrence and ensure effective management of health and safety.
17. The draft Bill identifies that HSE will work with the Police on any investigation which might give rise to proceedings under this Legislation. HSE Inspectors have a range of enforcement powers open to them, such as improvement and prohibition notices, and we feel that these should be utilised to address non-compliant situations long before proceedings are brought to court.

18. If this is the case then the provisions for remediation within the draft Bill would represent needless duplication, and we therefore recommend that these be removed in line with the principles of better regulation. If however the provision is to remain in the Bill, then we would urge the Government to draw up guidance for sentencing. This should ensure that orders made under the provision are proportionate, relevant, practicable and in harmony with the other obligations and responsibilities placed on an organisation.

CONCLUSIONS

19. We feel that this draft Bill represents a welcome development in the process of legislation, however there are a number of issues which we feel should be addressed before this draft becomes law.

20. This is a complex area of law which is of concern to business organisations, and we feel that it would be essential to supplement legislation with a Code of Practice document that would set out the steps necessary to mitigate liability in a responsible manner. We feel that this would provide great reassurance to the majority of organisations which do operate their businesses in a responsible fashion and take all reasonable steps to ensure the health and safety of anyone likely to be affected by their undertaking. It would also limit any potential for unscrupulous exploitation of business concern for material gain by consultants or service providers.

21. EEF members accept that there is a need to change the law in order to effectively hold organisations to account where fatalities occur as a result of workplace activity, however they are keen to ensure that such legislation does not impose additional duties, burdens or concerns on responsible businesses. We feel that this draft Bill has gone a long way to addressing these points, but would urge the Government to give further consideration to the areas outlined above before enacting the Bill.

99. Memorandum submitted by the National Blood Authority

As a large and complex national NHS organisation, the Government’s draft Bill has many implications for the way we manage and deliver our services and products. The way the draft Bill currently stands, we feel that our current Governance and Assurance arrangements places us in a strong position to deal with this new Bill once passed into legislation.

However, one area the NBA would wish to seek clarification on, is the impact of management failure leading to the fatal transmission of disease. The NBA, which screens blood for some viruses, but not others, and therefore runs the risk (no matter how small) of transmitting infection.

Decisions on screening are taken on the basis of independent expert advice, taking account a number of factors including cost-benefit and the impact of screening on the blood supply. The NBA is also subject to Secretary of State’s direction, which specify the screening tests to be undertaken.

The NBA welcomes the provisions of paragraph 4(2) of the draft Bill. However we have concerns because of the way decisions about testing are made. We act on expert advice and on direction from the Secretary of State. We also need to balance our books through negotiation of the prices of our products including blood.

Because the decision may be out of our hands, we would ask you please to include after the words “in respect of the decision” in that paragraph the words “by that public authority or by or in conjunction with another public authority”.

It is essential to the NBA that in carrying out our normal activities and in making decisions in relation to the supply and testing of blood, tissues and blood products to meet the needs of patients, we are not vulnerable to prosecution.

100. Memorandum submitted by the Road Haulage Association Ltd

The Road Haulage Association (RHA) is the primary trade association representing the hire-or-reward sector of the UK road freight transport industry. The Association comprises 10,000 member companies, operating between them 90,000-plus commercial vehicles and employing some 250,000 staff. Members range from single vehicle owner-drivers right through to multi-national fleet operators.

As an organisation, the RHA is not expert in corporate law and thus we do not feel qualified to offer detailed comments on the appropriateness (or otherwise) of the proposals. However, there are a few more general comments that we would like to make:
— The RHA endorses high standards of corporate responsibility and welcomes efforts to address any problems with the current law (notably the need to identify a “directing mind” within the company before a prosecution for manslaughter is possible). The vast majority of road haulage firms are SMEs where it is likely that, if necessary, identification of a directing mind would be possible. Thus moves that ensure that large corporations could be held liable in the same way as is possible for smaller enterprises will improve fairness;

— The road haulage industry is already subject to an enormous amount of health and safety legislation. The RHA believes therefore that any new offence should focus on existing legislation and not seek to introduce new or more stringent requirements/regulations;

— We welcome the Government’s assurances that the new offence will be targeted at the most serious management failings and is not intended to catch companies or others where proper efforts have been made to comply with the relevant requirements but appropriate standards not quite met;

— Since the new offence is aimed at corporations, we agree with the Government’s proposals that a financial penalty would be the most appropriate form of punishment.

16 June 2005

101. Memorandum submitted by Amicus

Main issues

— Amicus welcomes the draft Corporate Manslaughter Bill.

— The Bill’s coverage is too narrow.

— There should be an additional offence of “unlawful killing”, that would open up the possibility of individual directors or senior managers being held responsible for failures in corporate responsibility. The penalties for such breaches should include imprisonment.

— Individual penalties should include fines, disqualification of Directors, training orders, and community health and safety orders.

— The Bill needs to apply to directors and senior managers, and must cover senior managers who play a major role in the whole, or significant parts, of the organisation.

— We expect to see an increase in corporate manslaughter cases being taken to court, with a significant improvement in the overall management of health and safety.

— It must be clear that the suggested tests in the Bill do not all have to be failed to justify guilt.

— The judgement of whether an organisation “profits” from health and safety failures must involve non-monetary considerations—we favour the use of the word “benefit”.

— The Bill needs to address adequately deaths of contractors, sub-contractors and agency workers.

— The financial penalties for corporate manslaughter need to be considerably higher than current penalties for deaths at work that are taken by the Health and Safety Executive.

— Corporate sentences under the Bill should include corporate probation, corporate community service and negative impact orders.

— The Bill needs to make a clear link to the directors duties guidance, published by the Health and Safety Executive.

— The current guidance on directors duties must be made into a clear legal requirement, and be applied to senior managers as well as directors.

— The Bill should be used as a vehicle to achieve the removal of Crown immunity for all health and safety offences.

— The Bill should be used to increase all health and safety penalties.

Amicus is the UK’s largest manufacturing, technical and skilled persons’ union, with over 1.2 million members in the private and public sectors. Amicus represents members in all parts of UK enterprise and industry. We welcome the opportunity to comment on the proposals for introducing new legislation covering Corporate Manslaughter.

In making these written comments, we would welcome the opportunity to make oral representations, in due course, to the Pre-legislative Scrutiny Committee.

Amicus is seriously concerned about the past failures of the Government to enact satisfactory legislation on corporate manslaughter and the failure of enforcement agencies to pursue prison sentences for company directors whose companies kill or seriously injure workers. We welcome, therefore, the publication of a draft Bill to reform corporate manslaughter legislation. However we are concerned that the current coverage is too narrow.

The Committee also recommended that the Government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.

Amicus strongly supports a new offence that targets very serious failings in the strategic management of a company’s activities that have resulted in death. Like the Government, Amicus believes the corporate manslaughter law must focus on wider management failings within an organisation. However, we also believe that corporate manslaughter legislation must ensure that one or more directors and senior managers could be held individually responsible for workplace deaths if they are found to be responsible for those management failings. We are seeking therefore an additional offence of “unlawful killing”, that would open up the possibility of individual responsibility arising from failures in corporate responsibility. The penalties for such breaches should include imprisonment.

**REGULATORY IMPACT**

We have reviewed the Home Office Regulatory Impact Assessment. We accept that the problems inherent in the current corporate manslaughter laws have been highlighted by major disasters, such as the Herald of Free Enterprise ferry disaster in 1987 and the Southall rail disaster in 1997; where prosecutions failed in both cases. However, the reality of most deaths in the workplace, which we also expect these laws to deal with, is that they are isolated, yet tragic, events. The organisations involved are often smaller that those involved in the high profile deaths of members of the public, but nonetheless, have proved effectively immune from charges of manslaughter at an individual or corporate level.

We are alarmed that the RIA only envisages five cases a year under the new Corporate Manslaughter provisions. We believe that if the new provisions are correctly framed to have the impact we desire, we could envisage more cases than this. We also believe that on the positive side of the equation, the effect of such provisions would be to drastically improve, at a senior level, the management of health and safety in many organisations, thereby leading to significant improvement in safety and a reduction in work-related ill-health.

We also believe that such changes will significantly improve the climate for the effective operation of trade union appointed safety representatives, key players in improving safety in the workplace.

**SCOPE OF THE OFFENCE**

The proposed new legislation will make it possible to prosecute an organisation if there is a gross breach of their duty of care and that a senior manager of the organisation knew, or ought to have known, about this breach. Amicus supports the draft Bill on this point. To confine the awareness to actual directors would be too restrictive; however, we also think that to extend it to those below senior manager level would undermine the focus of the Bill, which is on corporate, senior management failings.

We are aware, for example, of many senior managers who should be within the scope of this law who are not directors. But they could be members of senior management teams, or could be senior managers in roles involving major control of a company’s activities, or major control of a production site, or other part of an organisation.

We are concerned that some organisations are not covered effectively by the Bill. Take, for example, an organisation employing 5,000 people on 10 sites. There is a board of directors, but each site has an operating manager, who is not a director but is responsible for everything on that site. We understand that the current definition for director or senior manager would not class the operating manager as a senior manager, as that person would only be responsible for 10% of the organisation.

We are aware that variations on the situation described above are very common throughout industry. Therefore, either operating managers of the type described must be classed as senior managers, or, it must be made clear in the Bill that senior managers do have responsibility for the actions of these managers and will be held liable for their failings. It needs to be stated explicitly in the definition that senior managers must take the necessary action to assume, and meet, this responsibility.

Clause 3(2)(b) of the Bill needs to make it clear that any one of the three tests needs to be met rather than all three. We are also concerned that the third test, which requires the prosecution to show that an organisation sought to profit from a failure, could lead to action being less likely against public and non-profit bodies. Instead we would wish to see the word “benefit” used instead of “profit”.

Amicus believes that the new law should include additional considerations concerning the proper conduct of directors and senior managers in relation to health and safety.

Directors and senior managers should be compelled to show that, where they did not meet the requirement themselves:
(1) they employed personnel properly qualified to analyse, direct and execute those activities in their business that give rise to risks; and

(2) these personnel were properly used and consulted.

Amicus welcomes the fact that the proposed offence will cover deaths to the public that result from the work process, as well as deaths in the workplace. However, clause 3(3) needs to make it clear that other health and safety legislation not made under the Health and Safety at Work etc Act, such as the Working Time Regulations, is also covered.

Duty of Care

The corporate manslaughter offence is based on the duty of care held by an employer, an occupier, a supplier of goods or services, or where there are relevant commercial activities. Amicus is concerned that the current definitions and framing of the Bill do not deal adequately with contractors, sub-contractors or agency workers.

The Bill must be absolutely clear where duties lie, and where is the target, or targets, of any corporate offence. For example, it is not clear from the Bill who might be liable in the event of the death of a subcontractor on a multi-contractor site. Nor does the Bill seem to address adequately the position of an agency worker killed at a workplace where the occupier is not the agency worker’s employer.

Coverage

The draft Bill applies to “corporations” and government departments, not only as employers but also as suppliers. There is the question of whether it should apply to “un-incorporated” bodies such as partnerships. While recognising the difficulties, Amicus would like the offence to be as broad as possible.

The draft Bill has ruled out any jurisdiction over the operations of companies which are registered in the UK if a fatality occurs abroad. Amicus supports the view that there are some circumstances where the legislation should apply—in particular where a worker is killed overseas because of the failure of a UK based corporation to undertake a suitable risk assessment. We would also ask that consideration be given to extending the provisions to British dependencies which are often used to register merchant shipping.

Amicus is also seeking positive confirmation that the Bill will apply to offshore workplaces, e.g. offshore oil platforms.

Fines

We believe that all current fines coming out of health and safety cases are too low. Recent cases taken by health and safety inspectors, under existing health and safety law, have seen fines in the region of only £100,000, where workers have been killed. No individual manslaughter or corporate manslaughter charges have been brought in these cases. This puts a very low value on loss of life, and many fines have been much lower than this.

These cases and fines vary according to the circumstances, but they can hardly be seen as adequate when a worker has died. So, we take the view that corporate manslaughter fines must be much, much higher. We need to be talking millions of pounds, rather than tens of thousands of pounds. Even a million pound fine may be a relatively small amount to a large organisation. It is worth looking to the financial sector to see what could be expected. The Financial Services Authority can impose fines of up to 10% of the gross turnover of a company. This might be closer to the appropriate level of fines for corporate manslaughter offences.

Another option that should be explored is equity fines. These are aimed at Public Limited Companies (PLCs), requiring the company to create shares up to a particular value in a victims compensation fund. An advantage is that this hits shareholders, something a board of directors will not be keen to do.

We do recognise a problem in fining public companies. What is the point in Government money being paid back to the Government? It is a tricky issue and needs more thought, but it also points to the need for other forms of sentencing.

So, all of this shows us that fines against corporate bodies, companies or organisations are not enough. Corporate fines do not penalise the senior managers who are often responsible for the organisation’s failings.
INDIVIDUAL DIRECTORS AND SENIOR MANAGERS

The draft Bill, as currently presented, will simply allow for an organisation to be fined, although remedial orders will also be able to be imposed. Because a company or public body cannot be sent to prison, the Government is suggesting there are no other alternatives to this. We fundamentally disagree with this point.

The absence of statutory directors’ and senior managers’ duties on health and safety hinders the prevention of accidents, injuries and fatalities and makes it more difficult to secure justice for the victims of health and safety breaches. Only the introduction of statutory health and safety duties on company directors and senior managers, and effective penalties, will ensure that the most senior members of an organisation can be held responsible for health and safety negligence.

We disagree with the view that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. Amicus believes that without punitive sanctions against directors and senior managers there would be insufficient deterrent force to any new proposals.

The Corporate Manslaughter Bill should open up the possibility of action, and sanctions, against individual directors and senior managers, where it can be shown that their actions or inactions contributed directly to the gross failings of the organisation on health and safety. Those legal sanctions must include the possibility of directors or senior managers being sent to prison where their gross failures lead to the death of someone at work.

Amicus believes there should also be a range of potential non-custodial sentences against individuals.

A number of options should be considered, including personal fines, suspension or disqualification of directors, retraining or remedial training orders, and community health and safety service orders against directors or senior managers.

DIRECTORS DUTIES

Furthermore Amicus believes that the Government must also look, as a matter of urgency, at the responsibilities of directors and senior managers with a view to tighter regulation. Criminal liability for management applies not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure. The existing guidance on Director’s Duties on health and safety needs to be reframed as a legal duty, with the clear indication that it applies to directors and senior managers, so that its coverage is in line with that of the Corporate Manslaughter Bill.

SENTENCING ORGANISATIONS

As far as corporate penalties and sentencing are concerned, we think there needs to be more than just large fines. Amicus would like to see the Courts exploring more imaginative, additional penalties. We see these as additional, not as alternatives, to fines.

Unfortunately the Government has given no serious consideration to the best way of sentencing companies and other organisations. The Home Office, for its part, has displayed a total lack of imagination in this area. It might also be recalled that the Government’s “Revitalising Health and Safety” report, published in 2000, committed itself to looking at alternative forms of sentences. As far as we are aware, no work has been done on this.

The only measure identified in the draft Bill is Remedial Orders. Courts already have the power to issue these in relation to health and safety offences, but, as far as we are aware, they have never been used. In practice, we expect health and safety failings to be put right long before companies end up in Court. The Health and Safety Executive generally imposes health and safety improvements through their investigations and interventions under existing health and safety law. So, we are not against remedial orders, but we have some doubts about their practical value.

There are other alternatives that we think might be more effective:

- For organisations we should be considering Corporate Probation. The Court should have the power to place conditions on an organisation. These could include setting periods of time during which the organisation must deliver identified, good health and safety practices. The Court could require companies to employ additional safety advice, or train managers and so on.

- Organisations could also be subject to Corporate Community Service Orders, requiring them to provide health and safety services to workers or to the local community. This would mean putting something back into a community, or to families, or to workers, that have been affected by a workplace death or deaths.

- Another type of order is a Negative Impact Order. This would require a company to pay for prominent advertising informing people that they have been convicted. This is naming, shaming, publicising and then charging! It could be very effective.
GENERAL HEALTH AND SAFETY PENALTIES

Amicus recognises that the issue of penalties relates to all corporate offences, not just Corporate Manslaughter, and would hope that the Government will look at this issue generally. In noting that the Government has committed itself to increasing penalties for health and safety offences, Amicus supports the TUC in asking the Government to consider whether this Bill could be an instrument to achieve that.

CROWN IMMUNITY

It is also important that the new laws apply to everyone, including all public bodies. Amicus welcomes the fact where a government department or agency is responsible for a death at work it is prosecuted. Crown bodies must not be exempt from prosecution where they have caused a death and so we welcome the removal of Crown Immunity.

We hope that this Bill could be used as a vehicle to achieve the removal of Crown Immunity for all health and safety offences.

SPECIFIC AMICUS POINTS ON THE DRAFT BILL CLAUSES

1. The Offence

1(5)

We oppose this clause which explicitly removes the possibility of individuals being held liable under the Bill. We think it is entirely appropriate that where there is clear evidence that an individual senior manager, or managers, has aided, abetted, counselled or procured the offence of corporate manslaughter, there should be the possibility of action against them.

This should include imprisonment, but also such things as disqualification from holding directorships, training orders and community health and safety orders.

2. Senior Manager

This definition needs to be extended to fully cover the meanings given to it in the explanatory notes to the Bill.

It must not be possible to scapegoat less senior managers through denials of responsibility at a higher level. The Bill needs to cover divisional or site managers for example, who have substantial decision making, managing and organising responsibilities. Additionally, or alternatively, it must be made clear that Senior Managers do have responsibility for the actions of these managers and will be held liable for their failings.

It should therefore be stated explicitly in the definition that Senior Managers must take the necessary action to assume, and meet, this responsibility.

3. Gross Breach

3(2)(b) (i) (ii) and (iii)

In clause 3(2)(b) the sub clauses (i) to (iii) need to have the word “or” added at the end of each of them. This is necessary to show that senior managers do not have to fail all of these tests to show failure to comply.

3(2)(b)(iii)

After profit add the words “or benefit in other ways”. This is to address the fact that organisations could benefit in ways that are not purely monetary.

Add an additional new clause 3(2)(c) stating:

“Whether or not senior managers:

(i) employed personnel properly qualified to analyse, direct and execute those activities in their business that give rise to risks; and

(ii) these personnel were properly used and consulted.”

3(2) and 3(3)(b)

Amicus strongly supports the inclusion in these clauses of reference to “guidance” (3(2)) and “any code, guidance, manual or similar publication” (3(3)(b)). This is essential in any judgement of an organisation’s compliance with its health and safety duties, since so much of this is detailed in supporting material to the legislation.
New clause 3(2)(d)

Amicus is seeking an additional clause that makes specific reference to compliance with HSE material on Directors Duties. (At present this is published as guidance, but it should be noted that Amicus is seeking a legal requirement on Directors and Senior Managers, based on the current guidance.)

3(3)

We need to be certain that this clause is worded so that it is clear that other health and safety legislation, such as the Working Time Regulations is covered by this definition.

6. Power to Order Breach etc to be Remedied

Amicus welcomes the provision that a court can make remedial orders to remedy breaches and any other matters.

We are keen to see additional corporate penalties including corporate probation, corporate community service orders and negative impact orders.

10 June 2005

102. Memorandum submitted by the Institution of Civil Engineers

The Institution of Civil Engineers (ICE) is a UK-based international organisation with over 75,000 members ranging from professional civil engineers to students. It is an educational and qualifying body and has charitable status under UK law. Founded in 1818, the ICE has become recognised worldwide for its excellence as a centre of learning, as a qualifying body and as a public voice for the profession.

The Institution welcomes the opportunity to respond to the consultation and submits the following comments.

The ICE Health and Safety Board broadly welcomes the new offence of Corporate Manslaughter. While there is other legislation within the construction Industry, such as the HASWA tackling related issues, these proposals carry significantly more weight. The proposed legislation will also act as a strong tool in reassuring the public that steps are being taken to address corporate manslaughter issues within the Industry.

The need for new Corporate Manslaughter legislation has been questioned in the light of recent successful prosecutions. Yet it is recognized that these have tended to be more prevalent in cases against smaller firms where there is a clearer connection between the director/management and the outcome. The attempt to make companies of all sizes accountable is regarded as positive. However a psychological concern appears to remain that small companies will be left more exposed than larger organizations. Only the outcome of prosecutions after the implementation of this proposed Bill would be able to clarify the situation. The necessary message that “all persons who run a reasonable business, regardless of the size, should have nothing to fear but those who do nothing, do have cause for concern” needs to be supported by successful prosecutions after the implementation of the proposed Bill.

The move away from the “identification” principle in seeking to prosecute a company for manslaughter is welcomed. The requirement within the proposals for there to be gross negligence brought about through management failure by senior managers, and the strategic management of an organization’s activities prior to prosecution, is regarded as positive as it recognizes and encourages the need for a cultural change to health and safety and the associated risk management standards.

However although guidance is given on what constitutes “senior managers” it will ultimately be the courts who decide this definition. Likewise an expanded definition of what constitutes “management failure” would also be welcomed.

Definition is also very important in clarifying the term “Gross Breach” in Clause 3 and particularly in relation to “failure falling far below what could be reasonably expected”. The commentary on pages 35 and 36 is regarded as helpful but an expansion on this would be warmly welcomed.

The inclusion of companies, incorporated bodies and for the first time Government departments and other Crown bodies within the proposals is recognized as creating a more level playing field within the Industry. The principle behind the incorporation of the latter two bodies, Government departments and some Crown bodies, is very much supported.

However the Board would like to reiterate the concerns raised in Point 53 regarding the fining of Crown bodies which, under current proposals, would involve “a financial penalty . . . and organizations found guilty of Corporate Manslaughter would face an unlimited fine. Where the circumstance of the case merit, a fine can be set at a very high level.” While the correct image is being portrayed in the message the practical implementation needs to be re-considered.

30 June 2005
103. Memorandum submitted by Linklaters

1. INTRODUCTION

The law in its current state is clearly in need of reform. It is wrong for an offence of this nature to be capable of enforcement only against the smallest of companies. The “identification principle”—that prosecutions against companies for manslaughter can only succeed where the courts are able to identify a “controlling mind” whose gross negligence caused death—is in need of replacement.

We therefore support in principle the creation of a new offence of corporate killing.

We note that it is the intention that very few prosecutions would be brought each year under the new offence, and that its purpose is to penalise truly egregious instances of corporate failing. However, various provisions in environmental and health and safety regulation have been interpreted much more widely post enactment than was envisaged during the legislative process. Our principal concern with the bill, therefore, is that the test for liability is couched widely enough to permit prosecutions under the proposed offence in very many cases and certainly far more than the five per year which Government anticipates.

This and our other comments are set out in more detail below.

2. DEFINITION OF SENIOR MANAGER

2.1 Nature of “senior manager” role

The proposals intend only to cover those senior managers who play a major role in management decisions about, or actually managing, the activities of an organisation as a whole or a substantial part of it.

For the offence to reflect Government’s aims, this concept should capture the activities of those persons who are engaged with the strategic management of the organisation. We are concerned it is too widely drawn at present to do so. The definition would permit relatively junior levels of management to be treated as senior management.

Clause 2(a) might be recast to reflect more closely the aspirations set out in the consultation paper by referring to “the making of strategic decisions…”

Clause 2(b) is potentially capable of capturing a yet wider group of managers. We imagine the intention is to capture the activities of those with overall management responsibility for the operational performance of a business. In this regard we think the reference to “organising” broadens the group significantly beyond those who could properly be termed “senior managers”. Organisers may be relatively junior, process related personnel. We would delete the reference to organising.

We also think it should be clear that the manager is an employee, officer or director of the defendant organisation.

2.2 “Substantial part” of an organisation

The Government acknowledges that the application of this test will differ between organisations, depending on their size and operations. However, major differences of application, at least between similarly shaped organisations, are not desirable. If, as the Government anticipates, there are few cases brought under this legislation, regulators and juries will find it particularly difficult to determine how to apply this aspect of the test. Further guidance would be useful as to how to apply the test in relation to relatively common corporate structures.

2.3 “Significant role”

This is a key aspect of the test for determining the senior management whose conduct will be assessed against the requirements for the offence, and yet it is not defined. The Government points out in its commentary on the draft bill that this intends to capture those whose role is decisive or influential rather than those who play a minor or supporting role. The Government describes this as a “second threshold” which will need to be overcome to determine management seniority.

We appreciate that this test of significance will be a question for a jury, but some guidance on what constitutes a “significant role” could be usefully included in the bill. Without such guidance we are concerned that this test will be meaningless and that almost any manager could, with the application of hindsight, be construed to have a significant role.

267 A prime example of this is the way in which some local authorities have sought to use Part IIA against lenders, and against waste producers whose waste was sent long ago to landfills which have now been designated as contaminated land.
2.4 Senior Manager definition as a whole

The definition as presently drafted is wide enough to catch a very broad spectrum of managerial activity. In most large commercial organisations, there will be a large number of management positions that could potentially have a significant role of some form on the organisation’s processes. This could encourage a “fishing expedition” approach on the part of regulators, who are likely to come under pressure to prosecute under this new legislation. In relation to organisations with complex and multi-layered management, the CPS could adduce evidence from multiple levels of management and effectively “aggregate” that evidence to derive a gross breach of an applicable duty of care. Although it is clearly contemplated, and correct, that the offence should derive from the failings of those with overall responsibility for the strategy or operations of these organisations (or large parts thereof), any aggregation of failings should be restricted to the level of senior management within the defendant company. The bill appears to bring into the definition persons who would not in ordinary parlance be considered senior managers and hence to aggregate the deficiencies of a large range of persons. This appears to be at odds with the objectives of this legislation, and we think further refinement of these provisions is necessary to ensure fairness of application.

3. Conduct that “Falls Far Below”

It is correct, in our view, that the offence should only capture the most serious workplace failures that lead to fatalities. This reflects the expectation that, though tragic, the majority of workplace deaths are unlikely to derive from management conduct which is so far below that which could reasonably be expected that a prosecution under this legislation is required. More general health and safety legislation would remain applicable to cases involving lesser failure.

The use in the current draft bill of specific guidance for juries as to what amounts to a gross breach is helpful in theory. We are concerned however that there is a real disconnect between the actual test, as set out in clause 3(1), which replicates the common law position in its imposition of a high threshold for liability, and the relatively low threshold set by the guidance under clause 3(2). By requiring that the jury considers, inter alia, the issues outlined in clause 3(2) and by setting requirements under 3(2)(b) in particular that can readily be ticked off, the legislation suggests that if the elements of clause 3(2) are fulfilled, this is sufficient to constitute conduct falling far below what can reasonably be expected. This has the potential significantly to lower the test of gross breach from that which would apply to an individual under the common law.

It is not clear from the draft bill whether it is intended that juries must take into account all three factors listed in clause 3(2)(b) in considering whether an organisation has committed a gross breach. We assume from the wording of the clause that this is the intention and, if so, this should be made clear.

3.1 Failure to comply with any relevant health and safety legislation or guidance

The obligation on juries to consider whether there has been a failure to comply with applicable health and safety legislation is an obvious starting point. It does however raise an issue which can be difficult for organisations to voice publicly. With the increase in regulation in the sphere of health, safety and the environment, the imposition of strict liability in many cases, and the lack of specificity, in some cases, as to what constitutes compliance, it can be very difficult for even the most committed organisation to avoid compliance breaches. Further, the context in which any post incident investigation takes place is very likely to change the assessment as to what constitutes compliant conduct. In practice, therefore, where there has been a fatal accident, it will always be possible to identify a compliance breach. Therefore while this is a necessary test, it is not one which will ever be particularly determinative as to whether or not an offence has been committed under the Act.

To render this limb of the test somewhat more focused, it could be refined by making clear that the compliance breach or the circumstances flowing from the breach contributed materially to the person’s death.

We do not believe it is proper to extend this element of the test to codes, guidance, manuals or similar publications published by regulators. By their very nature, these are not legally enforceable. The Health and Safety Executive publication “Health and Safety Regulation” states clearly that “following guidance is not compulsory and employers are free to take other action”. It would be wrong to impose criminal liability for such a serious offence on the basis of a failure to follow advice in an HSE publication, when a failure to follow such advice in other circumstances would not of itself give rise to liability. The current drafting also diverges from the Government’s assertion that these proposals do not seek to place additional burdens on businesses.

To the extent that the Government wishes to keep some reference to guidance, a compromise position might be for any failure to follow guidance to be an aggravating factor taken into consideration at the sentencing stage, rather than as a deciding factor in the commission of the offence.
3.2 **Seriousness of the compliance failure**

We assume this is meant to measure not just the extent of the failure to comply with a particular requirement, but also the relative importance of the requirement which has been breached, and that the test is to be fulfilled where the jury consider a serious breach of a serious obligation to have occurred. This is not explicit in the current drafting and should be clarified.

3.3 **Knowledge of Senior Managers**

This element of the test has three limbs. Whether senior managers:
- knew or ought to have known of the organisation’s failure to comply;
- were aware or ought to have been aware of the risk of death or serious harm posed by the failure to comply; and
- sought to cause the organisation to profit from the failure.

The first limb is straightforward. We imagine that this limb will almost always apply, unless a particular requirement has only just been introduced. The second limb is also reasonably clear, but it would be preferable to make explicit that the risk of serious harm or death has to be reasonably high. We also believe that there should be a due diligence defence available expressly in the legislation. If a company has taken action to try to bring itself into compliance, for example, by training and monitoring its employees in the conduct of particular activities, this should be taken into account. Thus, an amended test might read:

“were aware or ought to have been aware of a significant risk of death or serious harm posed by the failure to comply and failed to take reasonable steps to render such risk as low as reasonably practicable”

Our other concern lies with the third limb, and what this is intended to capture. If this is taken literally, the instances where evidence exists that an organisation intended to profit from a failure to comply with health and safety legislation are likely to be few. If, however, this is construed to capture situations where, for example, expenditure is delayed because an annual budget has been fixed (which will have been based on a particular profit target) and there are insufficient funds in that budget to permit expenditure within that year, it could arise in many organisations. This construction would conflict with the provisions of clause 4(2) in relation to the liability public authorities (given that such an issue would relate to a decision on the allocation of public resources). Disparity in treatment of like circumstances between commercial and public organisations in this regard would be unfair.

4. **Parent Company Liability**

The draft bill would apply to parent or other group companies if that company owed a duty of care to the deceased and there was a gross management failure by senior managers that caused death. We wonder whether extending the offence in this way is consistent with the well-established principles of individual corporate identity and so-called “piercing of the corporate veil”. Seeking to apportion liability to parent companies is likely to be seen as an attempt to find a “deep pocket” for liability purposes and undermines the relative freedom of groups of companies to structure themselves as they see fit, in accordance with their business needs. There is also the potential that extending liability to parent companies could discourage large groups of companies from organising, managing and implementing health and safety initiatives on a group-wide basis (and we have previously encountered concerns about doing so for precisely this reason). Given the width of the drafting of the rest of the bill, even the dissemination of the most generic of health and safety policies could be viewed as an assumption by parent company management of responsibility for issues which may in reality be delegated to the management of subsidiary entities.

5. **Individual Liability**

The consultation paper makes clear that the Government considers that corporate manslaughter is an offence committed by organisations rather than individuals. We agree with this position. The current bill should concentrate on its core aim of establishing a clearer offence in respect of organisations rather than attempting a wholesale change of the law relating to manslaughter, health and safety and directors' duties.

An individual in a corporation may, for many reasons (such as changes in intra-company responsibilities or alterations in management structure) not actually be responsible for the collective failings of the organisation to which he belongs. There is a significant risk that individual liability would give rise to a culture of blame and that senior managers would retreat from embracing and encouraging safe systems of work. Certain industries, such as construction, might find it difficult to retain or recruit managers with appropriate health and safety qualifications and training.

Even without the risk of personal prosecution, this legislation will be felt keenly by managers. It is they who will be asked to justify their actions and their decisions not to act in the event of prosecutions. The prospect of this in itself is likely to have a significant (not entirely beneficial) impact on management
conduct. One can foresee that increased emphasis will be placed on recordkeeping in order that companies (and indirectly managers) are in a position to defend themselves. In any event individuals could still be liable under the provisions of the Health and Safety at Work Act 1974 and the general law of manslaughter.

We support the on-going work which the Government and the Health and Safety Commission propose in relation to assessing the obligations and duties on directors in their individual capacity and, in particular, whether further work needs to be undertaken to clarify the legal duties of directors under existing health and safety legislation or voluntary action under Codes of Practice (including consideration of whether different requirements should be made of executive and non-executive directors). We look forward to receiving the findings of the Health and Safety Commission on this area later this year.

6. CAUSATION

We agree that the ordinary rules of causation should apply to determine whether the management failure caused a person’s death. Clearly if a corporation fulfils the other requirements of the offence then the chain of causation should only be broken if there is an extraordinary event which intervenes to cause death.

7. PROSECUTION

The current Draft Bill envisages that the police will investigate offences, with the CPS having responsibility for prosecution. We agree with the Government’s comments that it is important for the HSE to be “effectively harnessed” in an investigation. We consider that, with the proposed new offence hinging principally on (a) the establishment of a relevant duty of care and, most importantly, (b) that there was a gross breach of that duty (and in reaching this decision the jury must take into account whether there was a failure to comply with relevant health and safety law and guidance), it is imperative that the HSE have a role to play in the investigation and prosecution process. We are not convinced that, without further training, police forces have the necessary experience or expertise in considering health and safety law to properly investigate such cases. It is therefore important that the police and HSE co-operate very closely in potential corporate manslaughter cases.

8. SANCTIONS

We agree with the proposed principal sanction of financial penalties, coupled with a court power to order remedial works to be undertaken. We do not consider alternative sanctions, such as corporate probation, to be necessary. The publicity of a prosecution (even if unsuccessful) will result in significant reputation damage to a defendant organisation and any prosecution is also likely to result in increased regulatory supervision. These factors will be foremost in the minds of management in the majority of UK businesses which endeavour to achieve compliance with the law.

We also have reservations about the usefulness of remedial orders. Such powers already exist under health and safety law in relation to enforcement and prohibition notices. We wonder whether, in practice, a remedial order following a successful prosecution would ever be made. In reality following a fatal accident most organisations would take immediate steps to investigate and address any identified weaknesses, and even if they did not do so of their own initiative, the HSE could require such action under existing provisions.

23 June 2005

104. Memorandum submitted by the Association of Personal Injury Lawyers

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

— To promote full and prompt compensation for all types of personal injury.
— To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform.
— To alert the public to dangers in society such as harmful products and dangerous drugs.
— To provide a communication network exchanging views formally and informally.
— To promote health and safety.
EXECUTIVE SUMMARY

— APIL believes that the draft Corporate Manslaughter bill is unworkable in its current form and needs substantial redrafting. We are particularly concerned about the following areas:

— the bill is intended to be applicable to companies only, yet still refers to “senior managers’ within its definitions;
— there appears to be a certain amount of confusion concerning which organisations are to be exempt under the new bill;
— it appears that senior management which can demonstrate a lack of action regarding health and safety issues will have a valid defence;
— the use of ill-defined terminology such as “falling far below” means that it will potentially be more difficult to actually gain a successful conviction for the new offence;
— there is an uneasy mix of common law tests being applied to a statutory breach of health and safety legislation;
— the restrictive nature of to whom a relevant duty of care applies; and
— exactly what constitutes a “gross breach”. For example, it appears to only apply to a health and safety violation rather than a simple breach of the duty of care; such a definition is too restrictive.

— APIL proposes that the Companies Act should be amended so as to enshrine directors’ responsibilities in terms of health and safety in statute, with an individual director nominated to deal with this issue. Ultimately APIL hopes this will allow more guilty directors to be identified and sanctions—both criminal and civil—brought against them.

— In terms of civil sanctions, APIL suggests that the courts should disqualify directors more readily. While this power already exists in the Company Directors Disqualification Act 268, APIL believes there is a need for the court to have additional powers.

INTRODUCTION

1. APIL welcomes the opportunity to put forward its comments on the Home Office’s consultation on the Government’s draft Corporate Manslaughter Bill. APIL believes, however, that while the intention to legislate on this matter should be applauded, the bill itself, in its current form, is unworkable and needs to be re-drafted in its entirety. APIL’s concerns about the bill are detailed in the “Analysis of draft Corporate Manslaughter Bill” section below (paragraphs 8-24).

Directors’ Duties

2. While APIL is aware that the draft Corporate Manslaughter Bill specifically removes the possibility of proceeding against individual directors for the offence of corporate manslaughter, we firmly believe it is imperative that company directors take responsibility for their company’s health and safety practices. Due to the fact that the draft bill is criminal in nature and is only applicable in relation to a specific criminal act—the death of a person, or persons, who are owed a relevant duty of care—we believe that it is more appropriate to tackle the issue of directors’ individual liability via changes to the civil law. This will allow all types of health and safety compromise, regardless of whether it results in a death, to be fully considered.

3. APIL believes that the Companies Act 269 should be reformed to enshrine directors’ health and safety responsibilities in law, in order for deaths and injuries at work to be prevented. To this end we fully support the Transport and General Workers Union’s (T&G) suggested amendments to section 282 and 309 of the Companies Act concerning the need for a company to nominate one of its directors as a health and safety director, and that this health and safety director’s name should be set out in the company’s annual return 270.

One of the greatest difficulties with corporate manslaughter prosecutions under the current regime is that in order for a company to be convicted, someone must be “identified as the embodiment of the company itself” 271 and convicted of manslaughter. This principle is widely known as the identification doctrine, and stipulates that a “directing mind” must be identified in order for a company to be guilty of corporate manslaughter. The difficulty in identifying this “directing mind” is that companies, particularly large companies, have labyrinthine management structures. By having a dedicated health and safety director, with specified legislative duties, it will be easier to identify who the “directing mind” is behind any health and safety breach and be able to successfully prosecute the company for the breach. In addition, the ability to accurately identify this “directing mind” will hopefully lead to more prosecutions for all types of health and safety offences, including criminal charges where the breach has been particularly severe.

268 1986 (c. 46).
269 1985 (c. 6).
270 See Appendix for a copy of the suggested Health and Safety (Directors Duties) Bill and Explanatory Notes. (A copy can also be downloaded at: http://www.corporateaccountability.org/press_releases/2003/17Jun.htm)
271 R v HM Coroner for East Kent, ex p Spooner (1989) 88 Cr App R 10, 16, per Bingham LJ.
4. APIL also believes it is essential that health and safety management becomes as much a management priority as financial management. Indeed the Financial Services Authority (FSA) recently stated that compliance with regulations, including health and safety regulations, should take place at a board room level:

“We are making it absolutely clear to firms that we expect them to think about regulation at board level. In the past companies have regarded compliance as something boring to give to some compliance officer down the corridor. We are saying very clearly to senior people in firms that dealing with the regulatory system sensibly and thinking about regulatory standards is something that we expect boards to do.”

Sanctions against directors

5. APIL believes that in order for health and safety to be made a boardroom priority, there need to be stiffer sanctions against directors. The need for more stringent sanctions is due to the perceived failure of company directors to take compliance with regulations—of all types—sufficiently seriously. For example, a former chief executive of a FTSE 100 company stated that “[a]lthough I signed the papers to be a director, I had no clue when I signed them what that meant and where I might end up as a result. I was completely ignorant of my obligations. Management has a cavalier attitude to regulation and assumed in some way that it didn’t really apply to them.”

6. APIL therefore recommends that the court should make greater use of its powers to disqualify a director if he is found to have contributed to a health and safety breach which resulted in a death or serious injury. Indeed the director of the Office of Fair Trading (OFT) recently stated that although fines are an effective sanction, the “sanction that attracts the most attention of directors is director disqualification. The threat of being disqualified seems to strike a large number of senior managers and directors.” While the Company Directors Disqualification Act allows for the disqualification of a director who is convicted of an “indictable offence”—including a breach of health and safety legislation—this sanction is rarely used. APIL proposes that the Company Directors Disqualification Act could be made more effective by the adoption of the aforementioned proposal to enshrine boardroom responsibility for health and safety in legislation. This would allow the appropriate identification, and disqualification, of directors who have failed in their health and safety duties.

7. APIL also suggests that the courts should be given additional powers to disqualify directors who are shown to have failed in their health and safety responsibilities. While such a power would be inappropriate within the new Corporate Manslaughter Bill itself—due to the fact that director disqualification would seem to be a civil concern rather than a criminal matter—we believe that such a power could be introduced alongside it. This would allow the court to consider possible sanctions against individual directors based on evidence arising out of a corporate manslaughter offence, irrespective of whether a guilty verdict was eventually delivered.

Analysis of Draft Corporate Manslaughter Bill

Section 1—The offence

8. APIL notes that there appears to be a discrepancy between the stated intention of the bill and the actual definition of the offence contained within the bill. The consultation preamble to the bill states, quite categorically, that “[a] corporate offence tackling the specific problem of holding organisations to account, the offence will not apply to individual directors or others”. This position is, in turn, reflective of the general approach recommended by the Law Commission in its 1996 report, namely that “liability should lie in the system of work adopted by the organisation for conducting a particular activity” not on individual culpability. Yet the draft bill—at section 1 (1)—specifies that an organisation will be guilty of the offence of corporate manslaughter if the way in which any of the “organisation’s activities are managed or organised by its senior managers” causes a person’s death or leads to a breach of its duty of care. The mention of the senior managers rather than senior management seems to contradict the preamble’s stated intention that it is not concerned with individuals, as well as the Law Commission’s recommendation that the bill should be directed at the system of work.

9. If the current wording was to be retained, APIL envisages that in attempting to prosecute companies for corporate manslaughter the difficulties with the identification doctrine would resurface, and negligent companies and directors would escape punishment through technical defences. The re-introduction of the need to identify the “directing mind” would defeat the original intention of the bill—namely to make it easier to attribute to an organisation “failures in the way its activities are organised or managed at a senior
“An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised:

(a) causes a person’s death; and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.”

APIL believes—as previously mentioned—that the draft bill’s use of the term “senior manager” undermines the Government’s assertion that it is directed towards companies rather than individuals. Furthermore, by concentrating on senior managers, APIL believes the bill is looking at the vicarious liability of organisations attracting criminal criticism rather than the personal responsibility of a corporation in avoiding deaths and in managing health and safety. Within the current drafting of the bill individual managers will still have to be identified, as with the previous need to identify a “directing mind”. If, however, the bill were to focus on senior management, consideration would be given to the structure and systems of an organisation, rather than its individual members. Therefore APIL suggests that a more appropriate wording for section 2 would be:

“Senior management of an organisation is the person or group of persons who play a significant role in:

(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

(b) the actual managing or organising of the whole or a substantial part of those activities.”

Consultation document—page 6—paragraph 3.
15. APIL is further concerned that the bill defines senior managers in terms of the activities which they perform, namely those who play a “significant role” in “the making of decisions” and the “actual managing or organising” of activities within the organisation. What this definition fails to address is the situation where a manager may have certain responsibilities, for example in relation to health and safety, yet fails either to make decisions or manage or organise these activities. Under the current definition, due to his lack of activity, the manager described above would not be considered “senior” for the purposes of the offence. Consequently, his lack of actions, regardless of whether they led to a death, would not be considered relevant within the remit of the bill. APIL believes that a lack of activity in ensuring health and safety within the workplace should not be a cause for the corporate manslaughter charge to fail. We propose that the following amendment should be added to section 2 in order to prevent managers who do nothing escaping the scope of the offence:

“Senior management’ of an organisation is the person or group of persons who play, or ought to have played, a significant role in—

(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

(b) the actual managing or organising of the whole or a substantial part of those activities.”

Section 3—Gross breach

16. While APIL accepts that the use of terminology “falling far below” in section 3 (1) has been adopted directly from the Law Commission’s recommendations, we believe that it is still too ill-defined and will inevitably add another layer of uncertainty to the offence. The more uncertainty present in the definition of the offence, the less likely the Crown Prosecution Service (CPS) is to pursue a corporate manslaughter charge and the less likely a court is to convict an organisation of the offence charged. Indeed APIL’s reservations echo those of the Law Commission itself concerning the use of “falling far below” to define “gross breach” as it “would still leave a large degree of judgement to the jury, and this might lead to inconsistent verdicts being entered in different cases based on similar facts”278. APIL believes a more appropriate definition to be used in the circumstances is that of the criminal offence of involuntary manslaughter. “Gross 2” under this definition means that “the defendant’s conduct was so bad, that all of the circumstances amount to a criminal act or omission”279. Although this definition appears to offer little detail, it should be remembered that it has been used within criminal law for many years and has a specific legal meaning, defined through precedent, which the criminal courts understand.

17. APIL is concerned that the conditions which indicate “gross breach” for the purposes of the bill fail to consider non-health and safety reasons. For example, a management failure may have lead to the death of a worker, but due to the fact that this failure was not contrary to the current health and safety legislation, it would not be considered a “gross breach of the relevant duty of care” under the draft bill. In order to address this issue, APIL proposes that section 3 (2) should be re-drafted so as to remove the current stipulation that health and safety legislation must be contravened before a breach can be considered “gross”. Instead a breach of health and safety should be one of the circumstances to be considered when a jury is deciding whether a breach of the relevant duty of care was “gross” or not. For instance, section 33 (3) of the Limitation Act states that “[i]n acting under this section the court shall have regard to all circumstances of the case”, and then it continues by listing particular items to be considered. Using this example, a re-drafted section 3 (2) would state:

“In considering what is “gross breach”, the court shall have regard to all circumstances of the case in particular to:

(a) the failure of the organisation to comply with any relevant health and safety legislation or guidance; and

(b) etc.

