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Home Affairs and Work and Pensions Committees

Draft Corporate Manslaughter Bill

First Joint Report of Session 2005-06

Volume III

Oral and additional Written evidence

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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.

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List of witnesses

Monday 24 October 2005

Ms Pamela Dix, Executive Director and Ms Sophie Tarassenko, Co-chair, Disaster Action and Ms Anne Jones, Simon Jones Memorial Campaign

Mr Mike Griffiths, National Political Officer, Amicus, Mr Hugh Robertson, Senior Policy Officer, Trades Union Congress and Mr Barry Camfield, Assistant General Secretary, Transport and General Workers’ Union

Mr David Bergman, Executive Director, and Professor Steve Tombs, Chair, Board of Directors, Centre for Corporate Accountability

Monday 31 October 2005

Mr Christopher Donnellan, Law Reform Committee of the General Council of the Bar, Mr Michael Caplan, QC, London Criminal Courts Solicitors’ Association, and Mr Mick Antoniw, Thompsons Solicitors

Professor Frank Wright, University of Salford, Mr Lawrence Waterman, President and Mr Michael Welham, Member, IOSH Council of Management, Institution of Occupational Safety and Health

Monday 7 November 2005

Mr Adrian Lyons, Director General, The Railway Forum, Mr Aidan Nelson, Director of Policy and Strategic Initiatives, Rail Safety and Standards Board

Mr Peter Commins, Chairman, Mr Andy Sneddon, Health and Safety Director, Construction Confederation, Mr Keith Batchelor and Mr Jeff Smith, Royal Academy of Engineering

Mr Geraint Day, Head of Health, Environment and Transport Policy Ms Patricia Peter, Head of Corporate Governance, Institute of Directors, Mr Peter Schofield, Director of Employment and Legal Affairs, and Ms Louise Ward, Health and Safety Adviser, EEF

Thursday 10 November 2005

Mrs Eileen Dallaglio, member, and Mr John Perks, member, Marchioness Contact Group

Mr Alan Ritchie, General Secretary, Union of Construction Allied Trades and Technicians

Dr Janet Asherson, Head of Health and Safety and Mr Michael Roberts, Business Environment Director, Confederation of British Industry
Monday 14 November 2005

Mr Des Prichard, Chairman, and Mr Andrew Hopkin, Association of Principal Fire Officers, Deputy Chief Constable Jon Stoddart and Detective Chief Superintendent Mark Smith, Association of Chief Police Officers of England, Wales and Northern Ireland

Ms Jan Berry, Police Federation of England and Wales, Mr Geoff Dobson, Prison Reform Trust, and Ms Sally Ireland, JUSTICE

Monday 21 November 2005

Rt Hon Sir Igor Judge, President of the Queens Bench Division

Mr Bill Callaghan, Chairman, Health and Safety Commission, and Mr Jonathan Rees, Deputy Chief Executive, Health and Safety Executive

Fiona Mactaggart MP, Parliamentary Under-Secretary, Home Office, Mr Adam Smith, Manager, Home Office Bill Team and Mr Nick Fussell, Legal Adviser, Home Office
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*A first volume of written evidence was published on 26 October as HC 540-II*

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Oral evidence

Taken before the Home Affairs and Work and Pensions Committees
(Draft Corporate Manslaughter Bill Sub-Committees)

on Monday 24 October 2005

Members present:

Mr John Denham, in the Chair

Colin Burgon
Mr James Clappison
Harry Cohen
Mr Philip Dunne

Mrs Natascha Engel
Justine Greening
Gwyn Prosser
Mr Terry Rooney

Witnesses: Ms Pamela Dix, Executive Director, Ms Sophie Tarassenko, Co-chair, Disaster Action and Ms Anne Jones, mother of Simon Jones, Simon Jones Memorial Campaign, examined.

Q1 Chairman: Good afternoon. Thank you very much indeed for coming to give evidence to us this afternoon. As you will know, this is the first of the public hearings that the Committee has held, as part of our scrutiny of the draft Corporate Manslaughter Bill, and we are very grateful to you for coming. Perhaps if you could start, Ms Dix, and explain your organisation and its aims and then Anne Jones I will come to you for the same?

Ms Dix: Thank you. We are very glad to have the opportunity to come to present our views to you this afternoon, so thank you very much for this opportunity. Disaster Action, as you will know, is a group of survivors and bereaved people from a series of major disasters. We came together first in the late 1980s as a result of eight disasters which happened over a period of three years. There were in addition two disasters 20 years ago, in 1985, and the people affected by those events have also joined our organisation. The main point is that all of the disasters have very specific, common features: the survivors and the bereaved and the public asking questions about why something happened, how it was allowed to happen and what should be done about the fact that it had happened. Our main raison d'être is to help create a climate of safety in which disasters are simply less likely to occur and to encourage a corporate culture that understands the importance and the sanctity of human life. I would like to read something from our original document, just a couple of lines long, which will encapsulate these views. “Disaster Action wants to encourage responsible corporate behaviour but where organisations fail in their duty of care and are grossly negligent or indifferent to safety they should be subject to a workable process of law which imposes appropriate penalties on guilty parties.” Thank you.

Q2 Chairman: Thank you very much indeed. Anne Jones?

Ms Jones: I would reiterate Pamela’s thanks to you for allowing me to come to put forward our views. The Simon Jones Memorial Campaign was set up initially by Simon’s friends. Simon was my son. He was a 24 year old university student taking a year out, and to finance himself before he went back to take finals he had signed on at an employment agency to get work. One morning, without prior knowledge of where he was being sent, he was put in a taxi and sent to Shoreham Docks. Within two hours of his arrival there he was dead. The Campaign was set up initially to get justice for Simon. As Pamela has said, people were saying, “How could this happen? Didn’t these people have a duty of care to him? Shouldn’t they have ensured adequate communication? Shouldn’t there have been enough workers, shouldn’t there have been enough trained workers? Where was the supervisor? Why should anyone be so indifferent to human life?” Simon was killed in 1998. To this day, I have never had so much as two lines from the company that killed him. So, first to get justice for Simon, but as we delved into the problems we wanted to raise awareness of the law’s failure to protect workers in general and agency workers in particular from death or serious injury. We wanted to campaign against poorly-paid, untrained workers being used to replace properly-trained, experienced workers. Most importantly, we wanted to persuade the Government to honour its pledges to improve the working conditions of agency workers.

Q3 Chairman: Thank you very much indeed. Both of you have spoken both about particular people responsible for particular incidents but about the need also to change corporate culture. Can I ask you to say what role exactly you think being able to get successful criminal prosecutions would play in doing that? This Bill is all about being able to prosecute people and it is important for us to understand how the ability to prosecute fits into that broader agenda, in addition to meeting your understandable feelings about your loved ones. Anne Jones, would you like to answer first?
Ms Jones: The first thing we feel is that a successful prosecution brings into the public domain all the failings that led to a preventable death and, very importantly, it shows that this country values all human life and is prepared to punish those who are negligent or indifferent to the lives of workers. It would make people with the real power in an organisation accept responsibility for what they have done. Most importantly, it allows lessons to be learned from mistakes and acts as a spur to other employers to rectify similar problems. Also, it gives the only consolation available to the bereaved family, that their son, daughter, husband or wife has not died in vain but that by their loss the annual carnage involved in work-related incidents in Britain will cease.

Q4 Chairman: Pamela Dix, is there anything you would like to add to that?
Ms Dix: One thing I would like to say is that there will be instances when both Sophie and I would like to answer a particular question, so we will not be interjecting in order to add for the sake of it but to add something of substance. We sit here in representation of many people and I think the point I would like to make, before handing over to Sophie, in terms of a successful prosecution, is to go back to the words of one of our founder members whose son died on the rather extraordinarily named Herald of Free Enterprise. Peter Spooner said in 1990, which, I would like you all really to bear in mind, is 15 years ago: “Corporate responsibility is not a question of conforming with the minimum standards imposed by increasingly hesitant legislators, it is also a question of sharing moral leadership and of developing truly responsible codes of corporate conduct.” That man is now too old to be here and say this for himself to you but, in terms of specifically trying to get a prosecution, he was one of those who were trying. Perhaps I could hand over to Sophie, just to finish our answer to this question.

Q5 Chairman: Perhaps, in doing that, I could ask you to move on to cover what was going to be my next question, which is, without going through every individual case, can you distil, if you like, the essence of your experience in trying to get successful prosecutions?
Ms Tarassenko: My own experience comes from the King’s Cross fire, in which my brother was killed. In that instance we did not get to stage one, because although we had advice that we may have a case for a private prosecution, it is prohibitive, basically, to do that, so there were no criminal proceedings, there were no health and safety breaches that were prosecuted either, there was no civil liability admitted and there was an inquest verdict of accidental death. Actually there was no recognition at law by any body of what came out in the Fennell Report, which was a fairly negligent culture which existed in the Underground at the time; that was the difficulty for us. Since then, of course, our members were in the Herald of Free Enterprise case, which failed after a few days, and at Southall we also have members basically who did not get ahead on day one. It is very frustrating, to say the least. There does not seem to be a forum whereby accountability is recognised. The importance of a deterrent I would emphasise again. I know that lots of corporations will say, “Well, having an offence is never going to make a corporation behave better, that’s not the way corporations work.” That may be true but I always like to think of comparing it with the legislation which came in on the wearing of seat-belts. You will get a body of people that wear seat-belts anyway, you will get a body of people that will never wear seat-belts, whether there is a law against it or not, and there is a substantial body of people who will start wearing seat-belts because the law has been passed. I think corporations do not behave entirely differently from that.

Chairman: Thank you very much.

Q6 Gwyn Prosser: Mrs Jones, as you know, in the current state of the draft Bill, no criminal sanctions can be taken against individuals, even if those individuals are senior directors in a company which is proved to be grossly negligent. That being the case, do you think this Bill is worth having?
Ms Jones: Unfortunately, that being the case, I do not think that really it will be any easier to prosecute this Bill than the old Bill of Corporate Manslaughter, because we have this big problem about the definition of a senior manager and woven into the offence that the organiser of the breach has got to have involved a senior manager. The definition of a senior manager is so narrow that to try to show that he was involved is going to be no easier than the old “controlling mind” legislation. The other thing is that, even if you can identify a senior manager, because there are no statutory duties placed on him to ensure that his organisation is complying with health and safety legislation and the management of Health and Safety at Work regulations, we are back with the situation that we ended up with in court, with Martell’s defence arguing successfully that, even though he had designed the hazardous system of work and, on his own evidence, insisted that it was used unless he said they could do otherwise, he was not there that morning. He was not supervising and therefore he could not possibly be expected to know exactly how it was being used and that he had no duty to know.

Q7 Gwyn Prosser: You are identifying what you consider to be a very clear flaw in the Draft Bill but, that being the case, is it a Bill worth having?
Ms Jones: Not without considerable amendment. That is the main thing. There are good things about it, for instance, including at least some Crown bodies, and so on, but it seriously needs amending to make it effective and operational.

Q8 Gwyn Prosser: May I ask Pamela Dix the same question. In your submission you did not actually go into these issues of holding individuals culpable. What is your view?
Ms Dix: I will hand over to Sophie to answer that.