18. In addition, APIL believes that the assessment of “gross breach” in section 3 (2) (a) (iii) in terms of whether the organisation “sought to cause the organisation to profit from that failure” is irrelevant to culpability and is only relevant to punishment. We can see no reason why it should matter whether the offence was caused deliberately or whether by pure incompetence, because the result is the same—the avoidable death. For example, in a murder trial the guilt of the offender is not dependent on whether he happened to kill for money or not. Admittedly the issue of profit is important, but it is more suitable for consideration in sentencing than in the actual definition of the offence itself.

278 Page 52—Paragraph 5.32.
279 Archbold: Criminal Pleading, Evidence and Practice 2005.
Section 4—Relevant duty of care

19. APIL believes that the relevant duty of care as specified within section 4 (1) of the draft bill is too narrow, and will inevitably lead to some negligent deaths being exempted from the scope of the proposals. In particular, we are concerned that the duty of care is only applicable to the categories of person specified in section 4 (1) (a) to (c). APIL believes that a company should owe a general duty of care to anyone who it negligently kills, regardless of whether they are in one of the specified groups detailed in the bill. Indeed the suggested categories mean that only negligent deaths to employees, visitors and those who provide goods and services for profit will actually be covered. For example, if a train came off the tracks and killed a person walking his dog, he wouldn’t be covered under the current proposals as he does not fit into one of the specified categories, so that no duty of care is owed to him. APIL considers such a situation unfair and unjust. In fact we consider the attempt to indicate the exact category of person to which a “relevant duty of care” is owed as unduly restricting the application of the bill.

20. Furthermore, APIL suggests that by restricting section 4 to specific categories of claimants, the draft bill is incorrectly applying the common law duty of care. Traditionally a duty of care in common law negligence arises when three conditions are met: there must be sufficient proximity between the parties; it must be just, fair and reasonable to impose a duty of care; and injury to the claimant must be reasonably foreseeable. For example, an employer of workmen “clearly satisfies the proximity test and the just, fair and reasonable test so far as his employees are concerned”. The issue is therefore whether the injury was foreseeable. The duty of care within the draft bill, however, is not restricted by reference to whether the death was foreseeable or not, but by reference to the category of the victim. This appears to be contrary to the correct operation of the “duty of care” principle, and APIL questions its use within the draft bill.

21. In relation to the use of the “duty of care” concept within the bill, APIL is concerned about the presence of such common law duties within a statutory framework. For example, according to the draft bill—at clause 3 (2)—a “gross breach” for the purposes of being guilty of corporate manslaughter relates only to the failure to comply with health and safety legislation. Yet before a company can be convicted of the offence, the company must owe the dead person a duty of care under the common law. The difficulty lies in the fact that there does not have to be common law negligence in order for a company to breach health and safety legislation. Indeed health and safety legislation is based on set statutory standards which are punishable when breached, regardless of whether there was negligence involved or not. Inevitably, APIL suggests, the presence of common law notions within a legislative framework—one which specifies that the offence can only be committed by a death resulting from a statutory breach—will lead to confusion, especially for a lay jury. This uncertainty will lead to fewer cases being successfully brought against companies for this offence.

22. APIL suggests that the terminology used within section 4 (1) is inconsistent and confusing. While subsection (a) refers to “employees” in terms of the organisation’s capacity as an employer, in order for there to be consistency, subsection (b)—when talking about the employer’s duties as a land occupier—should make reference to “visitors and neighbouring owners”. Instead the organisation is referred to in terms of its “capacity as occupier of land”. The same lack of clarity is evident in sub-section (c) where, rather than specifying “in connection with—a user of services or customers”, the bill makes reference to:

(i) the supply by the organisation of goods or services (whether for consideration or not); or
(ii) the carrying on by the organisation of any other activity on a commercial basis.

As previously mentioned, any lack of clarity or definition within the bill will lead to disagreements in court allowing potentially guilty defendants to avoid punishment.

23. APIL is disappointed to note that the explanatory text preceding the bill suggests that the exemption relating to “exclusively public functions” at the end of section 4 (1) will potentially include deaths of prisoners in custody. If this is the case we would be greatly disappointed, as we have campaigned vigorously—as part of the Government’s ongoing coroners review—for prisoners to be brought within the same civil accountability system as any other death which has occurred negligently. APIL sees no reason why public authorities should not be brought to account when a prisoner dies in their care. Therefore any attempt to exempt such cases should be removed from any re-drafted bill.

24. A further complication in relation to prisoners in custody—which is also relevant to many of the UK’s other public services—is that more and more prisons are being run by private companies. APIL’s concern is that while Government institutions may be included under the “exclusively public function” clause of the bill, private prisons may be exempt. This will create a two-tier system of enforcement, where liability for exactly the same offence will be different dependent on the status of that organisation. APIL proposes, in order for corporate manslaughter to be considered with the appropriate gravity across all institutions, all exemptions detailed within the bill should be removed. This will allow a level-playing field for all organisations as they will all be bound by the same duties and potentially the same liabilities and punishments.

105. Memorandum submitted by DWF Solicitors

CORPORATE MANSLAUGHTER SEMINARS—KEY POINTS RAISED

1. Reasons behind the new offence

Overall, delegates felt that the new criminal offence was only being introduced in order to satisfy public perception that somebody should be blamed for deaths in the workplace.

2. Future effect of prosecution

Some delegates were concerned that, as records would be kept of any Corporate Manslaughter convictions, clearly it would make it more difficult to tender for any future public sector work. Companies who had previously been convicted would be continuously punished through the fact that they were not able to acquire new contracts.

3. Ability to bring a successful prosecution

Delegates felt that the level of “falling far below” health and safety standards was potentially a very high bar to set. This was also seen to be an ambiguous test which would make a defence both difficult and uncertain (in particular because nobody knows how a jury would interpret this).

4. Section 3(b)—“codes, guidance, manuals or similar publications”

There were strong concerns over the vast amount of documentation which would need to be followed in order to comply with the Act. It was felt that the HSE should provide guidance to companies free of charge if prosecutions were to be reliant on this guidance documentation.

5. Failure to place liability on Partnerships and unincorporated entities

Delegates felt that it was important for the Bill to categorize Partnerships as businesses in the same way as incorporated companies were.

6. Effect of the Draft Bill on Insurance

Delegates representing Insurance Companies felt that the result of introducing the new Bill would be that Insurance companies would be unwilling to insure companies against Corporate Manslaughter charges.

7. Mitigating Circumstances

Delegates felt that it should be stated clearly in the Bill that the jury should take into account all mitigating circumstances. It was noted that Section 3(2) appeared to focus on the negative aspects which should be taken into account by the jury as opposed to any positive actions by companies. In regard to positive acts which the jury should take into account, as well as the previous history of a company’s health and safety record, the group felt that areas such as BSI compliance and recognised accreditations as well as international standards should be taken on board as evidence. This would be particularly important when setting the level of fine.

Delegates also felt that it would be helpful for all companies of a medium size and over to have to carry out an annual audit. This could then be taken into account as mitigating factors and would act as a benchmark between all prosecuted companies. Some delegates felt that this could be explicitly in the Bill.
8. **Level of Fines**

It was noted that the Draft Bill is silent on the issue of fines in general. Reform of the present system (based on company turnover) does not seem to have been discussed. For example calculations of fines to be placed on Universities and academic institutions would be difficult to calculate as these bodies have no operating profits. It was also felt that companies with low trading profits would require a different kind of remedy and this is not made clear in the Act.

---

**106. Memorandum submitted by Confederation of British Industry**

The Confederation of British Industry (CBI) welcomes the opportunity to respond to the Home Office Consultation Document: Corporate Manslaughter, the Government’s Draft Bill for Reform. The CBI, with a direct corporate membership employing over 4 million and a trade association membership representing over 6 million of the workforce—is the premier organisation speaking for companies in the UK. Nearly all businesses may be affected by the proposals on reforming the law on corporate manslaughter and this response reflects an extensive CBI consultation of regional and national committees and the broader membership representing business of all sectors and sizes.

These proposals cannot be taken in isolation and make no reference to developments and initiatives taking place in other Government departments such as the DTI (company law, corporate governance and product safety), ODPM (transport safety) and HSE where high levels of risk management are expected of companies and different levels of management already have legal duties. Whilst there are no grounds for complacency, the UK is one of the best performers in health and safety terms within Europe, thanks largely to the diligent application of existing risk-based law aimed at preventing incidents.

The CBI’s submission provides general comments on the current developments of the criminal law, as well as providing more specific comments on the possible implications of the proposals on businesses and it comments on some of the legal drafting.

**EXECUTIVE SUMMARY**

The public deserves reassurance that business is accountable and takes its responsibilities to society seriously. However, the framework of obligations within which business must work needs to provide clear standards for behaviour.

It is essential that:

— the law does not unduly increase risk averse behaviour in corporations (the AD Little Study (March 2005) commissioned by DFT has provided information on this). It is also essential that the law also does not unduly increase risk aversion behaviour in enforcing authorities

— adequate time, discussion and publicity are given to any legislation that is made, to allow business time to understand the implications of the legislation and make any necessary adjustments.

We welcome and support the draft Bill being aimed at corporations and not individuals. Directors and individuals are already subject to existing company and health and safety laws. An individual whose acts or omissions are judged to be sufficiently serious and causative of a death will also be potentially liable for a separate offence under existing law of gross negligence manslaughter.

If there is an intention to place specific health and safety legal duties on directors or to propose innovative penalties these should be the subject of separate debates. It will be necessary to consider the effectiveness of sanctions and the responsibilities of companies and the relevant level of control and direction in relation to all the operating and strategic activities.

Recognising that existing health and safety legislation already provides for unlimited financial penalties, the primary additional sanction within these proposals is the ability to stigmatise a company with the label of having committed corporate manslaughter, with its major effect on corporate reputation. There is a danger that those organisations who take their corporate reputation seriously will become risk averse, whilst those with little invested in brand and reputation will remain unchanged by the proposals.

There is a danger that the proposals will lead to duplication, and possibly conflict, between the many legal frameworks and enforcing authorities dealing with company behaviour and liabilities that could be linked to work-related fatalities unless Government takes a coherent approach.

We support the intention that this legislation is focused on the few incidents where gross negligence is proven (the Home Office estimates that it will generate 5 cases a year) but have severe reservations that enforcing authorities will be able to resist undue pressure from lobby groups and individuals to put forward proposals for cases that will affect company reputations even if there are insufficient legal grounds to prosecute.
We have concerns that in addressing the issue of the controlling and directing mind of a company the focus has turned to that layer of an organisation deemed a “senior manager”. The variety of the corporate structures in the UK and the inclusion of those who “actually manage activities” has the potential of lowering the status of person who might give rise to a liability compared to the type of person who might represent a directing mind.

The offence of corporate manslaughter should be:
- applied to all undertakings; Crown Immunity should be limited to matters of national security, we believe that the draft law has only gone some way to achieving this
- applied to behaviour that grossly negligently disregards foreseeable risks to employees and the general public
- related to a duty holder’s obligations for the reasonably foreseeable identification and evaluation of risks and the reasonably practicable control of risks
- related to a continuing and systematic failure to assess and control risks rather than an isolated lapse within a well-established system, not be founded on aggregation of a number of unlinked faults that had been appropriately managed, to paint a picture of systemic failures.
- consistent across the UK.

**GENERAL COMMENTS**

**Better Enforcement of Current Law**

We understand the perceived need to introduce an effective legal sanction to deal with serious management failings that lead to fatalities overcoming the “Identification” principle. Clearly it cannot be right that corporate liability can only apply if all elements of the offence can be proved against one member of the directing mind of the company.

We share the Home Office view that in seeking to create a new offence that it is most important that businesses that already take their obligations seriously under health and safety law should have nothing to fear. Companies that already manage health and safety to achieve exemplary performance should be recognised as not having to do more.

The debate on corporate manslaughter takes place against increasing public concern that the sanctions imposed by the courts do not reflect the consequences of the event, both for individuals and for corporations. Particularly for fatal injuries, there is the view that someone must be, and must be seen to be, to blame. The real challenge under new proposals, as it is with current law, is getting the evidence, proving and enforcing the law whatever the offence is called.

The expectation by the Home Office, that the offence will attract no more than 5 prosecutions a year, as it is intended to be aimed at only the most serious offences, is a heroic assumption. There is a significant possibility that pressure groups will seek to press for prosecution in a much larger number of cases. Notwithstanding the need to get evidence, it will be tempting for enforcers to forward corporate manslaughter papers to the CPS rather than justify inaction and poor usage of a new law to a sceptical section of the public.

**Changing Values**

Business recognises the changing values and expectations of society and accepts the balance of authority and responsibility that should be placed on organisations and individuals, both within and outside an organisational framework. However, business operates by managing risks and should be held accountable when risks are not managed appropriately. They cannot be expected to provide or be accountable for a risk-free environment.

**Business Competitiveness**

It is also important that the developments in framing legislation and penalties for business are not misunderstood by those considering inward investment and having the flexibility to chose global locations.

**Application and Enforcement**

The proposals relate to England and Wales and it is desirable that there is consistency across Great Britain and Northern Ireland.

Whilst the extent of the offence would apply to England and Wales in reality the possibility of taking cases and effectively imposing sanctions against foreign registered companies or those where the senior management is based abroad should be more realistically assessed. We do not believe that in practice,
enforcement of companies outside the UK will be achievable in the short term. With the development of “e-commerce” the distance between corporations and senior management can be considerable. Those who will have to judge the linkage will need a great understanding of company systems and cultures.

**Penalties as Motivators**

The CBI stresses that companies must not gain advantage from flouting health and safety and other laws. Compliance with the law and a high standard of health and safety performance are seen as primary indicators of business success as well as being necessary to gain the public approval to operate. However, generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance.

**Individuals in Companies**

Directors, who are grossly negligent in their own right, of causing the death of a person to whom they owe a duty of care, can be prosecuted under the common law offence of manslaughter. It would be fundamentally inappropriate to lower the standard and tests of proof against an individual, simply to satisfy calls for a corporate scapegoat or because it may be challenging to prosecute the individual for his own actions or inaction, rather than on the basis of what is fair and reasonable.

For fatalities arising from work activities the Health and Safety at Work etc Act 1974 (HSWA) already acknowledges the principle of custodial sentences for individuals held responsible for the most serious omissions or acts. The framework of HSWA covers all work related activities, suppliers of products and services and obligations of landlords. Sections 7 and 37 differentiate duties for employees, managers, and directors. Any debate concerning enforcement against individuals should be held in the separate context of the existing provisions under HSWA.

Within organisations, employees must take reasonable care for their own health and safety and that of others to contribute to the organisation’s efforts. If the law focuses the responsibility on individuals or a specific level of management, however senior, it runs the risk of others abdicating their responsibility to the detriment of the team effort. Health and safety management and performance is completely undermined in a blame culture and businesses have worked hard to remove this as a factor that stifles innovation.

**Specific Comments on Elements of the Draft Bill**

We have the following concerns with the draft bill and a number of suggestions for consideration as to how the desired goal might better be achieved whilst minimising the risk of increasing regulatory burdens, stifling entrepreneurial activity or creating an excessively risk averse culture.

**Senior Managers**

If the Bill is enacted, it seems likely that in any case prosecuted against an organisation with complex management structures there will be potential for argument as to who is a senior manager. The definition in section 2 has two strands where a senior manager is defined as a person who plays a significant role in:

(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(b) the actual managing or organising of the whole or a substantial part of those activities.

The definition in s2(b) “actually managing a substantial part” appears to potentially lower the threshold management position for those who might be a “senior manager” under the new law but who would not be identified as a “directing mind” under the current common law. It seems that the introduction of the responsibilities of senior managers has not captured the real level of decision making of a business but has introduced an artificial level on which responsibility is placed.

It seems that the difficulties of applying the identification principle to directors have been carried forward to this proposal despite the fact that the offence is now intended to be targeted at the corporate body as a whole rather than individuals.

If the intention is to catch strategic rather than operational decision-making at Board level then a definition based on “Director, Secretary or person appearing to act in such a capacity” would provide a formulation already well established in other areas of law.

**Assessing Management failure**

The proposed offence in s1 relates to the way in which an organisation’s activities are managed or organised by its “senior managers” (this can involve the acts or omissions of more than one senior manager). The notes to the draft Bill state that this involves an assessment of how the activities of an organisation were organised or managed in practice. It is not altogether clear what this actually means nor in reality how this
is not going to involve some form of aggregation of senior managers’ conduct. It is incumbent on the Home Office to give further guidance on how the acts or omissions of more than one senior manager in any incident are to be examined and how liability will be imposed other than on the basis of some form of aggregation.

However, whatever the level of management identified with controlling the corporation, a formula allowing the conduct of the organisation of the business as a whole should be considered rather than restriction to the conduct of a narrowly defined senior management role.

Businesses adopt a variety of corporate structures for different reasons, such as tax and financial planning and joint venture relationships. They are often not related to the management of health and safety.

In the event of a fatality, it is likely that two managers doing much the same job in organisations of similar size but one may be a single integrated corporate entity and the other a corporate structure that contains many subsidiary “Limited” entities could have differing effects on the potential corporate liability. The inclusion within the definition of senior management of those who actually manage, as opposed to providing strategic direction and control of resources, coupled with the requirement of the legal entity to owe a duty of care to employees or the public, could mean that where there is a low level subsidiary legal entity, the possibility of an isolated management failure in such an operation could mean that the subsidiary legal entity is targeted for the offence of corporate manslaughter despite the existence of wider well organised corporate management systems and decisions.

In considering assessment of management failure, after a work related fatality, HSE, and/or other relevant enforcing authorities, should be actively involved in assessing the extent of safety management, at an early stage.

**Gross Breach**

Section 1(1)(b) requires a breach to be “gross”, that is: “falling far below what can reasonably be expected in the circumstances”. We believe that the test for a gross breach should refer to “reasonable foreseeability”.

S3 (2) states that the jury must consider whether the evidence shows the organisation failed to comply with safety legislation and if so:

- How serious was the failure to comply
- Whether or not senior managers:
  - knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance
  - were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;
  - “sought to cause the organisation to profit from that failure”.

We do not believe that any organisation should gain commercial advantage from non-compliance with safety law. Most organisations do not deliberately seek to put “profit” before safety but have to put resources and attention into other aspects of running the business. If there is a fatality and a clear and marked deficiency in safety management, but no clear evidence that an organisation actively sought to “profit from that failure”, this may well affect a jury’s decision. As such, the wording in the Bill (and any guidance in this area) will need careful attention.

The construction of “whether or not” is not helpful to those who have to implement compliance systems, as, after the event, it points juries to matters that may or may not be considered. The risk of emotive responses and “wisdom in hindsight” being brought into account is self-evident.

The apparent certainty of s3 (2) is further reduced by clause 3 (4), which leaves the jury with very wide residual latitude to be able to take into account any other matter it considers relevant. Any other matters that a jury may take into account should be clarified to avoid uncertainty.

The use of the word “gross” is significant. It would seem to be an attempt to emphasise that the offence should be restricted to the most serious cases only, as opposed to a re-packaging of HSWA s2 and s3 and this is something that must be made to work.

We do not consider that the reference to general health and safety law and guidance, then specifically referencing HSWA is at all helpful. It detracts from the other enforcing arenas.

The reference to guidance also does not add anything, as sources of guidance do not necessarily have a link to the quality and relevance of the legislation. There is a well known and accepted hierarchy of Approved Codes of Practice and guidance produced by the Health and Safety Executive (HSE) that has a particular legal effect. The status of guidance across enforcing authorities is not consistent with many relying on “statutory” guidance to establish acceptable operating standards. Guidance, including that issued by HSE, is not mandatory and failure to follow it should not, in itself, be taken as evidence of a gross breach.
**Relevant Duty of Care**

The offence in s1 requires that the way in which the activities of the organisation’s activities are managed or organised by its senior managers—causes a person’s death.

However, the new offence does not appear to change the position on causation from the current common law situation. In many respects the difficulty of proving the legal concept of causation in any incident is likely to provide as much of a hurdle to the prosecuting authorities under the new offence as it does already. Reasons for accidents are never straightforward and normally involve the complicated interaction of numerous multi-causal elements, organisations and people at varying levels and it is hard to see that the new proposals do anything to simplify this.

The offence in the draft Bill will only apply in circumstances where an organisation owed a duty of care to the victim. Draft s4 (3) confirms that the existence of a duty of care in a particular case is a matter of law for the judge to decide. In general terms the proposed duties would not appear to impose any greater duty of care than under existing health and safety legislation or the common law offence of manslaughter but it becomes more significant when considering corporate structures and levels of senior management.

The relationship of corporations to their contractors and franchisees and the degree to which they have a duty of care or the primary duty of care to these employees is an essential element in the application of the offence. The different legal and practical structures of corporations will give rise to different answers to the identification of the senior management level and the organisation that owes the duty of care to the victim. The inevitable inconsistency risks discrediting the law.

**Fines and Remedial orders**

The offence should only be brought in the most serious of cases and the appropriate fine should be calculated by the Court consistently with the criteria adopted by the Court of Appeal in R v Howe and Sons and the production of accounts.

The draft Bill provides the Court with the power to make remedial orders within a specified time and this principle is already contained within the HSWA (s42). However, it is rarely if hardly ever used as in practice the potential sanction is fraught with difficulties and now is the time to reconsider its validity.

A criminal court is unlikely to be equipped to decide on the necessary standards of safety. There would be a danger that a court considering one aspect of managing safety by one undertaking involved in the particular industry would be unaware of the impact of any remedial order on the activities of the system overall. Further there may be issues or other safeguards in the system that a court would not be aware of or did not fully appreciate, so would have to defer to many experts who may have conflicting views. There is a risk of “punitive” as opposed to “effective” safety measures being imposed, and imposing measures that are either wrong or may have a negative effect on other areas of safety management.

In any safety incident resulting in corporate killing the enforcing authorities should be aware of the circumstances and serve the necessary prohibition/improvement or remediation notices. That is the role of the HSE and others enforcing authorities.

**Individual Culpability**

The draft Bill imposes no new liability on individuals. This is to be welcomed.

If, however, an individual’s acts or omissions are judged to be sufficiently serious and causative of a death then they will be potentially liable for a separate offence under existing law of gross negligence manslaughter. Further the enforcing authorities will continue to have powers under s37 of the HSWA in relation to senior managers or officers to cover acts or omissions where employees or others affected are exposed to risk. Similarly s7 HSWA creates a similar duty in the case of employees to other employees and others affected.

Notwithstanding that the draft Bill does not impose a new liability, an issue arises from the concept of “senior managers” involvement in the corporate manslaughter offence. In order to prove the offence it will be necessary to identify the senior managers through whom it is alleged that the organisation’s liability is attributed. It will also be necessary to examine their actions and omissions to consider a) whether they are by definition a senior manager ie whether he/she plays a significant role in the making of decisions about how the whole or a substantial part of its activities are managed or organised b) whether those acts or omissions formed part of a gross breach of what could reasonably have been expected by the organisation as a whole.

The inevitable position is that those individuals are to an extent going to be examined as if they themselves were on trial. However, because they are not defendants themselves (unless prosecuted for manslaughter or under the HSWA as individuals) they will have no locus before the court to defend or put forward explanations for their actions or omissions.
It is possible that such a person may be effectively found to have committed the offence of gross negligence manslaughter by the court without being able to defend him/herself. Whilst, in the absence of other proceedings, no criminal sanction would flow from this, there is the prospect that they could have the reputation irreversibly damaged and potentially render them unemployable.

Who will investigate the offence?

The draft Bill proposes no change to the current responsibilities of the police to investigate, and the CPS to prosecute and we welcome this approach. However, this should be supported by close co-operation with the HSE (or other relevant enforcing authorities). Sharing technical information and evidence following the incident is essential to establishing quickly whether there may be a “gross breach”, to enable appropriate and effective remedial action to be taken and to prevent a recurrence.

S1 (6) and the requirement for the consent of the DPP is a sensible conclusion to have reached and is to be welcomed so that enforcing authority and business resources are not wasted on vexatious or inappropriate responses.

Coverage of Governmental Bodies

On the face of it the draft Bill does not take advantage of Crown Immunity. However the detail is obscure and whilst exclusion of the Armed forces may well be in the public interest we are extremely concerned at the proposed exclusion of public authorities from a duty of care for the purposes of the Act including allocation of resources and weighing of competing public interests. Agencies such as the Food Standards Agency and HSE do make very significant decisions and enforce actions impacting on the safety of operations and products in the UK market place and it is right that at least the same high standards should be expected from them in the management of such matters as are expected from commercial operators. Where a public authority has duties of care in negligence they should have duties under this law, this reflects the norms and expectations of society. There is also the possibility of regulations being made under the Bill which would limit (and possibly exclude) certain government activities and that further consideration is to be given as to what government bodies should be excluded from liability. This leaves the door wide open to potential injustice.

17 June 2005

107. Memorandum submitted by the Communication Workers Union

CORPORATE MANSLAUGHTER: NORTHERN IRELAND—PROPOSALS FOR A NEW OFFENCE

Introduction

The Communication Workers Union (CWU) is one of the UK’s largest Trade Unions with 250,000 members. Along with the TUC and other Trade Unions the CWU has been campaigning for new laws on corporate manslaughter and directors health and safety responsibilities since 1997 when the present Government first came to Office and first promised to introduce a new offence.

Last year 235 workers were killed at work in the UK, including CWU members and workplace deaths actually rose by 4%. Reform of the law is therefore long overdue.

The CWU welcomed the Government’s publication of a Draft Corporate Manslaughter Bill on the 23 March 2005 and are pleased to have the opportunity to respond to the consultation papers issued by the Home Office, Scottish Executive and Northern Ireland Office. The proposals are a step in the right direction but at best, we can only give a “cautious” welcome the publication of the long-awaited draft corporate manslaughter bill as the CWU has serious concerns over just how effective it will be.

Many feel that the lack of progress over the last eight years on introducing a new corporate manslaughter Law highlights the Government’s contempt for workers and for the victims of workplace injuries and deaths. During that time around 2000 people have been killed at work many of them due to serious management failures with those responsible evading justice and the families of those who died denied justice.

Background

The Government’s draft Corporate Manslaughter bill is a “watered-down” version of the original 1996 proposals which in our view will not bring about any significant change unless it is amended to deal with the lack of accountability for company directors and senior managers which the Government itself admitted was a major concern back in 2000. Death at work caused by carelessness and negligence will remain a mundane part of industrial life until those exercising ultimate boardroom power know that they could be held accountable for the maladministration of safety in their company. When all those who are responsible
for workers health and safety are truly held to account, there will be a significant improvement in the safety and occupational health of workers—the longer Government backs away from those changes the longer we will return to events each year like Workers Memorial Day, commemorating unacceptable numbers of deaths and injuries at work including Postal and Telecommunication workers. We wish to stress our determination to see new effective laws on “Corporate Manslaughter” and “Directors Duties” brought in early by a third term Labour government. The CWU calls upon the Prime Minister and Government to “Start Listening” and be “Tough on Crime—Tough on the Causes of Crime”.

History

In 1996, after the courts had failed to deal with the collective management failures responsible for such high-profile disasters as the sinking of the Herald of Free Enterprise and the Marchioness, the Piper Alpha fire (on which two CWU members were killed) and King’s Cross fire and the Clapham and Purley train crashes, the Law Commission proposed a new law of “corporate killing”. While in opposition and then immediately on its return to government in 1997, Labour backed this proposal with loud and vigorous rhetoric. Proposed legislation was the subject of a 2000 consultation document, a 2001 manifesto commitment, and further consultation in 2002. In May 2003, then Home Secretary David Blunkett announced “a timetable for legislation” with further details to be announced shortly thereafter. No timetable followed and Home Office promises of a draft bill were made and promptly broken with monotonous regularity for a further two years, leading up to the publication of the Government’s draft bill in March 2005.

In early 1997, prior to the Labour Election victory a CWU delegation met the then shadow Health and Safety Minister at Westminster to discuss CWU policies and the Health and Safety intentions of a new Labour Government. We received a number of assurances that a new Labour Government would introduce a range of new Health and Safety Laws and Regulations including a new Corporate Manslaughter Law, harsher penalties for Health and Safety Offences including imprisonment, greater powers and protection for Safety Representatives, the proper implementation of EU Health and Safety Directives not carried out by the previous Conservative Government and increased funding for the Health and Safety Commission and Executive.

Following their election in 1997 the Labour government pledged to improve safety by ensuring that companies and directors would be held to account more easily for negligent or reckless conduct.

To date none of those promises and commitments have been carried out and in fact Treasury spending reviews have led to reductions in HSE Inspectors and more recently the HSE considering proposals to reduce its vital inspection and regulation activities as a result of the “Hampton Review”.

Overview of the “Draft Bill”

Positive Points

The government has at last honoured its commitment to bring forward a corporate manslaughter bill after eight years of prevarication over corporate killing legislation.

The bill introduces a charge of corporate manslaughter for the first time, which can be brought against companies and organisations for cases of management failure causing death.

The court will be given powers to order convicted organisations to take remedial steps.

Crown immunity is abolished for many government bodies and agencies.

Negative Points

The Bill does not introduce any greater penalties than can already be imposed under existing legislation for lesser offences.

It does not impose any specific health and safety obligations or duties on company directors.

The definition of senior managers is confusing and restrictive and opens up a further loophole through which negligent organisations could escape prosecution.

The focus on senior managers is too narrow.

The criteria from determining a gross breach is confusing and restrictive and could be impossible for juries to establish without any legal obligation on directors to ensure that their organisation is complying with health and safety law.

The Bill propose a fines based penalty system and fails to consider other more imaginative forms of penalty which could be imposed such as custodial sentences for individuals and probation orders for companies.

The draft Bill fails to rebalance corporate criminal justice Law in favour of the victims of work-related deaths and serious injuries.
The Draft Bill will only lead to an additional 5 prosecutions for corporate manslaughter each year according to its accompanying Regulatory Impact Assessment.

The Draft Bill introduces a “profit from failure test” that opens up a loophole through which negligent organisations could evade prosecution for corporate manslaughter (ie for corporate guilt to be established it would have to be proved that an organisation sought to profit from a failure that led to a work-related death).

The Draft Bill exempts from prosecution all decisions involving public policy. As, by definition, any decision by a Crown body could be argued to be a public policy decision, every Crown body could potentially escape prosecution for corporate manslaughter by invoking a “public policy defence”.

The Draft Bill does not remove Crown Immunity for health and safety offences.

The Draft Bill fails to include all employing organisations within its scope (ie it excludes all unincorporated bodies and a large number of Crown bodies from its provisions).

The Draft Bill does not apply the new offence of corporate manslaughter to UK companies that cause deaths abroad.

The Draft Bill has been published but, as yet, there is still no timetable for, nor specific details on the mechanics and structure of, the pre-legislative scrutiny process that it will undergo.

Statistics

In the past five years to 2003–04 there has been 2,157 death at work. On average there are approximately 240 workplace deaths each year. Despite these figures only 11 Directors have ever been convicted of manslaughter. Five of the directors were sentenced to imprisonment and another five had suspended sentences. One was given a community service order.

During the period 2003–04 there were 159,809 accidents which did not result in a death but which resulted in injury.

Each year around 11,000 enforcement notices (Improvement Notice/Prohibition Notice) are issued by HSE Inspectors and Local Authority (EHO) Inspectors.

The number of prosecutions is around 1,000 a year.

Considering that prosecution is a last resort, the fines resulting from prosecution are generally low. The average fine for a breach of health and safety law was £4,036 in 2003–04.

Each year there are many hundreds of accidents which narrowly avoid death but which often result in severe disabling injury.

The HSE reported a 4% increase in deaths at work during 2003–04, and that the rate of fatal injury to workers increased from 0.79 deaths per hundred thousand workers to 0.81, an increase of 3%.

Northern Ireland

The Home Office proposals for England and Wales are appropriate and should be extended to Northern Ireland, just as they should for Scotland. The proposal for a new Corporate Manslaughter Law in Northern Ireland is just as relevant as it is for the rest of the UK. However, the Home Office draft bill proposal as it stands is unimpressive and unlikely to have any significant impact on health and safety compliance or on the number of accidents and deaths at work unless it is significantly amended.

Crown Immunity

We welcome the removal of Crown Immunity and that the new offence will apply to the Government’s own departments who will be prosecuted where they are responsible for a death at work. As the largest employer in the land, it is vital that the government sets the lead on workplace health and safety. There is no logical, legal or moral case for leaving Crown bodies exempt from prosecution where they have caused a workplace death and the CWU would like to see the draft bill used as a vehicle to remove Crown immunity from all Health and Safety Offences. We note there are a number of exemptions listed in the draft bill in areas such as for the security and intelligence services and for the Army in combat and combat preparations. Beyond a limited number of such areas however the Government must ensure that any exemptions for the Crown do not mean that the existing immunity is removed only to be replaced by others.

Jurisdiction

The “draft bill” rules out any jurisdiction over the operations of UK companies if a fatality occurs abroad. The CWU believes that where a worker is killed outside the UK because of the failure of a UK based company to undertake suitable and sufficient risk assessments the company should be able to be prosecuted in the UK for the new corporate manslaughter offence.
SENTENCING AND PENALTIES

The Government has failed to give any proper consideration to how to sentence companies and other organisations convicted of the new Corporate Manslaughter offence. The new Corporate Manslaughter Law will only allow the courts to impose fines on companies and organisations plus remedial orders and not Jail sentences like other killing offences. This is because a company or public body can not be sent to prison and the government apparently see no alternative to this. However, even huge fines on Companies have a limited effect. Unless the Government establish a tough sentencing regime for companies, the new Corporate Manslaughter offence will have little impact.

For example the £1.5 Million fine imposed on Great Western Trains following the Southall Train Crash was only 5.6% of Annual Profit and this compares poorly against Competition Law Offence Fines eg Sotheby's £12.9 Million and Genzyme Ltd £36.8 Million.

When Royal Mail was convicted in 2003 for three Health and Safety offences following the death of a member of the public in a horrific accident at the Bridgend Delivery Office the Court imposed fines of £200,000 and this compares poorly with the power of the Postal Regulator who may impose massive fines. After missing its 2004 targets, Royal Mail paid out £50 million in compensation fines for failing to meet quality of service delivery targets which never hurt anyone. When the Royal Mail Board sits down to decide their priorities, taking these comparisons into account, how on earth will an organisation like Royal Mail and its Directors and Senior Managers ever take their safety responsibilities seriously enough, bearing in mind their key role is to maximise Royal Mail’s profits and minimise losses. The new draft Corporate Manslaughter Bill may have little effect on their decision making if the “unlimited fines” proposed in the draft bill reflect those being imposed by the courts currently for health and safety offences connected with convictions associated with fatal accidents like at Bridgend.

The CWU strongly supports the view that penalties for health and safety offences should be much harsher.

In order to introduce effective and credible deterrents to the reckless and negligent Organisations and their Directors and Senior Managers consideration should also be given to a range of penalties that will deliver justice to the victims of work-related deaths and serious injuries. For example:

— Fines should be significantly increased for Corporate Manslaughter and the “draft bill” should be amended to specifically require this with fines pegged to the profits or turnover of a company or organisation. For example a company could be ordered to pay 10% of its profits for a three year period.

— Directors of convicted companies should suffer automatic disqualification from being a director as a secondary penalty additional to any Fines on the company. Presently this doesn’t happen. Between April 2002 and March 2004, 600 workers were killed and 60,000 suffered major injury at work but not a single Director was disqualified.

— Convicted companies could as a penalty have an equity stakeholding taken by government by way of shares through which the HSE could influence the companies management of health an safety.

— Convicted companies could as a penalty have an equity stakeholding taken by government by way of shares through which the HSE could influence the companies management of health an safety.

— Offending companies should be named and shamed through prominent publicly advertised lists, paid for by the offenders.

— The Courts should be allowed to award punitive damages to the victim’s family which would be in addition to any Damages awarded to the family via Civil Litigation. All too often the victims are the surviving family who are all too often forgotten and this would provide some direct justice to them.

DIRECTORS AND SENIOR MANAGERS—INDIVIDUAL LIABILITY

The Government’s “draft bill” consultation document has concentrated on making it easier to prosecute companies. Although we support the change proposed in relation to the accountability of “companies”, the Government has failed to give sufficient thought and attention to the accountability of company directors. Government therefore does not propose to invoke individual liability against Directors and senior managers. Under the “draft bill” therefore there will be no means of holding company directors and managers accountable for contributing to corporate killing. In Government’s initial consultative document on reform of the manslaughter law it was envisaged that individual directors who had contributed to safety management failure by their connivance, consent or neglect could also be targeted for prosecution but the Governments “draft bill” now excludes this possibility and this is a retrograde step in our view as it shields the decision makers, who have the power to make the necessary changes to secure a safe working environment.
In our view, it is crucial that the Government give serious consideration to the area of influencing and motivating the conduct of directors. It is often forgotten in discussions about safety and “corporate accountability” that company directors control companies, they decide what companies can and cannot do, and it is their conduct and decision making that ultimately determines whether or not a company operates safely. In our view, although the accountability of “companies” is important, criminal sanctions should be directed at the criminal conduct of company directors because a fundamental public concern about the current law is that it allows culpable company directors to escape prosecution for manslaughter. The CWU strongly supports the view therefore that making corporate leadership personally responsible for serious breaches of health and safety law within their organisations is the key to motivating directors and senior managers in a company, making real the threat of personal liability upon directors and senior managers.

The Government and Health and Safety Commission (HSC) gave a commitment in the “Revitalising Health & Safety” Strategy published in 2000 to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers which currently doesn’t exist. The Revitalising Health & Safety Strategy Statement confirmed the intention of Ministers, to introduce legislation on these responsibilities and that the HSC would develop a code of practice on Directors’ responsibilities for health and safety and would advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. This has never been implemented.

Voluntary codes and guidance just do not work! The HSC/E have produced some excellent guidance, leaflets and research about the savings to industry of good health and safety. However it is apparent that industry does not take notice of this advice, information and guidance. It is therefore clear to our Union that the statutory health and safety responsibilities for Directors and Senior Managers are vital in order to stop the present situation where they can legally insulate themselves from what is going on in the company despite those individuals being the people with the most power. This is bad for Safety and bad for accountability.

The Health and Safety Executive (HSE) estimates that up to 70% of workplace deaths are the result of serious management failures. It is not companies that are responsible for killing workers, it is people. Workplace fatalities are avoidable and are usually caused by fundamental safety shortcomings throughout the organisation which can properly be laid at the door of the Chairman, Chief Executive, and Board of Directors etc as appropriate.

In Royal Mail the CWU has seen a number of recent examples where the Chairman, Chief Executive and Director Operations have not acted responsibly and have made various fundamental decisions by “dictate”, without consulting the Trade Union and which indirectly affect the health and safety of the workforce, exposing workers to a higher risk of injury. The effects of their decisions were subsequently linked to enforcement action by the Health and Safety Executive (HSE). Under the Government’s “draft bill” Directors will effectively be allowed ‘off the hook’ once again and will not be made to act responsibly.

Ironically, Directors and Managers can be imprisoned for Companies Act or Taxation Offences eg “Cooking The Books” but not for killing workers and members of the public.

Additionally, around 60 people were imprisoned for Animal cruelty offences last year but under the new “draft” Corporate Manslaughter bill, for committing the gravest health and safety offence of all, killing a person, the Government propose to continue to exclude from liability Directors and Senior Managers whose actions and decisions may have been in serious breach of health and safety law and which ultimately leads to a fatality.

In view of the fact that the proposed new Corporate Manslaughter Bill will exclude individual liability, it is vitally important that government acts to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers as part of or alongside this legislation. Workers and the public do expect the law to be effective in holding those individuals responsible to account and sentencing must be appropriate and effective and in this respect the case for reform is overwhelming.

It is our view that the “draft bill” as it stands will not in itself achieve effective accountability and improved standards of work related health and safety via the introduction of such legislation. Most recently, the CWU backed Stephen Hepburn MP’s “Health and Safety at Work (Directors’ Duties)” Private Member’s Bill which in spite of receiving unanimous support in the Commons at its second reading stage fell due to the House not being quorate. The Government should therefore consider supporting a similarly worded amendment to this “draft bill” in our view.

Serious Injuries

We are firmly of the view that the new legislation should provide an offence covering serious injuries because it is illogical to prosecute companies, organisations and managers for corporate killing but not to prosecute for example in cases where very serious injury resulted in an individual or individuals who for example end up on a life support machine or paraplegic. (The new Canadian law applies to all offences, manslaughter and injury.)
Senior Management (the a “Senior Managers” Test)

The definition of “senior management” as used in the Home Office proposals is confusing, too restrictive and the focus on senior managers is too narrow. The Draft Bill introduces a “senior managers” test that would open up a loophole through which negligent organisations could escape prosecution (ie by delegating health and safety management to non-senior managerial levels they would fall outside of the scope of the Bill and the reach of the law). The Draft Bill must be amended so that work-related fatalities caused by failures at every level of management—not just at senior level—are admissible for use in the consideration of corporate liability for manslaughter.

Gross Breach (the “Gross Breach” Test)

In order for an organisation to be found guilty of the offence of corporate manslaughter a death must have occurred as a result of a failure by senior managers that “amounts to a gross breach of a relevant duty of care.” Moreover, in deciding whether or not this particular test has been met a jury must consider whether or not senior managers:

(a) knew or ought to have known that the organisation was failing to comply with any relevant health and safety legislation or guidance; and

(b) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply

While we believe that failure to comply with health and safety legislation, or indeed a failure to be aware of the risks associated with such non-compliance, should certainly be grounds for prosecution for corporate manslaughter we are concerned that this particular test will be all but impossible to meet in actual court cases because, as the law currently stands, company directors have no legally binding duties in respect of health and safety.

So, since there is no obligation for directors to be informed of the health and safety performance of the company, it will be easy under this Draft Bill for directors to argue that they were unaware of failures—or the implications of such failures—within the company. In other words, because a director has no explicit legal obligation to ensure that their company is complying with health and safety law it will virtually be impossible for a jury to conclude that he or she knew or ought to have known that their organisation was failing to do so. The end result will be that prosecutions will fail through lack of evidence in respect of this crucial test.

We would therefore argue that the only way in which the “gross breach” test can be made to work is if it is complemented by the introduction of legally binding health and safety duties for company directors and their Crown body equivalents.

The “Profit from Failure” Test

In their assessment of the “gross breach “ test a jury must also consider another legal test imposed by the Draft Bill: namely that for an organisation to be found guilty of corporate manslaughter, the jury must be persuaded that there is sufficient proof to demonstrate that senior managers “sought to cause the organisation to profit from that failure” (ie to profit from a failure to comply with any relevant health and safety legislation or guidance that led to a death of a person, or persons, to whom the organisation owed a duty of care).

We are concerned that this test opens up a potential legal loophole for negligent organisations: evidence would be extremely difficult to obtain and the absence of such evidence will be used by organisations to show that their conduct was not grossly negligent. Furthermore, we are unclear as to how this requirement would impact upon juries assessing organisations that do not have a profit motive—such as those delivering public services.

We can see an argument for allowing courts—once they have passed a guilty verdict and are determining the penalty to be imposed—to consider whether the offence of corporate manslaughter was further compounded by the fact that a company was deliberately negligent in order to make a profit or to gain some sort of benefit. But using the issue of profit to help determine a criminal penalty is very different from using the issue of profit to determine whether a company is guilty in the first place. We therefore believe that, in respect of its use as a means for determining corporate liability, the “profit from failure” test must be removed.

Victims

The key aim of the Health and Safety at Work Act 1974 which amongst other things established the Health & Safety Commission and Executive (HSC/E), is to prevent deaths and injuries, at work and so reduce victims. The view of the CWU is that the balance of power and influence needs to be redressed in favour of victims as our Union’s view is that currently, industry has far too much influence on the Government and the HSC. Baroness Scotland, Minister responsible for criminal law reform, said on
29 April 2004 “the Government is engaged in an ambitious and extensive modernisation of the criminal justice system, to rebalance it in favour of the victim and the community”. The Government’s proposed draft Corporate Manslaughter Bill as proposed however will fall well short of redressing the balance of power unless alongside the new Corporate Manslaughter Law, the Government impose statutory safety duties upon directors, as promised by the Deputy Prime Minister in 2000 in the “Revitalising Health and Safety” Strategy document.

PRE-Legislative Scrutiny

After 8 years of delays and around 2000 deaths at work in the mean time the Government should announce the timetable and set up the Parliamentary Scrutiny Committee to consider the “draft bill” and submissions without further delay. Further delays will see further deaths and further cases of culpable companies and their managements escape justice. Over the last year our own Union has sadly witness several members killed at work and the employers evade real justice.

Conclusions

The legislation as proposed in the “draft bill” falls well short of our Union’s expectations. The draft bill as it stands is unimpressive and unlikely to have any significant impact on health and safety compliance or on the number of accidents and deaths at work unless it is significantly amended. The draft bill if unamended would leave the UK with inferior legislation to that in countries like Australia, Canada and Ireland. With significant amendment the bill has the capacity to become an important and powerful piece of legislation.”

From our point of view the purpose of the new Corporate Manslaughter law should be:
— To motivate Directors and Senior Managers and so deter organisations from exposing people to unnecessary dangers,
— To ensure that individual Directors and Senior Managers understand that they can expect to be held to account for their conduct, where their actions or omissions result in death of a worker or member of the public,
— To provide a practicable and just framework where the criminal law can be applied to serious misconduct which causes death with penalties that fit the crime, and
— To regain and maintain public confidence in the law and in the accountability of corporations, companies and other organisations as well as the people to run them and make the crucial decisions.

Recommendations Summary

— The Government has got to “Start Listening” and be “Tough on Crime—Tough on the Causes of Crime”.
— Ensure the Treasury provides sufficient resources to employ additional Inspectors enabling HSE to provide the crucial support and expert assistance to the Police in Corporate Manslaughter investigations.
— The Government must redress the balance of power in favour of victims as currently Industry and the CBI has far too much influence on the government and the HSC.
— Government must ensure that any exemptions for the Crown do not mean that the existing immunity is removed only to be replaced by others.
— Where a worker is killed outside the UK because of the failure of a UK based company to undertake suitable and sufficient risk assessments the company should be able to be prosecuted in the UK for the new corporate manslaughter offence.
— Fines should be significantly increased for Corporate Manslaughter convictions and the “draft bill” should be amended to specifically require this. Consideration should also be given to fines pegged to the profits or turnover of a company or organisation. E.g. 10% of company profits for a three year period. Directors of convicted companies should suffer automatic disqualification. Probation Orders against organisations should be included within a range of penalties. The Courts should award punitive damages to victims families.
— The new legislation should also provide an offence covering serious injuries on a similar basis to the new Canadian law which applies to all offences, manslaughter and injury.
— The definition of “senior management” as used in the Home Office proposals is confusing, too restrictive and the focus on senior managers is too narrow. The Draft Bill must be amended so that work-related fatalities caused by failures at every level of management—not just at senior level—are admissible for use in the consideration of corporate liability for manslaughter.
— The only way in which the “gross breach” test can be made to work is if it is complemented by the introduction of legally binding health and safety duties for company directors and their Crown body equivalents.

— The “profit from failure” test must be removed because this test opens up a potential legal loophole for negligent organisations and evidence would be extremely difficult to obtain.

— It is vitally important that the Government acts to introduce new positive statutory health and safety responsibilities on Directors and Senior Managers as part of or alongside this legislation.

— Government should announce the timetable and set up the Parliamentary Scrutiny Committee to consider the “draft bill” and submissions without further delay.

108. Memorandum submitted by Living Streets

1. Living Streets would like the opportunity to comment on the draft Corporate Manslaughter Bill. As the issues relating to corporate manslaughter do not usually fall within our remit, we became aware of the implications of the draft bill late in the day. We have since written to the Home Office expressing our concerns, but also want to ensure that they were put before the Select Committee’s Inquiry.

2. Living Streets (formerly the Pedestrians Association) is a national charity which campaigns for better streets and public spaces for people on foot. We undertake Community Street Audits for neighbourhoods and local authorities, where we assess the quality of the street from the viewpoint of the pedestrian, and we have local branches and affiliated groups across the country. Our work to improve streets helps to make streets safer, encourages community cohesion through encouraging people from different ages and backgrounds to meet within the shared space of streets, helps to reduce obesity and increase healthy lifestyles through encouraging walking, and helps to reduce car dependence.

3. We are concerned that the Bill as currently drafted will reduce the scope of local authorities and others responsible for the public realm to improve conditions for pedestrians. This will be counter to government policy to improve the quality of public spaces (as set out in the Public Service Agreement 8, on which the ODPM leads); to increase the levels of walking and cycling (as set out in the Department for Transport’s Action Plan on Walking and Cycling); and to reduce the level of childhood obesity (as set out in Public Service Agreement 4, on which the Department of Health leads).

4. Our concern is with Clause 3(3)(b) of the draft Bill, which requires a jury to consider whether an organisation failed to comply with “any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued...by an authority responsible for the enforcement of any enactment or legislation of the kind mentioned in paragraph (a)”.

5. All of these techniques, whilst ostensibly intended to increase pedestrian safety, often create worse conditions for pedestrians and thus contribute to the reduction in walking which has taken place in recent years.

6. Whilst some local authorities—for example, Norwich City Council, Nottingham City Council, and the Royal Borough of Kensington and Chelsea—have acted in contrary to the guidance from the Department for Transport, following careful risk assessments—most local authorities apply the guidance without consideration of the detrimental impact on pedestrians.

7. We are concerned that, should the legislation be passed in its current form, it would kill off the innovations that we are currently seeing from those local authorities committed to improving public space. This will make the task of our branches and supporters more difficult, and be contrary to government policy. We would therefore strongly urge that the Corporate Manslaughter Bill, whilst still requiring local authorities to comply with health and safety legislation, should not require them to follow any “code, guidance, manual, or similar publication”. Local authorities should simply be required to demonstrate that they have carefully quantified the risk associated with their decisions, and that they have acted in accordance with their own decisions on the balance of risk.

8. Since contacting the Home Office, we have received a note from the Corporate Manslaughter Bill Manager, assuring us that this will be looked at again. “How this is reflected in the Bill will require care, but I can assure you that we will be looking at this carefully.”

9. We would ask that the Select Committees probe the Home Office further on how it intends to ensure that the Bill will not stifle improvements to streets for pedestrians.

Transport for London (TfL) welcomes the opportunity to respond to the Government’s consultation on the Draft Corporate Manslaughter Bill. This response should be viewed as the response of the entire TfL Group.

TfL makes the following observations about the draft Corporate Manslaughter Bill.

**Clause 3—Gross Breach**

TfL feels that test for what is a “gross breach” of an organisation’s duty of care will unnecessarily complicate matters for the jury. Clause 3 includes several statutory criteria for the jury to consider including health and safety legislation. The test as currently drawn requires a jury not only to comprehend the law of gross negligence but also to consider health and safety legislation which involves different burdens of proof.

The position under section 3 of the Health and Safety at Work etc Act 1974 is complicated enough in as much as the jury must consider whether the Crown has established beyond a reasonable doubt a contravention of section 3 and in turn whether the defence has established on a balance of probabilities the defence of reasonable practicability.

It is more than likely that any prosecution under the proposed corporate manslaughter legislation will also have an offence in the alternative under the health and safety legislation. To include an explicit reference to health and safety legislation in the corporate manslaughter offence will give the jury a very complicated set of issues to consider.

**Public Sector Bodies**

In relation to sanctions, TfL notes that the consultation document states that there is an argument that fining a Crown body serves little practical purpose and simply involves a recycling of public money through the Treasury and back to the relevant body to continue to provide its service. TfL notes that this argument is not limited to Crown bodies and applies other public sector bodies as well.

**Most Serious Failings**

Finally, as set out in the consultation document, the Government’s policy is that the new corporate manslaughter offence should be targeted at the most serious management failings that warrant the application of a serious criminal offence. It is not the Government’s intention to catch companies or others making proper efforts to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation and appropriate standards are not quite met. TfL supports the Government’s approach. TfL’s view is that less serious failings are best dealt with under the existing health and safety legislation and that this sort of serious criminal sanction should be reserved for the worst offences.

21 June 2005

110. Memorandum submitted by the Law Commission

The Law Commission Broadly Welcomes the Government’s Draft Bill.

There is a serious defect in the present state of the law in cases where death results from serious failings by companies to take care for the safety of employees or members of the public. The possibility of successful prosecution in such cases is inversely proportionate to the size and complexity of the company. The smaller the company, the better the prospects of conviction; the bigger and more complex the company, the poorer the prospects of conviction. This is bizarre and unjust.

We welcome the Government’s determination to rectify this state of affairs along the lines proposed by the Commission in its report on Involuntary Manslaughter (LawCom 237).

The most important difference between the Government’s draft Bill and the Commission’s draft Bill is that the Government’s Bill extends (with qualifications) to Government Departments. This was not considered by the Commission in its report and we have no comment to make on that part of the Bill.

The Government’s Bill makes explicit the need for a breach of duty of care owed to the deceased: clause 1(1). We believe that this was implicit in the Commission’s Bill, but we see the value of making it explicit.

The Government’s Bill adopts the test proposed by the Commission that the defendant’s conduct must have fallen far below what could reasonably be expected in the circumstances, but it also includes a non-exclusive list of criteria for the jury’s consideration: clause 3(2). Again, we see the value of this.
The Government’s Bill omits the provision in the Commission’s Bill at clause 4(2)(b) that a failure may be regarded as a cause of a person’s death notwithstanding that the immediate cause is the act or omission of an individual. We think that this draft provision does have some value, but we note the reasons given in the White Paper at paragraph 51 for not including it, and we do not regard this point as one of major importance.

7 June 2005

111. Memorandum submitted by David Thomas

The legislation as such has been anticipated for upwards of 5 to 6 years and is no doubt welcomed by some. Unfortunately however, many of those who have waited for such legislation will be disappointed as one of their motives is to make it easier to personally punish an individual or individuals following the death of a loved one. This was their main motivator and this legislation does not make this desire more achievable.

The HSE web site states that “Following a successful prosecution, the courts will decide what penalty to impose, if any. As well as fines the courts also have the power to imprison offenders for certain health and safety breaches. To date five people have been sent to prison for health and safety offences since January 1996; none in the last four years. HSE believes that the current general level of fines does not properly reflect the seriousness of health and safety offences. However, it is up to the courts to decide appropriate fines.”

It appears that the draft Corporate Manslaughter adds nothing to this process as I believe it more important to raise the penalties for Health and Safety offences rather than introduce duplicitious legislation. Does it matter if a firm is fined and prosecuted £40,000 under Health and Safety legislation or this new Corporate Manslaughter legislation? Indeed, with a prison sentence available under Health and Safety legislation I would argue that if a death has happened then a stricter penalty will be available under existing H and S legislation than the new bill.

I am also concerned that such legislation may not address the issue of foreign firms operating within the UK having read paragraphs 55 and 56 where a non English/Welsh firm can be found guilty, possibly in their absence and where it is impossible to find a “directing mind” to pursue extradition and a prosecution in our courts.

The prime case where an accident involving a foreign company comes to mind is the following accident at Ramsgate, Kent, in September 1994 where a walkway fell 30ft while passengers were boarding a ferry and with two Britons were among the dead. The severest penalties of £750,000 and £250,000 were on two Swedish companies, Fartygentreprenader AB (FEAB) and Fartygskonstruktioner AB, (FKAB) whose “gross design defects” were the main cause of the tragedy. They were also ordered to pay £251,500 costs. However there is some doubt about whether the money will be recovered as the firms did not attend the trial and there is no mechanism in place to force them to pay. The court was told that the walkway was supposed to last at least 20 years, but collapsed after four months. The judge fined the organisation—which is mainly concerned with maritime safety—£500,000 plus £252,500 costs and said it was guilty of “gross and inexcusable errors”. It was basically not possible to identify a directing mind.

I notice that Crown Immunity has been lifted from certain government departments and for certain strategic public policy decisions which could be considered core public functions. However there is little clarity with regards its extent to Local Government and a possible conflict between this retained immunity and s36 and s37 of the Health and Safety At Work Act where members do have explicit responsibilities for public policy decisions.

I welcome the introduction of “sanctions” where fining a council only penalises the Council tax payer and feel that this should be extended to other areas of existing health and safety legislation where local authorities do receive fines for breaches of H and S legislation.

In summary I do feel that:

(i) this new legislation does not address the key issue of bringing a responsible person to trial which is what organisations such as the CCA and the TUC have been asking for,
(ii) it adds little in practical terms to existing health and safety legislation and in may cases is inferior,
(iii) it introduces the provision of sanctions which should be extended to existing health and safety legislation,
(iv) foreign organisations may not be made accountable, something becoming increasingly more common due to globalisation,
(v) consideration be given to revising the provisions of crown immunity for what would be prosecutions under Health and Safety Legislation,
(vi) this Bill is a knee jerk reaction to recent high profile rail disasters and is for political reasons rather than practical reasons,

(vii) consideration should be made to combine this new bill with the existing Health and Safety at Work Act with the current “Gross Negligent Manslaughter” remaining for existing serious offences when individual punishment is sought.

13 June 2005

112. Memorandum submitted by Mike Shuker

STATUS

This submission to Her Majesty’s Government’s draft Bill is a personal submission from me as a Health and Safety Representative at the Derby College.

OVERVIEW

The opportunity to comment on a draft Bill is much appreciated and it is hoped that HMG will proceed to table legislation after the consultation.

The draft Bill creates the offence of corporate manslaughter and helpfully applies it to Government bodies and agencies. This is a positive step.

COMMENTARY ON THE DRAFT BILL

Clause 1(1)

The offence seems limited, relating only to a person’s death. In view of the Government’s and HSE’s commitments based upon the “Revitalising” strategy, the offence should be widened to include causing death or major injury.

Additionally, death may not occur immediately as a result of the breach of a relevant duty and there should be arrangements for a prosecution to be brought even when the death occurs at a later date.

Clause 1(4)

The liability on conviction is to a fine. This parallels the penalty which could be faced by companies committed to the Crown Court for breaches of the Health and Safety at Work Act 1974.

It is important that the Courts are given a range of penalties. To limit this to fines only does not distinguish the offence of corporate manslaughter from a criminal breach under the Health and Safety at Work Act and may, if the fine is severe, threaten the continued employment of employees for breaches by the senior management.

It is recommended that alternative penalties, such as:

— fines commensurate with profitability;
— barring directors from holding office in the convicted company or any other company;
— barring senior managers within organisations defined in the Schedule from holding similar posts of responsibility; and
— retaining the possibility of prison sentences

should be considered.

Clause 1(6)

Proceedings can only be brought with the consent of the Director of Public Prosecutions. There should be a straightforward appeal procedure against the decision of the DPP not to proceed prior to recourse to expensive and time consuming judicial review.

Clause 2

The “senior manager” playing a “significant role” in “making decisions” or actually “managing or organising” may be difficult to identify—particularly in large, complex organisations. This may allow organisations to avoid prosecution where the acts or omissions of those not “senior managers” result in death or (as suggested above) serious injury.
Where there are multiple employers on one site (e.g., construction works), the “senior manager” as defined may also be difficult to identify.

These complexities may be able to be resolved by amending the Draft Bill to take account of the responsibilities imposed on company directors as detailed in the Health and Safety (Directors’ Duties) Bill tabled by Stephen Hepburn, MP.

**Clause 3**

For conviction under the draft Bill, the requirements under 3(2)(b) (i) to (iii) will have to be met.

As indicated above, this initially raises problems over the definition of “senior manager”.

Clause 3(2)(b)(iii) requires the jury to consider whether there is evidence that the organisation sought to profit from the failure. Surely, all that is required is that there has been a breach of duties under relevant legislation, that it has been a gross breach and there has been consequential death or serious harm.

**Clause 4**

It would appear that under clause 4(2) a public body could make a policy decision concerning the allocation of resources which led to a breach of health and safety legislation which in turn led to death or serious injury and not face prosecution.

Surely, to improve the health and safety performance of public bodies, it should be a requirement for policy makers to be informed of the likely health and safety consequences of their decisions and to be liable for prosecution if decisions then made result in death or serious injury.

**CONCLUSION**

I trust that the comments in this response to HMG’s consultation on the draft Corporate Manslaughter Bill will help to strengthen some areas of the legislation, thus providing a legislative framework which means that “people are free to go about their work safely and that those organisations that pay scant regard for the health and safety of their workers and members of the public are held to account.”

---

113. Memorandum submitted by Tim Midgley

I write with regards to NHS Hospital Trust Directors being enabled to all intents and purposes to “ring fence” themselves from ever being charged with corporate manslaughter.

Indeed one only has to listen to Patricia Hewitt MP, HMG Health Secretary, who told MPs that NHS managers could face criminal prosecution for failing to strengthen hospital hygiene controls to combat the MRSA but went on to say that “they would not be charged with corporate manslaughter for the deaths of individual patients but could be held criminally liable for ignoring improvement notices issued by the health inspectorate.”

As you will appreciate my primary concern is that clinical directors whom on the whole are themselves clinicians are the ones outside that “ring fence” as it’s going to be easier to prosecute a clinical director than the Trusts directors given they created mechanisms and inserted “so called” managerial layers such as the creation of clinical directors who have in law been given responsibilities outside of individual clinical decisions. Moreover their legal responsibilities extend from departmental finance and governance to staffing levels etc., albeit without being given any real power or control however a jury could be easily convinced that the clinical director was responsible and as an individual and not part of the collective for a death due to their inactions as well as their actions, whereas in reality a clinical director and, or directors of most NHS Hospital Trusts sadly have no real power or control.

My concern being: what is the point of bringing NHS Hospital Trusts within the scope of the Corporate Manslaughter Bill for Ministers to then state that they, and I quote the Minister, “not be charged with corporate manslaughter for the deaths of individual patients”, so that’s Trust directors off the hook? However the Health Secretary alas went on to say “...NHS managers could face criminal prosecution for failing to strengthen hospital hygiene controls...”, the “so called” managers in this instance could easily be proved to be in, say, a case involving MRSA the clinical director whom has the perceived ultimate control over wards within his/her clinical directorate.

In light of the actions and statements coming out of the NHS and DoH my fear is that clinical directors may become sacrificial lambs on the altar of public and media feeding frenzies for prosecutions given the increasing number of deaths from hospital acquired infections etc. It’s going to be far easier for clinical

directors to face gross negligence manslaughter prosecutions to quench the thirst for public and media hypothetical lynch mobs in the likes of MRSA cases if the bill or other legislation ensures directors of NHS hospital trusts can not face prosecutions under the proposed Corporate Manslaughter Bill.

Respectfully; whilst this bill is still in its consultation stage, I believe HMG should not set the precedent by way of prior exemption despite their coming within the scope of the act. The act must, in my humble opinion, cover the likes of a case of MRSA resulting in a death and that patient’s trustee and/or executor should be able to bring an action against the directors of the NHS Trust.

It should be noted that I am not a clinical director nor a clinician nor do I work for the NHS, however I have multiple conditions and impairments. Correspondingly my vested interest is from a patient’s prospective and in ensuring that those who direct and control are truly accountable and not a quasi director or manager.

2 June 2005

114. Memorandum submitted by Ford and Warren Solicitors

INTRODUCTION

We are a multi-discipline commercial firm with a niche practice in road transport. We act for a large number of road haulage and PSV operators.

We have been involved in a number of manslaughter cases going back over 10 years. We advise the Road Haulage Association and Freight Transport Association.

We have a number of concerns about the proposed Bill which are set out below:

THE NEW OFFENCE SHOULD ONLY RELATE TO LARGE COMPANIES

The common law offence of manslaughter has only proved to be ineffective in securing the conviction of large companies. Since 1987 there have been a number of infamous disasters, involving large scale loss of life, despite findings of fault in the inquiries that followed, there were no convictions for manslaughter.

By contrast the Courts have not had difficulty in pursuing small companies because it has been more straightforward to establish a causal link between the actions of one of their directing minds and the death (for example R v OLL—The Lyme Bay case).

We recently represented AJ Weaver (Haulage) Limited in manslaughter proceedings before Shrewsbury Crown Court. Although the Crown finally offered no evidence there was no issue that the Director in charge of the maintenance workshop was part of the brains of the company.

We act for a large number of small road hauliers. Typically they operate five vehicles or less. These organisations are split between businesses (sole traders or partnerships) and corporations. Under the proposal the old law would continue to apply to businesses. The decision whether to incorporate is usually made on the advice of accountants. We believe that it would be inconsistent and unfair to apply different tests for manslaughter based purely on the trading style of the organisation.

Given that the lacuna is in relation to larger companies we believe that the new offence should only apply to those organisations. Rather than making a distinction between businesses and corporations any new legislation should exclude small companies. The threshold for a large company would be a matter for parliament but excluding those employing less than 1,000 people might be appropriate.

THE DEFINITION OF GROSS NEGLIGENCE

Although there is widespread support for a greater deterrent the government should not lose sight of the fact that our road transport industry has the best safety record in Europe. Our haulage industry is the second safest in the world behind Singapore.

Although the bill attempts to define a gross breach of a duty of care (section 3) we are concerned that it may be too easy for juries to convict for relatively minor omissions.

Under section 3(2), when determining whether conduct falls far below that which could be reasonably expected the jury must consider whether the evidence shows a failure to comply with any relevant health and safety legislation or guidance. No explanation is given on what this phrase means, does it, for example, include the Goods Vehicles (Licensing of Operators) Act 1985 or the Public Passenger Vehicles Act 1981? Does it include the Working Time Directive?

Under our domestic licensing system regulated road hauliers are required to carry out periodic checks to ensure that their vehicles are roadworthy. Typically these take place every four weeks. Some juries might regard missing one inspection as conduct falling far below. It should be noted that we are the only EU country which imposes this type of inspection regime.
We believe that new legislation should include a clear definition of the conduct which it is designed to capture. In R v Prentice and Another (1993) 4 AER Lord Taylor listed (at 943J) states of mind which the Court might consider as establishing gross negligence including the following:

(a) Indifference to an obvious risk of injury to health;
(b) Actual foresight of the risk coupled with the determination nevertheless to run it; and
(c) an appreciation of the risk coupled with an intention to avoid it but with such a high degree of negligence in the attempted avoidance as the jury consider justifies convictions.

We believe that a definition incorporating these descriptions might form the basis of an appropriate test.

**Senior Manager**

The definition created under section 2 is vague and could lead to anomalies. The phrase significant role is not defined. According to the explanatory note it is intended to capture those whose role is decisive or influential rather than those who play a minor or supporting role. This definition creates a wide band within which conduct might fall. This creates the risk that juries might apply different standards.

The definition would also have different meanings depending on the size of the company. In small organisations there is a risk that the they would be fixed with the conduct of even low level managers.

The phrase substantial part creates separate problems. We understand that the word substantial is meant to be a relative term ie the size of the part of the business compared with the rest, rather than its size in absolute terms. Again this could create anomalies. If the gross negligence of the manager of a supermarket led to the death of a customer it would be perverse if the question of whether his employer was liable, for his conduct depended on whether it was owned by a chain like Tesco (in which case it would not be a significant part) or a small company with half a dozen outlets in which case it would.

**The Power to Order a Breach to be Remedied (Section 6)**

This provision would be largely ineffective. Most manslaughter prosecutions do not take place until at least 18 months after the incident. In the case of a road haulage or PSV operator there would almost certainly be a Public Inquiry following the fatal accident. At that stage the Traffic Commissioner would have the power to revoke the licence if, for example, the company was unable to show that it was professionally competent, alternatively he could impose conditions on their continued operation. In other cases the HSE have the power to put changes in to practice by the imposition of enforcement or prohibition notice.

**Conclusion**

The limitations of the identification principle relate to large companies. The police and CPS are always under pressure, following a fatal accident, to find someone to blame. If the current Bill becomes law it will apply a new potentially less onerous test for manslaughter to small companies which is unnecessary.

A manslaughter conviction against a haulage company has consequences beyond any fine, it almost certainly leads to them losing their operators licence at Public Inquiry on the grounds that they are no longer of “good repute”.

In so far as the new Bill would apply to large organisations we welcome the proposal subject to the observations which we have made in this document.

23 June 2005

**115. Memorandum submitted by Martin Elliott**

This note refers to the Home Office publication Cm 6497 “Corporate Manslaughter: The Government’s draft Bill for Reform”. In this note, unless otherwise stated, references to section numbers are to section or paragraph numbers in the introduction to that publication, and the applicable text of the publication is quoted in each case prior to answering the query posed by the publication.

**Sections 25–31: Management Failure by Senior Managers**

The heart of the new offence lies in the requirement for a management failure on the part of its senior managers ... The definition of a senior manager is drawn to capture only those who play a role in making management decisions about, or actually managing, the activities of the organisation as a whole or a substantial part of it ... The definition then requires the person to play a “significant” role ... The term “significant” is intended to capture those whose role in the relevant management activity is decisive or
influential, rather than playing a minor or supporting role... What amounts to a “substantial” part of an organisation’s activities will be important in determining the level of management responsibility engaging the new offence. This will depend on the scale of the organisation’s activities overall... We look forward to receiving comments on this key aspect of our proposals. We would in particular welcome views on whether the proposals for defining a senior manager, in terms of the management of the whole or a substantial part of the organisation’s activities and playing a significant role in such management responsibilities, as illustrated above, strike the right balance.

Agree that the current proposals strike the right balance.

Section 32 and 33—Gross Breach and Statutory Criteria

The new offence is targeted at the most serious management failings that warrant application of a serious criminal offence. It is not our intention to catch companies or others making proper efforts to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation but appropriate standards not quite met. The proposals do not seek to make every breach of a company’s common law and statutory duties to ensure health and safety liable for prosecution under the new offence. The offence is to be reserved for cases of gross negligence, where this sort of serious criminal sanction is appropriate. The new offence will therefore require the same sort of high threshold that the law of gross negligence manslaughter currently requires—in other words, a gross failure that causes death. We have adopted the Law Commission’s proposal to define this in terms of conduct that falls far below what can reasonably be expected in the circumstances.

A number of respondents to the consultation exercise in 2000 were concerned that the term “falling far below” was insufficiently clear and that further clarification or guidance was needed in respect of this. The draft Bill therefore provides a range of statutory criteria providing a clearer framework for assessing an organisation’s culpability. These are not exclusive and would not prevent the jury taking account of other matters they considered relevant. We are very much interested in further debate on whether the criteria proposed are appropriate or whether further or different criteria would be helpful.

Gross Breach

In the phrase “conduct falling far below what can reasonably be expected”, the expression “far below” is imprecise and lacks the severity and overall impact of “gross” in the definition of a “gross breach of a duty of care”. There would be closer correlation if “far below” were replaced with “grossly below”. A “gross breach” of any legal duty would normally be interpreted as conduct that falls little short of wilful default, and that interpretation of the Bill would appear to reflect the intention of the legislature here.

Section 37—Corporations

The Government’s consultation paper in 2000 invited comments on whether action should be possible against parent or other group companies if it could be shown that their own management failures were a cause of the death concerned. A large majority of respondents agreed with this proposal, but in most cases on the basis that the parent company should only be liable where their own management failings had been a direct cause of death. Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death.

Agreed.

Sections 38–40: The Armed Services

The Government recognises the need for it to be clearly accountable where management failings on its part lead to death. There will therefore be no general Crown immunity providing exemption from prosecution. However... it is important that the ability of the Armed Forces to carry out, and train for, combat and other warlike operations is not undermined. The law already recognises that the public interest is best served by the Armed Forces being immune from legal action arising out of combat and other similar situations and from preparation for these, and this is recognised in the offence. We also consider it important that the effectiveness of training in conditions that simulate combat and similar circumstances should not be undermined and these too are not covered by the offence. However, the offence would otherwise apply to the Armed Forces.

To avoid possible future accountability of individuals deployed with the Armed Forces on Contractor on Deployed Operations (CONDO) who by their nature are employees of a Company performing work for the MoD but are also members of Reserve Forces Clause 10 (2) of the Bill should be amended by inserting after “armed forces” the phrase “at the date of commission of any offence to which this Act applies” and inserting “exclusively” after employed.
Sections 45–46—Punitive Sanctions

The Law Commission in its 1996 report argued that it would not be appropriate for an offence that deliberately stressed the liability of the corporation itself to involve punitive sanctions for individuals. Secondary liability for the new offence should only extend to individuals in circumstances where they were themselves guilty of manslaughter.

In its consultation paper in 2000, the Government expressed concern that without punitive sanctions against company officers, there would be insufficient deterrent force to the new proposals. The paper therefore asked for views on whether individual officers contributing to a management failure should face disqualification. It further sought views on whether imprisonment should be available in proceedings for a separate offence of contributing to a management failing that had caused death, and the sort of sanctions that should be available.

Agreed—the approach of the Bill is right ie there should be no additional jeopardy for the individuals concerned, since they would in appropriate cases be subject to separate prosecution for manslaughter or other offences, as well as certain disqualification proceedings under existing legislation.

Section 57—Investigation and Prosecution

The consultation paper in 2000 invited views whether health and safety enforcing authorities in England and Wales should be given powers to investigate and prosecute the new offence, in addition to the police and Crown Prosecution Service. This attracted a range of comment, and little consensus of opinion.

The results of enforcing authorities investigations should form the basis of decisions to prosecute. Support the proposal that the consent of the DPP is required before prosecution.

Section 62—Costs

. . . we have identified costs of some £14.5 million to industry. A 1% increase in compliance with health and safety measures would provide some £200–300 million in savings in the costs associated with workplace injuries and death. We will continue to develop the RIA (regulatory impact assessment) in the light of comments on the draft Bill and would welcome further information from respondents on potential costs.

No comment.

Additional Comments or Notes

Clause 4 of the Bill: Relevant duty of care.

The second sentence of Clause 4(3) should be removed. It is accepted that the issues surrounding the duty of care are questions of law, but the underlying facts should always be questions for the jury in a criminal trial and not for the judge. This is a fundamental tenet of the English criminal justice system and to exclude it would be potentially to deny some of the basic human rights of the defendant. It is also difficult to see how in practice the judge could be expected to rule on the underlying facts relating to the duty of care when those facts will almost inevitably consist wholly or partly of the very facts of the case before the court, which are in any event reserved to the jury.

116. Memorandum submitted by Asda Stores Ltd

Asda operates 280 retail stores located throughout the UK. Asda meets the weekly shopping needs of approximately 12 million customers each week and provides employment for approximately 140,000 people on a full or part time basis. In addition to fresh food and grocery items the “George” clothing brand exclusive to Asda is the UK’s largest retail clothing brand by volume. Asda stores also stock a wide range of general merchandise items and increasingly stores operate pharmacies, optical and photo centres. Home shopping, insurance and other financial services are of increasing importance to the Asda offer. The business aims to maintain good relationships both with suppliers and with the communities in which it operates.

General Remarks

We understand the background to the perceived need to introduce an effective legal sanction to deal with serious management failings that lead to fatality overcoming the “Indentification” principle. Clearly it cannot be right that corporate liability can only apply if all elements of the offence can be proved against one member of the directing mind of the company. Arguably the importance to business of a good reputation ensures appropriate focus on issues of Health and Safety management and that the new corporate offence is unlikely to deliver significant additional benefit.
The Bill is we believe a substantial improvement on the draft previously issued, however. We do have the following concerns with the draft bill and a number of suggestions for consideration as to how the desired goal might better be achieved whilst minimising the risk of increasing regulatory burdens, stifling entrepreneurial activity or creating a risk averse culture.

We share the Home Office view that in seeking to create a new offence that it is most important that businesses who already take their obligations seriously under health and safety law should have nothing to fear. As the largest private sector employers, food retail is possibly uniquely vulnerable due to the high number of customers visiting retail stores and the volume of goods handled.

Our concerns and suggestions cover the following areas:

**Use of term “Senior Manager”**

We question the need to introduce and define the term “Senior Manager”. In a large organisation with a high degree of specialisation in vertical work streams it might be difficult to define whether an individual plays a significant role in the management or making decisions on the management of the whole or a substantial part of the activities. If the intention is catch decision making at board level then a definition based on director, secretary of person appearing to act in such a capacity would provide a formulation already well established in Consumer Law areas. It seems that the difficulties of applying the identification principle to directors have been carried forward to this proposal despite the fact that the offence is now intended to be targeted at the corporate body as a whole rather than individuals. As such a formula allowing the conduct of the business as a whole to be considered rather than restriction to the conduct of a narrowly defined senior management role would seem more effective.

**Definition of “Gross Breach”**

The introduction of any new term to law and particularly in an area of such importance is likely to lead to significant legal uncertainty to be decided by appeal cases. We are concerned that the definition given to “relevant health and safety legislation or guidance” may be too wide in referring to “any code, guidance, manual or similar publication . . .”

In the current highly fragmented local authority-based enforcement network for environmental health and product safety matters we are concerned that a plethora of advice sometimes conflicting can be addressed to business both at a local and at national level. A possibility will always exist that the significance or significance in hindsight of a particular piece of information or informal guidance may in these circumstances be overlooked however diligent the organisation and it would seem oppressive for the offence to be made out in these circumstances. The reference to guidance could be restricted to statutory codes of guidance.

Similarly the direction that the jury is not prevented from having regard to any other matters they consider relevant appears too wide without further guidance and direction eg the weight to be given to conformity with prevailing industry practice.

Reference to “sought to cause the organisation to profit from that failure” might be widely applied to all commercial activity where there has been a failing to meet a requirement however minor or technical rather than restricted to gross corner cutting on cost grounds.

It will be of great concern to investors and business operators that no defences are provided in respect of an offence of potentially unlimited penalty.

**Inclusion of a Due Diligence Defence**

It is noted that the proposed offence also covers the supply of goods or services. The increasing convergence with food safety, general product safety and trading law provisions would suggest that there is merit in the same basic legal principles applying to liability. This would include the provision of a due diligence defence for an organisation where it can show that it has taken all reasonable steps to avoid the contravention in question. The legal formula on this is well tried and tested in the courts over many years and surrounded by a cohesive body of decided cases. The due diligence defence is also often associated with defences where the offence can be shown to be attributable to the act or neglect of a third party. The existence of the due diligence defence has provided a major incentive for retail and manufacturing businesses to adopt a proactive risk based approach to the controls that they have in place and has contributed very significantly to improving food and product safety management much of which improvement has been driven by the UK retail sector.
APPLICATION TO THE CROWN AND PUBLIC AUTHORITIES

Whilst exclusion of the Armed forces may well be in the public interest we are extremely concerned at the proposed exclusion of public authorities from a duty of care for the purposes of the Act including allocation of resources and weighing of competing public interest. Agencies such as the Food Standards Agency and HSC do make very significant decisions impacting on the safety of products in the UK market place and it is right that at least the same high standards should be expected from them in the management of such matters as are expected from commercial operators.

PROSECUTION OF OFFENCES

We are concerned that the right to take proceedings is not restricted to the Crown Prosecution Service. Conditions surrounding consent to proceedings by the Director of Public Prosecution should be set out clearly in the Bill for transparency. Given the potential cost, publicity and negative impact on shareholder value that might result from any such proceedings it would seem right that there are safeguards in place to filter proceedings with a public interest test. Restriction of the investigation of offences to the police and institution of proceedings to the Crown prosecution service would appear appropriate.

REMEDIAL ORDERS

The inclusion of a power of the court to require remedial action might bring significant unanticipated costs to entire industries and we question whether the court and jury would be appropriately qualified in the context of the limited knowledge gained during a trial to decide such technical matters which might have knock on consequences for practices across whole industry sectors. There should certainly be an appeal mechanism to safeguard against the imposition of unreasonable remedies and timescales. Is it necessary to have such a power given the power that enforcement officers already possess to issue improvement and prohibition notices?

PENALTIES

The absence of a limit to penalties may provide a disincentive to invest in higher safety risk areas of the economy. In an increasingly global market place this may cause long term detriment to growth and viability of the UK economy.

Supermarkets are possibly uniquely vulnerable given the high number of customers, and colleagues and the movements of goods through our distribution systems and stores.

We believe that it is very important that a properly thought out and proportionate response to the legal difficulties that have arisen in recent corporate manslaughter proceedings is reached and we would be very pleased to discuss further any of the issues set out above.

117. Memorandum submitted by British Energy

British Energy (BE) is pleased to have the opportunity to make this consultation response and our comments are as follows:

1. BE recognises the helpful clarification by the Home Secretary in his Foreword to the Consultation that corporate manslaughter charges must be reserved for the very worst cases of management failure where there has been a flagrant disregard for health and safety leading to death. Additionally, the Home Secretary makes clear that it is not his intention to propose legislation that would increase regulatory burdens, stifle entrepreneurial activity or create a risk adverse culture and he confirms he is satisfied that the Draft Bill does not do so.

2. The current proposal removes a key problem with the common law offence of corporate manslaughter, being the need to prove that an individual who can be properly characterised as the “directing mind” of the company in question is personally guilty of manslaughter. This development is constructive as it removes the threat of senior individuals being aggressively investigated and prosecuted incorrectly for manslaughter in order to try and secure a conviction against an organisation.

3. The consultation is also of assistance in making clear that, whilst the offence builds on the current law relating to gross negligence manslaughter, “the management failure must amount to a gross breach of the duty to take reasonable care; the sort of high threshold that currently applies and which remains appropriate for an offence of this gravity”. It is not intended that the offence will apply in wider circumstances than the current offence of gross negligence manslaughter. The Draft Bill introduces no new liability for organisations. Nor does it introduce any new or secondary liability for individuals. This approach is welcomed and supported by BE.
4. One area which gives BE concern is the description of a senior manager. This is linked in the Draft Bill to management responsibility—the taking of decisions about how activities are managed, organised and actually managing those activities. The proposal notes that “This is intended to capture those managers who have responsibility for the overall way in which an organisation manages or organises any particular activity”. Also that “This ensures that managers who set and monitor workplace practices as well as those providing operational management are covered”.

5. It appears to BE that in using and particularly explaining the senior manager description in that way the proposal could identify individuals at a lower level in an organisation than those who under the current common law could be identified as the “directing mind”. This is not what the proposal intends, as there is to be no new liability on organisations. Who is a senior manager should be decided on a case by case basis and it seems sensible to let a jury to decide, but leaving it open to a Judge on an application to dismiss a case that persons identified are not senior managers.

6. The power in the Draft Bill for a Court to fine an organisation is supplemented by an ability to impose an order for remedial action. British Energy believes there are sufficient tried, tested and robust powers under the Health and Safety at Work Act 1974 (“HASWA”) to deal properly and appropriately with the need for remedial action. Significant problems could arise as a Court could be unaware of the overall impact of any remedial order on the activities of an organisation. British Energy believes that a financial penalty should be the only penalty and suggests that it is not the role of a criminal court to regulate the management of safety nor to decide what is the relevant standard of safety in any industry.

7. The current proposal confirms that one of the factors to be taken into account when assessing whether the breach of duty, where one is established, involved in the senior management failure was gross is the extent to which the organisation failed to comply with any relevant health and safety legislation or guidance. The Draft Bill confirms that this is not only includes HASWA guidance, but also all other legislation and guidance on health and safety. This is a very important, persuasive factor and British Energy believes that the definition of guidance is much too wide. Guidance should be expressed in the Draft Bill as limited to legislation and approved codes of practice publicly issued by the industry safety regulator.

8. In light of what is required in the Draft Bill to successfully prosecute a corporate body for manslaughter, the proposal does not to BE’s view seek to go against organisations which make a proper effort to comply with health and safety legislation or who make a proper effort to operate in a safe and responsible fashion and learn from operational feedback, but who might not have complied with the required standard in a particular circumstance, which approach is supported by BE.

9. The Draft Bill specifically requires the consent of the DPP before proceedings can be instituted. BE approves this requirement in order to avoid insufficiently well-founded prosecutions, which would ultimately fail, and would place an unfair burden on the organisation involved with possible irreparable damage and personal harm.

17 June 2005

118. Memorandum submitted by Zerrin Lovett

I have looked at the draft document on corporate manslaughter and would wish to make the following comment.

Whereas the consultation documents says that Military training where it reflects conflict situations is exempt I am concerned that this offers a significant grey area for our Armed Services to hide behind.

In the name of training for various situations our armed services sally forth into all sorts of training such as:

— caving in latin American countries that do not know they are there
— tramping up and down volcanic regions and getting lost
— jungle training
— boating down the Zambezi
— sail boat training
— learning to fly
— learning to ski
— parachuting

Whereas in some cases military training is fully justified a couple of the examples refer to situations that poorly managed training could have led to disaster and loss of life. In cases such as these I would say that the training was more for pleasure and if someone dies due to negligence the MoD should be held to account.

I believe a clear distinction between vocational (in the field training) and development training should be made. Often on military training courses individuals are made to continue past their limit, where this may build them as people it may also kill them and the leader in this type of case should be held responsible, so should the MoD for allowing such training to continue. Where training funds are requested from Sports
Committees, the MoD sees the plan/operational order and has the opportunity to comment; often these are sketchy to say the least. On such occasions they should be asking the question as to what procedures are being followed, has diplomatic agreement been obtained and has a risk assessment been carried out. The concern over whether Corporate Manslaughter may apply should weed out some of the badly run expeditions and prevent injury.

14 June 2005

119. Memorandum submitted by Centrica Plc

This response sets out the considered views of Centrica plc and its subsidiary companies, including, but not limited to, British Gas Services Limited, British Gas Trading Limited and Hydrocarbon Resources Limited.

Centrica plc does not object, in principle, to the introduction of a new statutory offence of corporate manslaughter. We are pleased that the draft legislation does not seek to impose individual liability on directors, company secretaries, and other officers of the company. However, we do have concerns that, in addition to a corporate manslaughter prosecution being brought against a company, the existing manslaughter law could be used to prosecute individual directors and officers. Further, in the event of the failure of a corporate manslaughter charge, it would be open to prosecuting authorities to bring charges against the company and against individuals under the HSWA. Further, a successful criminal prosecution of a company is likely to lead to civil claims being brought against it. We presume that the Government’s main objective of the proposed legislation is to bring about improvements in Health and Safety, and not to bring about multiple criminal and civil remedies against companies. Please refer to our comments in relation to page 7 paragraph 6 below with regard to prosecution policy.

Page 7 Paragraph 6

The following statement is made: “The extra deterrent effect of a possible corporate manslaughter conviction for organisations who consistently fail to meet proper standards of health and safety will also provide a further driver for ensuring safer working practices”. We do not believe that strong evidence exists to support this statement. We believe that passive legislation which is used only in the aftermath of an accident is unlikely to act as a deterrent or to actively drive safety improvements. Further, the document states “The UK has a very strong H&S record, but there remain unacceptably high levels of work related deaths each year”. This statement is, on the face of it, contradictory. In any event, work related deaths have reduced substantially in recent years without the existence of corporate manslaughter legislation. We believe that further reductions will be brought about by improved working practices and engagement with organisations such as the Health and Safety Executive (HSE). It is important that any new offence is not aimed at those companies that consistently try to meet proper standards of health and safety.

In practice, we believe that the prosecuting authorities are likely to prosecute, where they are unsure as to whether the conduct in question is grave enough to do so. We believe that prosecutions should be undertaken by the CPS, who are less close to these issues than the HSE, and are therefore more likely to take an objective view. We also believe that the CPS needs to be provided with support and guidance on when and how to prosecute this offence having regard to the public interest test.

Page 9 Paragraph 14

Reference is made to “management failings by an organisation’s senior managers”. We are concerned that it is unclear as to who is to be classed as a senior manager. Such uncertainty is likely to lead to uncertainty and costly litigation. We do not believe that the Government should rely on the courts to determine this definition, rather that the statute should offer certainty. A clear definition would also be more likely to push health and safety matters higher up corporate agendas.

Reference is also made to an approach that focuses on the arrangements and practices for carrying out an organisation’s work, rather than any immediate negligent act. We believe that there will be pressure on companies to move towards formally certified Health and Safety Management systems, potentially resulting in unnecessary additional costs for businesses. Such processes would not, by themselves, prevent poor performance, and we believe that certification bodies would struggle to find resources of the right calibre. Further, however good the certification process was, there would be a danger of it becoming automatic rather than focusing on individual risks in a dynamic way.
Page 9 Paragraph 15

Reference is made to the management failure amounting to “a gross breach of the duty to take reasonable care”. We support the Government’s intention to provide offences that are “clear and effective”. It therefore follows that there should be total clarity as to what constitutes a gross breach of duty of care. Without such clarity, we believe that there would be extensive reliance on expert testimony, leading to lengthy and complex trials. We believe that the criminal threshold should be higher than the civil one, and that the prosecution should be compelled to prove that the organisation exhibited an intent to commit a gross breach of its duty of care. An appropriate mental element should be specifically included in the draft legislation.

Page 10 Paragraphs 18 Onwards

We are concerned about the applicability of the proposed legislation to public bodies, which, we believe, will lead to inequality of treatment. Whilst we accept that it would be inappropriate for the legislation to apply to certain public bodies, such as the armed forces, we do not believe it to be in the public interest for certain Government bodies to be exempt. This would cause anomalies in cases where services are jointly provided by public bodies and private organisation, for example in relation to prison management and prisoner transportation. The result would be to create inequality in areas in which public bodies and private companies compete, burdening private companies with liabilities from which such public organisations are exempt.

Page 12 Paragraphs 26 to 30

The document refers to senior managers having a “significant role” or “substantial responsibility” in an organisation. Reference is also made to the scale of physical or practical operations. This does not appear to recognise the fact that in corporate decision making, those with “substantial influence” may reside in other disciplines, for example Finance or Information Systems. Furthermore, we believe that use of these definitions may push liability further down the organisation than the Government intended. There is a strong case for these definitions to be amended and tightened up.

Page 13 Paragraph 32

Reference is made to “conduct that falls far below what can be expected in the circumstances”. Generally, we would expect such conduct to be judged against an established or recognised standard of good practice such as an Approved Code of Practice. We are concerned, however, about the use of the words “in the circumstances”. This suggests that larger companies, with substantial resources, could be judged differently from smaller ones. Page 36 paragraph 18 refers to compliance with “relevant health and safety legislation and guidance”. Whilst this is clearly defined, it causes us concern, as our experience is that some Health and Safety guidance aims for impractical standards and has been produced without consultation with organisations. This is included in the draft Bill—section 3 (3) (b).

We must stress that it is vital that what is assessed and measured by the prosecuting authorities and the courts is the breach itself and not the consequences of the breach. This is particularly important in relation to businesses such as ours, where a single and isolated minor breach can lead to a fatality. We believe that what should be measured is the degree of departure from accepted standards.

Page 14 Paragraphs 36 and 37

Under these proposals, parent companies would be liable if their “own management failures were a cause of the death concerned”. We do not believe this definition is clear enough, and we therefore believe that parent companies are as likely to be prosecuted as operating subsidiaries. However, in large Groups, it is often the case that the main operating subsidiaries have responsibility for health and safety, with the parent company setting a framework for compliance. This framework is often tailored to meet the subsidiary’s specific requirements. It is unclear as to whether the setting of such parameters would, by virtue of the proposed legislation, impose a duty of care on the parent company. We therefore believe that the proposed legislation should better define the circumstances in which parent companies may be liable. Otherwise, parent companies may decide to simply delegate such responsibilities, in their entirety, to operating subsidiaries.

We are also concerned that these proposals could result, in effect, to a lifting of the corporate veil. We therefore believe that these sections should be carefully re-examined.