Ms Tarassenko: Our view is that, of course, at the highest level, for the reasons pointed out, directors must be held to be accountable, but I think it is a different issue, because here, in this Bill, and Anne is right, basically we are going back to what the law is. All in all, there is not a vast amount of difference between a current “directing mind” issue and the way this Bill is worded, so it is barely different at all, which is why we did not address this issue particularly. What we looked at in the Bill was and what we would like to argue is that you cannot have this liability requirement on senior managers. We have argued that the law needs to look at—and that is where I use the Australian Code as an example—the existence of a corporate culture, because in almost every single public inquiry report the words “culture of safety” or “the existence of a culture” were found to have been at least one of the causes of the deaths, if not the cause of the deaths, certainly as a background. The cause of death normally will be the act of a very junior employee, someone who did not shut the door, or whatever it was, and behind that lies corporate culture. If you have just “senior manager” and if you have to find a link between just a senior manager and a death it is never going to be found. Therefore, this whole idea for us is completely unworkable.¹

Q9 Gwyn Prosser: You mentioned the Australian model. Some people argue that defining the culture of a company, or the corporate body, is far too vague and that it will be difficult for juries to get a grip of, especially if their understanding of the company corporate is lacking. What is your comment on that?

Ms Tarassenko: The Australian Code actually provides a definition of what they mean by “corporate culture”. It is an attitude, a policy, a set of rules, a course of conduct or practice existing within the body corporate generally. However, the Australian legislation also provides a defence of a kind of counter-defence of “due diligence” in terms of showing that their attitudes, policies and rules were not sloppy or negligent, so there is that balance. I think the jury, in being asked to prosecute an offence under the Bill with the way it is worded presently, would have immense difficulty in linking any senior manager with the cause of death; it is going to be impossible, in my view, for almost any jury, given any reasonable defence lawyer.²

Q10 Mr Clappison: You have made certain observations about what you see as being the difficulty of proving that a senior manager is responsible for what has taken place. Perhaps I could start with Anne Jones on this. Putting that to one side, assuming that the case has been made out and there has been a finding of guilt against the company concerned, do you believe that there should be individual liability for directors of those companies, that they should face individual punishment?

Ms Jones: I think that this is going to be almost essential, because many companies, to avoid the suggested fine, will go into liquidation. It is very, very, difficult, therefore, to have a sanction against the company or anyone involved in it if it goes into liquidation. However, if you do insist, as in the consultation document that was put out in 2000, that there should be an associative crime of contributing to, conniving at or assisting in corporate manslaughter, aimed at senior management or directors, then you would have some way of still putting the sanction on the decision-makers in the company. This is the real problem. I can see the point entirely in targeting the entire company because everybody within that company is benefiting, effectively, from the shortcuts that were taken that caused the tragedy, but it is not the company that makes the decision. It is theorganisation that makes the decision and unless you target decision-makers in some way then they are not going to change their behaviour. A company cannot change its behaviour, the decision-makers can change the way a company behaves. Therefore, unless you have got some way of targeting those decision-makers I do not think it is going to work. Having said that, assuming that we had got a sort of wonderful world where this would work then we do have to look at how you sanction the company. As I say, non-payment of fine is a very common problem. This happened in the Ramsgate walkway collapse. I do not think the fine was ever paid and you do have to have some method of targeting individuals. Even if you say, “Right, we’re not going to imprison this director for this but clearly he isn’t worthy of having such a senior post in a company, any company, and he should be disqualified from holding any post for a minimum of 10 years,” there is a precedent in company law for unlawful trading within this sort of thing, then you would have some sort of hope because the company might have to reorganise itself totally if enough of its board of directors have been disqualified from acting. The only other way I can see round it, with this at it stands, is if you accept that to take shortcuts that cause loss of life is criminal negligence and therefore that any company which effectively is gaining assets by criminal activity can have its assets frozen during an investigation and a prosecution. You say, “Right, this is a criminal investigation. We believe you have been benefiting from criminal activity.” That is about the only way I can see it.

Chairman: Mrs Jones, we are going to pick up that point at a later stage in the inquiry.

Q11 Mr Clappison: Thank you for that. To Disaster Action, have you got anything to add to that; either Pam or Sophie?

Ms Tarassenko: We recognise that this is probably one of the biggest sticking points, because certainly the Institute of Directors and those respondents have professed the most hostility towards this, so we recognise this as a major issue in this Bill. There are other ways of getting directors to behave better. We think it should be in there but if it were not to be in there, if we are talking only corporate responsibility as

1 See Ev 114
2 See Ev 114
opposed to individual directors’ responsibility, we think there should be parallel legislation imposing safety duties on directors, in the same way that they have financial duties under the Companies Act imposed on them, that there should be actual legal obligations. We think this would improve matters considerably. We would have liked to have the offence of aiding and abetting a company to commit manslaughter, but if that is going to be a sticking point and it is never going to be accepted we would have the Corporate Manslaughter Bill with accompanying legislation for directors but within another forum, if you like.

Q12 Mr Clappison: Could I ask you about one other issue, with regard to establishing liability in the first place, and that is the somewhat technical issue of causation. You are probably aware that the Law Commission’s 1996 proposals suggested the legislation should contain a special provision on causation which would clarify that “the management failure may be a cause of the death even if the immediate cause is the act or omission of an individual.” The Home Office, in its proposals, has left that out. I think you believe the Home Office is wrong to do that. Could you say why you think it is wrong?

Ms Tarassenko: My understanding is that the Home Office may have left it out because of a couple of cases that have intervened, the Empress Car case3 and the Finlay case4, that have sort of clarified this area. I have two things to say about that. First of all, the Empress Car is a specific pollution case and it is notorious that the law has said, “Oh, well,” like in the Meridian case5, “we will accept this and that in terms of this type of offence but not manslaughter.” It may always be argued that the Empress Car way of thinking is not applicable to manslaughter, it was applied in Finlay but Finlay was individual manslaughter, not corporate manslaughter. I can see ways in which a defence would easily find holes through that particular reason for leaving it out. Secondly, a new piece of legislation is an ideal opportunity to clarify what is an incredibly difficult area of law, which of course has been wrestling with causation for years and why not take that opportunity to make it absolutely clear.

Q13 Mr Clappison: You believe that there would be clarity and that it would be preferable to have it dealt with by statute rather than through arguments over previous case law?

Ms Tarassenko: Absolutely.

Q14 Mr Rooney: Can I address this to Anne. In your opinion, does the draft Bill clarify enough the different types of relationships in employment and if not what would you suggest should be there, where an employment agency did something like this?

Ms Jones: I think this is one of its really big problems. It is not just agency workers. Everyone knows that on a big construction site, like Wembley, for instance, there are enormous numbers of contractors and subcontractors and sub-contractors that are taking on agency workers and even agencies that have borrowed workers from other agencies. There was one case, I think it was two years ago, of an Eastern European who had been killed on a construction site and there were enormous problems with identifying who was employing him, because each layer was passing the buck, saying, “He’s not our employee.” There is a big, big problem with agencies, even though they are executing a PAYE system, dictating where the person works and when a person works, what their rate of pay is, what their hours of work are, then turning round and trying to say, “But they’re self-employed.” Unless we can tighten that up, in the first place, this bill has got a real problem on its hands. If only we could insist on saying to an agency, which effectively is a subcontractor supplying labour, “Right, you are the principal employer, health and safety law says that you are responsible,” and this is quite correct, the agency is actually responsible for that person’s health and safety at work and for their training but the host employer is responsible for the safe systems of work. As agencies just about never visit the host employer to assess whether a safe system of work is operating there, it seems odd that it is very rare for an agency to be targeted with the corporate manslaughter law, because, in my view, they are as guilty if they have failed in their duty to establish that the company they sent the person to was operating a safe system of work. It is not only my son, in this case, I have had so many other people contact me. A more recent case, showing the terrible involvement, was another university student, Michael Mungovan. He was sent by McGinley’s recruitment agency to work doing rail maintenance for Balfour Beatty, who had been subcontracted by Railtrack, to do a particular job. McGinley’s, just like Personnel Selection, had no idea what job he was going to be doing, they simply sent him there. He had never done that particular type of work before. Within two hours of being there he was dead, he had been hit by a train. The inquest returned a verdict of unlawful killing. It was horrendous, the errors of communication and everything else that had taken place, but the CPS did not prosecute, and I could quite understand their point. Although you could see the company was definitely guilty of that young man’s death, it was very difficult to follow the paper trail to see exactly who should shoulder the total responsibility. It is happening on construction sites and in docks all over the country, and until we tighten up this, placing a responsibility plainly on the people sending out the workers, then all that will happen is that the host employer will argue, “This isn’t my duty of care, this isn’t my responsibility,” and they will walk free.

Q15 Mr Rooney: Thank you for that. Why do you think it is important that the bereaved are given the right to bring private prosecutions without prior approval of DPP?
Ms Jones: As far as I understand it, the reasoning for requiring the approval of the DPP is to prevent spurious prosecutions. I think the idea of that happening is remote. First, the financial hurdles are absolutely enormous. You have not only to find the money to bring your private prosecution but you have also got to fund it sufficiently should you lose the case and have to pay the other side’s costs, so that is an enormous financial hurdle. Second, if you do manage to bring the private prosecution it will have a preliminary hearing at a magistrate’s court and the magistrate can examine the case, decide whether you have a valid case to continue or throw it out at that stage. If it goes on to the Crown Court, the judge at the pre-trial hearing can also look at it and decide whether or not you have a valid case and throw it out, so I think the chances of a spurious prosecution are very, very low indeed. However, it is often the case that the DPP has not necessarily got all the information. In our own case, I was raising points right up to two months before the trial, particularly people who had not even been interviewed, and I was saying, “Look, he was supposed to be doing that, where was he, why wasn’t he doing it?” “Oh, who’s that?” they would say. It is often the case that the bereaved family, because they have spoken to so many people and because they are very focused, have actually got more information than the DPP and there may have a very valid case for bringing a private prosecution. As I said, I cannot see any bereaved family doing this on a spurious case, they would have to be a very, very, very wealthy bereaved family, and the idea of, say, Richard Branson’s son being in the position of my son is laughable, it would not happen.

Ms Tarassenko: I very much go along with that, in all its points. Sometimes relatives have actually got the staying power that the DPP does not have, so they may actually get there, but certainly we were quoted about a quarter of a million to get to the first magistrate hearing, so nobody has the money. It is never going to happen. It is a sacrosanct right which has existed for hundreds of years, there is no reason to get rid of it at all.

Q16 Harry Cohen: The draft Bill proposes sanctions of unlimited fines and/or a remedial order for those found guilty of corporate manslaughter. I understand that you are not satisfied that is sufficient. Leaving aside the individual directors, what more would you argue for as being amongst the sanctions that should be there?

Ms Dix: If I can deal briefly with the issue of fines in themselves, we think basically, on a philosophical basis, that they are meaningless. There is no connection between the number of people killed, the kind of event, the kind of incident and the nature of a fine imposed. There is no way in which it has ever been done on a basis that we can all sit here and agree had some logical sense, so that situation is likely to continue into the future should this Bill be enacted. I would also say that when a fine is exacted there are these questions about what happens to the money. The money goes into the Treasury, it is not ring-fenced in any way in relation to the use to which it might be put, the money just disappears into a big pot. What is the point, except for a headline in a newspaper that might suggest that fining a company over £13 million is meaningful; we would argue that it is not particularly meaningful either as punishment or as deterrence. You might be interested in the situation which pertains in the United States whereby the product of corporate fines often goes into a pot for the office for victims of crime, whereby the money is put to some use in relation to activities for the victims of crime, including corporate crime. That is not proposed here. I know that Sophie has something she would like to add to that.