Page 18 Paragraph 54

We are very concerned that under these proposals, courts could impose remedial orders on organisations. Such orders might be imposed without any proper risk assessments and could affect the whole Group—not just address the particular issue which had contributed to the death. Further, such remedies may also cut across enforcement measures taken by bodies such as the HSE.
OTHER MATTERS

We would like specific clarification that Road Traffic accidents are excluded from the ambit of the proposed legislation.

We also believe that it would be helpful for guidance to be produced on the range of financial penalties to be imposed by the courts.

16 June 2005

120. Memorandum submitted by General Counsel 100 Group

1. This response sets out the combined comments of the General Counsel 100 Group.

The General Counsel 100 Group (GC100) was launched on 9 March 2005 in response to the increasing volume and complexity of domestic and international law and regulation which impacts on UK listed companies. Membership of the group is by invitation only and restricted to general counsel in FTSE 100 companies. A list of member companies is annexed. The main objectives of GC100 are to provide a forum for practical and business focused input on key areas of legislative and policy reform and to enable members to share best practice in relation to law, risk management, compliance and other areas of common interest. The group has been formed with the support of the Practical Law Company, which acts as its secretariat.

The views expressed in this response do not necessarily reflect the individual views of members or their employing companies.

2. In principle GC100 members do not object to an offence of corporate manslaughter being introduced and are supportive of the draft in so far as it does not impose prosecution and/or imprisonment of individual directors or personal fines. Positive legal duties already apply to company directors, secretaries and other officers and senior managers in discharging their duties in the workplace under section 37 of the Health and Safety at Work Act (HSWA). However we have concerns that, in addition to a charge of corporate manslaughter being brought against a company, the existing manslaughter laws could be used against individuals. Similarly, if a corporate prosecution against a company failed, there would be no prohibition on a HSWA prosecution being brought. In addition, a successful criminal prosecution against a company is likely to facilitate civil actions against individual directors and officers. It is presumably not the Government’s intention for multiple criminal and civil law suits against companies and individuals but to ensure that companies have robust health and safety regimes in place. The issues that the US Courts have been faced with illustrate the risks of legislation being improperly used to launch speculative or satellite litigation. The impact of draconian measures upon employers’ liability insurance and D&O cover also needs to be factored into the equation.

3. In promoting the draft bill, the Home Secretary, the Right Honourable Charles Clarke MP, states that “a fundamental part [of a criminal justice system that commands the confidence of the public] is providing offences that are clear and effective”. We would support this. However, if companies are subject to criminal sanctions it should be clear as to what constitutes a “gross breach of duty of care”. Whilst case law would no doubt in due course clarify this, it is our concern both the prosecution and defence will rely extensively on expert testimony and lengthy and complex trials will ensue. Where criminal sanctions are involved, the relevant threshold for imposing those sanctions should be higher than for an equivalent civil offence and should, in our view, involve an element of intent. It is therefore our belief that intent to cause a gross breach should be shown by the prosecution in a criminal action and that this should be clear in the legislation.

4. There is often institutional shareholder as well as regulatory pressure to operate in a not only efficient but also cost-effective manner. In light of this, we are concerned that there is sufficient uncertainty in the draft legislation that prosecutions may focus on economic arguments, assuming that companies have unlimited funds available to cover the health and safety area.

5. We are concerned about the lack of clarity as to who a “senior manager” is intended to be. This lack of clarity will invariably lead to uncertainty and costly litigation. It should therefore not be left to case law to develop a definition and it would be preferable for the statute to offer certainty. Further, a clear and narrow definition would achieve the intention to push safety management issues further up the corporate chain of command. In order to remove uncertainty it would therefore be preferable for a clear definition of “senior manager” to be included in the statute.

6. The draft Bill also makes reference to consideration of compliance with any health and safety legislation or regulatory guidance. It is clear that the reference includes the HSWA but it also appears to have a wider reach and may extend to, for example, product safety legislation. In addition, liability for corporate manslaughter will be looked at in light of a company’s compliance with guidance issued by the Health and Safety Executive or any other authority responsible for enforcement of health and safety laws. There is therefore uncertainty as to exactly what a company needs to consider.

7. We believe that the legislation is also uncertain, and could cause potential inequality, in how it deals with the public sector. Whilst we accept that there should be permitted exclusions to which the new legislation should not apply (eg the armed forces), we do not believe it is in the public interest for some
government bodies to be exempt. Where services are carried out by both government bodies and private sector companies (for example, waste disposal and prison management), it would be illogical if the government-owned body was exempt but in an analogous situation a private sector company was not. As such, the result would be a lack of a level playing field in industry sectors in which public authorities and private companies compete, burdening private companies which are subject to the legislation with additional potential liabilities from which their public counterparts are exempt. The public sector would therefore benefit from a certain competitive advantage if it were exempt.

8. For the avoidance of doubt, we believe it should be clarified that road traffic accidents occurring in the normal course of discharge of an employee’s responsibilities are excluded.

9. Under the current proposals, parent companies are only liable if their “own management failures were a cause of the death concerned”. Given the lack of clarity surrounding this provision, it is likely that litigants will, as a matter of course, include parent companies in any litigation. However, within large groups it is often the case that the main operating subsidiaries will have responsibility for health & safety whilst the parent company may set a framework for compliance. The framework will often be tailored to the individual subsidiary’s requirements (taking account of the particular industry in which the subsidiary operates), but the proposals are unclear about the question whether the mere setting of parameters by a parent should be sufficient to impute a duty of care on the parent. The potential liability of parent companies should therefore be better defined, as it may otherwise lead to the delegation of responsibilities to subsidiaries, rather than encourage parent entities to set clear parameters for their subsidiaries.

GC100 GROUP—MEMBER COMPANIES

<table>
<thead>
<tr>
<th>Alliance &amp; Leicester</th>
<th>Liberty International Holdings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allied Domecq</td>
<td>Lloyds TSB Group</td>
</tr>
<tr>
<td>Amvescap</td>
<td>MAN Investments</td>
</tr>
<tr>
<td>Anglo American</td>
<td>Marks and Spencer</td>
</tr>
<tr>
<td>Associated British Foods</td>
<td>National Grid Transco</td>
</tr>
<tr>
<td>AstraZeneca</td>
<td>Prudential</td>
</tr>
<tr>
<td>Aviva</td>
<td>Reckitt Benckiser</td>
</tr>
<tr>
<td>BAA</td>
<td>Reed Elsevier Group</td>
</tr>
<tr>
<td>BAE Systems</td>
<td>Reuters Group</td>
</tr>
<tr>
<td>Barclays</td>
<td>Rexam</td>
</tr>
<tr>
<td>BHP Billiton</td>
<td>Rio Tinto</td>
</tr>
<tr>
<td>BP</td>
<td>Royal and Sun Alliance Insurance Group</td>
</tr>
<tr>
<td>British Airways</td>
<td>Royal Dutch Shell Group</td>
</tr>
<tr>
<td>BT Group</td>
<td>Schroders</td>
</tr>
<tr>
<td>Cable &amp; Wireless</td>
<td>Scottish &amp; Newcastle</td>
</tr>
<tr>
<td>Cadbury Schweppes</td>
<td>Severn Trent</td>
</tr>
<tr>
<td>Centrica</td>
<td>Shire Pharmaceuticals Group</td>
</tr>
<tr>
<td>Diageo</td>
<td>Smiths Group</td>
</tr>
<tr>
<td>Emap</td>
<td>Standard Chartered Bank</td>
</tr>
<tr>
<td>Friends Provident</td>
<td>The BOC Group</td>
</tr>
<tr>
<td>Gallaher Group</td>
<td>The Royal Bank of Scotland</td>
</tr>
<tr>
<td>GlaxoSmithKline</td>
<td>The Sage Group</td>
</tr>
<tr>
<td>Hanson</td>
<td>Unilever</td>
</tr>
<tr>
<td>HBOS</td>
<td>United Business Media</td>
</tr>
<tr>
<td>HSBC Holdings</td>
<td>Vodafone</td>
</tr>
<tr>
<td>Imperial Chemical Industries</td>
<td>Whitbread</td>
</tr>
<tr>
<td>Imperial Tobacco</td>
<td>Wolseley</td>
</tr>
<tr>
<td>Legal &amp; General Group</td>
<td>WPP Group</td>
</tr>
</tbody>
</table>

121. Memorandum submitted by the Royal Institution of Chartered Surveyors

The Royal Institution of Chartered Surveyors (RICS) represents the views and interests of 110,000 chartered surveyors worldwide covering all aspects of land, property and construction. Under the terms of its Royal Charter, RICS is required at all times to act in the public interest.

We have long supported the Government’s intention to reform the law on corporate manslaughter and therefore welcome the publication of this draft Bill. However, despite the general effectiveness of the proposals there are some situations in which companies may still be able to avoid liability. These are highlighted below.
JURISDICTION

In a global economy with ownership of companies often being separate from the location of the work, and the fatality, there is a problem with some aspects of the offence not occurring in England or Wales. The draft Bill is only applicable in England and Wales, s16. This means that in terms of territorial coverage the offence will apply if the injury that results in death occurs in a place where the English courts have jurisdiction. This will be the case if the management failure occurred either here or abroad, as might be the case with a foreign company operating in England. However, there is a problem in that there is no extra-territorial jurisdiction proposed. There would be huge practical difficulties in trying to extend jurisdiction over the operations abroad of English companies. Still, this means that if the company is managed in England and the fatality happens at an Eastern European site this legislation could not be used. The prosecution may not want to be stepping on the toes of the local laws yet many deaths could go unpunished.

What often happens in such a situation is that the English company will employ a local company and instruct them to comply with all local laws. This is a problem as it could effectively get around the legislation and means that a ‘Bhopal’ situation would not be liable.

A more likely problem could be that if an English employee travelled to a foreign site and suffered a fatality, corporate manslaughter charges could not be brought. On the other hand, the Health and Safety at Work Act might still be used in this situation.

A situation such as Zeebrugge would be covered by s16(2)(b) if the deaths occurred on a British ship registered under the Merchant Shipping Act 1995. The Piper Alpha scenario would also be covered due to s16 (2)(e).

The intention of the Bill is that it is the decisions about processes that are punished, yet the lack of extra territorial jurisdiction means the decisions could be made within the court’s jurisdiction, lead to a death and still go unpunished.

FOREIGN COMPANIES

Another potential loophole is if the injury occurs in England and the company is based abroad then the legislation could not be used. It is unlikely that extradition proceedings would be brought to bring managers to England from abroad. What can often happen in such a scenario is that the foreign parent company would set up operations in England or purchase an existing English company. The management decisions would thus be made within the jurisdiction and so a prosecution could be brought. Nonetheless, there are many potential fatalities that are not covered.

CHANGED OWNERSHIP

Just as Railtrack changed to Network Rail, other companies may change ownership between the date of the death and the prosecution. There is a question about whether the new firm should be affected by the previous companies errors. This potential problem could be resolved by the fact that the judge can levy a fine to an appropriate level, or can issue a remedial order if the error has not been resolved by the new company.

TIMING

Companies will not be able to be prosecuted for “anything done or omitted before it comes into force”, S15(2). However, there could be a potential problem if the management decisions are taken before the Act comes into force, and hence be more easily convicted, than a firm that does not even have procedures in place. In s3(2)(b)(i) the proposed test is conduct falling far below what can reasonably be expected. This should probably be conduct that ought to be reasonably expected, so that a firm is not more harshly treated just because it has high in house standards. An example is that the HSE see most work place deaths as preventable, but some construction companies have taken the position that all work place deaths are preventable. This could make prosecuting these firms easier than a company that has lower standards in its procedures.

GROSS BREACH AND AWARENESS

There would be merit in allowing non-disclosure to the prosecution of company procedures. Otherwise firms making an effort, but where managers did not follow their own company’s advice, could be more easily seen to commit a gross breach, and hence be more easily convicted, than a firm that does not even have procedures in place. In s3(2)(b)(i) the proposed test is conduct falling far below what can reasonably be expected. This should probably be conduct that ought to be reasonably expected, so that a firm is not more harshly treated just because it has high in house standards. An example is that the HSE see most work place deaths as preventable, but some construction companies have taken the position that all work place deaths are preventable. This could make prosecuting these firms easier than a company that has lower standards in its procedures.

17 June 2005
122. Memorandum submitted by David Daniel

I write as a Health and Safety Consultant providing support and advice to a network of diverse and mainly small businesses.

I have concerns regarding the framing of these requirements which I believe still leave businesses in a position of undeserved jeopardy, and sets out legal principles which are at best dubious. I remain of the view that as far as occupational safety is concerned existing laws do not need additional improvement and are sufficient. I would point out that less than 300 people per year are killed at work, and employment remains a very safe part of life. I suspect that the issues of Medical Negligence arising from such laws will be much more widely actioned.

I am particularly concerned that the Bill proposes to judge defendants not only on the basis of failure to comply with specific legal requirements, but also with failing to comply with codes of practice and “Guidance”.

Within Occupational Health and Safety, the use of Codes of Practice approved by the Health and Safety Commission is well understood, although few ACOPS have been developed with industry, the HSE/HSC having reserved a monopoly on drafting such documents over many years. One consequence is that most ACOPS are extremely vague, avoiding commitment to specific requirements, and it is often difficult to determine exactly what an employer is expected to do.

“Guidance” on the other hand is unregulated. The Health and Safety Executive produce a wide variety of guidance, of varying quality and this is often prepared by local teams or individuals with no apparent scrutiny by the Commission. Cataloguing is poor and there are several different routes for publication. Some documents are extremely obscure, difficult for even a professional adviser such as I to locate, are out of date, contain dubious or contradictory advice, and generally have been written without recourse to or involvement of industry specialists but are written in order to further the viewpoint of the enforcing authorities. I can cite many examples where I have had to discard guidance in favour of my own professional judgement as a result of such situations. Such guidance is not currently admissible in court and has no legal status.

As a graphic example, the HSE’s guidance on stress at work recommends the use of questionnaires and surveys, whilst other research concurrently commissioned by the HSE concluded that such surveys were not effective. The HSE’s official line requires that work related stress be the subject of a risk assessment, despite the fact that there appear to be no reliable ways to assess the likely occurrence of stress. In respect of the storage of petrol—an area not devoid of risk—I have been referred by the HSE to a guidance document which was based on legislation which is now wholly obsolete, and for which there are no plans for a re-write. This leaves the reader extremely confused as to what if any of the guidance remains relevant. Consider the consequences of having such documents used as prosecution evidence.

The offence of Manslaughter is an extremely serious one. I feel that allowing the possibility of basing a prosecution on an obscure publication prepared by a minor department of a government organisation such as a local HSE office (currently such offices have additional “specialist” roles and do produce guidance which again appears not to undergo scrutiny by the Commission), or even a Local Authority’s Environmental Health department, as is proposed, is extremely dangerous. It is not a crime to fail to heed guidance, or having read it, to choose not to follow it but implement other strategies, especially where such guidance has no legal status and does not come from an authoritative source. This law seeks to make it so.

Approved Codes of Practice were intended to be admissible in court and are at least the subject of official approval. They have faced difficulties even so as a result of the reversal of the burden of proof, and would be a dubious basis of prosecution.

On the other hand I am pleased to see that the Bill now restricts this crime to cases where there is clear evidence of direct causation, and the concerns are lessened by the avoidance of individual prosecution.

In respect of the “Buck-stopping” provisions relating to Public Authorities, I can see no obvious reason why any organisation should not be fully open to scrutiny in respect of this law, and I suspect that the attempt to avoid the courts considering the decisions of the Government itself will not be acceptable.

31 March 2005

123. Memorandum submitted by Simone Plant

Attending a recent legal conference for Safety Practitioners where the presenters were solicitors was a shocking experience.

If you want to neglect safety for your staff, work for a big faceless organisation . . . your chances of getting away with it are far higher.

This has to stop.

Big wealthy organisations can absorb the costs of big fines and high legal costs.

This is disproportionately unfair on smaller organisations and makes them less competitive.
It is high time the burden fell equally . . . bigger organisations can afford to be legally compliant . . . smaller ones less so.

Learning about business in a big conglomerate sets up those setting out on their own with unrealistic understanding of the importance of safety. Murdering employees through poor safety practices is seen as a cost effective strategy . . . this must change.

15 May 2005

124. Memorandum submitted by Public Concern at Work

We are particularly pleased that the Government has accepted that the new offence should not replace or prejudice the application of the existing law of gross negligence manslaughter to companies. We are also pleased that the Bill focuses—through clause 3(2)—on whether or not senior managers were aware or should have been aware of the risk of death or serious harm posed by the failure to comply with relevant health and safety legislation and guidance. While we still see merit in the Bill providing a defence in the circumstances we outlined in our response of 5 September 2000 to the initial proposals, we welcome the Government’s recognition of the relevance of this issue.

We have one minor observation on clause 3(2), which we imagine others are also making, which is that the reference to profiting from the failure in sub-clause (iii) will be problematic in applying the offence to public and non-profit making bodies. We would prefer the term “benefit” rather than “profit”.

We have one other observation which may be caused by our misunderstanding of the intent or application of one part of the Bill. This relates to the proposed requirements that (a) there should be a breach of a relevant duty of care in negligence owed to the deceased and that (b) in considering whether that breach was “gross”, the jury should do so by regard to relevant health and safety legislation and guidance.

As we understand the Bill, it will be for the judge to determine whether there was a duty of care owed to the deceased in negligence and it will be for the jury to determine whether that duty of care in negligence was breached. It will then be for the jury to determine whether that breach was, in those circumstances, gross having regard to any failure to comply with relevant health and safety legislation and guidance, the seriousness of that failure and the matters set out in clause 3(2)(b).

It seems to us, then, that the key facts for the jury as to whether criminal culpability for the death is made out under the Bill will be:

(a) whether there was a failure to comply with relevant health and safety legislation and guidance
(b) which was so serious, that
(c) having regard to the matters in clause 3(2)(b)
(d) the failure fell far below what would reasonably have been expected of the conduct of the organisation in the circumstances.

If this (although it is an oversimplification) is essentially correct then it will be the grossness of the failure to comply with relevant health and safety legislation and guidance which will be the focus. If this is so, then we are not clear why the Bill provides instead that the grossness of the breach has to be found by reference to a duty of care in negligence owed to the deceased.

We are conscious that this may seem an abstruse point but our concern is that the stakes will be very high in such cases and many may pan out like fraud trials where abstruse points can cause additional confusion, time and cost without any demonstrable countervailing benefit.

In an attempt to put this point more simply, are there circumstances where the jury would find the four matters summarised above are met but where the prosecution should fail because they do not also find there was a breach of a duty of care in negligence owed to the deceased?

If the answer is no, then we question what is added by the requirement that the jury should also find there was a breach of a duty of care in negligence. If the answer is yes, then we wonder whether it might be simpler if, where a defendant disputes that its conduct had been in breach of a duty of care in negligence it owed the deceased, this is an issue that is first determined in a civil court to a civil standard of proof, rather than one for the jury in such a prosecution.

15 June 2005

125. Memorandum submitted by Mike and Martina Pansonly

After giving all matters arising due consideration, this is my considered input into the office of HM Home Secretary Charles Clark MP.
As this Act will replace the 1952 decision of Lord Denning MR “Deciding Mind” principle, then it’s good Law. The identification principle has for far too long, been an excellent defence for companies seeking to totally avoid their liabilities in Law. Example: P & O European Ferries Ltd, who completely escaped legal sanction despite the unlawful deaths of 188 men, women and children that cold, damp Friday night the 6th March 1987, when the MV Herald of Free Enterprise turned over outside Zeebrugge harbour, due to the negligent but widespread practice by Ferry Captains of leaving the dock, with the bow doors open (Something I saw many times with my own eyes).

The one item clearly missing from this bill, is that it does not state what Directors and Senior Managers could and should do now to show compliance, with the Act. That is, there is no mention of the Duties of those decision-makers within UK plc. (My question being, will this statutory requirement for Directors Duties come later in the secondary regulations?)

Finally, the Corporate Manslaughter Bill should be equally applicable to all “Crown Bodies” and their agents, for in a time of increasing privatisation, many private companies are now service providers to what are essentially Crown Bodies. (Example: The Prison Service, Police Constabularies through the UK and the Ministry of Defence. IE. Group 4 Security, Serco and Ryder plc, to name but three.)

May I, on behalf of my late Father-in-Law, Mr David Stanford, (who was killed at work by the driver of a Large Crawler Crane negligently dropping a skip full of wet concrete onto him on Friday morning the 15 January 1988, on HM Featherstone Prison extension site, managed by Taylor-Woodrow Construction plc.) thank you all, to all of you in the Home Office, for your combined efforts in getting this socially desirable piece of Legislation enrolled onto the statute book, for if it were in place back in 1988, it could have been used by the Police to prosecute Mr Stanford’s employer, instead of him totally escaping his liabilities in Law and laughing about it in the Coroners Court, while Mr Stanford’s widow and her three daughters were beside themselves with distress, over the violent and unnecessary death of their Father and Mrs Stanford’s husband, that fateful Friday morning, his last day on that site.

You maybe interested to know that Mrs Stanford waited ten (10) years for the final insurance settlement . . . and even then they only paid her £32,000, which was then used by Mrs Stanford to pay off all of her accumulated debts, due to having little or no income, since the manslaughter of her husband David Stanford on Friday 15th January 1988.

Don’t let anyone ever tell you that the public don’t take any notice of your actions, we do and I for one am very grateful for all of your efforts and those of the Home Secretary.

So a great big “thank you” to Mr Charles Clark and his staff.

14 June 2005

126. Memorandum submitted by Sandwell Metropolitan Borough Council

The Local Authority are classed as a Corporation and therefore fall within the remit of the offence.

Could the Bill/Explanatory Notes clarify the position regarding Councillors? You will be aware that the day-to-day functions of the Local Authority are exercised by Local Authority Officers but that policy to a certain extent is approved by Councillors. The current definition of a Senior Manager is somebody who plays a significant role in the making of decisions about how the whole or a substantial part of an organisation’s activities are to be managed or organised. It is often the case that reports are put before Councillors on behalf of various departments within the Local Authority. Those Councillors would effectively make decisions based upon the content of those reports. Would a Local Authority Councillor in the above situation be classed as a Senior Manager? Clearly the Local Authority would have a duty of care to for instance, employees, children and service users. Decisions taken by Councillors would potentially affect those groups.

The second issue is that relating to the definition of an organisation’s “activities”. It has become the norm for local authorities in recent years for various reasons to press ahead with “Arm’s Length Management Organisations”. The former Housing Department within Sandwell is now referred to as “Sandwell Homes” which is an Arm’s Length Management Organisation. Sandwell Homes is a limited company in its own right but is also a Local Authority controlled company. There is, of course, a relationship between Sandwell Homes and the Local Authority who retain ownership of the housing stock. Could the Government please clarify as to the respective liabilities of the Local Authority and an Arm’s Length Management Organisation should for instance, an employee or service user die as a result of a gross breach of a relevant duty of care by a Senior Manager of the Arm’s Length Management Organisation.

8 September 2005
127. Memorandum submitted by Oldham Metropolitan Borough Council

**Summary**

1. The draft Bill’s main effect is that it would be easier to prosecute a corporation for manslaughter. It would be necessary to find only that the way its senior managers ran its activities caused the death and was a gross breach of a duty of care, rather than have to prove first that an individual “directing mind” was guilty. The law would probably apply to most of a local authority’s operational activities.

2. It leaves questions, however, as to the level that will count as “senior manager” and what “exclusively public functions” would not be covered. As it stands, the draft Bill leaves these to be decided by the Courts on the facts.

**The Main Points of the Draft Bill**

3. An organisation would be guilty of the new offence of corporate manslaughter if the way its senior managers managed or organised its activities caused a person’s death and was a gross breach of a duty of care as employer, as occupier of a building, in supplying goods or services or in a commercial activity. The offence would apply to all corporate bodies, Crown bodies and the public sector, but would not include public policy decisions.

4. The organisation’s conduct would be assessed against statutory criteria, including how far it had breached relevant health and safety legislation, whether senior managers were aware of the risk the company was running and whether they had sought to profit from the breach. The Court could impose an unlimited fine and remedial orders. Martin Heslop QC suggests a fine could be £15 million for a leading corporation, £10–15 million for a leading public company and £5 million for a larger company (The Times, 3.5.05).

**The Main Changes for Local Authorities**

5. A corporation cannot currently be convicted of manslaughter without proving manslaughter by a “directing mind” of that corporation; that is, an individual at the very top of the company who can be said to embody the company in his actions and decisions. Clause 1 would remove this test, basing liability instead on a failing in the way senior managers run the organisation’s activities.

6. Clause 13 would abolish the common law offence of gross negligence manslaughter as it applies to corporations (including local authorities). Under the common law, the duty of care is rarely owed for strategic public policy decisions; under the draft Bill, it would not be owed at all.

**Parent Company**

7. The introduction to the draft Bill at paragraph 37 states that a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death. This is effectively simply a restating of clause 1. It is unclear how far this might be able to reach: it will apply in the case of an arm’s-length management organisation 100% owned by a local authority; it is possible in a given case that it could apply to the authority’s supervision of an entirely outsourced contract.

**Questions**

8. Two questions to which the answers remain unclear in the draft Bill are:
   (a) the meaning of “senior manager”; and
   (b) the meaning of “exclusively public functions”.

**Senior Manager**

9. In proceedings arising out of the Southall rail crash of 1997, A-G’s Ref (No. 2 of 1999) [2000] QB 796 (CA) confirmed that a company can be convicted of manslaughter only if an individual who can be identified with the company as its “directing mind” can be shown to have been guilty of the offence and his guilt can then be attributed to the company. The “fault” of a number of individuals could not be aggregated to establish gross negligence overall. Unless an identified individual’s conduct, characterised as gross criminal negligence, could be attributed to the company, the company was not liable for manslaughter.

10. Clause 1 of the draft Bill would instead make a corporation liable for a death caused by “the way in which any of the organisation’s activities are managed or organised by its senior managers” in gross breach of a duty of care. Clause 2 defines a “senior manager” as a person who “plays a significant role in
   (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or
(b) the actual managing or organising of the whole or a substantial part of those activities.”

11. This leaves open to interpretation the level of officer it could apply to. The commentary on the draft Bill says:

“This is intended to capture those managers who have responsibility for the overall way in which an organisation manages or organises any particular activity . . . What constitutes a substantial part of an organisation’s activities will need to be considered in the context of individual organisations and will depend on their overall scale of activities . . . This links corporate liability to a particular level of management responsibility within the organisation, rather than to the management or organisation of a particular level of activity.”—Commentary, paras.14–15

12. But it adds that “managers who set and monitor workplace practices as well as those providing operational management are covered”. Local authorities may be concerned that, on these terms, “senior manager” could conceivably apply to an operational third- or fourth-tier officer. Could a “substantial part” of a local authority’s activities include, say, the management of a neighbourhood housing office, an area repairs office or Social Services children’s services?

EXCLUSIVELY PUBLIC FUNCTIONS

13. As in gross negligence manslaughter, the new offence would only apply where an organisation owed the victim a duty of care. But duties of care are not owed in the exercise of “exclusively public functions”, whether by a public or private organisation/clause 4(1)(c). Such functions are defined as those in the Crown prerogative or by their nature exercisable only with authority conferred by the exercise of that prerogative or by or under an enactment/clause 4(4).

14. According to the commentary, “exclusively public functions” means those that are peculiarly an aspect of government including, for example, decisions about regulatory standards or statutory inspection; that is, services that cannot be independently performed by private bodies. But the fact that there is a statutory basis for a service provided by a local authority does not mean it is excluded: services to the public by public bodies, such as local authorities or NHS trusts, would be included regardless of whether they are supplied for payment. The exclusion—

“... looks at the nature of the activity involved and therefore would not cover an activity simply because it was one that required a licence or took place on a statutory basis. Rather, the nature of the activity involved must be one that requires a particular legal basis, for example functions related to the custody of prisoners (the function of lawfully detaining someone requiring a statutory basis).”—Commentary, para.25

15. The difference was explained in Heather:

“All of the inmates of a prison are there under state compulsion, and none by choice. Sections 84 to 88 of the Criminal Justice Act 1991, as substituted by the Criminal Justice and Public Order Act 1994, confer important statutory obligations and powers on those who run privatised prisons, and special powers of control and intervention on the Home Secretary, which do not have an equivalent in the case of registered homes.”—R (Heather and others) v The Leonard Cheshire Foundation and HM Attorney General [2001] EWHC Admin 429, at para.51; upheld by the Court of Appeal [2002] EWCA Civ 366

16. Without tighter definition in statute, this may not prove to be quite so clear cut: the commentary also says that the new offence would not allow the courts to look at the management of core public functions, and yet “the provision of education is a core governmental function The provision of health care is another core governmental function”: Heather, at para.66. The meaning of “public function” has been considered in depth with regard to bodies that are questionably public:

“... the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging” : Hampshire County Council v Graham Beer t/a Hammer Trout Farm [2003] EWCA Civ 1056, at para.16, per Dyson LJ

17. The meaning of “exclusively public function” will perhaps require similar detailed consideration by the courts; but the commentary to the draft Bill implies one should assume that the bulk of local authority functions would be covered in the new offence.
128. Memorandum submitted by Police Federation of England and Wales

The Police Federation of England & Wales (PFEW) is a staff association representing some 140,000 police officers in the ranks of constable, sergeant, inspector and chief inspector.

SUMMARY

The PFEW supports the concept of legislation to deal with corporate manslaughter. However, we do have major concerns about the Bill in its current draft form because we consider that:

(a) the legislation should, on being made, extend to police forces;
(b) the Bill should not include an “exclusively public function” exemption applicable to police forces; and
(c) there should be scope for personal prosecution of any individual who was responsible for the “corporate” failings also.

DETAIL

The extension of the Bill to police forces would provide a strong incentive for forces to take seriously their health and safety obligations. Any failure to apply the corporate manslaughter provisions to police forces might be interpreted as suggesting that health and safety in police forces is not as important as elsewhere.

We note from the Government’s commentary (paragraph 44) that they agree in principle that police forces should be within the scope of the offence.

It is stated that the Government’s intention is that “legislation should in due course extend to police forces”. It has taken the Government some nine years to act on the Law Commissioner’s recommendations of 1996 to introduce some form of corporate manslaughter legislation. We are also aware of the pressures on the legislative schedule. Accordingly, the PFEW believe strongly that the Bill should cover police forces now.

If the Government considers that, in principle, police forces should be within the scope of the offence, the legal structure of the police force is insufficient reason to exclude the application of the Bill to police forces. Prosecution of the office of chief constable might well be an appropriate option in extending the legislation to police forces.

We understand that in response to an earlier draft bill in 2000, ACPO argued that as a matter of principle the police and emergency services should not be covered by the legislation. ACPO argued that “there is a need to ensure protection for those who take on a duty or a role which in turn protects society against life threatening situations and may involve the use of force”.

The PFEW consider such an objection to be misconceived. If a member of a police force is killed on duty, then there should be an examination of whether appropriate steps had been taken to prevent it. The nature of police service is such that, regrettably, taking all reasonable steps may not always prevent our members from being exposed to life threatening risks. Where however there have been material failures to take appropriate steps by senior managers, then the PFEW consider that quite rightly there should be a prosecution.

THE “EXCLUSIVELY PUBLIC FUNCTION” EXEMPTION

The PFEW also consider that the “exclusively public function” exemption is inappropriate to the extent that it removes most police operational activities from the scope of the Act. We have some difficulty in seeing quite why this should be the case. There is a need, in our view, to emphasise the importance to senior managers within any police force that there be appropriate safeguards introduced to protect members of the public.

ACPO may consider that this is inappropriate because of what they see as a tension between health and safety legislation and what they describe as the “policing imperative”. In our view this misses the point that health and safety legislation does not prevent dangerous tasks being undertaken, but rather requires them to be undertaken as safely as possible. Again it is our view that where there has been an incident involving the death of a member of the public, there should be an examination of whether appropriate steps were taken to avoid the accident/incident in question.

In practice, when there has been the death of a member of the public, there is sole emphasis on the actions of the police members directly responsible, with little focus on the working conditions in which the incident took place. The adoption of the “exclusively public function” exemption misses the opportunity of emphasising the need of senior police managers to secure that, consistent with the policing imperative, actions are taken as safely as possible.
INDIVIDUAL LIABILITY

An organisation like a police force (and, indeed, a company) acts through individuals. In the absence of potential criminal liability for individual senior managers (as well as for the police force), there is in our view a weakening of the impact of the Bill. Hence, we consider that these senior managers responsible for the “corporate” failings should also potentially face prosecution.

In summary, as a staff association we believe that police forces should be covered from the outset within the scope of the Bill, that there should be no “exclusively public function” exemption applicable to police forces and that there should be provision for an offence having been committed by a senior manager responsible for the “corporate” failing.

17 June 2005

129. Memorandum submitted by the Prison Reform Trust

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, Government and officials towards reform.

1. The Prison Reform Trust (PRT) is pleased to have the opportunity to respond to the Consultation Paper published in March 2005.

2. The Prison Reform Trust understands that the implications of the Bill for prisons in England and Wales are as follows:

In the case of prisons, the effect of the proposals is that, apart from duties owed as an employer to employees, duties of care that arise out of being an occupier of land (for example relating to the maintenance of the prison estate) and duties of care that arise out of the provision of services (for example, catering) would be covered by the offence. This is the case for both publicly and privately managed prisons.

However, broadly speaking, duties of care that arise out of the exercise of custodial powers would not be covered by the offence (again in either publicly or privately managed prisons). It would still be the case that individual prison officers would be liable under the criminal law if they themselves were personally responsible for a death. However, the Government considers that accountability for strategic policy decisions and for the organisation and management of core public functions lies elsewhere. In the case of prison custody matters, this includes independent inspection by HM Chief Inspector of Prisons, Ministerial accountability in Parliament, as well as in specific cases public inquests, independent investigations by the Prison and Probation Ombudsman and public inquiries where necessary.

3. The exemption of the critical functions involving duty of care to prisoners, on the basis that they are subject to separate enquiries, appears to arise from a confusion of means and ends. If investigations suggest that “management failure” did, in all probability, bring about the death of an inmate, then it is difficult to understand why the offence should be less relevant than in any other sphere of service delivery. The various tests set out under “management failure by senior managers” and “gross breach and statutory criteria” would still apply, providing a transparent framework, with necessary safeguards.

4. The proposed exemption is anomalous given our understanding that:

The intention is that the duty to patients in hospital and students in universities and colleges would be covered in the scope of the offence.

5. The Prison Reform Trust therefore maintains that the offence of “corporate manslaughter” should cover duties of care that arise out of the exercise of custodial powers.

130. Memorandum submitted by Prospect

We welcome the opportunity to respond to the consultation on the draft Bill. Prospect is the trade union formed by the merger of IPMS (Institution of Professional Managers and Specialists) and EMA (Engineering Managers Association) and we represent 104,000 scientific, technical, managerial and specialist staff in the civil service, related bodies and major companies. Our membership includes professionals in a number of enforcing authorities including HSE.

The draft Bill is welcomed by Prospect. For the first time it will be possible to have companies charged with a specific charge of manslaughter because of the failings by the company of senior management.
However, that said, we believe the draft Bill to be seriously deficient, and combined with the regulatory impact assessment, the impression is created that the starting point was not what legislation is needed to tackle the problem. The impression is instead that the drafting started from an assumed need for a largely resource neutral measure and the bill was drafted to deliver minimum impact. It is already being questioned whether the figure of five cases per annum was the starting point in the drafting process in order to set the evidential hurdle for cases at a high level. It would be rather unfortunate if this long awaited Bill turned out not to fulfil the need after all, and for campaigning for its reform to begin straight away. We do not believe this is what the Government intended in preparing this draft and would urge a rethink.

**The Criteria for Determining a Gross Breach is Confusing and Restrictive**

The explicit requirement for senior managers to be directly involved in managing or organising the activities which cause a person’s death sets too high a test which we feel could not have been intended. We agree with the sentiment in the Introduction, that the test for management failure should focus “on the way in which a particular activity was being managed or organised” and that liability should not be “on the basis of any immediate or operational negligence”. It is right that the responsibility should focus responsibility on the working practices of the organisation and that it should be targeted at failings in strategic management rather than at relatively junior levels. However, the drafting will not achieve this. It is not necessary to state which individuals within an organisation should be directly involved. It should be sufficient that the failings of the organisation as a whole amounted to a gross breach. A corporate body is a “legal person”, under health and safety law. Its level of guilt depends on the actions of the body as a whole not of certain individuals exclusively. Failings at a junior level no matter how serious are unlikely to amount to a gross breach of the organisation as an entity. However, explicitly stating senior managers have to have had “their finger on the trigger” distorts corporate responsibility.

The consequence of the inclusion of words “senior managers” will be to divert the court’s attention to intricate questions of the degree of involvement of a number of individuals, even in cases where the jury would otherwise be satisfied that the behaviour of the organisation as a whole fell so seriously short that it could be considered to be a gross breach. Evidence will be needed to prove that senior managers knew, or ought to have known about a failure that could cause death. This is a high evidential hurdle to clear and senior managers will seek to insulate themselves from that level of knowledge by issuing instructions to lower levels and only taking high level decisions, sufficiently removed from the level of detail needed to appreciate the risk of specific activities. Asking in addition that it also be proved that they had a profit motive in that failure is an extremely high evidential test and we know through our collective experience that even in serious breaches this evidence cannot be obtained even when there is a strong suspicion that such a motive was involved. It would be a very foolish manager indeed who ran the risk of leaving an evidence trail for such a decision to put profit before safety.

Another problem with the draft Bill is Clause 3.3. The definition in here of “relevant health and safety legislation or guidance” is unnecessarily restrictive and is not in line with the way the health and safety system in the UK is shaped or the way it is developing. There is a great deal of useful and extremely credible health and safety guidance that is not produced by the enforcing authorities, but is produced by industry themselves or bodies such the British Standards Institute, or internationally recognised bodies. This guidance is often the “industry standard” which everyone strives to follow and to which HSE inspectors refer people. But the draft Bill’s exclusion of these sorts of guidance appears to weaken their standing. There are many examples of this across all industries including health care, printing, engineering, gas work, electrical work, etc. Specific examples are guidance produced by the LPG Association on storage of LPG. This guidance used to be published by the HSE but copyright was handed over to the LP Gas Association several years ago. Also within the rail industry the relevant standards on things such as track worker safety are contained in Railway Group Standards, produced by the industry, not by HSE. This is increasingly the way industry standards are produced and it is HSE policy to withdraw from producing specific guidance where industry can produce it itself. The fact that an organisation ignored standards or guidance not falling within the definition in clause 3.3 should not in itself lessen the chances of passing a test for gross breach, as it appears it could.

**Illustrative example**

By way of illustration of these problems, consider the example of a large national company with several dozen commercial sites around the country. They have regular discussions on health and safety at board level and have a safety manager who reports direct to the chief executive. They have comprehensive policies in place on a whole range of safety issues. They pay a consultant to carry out regular tours of the individual sites to check on progress and do audits. The company policy is to give a large degree of financial autonomy to individual sites which operate as profit centres. Similarly, this culture of autonomous centres extends to other areas such as safety. The site managers are instructed to implement company policy and the board have safety as a standing item on their agenda but do not get involved in detail. A worker is killed in a machine. He was following the site’s custom and practice for entry into the machine and the site engineer was standing by assisting him. The deceased had been shown by the site engineer how to do the job and been given training. The investigation revealed that the local procedure did not match the company’s national
procedure and that the national procedure was also somewhat deficient compared to that produced by the industry association for this work. The company were clearly culpable in not ensuring that the correct procedures were being applied at each individual site, they had delegated the responsibility to the local site and their systems for ensuring control were wholly inadequate. The consultant had not identified any problem.

It is unlikely that despite there being a high degree of negligence by the company that there would be any case for manslaughter under the proposed legislation. It fails on several tests. Firstly the senior managers may well have insulated themselves from the commission of this health and safety failure even though there is a clear systems failure on the part of the organisation as a whole. A jury could well find that this death was not caused by the way the senior managers managed or organised the activities. They had systems in place and the failures were at a lower level in the organisation, and by a consultant. Secondly, they certainly did not know of the failing, or that it could lead to death, and it could be argued strongly that it was not reasonable to expect that they “ought to have known”. They were after all, busy people, spending long hours keeping the company afloat, and they had taken all the necessary high level decisions, and had taken steps to ensure others were dealing with such low level decisions. Thirdly, there was no intention to profit from this breach. Finally there was no breach of guidance “made or issued” by an enforcing authority, since the guidance on this was published by the industry association even though HSE were consulted and contributed to its drafting.

The draft Bill should not exclude such cases. Its intention is stated as being to “target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity”. The above case ought to be captured and be capable of being presented to a jury to let them decide on the facts.

Paragraph 33 of the Introduction refers to the 2000 consultation, and a number of respondents being concerned about the words “falling far below” and therefore the draft Bill introduced “statutory criteria for providing a clear framework”. It says these are not exclusive and do not prevent a jury taking further account of other matters, but the criteria are restrictive and in our opinion unnecessarily, and overly restrict the cases to those where someone in senior management had their “hands on a smoking gun”. Many cases where serious organisational failures result in someone’s death will be excluded and not even brought before a judge and jury to weigh up the evidence.

Penalties

The draft Bill only provides two sanctions. One is an unlimited fine. The other is a remedial order. There are already unlimited fines for lesser offences. There may be no difference in fines for offences of corporate manslaughter than there are for breaches under the Health and Safety at Work Act 1974 and the HSE already have the power to make remedial orders.

Consideration should be given to the following possible penalties:

*Requiring fines to be commensurate with the offence*

The current level of fines is grossly inadequate and has little effect on corporate behaviour, indeed, it is often more cost effective to ignore safety obligations and pay a fine.

Fines should be significantly increased for corporate manslaughter and the legislation should specifically require this.

*Link fines to profitability*

Consideration should be given to fines, which are linked to the profitability of the company.

*Probation orders*

Consideration should be given to allow courts to impose probation orders. A company could therefore be put on probation, and required to ensure it is compliant with its safety obligations and is operating in accordance with those obligations.
Negative advertising

Consideration should be given requiring convicted companies to pay for prominent adverts advising the public about their conviction.

Punitive awards of compensation

Consideration should be given to giving the courts power to award punitive damages to be paid by the court to the victim’s family. The jury could determine the level of damages.

Individual Directors and Specific Boardroom Health and Safety Obligations

In its 2000 consultation paper the Government accepted that without punitive sanctions against company officers, there would be insufficient deterrent force to any new proposals, it is therefore unfortunate that the draft Bill takes the view that it would be inappropriate for an offence of corporate manslaughter to look at individuals such as company directors. Prospect’s view is that as a minimum, directors of companies with poor safety compliance should not be allowed to remain directors.

Companies should also be required to appoint one of their directors as a health and safety director. Such a director should be required to assess the activities of the company and how the activities affected the health and safety of its employees and to consider the safety measures in place and their effectiveness. A company board should be required to consider information from the health and safety director, and provide him/her with sufficient resources and information to do their job.

Conclusion

The draft Bill will not, as it stands, achieve the Government’s intention of restoring public confidence that organisations responsible for loss of life be held accountable in law. The campaign for justice for victims would not be quelled by this draft but would likely increase and mean that the Government would be forced by the next failed expectation of justice to review a law that was relatively fresh on the statute. However, with significant amendment the draft has the capacity to be an important and effective piece of legislation.

131. Memorandum submitted by Roy Thornley

Introduction

1. The core objective of a reformulation of the law on corporate manslaughter by criminal negligence is the creation of an effective vehicle to prosecute companies that fail to protect individuals from the risk of harm as a result of corporate activity.

2. The collapse of criminal trials against large organisations for causing death by gross negligence is evidence that present corporate manslaughter law has proven ineffective against large organisations. The only law that offers any consolation to those who seek justice for corporate manslaughter committed by such organisations is the Health and Safety at Work etc Act 1974. This robust piece of legislation achieves success against companies of whatever size and complexity where the common law has failed.

3. Companies convicted on indictment for offences against the Health and Safety at Work etc Act 1974 are subject to an unlimited financial penalty. And in terms of the new proposals, no matter the simplicity or complexity of its construction and/or the technical difficulties that will surely ensue during the prosecutorial process, the sanction for the offence remains the only sanction available against an organisation, namely an unlimited fine.

4. Thus if objectives are to be achieved, any new legal remedy must be constructed with clarity and in terms that enables corporations to understand conduct that will constitute criminal liability and one that allows the prosecution to pursue a case without unnecessary complicating factors. It must also reflect the seriousness by which many sectors of society view health and safety issues and take into account the State’s legal duty to protect people against risks to their lives.

5. The Health and Safety at Work etc Act 1974 already imposes a duty requirement on an employer to ensure the health, safety and welfare of employees and a similar duty towards other persons. It is not an absolute liability, but the statutory defence is limited to proving that the accused company, given the circumstances and facts of the case, had done all that was reasonably practicable. It is a defence that is hard to prove, as in nearly all cases there is likely to have been something else that could have been done to prevent the particular harm from occurring.
6. It is believed that a new legal remedy should complement the provisions of the Health and Safety at Work etc Act 1974 and in consequence will be as equally severe. Prosecution has positive values. First, it serves to encourage the directing minds to take the steps necessary to ensure that dangers do not arise, or are quickly detected and corrected if they do. Secondly, it serves to deter others from pursuing a poor standard of health and safety management.

7. Presently the largest single barrier to the conviction of a large organisation for corporate manslaughter by gross negligence is the principle of identification. New law will see this requirement removed. However, it is argued that the Government proposal to create a new offence of corporate manslaughter includes an element, namely the provision to prove that a duty of care is owed by the defendant towards the victim that is considered unnecessary and inconsistent with current health and safety legislation. Secondly, the use of the term, “management failure” has the potential to cause difficulties of interpretation when prosecuting the offence. It is submitted that these difficulties may be overcome as follows:

**Duty of Care**

8. Under the provisions of the Health and Safety at Work etc Act 1974, individual and corporate employers are bound by a duty imposed by law to do all that is reasonably practicable to ensure the health and safety of employees and other persons. It is a duty that cannot be delegated and a liability that cannot be voided on the basis that the company at senior management had taken all reasonable steps to discharge its duty *(R v British Steel Plc [1995] 1 WLR 1356)*. It is a duty generally satisfied through the provision of competent and qualified staff, working in a safe environment with adequate tools and material and the creation, implementation, and enforcement of safe systems of work.

9. It is suggested that new law should harmonise with existing health and safety legislation. Thus the proposal to create a new offence of corporate manslaughter should acknowledge the duty principle and impose on corporate employers a statutory duty of care towards employees and other persons whose health and safety may be affected by the organisation’s activities.

10. No prosecution against an organisation for an alleged gross negligent act or omission against an individual has failed on the basis that the organisation in question did not owe a duty of care towards the victim.

**Management Failure**

11. It is submitted that the term, “management failure” and the interpretations applied thereto will be the subject of constant judicial debate, in similar terms to that which now exists in cases where identification of a person of real responsibility (controlling mind) sufficient to bind the company, is an issue.

**A problem perceived**

12. Government proposals centre on the conduct of senior managers to efficiently and effectively manage and organise their business activities in such a way that the lives of people who may be affected by their services are not unnecessarily put at risk.

13. A problem perceived arises with the interpretation of management, within the term, “management failure”. It is wholly accepted that in any organisation that delegation of responsibility is a necessary and accepted practice. Under the terms of the new proposals it would appear that a company will not be convicted of corporate manslaughter unless the person(s) to whom the authority is delegated has the discretion of independent control in the conduct of some of the company’s affairs. The question is how far down the corporate ladder will the law allow, before corporate identity is lost and the organisation is no longer considered culpable?

**Corporate Identity**

14. It is suggested that whilst corporate labelling of employees as “director” or “senior manager” may define an employee’s status in a company’s management structure; it does not necessarily follow that those who are so described have the amount of control that their title may suggest. The individual may merely have a certain amount of managerial discretion working to the directives of the main board of directors. He may input ideas to assist formulating company strategic policy by submission of reports, but may have no say whatsoever as to whether any recommendations made will be acted upon. It is conceivable that in a large company, a finance director may restrict company expenditure on recruitment. This may prevent the head of human resources from engaging the most qualified and experienced person to fill an important role in the company. In consequence, the operations director may have to complete a task with fewer staff than is safe. The regional director is probably thus only able to do the best he can, working to boardroom directives that he has no overriding authority to change.

15. The difficulties of determining who represents the controlling minds of companies have been debated in the courts for many years. The following cases emphasise these difficulties and are listed chronologically.
16. Viscount Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* said: 284
   
   “… its acting and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and the centre of the personality of the corporation.”

17. Denning LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* said: 285
   
   “… Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

18. Lord Reid in *Tesco Supermarkets Ltd v Nattrass* 286 said:

   “It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent… If the principal has taken all reasonable precautions in the selection and training of servants to perform supervisory duties and has laid down an effective system of supervision and used due diligence to see that it is observed, he is entitled to rely upon a default by a superior servant in his supervisory duties…”

19. Turner J in *P & O European Ferries (Dover) Ltd* referred to management decision processes as follows: 287

   “Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.”

20. Hoffman L.J in *El Anjou v Dollar Land Holdings PLC* 288 stated that: 289

   “… the directing mind is primarily identified by tracing the constitutionality of power under the articles… supplemented by a holding out of a person, or acquiescence in his exercise of controlling powers… different persons could be the directing mind for different purposes.”

21. Rose L.J. in supporting Hoffman L.J said: 290

   “… that the directing minds were usually the board of directors, the managing director and perhaps other superior officers who carry out the functions of management, and speak and act as the company under the articles or by authorisation of a general meeting of shareholders. However, the board could delegate its functions of overall direction—or part of them—to other persons with full discretion, so constituting those persons as directing minds… Particular circumstances could make non-directors the directing mind, and the directing mind could be found in different persons for different purposes.”

22. Nourse L.J in *Meridian Global Funds Management Asia Ltd and Securities Commission* 291 said: 292

   “… that the directing mind theory was a general principle applying to both civil and criminal cases… it was necessary in applying the directing mind test to identify the person who had management and control for the purposes of the particular act or omission in question in the case. In doing this the constitutional position under the articles and service contracts was highly relevant but not decisive.”

23. Lord Hoffmann also in *Meridian Global Funds Management Asia Ltd and Securities Commission* said: 293

   “… their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.”

284 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 per Viscount Haldane at p 713.
285 *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159.
286 *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127 (HL).
287 *P & O European Ferries (Dover) Ltd* (1991) 73 Cr App R, CCC per Turner J at p 82.
289 Ibid, cited in Wickens and Ong at p 540.
293 See supra n 12, per Lord Hoffmann at p 511.
24. It is against the background of these cases that the answer to the question of who is, or isn’t a controlling mind and will of a company is presently determined. It is also believed that in terms of the new proposals the same arguments will apply when deciding who are the senior managers within the term “management failure”. No one set of facts and circumstances can be totally similar to another, particularly when apportioning degrees of negligence by individuals within a large organisation. Thus apportioning blame in the largest of organisations such as the oil companies will be as difficult under the new law as it has proved to be under present law.

25. If the term “management failure” remains, there is a fear that corporate employers could avoid liability for death caused by corporate activity, by arguing that other persons, who cannot be identified as senior managers of the company, caused the death.

26. The result will be corporate manslaughter law that remains inadequate to prosecute large and complex organisations for corporate manslaughter by gross negligence.

**RECOMMENDED ALTERNATIVE**

27. It is believed that removal of the term “management failure” from the definition and replacing it with the term “corporate criminal negligence” will alleviate the problem identified.

28. In order to reflect the above observations I invite your consideration of changing the wording of the Government’s proposal as follows:

**The Offence**

29. An organisation to which this section applies is guilty of the offence of corporate manslaughter, if the organisation by corporate criminal negligence caused death to another person.

30. Corporate criminal negligence will be proved when the conduct of the corporation, either through act(s), or omission(s) fails to comply with a duty imposed by law, is a significant cause of death.

31. Corporate criminal negligence will occur when the organisation, through the acts, or omissions of its employees (as a collective entity), fails in its legal duty to ensure the health and safety of persons in such a manner that shows a wanton and reckless disregard for the lives and safety of other persons.

32. The act or omissions being performed within the scope of their employment and to which the organisation derives some benefit.

33. The burden of proving that the corporation did all that they could to prevent the fatality rests on the defence.

34. The burden of proof that the organisation did not owe a legal duty to the deceased rests on the defence.

**Derives some benefit (see 32 above.)**

35. It is believed that difficulties may arise by using the word “profit” in the definition of gross breach. See 3(2)(b)(iii) of the Bill. There is no guidance to say how this word should be interpreted. Consequently it may lead to a general assumption that in order to find an organisation guilty of the new offence, evidence will be required to show that a financial profit was achieved as a result of a failure to comply with regulations or guidance.

36. Using the phrase “derives some benefit”, allows for flexibility when determining the criminal liability of an organisation for the illegal acts of its employees. This would allow for organisations to be deemed to have received a benefit, if the acts or omissions of employees was intended to benefit the corporation, or the corporation received an incidental benefit from an employee’s conduct. The conduct may arise through either individual or collective acts or omissions. This accords with the rules of general corporate criminal liability within the jurisdiction of the United States of America.294

**Jurisdiction**

37. Large organisations increasingly look to the wider global market to achieve greater profitability. Potential markets will vary widely, depending on the type of industry; some may operate in the poorest of countries. It is likely that the requirements of some countries will not be so demanding of robust health and safety standards as our own. In consequence, policy makers of British companies, operating on foreign

294 See Androphy, Paxton and Byers 1996, Texas Bar Journal, vol 60 No 2 at p 121.
shores but working from headquarters in England and Wales, may decide corporate policy that denies, to a gross negligent degree, the level of safety to which employees and others would be entitled under English and Welsh health and safety legislation.

38. Accordingly, I believe that the offence should include organisations whose gross negligent decisions made from headquarters in England or Wales contributed significantly to a death abroad.

Scope of the Offence—Exclusions

39. It is appreciated that there will be many divergent views, when considering the organisations that should be exempt from the new corporate offence. However, it is surely agreed that there must be very extenuating circumstances, if the Government are to excuse an organisation from criminal accountability for allegedly causing death by gross negligence.

40. Few people would disagree that justice requires that corporations be punished where death or serious injury results, where the conduct of the corporation has been seriously blameworthy in the circumstances. This is the notion of retribution—the vindication of the victim(s) in recognition of the violation of their rights.

41. The public are unlikely to understand why, for example, organisations responsible for police or prison custody of persons, should not be the subject of a rigorous criminal inquiry, in circumstances when it is alleged that organisational gross negligent conduct contributed significantly to the death. A similar argument could apply to the armed forces and to Crown bodies.

42. Accordingly, it is suggested that organisations, as employers, who are already subject to a duty imposed by law, under the Health and Safety at Work etc Act 1974, should also become accountable under the new corporate manslaughter proposals.

43. Public inquests and independent reports, generally work to agreed terms of reference. However, organisations subject to scrutiny by such enquiring bodies are unlikely to have their accountability tested in a criminal court. This appears an inadequate alternative to examination of a corporation’s conduct in the criminal courts. It does not allow for the objective assessment of a jury, who given the facts and circumstances of the case, may find the corporation’s conduct criminal and demanding of punishment.

23 August 2005

132. Memorandum submitted by Hampshire County Council

The Council welcomes the clarification that the new offence will not apply to decisions of public policy where those decisions involve weighting factors of competing public interests dictated by financial, economic, social or political factors.

We note that individuals could still face prosecution for the “old” common law offence, or for a breach of the Health and Safety at Work Act, but we support the idea that “it would not be appropriate for an offence that deliberately stressed the liability of the corporation itself to involve punitive sanctions for individuals”.

We think it right that the ordinary rules of causation should apply and that there must be a demonstrable chain of events leading from the failure to the death, which has not been broken by some intervening act.

In terms of sanction, we think it right that a Crown body should be subject to the same sanction as other organisations and that the commitment to this new Bill should be demonstrated by retaining the same sanction for Crown bodies.

We think it right that there should be no change to the current responsibilities for the police to investigate and the CPS to prosecute. We welcome the need for individuals to obtain the consent of the DPP before bringing a private prosecution.

17 June 2005

133. Memorandum submitted by the Restorative Justice Consortium

1. We welcome the Government’s initiative in addressing this problem. We accept the principle that there should be such an offence, on the lines set out in the Bill. Our comments will be only about the sanctions, and the important related question of prevention.

2. We base our comments on the principle that the first concern of the legislation should be to give any possible assistance to the relatives of those who died, and to survivors who were injured. After that, the emphasis should be on preventing similar disasters in future.
Compensation

3. We are therefore surprised that there appears to be no mention of compensation, or of payment for any therapeutic care that may be needed by relatives and survivors. The first part of Clause 6(1)(b) would cover such measures, but it is limited by the second part to matters, which appear to have been a cause of the death. We recommend that there should be an explicit duty of care towards relatives and survivors, and that Clause 6(1) should mention such requirements. We are of course aware that relatives and survivors can bring actions in the civil courts, but we do not see why they should be put through the additional stress of doing so.

4. We welcome the principle behind Clause 6, that the court should order steps to be taken to remedy the failings which led to the loss of life. This is often what victims want, rather than compensation. For this reason, emphasis should be placed, in deciding the amount of compensation, on material loss and the cost of any treatment required by relatives and survivors, rather than on exemplary or punitive damages.

Dialogue

5. No mention is made, however, of involving relatives and survivors in this process. The Government has clearly stated that it “aims to maximise the use of restorative justice in the Criminal Justice System (CJS), where we know it works well, to meet victims’ needs and to reduce re-offending . . . Restorative justice brings victims and offenders into contact, where victims want this, either face to face or indirectly” (Criminal Justice System 2003, p 1). Corporate manslaughter is a prime example of the type of case where this would be highly appropriate.

6. Relatives and survivors should be offered the opportunity to meet senior managers as defined in Clause 2 of the Bill (or communicate with them indirectly if they did not wish to meet), so that they could ask questions, express their feelings and discuss the form, which any reparation or compensation should take. There should be a procedure for arranging this as soon as the relatives and survivors were ready for it. In keeping with the principles of restorative justice, it should be conditional upon (a) acceptance by those responsible of some responsibility for what occurred, and (b) their willingness to take part. This could take place before a trial, or after conviction and before sentence, or after sentence.

7. Acceptance of responsibility does not necessarily entail an admission of legal guilt. The effect of this is (1) that the accused are more likely to accept a degree of responsibility, which is what relatives and survivors want, and less likely to contest or minimize it; and (2) that if a trial nevertheless takes place, they will, having accepted facts that are not in dispute, still be able to conduct their defence on other grounds.

8. If the agreement was fulfilled to the satisfaction of all concerned, this could be taken into account by the Crown Prosecution Service as a reason why it was no longer in the public interest to proceed with prosecution, as provided by paragraph 6.5(h) of the Code for Crown Prosecutors (2000), which states: “A prosecution is less likely to be needed if: . . . (b) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution solely because they pay compensation).” If it took place before sentence, any agreement reached about compensation or other remedial action would be taken into account in deciding the sanction to be imposed.

Fines

9. Clause 1(4) states that an organization guilty of corporate manslaughter is liable to a fine. We recommend that there should also be a re-statement of the principle established in the Criminal Justice Act 1982 that compensation should take priority over fines, and that this should be amplified to include reparation, as mentioned above, and remedial action, as provided under Clause 6 of the Bill. We are concerned that the imposition of a large fine might limit the organization’s ability to pay compensation or make reparation.

10. This consideration is also relevant to Clause 6(4), which provides that an organization, which fails to carry out remedial action, should be fined. This too would do nothing to remedy the failings that led to the loss of life, we suggest that senior managers who have failed to take remedial action, or have not complied with their undertakings to make reparation or pay compensation, should (a) be required to make personal contributions from their salaries and assets, or (b) be disqualified from holding their positions, so that they could be replaced by others who would fulfil these obligations.

Ensuring Compliance

11. The Bill should also lay an obligation on the government to provide an adequately resourced system of inspection to ensure that remedial action was carried out. Where unsafe practices were discovered and there was reason to suppose that they were not confined to the organization in question, the government should be required to introduce measures, accompanied by adequate inspection, aimed at preventing them.
Restorative Justice in Practice

12. To conclude, we will cite some examples showing how these proposals could work. Braithwaite (2003) reports that in the United States, a 25% increase in inspections by the Mine Safety and Health Administration was associated with a 7 to 20% reduction in fatalities, but no association was found between safety improvement and the level of penalties (p 63). These fatalities would probably have been classified as corporate manslaughter. He found “strong empirical evidence that persuasion works better when workers and unions (representing the victims of the crime) are involved in deliberative regulatory processes” (p 63). In the British coal industry, before World War I often a thousand miners lost their lives in a year in the pits, and the average number of prosecutions was 1,309; in 1982–83, fatalities had decreased to 44, and in 1980 and 1981 there were no prosecutions. Braithwaite notes, however, that there are limits to responsive regulation: rapacious big firms and incompetent little ones will not or cannot respond responsibly (p 65). Another example was the discharge of mercury-containing waste into Minamata bay, in Japan. People who had eaten the contaminated fish suffered paralysis, nervous disorders and even death. The Chisso Corporation agreed to pay each victim an average of £20,000 compensation and to dredge the bay, but this left it with a large deficit. Rather than allow the company to become bankrupt, the government issued bonds so that it could continue to trade and thus meet these liabilities (Wright 1982, p 264).

Conclusion

13. In summary, we accept the need to create the new offence of Corporate Manslaughter, and propose a response to it that would put the well-being of relatives and survivors first, enable them to conduct a dialogue with those responsible, and make senior managers more likely to admit some degree of responsibility, agree to take part in such a dialogue, and fulfil their reparative obligations. It would provide a way by which those responsible could make amends in a constructive way, both by meeting the needs of relatives and survivors and by taking steps to prevent a recurrence. There is evidence that such measures are more likely to be carried out when decided by agreement, but we also propose a constructive system for inspection and enforcement. We emphasise that adequate inspection, conducted on restorative lines, makes fatal disasters less likely to occur in the first place.

References


About the Restorative Justice Consortium

The Restorative Justice Consortium was formed in 1997. It brings together a wide range of people with an interest in restorative justice. These include organizations, policy makers, practitioners, academics etc from many different contexts and from across the world. In June 2003, the Consortium was granted charitable status.

The objects for which the Consortium is established are:

“...To promote restorative justice for the public benefit as a means of resolving conflict and promoting reconciliation by:

— Promoting the use of restorative justice in the criminal justice system, in schools, in the workplace and elsewhere in the community in situations where conflict may arise.

— Developing and promoting agreed standards and principles for evaluating and guiding restorative practice.

— Advancing education and research on restorative justice and the publication of the useful results of that research”.
134. Memorandum submitted by Norton Rose

Norton Rose Questionnaire on the Draft Corporate Manslaughter Bill—Analysis of Results

Q1—Do you believe it is right to relate the offence only to the actions of senior managers?

50% Yes
44% No
6% No comment

Key comments:
— If safety is to be important throughout an organisation then all levels need to feel responsible.
— It should apply to anyone in an organisation whose actions/inactions lead to a death in the workplace.
— Personal accountability and ownership is required to improve a safety culture within a business. Too often the negligence of the injured party is totally overlooked.

Q2—Do you believe the proposed new offence is defined sufficiently clearly for people to understand the offence and how to avoid committing it?

89% No
5.5% Yes
5.5% No comment

Key comments:
— There is a real need to introduce compliance monitoring systems to provide a defensive position.
— Responsibility is a minefield and those having ultimate responsibility as owner or operator must have the skills and capacity to direct others and ensure compliance.
— As written, it is probably reasonable but it seems likely that it will be “backed into” Health and Safety legislation such as the CDM Regulations etc and these are hopelessly broad and vague in the way they define things and unreasonable and impractical in the standards they demand. They are increasingly moving into advocating particular management techniques and contractual arrangements, despite a complete lack of knowledge and understanding of these at the HSE.

Q3—Do you think the response to the offence as proposed will be to improve health and safety standards?

56% No
33% Yes
5.5% Undecided
5.5% No comment

Key comments:
— It is the way companies are managed at the top that effects real change. Changes may simply provide an impetus to institute such diffuse structures that no single person has substantial control.
— It depends how it is interpreted. If the legislation is interpreted in a practical, common sense way it is likely to have some beneficial effect. However if it is enforced relying heavily on H&S legislation and ACOPs as guidance it is unlikely to be effective but could cause a lot of damage. The CDM Regulations are an example of the problem with current HSE thinking—they were expected to greatly improve construction safety but in practice they have produced bureaucracy and cost but no reduction whatsoever in construction deaths and injuries.
— This is a political proposal/deal rather than a genuine attempt to improve H&S standards. Radical simplification of existing safety legislation is needed.

Q4—Do you think it right that the law is expected to be easier to enforce against small companies than against larger ones?

78% No
17% Yes
5% No comment

Key comments:
— Current legislation is easier to enforce on small companies.
The main justification for corporate killing legislation is that it would “level the playing field” between large companies and small companies and individuals.

It will raise the awareness of Senior Executives and place a greater focus on Safety. With a raised profile it will be a good thing for safety standards. Even in large companies, safety is not always where it should be in terms of importance on the agenda.

Q5—Do you think that jurors are able to form valid judgments about the link between a failure causing death and the intention of a company to profit from that failure?

- 67% No
- 28% Yes
- 5% No comment

Key comments:
- All companies survive by profit so how can such an issue be judged? The mens rea would be seen in other ways if there was a deliberate decision to make money from the risking of a life.
- As long as “Profit” is defined.
- Undoubtedly the very nature of the offence will cloud or colour judgements.

Q6—Should profit be defined in the Bill?

- 50% Yes
- 44% No
- 6% No comment

Key comments:
- Definitions are subject to loopholes and there should be no “wriggle room” in this area.
- Does it have to be direct profit or can it be indirect?
- Judiciary should provide broadest definition.

Q7—Are there penalties other than unlimited fines and remedial notices which you would think appropriate?

- 50% No
- 44% Yes
- 6% No comment

Key comments:
- A register for those found guilty of offences.

Q8—Do you think that, even with the proposed law in place, if a larger company is not successfully prosecuted after the next fatal rail crash, the public will call for another attempt to be made to legislate for this offence?

- 83% Yes
- 17% No comment

Key comments:
- Yes, but the public will be wrong and need to be helped to understand that this is an ineffective mechanism for the purpose of avoiding accidents.
- Undoubtedly—if this does not work amending legislation will be needed and fast!

Additional Comments on Draft Bill/Corporate Killing Debate Generally

- The ability of a jury to define gross is also a concern. There could be an overwhelming subconscious view that management must have been negligent in some gross way simply because someone is dead. The HSE approach to enforcement has often reinforced this view, it will rub off on the police and contaminate any investigation. Remember HASAW Act etc place burden of proof generally on the accused—I rather suspect this may happen in this legislation.
- Legislation is often the only way to force change where commercial concerns are involved. However, improvements (as has occurred with the construction industry) should not stifle innovation or change due to fear of the potential risk if unforeseen accidents occur. The threat of stifled innovation etc is perhaps greater in terms of its threat to a “healthy” society than the occasional accident in an otherwise well-regulated industry. Existing H&S legislation can generally
be said to be sufficient if the present agencies are given sufficient funding and have objective targets that have a bearing on common sense. Emotive responses to rail and air accidents are at odds with the facts. I should like to see comfort and speed improved rather than risk reduced (but not increased) from already low levels. Teaching recognition and management of risk and how to enjoy it (thereby introducing pragmatism) is probably of longer term benefit.

— Better to encourage H&S culture as done by leading US companies.

— The way any bill is implemented is very important. Prosecutions that fail are of no use in ensuring safety is taken seriously.

— The proposed bill will inevitably discourage senior managers from assuming responsibilities which they would otherwise take especially in decision making after the occurrence of major casualties.

— (1) It is unfortunately liable to result in conviction of companies employing those who are simply guilty of the sort of human failings we are all capable of and (2) It will stifle risk management and make the economy less efficient and (3) It will prevent effective accident investigation and therefore prevent the learning of lessons (that process of investigation/learning and pre-accident enforcement being the proper role of government).

— [A representative body] is currently developing its policies in respect of corporate killing. In recent statements [it] has supported the Corporate Killing draft legislation but also the Directors’ Duties Bill believing that the irresponsible should be criminally liable both individually and corporately.

— It seems to me that the major question is its relationship to the latest H&S legislation, which is becoming increasingly unworkable, impractical, arbitrary and unjust. If H&S legislation can be made clearer, fairer and more workable, then it could complement the draft Bill in an effective way. However if it is effectively linked to the legislation now being produced by the HSE and the ACOPs they are producing to go with it, the draft Bill could turn out to be an absolute nightmare, where it is not possible to work out what would or would not be regarded as legal behaviour until after the event, when the HSE, lawyers and others make it all up with the benefit of hindsight. The classic problem in this area is H&SW Act Clause 40, which completely inverts the meaning most people would take from the term “as far as reasonably practicable”, turning it into a requirement to deliver absolute perfection. The extreme vagueness and poor drafting of regulations such as Work at Height regulations and CDM Regulations (and the latter’s ACOP) create confusion and these have the potential to inject uncertainty into the corporate killing bill, which needs to be capable of being interpreted in a very plain, simple, common sense way if it is to have a chance of success.

— The offences must be described in sufficient detail that offenders know (or ought reasonably to know) that they are offending, and jurors are clear and without doubt as to the identity of the offender and clear from the definition that an offence has been committed by that person. If that is not the case then no convictions will occur.

— Although there is a definition of senior managers, we would like to highlight that is important that the definition is applied consistently to ensure companies of differing sizes are treated equally.

135. Memorandum submitted by the Chamber of Shipping

The Chamber of Shipping is the trade association for British shipowners and managers. It has some 100 members and 40 associate members who own or manage over 600 ships totalling some 11 million get and represents over 90% of British-registered tonnage.

We welcome the fact that the proposed new offence does not target individuals within companies, as this was the aspect of the Government’s previous proposals that caused most concern among the Chamber members. We also welcome the decision not to exclude the Crown from the scope of the legislation, since the same rules should apply to the Crown as an employer and an occupier of land as to private companies in these positions. However, we would like to raise a number of concerns with the proposals and these are summarised below.

We note that, irrespective of whether a failing on the part of a company results in a fatality, existing health and safety legislation provides for unlimited fines for corporate negligence. The purpose of any new legislation in the health and safety field should be to achieve improvements in these areas. However, since the proposed new laws appear to have been drawn up primarily to secure successful prosecutions, the need for and appropriateness of such legislation must be open to question.

The proposal that a company could be criminally liable implies that a company might have to pay a fine, presumably from its reserves, with implications for future investment and viability. Ultimately this may mean that persons who are entirely innocent of any wrongdoing end up paying a disproportionate price for the company’s failings, perhaps through redundancy.
We are concerned that the threat of criminal action may lead to delays in compensation payments to victims, since the payment of any compensation would be likely to be taken as an admission of guilt and/or might prejudice the outcome of proceedings under the new offence. It would indeed be an unfortunate consequence of the introduction of legislation aimed at proving the guilt of companies if relatives of a deceased person were forced to wait for compensation payments and thus have their pain increased further.

Similarly, the proposal might make investigations into the causes of accidents more difficult, as it could encourage cover-ups and failure to accept responsibility for failings that have occurred. Once a fatal incident has taken place, the priority should be to identify the failures that have led to the incident and ensure that key lessons are learned; this is the most effective means of preventing a recurrence.

The consultation document briefly makes reference to the principles of causation and intervening acts. However, it is not at all clear how these principles will be applied to the new laws. We would like more guidance to be given on this point, along with some real or hypothetical examples.

We are concerned that one possible effect of the new laws will be to shift the balance of responsibility for workplace health and safety and hence, rather than leading to improvements, to make workplaces less safe. Under existing health and safety law, everybody within an organisation, including all the employees, has a responsibility for health and safety. However, non-senior employees might become less disposed to fulfil their own health and safety responsibilities vis-à-vis themselves and others if an additional threat of criminal prosecution hung over company, based on the actions of the senior managers but not others.

In addition to the above general comments, we would like to raise some issues with particular regard to the shipping sector. The definition of “senior management” covers those who play a significant (ie decisive or influential) role in management decisions or manage the organisation either as a whole or a substantial part of it. “Substantial part” will include a regional office but an individual retail outlet or factory etc. will not usually be considered a substantial part, unless it is the only such outlet or factory. Our interpretation of this is that one ship out of a sizeable fleet would not be treated as a substantial part of an organisation, meaning that the shipboard management would not be regarded as company senior management. We would be grateful for your clarification of this point.

On the subject of the scope of application, it appears from the Bill that the courts will have jurisdiction if the harm resulting in death is sustained on a ship registered in the UK (including fishing vessels) or on any ship within the seaward limits of the territorial sea adjacent to the UK. However, since the offence is based on breaches of applicable health and safety legislation, it is not at all clear how operators of ships registered outside the UK (and hence not subject to the Merchant Shipping Act 1995) could be prosecuted. Previous enquiries to the Home Office have indicated that the existing offence of gross negligence manslaughter applies in theory to foreign ships in UK territorial waters and it would not be acceptable for the new law to extend less widely than this.

16 June 2005

136. Memorandum submitted by Mr Justice Silber

1. I was the member of the Law Commission, who was primarily responsible for producing its report *Legislating the Criminal Code-Involuntary Manslaughter* (LC 237), which constituted the starting point for the present draft Bill.

THE NEED FOR REFORM

2. The responses to the Home Office’s consultation in 2000 and to the Law Commission’s Consultation Paper show very strong support for the reform of the present law on manslaughter. There are many serious defects in the present law such as that:

(i) at present, corporations - other than one-man companies - have consistently escaped conviction for corporate manslaughter merely because of the requirement that a “directing mind” is also guilty of manslaughter. The failures of the prosecutions after the Herald of Free Enterprise ferry disaster and the Southall rail disaster reveal starkly the glaring defects in the present law, which cries out for immediate reform;

(ii) we now have a state of affairs by which one man companies are liable to be convicted for manslaughter while their larger counterparts cannot be convicted; this position is in direct conflict with the aim of our criminal justice system, which is to treat wrongdoers equally; and
as a matter of public policy, if companies were liable in appropriate cases to be convicted of corporate manslaughter, this sanction would provide a powerful incentive for companies to be especially concerned about safety issues. Obviously convictions for breaches of Health and Safety legislation are not adequate substitutes for convictions for manslaughter, which alone would mark society’s condemnation of the grossly negligent conduct of a company, when it causes death.

3. Although there have been judicial requests for there to be no further criminal legislation, this Bill is long overdue and should be implemented. It will not burden the legal system as it will not lead to a great increase in work for the court but will ensure that the present anomalous position described in paragraph 2 above is ended.

THE PROPOSALS FOR REFORM

4. The proposals for the scope of the new offence in the Bill are admirable. The threshold of liability based on gross negligence achieves a fair balance as it will lead to the convictions of only those who should be held culpable. Experience has shown that the law of gross negligence manslaughter as effecting individuals has been widely understood and has been applied without undue difficulty by juries. Thus the requirement of gross negligence will also be relatively easy for a jury to understand and to apply.

5. Furthermore, I regard as fair and striking the correct balance, the proposals for defining a senior manager in terms of the management of the whole or a substantial part of the organisation activities and playing a significant role in such managerial responsibilities.

6. I am content with the proposals about the bodies, which should be exempted as again it seems that a fair balance has been achieved so to exclude organisations such as the armed forces for which different consideration is applied.

7. The sanctions in the Bill are adequate. In my view, it is very important that the Crown should in appropriate cases be fined if found guilty of corporate manslaughter even though the fine would be recycled through the Treasury; the important factor, which cannot be exaggerated, is the shame and chagrin that a public body will suffer by being fined for corporate manslaughter and lot merely for what is perceived to be a regulatory offence. It would be very unsatisfactory if public bodies were exempt from being fined or found guilty of corporate manslaughter as this would seriously reduce the effectiveness of the new provisions.

8. I am no longer a member of the Law Commission and so this response is mine alone.

24 May 2005

137. Memorandum submitted by the Confederation of Passenger Transport

The Confederation of Passenger Transport (CPT) represents the operators of buses, coaches and fixed track passenger transport systems. Our membership exceeds 900 enterprises and ranges from large PLCs such as Stagecoach Group and Arriva to owner-operators. CPT’s members are drawn from both the private and public sectors.

There are many factors—not least the public service ethos and professionalism of the individuals involved—that keep safety as a key objective for our members. Our members have misgivings about an additional layer of liability, but we accept that the Government has been under public pressure to introduce a measure of this kind.

It is absolutely essential, if frivolous, expensive and time-consuming claims (and the consequent stress on managers) are to be avoided, that the concept of gross breach of duty is absolutely clear in the legislation and not watered down in any way. Section 3 of the Draft Bill strikes a fair balance, we believe.

17 June 2005

138. Memorandum submitted by the Royal Society for the Promotion of Health

The Royal Society for the Promotion of Health (RSPH) welcomes the presentation of the Corporate Manslaughter Bill. On inspection of the consultation document the Society is satisfied that the Bill is comprehensive and consideration was made of the comments received in response to the consultation in 2000.

The Society wishes to make two comments for clarification regarding the draft Bill: In both instances the Society proposes that the text of the Bill be revised to provide further clarification.

Firstly, it is important to clarify the order in which this bill would be applied to an organisation. For example, would corporate manslaughter be used after the Health and Safety Executive had sought and achieved criminal convictions for breaches of health and safety legislation or due to the severity of the offence which Corporate Manslaughter would imply and the unlimited fines proposed in the Bill would the
corporate manslaughter legislation be used firstly with the relevant health and safety legislation breaches cited at the trial and then only used for criminal conviction after the corporate manslaughter charge was dropped/was unsuccessful?

Secondly, we would suggest that the text of the bill be amended to clarify whether success in achieving a conviction under the new bill be admissible to allow criminal conviction for other breaches or to allow a successful civil claim against an organisation or liable individual.

17 June 2005

139. Memorandum submitted by NAPO

NAPO, representing workers in both the National Probation Service and the Children and Family Court Advisory and Support Service (CAFCASS), welcomes the opportunity to comment on the proposals for introducing new legislation covering Corporate Killing.

NAPO supports the aim of the draft Bill to improve the possibility of successfully prosecuting organisations for an offence of manslaughter by creating a new offence that targets serious failings in the strategic management of a company, which is not tied to a requirement to demonstrate that an identifiable individual director or senior manager (“the directing mind”) was responsible and grossly negligent for directly or expressly permitting an activity which led to the death of an employee.

NAPO also welcomes the acceptance that for the first time Crown bodies may no longer be immune from criminal prosecution. However NAPO is concerned to see that this is only a partial inclusion as it only extends to those government departments or other body that are listed in the Schedule. (NAPO would wish the Government to clarify whether the legislation would or would not apply to the Probation Service and/or CAFCASS.) In addition NAPO is concerned that Crown bodies may be exempt from prosecution in this draft Bill as their “relevant duty of care” could be over-ridden when they are providing goods or services which are an exclusively public function. NAPO believes Crown Immunity should be removed completely leaving decisions as to culpability and sentencing to the courts. As the Government has previously indicated support for the removal of Crown Immunity for all Health and Safety Offences NAPO hopes that this Bill could be used as a vehicle to achieve this end.

NAPO welcomes the fact that the new offence will cover both deaths in the workplace and also deaths to the public that result from the work process, such as major transport accidents and is linked to the standards required under existing health and safety legislation. However NAPO believes that the wording of the draft Bill also needs to specify that other health and safety legislation, such as the Working Time Regulations are also covered.

NAPO notes that Section 3 (2) (b) of the Bill says that a jury in deciding whether there has been a “gross” breach of the duty of care must consider “whether or not senior managers of the organisation:

(i) knew or ought to have known that the organisation was failing to comply with that legislation or guidance;
(ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply; and
(iii) sought to cause the organisation to profit from that failure”.

NAPO believes the Bill should make it clear whether any one, or all of the three tests need to be met. NAPO is also concerned that the third test, which requires the prosecution to show that an organisation sought to “profit” from a failure, could lead to action being less likely against public and non-profit making organisations.

NAPO notes that the draft Bill applies to “corporations” and government departments, not only as employers but also as suppliers. It is not clear however whether it would apply to “un-incorporated” bodies such as partnerships and how it would apply when more than one public body or agency are involved together in partnership work such as is the case when probation workers are involved in Multi Agency Public Protection Panels (MAPPA) or Youth Offending Teams.

The draft Bill only allows for an organisation to be fined, although remedial orders will also be able to be imposed. NAPO believes that, as a company or public body cannot be sent to prison, it is important that the whole range of community sentences should be available to the courts when sentencing. This would then in addition to fines (which in the case of public bodies would just transfer money from one government department to another) provide courts with the opportunity to include community orders, which could:

— impose obligations and restrictions on the organisation to fulfil the courts’ requirements of punishment;
— develop more responsible behaviour in the organisation;
— improve the organisations’ knowledge and approach to their duty of care to employees and others affected by their work; and
— include a requirement of unpaid work which would benefit the community.
NAPO believes that supervised effectively, such a “corporate community order” would punish convicted organisations while allowing them to make reparation.

As the Government has committed itself to extending the penalties for health and safety offences, NAPO would suggest that this Bill could be an instrument to achieve that.

NAPO believes that director’s duties also need to be subject to tighter definition and regulation. Whilst wishing to avoid the scapegoating of front line employees or middle managers, it is fundamental that criminal liability for the management of an organisation’s undertakings should apply not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure.

17 June 2005

140. Memorandum submitted by the British Coatings Federation

The British Coatings Federation is the sole trade association representing the paint, coatings and printing ink manufacturers of Great Britain. It represents 90% of the industry, some 130 companies, with a turnover of £2 billion and a workforce of 15,000.

Generally we support the proposal to introduce a specific offence for corporate manslaughter, and the proposed methods of implementing this.

We have one concern with the definition, in draft regulation 3 (2), of “gross breach”. The failure to comply with “any relevant health and safety legislation and guidance” places a legal status on guidance that has never existed before. In most Health and Safety publications, it states that if the guidance is followed, this should result in legal compliance. However, alternative methods may also give legal compliance. Including guidance in the definition of gross breach reverses this. We request that “and guidance” is removed from Regulation 3 (2).

21 June 2005

141. Memorandum submitted by the Electrical Contractors’ Association

The Electrical Contractors’ Association (ECA) represents the interests of 2,400 member companies involved in electrical installation work. Collectively, the member companies have an annual turnover of more than £5 billion, employ over 30,000 operatives and support 8,000 apprentices in craft training. The role of the ECA is to provide a focus for the electrical industry in terms of safety, training, qualification, technological development and industry performance. We are an active member of the Specialist Engineering Contractor group, and the Confederation of British Industry.

The ECA operates an industry-wide “ZAP” (zero accident potential) initiative. Serious accidents have fallen by over 60% within ECA member companies, since 2001. There were no fatalities to the operatives of ECA member companies in 2004.

Executive Summary

Overall, the ECA welcomes the draft Bill, which aims to achieve justice in the case of gross management failings where there has been a fatality at work. In this context, the general approach taken in the draft Bill is an improvement on the common law offence of “manslaughter by gross negligence”, which it seeks to replace.

We strongly support the proposal that the draft Bill applies to organisations and not to individuals. (If an individual’s acts or omissions are sufficiently serious they can already be prosecuted under other legislation.)

We believe that organisations engaging effectively with the requirements of UK safety law should not be subject to the proposed offence in the event of a death linked to their activities.

We believe that the Bill should be clearly applicable to organisations associated with “atypical” employment arrangements (ie it should also be seen to apply to safety measures in organisations that do not have an employee/employer relationship).

We agree that the police should investigate, and the CPS will prosecute. This should be supported by close co-operation with the enforcing body (usually the Health and Safety Executive), who should be actively involved in assessing the extent of a safety management failure, at an early stage.

In issuing remedial orders, the Court should only act in line with the recommendations of the Health and Safety Executive.
The international nature of business and employment should also be considered. The European Commission should be encouraged to pursue similar measures, once this legislation is enacted within the UK.

Note that in our response, “safety” is taken to mean “health and safety”.

**OUR SPECIFIC COMMENTS**

We believe that an offence of corporate manslaughter should be related to a major or continual and systematic failure to assess and control risks to safety, rather than a temporary gap in an established management system. Businesses that engage effectively with the requirements of U.K. safety law should not be subject to the proposed offence in the event of a death linked to their activities.

**Contractor and atypical arrangements**

We believe that the Bill should be clearly (not just implicitly) applicable to organisations associated with “atypical” employment arrangements (i.e., it should also apply to safety measures in organisations that do not have an employee/employer relationship, for example, employment agencies (where workers are effectively hired out to other organisations) or “holding companies” that may not employ anyone but still command the organisation of employees and others in a subsidiary company).

We believe that, in the context of the proposed offence, it should be clear what level of responsibility an organisation will have for the acts or omissions of contractors, sub-contractors, agency workers, composite companies or other organisations that employ workers.

**International issues**

Although there are practical limits to the scope of the draft Bill, the international nature of employment should also be actively considered. This is a growing issue for service industries, with the many foreign-based contractors now working in the U.K. Joint ventures (sometimes with no direct employees) or other arrangements are set up in organisations that are not U.K.-based.

In addition to developing this Bill, we believe that the Government should work within the European Commission to ensure that foreign-based companies can also be properly held to account, by introducing similar legislation.

**Investigating the offence**

We welcome the proposal that the police will investigate, and the CPS will prosecute. However, this should be supported by close cooperation with the HSE (or other relevant enforcing authorities). Sharing technical information and evidence following the incident is essential to establishing quickly whether there may be a “gross breach”.

**Assessing management failure**

We recognise the difficulties that the courts experience over the application of the “identification principle”, and we believe that the proposal to introduce a new test related to “management failure” is the correct approach.

The proposed offence in s 1 relates to the way in which an organisation’s activities are managed or organised by its “senior managers” (this can involve the acts or omissions of more than one senior manager). The notes to the draft Bill state that this involves an assessment of how an organisation’s activities were organised/managed in practice. HSE should be actively involved in assessing the extent of safety management, at an early stage.

**Senior Managers**

A senior manager is defined as a person who plays a significant role in:

(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

(b) the actual managing or organising of the whole or a substantial part of those activities.

The definition in s2(b) “actually managing a substantial part” appears to potentially lower the management position for those who might be a “senior manager” under the new law (but who would not be identified as a “directing mind” under the current common law). We believe more guidance is needed on who will constitute a senior manager.
Tests for a “gross breach”

Section 1(1)(b) requires a breach to be “gross”, that is: “falling far below what can reasonably be expected in the circumstances”. We believe that the test for a gross breach should refer to “reasonable foreseeability”.

S3(2) states that the jury must consider whether the evidence shows the organisation failed to comply with safety legislation and if so:

— How serious was the failure to comply.
— Whether or not senior managers:
  — knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;
  — were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply; and
— “sought to cause the organisation to profit from that failure”.

It should be made clear whether the jury must take into account all or only some of the factors listed above. In 3(2) the phrase “whether or not” seems open to wide interpretation.

We do not believe that any organisation should gain commercial advantage from non-compliance with safety law. However, our experience of companies in general (across a range of sectors) is that deficiencies in safety management are more often by default than by design. That is, various organisations do not deliberately seek to put “profit” before safety but instead, they do not pay enough attention to safety because they are continually looking at other aspects of running the business (in noting this, we do not condone it). If there is a fatality and a clear and marked deficiency in safety management, but no clear evidence that an organisation actively sought to “profit from that failure”, this may well affect a jury’s decision. As such, the wording in the Bill (and any guidance in this area) will need careful attention.

Remedial orders

The draft Bill provides the Court with the power to make remedial orders within a specified time. A criminal court is unlikely to be equipped to decide on the necessary standards of safety if it does not refer to recommendations from the HSE. We therefore believe that the Court should be required to make remedial order consistent with the recommendations of the HSE. This will help to avoid the risk of imposing “punitive” as opposed to “effective” safety measures or imposing measures that are either (1) wrong or (2) have a negative effect on other areas of safety management.

Regulatory impact

As drafted, we do not anticipate a financial impact for those employers who already comply with UK health and safety legislation, provided the points on clarification (made above) are suitably addressed.

16 June 2005

142. Memorandum submitted by Victim Support

Victim Support is the national charity for people affected by crime. Staff and volunteers offer free and confidential information and support for victims of any crime, whether or not it has been reported and regardless of when it happened. Victim Support works to increase awareness of the effects of crime and to achieve greater recognition of victims’ and witnesses’ rights. The organisation operates via a network of affiliated local charities, the Witness Service and the Victim Supportline (0845 30 30 9000).

A Response by Victim Support

We welcome the publication of Corporate Manslaughter, the Government’s Draft Bill for Reform. We share the concerns of those who have argued that the existing law in this area is ill defined and ineffective. It is right that the Government is responding to the real concern that, as the law stands, “it is not delivering justice”.

Last year, Victim Support supported 1,136 relatives of homicide. We also run the Witness Service which supports prosecution and defence witnesses in every criminal court in England and Wales. Last year trained volunteers supported 364,888 victims, witnesses and their families before during and after hearings.

* We often support more than one relative in the same family.
CROWN IMMUNITY

We welcome the widening of the offence to cover many activities by Crown bodies however, we are concerned that important exceptions remain. We feel it is anomalous that, for example, hospital trusts may be prosecuted for gross negligence causing the death of someone in their care while the prison service may not.

Also, if as it is to be hoped, the threat of prosecution for corporate manslaughter will promote better health and safety practices, the law should apply to all employing organisations with no exemptions for Crown bodies.

We would conclude that is not clear that these restrictions are justifiable.

Unincorporated bodies

The provisions of this Bill will not cover unincorporated bodies such as trade unions and solicitors’ firms. We believe that the proposals should cover all employing organisations as was envisaged in the Government’s 2000 proposals.

Extra territorial jurisdiction

Victim Support welcomes the proposal that if a death took place in Britain, any company, whether it is based here or abroad could be prosecuted in this country, even if the management failure itself occurred abroad. However, we believe that if a death took place abroad due to a management failure in this country, the offence should still apply. Although we appreciate that there are some practical difficulties in investigating, prosecuting and enforcing such offences when the death occurred abroad, these difficulties are not insurmountable, especially where the jurisdiction in question criminalises such corporate conduct.

Private prosecution

In the Government’s 2000 proposals, it was stated that it should not be necessary to get the consent of the Director of Public Prosecutions (DPP) to bring proceedings for the offence of Corporate Manslaughter. Furthermore, the Law Commission’s report stated, “the right of prosecution should be unrestricted unless some very good reason for the contrary exists”. However, these proposals have been changed to require the consent of the DPP in such circumstances. The DPP is unlikely to give his consent if the CPS has refused to prosecute, thus these provisions effectively rule out the possibility of private prosecutions. We believe that the provision allowing private prosecution proceedings to be started without the DPP’s consent should remain as an important right for relatives of victims of corporate manslaughter.