Ms Tarassenko: Going along the same lines, there could be criminal compensation which could be a form of punitive compensation, which would make more philosophical sense in terms of the bereaved families, certainly as a bereaved person, in terms of doing the maths. A death is very cheap if the person is over 18 and has no dependants and that is a glaring flaw in any system for us. In the past, Disaster Action has also proposed corporate probation to avoid slippage because companies tend to do things right for a year or two and then start slipping back and a long probation order would prevent slippage. Finally, equity fines may also be valuable. I think probably what corporations fear most is the diminution of their equity value, so that could be a very strong disincentive as well as what I have mentioned previously, disqualification of directors who may have been involved in the criminal context.
put safety in place. We are talking of fines that would have to be more than 10% of annual turnover to have any effect on them. On its own, I do not think that will work. Remedial orders sound great but the Health and Safety Executive can already do that. I was very worried about the draft Bill saying that people could apply for an extension on it and then it says and they could apply for a second extension, and there does not seem to be any limit placed on how many extensions a company can ask for, for how long it is going to take them to put in this remedial work. I cannot see why, if the judge says, “You have got to put everything right that causes death, you’ve got to increase staffing, improve training, improve communications, get the right machinery in place,” and so on, “and you have got three months to do it,” if the company fails to do that then the directors are not in court on a ‘contempt of court’ charge, for which there is a custodial sentence. That might focus their minds on correcting the errors and omissions which caused the death in the first place.

Q19 Harry Cohen: Can I come back to this point about freezing of a company’s assets directly, because I can see the argument of the fear that a company goes into liquidation and I think that is the way they avoid fines or penalties. Are you arguing that they should not be allowed to go into liquidation, that their assets should be frozen ahead of it? Is that the point you are making?

Ms Jones: Yes. This happens, for instance, in, say, serious fraud cases, they can freeze their assets. Why cannot you do it if it is killing somebody, if you can do it in other cases? If they have been seen to be profiting from criminal activity their assets can be frozen, so if it can happen in other cases is not this a crime? Are we getting away from the idea that this is a crime? This is criminal activity. Should not the same things apply if you are killing people as if you are taking their money?

Q20 Harry Cohen: A minister made a recent speech on this area and said that really we should focus on the consensus, what we can agree on in this Bill, and not re-open disagreements. Would you go along with that way of thinking, or do you think that leaves it just too weak? What is your feeling about that?

Ms Jones: Can I say that consensus is likely to create the lowest common denominator. What would be the point?

Q21 Harry Cohen: If these other issues are still raised then the danger is that the Bill could be delayed?

Ms Dix: We have thought long and hard about this issue and actually there is no easy answer, because we have spent many years, as we have already rehearsed today, trying to get to a point at which there is a workable Bill. I would emphasise our words from 1990, that is “a workable process of police training, improve communications, get the right machinery in place,” and so on, “and you have got three months to do it,” if the company fails to do that then the directors are not in court on a ‘contempt of court’ charge, for which there is a custodial sentence. That might focus their minds on correcting the errors and omissions which caused the death in the first place.

Harry Cohen: That is interesting.

Chairman: Thank you very much indeed. It is a very difficult question and thank you for answering it as you have done. That was all too brief, I am afraid, but we need to move on to our next witnesses. Can we thank the three of you for your answers and your helpfulness. Thank you very much indeed.

Witnesses: Mr Mike Griffiths, National Political Officer, Amicus; Mr Hugh Robertson, Senior Policy Officer, TUC; and Mr Barry Camfield, Assistant General Secretary, Transport & General Workers’ Union; examined.

Q22 Chairman: Good afternoon and welcome. Thank you very much indeed for coming. The Committee knows which organisations you are from. Can I open up really with where the questioning of the representatives of victims left off. It would be unfair to overstate what we were just told, but perhaps the suggestion was, from Disaster Action, that if the Bill went through in its current form, unamended, it might not be worth having at this time. Can I ask each of you, if the Bill were to go through in the form that it is in now, without some of the amendments you might like to see, is it worth enacting?

Mr Robertson: We feel that if the Bill were to go through in its present form what it would do would be to help remove the loophole, since the P&O case, Zeebrugge, about the “directing mind”. That would be a positive thing. However, really it would be just clarifying and tightening up the law. Also, to a certain extent, in some cases, it would help give a sense of justice to the relatives of victims, who have lost a relative as a result of a fatality, where the
alternative is a health and safety fine, basically. However, there are major limitations, which I think all three organisations here have put in their submissions, around, in particular, the fact that it is not companies that make decisions, it is individuals that make decisions, and the only penalty for a company is an unlimited fine, which effectively is exactly the same as the Health and Safety at Work Act. With these caveats, we are certainly not saying the Bill is worthless; it is something that the trade union movement has been calling for for the last 10 years. What we believe is that it could be far more effective.

Q23 Chairman: Thank you very much. Mr Griffiths and Mr Camfield, broadly do you share that assessment?

Mr Camfield: We think the fact that we clarify some of the issues around the Crown bodies, and there would be a slight easing of the burden of the single director mind, the idea that there may be five additional prosecutions, has got to be worth it itself but we think would be a massively missed opportunity, because the reality is probably that is all we would get, in terms of this part of the legislative process, for a foreseeable term. We think that would be a tragedy and really a missed opportunity.

Mr Griffiths: It is broadly in line with my colleagues. It would be a tragedy if this Bill did not eventually become realised as an Act of Parliament, but in its current form I have to give great emphasis to what I see and my organisation sees are major deficiencies, which we would hope, with the assistance of this Committee, would be corrected before it appeared in its final form.

Q24 Chairman: Mr Robertson, can I ask you about the overall position. Does the TUC have an estimate of how many preventable worker deaths occur each year and, whatever assessment you are able to make, how many of those ought to lead to prosecutions for corporate manslaughter?

Mr Robertson: The deaths that this would relate to would be almost exclusively the accidents, if you like, the immediate deaths, as opposed to the 10,000, 15,000 other work-related deaths. Of those, among workers, there are about 220 a year, 250, total. The Health and Safety Executive recognises that at least 70% of these are the result of management failures. Management failures are responsible for somewhere between 150 to 200 of these deaths every year. However, we think it is highly unlikely that in all of these cases a conviction for corporate manslaughter would be attempted or would be successful. As you will know, the Regulatory Impact Assessment seems to put the figure at roughly five a year.

Q25 Mr Dunne: Following on, Mr Robertson, from what you have said, both in that context, it is very clearly a relatively modest number of incidents where this legislation would apply, and what you were saying about the Health and Safety at Work regulations, do you think that, the culture which has been introduced as a result of Health and Safety at Work, with corporate governance coming in at a much increased level, this Bill would impose greater burdens on business to reduce risk-taking? And are those burdens worth it?

Mr Robertson: Certainly we do not see corporate responsibility as being a burden. We think it is to the benefit of the organisation itself at all levels, from boardroom down, to be socially and corporately responsible. Hopefully, this Bill will increase the level of responsibility. Certainly I do not see it in any way as being something that good employers should have any fear of whatsoever. Primarily, this Bill will be aimed at larger employers. At the moment it is relatively easy to prosecute a small company. It will be in primarily the large organisations and the public sector where I think we should be doing a lot more to encourage corporate governance and responsibility on occupational health and safety issues. There is the issue which is intertwined with this, which is of the duties of directors and directors’ duties, which is something which we think cannot really be seen in isolation from the issue of corporate manslaughter, and they are just two sides of the same coin. I think to see this as a burden really misunderstands the way that a responsible business will see this.

Q26 Mr Dunne: Could I ask your colleagues whether the scope of this Bill should be increased to cover serious injury, not just fatality?

Mr Camfield: I think it should. We are talking about 150,000 plus injuries a year that are recorded, over 150,000 in the recent period, and part of our concern about this is that it is about the health and safety culture. If we address this seriously, so that companies know that the obligation is a very serious one, it is on them at the highest level through the business, it is not just about preventing the most tragic and publicly notable deaths but the scale of injury that goes on day in and day out. We are recording cases and representing members on a very regular basis. It picks up the issue that we are all so concerned about, which is those occasions of the 200 odd deaths which occur. Underneath that there is that tragedy of human misery which we think has to be addressed more seriously, and that companies need to be liable not just for compensation to individuals but ought to be prosecutable under legislation.

Q27 Mr Dunne: Would it be a similar proportion that would be susceptible to negligence? You referred to 200 deaths out of 20,000, I think, as roughly the proportion that would apply. Do you have any figures as to how serious accidents would fit in things?

Mr Griffiths: I certainly do not have those precise figures, if we were to broaden it to serious accidents, and whether the TUC would have that information or would be able to research it for the Committee if they felt it was important. I start from the premise that the vast majority of deaths and, by similar definition, serious injuries are preventable. They are preventable if only the proper duty of care was exercised by the company. It seems to me wholly
appropriate that the Bill’s scope should be increased to cover serious injuries, not just because, in many cases, we can all appreciate the dramatic effect it can have on dependants and their families, the type of life-changing experiences there very well may be as a result of a major and serious injury, but simply because of the first point I made, that if there were a better deterrent then many of these injuries would be avoidable. The actual penalty in different cases is likely to be different but, nevertheless, the scope of the Bill should be extended to cover that.

Q28 Justine Greening: In many respects, we have already covered the next question I had to pose to you. Mr Robertson, obviously, the courts can impose large fines on companies when they are found to be guilty. In the case of Network Rail and Balfour Beatty, Balfour Beatty, for instance, was fined £10 million, so the courts do seem to show a greater willingness to impose very high fines envisaged under health and safety legislation. Do you think this means that a separate offence of corporate manslaughter therefore is less needed perhaps than it was before these sorts of fines have been imposed by the courts?

Mr Robertson: No. I think the fines do recognise society’s concerns over health and safety, but also perhaps, to some extent, the frustration of the existing failures of the law, the fact that we cannot at the moment, or find it very difficult to, prosecute for corporate killing. Fines are low and are not going to change the culture within boardrooms. We do have to look at more innovative penalties, and there is a problem with not only corporate killing but generally. Our submission and the submissions of the other unions have looked at some of the possibilities of how we can look at other penalties, such as corporate probation, so that a company is assisted with their health and safety culture for a period, as well as a fine. That is one example that has been given; there are a number of others as well. It is also the fact that we have to look at the individual directors of an organisation as well, both within this Bill or certainly parallel to this Bill. Certainly at the same time we have to look at the issue of directors as well to make sure that they change their behaviour rather than just seeing it as something for a company which may or may not get fined, which will be picked up by either the shareholders, in the case of a corporate body, or in the case of a Crown body it will be just recycling money, to be quite honest. I think it is because of the Crown issue that we have to look very closely at the issue of penalties. A fine only being available for corporate killing offences by a Crown body just does not make sense.

Q29 Justine Greening: Thank you. Mr Griffiths and Mr Camfield, do you have anything that you would like to add to that?

Mr Griffiths: There is just one thing I would like to say about that particular instance, because obviously we have looked at it since we submitted evidence, and I am sure a number of the committee will be only too well aware of Mr Justice McKay’s remarks. He said, in summing up, that this was one of the worst examples of sustained industrial negligence that he had come across. There was a large fine and that has been welcomed by a great many. I suspect it was the public interest that brought about such a fine. You also have to make some comparison of the size of the fine with that particular company’s turnover. It is not quite so large when you put it into that sort of proportion. I think the central point though is that here is the Justice, in this particular case, describing it as one of the worst examples of sustained industrial negligence, yet no individual is liable.

Mr Camfield: The campaign that we have been involved in started 40 years ago when a construction worker fell to his death in the River Wye when the bridge he was working on collapsed. The case caused so much outrage at the time that a corporate manslaughter case was taken but failed to be proved because of the narrowness of the particular point in law. Since then, 32,000 workers have died over that period. Coming back to the Balfour Beatty case, it seems clear to us that these things will hit the public at the level of what might be called a disaster, in other words, it affects the public. The individual disaster that is not seen, a worker tragically may be killed in appalling circumstances, will not attract that kind of publicity. Maybe the pressure then associated with it will be less, so I agree very much with this point about a broad range of options and our central point about directors’ duties is one that we would press very strongly.

Q30 Justine Greening: Just to be clear, going back to my original question around fines, do you think that fines in the workplace, rather than in a very public disaster, like the one associated with Balfour Beatty, are less likely to be quite so severe, for the reasons you have explained?

Mr Camfield: The evidence is, the average fines are £18,000, £20,000, of that order. We are not arguing that the fines should not be part of the armoury of the judiciary in dealing with these issues, but just on their own we do not think that, in terms of the culture of health and safety across Britain, it is really going to make the difference.

Q31 Justine Greening: Thank you. Moving on then, in terms of which organisations are covered by this Bill, obviously the Bill itself has a definition of organisations which actually does not cover partnerships, sole traders and other unincorporated bodies. To your mind, how many people do you think therefore are not covered by the legislation as it stands, in terms of the definitions of organisations at the moment?

Mr Robertson: Part of the problem with this is, I think, when the people were drafting the consultation they themselves did not know, and I think it is because it is very difficult to find out, the vast majority of the organisations which will not be covered. You are quite right, in terms of unincorporated bodies and partnerships there are ones which are very small and where therefore there is not really a problem. They were the main organisations we were talking about, in terms of the
large employers and the very, very big partnerships, large accounting and law companies, which may or may not be covered, depending on the final definition. We would like to see as broad a definition as possible but we do recognise the difficulties in drafting legislation that covers every single opportunity. I would not like to place a guess on it, to be quite honest, but what I would say is I would hope that, rather than making sure that every single individual, two-person, one-person, organisation is covered, the focus is to ensure that all large employers, which are the ones where the problem is, are covered, broadly, I think, where we recognise the problem is primarily large, unincorporated bodies.

Q32 Justine Greening: To your mind, the smaller, very small, partnerships would be covered by individual manslaughter cases, for example?  
Mr Robertson: They are the ones where there has been no real difficulty in getting convictions in the past few years. They have all been small ones.  
Mr Griffiths: I think it is a complicated area. I accept that, in terms of the Committee’s thinking; in fact, we have said that in our own submission. If I can take some licence with the question and just broaden my answer, specifically we would want an assurance that offshore oil rigs and offshore British interests would be covered by the scope of the Bill. We have seen the Government recently covering a loophole there in their area and we certainly would not want to have to ask retrospectively for that to be applied in the case of this particular Act. Of course, we also have a view that where UK companies are the controlling mind of a UK worker, even if they are working abroad, they should also be covered in the scope of this Act.

Chairman: We will pick that up for attention in a few moments' time, Mr Griffiths. Thank you.

Q33 Mrs Engel: I understand that all of the unions want to have an additional offence of unlawful killing which is aimed specifically at company directors and senior managers. You will be aware that under current manslaughter legislation a lot of this is covered already. There is a specific offence, if somebody acts grossly negligently and through that behaviour causes death, that is covered already. How will an additional offence under this new legislation actually make any real difference?  
Mr Robertson: We have been asking for a specific duty for directors. The problem is that the current duty under the Health and Safety at Work Act is one which, if they take it on, if they breach it they can be prosecuted, is not actually a positive duty on directors. I think that is what we have been asking for, so that it changes the focus round to a specific responsibility for directors under the Health and Safety at Work Act or the Companies Act. There was a private Member’s bill put in by Mr Hepburn, I think, at the beginning of this year which would have achieved that, and that is what the TUC submission concentrates on. We recognise that there are already-existing penalties for individuals under manslaughter legislation and under the Health and Safety at Work Act, and this is primarily, obviously, about manslaughter cases and is about corporate bodies. However, you cannot separate the corporate body from the individuals who make the decisions, and that is, I think, what we are trying to get at. The problem with this Bill is perhaps it does and until you match the two up the effectiveness will be less effective.

Mr Camfield: We think, in the T&G, that we will not make a significant impact on health and safety in this country, and that includes corporate killing and workplace accidents generally, until there is a specific and general duty on company directors at the most senior level of companies, because it will put it on their radar. I know directly that, yes, there are some boards of companies where health and safety would feature, but I think most of the research we have available shows something like two-thirds would never discuss it. They are looking at other questions involving the company’s financial future, its expansion activities, dealing with crises, and so on, not the health and safety that is in place. It would put it on their radar and we think what would follow would be a reduction in accidents, in deaths at work and a reduction in the need for prosecutions and the legal process that would come with that. I have seen there is a straightforward way, that we have got an army of safety reps in workplaces, battling for improved safety conditions, working with managers. We have got the Health and Safety Commission, the Health and Safety Executive with their particular responsibility for developing a health and safety culture. We have got the Health and Safety at Work Act and the courts, and so on, but at the board of directors, at that central level, the responsibility is devolved, as it were, to individual acts and not to this notion of a more general mind of the company. We firmly believe that until and unless that is addressed, and we have no desire to see attacks on directors, and so on, but once we have got people focusing on this issue then the culture of a company we think will change pretty rapidly, in terms of the way this is addressed. We see this, again, as part of the armoury, not the sole response, there will be corporate fines, individual liability and the other things going on, but for the first time British companies will be at the centre of the strategic tackling of health and safety.

Q34 Mrs Engel: If I can ask Amicus, I understand that your memorandum proposes this additional offence. The way that is worded in your memorandum specifically, how might that relate to secondary offences of aiding, abetting, counselling or procuring an offence of corporate manslaughter?  
Mr Griffiths: I think the quick answer would be, I do not know. I dare say, the courts, if you were to include it as we have suggested, may themselves have some difficulties there. We are absolutely clear on exactly what we mean by the additional offence and there is an agreement between all three parties here, but in Amicus’ case there is a slight difference of emphasis. We believe that, as well as the corporate responsibility that senior directors will have, there is a responsibility on an individual who is seen to be grossly in breach and responsible for the breach of
that corporate responsibility. We believe that can only be addressed by an additional offence, as we have said, of unlawful killing, where we could see the individual being prosecuted for exactly that offence as a result of the breach of the corporate responsibility. On the aiding and abetting one, I will come back to my original answer and pass, if you do not mind.

Q35 Mrs Engel: Going back to the Chair’s original question to you really, it is the fact that a lot of the stuff which is being proposed in this legislation could be dealt with in other pieces of legislation. How will having this piece of legislation improve things, and might not we be dealing with it through other ways and means actually speed it up and, from your perspective, that should be a bit more helpful?

Mr Griffiths: From Amicus’ point of view, we are strongly recommending that it be dealt with in this legislation. We are concerned about the delay. We are conscious that there are parallel examinations of directors’ duties and if there were some sort of an assurance that the concerns, particularly around the requirement for imprisonment for corporate manslaughter, would be covered there then we might be satisfied. What we are concerned about is that we do not think that will get picked up in quite the same way and that is a specific Amicus view.

Q36 Chairman: Can I pursue that one. We are due to report in December, as a Committee, the Health and Safety Commission’s review of directors’ responsibilities is due to report in December, so maybe after the report, we do not know. If the Health and Safety Commission review came out in favour of directors’ responsibilities, in the way that you have advocated, or in Mr Hepburn’s Bill earlier this year, then would you be saying to us, “Well, actually, we’re not so bothered about whether we’ve got individual liability in the Corporate Manslaughter Bill”?

Mr Robertson: We would hope that the two things would be married up, not necessarily through the same legislation, as opposed to specifically. We recognise this is a Bill about corporate manslaughter and I think that is a very important distinction. However, to make it effective we need the two. What we would say, from TUC, and we say in our submission, is that we believe we need directors’ duties in parallel to this, either as part of this Bill or at roughly the same time. You are quite right, a decision may be made by the Health and Safety Commission in December, although, on the other hand, it may not, but then it goes to ministers. The HSE is a tripartite body and whether or not they will be able to get agreement on a matter like this we will have to wait and see.

Chairman: Thank you very much indeed.

Q37 Colin Burgon: Mr Robertson, the word “culture” has been mentioned by all three of you, and the culture you want to emphasise is the health and safety culture, implementing and instituting it in the workforce. There is another culture which it clashes with and we all operate in a political context and that is the flexible labour market. How do those two cultures sit together, can they be reconciled, or has there got to be a primacy of one or the other?

Mr Robertson: I am not sure, in terms of this particular draft Bill, whether or not you are talking about, in particular, contracting, whether you are talking about agency staff, whether you are talking generally about the large number of self-employed.

Q38 Colin Burgon: Generally, about agency staff?

Mr Robertson: Just people who are not immediately employed. I think the important thing about this is it does not have to be necessarily the employer who is covered, it is the people, the senior manager, controlling the operation. You will find in a lot of organisations, particularly when there is a big chain of contracting, which I think is very important by the Bill to much more than the building industry perhaps, which is a major problem, technically the people who are responsible for most of the policies are not employing the people who are carrying them out. I think we need to be sure that the Bill actually covers that. That is why it is important that it is not just the employer who is covered but it is the organisation which is responsible for making the decisions that have led to that death which is responsible. If we can get it that broad, which I think is the intention, then it will cover the very different labour market we have got now from the one we had 30 years ago.

Mr Camfield: It seems to me that the culture of health and safety needs to override issues around flexibility, if you are putting it as bluntly as that, that there are minimum standards that we have set ourselves. The problem with some of the tendencies around globalisation and flexibility are that companies, in the rush to compete, can undermine the health and safety and conditions of their workforce and we are aware of this as a concern. It does seem to me that we are talking here about minimum standards. I would not see that a flexible company and a modern company need fear decent minimum safeguards, in terms of people’s lives and their safety and health at work. I would not see these things as being in conflict, although I could see it being posed that way: “If we were to operate globally, wouldn’t this undermine our ability to compete?” We do not want, thank you very much, what happened to Chinese workers who died, burned to death, when they were locked in, in a company, and could not escape because of the circumstances they were in. I think a modern, flexible company which adopts a proper culture of health and safety, and particularly if there is a level playing-field and it is put in the boardrooms everywhere, will compete on what is best and not a race to the bottom.

Q39 Colin Burgon: The draft Bill proposed to remove Crown immunity for the statutory offence of corporate manslaughter and you are arguing that perhaps the Bill should go further and that Crown immunity should be removed for all health and safety offences. What do you see as the strength of
that argument? Do you think that Government ministers, effectively, will be like turkeys waiting for Christmas? Do you agree with that?

**Mr Robertson:** The Government has committed itself already to that. It is simply a question of getting a vehicle to do it. In *Revitalising Health and Safety in 2000*, it was then the DTLR. I think it was called, who committed themselves to removing Crown immunity for health and safety offences at the earliest opportunity.

**Q40 Colin Burgon:** Without wishing to encourage any splits here, the TUC and T&G take a slightly different line on this senior management test from that of Amicus. Is that a fair view? How do you respond to Amicus’ view that the focus of the Bill would be undermined if the offence were extended to cover the activities of those below the position of senior manager?

**Mr Robertson:** I do not think there is any disagreement, in terms of the application of the Bill, in terms of corporate manslaughter and senior manager. I do not think there is any disagreement on that at all. The problem for all organisations is that the existing wording in Section 2 relates to “the whole or a substantial part” and our concern is that where there is an organisation which has got a large number of subsidiary companies, which may be small in terms of the overall size but are still pretty large, a senior manager in charge of that factory could be exempted because of the wording “a substantial part”. Generally, we do not want it knocked down the chain as far as possible, we do think it should be the senior manager, in terms of the ones that make decisions, which is what the Bill recommends. On that, I do not think there is any major disagreement between us, Chairman.