Penalties for corporate manslaughter

We believe that there should be two overriding objectives with regard to penalties for this offence:

The first is that, in recognition of the desire of bereaved relatives for positive action to be taken in response to the offence, the requirement to correct practices and to undertake remedial action should take precedence over the imposition of a fine. Furthermore, the company that has been found guilty of the offence should be banned from providing its service until it has rectified the process which led to the breach of the duty of care. Fines should be calculated only after sufficient resources have been allocated to corrective measures, such as renewing equipment or training staff.

Second, offending organisations, including Crown bodies, should be required to pay compensation to the families of victims. Although no amount of money can ever compensate for bereavement, compensation does have considerable expressive power.

Stricter test for breach than 2000 proposals

We are concerned about the introduction of a stricter test of whether or not the duty of care owed to the victim was breached. The Government’s proposals in 2000 suggested a focus on all management levels, while this Bill focuses on “senior management”. Furthermore, the definition of the term senior management itself is narrow, thus risking further gaps in accountability. This means that even where there is gross mismanagement at middle and lower levels of the organisation that results in death, it may not be possible to prosecute for the corporate manslaughter offence. We share other organisations’ concerns that, as a result of this loophole, there is a risk that it may become company policy to delegate responsibilities down

297 Such as the Centre for Corporate Accountability (CCA).
the management chain, thereby allowing the organisation to escape manslaughter prosecution. By narrowing the net of accountability, the government risks leaving many bereaved relatives without any legal redress in the criminal law as well as increasing the vulnerability of more junior staff.

**Definition of gross breach**

By including the consideration of whether or not an organisation, “sought to cause the organisation to profit from that failure” as part of the jury’s deliberations, this Bill causes two problems. First, it is very difficult to obtain such evidence and second, it will not be relevant where the organisation that is charged is a public body or any other organisation that does not operate for profit. This provision increases the risk of inappropriate acquittals.

**Other issues**

In 2000, the Government thought that the issue of accountability of directors needed to be addressed. The current problem is that it is not clear that directors have a duty of care in relation to the person who dies as a result of an action or omission by his or her company. If there is no duty, it cannot be breached and a prosecution will be unsuccessful under this law and under health and safety legislation. This gap should be addressed as a matter of urgency either in this Bill or by other legislative means.

17 June 2005

143. Memorandum submitted by the Guild of Air Pilots and Air Navigators

It is our view that the Shipping and Railway industries have a lot to learn from the Airline industry with regard to safety, and if this law were to be introduced as currently drafted, it might have serious consequences for the Airline industry. The reason that we say this is because the key feature of a successful safety conscious industry is to create a natural safety culture from top to bottom. The acceptance that human mistakes can be made, but that by utilising an “open reporting system”, and frank discussion without fear of prosecution unless a derogation of duty is the case, one can arrive at a cause rather than concentrate on blame. This produces improved procedures and prevents potential accidents or incidents in the future.

There is a strong possibility that a law of corporate manslaughter would seriously inhibit this process. Creating an atmosphere of fear of prosecution can only inhibit the free and open discussion of errors, omissions and other mistakes relevant to incidents and accidents. Whenever human beings are involved we will always have to allow for human fallibility. Fear of punishment is not a sufficient deterrent. A safety culture developing sound designs and procedures is much more likely to improve safety.

6 June 2005

144. Memorandum submitted by the Employer’s Organisation for Local Government

1. Background

1.1 The Employers’ Organisation for Local Government (EO) is the national body providing support and guidance to local government in England and Wales on human resources issues. We also host Dialog, the team responsible for helping authorities to mainstream diversity issues into all local government activities, including service delivery, and a health and safety function, responsible for supporting local authorities to meet government health and safety at work targets as duty holders.

1.2 There are 410 local authorities in England, and Wales. They employ approximately 2.2 million people. Local authorities provide services to many millions of people to whom they owe a duty of care. The proposals for the new offence of corporate manslaughter clearly could have significant implications for local authorities as employers and suppliers of services.

1.3 Despite the large number of employees, service users, clients and members of the public who could be affected by local authority activities the number of fatal accidents is small. Having said that one is too many and authorities are not complacent and take their health and safety responsibilities very seriously.

1.4 In terms of where a local authority may attract a charge of corporate manslaughter, below are some examples.

- Death of an employee eg a person is killed at work
- Death of service user eg a person receiving care in a council run home for the elderly
- Death of a member of the public eg run down by a reversing council vehicle.
2. Consultation

2.1 The EO has brought the Government consultation to the attention of local authority health and safety practitioners. We have sought Regional Employers’ views to inform our response and asked chief executives, leaders and members with a HR portfolio for their input too.

3. The EO View on the Proposals

3.1 The EO notes the proposals contained in the draft Bill.

3.2 The EO welcomes the opportunity to contribute to the debate as the proposals impact upon local authorities (LAs) as employers and service providers.

4. Impact of Proposals upon Local Authorities (LAs)

4.1 The EO notes that this is an offence committed by the organisation and that individual gross negligence manslaughter remains unchanged.

4.2 The EO notes and welcomes that these proposals do not impose additional legislative burdens upon local authorities.

4.3 The EO recognises and accepts that local authorities as public bodies will be subject to the provisions of the new offence as proposed, if and when it comes into force. We believe that local authorities should be subject to this proposed provision as they employ a huge number of people and deliver services to millions more. LAs clearly owe a duty of care to these people in terms of both the common and statute law.

4.4 The EO notes that there are certain exemptions within the draft bill relating to public policy issues. Clearly local authorities are involved in making public policy decisions, as authorities are multi focus organisations with competing priorities in terms of service delivery. Clarity is therefore required to differentiate those matters, which would be subject to the new offence and those which fall within the public policy arena and are therefore exempt.

4.5 The EO recognises that under the new test more cases of corporate manslaughter may be brought. Those, which are brought, are more likely to succeed as the “identification principle” (which requires the identification of the directing mind of the organisation) has been replaced. It is more likely therefore that authorities will have to spend time and money defending themselves against a charge of corporate manslaughter.

4.6 The EO supports and recognises the concept of the proposed offence of corporate manslaughter as an “extremely grave offence” which should be punished severely by a significant fine. As a grave offence it should and must be reserved for the most serious of breaches of the duty of care. It should also be noted that current health and safety legislation already allows for unlimited fines in the Crown Court and for prosecution of individuals.

4.7 The EO supports the high threshold of “gross failure that causes death” as other existing common law and statutory duties deal with failures of a lesser nature.

4.8 It should be noted that in terms of local authorities, any fine imposed as a result of a conviction for corporate manslaughter would be paid from public funds. Council taxpayers may see it as though they are being punished for failures of the authority. There may be an impact in terms of service delivery as a result of large fines. Therefore, any argument which applies to the Crown in relation the recycling of public money could apply to local authorities.

4.9 A local authority found guilty of the new offence of corporate manslaughter could have significant fall out in both political and reputation terms.

4.10 The EO notes and is reassured that those authorities, which comply with their common law and statutory duties under the Health and Safety at Work etc Act 1974 have little to fear from this proposed new offence. We would wish therefore to encourage all authorities to ensure that they fulfil their statutory duties under the Health and Safety at Work etc Act 1974 and are not deflected from that aim by unnecessary concern over these new proposals for reform.

4.11 Local authorities are challenged to be exemplars of health and safety management practice by the Government’s Revitalising Health and Safety strategy. Authorities take this challenge seriously and we would hope that most authorities are broadly compliant. Therefore those minority of authorities, which do not manage their responsibilities to others effectively and cause someone’s death, should be subject to severe sanction in the courts.

4.12 Local authorities may wish to take the opportunity to review their arrangements for the strategic management of health and safety to ensure that they are effective in discharging their statutory duties. There will be little cost for those authorities that are in compliance and manage health and safety effectively. There may be significant cost to authorities that fall short of compliance. When seen in these terms the proposed new offence can be a driver to secure improvements in health and safety standards.
4.13 The EO supports the new concept of management failures by senior managers. This focuses on the strategic management of the organisation’s activities and not failures by those at a junior level or “unpredictable, or maverick acts of its employees”. The definition of senior managers requires clarity around where that level might be in local authorities. Those familiar with good practice health and safety management will be comfortable with these concepts.

4.14 The EO supports the link between Health and Safety legislation and guidance and the question of a “gross” breach of the duty of care. This link makes the standard to be achieved clear.

4.15 The EO notes that one of the criteria to be considered by the jury is whether the organisation sought to profit from the failure. More clarity is required in respect of this sub clause and its application to local authorities, which are non-profit making organisations.

4.16 The EO notes that elected members are not excluded from the definition of senior managers. Therefore, if in an investigation into the death of a person to whom the authority owes a duty of care, the evidence suggests an elected member exerts a sufficient level of control then it may be possible for them to be considered part of the authority’s senior management. Local authorities may need therefore to review the role and activities of their elected members.

4.17 Local authorities deliver services in different ways. Services may be contracted out, or delivered in partnership with the private, public or voluntary sector. Whilst the common law duty of care may not extend to those receiving services provided by contractors, in the Health and Safety at Work etc Act 1974 responsibilities in contract letting and monitoring must be complied with as LAs may be liable for corporate manslaughter if they do not and someone dies.

4.18 The EO notes but remains to be convinced of the need for the proposed power of the court to make orders to rectify the deficiencies, which led to the breach. In practice this power may be rarely exercised as significant delays may occur in bringing the case to court and to leave unchanged the circumstances, which led to a death until the organisation is convicted, appears worrying. It would seem necessary that action to remedy the breach should be taken much earlier to prevent a recurrence of the incident and a further possible death. A notice (which can have immediate effect) issued by a health and safety inspector under the Health and Safety at Work etc Act 1974 appears to provide the answer and at a much earlier stage in proceedings. Non-compliance with a notice is a significant offence in its own right.

4.19 Some local authorities are also health and safety regulators and therefore their officers may be involved with the Police in the investigation of fatal accidents, which occur in the LA enforced sector. LAs who are enforcing authorities will need to ensure that adequate resources are allocated to health and safety enforcement activities. Authorities will also need to ensure appropriate and adequate local liaison arrangements exist with the Police. We have discussed this with our colleagues in LACORS.

16 June 2005

145. Memorandum submitted by the National Union of Rail, Maritime and Transport Workers

SUMMARY

1. The National Union of Rail, Maritime and Transport Workers (RMT) welcomes the decision of the Home Affairs Committee to conduct an investigation into the draft Corporate Manslaughter Bill.

2. The high profile and very tragic accidents which have resulted in loss of life on the railways have contributed towards public pressure for a change in the law on Corporate Manslaughter. However it is not just the high profile accidents that highlight the need for effective Corporate Manslaughter legislation as there are still far too many deaths of railway workers due to the failure to comply with health and safety legislation and standards. The National Union of Rail, Maritime and Transport Workers is the largest rail union; we represent more than 44,000 workers directly employed in the railway industry, and therefore are grateful for the opportunity to comment on the Corporate Manslaughter Bill.

3. Last week Network Rail (formerly Railtrack) was found guilty of breaching safety regulations in the run up to the Hatfield crash in October 2000. This also followed an admission of guilt by Balfour Beatty to offences under the Health and Safety Act. However the admission of guilt by Balfour Beatty was only forthcoming after the company knew that it was not facing charges of Corporate Manslaughter. This is despite the fact that there had been a shocking neglect of the railway infrastructure in the run up to the disaster.

4. RMT wish to see legislation that ensures companies, on the railway and in other industries, are held accountable for their actions in the workplace. We can advise the inquiry that in addition to the high profile accidents on the railway there has been a steady increase in the number of fatalities of track workers.

5. In February 2004 four railway workers died at Tebay after they were struck by a runaway vehicle. In September 2004 a further two railway workers were killed by a road rail vehicle. Further details on these incidents are given later in this submission. In 2004 a total of eight workers were killed in four accidents,
Ev 306  Home Affairs and Work and Pensions Committees: Evidence

(Rail Safety and Standards Board, 2004 Annual Report). This was the highest number of deaths since 1990–91. In all the 2004 incidents better planning and/or site management could have prevented the fatalities.

6. In addition to informing the committee about developments on the railway RMT will also briefly comment on other aspects of the Bill. We believe that the publication of the draft Bill is a step forward from the current position where effective prosecutions for corporate manslaughter are virtually impossible. However we believe the Bill needs to be improved in a number of areas. The suggested amendments are not minor matters and are necessary to underpin the Bill and ensure effective legislation.

7. RMT is concerned that sufficient deterrents are not in place in the current draft legislation; in particular Directors and senior managers will not face liability. We believe this would be a mistake and will mean that the Corporate Manslaughter Bill will have little impact, and it will certainly not bring about a cultural change throughout UK workplaces.

8. The Bill needs to be far more imaginative in relation to the penalties that can be incurred. As the Bill stands the only penalty available will be a straightforward fine. This is far too narrow and the Government should consider other measures that can also be taken against companies as well as company directors, for example fines levied according to company profits or turnover, and director’s removal from office where offences justify this.

9. The Bill should be amended so that all employing organisations are covered. At the moment the Bill does not propose to cover unincorporated companies. RMT are also concerned that many institutions of the Crown will be exempt.

10. RMT represent merchant seafarers and we therefore wish to see protection afforded to seafarers in the same way as shore based workers. If the ship is registered in the UK the Government retains jurisdiction when the vessel is outside UK territorial waters and as a minimum UK shipping companies must be liable for death and injuries incurred irrespective of the location of the vessel.

11. Finally we must express our strong desire for the legislation to be implemented by the end of this Parliamentary session in November 2006. Revisions to Corporate Manslaughter legislation have now been debated for nearly a decade and the Government has promised the legislation since 1997.

THE NEED FOR NEW LEGISLATION

12. Since 1965 very few prosecutions have been attempted under current legislation, only three small British firms have ever been found guilty of corporate manslaughter and there have been no convictions for major incidents. Attempts to bring prosecutions for manslaughter failed after the 1997 Southall rail crash, in which seven people died, and after the 1987 Zeebrugge ferry disaster, which killed 192. As stated above, corporate manslaughter charges arising from the Hatfield derailment in October 2000 have also recently been dropped.

13. At present companies can only be tried for corporate manslaughter if there is an individual in their organisation who can be identified as the “controlling mind”. Lawyers believe that the difficulty is proving that one person in a position of control was personally responsible for gross negligence of health and safety laws. General failure, or the actions of a junior employee, are not deemed to be sufficient. Corporate manslaughter cases have only been successful in small companies where it is easier to establish lines of responsibility and a controlling mind at the top.

THE HATFIELD TRAIN DISASTER

14. The derailment of the high speed train at Hatfield illustrates the desperate need for a change in the law relating to corporate manslaughter. In October 2000 a high speed GNER train from Kings Cross to Leeds careened off the track at 115 miles per hour. The defective rail had actually been identified in November 1999 by Balfour Beatty which was the principal contractor for Railtrack on the route.

15. After the incident the Railtrack Chief Executive, Gerald Corbett, admitted that the track was in “an appalling and totally unacceptable condition”, and resigned. In contravention of the rules no speed restriction was imposed. In February 2000, eight months before the derailment, the rail was identified as needing urgent replacement. A new rail had sat alongside the existing track for at least five months prior to the crash. Prosecutors stated that the crash was a disaster waiting to happen and that a cavalier approach had been taken to the safety of the trains.

16. Both Railtrack and Balfour Beatty were identified as being culpable for safety failings. Due to the massive backlog of repairs Railtrack granted a general derogation to Balfour Beatty which waived normal maintenance deadlines. This was a flagrant breach of standards and outside of the contractual obligations of both companies. In total there were over 200 track defects within the first 43 miles from Kings Cross and the broken rail was described as one of the worst cases of fatigue ever seen by experts. When the train travelled over the track at 115 miles per hour the rail shattered into over 300 pieces.
17. Despite the graphic nature of this sequence of events corporate manslaughter charges were not successful. Charges were originally announced against Railtrack and Balfour Beatty in July 2001, but for Network Rail (formerly Railtrack) they were dropped in September 2004 and in July 2005 charges against Balfour Beatty were also dropped.

18. The trial judge, Mr Justice Mackay, stated that he understood that there would possibly be “concern, disappointment and perhaps distress to the relatives of those who died in this tragic crash”. Following his dismissal of charges he added “I have tried to explain why it is that I am obliged by existing law to make this ruling. This case continues to underline a long and pressing need for the long-delayed reform of the law in this area of unlawful killing. There are thankfully signs this reform is now in sight.”

19. The dismissal of the case happened despite the fact there were clear warnings given on the state of the track and senior personnel were identified. For example Nicolas Jeffries had taken over responsibility as civil engineer to Balfour Beatty in July 1999 and the prosecution stated that his position identified him as “a mind of the company”. He had a wide and significant remit, a safety critical post and there was no one more senior than Mr Jeffries within his sphere in Balfour Beatty.

HEALTH AND SAFETY FAILURES ON THE RAILWAY

20. As detailed earlier in this submission the new legislation must also be applied where applicable to less high profile incidents of company failure that result in workers deaths. RMT is extremely concerned that the Bill has been drafted in such a way as to focus only on a limited number of high profile accidents. Certainly rail crashes involving passenger injury and death attract far greater publicity than railway worker fatalities. Our concern would seem to be justified given that the Regulatory Impact Assessment has estimated that the legislation as currently constituted will only lead to an additional five prosecutions per annum.

21. In 2004 there were a total of eight fatalities for railway workers (Rail Safety and Standards Board, 2004 Annual Report) arising from four separate incidents. It is a sad fact that in every accident resulting in the death of railway workers last year poor planning and/or inadequate site management were identified as primary causes. In 2005 a further four rail workers have so far been killed on the track.

22. On 15 February 2004 four workers were killed, and three more injured, in an incident at Tebay. A runaway rail wagon came loose at a yard and ran four miles away down the hill on the track near Tebay before ploughing into the men working on the track. The men killed were working under arch lamps and it is believed that the runaway vehicle would have been running virtually silently as the generators were working. It is unlikely that the men would have known anything about it until the vehicle hit them.

23. The inquiry found that due to inadequate planning a rail wagon had to be hired at extremely short notice and therefore there was little choice but to use a supplier who was relatively new and had not been thoroughly assessed. The rail wagon hired had brakes which were not functional, no test was carried out and the consequences were of course fatal.

24. A further tragedy followed on 28 September 2004 when two workers were killed between Cannock and Hednesford. In this incident a Road Rail Vehicle (RRV), which was used to reposition rail as unloading and relaying of rail was taking place, reversed back up the track and struck the two men working on the relaying of rail.

25. Again in this instance inadequate planning was to blame. A detailed work plan was not produced in time for the job and insufficient planning had taken place in respect of an inspection of the site, so details were not safely recorded in the method statement produced for the work. In addition, labour supply organisations were being used and sufficient notice should have been given of the job and the intended duties so that an assessment could be undertaken by the contractor of the necessary competence of the personnel required. This was not done and safe systems of work were not planned to take account of the multiple activities and vehicles being used on the worksite.

26. It is vital that a new Corporate Manslaughter Law will tackle the very real shortcomings that continue to be highlighted with tragic results in the railway industry. The Corporate Manslaughter Law should not just be introduced to tackle high profile accidents, but also the continued health and safety violations of companies that has resulted in the deaths of railway workers.

THE PROPOSED LAW AND SUGGESTED AMENDMENTS

27. RMT are concerned that the new Bill as currently drafted will have only a very limited impact in the workplace. There should be a clear responsibility on Directors and senior managers under the legislation, so that action can be taken if they are deemed to be grossly negligent in their duties. Directors and senior managers basically run companies and public policy demands that they should be held accountable.
28. At the current time the law places unreasonable obstacles in the way of successful prosecutions of directors and senior managers. First of all there has to be a specific duty of care, but normally this does not exist as the duty of care is between the company and the employee. Secondly any conviction would have to arise from specific action, not a failure to act or an omission, when in fact it is far more likely that the later will cause the accident.

29. RMT believe that the Law Commission, upon which the Governments proposals are based, seriously failed to consider how the requirement to find a positive duty to act affected the ability to prosecute individuals who in all other respects may be seriously culpable.

30. The RMT would also like to see a far wider range of penalties available to the prosecuting authorities. The current proposals limit penalties to just the imposition of a fine and this is woefully insufficient. Custodial sentences have to be an option for Directors and other senior individuals should their actions or lack of action be serious enough. However as organisations cannot be sent to prison other penalties need to be included.

31. Penalties that the Government could make provision for in the Bill include the disqualification of Directors or fines linked to the profitability or turnover of a company. In the case of publicly quoted companies an equity stake is also an option. Research by the TGWU and the centre for Corporate Accountability reveals that between April 2002 and March 2004 some 620 people were killed and 60,177 people suffered major injuries at the workplace, but not one Director was disqualified as a result of these deaths and injuries.

32. RMT would like to see the legislation apply to as broad a range of employers as possible; this should therefore include unincorporated bodies whether they are private, voluntary or public. There should be no widespread exemption for Crown authorities on the grounds of public policy if the effect of this is to exempt virtually all Crown body decisions.

33. As stated earlier RMT are also concerned that there is to be no prosecutions for UK companies that cause deaths abroad. The union represents merchant seafarers on UK flag ships but often the ships can be operating in non-UK waters, this applies even to ferries going short distances to France or the Netherlands. UK flagged ships are UK workplaces, if foreign flagged vessels are in UK waters the law of another state applies in respect of employment legislation. It is therefore inconsistent to state that if an accident happens abroad UK legislation does not apply and seafarers deserve the same protection as UK shore based workers.

34. RMT have also noted that there could be a potential loophole in the legislation if companies delegate health and safety legislation to non-senior managerial levels. The Bill as currently constituted states that offences will occur if senior management know or should have known of failures in health and safety. Therefore further consideration needs to be given to the definition of those who are responsible for health and safety and the way around this would be to define it on the basis of those that have the authority to act on behalf of the organisation.

35. The legislation states that prosecutions can be brought where it can be shown that an organisation sought to profit from a health and safety failure. This could be difficult to prove, and it is also not appropriate for public and non-profit bodies. We therefore recommend that the definition should be “benefit” as opposed to profit.

Conclusion

36. RMT welcome the long awaited publication of a Bill on Corporate Manslaughter. We hope that following the changes outlined above this long outstanding measure can be implemented quickly. The Bill needs to be strengthened in a number of areas otherwise its impact will be very limited and a golden opportunity for an effective and far reaching reform of the law will have been missed.

37. The tragedy of Hatfield illustrates how inadequate the current law is. However as we have demonstrated there are many examples of violations of basic health and safety practices on the railway even if the vast majority of them are not as high profile as Hatfield. The new law needs to be effective so that the continued failures to undertake basic health and safety practices are no longer tolerated and real sanctions are applied. The health and safety failures that we have illustrated in respect of Tebay and Hednesford are frequent occurrences on the railway.

38. The union would like to see the law amended so that directors and senior managers are liable for prosecution under the new legislation. A range of penalties need to be available including imprisonment for the worst offences. Simple fines on companies will not deter the worse actions of individuals who after all determine corporate policy. Even a substantial fine can be comfortably taken on board by a company if they have benefited from cutting corners on health and safety.

39. The Bill also needs to be amended so that the definition of those who are responsible for health and safety failures cannot be used to circumvent the law. We would also like to see the full range of organisations covered and the test should be whether an organisation is seeking to benefit as opposed to seeking to profit.
40. Finally UK companies should also be liable for offences that occur abroad and held to account for their actions in the same way as they will be in the UK. In particular merchant seafarers need protection on UK flagged vessels as these are effectively UK workplaces.

16 September 2005

146. Memorandum submitted by the Better Regulation Task Force

The Better Regulation Task Force is an independent body that advises Government on action to ensure that regulation and its enforcement accord with our five Principles of Good Regulation:

— Proportionality
— Accountability
— Consistency
— Transparency
— Targeting

We have taken a close interest in the Corporate Manslaughter Bill, now before your Committee.

When we saw an early version of the proposals, we were concerned that they were not accompanied by a Regulatory Impact Assessment. We are pleased that the Home Office has now produced an RIA and is seeking to minimise regulatory burdens on business by using existing health and safety standards as a benchmark. Whilst it is important that companies and other organisations can be held to account for gross failings by their senior management which have fatal consequences, we must ensure that new legislation does not place unnecessary burdens on business or make them more risk averse.

We also raised on many occasions the issue of a level playing field between public and private sector organisations. We believe that any new offence should apply equally to Government departments and other Crown and public bodies especially, but not only, where they are carrying out the same sort of activities as employers or other organisations. We are pleased to note that the exclusions on specific core public functions apply regardless of whether they are performed by private or public sector organisations. We believe this level playing field is important to ensure that public sector organisations do not gain a competitive advantage over business. On balance we can now welcome the draft proposals.

16 September 2005

147. Memorandum submitted by JUSTICE

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.

2. JUSTICE responded to the Home Office consultation on the Draft Corporate Manslaughter Bill. We are grateful for the opportunity to provide evidence to this inquiry, and are happy for our responses to be made public.

Summary

3. We welcome the publication of the draft Bill, as it demonstrates the Government’s recognition that the current law of manslaughter is ineffective in dealing with deaths caused by gross negligence at a corporate level. However, the law of homicide is in need of wholesale reform—as evidenced by the Government’s announcement of an extensive review of the law of murder.

4. Ideally, corporate manslaughter should form part of that review and become part of a new, unified structure of homicide offences. However, the current situation necessitates urgent reform and we therefore support the draft Bill, in principle.

5. We do, however, have serious concerns about the scope and effectiveness of the new offence as currently drafted. Specifically, they are that:

— The reference to “managers” will complicate the offence and will make it more difficult to establish liability
— The requirement that the managers be “senior” will allow larger corporations to evade liability
— While we do not oppose the extension of the legislation to public bodies, we believe that care must be taken to avoid possible negative consequences of this move
— We are concerned at the exemption for “exclusively public functions”, especially since this would include deaths in custody
— Consideration should be given to making some partnerships liable for the offence
— The existence of a profit motivation should not be used to decide whether gross negligence is present
— The Government should ensure that the provisions do not prevent prosecutions of individuals for homicide offences alongside corporations, when this is appropriate
— The armed forces exemption should be narrow and should not apply to deaths in military custody

GENERAL REMARKS

6. The Government is obliged, under Article 2 of the European Convention, to establish a legal framework in which those responsible for homicides may be brought to justice, which acts as a deterrent against the commission of such offences. In Keenan v. UK, the European Court of Human Rights said:

The Court recalls that the first sentence of Article 2 subsection 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... This involves a primary duty on the State 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 punishment of breaches of such provisions.298

7. In the recent case of Öneyildiz v. Turkey, the Court said that:

The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2... entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life...299

8. In that case, death was caused by serious negligence on the part of state officials in the context of a dangerous activity for which the state was responsible. In those circumstances, the conviction of officials for a negligence offence, the provision for which did not relate to life-endangering acts or the protection of the right to life, and the imposition of suspended “derisory” fines, was judged not to have secured the full accountability of State officials or authorities for their role in...[the tragedy]... and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law.300

9. Following Öneyildiz, the current legal regime in England and Wales may not satisfy the Government’s positive obligations under Article 2. In some cases of manslaughter attributable to grossly negligent acts or omissions within a corporation, it may be impossible or inappropriate to prosecute any individual for a homicide offence—but the current law of corporate manslaughter makes it very difficult successfully to bring prosecutions against larger corporate entities. Further, although the offence under section 3 of the Health and Safety at Work Act 1974 allows for substantial fines to be imposed against corporations, it does not carry the “label” of a causing death offence, and it has been observed that “apart from some notable exceptions, the fines imposed have been relatively small”.301

10. While the deterrent effect upon corporations of a substantial fine may be considerable, the public opprobrium associated with a manslaughter conviction and its attendant publicity, which (for businesses) may result in loss of custom—particularly in cases where consumers/customers have died—may have a greater effect.

11. We therefore believe that the law of corporate homicide should be reformed in order to provide an adequate deterrent framework against gross negligence by corporate entities.

12. However, we also believe that the law of homicide is in need of wholesale reform. In May of this year, the Director of Public Prosecutions drew attention to the injustices that can be perpetuated under the current system. We therefore welcome the forthcoming review of the law of murder to be carried out by the Law Commission and Home Office. Without wishing to pre-empt its conclusions, we believe that it is likely (in the light of the Government’s commitment to the mandatory life sentence and the murder sentencing principles in the Criminal Justice Act 2003) that following the review, the scope of the offence of murder will be narrowed, to exclude instances of intentional killing where greater flexibility in sentencing is desired (for example, some types of mercy killings).

13. The logical consequence of this move is that the scope of the offence now called “involuntary manslaughter” will alter. The word “manslaughter” may no longer even be used.

299 App. No. 48093/99, judgment of 30/11/04, EctHR (Grand Chamber), para. 89.
300 At para 117. It has been observed in relation to this judgment that Given the paucity of successful convictions for corporate manslaughter, and the difficulties that have been encountered in prosecuting such cases, there must be a question mark over whether the United Kingdom's domestic legislative framework and the manner in which it is implemented in such cases fully and sufficiently protects Art. 2 rights.
14. The timing of this draft Bill is therefore not ideal. The offence of corporate manslaughter, if created before the review is complete and new homicide legislation passed, may require amendment in order to interact correctly with individual liability. It is necessary, in order to promote fair labelling and legal certainty, that if the titles of corporate and personal offences are to both be “manslaughter”, their constituent elements are similar (in so far as the different characteristics of natural and legal persons allow).

15. It is also necessary, in our view, that individuals can be tried alongside corporations in relation to a death where appropriate. A charge of corporate manslaughter should not result in impunity for individual corporate officers, employees or others whose individual acts would found a charge of manslaughter or murder in relation to the same death, either as a principal or a secondary party. This would be contrary to the rule of law, and, arguably, to Article 2 of the Convention.

16. In our view, the sub-committees should be alive to the danger that this draft Bill will “bind the hands” of future legislators seeking to establish a new structure of homicide offences. While there is no question, of course, that a future Parliament would be legally bound by the legislation, it might take the view that corporate manslaughter should not be reformed again so soon as, say, two years after the enactment of this Bill.

17. However, on balance, since the current situation is very unsatisfactory and since the review of the law of murder is likely to be lengthy and will not certainly result in substantial reform, we would urge that the offence of corporate manslaughter be created as soon as is reasonably practicable.

SPECIFIC CONCERNS

— The reference to “managers” will complicate the offence and will make it more difficult to establish liability

— The requirement that the managers be “senior” will allow larger corporations to evade liability

18. Section 1(1) of the draft Bill requires that the management failure that is a cause of death is committed by the organisation’s “senior managers”. We note that the Law Commission recommended only that the death should have been caused by a “management failure by the corporation”.\textsuperscript{302} We recommend the removal of the reference to “senior managers”, so that the offence can be established by a “management failure by the corporation”. This was the phrase proposed by the Government in 2000.\textsuperscript{303}

19. The reference to “senior managers” brings in an element of the “identification” principle that has made convictions so difficult to obtain in the past.\textsuperscript{304} To an extent, it substitutes a number of “controlling minds” for the single “controlling mind” previously required to establish liability, and will be an obstacle to successful prosecution in many cases.

20. The fact that the failure must have been committed by the corporation’s “senior managers” will retain another problem with the current law—the larger a corporation is, the more difficult it will be to establish guilt. The Government acknowledges this, but does not seem to consider it a problem, saying in the current consultation paper that “management responsibilities that might be covered by the offence within a smaller organisation, such as a single retail outlet or factory, may well be at too low a level within an organisation that operates on a much wider scale”.

21. We accept that vicarious liability should not apply to such a serious offence in relation to the acts of all employees. However, the appropriate level at which liability should be generated is, in our view, set by the phrase “management failure”. We believe that it is wrong in principle that a death caused by grossly negligent practices in the management of, say, a single factory should be entitled “manslaughter” if the factory is run by a small business but should only be a health and safety offence if it is owned by a large company which has a number of factories. This disparity not only detracts from fair labelling but may also result in a lack of public confidence in the offence.

22. It may be possible for larger corporations to evade liability for corporate manslaughter entirely because of this requirement, merely by shifting responsibility for health, safety and other potential liability-attracting activities to junior managers, and not having generalised policies. The deliberate policy of decentralisation would not, in itself, be grossly negligent in most circumstances, unless, for example, those to whom responsibility was delegated were clearly incompetent.

23. The impact of this requirement will be, therefore, that larger companies will not feel the deterrent effects of the legislation, while smaller companies will bear a greater regulatory burden. It will also lengthen and complicate the process of investigation. It may necessitate an investigation of the activities of individual senior managers and even all of the senior managers in order to assess, as a whole, their conduct in relation to the relevant issue. In the case of a large company this will engage considerable investigative resources.

24. Further, it will make trials longer and more complex. Court time and argument may be spent on deciding who is a “senior manager” under the section 2 definition. One of the advantages cited by the Court of Appeal of the development of vicarious liability for section 3 of the Health and Safety at Work Act 1974

\textsuperscript{302} Law Com No. 237. Draft Bill s4(1).

\textsuperscript{303} “Reforming the Law on Involuntary Manslaughter: the Government’s Proposals” (2000).

\textsuperscript{304} see [2005] Crim LR 677–689 at 684.
was that it would reduce the time taken up in trials by such enquiries.  

25. The definition is too similar to the Tesco Supermarkets Ltd v. Natras formulation, which omits “from its compass middle-level managers who may have considerable authority and discretion but lack the capacity to bind the company as a whole by their decisions”.  

A company should be criminally liable when it has organised its business in such a way that persons and property are exposed to unreasonable and unnecessary dangers, when the system for controlling, monitoring and supervising those whom the company has put in a position to cause harm are inadequate, when a criminogenic ethos or culture has been allowed to flourish, and when the company has failed to put into place mechanisms for managing and minimising risk.  

26. It is the Government’s intention that parent companies could be liable where a death occurred in a subsidiary company, provided that causation can be established in relation to the activities of the senior managers of the parent company. However, under these provisions it would be very difficult, again, to establish liability, since policies regarding, for example, health and safety could be devolved to subsidiary level.  

27. We therefore recommend that the offence should not refer to “managers”—especially to “senior managers”—but instead should be defined in terms of a “management failure” by the corporation.

Liability of local authorities, central government bodies and police forces.  

28. In our response to the Home Office consultation on the draft Bill, we opposed the extension of liability for this offence to public authorities. While we retain concerns about such liability, on reflection we no longer oppose such a move, for two reasons. Firstly, we think that it is desirable, wherever possible, to enhance the accountability of public authorities in relation to death caused by gross negligence. Secondly, following the case of Oneryildiz, where the state is responsible for a death and no criminal case against an individual for a “causing death” offence is possible, it is arguable that an offence of this nature is a necessary part of an adequate deterrent framework against violations of Article 2.  

29. However, while it is to be hoped that a manslaughter conviction would produce benefits for the public in the form of a thorough review of procedures in the relevant authority, we have some concerns about the effects of a conviction on the public. In some cases, there would be no alternative provider of the relevant service available. Public confidence in a public authority and the services provided by it could be severely undermined by the stigma of a manslaughter conviction.  

30. Particular issues are raised in this regard in the case of law enforcement bodies, such as the CPS and the police. It is notable that a homicide conviction would usually bar an individual from working as a police officer or prosecutor. To allow a police force, prosecuting authority or law enforcement agency to operate with such a conviction could bring the machinery of justice into disrepute.  

31. There are also conceptual and practical problems generated by the sentencing exercise in relation to a public authority. If financial penalties were available, guidance would have to provide for very careful “ring-fencing” of funds to ensure that public services, and non-managerial staff, did not suffer from the imposition of a fine.  

32. In relation to central government departments, the use of remedial measures is also problematic, since it requires the courts to become involved in executive functions in ways in which they have been reluctant to do in the past. In R v Secretary of State for the Home Department, ex parte Mersin, an appellant who asked for an order that the Secretary of State carry out remedial measures and provide a progress report to the court was refused: the court said that:  

The courts can identify breaches of the law by the Secretary of State, but I would be trespassing on the Respondent’s own discretion if I were to formulate an injunction or mandamus directing him how to deal with these cases in the future. Furthermore, in my view I would be trespassing on the function of Parliament if I were to try to hold the Minister to account in the court for his future conduct in the manner proposed. Ministers report and are accountable to Parliament, not to the courts. Even if I were to find that the respondent was in continuing breach of his legal obligations, it would be quite wrong to assume that he would be unwilling to abide by those legal obligations in the future in accordance with any judgment I would give, yet that seems to me to be the assumption that would need to be made if any such order were even to be considered. There is no basis at all for making that assumption here.

305 British Steel plc, [1995] ICR 586, see Law Com No. 237, para. 6.22.
306 [1972] AC 153. In this case, a branch manager was held not to be part of the “mind” of the company—see Law Com 237 at 6.32.
308 Ibid., at 621.
33. Further, in many public authority cases the criminal courts will simply not be best placed to assess the funding questions, public policy considerations and other matters of specific expertise that will be relevant to the imposition of remedial measures.

34. It is also possible that acquittals or the discontinuance of cases against public authorities, especially law enforcement bodies, may give rise to allegations of a lack of independence. We recommend that consideration be given to ensuring that investigating and prosecuting authorities are both independent, and seen to be independent, from the public authority defendant. Where a police force, law enforcement agency or prosecuting authority is the defendant in a case, this will be particularly important.

35. Other methods of holding public authorities accountable—such as inspection reports, investigations and inquiries—are in some ways preferable. This is not only because they avoid some of the problems outlined above, but also because they are likely better to address the organisation’s failings and make recommendations for change. A criminal prosecution is focused upon the events leading up to a single death, whereas the remit of an investigation could be expanded to cover the general activities of the organisation. Further, the body making the recommendations can be appointed so as to have an appropriate level of expertise in the relevant field. Public authorities can also, of course, be held accountable in the civil courts both in private and public law (including under the Human Rights Act 1998). However, in many cases this will depend upon the victim’s family being willing and able to sue.

36. We therefore do not oppose the extension of liability to public authorities but emphasise that such extension will require attention to make sure that it is workable. We note that in 2000 the Government considered the adoption of an approach similar to that of the Food Safety Act 1990, which, rather than applying criminal liability to government departments, allowed courts to make a declaration of non-compliance with statutory requirements, requiring immediate action on the part of the Crown body to rectify the shortcoming intended. We do not recommend this approach, as we do not consider that it would solve most of the problems highlighted above; it would also lessen the deterrent effect of the legislation.

There should be no exemption on the grounds that the corporation is performing an “exclusively public function”

37. We are concerned at the exemption for “exclusively public functions”. To create such an exception is to state that in those circumstances, gross negligence causing death on the part of a corporation is lawful under the criminal law. We do not believe that gross negligence causing death can ever be justified, even in an emergency. We note that no derogation is permitted from Article 2 of the Convention in times of war or emergency (save for deaths resulting from lawful acts of war themselves).

38. We are particularly concerned that the Government’s proposals would exclude deaths in custody from the ambit of the offence. It has proved particularly difficult to establish successful prosecutions in relation to deaths in custody, even after an inquest verdict of unlawful killing. The European Court of Human Rights has emphasised that “[i]n the context of prisoners . . . persons in custody are in a vulnerable position and . . . the authorities are under a duty to protect them”.

39. We believe that there is no principled justification for excluding deaths in custody from the ambit of the offence. In relation to publicly managed custodial provision, current mechanisms of accountability do not seem to be proving sufficient in practice to prevent such deaths. In relation to private custodial companies, we do not believe that public law remedies provide an effective deterrent or a sufficient degree of accountability.

40. We therefore recommend that there should be no general exception for “exclusively public functions”. If the Government wishes to prevent liability in specific situations, these should be specified and justifications provided so that they can be individually considered.

Consideration should be given to making some partnerships liable.

41. While we accept that liability may not be appropriate in the case of all unincorporated organisations, we are concerned as to the position of large partnerships such as major law firms (who operate as Limited Liability Partnerships). Such firms characteristically have an established management structure and policies in relation to employees etc. that are equivalent to those operating in companies. We believe that the Government should consider including unincorporated organisations of a sufficient size and with a sufficiently established structure within the terms of the Act.

42. We note that in 2000 the Government was inclined to the view that the offence should apply to all “undertakings”, rather than merely to corporations. Provided that the entity in question had a sufficiently defined identity and structure, we would welcome a more expansive application of the Bill than the current definition of “corporation”.

313 P14.
The existence of a profit motivation should not be used to decide whether gross negligence is present.

43. We do not believe that reference to a profit motivation should be included in clause 3(2). If it is included, we recommend that the jury should receive careful direction (via a specimen direction developed by the Judicial Studies Board) that they do not have to find all three factors listed in clause 3(2) to be present in order to convict.

44. The motivation of managers, if proven, should be taken into account at the point of sentencing if relevant to culpability, but should not, we believe, be regarded as directly relevant to the degree of negligence present. The inclusion of this factor in clause 3(2) may encourage the jury to focus upon the underlying motivations of managers instead of the degree to which relevant standards were breached and the nature of the risk created. In our view the important matters are the degree of risk created and the extent to which the management fell below the standard that could reasonably be expected. The mens rea element is comprised in the consideration of how apparent the breach and risk of death would, or should, have been to the management.

45. We believe that sub-clause 3(2) should refer to “managers” of the organisation, rather than “senior managers”, for the reasons outlined above in relation to clause 1.

The Government should ensure that the provisions do not prevent prosecutions of individuals for homicide offences alongside the corporation when this is appropriate.

46. In principle, the liability of a corporation for a homicide offence, in our view, should not result in automatic impunity for individuals who are responsible for a homicide, either as a principal or a secondary party. The threat of individual prosecution can operate as a very effective deterrent and should not be excluded.

47. We are concerned that the Bill may prevent the imposition of secondary liability in two situations. The first situation is that where there is evidence that an individual, as principal, has committed a homicide offence, and there is evidence that a corporation has committed corporate manslaughter in relation to the same death. We are concerned that the draft Bill, if passed into law, may frustrate such proceedings. If the individual was charged with manslaughter, it would be very difficult to try both the individual and the corporation together, since the jury would have to consider similar but distinct tests in relation to the guilt of both parties. If separate proceedings were brought, this could generate unfairness to one or more parties in some cases. The bringing of a prosecution against both an individual and a corporation might even give rise to an abuse of process argument in some cases.

48. The second situation is where an individual would, had another individual or group of individuals been responsible for manslaughter, have been guilty as a secondary party. There may be good reason for excluding liability for aiding and abetting an act of corporate manslaughter on the grounds that this would result in liability in an undesirably wide range of circumstances. However, we would welcome consideration of liability for individuals for counselling or procuring an act of corporate manslaughter.

The armed forces exemption should be narrowly defined; consideration should be given to extending jurisdiction to deaths in military custody

49. We are concerned about the extent of the armed forces exemption in clause 10. While there may be good public policy reasons for exempting combat operations themselves from the ambit of the offence, any extension beyond combat should be carefully scrutinised. In particular, the reference in subclause 10(1)(a) to “activities . . . in preparation for, or directly in support of, any combat operations” could be capable of a wider interpretation than is justified. We are also unsure as to why members of the armed forces should not be protected against gross negligence causing death during combat training, as provided for in clause 10(3)(b).

50. We also believe that consideration should be given to extending the clause to cover deaths in military custody. In R. (on the application of al-Skeini and others) v. Secretary of State for Defence314 it was held in relation to the death of Baha Mousa, who died in a military prison in Iraq in British custody, both that his death took place within the jurisdiction of the United Kingdom so as being capable of falling within the scope of the European Convention and the Human Rights Act, and that the enquiries that had taken place into his death did not satisfy the procedural requirements of Articles 2 and 3 of the Convention.

51. The effect of this judgment is that the jurisdiction of the Convention can apply to a prison operated by a state party in the territory of another state with the consent of that state. The court in al-Skeini said of Mr. Mousa’s death that:

In the circumstances the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. . . . We can see no reason in international law considerations, nor in principle, why in such circumstances, the United Kingdom should not be answerable to a complaint, otherwise admissible, brought under Articles 2 and/or 3 of the Convention Defence.315

315 At para. 287.
52. Since it may be difficult to prosecute individuals in relation to deaths in military custody, existing remedies may not satisfy Article 2 of the Convention. We therefore recommend that consideration be given both to providing that the clause 10 exception does not apply to deaths in military custody, and to extending the extra-territorial jurisdiction of the Act to military custodial facilities under British control in foreign territory.

14 September 2005

148. Memorandum submitted by the Union of Construction, Allied Trades and Technicians

The Union of Construction, Allied Trades and Technicians (UCATT) represents 125,000 members employed in the construction industry throughout the United Kingdom and the Republic of Ireland.

There are 2.2 million people working in the construction industry.

The construction industry currently accounts for approximately 9% of GDP.

UCATT have long campaigned for safe sites and have consistently raised the issue of the disproportionate high level of fatalities, injuries and ill health, which affects construction workers.

Since the beginning of April 2005 there have been 37 fatalities amongst construction workers—an increase of at least three on the same period last year (2004).

This additional evidence to the Home Affairs Committee is focussed on highlighting the lessons that can be learnt from the Hatfield Rail Crash judgement and specifically the failure to obtain a successful prosecution of any individuals as an aid to determining what provisions should be included in the final legislation.

1. The Hatfield rail crash in October 2000 caused four deaths and more than one hundred injuries. The crash was caused when a rail shattered while a London to Leeds express train was travelling over it at 115 mph. The rail that caused the derailment had been identified 21 months before the disaster as suffering from a form of metal fatigue commonly found where the track curves.

2. Balfour Beatty were the contractors responsible for track maintenance but their maintenance had been totally inadequate for months. This was something that Balfour Beatty and Railtrack were fully aware of.