**Mr Griffiths:** No. If I may, on behalf of Amicus, I gave some emphasis earlier to a slight difference between the submissions of the three representatives here. There is no problem, in Amicus’ view, with the definition that you have in the Bill at present. We are concerned to make sure that definition captures, to use the phrase, the controlling mind and we can see, in a large organisation, as has been suggested, with possibly as many as a thousand workers on site, the person responsible on that site would be a senior manager and not necessarily a director and that person clearly should have the responsibility for the health and safety on that site. Where there is a specific difference is that we go on to say, with our reference to unlawful killing, that should also allow for imprisonment and not just a fine of a corporate nature. There is no difference in the definition and defining a senior manager, as well as the director, as being responsible for the corporate responsibility. What we say is, that individual, with serious breaches, could possibly be subject to imprisonment, if clearly they were the responsible person.

**Q41 Gwyn Prosser:** Mr Griffiths, you started to tell us earlier on that you thought another deficiency in the Bill was the fact that it does not cover UK workers outside of England and Wales and indeed non-UK workers outside of England and Wales. Do you want to argue that point to us now?

**Mr Griffiths:** My apologies, if I decided to answer a question I had not quite been asked but I was keen to make sure that this came in. Without dwelling on the repeat, we do see that it is possible for UK workers to fall outside the scope of this Act and therefore to be vulnerable and possibly to be subject to abuse, simply because of the vulnerability and the fact that they are not covered within the scope. We would want there to be a clear acceptance that UK workers working abroad could be covered in the circumstances where the parent company, once again, was the controlling influence of the health and safety requirements.

**Q42 Gwyn Prosser:** What about non-UK workers working for that British company?

**Mr Griffiths:** In exactly the same case, the employer having the responsibility for his employees, it is not necessarily a definition of nationality here, it is a definition of the company’s responsibilities to all of its workforce.

**Q43 Gwyn Prosser:** What is the view of the T&G, Mr Camfield?

**Mr Camfield:** Our view is that if individuals who commit murder abroad can be prosecuted in the UK there should be no reason why a company that commits corporate manslaughter abroad should not be prosecutable in the UK. We think that this would affect only companies registered in the UK. Again, we think this is an important tool, if we are really serious about creating a culture of health and safety and not saying that British companies based here or registered here can operate with impunity abroad, because this is exactly the argument we get played back to us from certain Third World countries, which say that they can operate with impunity, whether it is on asbestos, no-one can deal with that. We should be setting an example that where British companies are operating abroad, for offences of corporate manslaughter, as a minimum, they should be prosecuted under UK law.

**Q44 Harry Cohen:** Some questions about the gross breach, as it is defined in the draft Bill. It includes a “profit from failure” test. Is it relevant whether or not an organisation has profited from non-compliance with health and safety law or guidance?

**Mr Griffiths:** There are two aspects of gross breach, I will answer that particular one but would want to come back on an extra point that we have made in our submission. In terms of the question, is it relevant if they have profited, we think that the definition and the use of the term “profit” is wrong anyway, we think the proper and correct term should be “benefit”. An individual company may not be making a specific profit but they could have a clear benefit from a major breach in health and safety. I think the examples are obvious but I can give some if the Committee wishes. I hope that answers, in a roundabout way, the point you make. The other thing is, while we are on gross breaches, we think that the current way in which the
Bill is framed in, is it, 3(2)(b) of the Act, that there is a requirement to meet all and every single one of those breaches, and we would imagine you mean that it is any one of those and we would certainly want that correction made.

Q45 Harry Cohen: To Mr Camfield, the T&G said in its evidence it would be impossible to establish that a senior manager knew or ought to have known of a breach of health and safety law. Why do you say that? Why do you say that would be impossible?

Mr Camfield: We say that is the likely consequence of the way the Bill is presented, because of the definitions around what a senior manager is. We would prefer the term about a management failure, which then would enable us to determine whether in corporate liability, and here we are talking about fines, a company would be likely to be exposed to the judicial process. The problem that we have got with the senior manager test again is, because of the qualifications, you can be in the construction industry a senior manager running maybe a major project but not a senior manager within the terms of the law, because in terms of the whole structure of the company that may be just one of many projects that you are managing. Therefore, a senior manager who commits some cardinal sin based on that site might not then expose the company to a prosecution because they will not meet the test of a senior manager. Indeed, some companies might want to reorganise their structure to redefine who has what powers so that the actions of managers of particular plants, or indeed wider areas, are not seen as strategic, they are not regarded as senior managers. We think the test is too narrow.

Q46 Harry Cohen: The last point on this gross breach aspect is that a court would have to look at compliance, or not, with health and safety legislation and I think you have argued that it should also be health and safety guidance. Some have argued that might be too broad. Why do you say that is relevant?

Mr Robertson: At the moment legislation or guidance, I think, is what it actually says. Our concern was that it refers specifically to the Health and Safety at Work Act, but in actual fact we think there are certain other pieces of legislation, particularly the Working Time Directive, which should also be taken into account. Certainly, statutory guidance under the Health and Safety at Work Act or an improved Code of Practice, I think, under the existing wording would be covered, it does say specifically it is not just legislation, which we welcome. However, we just wanted to make clear that we do not want just legislation covered by the Health and Safety at Work Act but there is other primary legislation which relates to health and safety matters which should also be covered.

Q47 Mr Rooney: To the TUC. Why do you think it is necessary for more work to be done on penalties? I know this has been kicking around for long enough. Who do you think should do that work?

Mr Robertson: I think probably that is for the Government to decide. Why do we think there needs to be more done? The reality is that we know there are still 220,000 people injured every year here, so the current system of fines, the average fine still being under £10,000 a year, just is not working for health and safety offences. There is no reason to believe that it is going to work any better for the very rare corporate manslaughter offences you are likely to get under this current Bill. What we need to do is say what is actually going to work, what is going to change the culture. We would rather there were no convictions under this, because we would rather there were not any offences being committed, that no-one was actually killing. The most useful thing about this is if it can be used to change the culture. It is not just about revenge, it is actually about prevention, that is the reason we are all here, and the current fines clearly are not working. Even the £30 million, the fact we have had them, I think honestly, that is really a sense of frustration by the judiciary that they cannot do more. We have got to say what is going to be effective. We have made some suggestions. The only other thing in this is going to be to be able to ask them to correct the mistake that they made. Despite the fact we can get serial criminals in the boardroom who have got dozens of convictions under this, because we would rather there were not any offences being committed, that no-one was actually killing. The most useful thing about this is if it can be used to change the culture.

Q48 Mr Rooney: Amicus, you also floated the idea of the equity fine. How would you see that working?

Mr Griffiths: I think we make clear reference in our submission to equity fine. I think, just a general point is that, as my colleague has just said, there is a real opportunity to bring in some alternative penalties, other than the two that are often talked about, the fines which are clearly there and that which we are asking for, imprisonment, here is an opportunity to bring in some real deterrence. The equity fine is one which we think should be given serious consideration. Not only is there a financial burden and a passing of compensation to the dependants in this particular instance, but actually it is a penalty against the shareholders, which we think will be quite useful in deterring those that have the responsibility to the shareholders maintaining their responsibility to their workforce. We think the chemistry between the management of the company, the investors represented by the shareholders and the workers in the company, to which management have a responsibility, is quite interestingly mixed by the application of an equity fine, as we have suggested.

Chairman: Thank you very much indeed, gentlemen. Again, a lot of ground covered in a short space of time and a very useful complement to our first session. Thank you very much indeed.
**Witnesses: Mr David Bergman, Executive Director, and Professor Steve Tombs, Chair, Board of Directors, Centre for Corporate Accountability, examined.**

**Q49 Chairman: Mr Bergman, can you introduce yourself briefly and your organisation and also introduce Professor Tombs?**

**Mr Bergman:** We are both from the same organisation. We are from a charity called the Centre for Corporate Accountability. I am the Executive Director of the organisation. Steve Tombs is the Chair of the Board of Directors of the organisation. We are a charity concerned with work and public safety. Our focus is primarily on law enforcement and corporate criminal accountability in relationship to that. Our prime activity is the provision of free and independent advice to families bereaved from work-related deaths, looking at investigation and prosecution issues arising from those deaths. Also, we undertake research and advocacy.

**Q50 Chairman: Thank you. I think you have been in for the previous two sessions. There is a general welcome for the fact that legislation is here but perhaps some reservations about its value in its current form. What is your own assessment about the value of having this Bill at this time?**

**Mr Bergman:** We may be not quite as pessimistic as some of the other speakers. We think that it will have a bite. Although the management failure must be a management failure of senior managers, and we do feel that is a serious limitation, despite that it will still have an impact, nonetheless. The Government says that it will increase the number of prosecutions by five, maybe it will be more than that, I do not know, but certainly it will have an impact, symbolic and also practical, but clearly we do feel there are significant limitations to the final draft.

**Q51 Chairman: Clearly, if the impact does not just reduce perhaps the five deaths a year that might lead to prosecutions but some of the several hundred a year that have been referred to by earlier witnesses in accidents, in one way or another, that will be a very good thing. How have you assessed the real impact of the Bill in terms of its regulatory burden on companies, whether it will, as some have suggested, get in the way of entrepreneurial activity, whether, in fact, it might simply just produce, right across British business and the public sector, an excessively risk-averse culture, which would be welcome in terms of the impact on people's lives but might actually mean the whole economy operating in a very ineffective and inefficient way? Have you been able to assess the impact of the measures that you support on the way in which the country operates?**

**Mr Bergman:** The first thing to say is that the actual Bill itself does not impose any additional duties at all upon companies or company directors, it simply captures a particular form of conduct on the part of companies, conduct which is viewed to be particularly serious, and define that as a criminal offence. That is a very important thing to note because often there is a misconception that the new offence is going to impose further duties. In relationship to the risk-averse question, clearly the purpose of the Bill is to deter a certain form of risk-averse culture and risk-averse behaviour. We are very sceptical of a lot of the rhetoric about risk-averse conduct and the way that is being used to try to question the merits of the Bill, because clearly an offence of this kind will, we hope, deter inappropriate risk-averse conduct that goes on at the moment. We do feel, if a company is complying currently with health and safety law, they have absolutely nothing to fear from this offence, and that is important.

**Q52 Chairman: I do not want to put words into your mouth but are you saying that if a company carries out its current legal responsibilities properly there is no danger that they will end up being prosecuted under this new piece of legislation?**

**Mr Bergman:** That is absolutely the case. I do not think anyone doubts that, whether it is Government, business or ourselves.

**Professor Tombs: I am going to go back to the more general issue, I am going to be a bit crafty here and I am going to put on my academic hat. I am a Professor of Sociology who has researched this area for many years. I see no evidence whatsoever. David referred to the rhetoric around the effects of regulation, and you used the phrase “regulatory burden”. There is actually no evidence that I know of, and I have been looking at this area for some 15 years, that increased regulation of business leads to a decline in productive activity, leads to something called an increase in risk-aversion or leads to a decline in investment. In fact, there are very many good arguments why regulating business more effectively, in a whole series of areas, not just in terms of health and safety, how creating equal conditions of competition amongst all companies, so that the companies which are complying with the law are not carrying an unfair burden in terms of costs of compliance, that creating a level playing-field actually improves levels of productivity and improves the health of a sector.**

**Q53 Chairman: When you say there is no evidence, just to press you on this point because it is important, amongst the people who have suggested what I have said about the regulatory burden include British Gas, the NHS Confederation in the public sector, the British Retail Consortium, the Business Services Association and the CBI. Can you explain, because obviously you deal with those industries, why such a broad range of bodies all misunderstand the legislation in the way that they do?**

**Mr Bergman: I will make just one, brief point, to say that in relation to any proposal that technically could be difficult or create difficulties for business as suggested by Government, or suggested by others than the Government—it is typical for that sort of language to be used, by business, it is not in a specific response to this particular offence. I do not think that these particular organisations which make this point are really making a comment about this Bill, they are making a political point in order to try to...**
counter the people who may be wanting to make changes to the current Bill or perhaps even to try to prevent the Bill from being enacted in the first place.