3. Railtrack were the privatised infrastructure company that owned the track but they appeared to be unable to cope with the volume of maintenance work that was needed and this led to a backlog of repair work. There have been allegations that Railtrack was run by accountants and not engineers. In 1999 the railway Safety Statistics Bulletin reported that there was an alarming increase in the number of broken rails. Railtrack had forecast 600 in 1998–99 but the actual number of breakages was 937.

4. The CPS brought charges of corporate manslaughter against Balfour Beatty, manslaughter charges against five employees of Balfour Beatty and Railtrack and health and safety offences. During the course of the seven-month trial at the Old Bailey, which concluded this month, Mr Justice Mackay dismissed corporate manslaughter charges against Balfour Beatty in July and the five employees were cleared of the charges against them this month. Network Rail (the successor of Railtrack) and Balfour Beatty have been found guilty of health and safety offences and will be sentenced on 3 October. There is no provision for any penalty other than a fine under the current legislation.

5. This case has provided clear evidence that the current law is failing workers and members of the public alike. Mr Justice Mackay made it clear that he was left with no alternative but to dismiss the charges of corporate manslaughter and said “This case continues to underline a long and pressing need for the long-delayed reform of the law in this area of unlawful killing.” Yet the legislation as it is currently drafted is only expected to result in an additional five prosecutions each year.

6. Balfour Beatty admitted it had breached safety standards but only after it had been cleared of corporate manslaughter. Network Rail continued to deny any breach of health and safety laws but has now been found guilty.

7. The failure to bring successful corporate or manslaughter prosecutions against the companies or individual senior managers, in this case, underlines the failure of the current law and yet the draft legislation that is being considered will do little or nothing to change this situation.

8. UCATT reiterates the recommendations it made in its earlier submission, namely:

---

It is not enough to simply target companies and some Crown bodies. The Bill should include individual liability which can be achieved by:

(a) Introducing legally binding health and safety duties on company Directors and their Crown body equivalents

(b) Allowing individuals to be prosecuted for, and convicted of, aiding, abetting, counselling or procuring the offence of corporate manslaughter. However, UCATT repeat our assertion that it should only be senior managers to which this should apply.
— The Bill should be amended so that work-related fatalities caused by every level of management are admissible for use in the consideration of corporate liability for manslaughter. In terms of the multiple sub-contracting that takes place on construction sites then this should reflect the practice that decisions about the overall standards on the site lie with the principal contractor and it is they who should be held accountable whether or not they actually employ any staff. This should not prevent senior managers of sub-contractors being held accountable in addition to the principal contractor.

— The “profit from failure” test must be removed from the Draft Bill.

— The “public policy” test must be removed from the Draft Bill.

— Crown Immunity must be removed for health and safety offences.

— The Draft Bill must be amended so that all employing organisations come within its scope. This will require:

(a) Crown and Parliamentary immunity to be removed in such a way so that it ensures that all Crown bodies, including Parliament, government departments, government agencies, the prison service, regulatory agencies and the civil service are liable to prosecution for the offence of manslaughter; and

(b) The extension of liability for the offence of manslaughter to unincorporated bodies.

— The scope of the Draft Bill must be widened so that companies that cause deaths abroad are liable to prosecution for corporate manslaughter.

— In order to encourage proactive health and safety management, provide a credible deterrent against negligence and deliver justice for victims, an innovative range of penalties, including custodial sentences, must supplement the fines system proposed.

— The pre-legislative scrutiny of the Draft Bill must begin as a matter of urgency and a final Corporate Manslaughter Bill should be introduced into parliament at the very earliest opportunity.

9. This quote from Maureen Kavanagh who runs the Safe Trains Action Group and reported in the Independent on 7 September 2005, articulates the spirit of what UCATT believes this legislation should achieve—“It is not about holding up people as scapegoats, it is about people doing the job they are supposed to do, having a duty of care and being accountable”.

149. Memorandum submitted by the Marchioness Contact Group

As members of the Marchioness Contact Group along with others we have campaigned long and hard for corporate accountability.

The Marchioness was rammed and sunk by dredger Bowbelle on 20 August 1989.

That night our beloved children Stephen Perks and Francesca Dallaglio were unlawfully killed along with 49 others.

We were cruelly dumped into a disaster, the traumatic events devastated us all emotionally, we were left sickened and in total shock.

At no time have those responsible for this terrible disaster ie the operators of both vessels namely Ready Mix Concrete and Tidal Cruisers Ltd, who failed to post proper lookouts were made accountable.

The owners of both vessels were in Lord Justice Clarke’s words “causative of this avoidable collision.” They admitted their failure to implement a safe system of navigation of the vessels on the River Thames:

1. English law has aided and abetted those responsible for 52 unlawful killings, for this reason it is important for the British Government to recognise the long overdue need for statute law to be implemented for corporate accountability and corporate responsibility.

2. Change the law of corporate manslaughter so that companies can be held to account if their grossly negligent management failures cause death.

3. Impose legally binding safety duties upon company directors.

4. The courts have the option of imprisoning company directors and managers convicted of any health and safety offence.

5. The courts must be provided with powers to impose stronger sentences.

6. The Government must take action that will improve workplace health and safety, increase law enforcement and promote corporate accountability.

7. Companies and directors who negligently or recklessly cause death or injury, who place others at unacceptable risks are held to account and imprisoned.

On a positive side what we have achieved thus far.

(a) The Thames Safety Inquiry
(b) Marchioness/Bowbelle Formal Investigation
(c) Set up of the Coronial Review Body
(d) RNLI Rescue Service on the River Thames

4 September 2005

150. Memorandum submitted by the National Patient Safety Agency

The National Patient Safety Agency (NPSA) supports the proposals in the draft Bill since we believe that the overall impact will help to further the agenda to improve patient safety in the NHS. The proposed legislation will raise the profile of risk management at Board level and will set out clearly that risks must be managed corporately, in a responsible way.

Our one area of concern is that large organisations with complex management structures, who have previously proved difficult to prosecute since a single “directing” mind cannot be identified, may in future be inclined to ensure that one person is blamed to avoid corporate responsibility. If this were to happen it would prevent people speaking up when things go wrong and has been proved in many industries such as aviation, nuclear and North Sea oil to halt progress to safety improvement. Any proposals would need to ensure this did not occur.

14 June 2005

151. Memorandum submitted by the British Air Line Pilots Association

Introduction

British Air Line Pilots Association (BALPA) is an independent trade union and professional association representing some 8,000 members, all of whom are employed in a safety critical capacity as flight deck crew in large and small airlines, helicopter companies and training schools.

BALPA represents members industrially, with their employers and with the regulator (CAA) on flight safety issues and in accident investigation.

BALPA welcomes the publication of “Corporate Manslaughter—The Government Draft Bill for Reform” and the opportunity to respond to the paper and draft Bill.


Our analysis of the accident data derived from the CAA database indicates the following:

UK Airlines (Passenger) Aeroplanes 5,700 kg MTWA (max take off weight authorised)
No fatal accidents
133 reportable incidents with
15 serious injuries
UK Airlines (Cargo) Aeroplanes > 5,700 kg MTWA
4 fatal accidents
18 reportable accidents with
6 fatalities and 2 serious injuries
UK Airline < 5,700 kg MTWA
4 fatal accidents—6 crew and 16 passenger fatalities
11 reportable accidents and 5 serious injuries
UK Public Transport Helicopters
2 fatal accidents—2 crew and 14 passengers
20 reportable accidents and 5 serious injuries
UK Police, Ambulance and Search & Rescue Services
3 fatal accidents—9 fatalities and 2 serious injuries
15 reportable accidents
UK Non Public Transport Aircraft > 5,700 kg MTWA
7 fatal accidents—11 crew fatalities
21 reportable accidents
UK Non Public Transport Aeroplanes < 5,700 MTWA
118 fatal accidents
1,820 reportable accidents—190 fatalities and
117 serious injuries
UK Non Public Transport Helicopters < 5,700 kg MTWA  
30 fatal accidents  
219 reportable accidents—56 fatalities, 27 serious injuries

Without going into the specifics of any case we do know, from litigation on behalf of bereaved families, that management failure lay at the heart of some of the above accidents.

In an industry where safety is absolutely critical to ensure the well being of flight crew, passengers and public, BALPA welcomes the new offence that targets serious failings in the strategic management of a company’s activities that have resulted in death.

Some of the accidents and fatalities listed above may have been avoided with greater care over acts, or omission to act. It is important that responsibility for management failure not only applies to the corporate body but also to owners, directors and the senior managers who are ultimately responsible for the management failure.

The term “senior manager” should not allow responsibility to be passed to front line employees or middle managers.

THE CROWN

Immunity of the Armed Forces while training for combat

In the case of the Army, its combat training is carried out away from the public; we do not see tanks at high speed down our high streets or see infantry carrying out bayonet charges in local parks. Therefore, combat training immunity for the Army is unlikely to affect the public. However, military aircraft do use “public airspace” for combat training (eg low flying over the Lake District not in Danger Areas, and in other airspace in transit to/from Danger Areas) and it could be argued that almost all military flying is training for combat, including that carried out in “public airspace”. We would not like to see military aviation using a blanket defence of “combat training” in any possible corporate manslaughter situation. Although we have used an analogy with the Army, we do not comment on the Royal Navy’s combat training, save to say that some of these can be said to be carried out in “public waters”. In summary, we would like to see the combat training immunity addressed in more detail to avoid future defence claims of blanket immunity.

UNINCORPORATED BODIES

When applying for a Type A licence to fly an aircraft (20 seats or more) or a Type B licence (19 seats or less) there is no legal requirement for the applicant to be a corporate body, in fact the holders of some Type B licences are sole traders. Either the law needs to be extended to include unincorporated bodies or the rules on licensing need to change so that only incorporated bodies are granted licenses. It can also be seen by the above statistics that the Police, ambulance and search and rescue air services should not be outside the scope of the offence.

CAUSATION

Paragraph 49 opens with the statement that: “... the management failure must have caused the victim’s death.” Consider two scenarios: in the first, the management failure, gross negligence, disregard for risk to life etc causes the victim’s death. The Draft Bill addresses this scenario. In the second scenario, the management exhibits exactly the same behaviour and attitudes, but due to other fortuitous circumstances, such as extraordinary medical skill or plain good luck, the victim does not die. Although outwith the terms of this Bill, we believe that the culpability of the management should be the same or very similar in the two scenarios. An analogy here is that attempted murder is about as serious as murder itself, because the defendant’s intention and attitude is the same in both cases. It is accepted that “attempted manslaughter” is an oxymoron but we submit that management failings and gross negligence in this scenario should be addressed, although possibly elsewhere.

EXTENT

Some foreign registered airlines have their largest base in the UK, it would be iniquitous if they were allowed to be outside the scope of this legislation.

SANCTIONS

We agree that fining the Crown would serve little practical purpose, provided that the Crown is fully subject to the court-imposed remedial orders advocated in “Sanctions”. However, public perception might be dissatisfied with the Crown “getting away with” non-payment of a heavy fine that would be imposed if a non-Crown body was in the dock. Something might need to be done to allay public concern in this area.
EXTRA-TERRITORIAL JURISDICTION

When we read this paragraph we were concerned that it appeared not to apply to aircraft away from the UK but we then saw in clause 16 of the draft Bill that it does so apply; we strongly support this inclusion.

SCHEDULE TO THE BILL

We trust that bodies such as the Met Office are included under their umbrella ministry.

152. Memorandum submitted by Merseyside Fire and Rescue Authority

The Merseyside Fire & Rescue Authority’s response can be presented briefly in that we are perfectly content with the proposed provisions that are contained in the Bill. We are an organisation which sets a high premium on good Health and Safety Management practice and so to coin Charles Clarke’s words in the Introduction, we believe we have nothing to fear from this Bill.

8 June 2005


This submission has been prepared by the TUC Certificate in Occupational Health and Safety students (2004–05) based at Derby College (as listed at the end of the submission.).

We are forwarding this submission to you for consideration.
We would like to congratulate Her Majesty's Government for drawing up this draft bill.
We feel that our submission will enhance the draft bill and make it a more effective piece of legalisation.

For far too long now the law relating to corporate manslaughter has been inadequate. Therefore, in principle, we welcome the potential for improvement to the existing legislation.

Having considered the draft bill we wish to make the following comments:

1. We feel that the proposed bill does not go far enough with regard to identifying culpability and providing an appropriate penalty.
2. We feel that the possibility of a custodial sentence should apply to all senior management, not just a fine of the organisation (clause 1 (4)).
3. Anyone with a supervisory role (eg in charge of a work-site, or project) should be held responsible and accountable (directive mind) (clause 2).
4. Transfer of functions to be applied to all corporations not just Crown bodies (clause 9).
5. There should also be a secondary offence pertaining to where a person is seriously injured although not killed (conduct liable to lead to manslaughter).
6. Fines alone are not a sufficient deterrent. Other options should be explored, such as custodial sentences or banning a guilty party from being a director of any company, or from holding responsible office under the Crown, for life. This would give courts options for sentencing whilst avoiding threatening continuing employment by unlimited fines (clauses 1 (4) and 1 (5)).
7. We recommend that the test on “Gross Breach” is clarified by placing “or” after 2(b) (i)and 2(b) (ii) in clause 3.
8. If time constraints for a prosecution to proceed under the bill are established, then these must be related to the time that CPS/Police/HSE/Coroner complete their reports.
9. We require a right of appeal against DPP decisions (Clause 1(6)).
10. We recommend that Clause 1 (1)(a) is reworded to reflect the need for a prosecution to proceed if an injured party’s death occurs some time after the event. We suggest “causes a person’s death either by the breach complained of, or subsequent to the breach complained of”.

OVERALL SUMMARY

If our submissions are put into the bill, we believe this will make this bill a stronger and more effective tool. This will assist the government in fulfilling their pledge to reduce workplace related deaths and serious injuries, thus creating a safer working environment for all.

We also believe that this submission will make sure that those who have a duty of care, and are found guilty by a jury of their peers are suitably held accountable and appropriately sentenced or fined.
We trust you will give due consideration to our submission and await your response.

Stewart Caitlin
Lionel Collins
Ian Cutts
Eamon Furey
Gloria Glasby
John Hadfield
Rob Hicks
Steve Jeggo
Elizabeth Lithgow
Clifton Martin
Gordon Osborne
David Powell
Steve Thorley

154. Memorandum submitted by the Specialist Engineering Contractors’ Group

INTRODUCTION

1. The Specialist Engineering Contractors’ (SEC) Group is an umbrella representative body in the construction industry. Its membership consists of the industry’s six premier trade associations. They are:
   - Association of Plumbing and Heating Contractors
   - British Constructional Steelwork Association
   - Electrical Contractors’ Association
   - Heating and Ventilating Contractors’ Association
   - Lift and Escalator Industry Association
   - SELECT (representing electrical installation contractors in Scotland).

   These organisations represent a sector comprising over 60,000 companies and a workforce of more than 300,000. They represent a wide range of engineering expertise including telecommunications, power and lighting, heating and ventilation, air conditioning, refrigeration, acoustics, ductwork, plumbing, automation and control systems, security systems, data transmission, lifts and escalators, constructional steelwork and facilities management.

2. In our response to the consultation document we concentrate on the provisions in the draft Corporate Manslaughter Bill whilst, at the same time, addressing specific issues raised in the document on which comment is invited.

3. We fully agree that there is a need for a new offence of corporate manslaughter to deal with an unfair lacuna in our law. It seems wholly unjust that under our current law a small business can be successfully prosecuted for the crime of corporate manslaughter in circumstances where a successful prosecution would be unlikely against a larger company. The only difference between the two situations is the difficulty—in the case of the larger company—of establishing whether the killing was the result of gross negligence of the “directing mind” of the company. In other words the offence of corporate manslaughter as envisaged in the draft Bill will create a level playing field of potential liability irrespective of the size and complexity of management structures within organisations.

CLAUSE 1

4. We are content with the scope of the offence as set out in sub-clause 1.

5. The reason for the inclusion of the words “by its senior managers” in sub-clause 1 is unclear; the references to “senior manager(s)” are not necessary. Clause 2 in the Bill defines “senior manager” as a person playing a “significant role” in managing/organising the whole or a substantial part of the company’s activities or making decisions as to how such activities are to be managed/organised. The use of the words “significant role” provides ample scope for argument on the role played by individual managers.

6. Sub-clause (1) could stand alone without the inclusion of the words “by its senior managers”. Clause 2 could be amended as follows:

   “The way in which an organisation’s activities are managed or organised relates to:
   (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
   (b) the actual managing or organising of the whole or a substantial part of those activities.”
7. Whilst we accept that the court will have to inquire into the way that “senior managers” initiated, planned and managed the company’s systems and processes, there could be severe difficulties placed in the way of a prosecution by including the reference to senior managers in the legislation. Identifying the actual roles played by managers either individually or collectively—particularly within very large organisations—could be extremely complex.

8. Furthermore this would not reflect the Government’s views that a prosecution for corporate manslaughter should be aimed at the organisation and the overall way in which the organisation has managed its risk profile. In practice this will involve a detailed consideration of the actions taken on behalf of the organisation by senior management. But the aim of this exercise should be to establish whether, collectively, senior management initiated, planned or managed the systems, processes and activities that caused a person’s death. The prosecution should not be faced with the unnecessary task of proving that some or all of the organisation’s senior managers played a “significant” role either in making decisions about the management of the organisation’s activities or in actually managing those activities. In a large organisation the role played by individual senior managers may appear to be less than significant but, in overall and collective terms, their respective contributions might have been highly significant in the determination of the organisation’s management systems and policies.

9. In summary the prosecution should only be required to focus on the organisation itself and the extent to which the alleged “gross” breach of duty originated in decisions taken collectively by its senior management irrespective of the actual contribution made by each manager.

10. Clause 1(5) states that “An individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter”. We agree with this. However, we believe that it should be made clear that the organisations listed in clause 1(2) can be guilty of aiding, abetting, counselling or procuring corporate manslaughter. In practice there could be situations where this might rise. Let’s take an example. Company A has engaged company B to carry out certain construction work. Company A knows that company B’s management is extremely poor and has an appalling health and safety record. Company A turns a “blind eye” to this and proceeds to engage company B on the basis that B’s price is extremely low. During construction there is an accident on the site resulting in the death of a workman employed by one of company B’s sub-contractors. In these circumstances it would be appropriate for company A to be prosecuted for having aided and abetted company B’s gross breach of duty.

   However, we would accept that in this situation there may be cases where company A could be guilty of corporate manslaughter where it also has a management role in relation to company B. This will occur, for example, where a principal contractor on a construction site is responsible both for engaging his sub-contractors and for providing overall management of their activities whilst on site.

Clause 2

11. We have already advised an amendment to this clause.

Clause 3

12. We have some difficulty with sub-clause (2)(b)(iii). The jury has to consider whether the “gross” breach results from management failure involving “conduct falling far below what can reasonably expected of the organisation in the circumstances”. In determining whether there was such failure the jury must consider whether the evidence shows that senior managers caused the organisation to profit from that failure. The reason for including this reference to profit is not clear. Serious accidents are often the result of incompetence in management rather than a deliberate policy on the part of an organisation to put its profits before the safety of its employees or members of the public. This is not a matter which should be relevant to the issue of guilt. Rather, as the explanatory notes state (at page 36), the extent to which a company profited would be a relevant matter for sentencing.

13. In sub-clause (4) we suggest that there should be an indicative list of other matters that the jury can have regard to. One of these “other matters” could include reference to registration, licensing and qualification schemes. In the construction industry (and, no doubt, in other industries) there exists many such schemes embracing corporate membership. These schemes—which may be statutory, quasi-statutory or voluntary—often audit firms for, amongst other matters, health and safety performance. Although membership of many schemes is voluntary, the reality is that membership often becomes, in effect, compulsory in order to comply with customers’ requirements or conditions laid down by insurers. In the construction industry the Health and Safety Executive is currently considering “core criteria” that will help in “badging” those schemes that audit firms for health and safety performance. This will facilitate firms’ compliance with the requirements in the Construction, Design & Management Regulations 1994316 that designers and constructors should be “competent”. We propose, therefore, that under sub-clause 3(4) failure of an organisation to belong to a relevant registration, licensing or qualification scheme should be included under “other matters”.

316 The Regulations provide a statutory framework for the management of health and safety risks within the construction industry.
We suggest the following draft for sub-clause 4:

“(4) Subsection (2) does not prevent the jury from having regard to any other matters they consider relevant to the question including:

(i) any failure by the organisation to belong to a relevant registration, licensing or qualification scheme concerned with health and safety performance provide that membership of such scheme is available to a broad cross-section of organisations within a trade or sector and the scheme is independently audited.

(ii) . . .

(iii) . . .

Indirectly, this may encourage organisations to join appropriate schemes and, thus, improve their management of health and safety risks.

Clause 5

14. Comment is invited on whether the offence of corporate manslaughter should extend to unincorporated associations. It would be an anomaly if a small company was to be successfully prosecuted for corporate manslaughter but a much larger unincorporated association was able to escape such liability.

15. In principle the legal status adopted by the organisation should not make a difference as far as a prosecution for corporate manslaughter is concerned. It should be left to the prosecution to determine, in the individual circumstances of the case, whether it is more appropriate to prosecute an unincorporated body for corporate manslaughter rather than partners or the individual(s) controlling the policy of the relevant body. In practice it will often be very difficult to ascribe guilt exclusively to a decision-maker within a unincorporated association in which case it may be more appropriate to instigate a prosecution of the organisation for corporate manslaughter.

Clause 6

16. We suggest that in clause 6 that there is included an indicative list of specified steps that a court can order an organisation to take in remediying the matters listed at sub-clause (1)(a) and (b). Such steps could include those powers that the Health and Safety Executive already exercise in relation to health and safety offences. Sub-clause (4) does not go far enough in dealing with an organisation that fails to comply with a court order requiring it to take the specified steps to remedy its failing. Other than fines we suggest that the court is also given the power to disqualify directors and order that the organisation concerned (assuming that it is a corporation) is de-registered.

155. Memorandum submitted by the Association of Chief Police Officers of England, Wales and Northern Ireland

This is the Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO) response to the Corporate Manslaughter Bill.

In building this response ACPO has consulted its membership and has invited comment from all of our Business Areas.

ACPO agrees with the consultation document that the current law on corporate manslaughter, linking a company’s guilt to the gross negligence of a person embodying the organisation, fails to reflect the reality of modern corporate life and also fails to deliver justice. The failure of numerous high profile trials and proposed prosecutions for corporate killing in recent years has indicated the need for change. ACPO notes Government’s own figures which show that since 1991 there have only been 34 prosecution cases for work related manslaughter and only six small, organisations convicted.

1. Police Service General Issues

1.1 ACPO agrees with the statement at paragraph 18 of the Government’s March 2005 publication in respect of an offence of corporate manslaughter not being an appropriate way of holding the Government or public bodies to account for matters of public policy or uniquely public functions. ACPO would further state that the police service, is arguably one of the most accountable groups in society, through application of the criminal law, and the scrutiny of other bodies such as the Independent Police Complaints Commission, Police Authorities, the Home Secretary, the Home Affairs Committee, and in London the Mayor’s office. ACPO would submit therefore, that there requires to be absolute clarity that the police will not be held to be accountable under the proposed legislation, for deaths relating to police operational conduct.
In the event of a death as a result of the police use of firearms, for example, there is a full and independent examination of the circumstances by the Independent Police Complaints Commission. If it is found that an officer has acted outside of the law, then that officer as an individual might be brought before a Court to stand trial. The same applies when a person dies as a result of police pursuits, or indeed any other form of contact with the police. It is accepted that in the event of a death, as a result of the activities stated above, there may be an examination of the service policies. That examination should rightly be carried out by the bodies charged with this scrutiny, as part of their statutory duty eg the Independent Police Complaints Commission.

ACPO accepts the comments contained in paragraph 19 of the Government’s March 2005 publication that we, as well as the Crown, should not be exempt where we are in no different position to other employers or organisations—for example in relation to our role as employer or occupier of buildings.

1.2 The Bill section 4(1)(c)(i) as drafted may have implications for police services: A relevant duty of care, in relation to an organisation, means a duty owed under the law of negligence by the organisation (amongst other things) in connection with the supply of goods or services (whether for consideration or not).

1.3 Discussion with civil servants has indicated that the police are not seen as suppliers of a service. However, there is a counter argument that the act of policing is the provision of a service to the community. ACPO submit that this issue requires greater clarity, and that the provision of policing is not, as far as the legislation is concerned, the provision of a service. It would be sensible for this clarity to be provided prior to enactment rather than allowing for expensive legal argument in the future.

1.4 There is also an issue in relation to the “carrying on of any other activity on a commercial basis” [Section 4(1)(c)(ii)]. Where police are carrying out policing in circumstances where the user pays eg football matches where the club is being charged for the policing service, is this the police operating on a commercial basis and therefore liable? Our understanding is that the term “commercial” is not intended to cover cost-recovery circumstances, but this is an area where ACPO seek absolute clarity. We do not think that we should be liable.

1.5 In recognising the exemption given in those circumstances where the police act in pursuit of a legal power or duty, a difficulty could arise where police operate outside this framework, such as supporting local youth training/activity schemes within the community. The risk here is perhaps small but once again ACPO would welcome clarity on whether such activity would create liability under the act. We do not think that we should be liable.

2. Investigative Considerations

2.1 It is implicit in the accompanying explanatory notes that the Police would continue to lead on investigations where death occurs because of potential gross negligence by individuals or companies. Existing working relationships can only be strengthened by this primary legislation. It is gratefully acknowledged that the offence has been listed as a Serious Arrestable offence, within the meaning of the Police and Criminal Evidence Act 1984.

2.2 Consultation has identified weaknesses in the investigative process arising out of the assumption that police will lead these investigations. Specifically these weaknesses relate to the ability of police officers to access the premises of corporations where material of significant value may be held, and the ability of the police, to obtain necessary information regarding the structure and processes within corporations.

2.3 Much of the evidence to support a Corporate Manslaughter prosecution will be found in the documents created by that Corporation in connection with their business. In order to identify the relevant senior managers in accordance with section 2 of the act, the police will also require information as to the structure, roles and responsibilities, and business processes within the corporation.

2.4 It would help to speed up the process, if such information and documentation were supplied or obtained under a specific power. This would prevent the significant delay that has historically happened in practice, if we rely on a process of voluntary disclosure or seizure and then a period of an analysis.

2.5 Currently, material that would be extremely beneficial to the investigation and prosecution will often fall within the definition of “Special Procedure Material” under the Police and Criminal Act 1984, ie material “acquired or created in the course of any trade, business, profession etc.”.

2.6 Access to this material may only be secured under an order granted by a judge (Schedule 1 PACE), rather than under warrant issued by a Justice of the Peace. This creates particular problems in obtaining an appropriate authority to access the business records of a company that is the subject of an investigation.

2.7 By the time arrangements have been made to apply for such an order, and a hearing scheduled in front of a judge, the passage of time may have had a detrimental affect on the investigation. It is also the case that in normal circumstances, before such an order can be made, a specific request for the relevant material should have been made to the organisation involved, and they must have refused to supply it on a voluntary basis. Some recent experience suggests that this provision can be used by suspect corporations to control the rate of supply of material to an investigation.
2.8 In relation to the gathering of information to identify the structure, roles and responsibilities, and business processes within a corporation, this information will often be in the knowledge or possession of employees of the corporation itself. In these circumstances a conflict can often arise, between the interests and liabilities of the corporation, and those of the individual. Other Agencies charged with the investigation of corporations, such as the SFO have powers of compulsion so that this ‘master/servant’ conflict can be overcome.

2.9 It is also anticipated that the use of experts to examine the records of a suspect corporation would probably require the use of experts beyond the normal forensic experts used in examining a crime scene. Our view is that the investigation of a death potentially caused by corporate mismanagement would require independent experts to undertake an analysis of how a company is structured and how it operates and then make an expert judgement as to whether a ‘gross breach’ may have been committed. This may involve the use of forensic accountants, business analysts, Risk Managers, computer experts and others.

2.10 We are concerned that if the investigation team requires that type of non-police support to accompany the police searching (for example) a company headquarters, that the law is currently incompatible with their legal right to enter the premises.

2.11 It is suggested that consideration be given to changes in the law to permit:

— Urgent authorities, similar to Schedule 1 PACE, to be granted upon application to a senior police officer (probably at Assistant Chief Constable level), to enter premises and seize material where there is a high level of urgency and where a delay would have a deleterious impact on the investigation;

To be used in conjunction with,

— The ability to compel an individual or corporation to supply specific information or material (similar to CJA 1987 S2 onwards), granted on authority of a senior police officer (probably at Assistant Chief Constable level);

and

— The use of experts (as described above) to accompany police and to exercise the same powers as police whilst on business premises in support of a police investigation

3. Comments on the Draft Bill

ACPO seek consideration of the proposed amendments and additions in order to make the Bill more effective.

3.1 Senior Manager

Whilst Section 2 of the draft bill defines what a senior manager is within an organisation, the consultative process considered that there were two areas that could allow a ready defence for a corporation. Both deal with the interpretation of the activities of a person in a senior position within a corporation:

It is felt that the definition should include the additions in the brackets below:

“A person is a “senior manager” of an organisation if he plays [or ought to have played] a significant role in [or had significant responsibility for] ... etc.

This is intended to address the failure of a person who holds a key position in an organisation but who is portrayed by his defence as really quite inept. The current definition would allow him to claim that he, as a mere figurehead, did not play “a significant role”.

We hold the view that unless those who make the decisions about how a company is managed are clearly identified, not only in role but also in the actual decision-making process, then the first threshold in Section 1 will not be met (and the prosecution may flounder).

3.2 Gross Breach

The consultative process considered that Section 3(4) should be rephrased to allow a more active interpretation by a trial judge of the possibility of a jury considering other matters.

We feel that S. 3(4) is too passive and permits a judge to not give any direction on the rights of a jury to consider other matters when reaching its verdict.

Whereas S. 3(2) puts a positive onus on the jury to consider health and safety breaches (which we support) the inclusion of S. 3(4) appears to be too passive and we suggest that the draft be:

“The jury may consider any other matters they consider relevant to the question”

Similarly the Police Service believes that the phrase at section 3(2)(b)(ii) “sought to cause the organisation to profit from that failure” is too narrow and ought to consider the possibility that the driver for the company activity was to save money (which is, of course part of a profit cycle, but ought to be viewed as a separate entity).
It is suggested that this sub-paragraph be redrafted to include:
— “Sought to cause the organisation some benefit from that failure”
or
— “Sought to cause the organisation prevention of loss or cost from that failure”

3.3 Relevant duty of care

In S.4 (1) there is the inclusion of the word “or” between sub-paragraphs ‘b’ and ‘c’ but no link between sub paragraph ‘a’ and ‘b’. This may merely be a typographical error.

3.4 Sanction and Secondary Liability

The Bill sets out the sole sanction as a financial penalty to the company. ACPO would suggest that some consideration be given to providing a sanction against those individuals established as having been significant contributors to the gross breach. This could take the form of a disqualification from holding office as a director or a position as senior manager for a set period of time. This would have the benefit of ensuring that the public, including the bereaved, can identify individuals, that were being called to account, rather than simply shareholders and tax payers footing the bill for company fines. Individual failings which fall short of the very high test required for gross negligence manslaughter could also be dealt with through such secondary liability sanctions, perhaps by means of a form of ‘Show Cause’ proceedings (a legal hearing in which individuals must show cause why they should not face disqualification or other sanction).

There is no provision in the draft which allows compensation to be awarded as part of the overall punishment of corporations convicted of this offence. We believe that a mechanism should be built into the legislation allowing for the Court to award financial compensation to dependents of the deceased without recourse to civil action.

3.5 Remedial Orders

It is unclear why a company that is convicted at the Crown Court and breaches or fails to comply with a Remedial Order should be prosecuted at a Magistrate’s court. It seems unusual that an order from a higher court that is ignored is prosecuted at a lower court.

It seems that the only driver for this would be the scale of the breach. For instance, if a firm is directed to undertake some relatively minor work at its premises and fails to do so, is this minor breach too inconsequential to take up the time of the Crown Court?

3.6 Armed forces

We have concerns that the exemptions to the Armed forces may be too broad and should be narrowed considerably.

The key phrase is the connection to “combat operations”. We envisage that a defence argument could be raised that a wide variety of activities could be covered by this exemption. For instance if a soldier dies whilst in the course of extensive physical activity as part of routine fitness training would this fall within the scope of “in preparation for . . . combat operations”?

Is a civilian truck driver, in England who is moving munitions or other hardware from a warehouse to a cargo plane for delivery to Iraq, acting “directly in support of combat operations”?

We believe this needs further clarification.

3.7 Territoriality

A death that occurs within the jurisdiction of the courts in England and Wales is liable to prosecution if the offence is proven.

However whilst it is accepted that the law is not intended to deal with deaths outside this jurisdiction there are investigative problems that arise.

If a corporation headquarters is in Germany and the death occurs in England will existing powers and international co-operation laws be sufficient to allow investigators the right to investigate in that other country?
4. **Conclusion**

ACPO considers this proposed legislation to be significant and would seek to continue to engage in the scrutiny process in order to ensure that the enacted legislation is effective and fit for purpose.

*19 September 2005*

---

**156. Memorandum submitted by the University of Leeds**

**Enforcement Against Senior Managers**

1. Section 1 removes individual culpability entirely (compared with previous draft papers and Law Commission report) and mentions no sanctions against the individual eg debarring as a director. This is a retrograde step and possibly reflects to ‘politicking’ by various employers’ organisations.

2. If there is to be accompanying guidance to the bill to make it clear that although the individual prosecution is not an option that consideration will still be given to prosecution under Section 37 of the Health and Safety at Work Act.

   Would this action be excluded under clause 1 (5) re secondary or treated as a distinct separate offence.

   Could a section be added to clause 1 (5) “but that doesn’t affect an individual’s potential liability in relation to any other health and safety offences”

**Applicability**

3. In the explanatory notes there is reference to the status of different public bodies which to an “outsider” is unfathomable.

   I would appreciate clarification that:

   (a) Where a Department is listed this also encompasses ancillary posts of that department for whom it has responsibility—for instance NHS encompassed within reference to Department of Health, Health ans Safety Executive within Department of Work and Pensions.

   (b) Charities/Charitable Institutions also covered by scope of Act eg University Sector.

**Senior Managers**

4. The definition of this term is incorrectly presented in Section 29 in that the first threshold is that Senior Managers play a significant role . . . in managing or making management decisions.

5. While the explanatory roles trying to explain the differential here appear reasonable, the reality may be somewhat different. What one may find is that large organisations may attempt to shift the balance of decision making from a central to a local level and imply that local management acted under their own initiative without the authority of the central organisation.

   One sees that in prosecutions and there is no reason to anticipate any difference here.

**Gross Breach**

6. Could the first criteria be teased out to consider some of the issues raised by R v Howe Engineering?

7. With regard to the explanatory notes on page 14 second point, awareness might also arise from internal advice or safety professionals or from external health and safety consultants.

**Application**

8. Agree with points in Section 34 on Page 14.

**Duty of Care**

9. Would the term occupier also encompass owner . . . as one could own land but not actually occupy it eg parks, public spaces.

10. Section 4 (i) (ii) to be modified so that does not solely refer to activities carried on commercial basis . . . activities carried out by the NHS or Government departments. Need to ensure that their activity not excluded because not commercial . . . which Section 23 on page 37 makes clear.
SANCTIONS

11. Crown to be subject to same sanctions irrespective of recycling argument at Section 55 on page 18 otherwise legislation is footless and Crown bodies might learn nothing from their failures due to the absence of sanctions.

INVESTIGATION AND PROSECUTION

12. The exact roles of the various regulatory bodies needs to be resolved so that it is clear who has a lead role—who has a supportive role (Section 58, page 11 refers).

9 June 2005

157. Memorandum submitted by the British Maritime Law Association

I am writing on behalf of the British Maritime Law Association (BMLA) and hope our brief comments can be of assistance.

The BMLA understands the policy objectives which underpin the Government’s proposals on Corporate Manslaughter. Recognising the conceptual and other difficulties presented by this subject, the BMLA welcomes the Government’s revised proposals on Corporate Manslaughter with reservations. In particular, the BMLA welcomes the fact that the Government no longer intends to pursue new criminal sanctions for individuals or to provide secondary liability.


In short, the revised proposals are that there should be a new offence of “corporate manslaughter” punishable by an unlimited fine where:

(i) there is a “gross” breach of duty of care is owed by a company to the victim;
(ii) this requires identified failures by “senior managers”;
(iii) their conduct falls “far below” what can reasonably be expected; and
(iv) the failures cause death on normal causation principles.

The proposed new offence is one which can only be committed by a corporation (or a Government department). There are to be no new criminal sanctions for individuals. Private prosecutions will require the consent of the DPP. The offence will only apply to death in places where the English courts have jurisdiction—this will include on board British registered ships—whether or not the relevant management failures took place here or abroad.

There are, however, certain weaknesses and ambiguities in the Draft Bill which we suggest should be addressed. In particular:

(1) The definition of “senior manager” (s2) is vague and ought for clarity to be tightened up. The definition captures those who play “a significant role” in managing the organisation ”as a whole or a substantial part of it”. The adjective “significant” is too elastic.

(2) The definition of “gross” breach is somewhat circular: it requires conduct falling “far below” what can reasonably be expected in the circumstances (s3). A safety’s mechanism should be built in, for example, by providing that the risk of death or serious injury should be obvious.

(3) There is a potential gap in the scope of application of the proposed offence: prosecutions are allowed against “parent and other group companies” but this does not cover companies which are neither parent companies nor within the group but which provide professional management services to a company for a fee. Such an arrangement is common in the shipping industry.

(4) The proposals are said not to affect investigations by independent accident investigation branches such as the Marine Accident Investigation Board. However, the proposed new offence of “Corporate Manslaughter” brings into sharp relief the long-standing but unresolved question which arises in cases of mass disaster of how the modern proliferation of potential criminal, civil and Government inquiries and proceedings are intended to fit together, viz. (a) a prosecution for “Corporate Manslaughter”, (b) an investigation by the Marine Accident Investigation Branch, (c) a Public Inquiry or Wreck Commission and (d) a Coroner’s Inquest. In the opinion of the BMLA this question urgently needs a solution.

27 September 2005
158. Memorandum submitted by Serco–NedRailways

On behalf of ATOC members, the ATOC Safety Coordination Group has prepared a common submission, a copy of which has been provided to you by David Weir, ATOC Director of Industry Projects and I confirm that the following TOC(s) ME 2002 and Northern Rail Limited.

(a) Have been consulted on its preparation and content;
(b) Are in support of the submission made and are listed in Appendix 1 of the submission.

Both companies are owned by Serco-NedRailways, a joint venture between Serco, a leading global public service company, and NedRailways, a subsidiary of Dutch Railways (NS), the major passenger operator in the Netherlands.

To avoid you receiving multiple copies of the ATOC Members’ submission, I would ask you to refer to the copy provided by David Weir, but request that having made that reference you log this letter as a separate submission.

In addition to the ATOC Members’ submission we make the following points:

**Parent/Subsidiary Issues**

1. We comment specifically upon the issue raised in paragraph 37 of the Home Office consultation document relating to parent company liability.

2. We recognise that the purpose of the offence should not be defeated by a small minority of companies who might, in theory, abuse group structures in order to circumvent accountability. Equally, proper group structures are an essential part of effective business. We would be concerned if the recognised need to address “sham” subsidiaries was interpreted in a way that undermines the way in which legitimate and sensible group structures operate.

3. We therefore support, and emphasise, the point made in the ATOC Members’ response (at paragraphs 2.23 to 2.25). A measured and sensible approach is needed. It is essential that balance is achieved in both the formulation of the offence and also, crucially, in the way in which the offences are applied in practice by investigating authorities, prosecuting authorities and the courts.

4. If that is not done then the economic and corporate implications would be both significant and unhelpful.

**Governance**

5. In properly managed governance structures there is a clear distinction between the role of a parent (whether an intermediate or ultimate parent company) and that of an operating subsidiary company. In effectively managed group structures the subsidiaries are not, nor should they be seen as, agents or artificial entities. They have distinct responsibilities for which their Board of Directors are responsible. The role of parent/holding companies is to manage the affairs of the group as a whole and not to micro-manage the affairs of the subsidiary.

6. If this distinction is not recognised in the formulation of the offence or in practice in the way in which investigation and prosecuting authorities approach the new offence the result may be to:

   (a) Duplicate effort between different companies and groups;
   (b) Target investigations and prosecutions in the area of highest profile;
   (c) Pass to juries for decision the legal issue of corporate duties of care.

7. We understand that there is no established principle in English law that a parent company does in fact owe the relevant duty of care necessary as a component to the offence. This of itself introduces uncertainty.

**Suggested Issues for Review**

8. We submit therefore that this is an area which should receive close and forensic scrutiny during the passage of the Bill with a full assessment of implications. We suggest in particular that:

   (a) It should be made clear in the guidance notes to the new offence, when published, that the investigation and prosecution of parent companies is intended to address only limited circumstances, namely to prevent parent companies from evading liability to the establishment of subsidiaries or to counter concerns relating to insufficient assets to pay a level of fine appropriate the gravity of the facts.

   (b) Consideration should be given therefore to sequential investigations. Only when an investigation of the relevant operating subsidiary demonstrates that one of the two areas of concern is made out should a prosecution or a detailed investigation of the parent ensue.
(c) In addition it would be important that decisions of law on when (and if) a duty of care arises is a matter for the trial judge rather than for the jury. In contrast the issue of breach if a duty exists in law would of course be a jury question.

9. If those steps are not taken, our concern is that legitimate group structures will be significantly undermined. The consequences of this will extend beyond the scope of the current offence. In particular it would impact on the wider corporate governance debate and on the effective management of companies and businesses which make up the economy.

10. If governance arrangements are undermined investment in higher profile activities may also be adversely changed. This might be in terms of either the amount of investment available or the risk premium placed upon that investment.

We hope that these further submissions on this issue are constructive.

17 June 2005

159. Memorandum submitted by South Wales Police

Due to my recent experience within the Corporate Manslaughter arena, I have been requested to review the above document and formulate my views to the Home Office. I have also been asked to comment on the impact on the bill on South Wales Police.

Views/Responses to the Home Office

I totally agree that there is a need for a reform, as existing legislation is extremely difficult to prosecute especially within larger companies.

I therefore, welcome the removal of the “Identification Principle” where we would have to show the “embodiment of the company” or an individual with a “directing mind” is guilty of manslaughter prior to the offence being complete.

This is an extremely difficult area, which now puts a greater emphasis on management failing at a senior level in an organisation.

I believe this will ensure that organisations will have to be more accountable in implementing safer working practices.

I note that a duty of care to the victim remains, however a gross breach of the duty to take reasonable care is replaced.

In order to assist in determining a gross breach, I again concur with the framework for assessing an organisation’s culpability, which is clearly set out in the bill and is clearly linked to Health and Safety standards (defined as conduct falling far below what could reasonably be expected).

Causation is another area which appears to have changed and I believe some clarification is required. Can’t “contributed” remain in the legislation which will therefore allow the test to be easier to present.

In summary, the heart of the new bill will focus on the management failures on the part of its senior managers who represent the organisation in question. Such legislation, once awareness has been disseminated, should reduce and minimise work-related deaths.

Impact on South Wales Police as an Organisation

Under the new legislation there will be no general Crown immunity providing exemption from prosecution. Therefore, my understanding is that senior managers in South Wales Police (strategic, influencing levels) will be accountable to ensure structures and systems are in place for safer working practices on behalf of the organisation.

As with previous legislation, we would have to prove a person was the embodiment of a company is guilty of manslaughter. We would now have to prove the way an organisation’s activities are managed or organised by its senior managers:

(A) Causes a person’s death AND

(B) Amounts to gross breach of a relevant duty of care owed by the organisation to the victim.

Where as previously “Gross Negligence” had to be proved, we must now show a “Gross Breach” which is conduct falling far below what can be reasonably expected.

There is a set criteria which will assist the jury in deciding that question and therefore provides better direction for prosecution at an earlier stage.
Although extremely difficult to predict future investigations, I suggest, in accordance with the work-related death protocol, an initial assessment of such a death, better decision making will be made from the outset between the police, CPS and other agencies.

It is paramount that the implementation of this legislation is monitored through the National Liaison Committee (NLC) and our Regional Forums, which in turn should guide us on the extent of future investigations.

**IN SUMMARY**

The legislation “should” ensure better working practices at a senior management level in organisations and therefore reduce the amount of work-related deaths. However, the police will have to take primacy of a greater proportion of those that do actually occur.

31 May 2005

160. Memorandum submitted by Dr Hazel Hartley

**INTRODUCTION**

Leeds Met. University values the application of research to learning, policy and practice and to benefiting our local, regional and national communities. However, in writing this response, the views expressed here are my own and not those of Leeds Metropolitan University.

I welcome the opportunity to respond to this consultation. I have responded to every consultation leading to this important Bill for ten years, since the initial consultation by the Law Commission in 1995. I have been greatly assisted in my understanding of the consultation process and the issues around such legal reform, by the materials provided and conferences organised by the Centre for Corporate Accountability in London and by the families of ‘Disaster Action’. In particular, I gratefully acknowledge the inspiration, commitment and leadership of the CCA Director, David Bergman, who has informed, supported and strategically facilitated a long-term and positive, collaborative response to all the consultations relating to corporate manslaughter and health and safety offences—engaging lawyers, policy makers, bereaved families and survivors, unions, campaign groups, MPs, and academics.