**Q54 Mr Clappison:** You have argued that the offence should apply to all employing organisations, not just incorporated ones; that would include, for example, partnerships. Could you say a little bit more about how you would approach this issue?

**Mr Bergman:** First of all, we approach this issue on a matter of principle. One should go back to, for example, the Government’s consultation document in 2000, where the Government itself proposed that the offence should apply to unincorporated bodies. Clearly, in 2000, the Government thought it was practical for that to take place. In our view, when you have an opportunity to create a new offence of manslaughter, like this one, it should be as inclusive as possible and it should apply to all businesses and all undertakings. A public body, or a partnership, or other forms of unincorporated associations, can create the same kinds of risk and cause the same deaths as those businesses that are set up for profit, so, in our view, in principle, any new offence should apply to them. The Government accepts that there are no technical problems in applying this offence to them. We say in our response that, first of all, many unincorporated bodies have the same stability of management as private companies. It is true that they do not have a current duty of care but it is easy to legislate that, so that, for the purpose of this particular offence, they do have a duty of care. We do not see any particular obstacles that should prevent the offence applying to unincorporated bodies. The debate has been going on for 15 years. This is a “once in a generation” opportunity perhaps. I do not know. Clearly, it has been a long time and it is important that this Bill, if it does go through, is inclusive. Although there may not be many situations that are known now where an unincorporated body has caused a death, if that is the case undoubtedly there will be cases in the future and if we create a Bill that does not allow for that unincorporated body to be prosecuted there will be cries of “injustice” and why not try to avoid that possibility?

**Professor Tombs:** Going back, in a sense, to first principles, one of the reasons why we are here, and people around this table know this better than I do, is partly because of the kind of landmark prosecution that failed following the Zeebrugge disaster and then, through the nineties, the emerging sense that the law simply could not be applied to certain kinds of undertaking, large companies, and a sense of outrage, I think, a sense of injustice to which David has just referred. That is why, I think, as a principle at this moment, all things being equal, that where possible, this offence needs to be as inclusive as possible. Otherwise we will be in the same situation – 4, – 5, – 10 or 15 years down the line, where a sense of injustice emerges because certain Crown bodies or certain unincorporated entities are not covered by the law and there appears to be, popularly, the sense that the law applies to some kinds of organisations and not to others.

**Q55 Mr Clappison:** On the same general theme of getting it right now, as it were, in general terms you seem to welcome the idea of linking corporate guilt to management failure. Can you say why you favour this approach over other options which we have heard about, and no doubt you are aware of and you have heard of this afternoon, such as corporate culture?

**Mr Bergman:** What you have got to recognise is the way this debate has developed in Britain. In 1994 the Law Commission came out with its First Report and then in 1996 was the key Law Commission Report which proposed a new offence of corporate killing and the concept of management failure was inherent in that particular Law Commission Bill. The Government in 2000 then supported that Law Commission Bill. Our view is that there are alternative ways of creating a new offence. In Australia the concept of “corporate culture” is used, in America a vicarious liability with a due diligence test is used. These are all perfectly possible tests that could apply but we are a practical organisation and clearly we had to engage with what was the offence that was really being discussed at the heart of Government and that was the offence which had the concept of management failure. Therefore, we have been looking at that offence, looking at management failure, because of the fact that the Government has been proposing that.

**Q56 Colin Burgon:** CCA have got some concerns about the way “senior manager” has been defined in the draft Bill. Could any definition of “senior manager” avoid the risk that companies will seek to avoid liability by delegating that responsibility below the level of senior manager?

**Mr Bergman:** This senior manager test is perhaps at the heart of criticisms of this Bill. Really it is a serious restriction compared with what had been proposed by the Law Commission and supported by the Government in 1996 and 2000 and does limit severely the circumstances in which a company or organisation will be able to be prosecuted, because you have to show the way in which the organisation is managed by a senior manager. In our view, we understand why it may have been inappropriate for the Government to have supported the previous proposal which simply required a management failure, the reason being that it would have allowed an organisation to be prosecuted simply perhaps on the basis of failures at a supervisory level. If these supervisory failures were sufficiently serious they could be deemed to be a management failure that could result in a company being prosecuted and we can understand the Government’s concerns about that. However, what we are concerned about is that the Government does not go the other way and make it effectively so difficult to prove the offence that the company escapes culpability where there are serious failures within an organisation. What we are proposing is that there is an alternative test for culpability, along with the current one, so that where you had a management failure in an organisation and that management failure was known about, or ought to have been known about, by a senior
manager, and obviously that management failure fell far below what could be reasonably expected, in those circumstances a company would be able to be prosecuted. I am sorry that I did not actually answer your key question, whether it is a real danger that companies will delegate responsibilities down. I think that is exactly what is promoted by this Bill and that is why it is a dangerous Bill, apart from being not a fair Bill, because increasing incentive is opposite to the one that the Government is supporting in relationship to its other health and safety policies where it wants responsibility to be at the top of an organisation. It is interesting that the Home Office, in response to the Law Commission, they have commissioned consultants Greenstreet Berman to do a survey of company directors and see whether or not, in their particular companies, they had appointed a director in charge of health and safety. In relationship to those companies that had not and in relationship to those companies that had delegated responsibility down, one of the main reasons why the companies had done that was because of the forthcoming corporate manslaughter legislation. Of course, if you were a good corporate lawyer, that is what you would be suggesting, not to the good companies, the good companies no doubt would be adopting best practices, but to those companies who wanted to try to limit their exposure as much as possible clearly that would be the best advice to give.

Q57 Chairman: Can I pursue this further because I want to understand it. If you have the senior manager test, if something went badly wrong at a lower level, as it were, and it went to court, and you went back through the minutes of the board and it was clear that a company had devolved responsibility downwards, in a conscious act, would it not be possible still to prosecute the senior management, as it were, for responsibility for that decision, in other words, for pushing it down? This is quite crucial to our entire discussion, I think, as to whether there is sufficient in there to catch the company that has deliberately devolved responsibility down or whether there is not.

Mr Bergman: You are absolutely right and that is what the Home Office’s position is, that it would be possible to prosecute a company on the basis of grossly negligent delegation, in effect, but you would have to show that delegation was grossly negligent. If you had a failure, a very serious failure, at a company level and that failure may have been known about or there may have been some understanding at a board level, but that failure at that senior manager level was not one that fell far below what could be reasonably expected then you would not be able to prosecute the company. You can prosecute the company only when the failure at a senior manager level fell far below what could be reasonably expected. You can have a situation where you had a very serious failure at a factory level, let us say you can show that serious management failure was the responsibility of a senior manager at that factory level, but that senior manager would not be defined necessarily as a senior manager in the context of this particular Bill. In order to connect that failure to the company in order to prosecute them for manslaughter you would have to show that the failure was at another level within the company, and often that is very difficult to do, particularly if you delegate responsibility down.

Q58 Colin Burgon: Continuing this point, you point out that by focusing on failures by senior managers the proposed offence would apply unequally to small and large organisations. Is it possible to avoid this problem if the concept of senior management failure is maintained, and if so how?

Mr Bergman: I think the senior manager test needs to be revised. It needs to be revised in order to ensure that it is not only situations where there are greater failings at a senior manager level which can allow a company to be prosecuted, a company should be able to be prosecuted where very serious management failures were lower down in the organisation and were known about, or ought to have been known about, by senior managers. Why we say that it is discriminatory against large organisations is because large organisations can delegate down and can escape accountability in the same way as they can at the moment, it does not deal with the current failure that the law is supposed to be dealing with.

Q59 Justine Greening: Moving on now to what constitutes a relevant duty of care, the draft Bill talks about an offence being created if there is a gross breach of a relevant duty of care. I understand that duty of care has been built very much around the concept of negligence and I know that the CCA has expressed some concerns about that sort of definition, pinning it to negligence. Can you tell us what additional duties legally you think are owed by organisations, which you think should be on top of the negligence definition, if you like? Which ones are relevant and why?

Mr Bergman: I think the important thing to recognise is that we accept that you have got to ground the offence in a breach of some kind of duty. The Home Office did not have to latch on to civil law duties of care. In fact, it is very peculiar, if you think about it. Why do you bring in civil law principles into a manslaughter offence, it is a bit peculiar, and in fact the Law Commission, in one of its reports, which we note in our report, were against that, they thought that you just should not be using civil law principles. The other duties which exist are the duties that companies are being prosecuted for every day of the week. The duties contained in safety at work legislation are statutory duties. In our view, it would be much more appropriate, either instead of or in addition to the duty of care principles, to ground the offence in relationship to those statutory duties. These duties are very well known, they have been around for 30 years, companies have to abide by them every day and inspectors come to their work places, inspect and ensure compliance in relationship to them, so why not use those?
Q60 Justine Greening: In terms of those additional duties, they may be developed obviously over the course of time by fresh legal cases coming. Do you not think perhaps that leaves things slightly too vague, given how serious this offence would be, if somebody is found guilty?

Mr Bergman: Not really, because the key structure of legislation is the Health and Safety at Work legislation and, effectively, when they fail to comply with a duty, companies can be prosecuted in relationship to those. It would seem to me much more logical and appropriate then to ground manslaughter in relationship to those existing duties for which companies get prosecuted. Companies do not get prosecuted for breaches of duties of care, generally, so in our view it makes much more sense for the new offence to be grounded on statutory legislation which is broader and is also much better understood than civil law duties of care.

Professor Tombs: Just to go back to the first point that was made, in terms of imposing additional burdens upon companies, this does not impose additional burdens because the knowledge is, or should be, existing within companies as to what those statutory duties are, under Sections 2-6, and how they can be discharged.

Mr Bergman: One other point is the 2004 decision of the Court of Appeal in the case of R v Wacker ([2003] 1 Cr App R 329) which looked at the issue of duty of care, which also talked about the inappropriateness of using civil law duties of care blindly in relationship to a manslaughter case.

Q61 Justine Greening: I think another point that you pick up on is that the duty of care is in the context of, for example, supply by an organisation of goods and services, and specifically it says supply rather than the provision. I think that is something which in your submission you picked out as being possibly a weakness. Can you give us an example of an activity that you think might fall under the term being a provision of services rather than a supply and therefore would not be captured by this legislation?

Mr Bergman: I have to thank the Home Office for clarifying this particular issue with me. When I was discussing with them how the offence might apply in different circumstances, it was their view that, certain services that are provided by public bodies, they are providers of a service but they are not suppliers of a service and they gave examples of the Police or the Prison Service or law enforcement bodies, inspection agencies. Effectively, that particular provision would exclude the following deaths: deaths of members of the public from police conduct, deaths of the public in a government prison, deaths from failure by social services and deaths from government inspection regimes. There may or may not be many deaths from these examples, and obviously there are more deaths resulting from some of those examples more than another: however, clearly, that particular exemption is quite a powerful one and, we would suggest that this can be dealt with easily by simply adding the words “or provision” to allow those deaths technically to come within the application of the offence.

Q62 Mrs Engel: You have answered the first question I was going to ask you, when you went into quite a lot of detail about the exemptions and the exclusively public function and the public policy decisions of public authorities. I do not think I will go into more detail on that. One of the other problems with this Bill is that it gives legal protection to the right to life. My question really is how can there be a breach of the right to life and any other Articles in the European Convention on Human Rights? It is moving on quite far but I think it is a very important question.

Mr Bergman: That was the subject of an appendix to our response, which was advice from two human rights lawyers. I am not a human rights legal expert. The key issue is that the right to life imposes certain positive obligations upon states, and that has been defined in Strasbourg law and in domestic law such that it is appropriate, in certain circumstances, for there to be criminal law remedies. The core concern of our legal advisers was that where the death resulted from certain state activities the offence created exemptions, and the exemptions are often based on arbitrary distinctions—whether or not a death resulted from a public policy decision-making process, for example. That was their key reason why they thought that potentially the legislation as it is now, because of the high level of exemptions, potentially can be in breach of the positive obligations imposed from the state in relationship to the right to life.

Q63 Mrs Engel: Do you think really that courts are qualified to make judgments on public policy decisions made by public authorities?

Mr Bergman: I think they do. I think this comes to the issue that you were going to ask us but did not, which was about the exemption relating to public policy decision-making, which is one of the key exemptions used by the Government to restrict the application of this Bill. In our view, it would be inappropriate to give a blanket exemption to deaths which result from the public policy decision-making of public bodies, however negligent that process of public policy decision-making may have been. We accept that probably it is going to be in very few cases where such a case will be appropriate to prosecute. Indeed, there may be limited cases where investigations would be required. Simply to give a blanket exemption, in the way that the offence does, in our view is entirely inappropriate because those decisions can cause death. It is important, if the Government is going to make a historic decision, which the Government has done by removing the principle of Crown immunity through this Bill, if you are going to give that decision life, the Government cannot then simply, in the same document, exempt those activities that cause death from those public bodies.
Professor Tombs: To be clear, it is easier for me. I think, to see this, as a non-lawyer, because I do not understand the technicalities around it, but it seems to me that those issues upon which the courts are adjudicating are not the outcomes of public policy decisions, not public policy, per se, but the mechanisms by which those decisions are reached, to ensure that the way those decisions are made by a senior manager or managers have met certain basic standards and are not negligent, for example. It is the processes rather than the outcomes that are being judged.

Q64 Mr Dunne: You talk about the exemption from Crown immunity but one of the specific points of evidence that you picked up was the question of military activities. Do you accept that certain military activities should be exempted from the law and, if so, which should be included and which should be excluded?

Mr Bergman: We are not experts, as an organisation, in the particular area of deaths resulting from military activities. What we are concerned about is the breadth of exemption that exists in the current draft, such that preparation, of simulation of military activities, that results in death could be exempt.

Q65 Mr Dunne: Do you mean training?

Mr Bergman: In support of training, it is not just training, it is not just an exemption for training for military activities but it is support activities for training for military activities as such. The MoD has to comply currently with health and safety law. They should be abiding by it. In the course of undertaking training, which under the current rules of jurisdiction that have been set up by the Home Office would be in this country, if death takes place that is a result of gross failure on the part of senior management—I cannot understand how you can justify that such a death could be exempt from application of the offence. It seems to be clear that sort of offence should apply to them. Currently the army has to comply with existing health and safety law; they cannot be prosecuted for it because they are a Crown body, but they have to comply with it.

Mr Dunne: We could go on with this at some length which I really do not want to, but I think you could get in some definition about who is a senior manager in the context of the Ministry of Defence, for example, as well, its different sort of structure from a company. I should add, Chairman, I have disclosed my interest to the Work & Pensions Committee but I have not specifically to this Committee. I am a director of companies and some of the things that have been said today make me feel a little uneasy that I have not made that clear to the Committee.

Chairman: Only for that reason or for other reasons?

Q66 Mr Dunne: I do not think I have got any risk. Moving on to my last question, which has been raised with other witnesses today, and that is to do with territoriality, the Government has argued that it would not be possible to apply the offence to UK companies conducting business overseas and causing deaths abroad. How do you react to that?

Mr Bergman: The current jurisdiction principles that the Home Office is proposing are that if a death takes place in Britain it does not matter where the management failure took place. It could take place in Britain or it could take place outside Britain, the British courts would have jurisdiction. In principle, in an ideal world, you would argue that where British companies operated abroad and they caused death that offence should apply, but we accept that health and safety law does not apply outside this country so there is no point really arguing that particular position. What we do argue is this, that it would be appropriate to allow British courts to have jurisdiction over the following category of death, which is, where the death takes place outside Britain as a result of gross negligence which takes place in Britain: so the management failure, the serious management failure, took place in Britain but the death took place outside Britain. The bizarre thing about this is that would be a much easier offence to investigate than the scenario of the management failure outside Britain with the death in Britain. It would be very difficult to investigate companies which were operating abroad; it is much easier to investigate them in Britain. We believe that the jurisdiction should extend in that way. I think it is important just to give a context to this, and what we are saying is not in any way radical, that under existing manslaughter law a British citizen can be prosecuted even if they commit a death abroad and their conduct is abroad and that can be brought home to the British courts. In our view, a British company, or companies operating in Britain, should have the same sorts of limitations to their activities. There is a good public policy reason for that. The British Government should not want British companies to export hazards, to use Britain as a base for exporting hazardous activities, as such. In our view, that would be an appropriate change.

Professor Tombs: Again, to speak as a non-lawyer, the proposal seems counter-intuitive, to me. As an employee of a university, if my university asked me to go to work in South Africa or the Middle East, which it has done, to do some consultancy work, I would expect my university to carry out some form of risk assessment which meets its duty of care to me, as an employee. I do not think that duty ends simply because I go to work for three months or three weeks in a different jurisdiction. Certainly, if my university sets up a subsidiary company in Malaysia, which it might easily do and asks me or colleagues to go to work there, again, I do not understand—it seems to me entirely counter-intuitive—that one would not expect decisions made in Liverpool, which is the base of my university, not to be judged according to English law, no matter where any death may take place.

Q67 Chairman: Can I ask a question about the interaction of this with public policy decisions and it might help to clarify our understanding of this. There was a case, a week or so ago, of Government
ministers losing, effectively, a High Court case regarding the deportation of a Zimbabwean asylum-seeker. In circumstances where, for example, a minister had agreed the deportation of a failed asylum-seeker and that asylum-seeker then died in the country to which they had been returned, is it your view that under those circumstances the minister would be open not only to having their decision challenged, as they might well be at the moment, either under ECHR or, historically, as happens, through judicial review, but also might be open to criminal prosecution; in which case, under what circumstances?

Mr Bergman: First of all, it is important to note there is often a misunderstanding, not that you have it, in relationship to Crown immunity. Civil servants and ministers technically can be prosecuted for criminal offences now. They do not have Crown. It is the departments of government, the bodies, which have Crown immunity. Currently there could be circumstances in which civil servants could be prosecuted for manslaughter if their conduct was subject to investigation. In relationship to the particular question that you raised, clearly that brings together two tricky issues: number one, the jurisdiction issue and, number two, the public policy issue. We would say that any activity which was grossly negligent, which effectively complied with the senior management test in Britain, within an organisation, which is quite a tough test, not an easy one, whether it is our view of what the test should be or the Home Office’s test of what it should be—falling far below what could reasonably be expected, and a death takes place directly as a result of that and you can prove the chain of causation, then clearly an investigation should take place and if the evidence is proved then a prosecution should take place and conviction should follow. In relationship to the examination of the public policy decision-making, that may not be a straightforward process, we accept, but clearly the process should be gone into. For example, if the minister or a group of ministers, civil servants or senior managers within the Home Office all knew, in fact, that there was a serious threat to this particular person and, despite that, despite having clear awareness of that, they decided not to prevent him from being deported then clearly that would be an appropriate set of decisions to be examined under an offence like this.

Q68 Mr Rooney: You said in your memorandum that it is reasonable to assume that courts will continue to impose fines less than the FSA, for instance, despite the more serious offence. Have you changed your mind on that since the Balfour Beatty/Network Rail judgment, or do you think that still stands?

Mr Bergman: I will make an introductory comment about sentences. If the Government can be criticised for one thing, for which there is absolutely no excuse, it is the way it has dealt with sentences. It has had years to consider alternative ways of sentencing organisations and companies. Canadian provinces and Australian states have produced report after report after report detailing alternative forms of sentences that can be imposed upon organisations. They are out there, they are used, there are options available, and the fact that the British Government has not been able to do the sort of work that one small Canadian province or Australian state has been able to do in the last 10 or 15 years is extraordinary. I just want to put that on the record. I think it is important to note that the fines are large but often they are not as large when you look at the profits and turnover of these companies. Balfour Beatty is a very large company; we are talking about profits and turnover of hundreds of millions of pounds. That is one point. The second point is, if Balfour Beatty had been convicted of manslaughter how large would the fine have been? It would have been much, much larger. It was fined for a health and safety offence. Maybe the judge also had in his mind that the law is unfair so he needed to impose a fine that was higher perhaps than one made for a usual health and safety offence. But what the sentence against Balfour Beatty indicates is that a fine for manslaughter would be much, much higher, maybe half of the profits of Balfour Beatty, the whole year’s profits of Balfour Beatty may have been threatened. I do not think that the fact that the courts are suddenly imposing large fines is an argument against the offence of corporate manslaughter; on the contrary and the need to consider what levels of fines courts can impose in relationship to manslaughter. If you look at the FSA and you look at the sorts of fines, these are administrative fines, these are not fines which are imposed by the court, these are fines imposed administratively, they are much, much larger than the sorts of fines that are imposed by the courts in relationship to health and safety offences.

Q69 Mr Rooney: Just on the possible alternatives, a whole year’s profits, well, smart accountants can soon make profits disappear. Small businesses would not be able to afford those smart accountants so they would be more at risk, proportionately, and similarly on the percentage of turnover, 10% of Balfour Beatty’s turnover, great, 10% of a corner shop makes a life worth £5,000. There has to be some sort of minimum. I do not think this is as easy as you appear to be saying. Accepting that you cannot retexture a life that has been taken, you cannot put a monetary value on it, it is more of a penalty thing. Do you not think perhaps you have been, dare I say, glib?

Mr Bergman: When you think about sentencing organisations, or indeed any form of defendant, I suppose, you have got to look at the seriousness of the offence and the wealth of that particular defendant and so both of those need to be taken into account. You have picked up very astutely on the problem about a lot of the discussion about fines and sentences, because what may appear to be a relatively small fine may be to a small company a devastating fine. What may appear to be a very large fine, to a large company may be just a drop in the ocean. It is important to look at the relationship of the fine to the profits and turnover of an organisation, if that is what you are doing, if you are imposing a cash fine. What was useful about the way
the FSA legislation is this, it had a provision that fines should not exceed 10% turnover of the companies involved and this seemed to encourage large fines. For years and years and years the fines for health and safety offences have been relatively low, they are now increasing. I cannot explain why that is the case but clearly that is important, but I do not think that is a reason to totally get rid of fines in relationship to possible sanctions in relationship to manslaughter.