**THE NEED FOR REFORM**

I agree with the context of this legal reform on p.8 of the document, particularly the problems of the doctrine of identification and the requirement in present law for a ‘directing mind’ to be found guilty of individual manslaughter before the company itself can be convicted of such a crime. The document rightly explains that the identification principle makes it difficult, under present law, to prosecute large companies with complex management structures:

This has given rise to public concern that the law is not delivering justice, a feeling that has been underlined by the lack of success of corporate manslaughter prosecutions, following a number of public disasters. Examples of such incidents include the Herald of Free Enterprise Ferry Disaster in 1987\(^{317}\) and the Southall rail disaster in 1997; prosecutions failed in both cases.

(paragraph 10, p. 8)\(^{318}\)

**THE OFFENCE**

I welcome the creation of a new offence that ‘should make it easier to prosecute companies: in contrast to the current situation, a company would be liable to prosecution even where there is no evidence to prosecute a single director or senior manager. This should make it easier to prosecute at the very least, medium-sized companies.’ (Bergman, 2005, p.6)\(^{319}\).

The new offence requires very serious management failures by a senior manager, i.e. a person who has a significant role over at least a substantial part of the organisation’s activities, ‘making prosecution impossible in cases where one would expect it. The larger the company, the harder it will be to prosecute—which is exactly the opposite of what was supposed to be the purpose of the offence and the Bill. The Bill’s focus on senior management may also motivate large companies to delegate responsibilities down the management chain’ (Bergman, 2005, p. 6).


\(^{318}\) See also Bergman, 1999 The Case for Corporate Responsibility London: Disaster Action.

\(^{319}\) See Bergman, D. 2005 ‘No Real Convictions’ Hazards 90, pp.6–7, April/June2005.
All the previous proposals, which I fully supported, emphasised that the prosecution would have to prove that the death was caused by ‘the conduct of the company if it is caused by a failure, in the way in which the corporation’s activities are managed, or organised, to ensure the health and safety of persons employed in or affected by those activities’ (LCCP No 237, 1996, para (4), p. 129).

More recently in the Government’s present proposals, it states that ‘Drawing on the Law Commission’s proposals, the new offence would be based on failures in the way an organisation’s activities were managed or organised—referred to as a ‘management failure’..this is designed to ‘capture truly corporate failings in the management of risk, rather than purely local ones’ (para 14, p. 9).

However, it should not be necessary for a senior manager to be aware of the risk, (see Law 1996). The original proposals, rightly in my opinion, simply referred to the company as a whole failing to collectively risk manage, causing the death and therefore falling far below the standard one would reasonably expect. To reintroduce awareness of risk by a senior manager, in this 2005 Bill, simply revisits elements of the doctrine of the ‘mind and will of the corporation’, smuggling it in to the document in another guise.

A failure of a senior manager to be aware of the risks the company created, which led to the death, should be regarded as just that, ie a failure by the company, rather than a ‘get-out’ clause, to avoid prosecution or conviction.

Furthermore, why has a new element been introduced, for the jury, in assessing the conduct of the company? This is the proposal that they must consider, among other things, whether senior managers “sought to cause the organisation to profit from that failure”? (Bergman 2005, p. 6). It would be difficult to prove and this addition to the Bill is not explained or justified. If additional guidance is needed for juries, then I believe it would be more appropriate to draw on the HSE 2000 recommendations, which identified as relevant, in prosecuting policy for health and safety offences, such questions as:

1. Did the executive board fail to properly evaluate the impact of all its decisions and strategies on health and safety?
2. Did the company fail to identify health and safety roles at every level of the company, including board level, rather than delegating such roles much lower down the hierarchy?
3. Did the company fail to heed warnings of risk/health and safety from employees or the public?

I agree with Bergman 2005 that the current Bill has done a U-turn on its 2000 proposals by withdrawing from these proposals an additional offence which ‘would allow a senior company officer to be prosecuted for “contributing” to the offence committed by the company’ (Bergman 2005, p. 6). It does ‘not address the current lack of accountability of company directors’ (p.6) or the issue of the lack of clear health and safety duties of managing directors.

Bergman 2005 points out that ‘only eleven directors have ever been prosecuted for manslaughter, all from small firms’ (p.7). Since 2001 ‘our records show that around 2 or 3 companies are prosecuted each year for manslaughter. Therefore although the number of prosecutions will, according to Government estimates, more than double, it will do so from a very low base’ CCA Press Release ‘Is Five extra corporate manslaughter prosecutions a year enough?’

THE SCOPE OF THE OFFENCE

I welcome, in principle, the introduction, for the first time, of the application of corporate manslaughter to Crown bodies, including Government Departments.

I also appreciate the points made in the draft Bill around:

— appropriate ways of holding the Government accountable for matters of public policy or uniquely public functions
— the ‘recycling’ of funding if Government Departments face fines
— other forms of accountability of Government Departments and other public bodies (p.10).

However, after researching disasters and the law for fifteen years, including the problems inherent in inquests, I view with very serious concern the proposal that this offence will not apply to deaths in prisons, or members or the public who die in police custody.

In my original response to the Law Commission proposals in 1995 I emphasised the importance of interrogating and evaluating, in legal reform processes, the interaction between the problems inherent in the inquest system, the weaknesses of investigations into health and safety offences and failures of the laws of individual and corporate manslaughter. To assume that deaths in custody should not be covered by this offence and that ‘independent’ inquests into deaths in custody will suffice, flies in the face of decades of extensive research and public concern regarding deaths in custody and the inherent problems of the inquest system.

SANCTIONS

I am very disappointed that the only real penalties for the new offence are ‘unlimited fines’. Such fines can damage and act as a deterrent to small firms, but are ‘unlikely to trouble major companies unduly unless they are fixed at a level previously unheard of in Britain’ (Bergman 2005, p. 6). The average fine for health and safety offences in 2003 was £9,858 (see Hazards 89 in Bergman 2005, p. 6)\footnote{For example Bergman 2005, p. 6, points out that ‘BAES Systems was fined £250,000 in November 2004 after its safety failings led to the death of contract worker Billy Farrell. BAE made a £453 million profit in 2003’ (Bergman 2005, p. 6).}. I would recommend that the following are reconsidered in relation to sanctions for this new offence:

— prison sentences
— equity fines
— corporate probation
— adverse publicity orders (see Hazards 87, including recommendations by the TUC; Bergman 2005, p. 6).

It is crucial that the proposed Bill is reviewed further, particularly in relation to awareness of risk by senior managers, deaths in custody and sanctions. ‘Salus Populi Suprema ext Lex’ The safety of the people shall be the highest law (Cicero-106 to 53 BC, the motto of the Marchioness Action Group).

16 June 2005

161. Memorandum submitted by Balfour Beatty

SUMMARY OF OUR VIEWS:

— Clarification is required in the legislation to ensure that it is only used, as intended, when there has been a very serious management failure giving rise to a fatality. There is the potential for the legislation to be misused and over used.

— In order to be effective prosecutions for all health and safety offences, including Corporate Manslaughter, should be brought in a timely, equitable and efficient manner.

— The definition of gross breach of duty of care requires significant amendment in order to ensure that the result of the legislation is as intended.

— Further clarification on the interpretation of “Senior Manager” is required.

— Corporate Manslaughter legislation should apply to unincorporated bodies.

— Causation is a pivotal element of the offence and requires further clarification.

— Application of Corporate Manslaughter legislation in Northern Ireland and Scotland is needed for consistency.

NEED FOR REFORM

We recognise the motivation behind this proposed new legislation. The perceived need for specific corporate accountability is understood.

We are concerned that the legislation may not be applied as intended. In the consultative paper accompanying the Bill it is stated that “The new offence is targeted at the most serious management failings that warrant the application of a serious criminal offence” (paragraph 32). However, it does not seem clear from the Bill itself that this is how the legislation will be applied. There is serious potential for the Bill to be utilised in every case where a fatality has occurred and not in the limited circumstances described in the consultation paper. This point is supported by our detailed comments below relating to the offence and the definition of gross breach.

In order for this legislation to achieve its stated objectives we believe that other issues also require attention. For the necessary lessons to be learnt from any incident and for the people responsible to be brought to account the prosecution of a Corporate Manslaughter charge would need to be fair and swift. The opportunity should be taken to ensure that all prosecutions relating to health and safety are brought in a timely, equitable and efficient manner.

We note that the financial penalties proposed in the Bill mirror those penalties already available under the existing health and safety legislation. We acknowledge that the reputational issues arising from a conviction for Corporate Manslaughter would be significant.

Many organisations have complex corporate structures and we believe that specific provision should be made in the Bill to take such structures into account. Guidance should be provided on how prosecutions should be structured in such cases.
Further, we believe that to be effective the Bill should specifically address multi-jurisdictional organisations which for example conduct business in England and Wales but are not registered in England and Wales. Practical issues regarding, for example, service of proceedings and enforcement of judgements should also be addressed. It would be a nonsense if overseas corporations could avoid sanction by refusing/failing to submit to the process of prosecution.

**THE OFFENCE**

We understand that this offence is intended to be directed toward companies and other organisations where gross failings by senior management have fatal consequences and that the offence be reserved for the worst cases of management failure. As stated above we are concerned that the application of the legislation will not reflect this intention.

We seek an explanation of the status of certification to internationally recognised quality and health and safety management standards (for example, ISO 9001:2000 and OHSAS 18001:1999). Certification requires implementation of formal management systems incorporating acknowledged good practice, and is only achieved through independent audit by an accredited certification body (for example, Det Norske Veritas, Lloyds Register). We understand that many organisations in our industry seek and achieve such certification. If no such certifications are sought then an organisation would in our opinion be at risk. We seek clarification on whether achievement of such certifications would ordinarily provide a (partial?) defence to a charge of Corporate Manslaughter.

**SENIOR MANAGEMENT**

The current drafting sets out the definition of the term “Senior Manager”. We believe that further definition of the term “Senior Manager” is required, particularly in the context of complex organisational structures, and that the current drafting is unclear. The consultation paper with the Bill gives some context to the definition but this is not reflected in the Bill itself and would not therefore be binding.

**GROSS BREACH**

Together with the potential misuse of the legislation, we believe that the current definition of “gross breach” gives rise to issues of the greatest concern.

It appears to be difficult to set out effective tests to establish whether a gross breach of duty has occurred. We are not convinced that the current drafting achieves the stated intention.

It seems to us that in other jurisdictions where there are objective standards prescribed for health and safety, it is easier to set out tests identifying where those standards have not been met and where a gross breach of duty has occurred. The nature of the law in England and Wales makes this task very problematic.

As mentioned above it is not clear from the Bill itself that prosecutions will arise under the legislation only where “the most serious management failings that warrant the application of a serious criminal offence” have occurred. It appears that relatively minor failings or omissions which are not symptomatic of very poor management would fall within the current definition and would expose well managed organisations to the risk of a prosecution.

Clarification is requested on the relationship between the burden of proof required for a conviction under this new legislation and the burden of proof required under the existing health and safety legislation. The current drafting will give rise to confusion. Is it the intention that prosecutions under the new legislation will be heard by a judge and not a jury? We suggest that the complex legal issues which will arise regarding the burden of proof and the test for whether there has been a gross breach of duty will mean that the cases should be heard by a judge alone.

**APPLICATION—CROWN IMMUNITY**

S. 7 of the Bill removes crown immunity. We support this provision.

The consultation paper questions the logic of fines which merely recycle public money through the Treasury. Should this view prevail there would then be no effective sanction against crown bodies who whilst being convicted would suffer no sanction or fine, nor would they suffer any additional sanction if they failed to implement the remedial measures required by the court.
APPLICATION—UNINCORPORATED BODIES

We support the contention that Corporate Manslaughter legislation should apply to unincorporated bodies. Technical and legal issues should not be allowed to present a barrier to applying this offence to unincorporated bodies.

It seems inequitable that certain bodies should be excluded from a Corporate Manslaughter Charge on the basis of their constitution. In particular we are concerned that professional partnerships (such as architects and chartered surveyors) might be excluded.

CAUSATION

Causation seems to us to be a pivotal element of this offence. However, the Bill does not deal with the issue of causation. We believe that the legislation should deal with this important matter.

SCOTLAND AND NORTHERN IRELAND

We understand that the legislation will apply in England and Wales only. This leads to the possibility of an entirely different legal framework from other parts of the UK which seems to us to be undesirable. We operate across the whole of the UK and would want to see consistency on this important aspect in all areas in which we operate. We believe equivalent and consistent legislation in all parts of the UK is important.

October 2005

162. Memorandum submitted by Professor Frank B Wright

SUMMARY COMMENTS

Proposals for a new offence of corporate manslaughter have been under consideration for a number of years, because the current law in this area is ineffective. This proposed new offence could introduce an important new option for the prosecution of the worst forms of industrial negligence by corporations, whether they be in the public or private sectors. The current law operates too restrictively and fails to deliver an effective sanction but as the Home Secretary as observed the proposed new offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation. Moreover, this must be “fit for purpose”.

The current provisions appear to go beyond the measures proposed by the Law Commission. These new proposals will inevitably give rise to difficulties.

First, the causal connection between the management failure envisaged and the death will be difficult to find. In fact, cases taken under this proposed statute would succeed only against the smallest of organisations. As has been said elsewhere there must be:

“A standard causal—connection between the acts or omissions constituting the management failure and the death(s), which have occasioned the prosecution.”

Second, the definition of senior manager lacks an appropriate focus. In a large corporation the manager would need to be very senior indeed to have the influence described. Why are directors not identified? What is the position of Board Chairs and non-executive directors? What is the position when true control is to be found in the holding company? The position of Ministers and senior civil servants, local authority councillors and their leaders in the context of this legislation also remains unclear.

Third, the use assigned to health and safety legislation, approved codes of practice and guidance material is confusing. These provisions are not comprehensive and they were not designed for this purpose. Moreover, statutes, regulations, approved codes of practice, codes and guidance notes have different and carefully defined legal standing.

Fourth, senior managers whose behaviour has led to a conviction of corporate manslaughter will be stigmatised. They will be publicly associated with the commission of a very serious offence, even though not charged. Whilst it is clear that an individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter, will they be charged with another offence or offences under the Health and Safety at Work etc., Act 1974 or related legislation? Will they be disqualified under section 2, Directors Disqualification Act 1986?

Regard should be had to the approaches adopted by other European Union jurisdictions. Many have based liability on models of direct liability and vicarious liability. Others, for example, the Netherlands and Finland, have extended the scope of liability and allowed for the possibility of holding corporations liable without identifying particular individuals as responsible for the crime. These ideas are perhaps worthy of closer consideration by UK policy makers.
Indeed, given the recent penalties handed down in HMA v Transco 2005 (Larkhall) and R v Balfour Beatty and Railtrack 2005 (arising out of the Hatfield derailment) following convictions under the Health and Safety at Work etc., Act 1974 one is bound to enquire whether the “side effects” identified above are worth the risk, whether by pressing forward with this measure the United Kingdom is over-regulating and whether health and safety standards will thus be improved in overall terms.

COMMENTS

1. Proposals for a new offence of corporate manslaughter have been under consideration for a number of years, because the current law in this area is ineffective.323 In “Munkman on Employers Liability”324 Professor Smith325 has said:

“One of the problems of the legal personality attributable to companies is the extent to which the company itself or its directors may be held criminally responsible. This has traditionally been addressed at common law by the “identification doctrine”, ie that a company can only be liable through the acts of its “guiding brains”, which essentially means at board level.326 This has had its most restrictive effect where there has been a fatal accident. Although in theory a company can be liable for manslaughter,327 in practice this will normally be impossible in any case where the real cause was organisational failure rather than the fault of one named individual.328”

2. This proposed new offence could introduce an important new option for the prosecution of the worst forms of industrial negligence by corporations, whether they be in the public or private sectors. The current law operates too restrictively and fails to deliver an effective sanction but as the Home Secretary as observed329 the proposed new offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation. Moreover, this must be “fit for purpose”.


“(1) there should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness.

(2) that (like the individual offence) the corporate offence should be committed only where the defendant’s conduct in causing death falls far below what could reasonably be expected;

(3) that (unlike the individual offence) the corporate offence should not require that the risk be obvious, or that the defendant be capable of appreciating the risk; and

(4) that, for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation’s activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities.”

4. CAUSATION

The Law Commission recommended that, for the purposes of the corporate offence, it should be possible for a management failure on the part of the corporation to be a cause of a person’s death even if the immediate cause is the act or omission of an individual.

5. POTENTIAL DEFENDANTS

The Law Commission recommended that the offence of corporate killing should be capable of commission by any corporation, however and wherever incorporated, other than a corporation sole.

The Law Commission recommended that the offence of corporate killing should not be capable of commission by an unincorporated body.

The Law Commission recommended that the offence of corporate killing should not be capable of commission by an individual, even as a secondary party.

325 Professor Ian Smith, of Grays Inn, Barrister; Clifford Chance Professor of Employment Law, Norwich Law School, University of East Anglia.
326 Tesco Supermarkets v Nattrass [1972] AC 153 HL.
327 See R v P and O European Ferries (Dover) Ltd (1990) 93 Cr App Rep 10.
328 Attorney General’s Reference (No 2 of 1999) [2000] 3 All ER 182.
6. **Territorial Jurisdiction**

The Law Commission recommended that there should be liability for the corporate offence only if the injury that results in the death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject.

7. **Consents**

The Law Commission recommended that there should be no requirement of consent to the bringing of private prosecutions for the corporate offence.

8. **Mode of trial**

The Law Commission recommended that the offence of corporate killing should be triable only on indictment.

9. **Alternative Verdicts**

The Law Commission recommended that, where the jury finds a defendant not guilty of any of the offences, it should be possible . . . for the jury to convict the defendant of an offence under section 2 or 3 of the Health and Safety at Work etc. Act 1974.

10. **Remedial Action**

The Law Commission recommended that:

1. a court before which a corporation is convicted of corporate killing should have power to order the corporation to take such steps, within such time, as the order specifies for remediying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of death;
2. the power to make such an order should arise only on an application by the prosecution (or the Health and Safety Executive or any other body or person designated for this purpose by the Secretary of State, either generally or in relation to the case in question) specifying the terms of the proposed order; and
3. any such order should be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, by the prosecution (or any other body or person applying for such an order) or on behalf of the corporation.

11. **Corporate Liability for the Individual Offences**

The Law Commission recommended that the ordinary principles of corporate liability should apply to the individual offences proposed.

The Government subsequently published a consultation paper in response to the Law Commission’s recommendations set out above. 331

12. **Current Provisions**

The current provisions appear to go beyond the measures proposed by the Law Commission. These new proposals will inevitably give rise to difficulties.

13. First, the causal connection between the management failure envisaged and the death will be difficult to find. In fact, cases taken under this proposed statute would succeed only against the smallest of organisations. As has been said elsewhere there must be: 332

“A standard causal—connection between the acts or omissions constituting the management failure and the death(s), which have occasioned the prosecution.”

14. Second, the definition of senior manager lacks an appropriate focus. In a large corporation the manager would need to be very senior indeed to have the influence described. Why are directors not identified? What is the position of Board Chairs and non-executive directors? What is the position when true control is to be found in the holding company? The position of Ministers and senior civil servants, local authority councillors and their leaders in the context of this legislation also remains unclear.

15. Third, the use assigned to health and safety legislation, approved codes of practice and guidance material is confusing. These provisions are not comprehensive and they were not designed for this purpose. Moreover, statutes, regulations, approved codes of practice, codes and guidance notes have different and carefully defined legal standing.

16. Fourth, senior managers whose behaviour has led to a conviction of corporate manslaughter will be stigmatised. They will be publicly associated with the commission of a very serious offence, even though not charged. Whilst it is clear that an individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter, will they be charged with another offence or offences under the Health and Safety at Work etc., Act 1974 or related legislation? Will they be disqualified under section 2, Directors Disqualification Act 1986?

17. Regard should be had to the approaches adopted by other European Union jurisdictions. Many have based liability on models of direct liability and vicarious liability. Others, for example, the Netherlands and Finland, have extended the scope of liability and allowed for the possibility of holding corporations liable without identifying particular individuals as responsible for the crime. These ideas are perhaps worthy of closer consideration by UK policy makers.

18. Indeed, given the recent penalties handed down in HMA v Transco 2005 (Larkhall) and R v Balfour Beatty and Railtrack 2005 (arising out of the Hatfield derailment) following convictions under the Health and Safety at Work etc., Act 1974 one is bound to enquire whether the “side effects” identified above are worth the risk, whether by pressing forward with this measure the United Kingdom is over-regulating and whether health and safety standards will thus be improved in overall terms.

October 2005

163. Memorandum submitted by Network Rail

EXECUTIVE SUMMARY

I am writing to set out the response of Network Rail Infrastructure Limited (Network Rail) to the Government’s draft Bill for reforming the law of Corporate Manslaughter.

This response falls into two parts. The detail of Network Rail’s response is contained in the annex to this letter. This letter sets out in executive summary from Network Rail’s response to the key points in the draft Bill.

1. As it has done throughout this important debate, Network Rail recognises that there is a view that clarification is appropriate in this area of the law.

2. In general, Network Rail acknowledges the draft Bill as currently published and the improvements in the policy developments that have taken place since previous consultations. Network Rail believes the requirement to identify knowledge or an unreasonable lack of knowledge on the part of senior managers is a necessary ingredient in any new offence. Similarly it must be an essential requirement that the breach must amount to gross negligence.

In September 2002 Network Rail received an impact assessment from the Home Office Criminal Policy Group, which indicated that the proposed offence at the time required nothing more of organisations than compliance with existing health and safety law and regulation. The impact assessment itself accepted that considerable importance was being placed on the “labelling” which results from a criminal conviction.

Network Rail had concerns about such an approach. In responding to the impact assessment it indicated that there would be a significant responsibility on the prosecuting authorities only to pursue the most serious cases where the evidence justified doing so. It therefore welcomes the introduction of the requirement for senior management involvement and the need for any breach to be gross as a positive improvement which should assist in achieving the Government’s stated aim of focusing on the worst cases of management failure.

3. Network Rail believes that the clear statement that this is an offence directed at organisations for which there can be no secondary liability for individuals is essential and is without doubt a sensible and critical conclusion to have reached.

Network Rail had serious and justifiable concerns about the proposed enforcement action against a director or other company officer (hereinafter described as the Associated Orders) contained in the 2000 proposals (but not in the Law Commission Report in 1996) which could have required in conjunction with a corporate killing offence that:

— Any individual who could be shown to have some influence on the circumstances in which a management failure occurred should be subject to a Disqualification Order from acting in a management role and;

— Where an organisation was guilty of corporate killing officers of the undertaking who “contributed substantially” to the management failure could be convicted and liable to a penalty of imprisonment or a fine.

Network Rail strongly believes that the Home Office has reached the right conclusion in not including the Associated Orders as part of the draft Bill. Plainly it is right that where a duty of care is breached there should be accountability and laws in place to punish the guilty where that is appropriate but the offences of manslaughter by gross negligence, and under health and safety legislation, provide that accountability.

Network Rail’s primary concern was the potential punishment of individuals who when applying the normal principles of gross negligence manslaughter and health and safety legislation, would not be so accountable. Network Rail considered this to be contrary to the principles of reasonableness and fairness. Further, if the Associated Orders had been introduced, it would assist no one if the threshold of accountability was reduced to a level where engineers, managers and directors were unable to manage efficiently due to the constant fear of being prosecuted for any mistake they make. Indeed they would most likely have lowered standards of safety, leading to a “closed” (as oppose to “open”) culture inhibiting the investigation of incidents and learning of lessons.

4. In terms of the offence of corporate manslaughter aimed at organisations, as stated above Network Rail believes that the requirement for senior management involvement in the offence is an improvement on the proposals outlined in the Law Commission and the Government’s Paper of 2000.

Network Rail does not believe that a prescriptive definition of senior manager to any circumstance is achievable. The question of who is a senior manager will depend substantially on the size of a company and the complexity of its management systems.

Network Rail would welcome greater clarity as to whether that question will in each case be a question of law for the Judge to decide or alternatively a question of fact for the jury. Network Rail’s view is that deciding the question of who is a “senior manager” will be analogous to deciding the question under the common law of who represents a directing mind of a company, in that this will be a question that is a matter for the jury to decide, having been properly directed by the Judge, but that a Judge would have the power to dismiss on application by the defence a case where he or she held that no reasonable jury properly directed could reach the conclusion that a person or persons identified are senior managers of the company. Network Rail understands that the Home Office agrees with this approach.

5. Network Rail also welcomes the introduction in the draft Bill of the requirement for a breach to be “gross”. This requirement was not in the previous proposals and in Network Rail’s view it represents a helpful and valid addition to emphasise that the new offence should be restricted only to the most serious cases, as opposed to a repackaging and re-labelling of health and safety duties.

6. Network Rail also acknowledges and welcomes the guidance given in Clause 3.2 which requires the jury to focus on what senior managers knew or ought to have known.

7. Network Rail agrees that the new offence should compliment existing health and safety legislation. However if a company is prosecuted both for corporate manslaughter and under the Health and Safety at Work Act both offences the starting point should be that both offences should be tried together. A single defendant on charges arising out of the same set of facts should not be forced to undergo duplicated sets of proceedings which will only result in significant additional costs unless there are good reasons for doing so in a particular case where an application for severance could be made to the Judge. There would be no justification for having a strict rule of not trying offences against the same defendant arising out of the same set of facts together.

Both the HSWA and the new corporate manslaughter offence have the same legal burden of proof in that the prosecution is required to prove beyond all reasonable doubt there has been a breach of duty. That burden having been fulfilled, under the HSWA it is for the accused to then prove that all reasonably practicable measures have been taken. Network Rail’s view however is that this does not provide any justification for separate legal proceedings. A jury properly directed should be able to reach conclusions based upon the facts before them and it would not involve undue “mental gymnastics” by the jury to separate the ingredients of the two offences.

8. Subject to some specific concerns identified in the annexed document, Network Rail welcomes and supports the proposed approach in relation to public authorities and the distinction to be between delivery and matters of policy/prerogative.

9. Network Rail has serious concerns about the imposition of remedial orders by Criminal Courts. Its view is that it should be the role of Criminal Court to impose standards of safety in any industry or to regulate the management of safety.

That is the role of the HSE (or other Safety Regulator) who in the event of any corporate manslaughter conviction would surely be aware of the prosecution and could fulfil the same role by serving Prohibition or Improvement Notices under HSWA. Network Rail considers that there are risks in allowing Criminal Courts to regulate the management of safety where a Court is dealing with a specific incident and where it may be unaware or not fully appreciate other safeguards in the system. This is certainly the case in the railway industry where an industry specific safety regime is required by the Railway Safety Directive (Directive 2004/49/EC).
10. Network Rail welcomes the indication in the draft Bill that there is no proposal to change the current responsibilities of the police to investigate, and the CPS to prosecute. It also welcomes the requirement for the consent of the DPP before proceedings can be instituted.

We hope that these views are seen as constructive and are of interest. Network Rail would welcome the opportunity to engage further with the Government on these important issues.

June 2005

Annex

This section sets out Network Rail’s comments on each of the main sections of the consultation paper.

Foreword and Introduction

1. As it has done throughout this important debate, Network Rail sees the force of change in this area of the law and accepts that there is a need to clarify and simplify the nature and ingredients of the offence of corporate manslaughter. Network Rail believes however that the offence should only be prosecuted in the most serious of cases where there has been a flagrant disregard for health and safety leading to death. Network Rail welcomes therefore the indication that the offence will be reserved for the very worst cases of management failure and that the offence will complement, not replace, other forms of redress such as prosecutions under health and safety legislation.

2. Network Rail also welcomes the indication that it is not the intention of the proposed legislation to increase regulatory burdens, stifle entrepreneurial activity or create a risk adverse culture.

3. In this respect Network Rail welcomes the indication in paragraph 3 of the Introduction that a key part of the proposals is to strike the right balance between a more effective offence and legislation that would not unnecessarily impose a burden on business. If, as it states, at the heart of the new offence is a desire to create a more effective means of attributing failure to an organisation then the draft Bill will have Network Rail’s support.

4. Network Rail particularly welcomes the indication that the offence will not apply to individual directors or others. It believes that this is an important and valid conclusion to have reached. Network Rail considers that had the Associated Orders set out in the 2000 paper formed part of the draft Bill it would, at the least, have “increased regulatory burdens, stifled entrepreneurial activity and created a risk averse culture” (see later section on individual accountability).

Need for Reform

5. Network Rail recognises the reasons stated for the need for reform in relation to the offence of corporate manslaughter and the Bill as currently drafted. Network Rail considers it is important that society has confidence in the law. If as appears to be the case there is a perception that the current law favours large undertakings over small undertakings then this may be a justifiable reason to clarify and simplify the nature and ingredients of the offence.

6. It is true of course that the penalties available to a Court where there is a breach of health and safety legislation, namely a fine and/or remedial order, are the same as for the new offence of corporate manslaughter. However Network Rail acknowledges that there may be extreme cases where a management failure has been so gross that the stigma attached to a conviction of a corporation for an offence similar to manslaughter is required. However Network Rail repeats its view that the offence should be restricted for the worst examples of management failure where there has been a clear gross breach by senior managers in the way an undertaking has been managed or controlled.

The Offence

7. In general terms Network Rail supports the approach proposed but has specific comments concerning the constituent parts of the offence as set out below:

(i) The scope of the offence

Network Rail supports the requirement for a duty of care analogous to the current law. It agrees that it is important for organisations to be clear that the new offence does not apply in wider circumstances than the current offence of gross negligence manslaughter.
Network Rail notes the circumstances in clause 4(1) when a relevant duty of care will arise. Currently, Network Rail does not consider it is clear what “the supply of services” may involve. Network Rail, for example operates a very diverse undertaking involving many different tasks and wishes to have as much clarification as possible about when a duty of care may arise.

Network Rail agrees that the new offence of corporate manslaughter should apply to Government departments. The intention to create a “broad level playing field between public and private sectors” is strongly supported.

Network Rail anticipates that there will be significant debate upon the activities by public bodies that should be susceptible to prosecution. It notes the exclusion of duty of care as set out in Clause 4(2) in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests).

Network Rail is concerned that such exclusions should be applied fairly to public and private bodies. Decisions of public policy are not confined to public authorities. In certain situations Network Rail, and other “private” organisations, will make decisions which will involve questions of allocation of resources derived from the public and determine policies which involve weighing up competing interests. In the exercise of these functions a private sector organisation should be in the same position as a public body. Network Rail, similarly to an NHS Trust, has a finite resource with numerous competing priorities and is required to make decisions about prioritisation of safety expenditure.

In those circumstances Network Rail considers that the prosecuting authorities should take decisions to ensure that where a private body makes what is in effect a public policy decision, it too should have the benefit of the clause 4(2) exclusion.

Further in this regard, it is important that there is equality before the law. For example, Network Rail considers it is important that the Highways Agency, being the infrastructure controller for the strategic road network, is subject to the same levels of accountability as Network Rail (and, indeed, local highways authorities). It is not clear from the explanatory notes how liability might be applied to the Highways Agency and in what circumstances culpability will be excluded. Network Rail suggests further clarification of clause 4(2) is necessary.

In the context of the Railways, another matter requiring clarification is the position of the Office of Rail Regulation (ORR), which under the Railways Act 2005 is to become the industry’s safety regulator (as well as its economic regulator). The ORR is not identified in the Schedule to the draft Bill as being a Government Department subject to the new offence presumably because it undertakes functions of public policy. However, Network Rail’s ability to perform its undertaking is directly affected by the exercise of those public policy functions by the ORR. For example, the ORR, having considered competing public interests and the availability of resources, may decide not to fund a particular safety measure such as an automatic train protection system. Does it follow that Network Rail cannot be prosecuted for any fatal consequences directly arising from that decision?

From time to time it may be necessary for the Secretary of State to review the schedule and make alterations to those bodies listed. The current proposals do not make it clear what criteria will be applied and as to how these potential changes will be implemented. Network Rail believes that some explanation of the criteria and process for review should be given how the powers of the Secretary of State will operate in such circumstances.

**(ii) Management failure by Senior Managers**

Network Rail believes that the introduction of the requirement for senior management involvement is in general a positive policy development.

This requirement was not in the proposed corporate killing offence either in the Law Commission Report in 1996 or the Home Office’s Paper in May 2000 (or even at the time of the impact assessment in September 2002).

At that time Network Rail responded that in cases of death the proposed corporate killing offence mirrored section 2 and section 3 of HSWA but with the greater stigma of corporate killing. Thus using section 3 of HSWA as an example, an organisation would be guilty of a breach of section 3 if it failed to ensure so far as is reasonably practicable that employees or those affected were not exposed to risk. This did not appear to be materially different from ingredients of the proposed corporate killing offence and the Impact Assessment accepted that there was a degree of “repackaging” in the proposals.

Network Rail submits that the offence of corporate killing as outlined in the Law Commission, the 2000 proposals and the Impact Assessment if enacted would have had a significant effect on a company’s potential for serious criminal liability in an unfair and unsatisfactory way. It would have rendered an organisation potentially liable for corporate manslaughter on the basis of individual errors rather than true corporate management failure. Network Rail fully supports the intention that the new corporate manslaughter offence in the draft Bill is designed to capture truly corporate failing in the management of risk (paragraph 14 of the consultation paper).
To this extent Network Rail welcomes the introduction of the requirement for senior management involvement as a criteria for the offence of corporate manslaughter. Indeed Network Rail considers that the removal of the requirement to identify and convict a “directing mind” is a positive development as it removes the threat of senior individuals being aggressively investigated and prosecuted inappropriately for manslaughter in order to try and secure a conviction against an organisation.

Network Rail believes that inevitably common law will refine who will (and will not) fall within the definition of senior manager and accepts that because of the diversity of organisations in business that a comprehensive statutory definition may not be achievable.

Network Rail considers that the question of whether or not a person is a senior manager should be a question of fact for the jury to decide in the same way that a jury currently reaches conclusions on who represents a directing mind of a company. It would of course be open to a Judge on application to dismiss a case where he or she finds that no reasonable jury properly directed could reach the conclusion that the person or persons so identified are a senior manager.

Although Network Rail welcomes the requirement that the offence is predicate upon senior management involvement in the management failure, it believes that there are a number of specific issues that need to be clarified.

For example, although Network Rail accepts that no comprehensive statutory definition may be achievable it believes that further clarification could be given on the definition of a person who plays a significant role in “the actual managing or organising of the whole or a substantial part of those activities” (Clause 2(b)).

The test under the common law of who represents a directing mind is summarised in Lord Reid’s speech in *Tesco Supermarkets v Nattrass* (1972 AC 153) that a “Corporation must act through living persons though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is speaking as the company and his mind which directs his acts is the mind of the company.”

It is unclear in Network Rail’s view what “the actual managing or organising of the whole or substantial part of those activities” means in the context of a large national undertaking like Network Rail. Network Rail believes that there is a risk that definition could significantly lower the seniority of the class of person who is classified as a senior manager from those that represent the directing mind under the current law. It considers that it would be unfortunate if this were the case and that this would be contrary to the stated intentions of the scope of the new offence.

Network Rail also invites clarification on the comment in the consultation paper (paragraph 27) that management failure will involve a different basis of liability focusing on the way the activities of an organisation are in practice organised or managed. Network Rail notes the comment that this has not replaced the need to identify a single directing mind with a need to identify several, nor does it involve aggregating individuals’ conduct.

Network Rail does not believe that it is clear what this actually means nor in reality how this is not going to involve some form of aggregation of senior managers’ conduct. Network Rail believes that the Home Office should give further guidance on how the acts or omissions of more than one senior manager in any incident are to be examined and how liability will be imposed other than on the basis of some form of aggregation of those senior manager’s involvement.

(iii) **Gross Breach and Statutory Criteria**

Network Rail welcomes the indication that it is not the intention to catch companies or others making proper effort to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation but appropriate standards not quite met. As stated, Network Rail believes the offence should be reserved for the worst examples of management failure.

In addition Network Rail also welcomes the indication that the proposals do not seek to make every breach of a company’s common law and statutory duties to ensure health and safety liable for prosecution under the new offence.

Network Rail considers the introduction of the requirement for any breach to be gross and the stated intention that the offence will only be reserved for the “very worst cases of management failure” to be a sensible policy development consistent with the stated aim of the offence and the overriding primary objective of not lowering overall standards of safety through a risk culture.

Network Rail believes that the guidance given in Clause 3(2) is helpful in that it requires the jury to focus on what senior managers knew or ought to have known. The inclusion of specific criteria also overcomes one of the criticisms of the current common law namely that the test as set out in *R v Adamako* is circular in that what is gross is what the jury believe should be gross and consequently what is criminal is what the jury believe to be criminal without specific guidance being given to them.
Although Network Rail considers that the inclusion of the criteria in Clause 3(2) is an improvement, Network Rail submits that the actual drafting is not as clear as it could be. It is not, for example, clear as to whether all of the criteria in Clause 3(2) must be present to create a finding of grossness.

In addition Network Rail considers that the definition of “health and safety legislation or guidance” in Clause 3(3)(b) is in need of further explanation. The current definition of “code, guidance, manual or other similar publication that is made or issued (under an enactment or otherwise) by an authority . . .” is too wide and will lead to uncertainty within industry of when a company will be in breach of its obligations. Network Rail considers that this should be replaced by “any written code of practice or official written guidance that is published by the relevant safety regulator following consultation with the relevant industry and is readily available to the public”.

Network Rail also believes that Clause 3(4) (namely that the guidance on what is “gross” does not prevent the jury from having regard to any other matters they consider relevant) is too wide and creates unnecessary uncertainty as to when criminal liability might arise. Given the stated intention to make the offence of corporate manslaughter a serious offence within the general criminal law, it is important that there is clarity of when the acts or omissions of a company, which would otherwise constitute legal enterprise, will be so serious so as to attract the imposition of this new criminal sanction.

APPLICATION

8.

(i) Corporations

Network Rail agrees with the analysis in the consultation paper.

(ii) The Crown

Network Rail believes that the decision to have no general Crown immunity providing exemption from prosecution is a sensible and equitable conclusion to have reached.

In terms of those Crown bodies identified in the Schedule to the draft Bill, Network Rail notes that the Office of Rail Regulation is not included amongst that Schedule, presumably for public policy reasons. Network Rail also refers to its comments above concerning the scope of the offence and decisions on public policy made by organisations that are not public authorities.

(iii) Unincorporated Bodies

The Home Office paper in 2000 proposed the extension of the corporate killing offence to “any trade or business or other activity providing employment”. Network Rail notes that the draft Bill for reform now published does not apply to unincorporated bodies although the matter is being kept under review.

Network Rail believes that this is a sensible policy development. It believes that to extend the applicability in the way suggested in the 2000 Proposals would have cast the net too wide. Network Rail notes that the position has now returned to that originally set out in the Law Commission’s proposals that were limited to organisations formed to secure profit.

Network Rail believes that the extension to unincorporated bodies covering, for example, voluntary organisations would have discouraged much useful work in the voluntary sector and believes that the draft Bill for reform has reached sensible conclusions in drawing a distinction between those organisations where a duty of care would otherwise be present under the current common law.

(iv) Individuals

Network Rail notes that the draft Bill imposes no new liability on individuals. Network Rail welcomes this as a sensible conclusion. Earlier proposals to extend enforcement action against a director or other company officer (which appeared in the 2000 proposals (but not the Law Commission report in 1996)) including to disqualify a manager who had “any influence” on a management failure and to potentially imprison someone who contributed substantially were conceptually unsound. They would have lowered the level of possible criminal sanction to an unacceptable and unreasonable level.

Network Rail believes that public and media perception of the corporate manslaughter debate has unhelpfully confused the issues of culpability of organisations and the culpability of individuals and that the current draft Bill rightly distinguishes between those two elements.

The Home Office paper in 2000 also included a number of Associated Orders and Penalties (hereinafter described as the Associated Orders). These included in conjunction with the corporate killing offence that:
— any individual who can be shown to have had some influence on the circumstances of which a management failure occurred should be subject to a disqualification order from acting in a “management role in any undertaking carrying on a business or activity in Great Britain”, and
— there would be an additional criminal offence so that officers of the undertaking who contributed substantially to the management failure were liable to a penalty of imprisonment or a fine in separate criminal proceedings.

As stated, Network Rail fully supports the conclusions in the draft Bill not to introduce secondary liability of this nature.

The Government’s proposals in 2000 for the Associated Orders in fact went further than the Law Commission’s recommendations and if enacted would have exposed directors, managerial staff and employees to unsatisfactory substantial risks.

The Railway Industry has been the subject of much publicity and debate in relation to accidental fatalities and this is understandable. However Network Rail believes strongly that the primary focus of any proposals for change to the law of manslaughter should be to improve safety. The principles of retribution and deterrence should be secondary. Network Rail submits that the Associated Orders did not achieve this primary aim.

Such draconian measures could have led to people refusing to take positions of responsibility and could have resulted in activity designed to give the impression of good safety management by the creation of audit trails for the prime purpose of exculpation, at the expense of safety improvements brought about by open reporting and investigation with the ultimate consequence that safety standards would be negatively affected. Network Rail believes that the proposals had the potential to lower the threshold of liability to unacceptable levels. Further, the effect of those proposals would have been to create a range of penalties which caused individuals to be unnecessarily circumspect in the conduct of their duties and to deny mistakes or seek to transfer blame. This could have had a severe detrimental effect on learning lessons and safety culture.

The second Associated Order relating to officers who “contribute substantially to the management failure” in particular caused Network Rail considerable concern. Network Rail’s view is that it would be unjust for an individual, against whom insufficient evidence can be found to convict him of manslaughter or a health and safety offence to still be liable to a term of imprisonment through secondary liability. If there is sufficient evidence of individual culpability then the prosecuting authorities should charge the individual with a manslaughter offence.

It should also be noted that enforcing authorities have powers under section 37 of the Health and Safety at Work Act 1974 which are very wide and which will cover the acts or omissions of officers of undertakings which have exposed individuals to risk. In addition, the enforcing authorities have powers under section 7 of the HSWA in relation to employees, which creates a duty to other employees and others affected.

In conclusion, Network Rail contends that the Associated Orders were too wide ranging and rather than improve safety might have had the effect of creating a poor safety culture with staff unwilling to take on safety management responsibilities and leading ultimately to lessons not being learnt and a reduction in safety. Network Rail therefore fully supports the conclusions reached in the draft Bill.

OTHER ISSUES

9. (i) Causation

Network Rail notes the analysis of causation at paragraphs 49-21 and agrees with it.

(ii) Sanctions

Network Rail notes that a power to impose a remedial order by a Court is also included in the draft Bill. That power is available to the Courts under the HSWA (s 42) but it is rarely used. Network Rail believes that the potential sanction is fraught with difficulties and that may be a reason why it is not used under HSWA. Network Rail’s view is that any such orders would need to be consistent with the strategy of improving safety across a whole industry. It believes there would be a danger that a Court considering one aspect on managing safety by one undertaking in an industry would be unaware of the impact of any remedial order on the activities of the system overall.

The only sanction which should be applied is a financial penalty. Network Rail submits that the appropriate level of fine should be calculated by the Court consistently with the criteria adopted by the Court of Appeal in R v Howe and R v Friskies Petcare (UK) Limited which apply in relation to health and safety offences currently.

Network Rail believes that clarification should be given on the relationship between a fine imposed
for corporate manslaughter and any simultaneous or subsequent fine for health and safety offences which would arise out of the same set of facts and underlying culpability.

In summary, Network Rail’s view that it is not the role of a Criminal Court to impose a standard of safety in any industry or to regulate the management of safety, particularly in a large and complex industry like the railway industry. This is particularly so in a situation where a Court is unlikely to have received the views of all constituent parts of an industry and there is a danger that an order might be made that was in conflict with other industry safety/operational or financial considerations or with other possibly industry-specific legislation. Regulation of safety in any industry is the role of the appropriate Safety Regulator (such as the HSE or the ORR) and one would expect that that body to be aware of the circumstances of any corporate killing prosecution and could fulfil the same role by serving Prohibition or Improvement Notices under the HSWA.

(iii) Extent

Network Rail is an English based company but operates in Scotland where it is also the infrastructure controller for the Railway Network. Network Rail is not unique in being an undertaking operating in different parts of the United Kingdom. It believes that it would be sensible for a single regime to apply. It would be unfortunate in Network Rail’s view for different standards of criminal liability to apply to the management of a single train service running from London to Inverness depending upon the precise point of its journey particularly as the Bill cannot be extended to cover Scotland without the approval of the Scottish parliament through a special parliamentary process. The example given would be most unfortunate in Network Rail’s view and the Home Office should be seeking uniformity of applicability of the new offence throughout the whole of the United Kingdom prior to its introduction.

(iv) Investigation and Prosecution

Network Rail notes the Government’s conclusion recognising the importance of police involvement in order to signal the new offence as a serious offence under the General Criminal Law and that as a consequence the draft Bill proposes no change to the current responsibilities of the police to investigate, and the CPS to prosecute corporate manslaughter.

Network Rail acknowledges the conclusions reached and welcomes them. It believes that the police and CPS should be the investigating and prosecuting authorities for corporate manslaughter respectively.

If the powers of the health and safety legislation enforcement agency, for example HSE (or in the case of the railway, from about December 2005, the ORR) were extended to cover the prosecution of an offence of corporate manslaughter, Network Rail believes that the sharing of information and evidence immediately following an incident would be further hampered by the conflicting interests of finding out what has happened in order to learn lessons and criminal prosecution for retribution purposes. In addition, because of their role in regulation it is possible that the HSE (or ORR) might have played a part in not correcting any management failure on the part of the corporate defendant despite having knowledge of it.

Network Rail believes that for these reasons and because the CPS has the experience in bringing major criminal prosecutions, the conclusions reached are the correct ones.

Network Rail also welcomes the indication that nothing in the proposed Bill affects the roles and powers of the independent accident investigation branches who undertake the investigation of air, marine and rail accidents.

Network Rail welcomes the requirement of the DPP’s consent before proceedings can be instituted.