Professor Tombs: Can I add just a couple of points to that. I think that you are right, it is not easy, these questions are not easy. That takes us back, I think, to David’s very first point, which is that fines are a very blunt instrument and there is a whole series of proposals out there which should have been actively considered as part of this legislation, and indeed more generally for health and safety offences, which will take us beyond monetary fines. Fines are very blunt and very crude and there is a whole series of problems with them. A second point I would make is this. There will be inequities but we do have to think in terms of percentages, because if we allow discretion for judges and rely upon judges to push up the fines for the bigger companies, actually beyond a certain level probably they will not do that. The evidence in the United States in the nineties, in fact, indicates that beyond a certain level judges simply will not go because the fines look absolutely outrageous, even though they may be a very small percentage of turnover. I think, despite associated inequities, if we are going to use fines we do need to look at some kind of unit or percentage system, probably.

Chairman: Thank you very much indeed, gentlemen. It was a very good first session.
Monday 31 October 2005

Members present:

Mr John Denham, in the Chair

Colin Burgon
Mr James Clappison
Harry Cohen
Mrs Natascha Engel

Justine Greening
Gwyn Prosser
Mr Terry Rooney

Witnesses: Mr Christopher Donnellan, Law Reform Committee of the General Council of the Bar, Mr Michael Caplan, QC, London Criminal Courts Solicitors’ Association, and Mr Mick Antoniw, Thompsons Solicitors, examined.

Q70 Chairman: Good afternoon. Thank you very much indeed, gentlemen, for joining us this afternoon for the second public scrutiny session that we have held on the Bill. Perhaps each of you in turn could first introduce yourselves for the record.

Mr Donnellan: I am Christopher Donnellan. I am a barrister. I practise from chambers at 36 Bedford Row in independent private practice. I was asked by the Law Reform Committee of the Bar Council to prepare a report with another colleague, Sean Enright, in response to the Bill.

Mr Antoniw: My name is Mick Antoniw. I am a partner with Thompsons Solicitors, acting mainly for trade unions in various matters involving fatalities and so on.

Mr Caplan: Michael Caplan. I am a solicitor in private practice. I also chaired the sub-committee for the London Criminal Court Solicitors’ Association on this particular matter, and I appear as chairman of that sub-committee.

Q71 Chairman: Thank you very much. If we can start by looking at the issue of which organisations are covered by the Bill and the definitions of that, Mr Donnellan, your evidence suggests that the offence does not need to cover small, unincorporated businesses because they would already be covered by the individual manslaughter offence. Should the offence apply to large unincorporated bodies, where it might not be possible to prosecute individuals, like partnerships, like some law firms, accountancy firms, and so on?

Mr Donnellan: The difficulty is, as has been identified by the Law Commission as well, that the corporate bodies are readily identifiable as a legal entity that can be defined. The difficulty with the various other bodies, partnerships and the like, is identifying them in the same way and identifying their legal liability in the same way, and therefore it is quite a complicated process to look at each one in turn, then try and find a phrase to cover all of them within the provisions of an Act of Parliament like this. For example, if you take a partnership, the liability of each of the partners might be clear and it may be possible therefore, as a result of an incident that has resulted in death, to prosecute one partner or the other partner or both for the existing common law offence of gross negligence manslaughter, so you have covered it for that situation, but it is much more complicated to try to see how to phrase it to cover all the other unincorporated and perhaps large bodies.

Q72 Chairman: Can you explain to me, a layman, that we seem to be able to define these bodies perfectly acceptably for accountancy and tax purposes, so in other areas of life it is clear what some of these organisations actually are. Why should it be possible to do it relatively easily if you are looking to tax them but, as you say, it is very difficult to define them if we are trying to hold them accountable for somebody’s death?

Mr Donnellan: My own practice is basic criminal law, so I am not a corporate specialist and in fact I do not deal with a lot of the sort of areas that Mr Antoniw will because he is within a firm of private practice. I also chaired the sub-committee. Although the difficulty with the existing law is proving it subsequently, and it was identified by the judgments of the higher courts that they are clear and identifiable and therefore we can prosecute them, we hold on to that and say that is clear and identifiable, but to go any further than that, I do not think it is within my ability to give you a clear answer to the question that you have just asked.

Q73 Chairman: Can I be clear about the implication of what you are saying? The implication of what you say is that there are a set of large, unincorporated bodies that we simply have to accept cannot be prosecuted for the offence of corporate manslaughter because of the difficulty of defining them in law.

Mr Donnellan: As a body, yes, but not as individuals who are responsible within that body.

Q74 Chairman: But that would be under the existing law of manslaughter?

Mr Donnellan: Under the existing law, yes.

Q75 Chairman: Mr Antoniw, do you have a view on this?

Mr Antoniw: Yes. It concerns me that unincorporated bodies are not included, partly because many of the fatalities which occur are in work places, on building sites. Many of the companies—one which I am involved in at the
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moment—roofing companies, all sorts of companies that are subcontracted down the chain, are often one-man bands; they are often unlimited companies. They trade as a particular company, they are clearly identifiable. It may be an option for them to be charged with common law manslaughter, but I see no reason why they should be excluded from the ambit of this.

Q76 Chairman: Do you share Mr Donnellan’s view that there is just a problem in defining these bodies or are there ways round that for large and small organisations?
Mr Antoniw: I think it is just a question of bringing unincorporated companies within the ambit of the legislation and effectively giving them a legal entity for the purpose of this legislation.

Q77 Chairman: Your view is that is achievable?
Mr Antoniw: It is achievable and I think it is desirable.

Q78 Chairman: Mr Caplan, do you have any ideas?
Mr Caplan: I got myself into a difficulty under the draft which was published some years ago, which I think everyone would accept is potentially much wider than the draft Bill that we have at the moment. I suggested in an article that would include the two-man electricity company or gasman as well as the very small firms of solicitors, and I did not think necessarily that was what was intended in the legislation, to which somebody wrote to me from the Health & Safety Executive to say why should they not be responsible, like everyone else? I think the difficulty is a matter of principle: either every organisation, unincorporated or not, is going to be covered, or you are going to have a distinction. It is quite right to say that if you have an unincorporated association, and you may have very small ones, you may say, quite rightly, that should not be covered if it is a two-man band, but of course, you have unincorporated associations which are much larger. Are you not going to cover them as well? I think that is the difficulty. Either you cover everyone or no-one of that particular ilk.

Q79 Chairman: Do you think, on large organisations first, that it is possible to cover them legally? The difficulties with the definitions are not so great as to defeat the draftsman?
Mr Caplan: I think there is a difficulty, for the very reason that if it is an unincorporated association, it is very difficult to distinguish between the two-man company and the 20-man company. Either you are going to say as a title they are all going to be covered or they are not going to be covered.

Q80 Chairman: Was my question earlier impossibly naïve, or do many of these unincorporated organisations have a legal identity at the moment for other purposes, such as taxation?

Mr Caplan: I was going to hide behind saying I am a mere criminal lawyer as well, but I suppose I cannot say that. I think you can show an identification, and I think there is the perception also from the public’s point of view.

Q81 Chairman: It has been suggested to us, moving now on to the issue of causation, the original Law Commission’s clause on causation has not been included in the draft Bill because the Home Office have said to us the case law has developed in a way that means that it is no longer necessary. I would be grateful if each of you could comment on whether you believe that is a proper assessment of where we are at the moment.
Mr Antoniw: I think it is probably correct. Causation does not cause me a problem with this particular legislation. There are differences. A colleague of mine would be able to comment on in more detail. The changes from the Law Commission side to the actual draft itself are on whether actions actually cause a death or are a cause of a death, and I think that is a potential problem, but beyond that, it is not something that has jumped up at me as being a particular problem with this.

Q82 Chairman: If I put the question round the other way, Mr Antoniw says it may not be necessary. Is there anything to be lost by including a formulation like the original Law Commission formulation? Can anybody see any significant disadvantage?
Mr Antoniw: I think it strengthens. There is this issue of the material contribution that is made to the final act.

Q83 Chairman: If we look at the senior management test, would the senior manager test simply, as some people have suggested to us, replicate the current problem with identification, because in practice, you need to identify a number of responsible directing minds, the senior managers?
Mr Antoniw: I think it creates the same problem, as you effectively put in another control test. It creates all the same obstacles and problems to prosecution that exist under the law as it stands at the moment. It is interesting to note that in the Corporate Homicide Bill in 2000 it was just reference to “managers” and not to “senior managers”. I myself find difficulty in identifying precisely what a senior
manager is. There is also the problem of the devolution of responsibilities down the chain of command to effectively avoid liability under the legislation that is proposed.

Mr Caplan: I have difficulties with it. I think it could raise difficulties in the minds of a number of people, because a senior manager in one organisation may be carrying out the same job as in another organisation where that person is not referred to as a senior manager. Does it really help? If you have to have these types of definitions, why can you not, for example, have “a manager playing a significant part in the activities of a company”? I cannot see the word “senior” adding anything; I think it can only detract from the potential legislation and cause confusion.

Mr Donnellan: I have a slightly different view, which is that, by giving a slightly wider term—and it may not be closely defined—you do widen the ambit and you do give a greater range of people at different levels of responsibility, who might be called in, to the point which you are dealing with, which is to be responsible for the whole of the corporate body. You are not looking to scapegoat people, but you are looking for people in different levels in the organisation who, either singly or as a group, are responsible for the decisions that have been taken that have led to the situation where, for example, a fatal accident has occurred. One of the dangers of trying to closely define it is that you end up with the problem we have now, and subject to having a definition which is generally—I know there is some concern when you use the word “substantial” and “significant”, that is always open to interpretation, but so long as somebody can be identified, or a group of people can be identified, who are capable of falling within that definition, then a jury can go on to consider whether they were in fact senior managers or not, sufficiently senior in the company to cause the company to bear that responsibility.

Q84 Chairman: That is an interesting point of view. Thank you. If I can pursue the point about prosecution of senior managers, it has been suggested that part of the unfairness of the proposal is that senior managers could effectively find themselves being tried and their reputations damaged by a prosecution of their company without ever having the power to defend themselves or to make representations during a court hearing. Is that a concern that we should be worried about?

Mr Donnellan: Strictly, no. If we are looking to prosecute a company for its failings, we have to choose what evidence we can to achieve that prosecution, properly laid before a court and a jury. In any criminal trial, people are mentioned who have no rights to be there. It is one of the complaints indeed of what is called the victim or the complainant, depending on what point of the trial you are in, that they do not feel they have any right. They may be cross-examined, and feel very upset about it. They have been put on trial by it and have no right to defend themselves. That happens in all trials. To seek to protect one group just because you are trying to prosecute a company is not a course we should go down. The clear way forward is to look at that. It may well be that an individual senior manager is also facing a charge under either the Health and Safety at Work Act or himself or herself might be charged with gross negligence manslaughter, so they may indeed be in the trial.

Q85 Natascha Engel: My question continues this theme. It is the issue of devolving responsibility for health and safety in order to avoid prosecution. The Home Office argues that the act of delegation itself could be seen as a management failure in the company. In your opinion, how easy would it be to prosecute a company if that is what is happening? It is something that you have already referred to.

Mr Donnellan: It is difficult to judge how easy or difficult something is going to be until you get to the point of trying to do it. The investigation process, whichever prosecuting authority is investigating—and that is another question, I appreciate—should have identified what they have seen as the major failings, and if a major failing is that a far too junior person is making serious health and safety decisions, then whether it is minor or whether it is a decision or whether it is just a lax system, you will be able to identify the people above them who have not taken the responsibility themselves. I do not see it as a major difficulty in the abstract. It may in an individual case be quite difficult to amass the evidence to go on and prove it to a jury on that particular point so they are sure, but that is often so in cases where you are looking for evidence.

Mr Antoniw: I do not see it changing very much what happens at the moment with prosecutions under the Health and Safety at Work Act. In order to find out factually what has happened, you have to identify what the roles of the individuals are, which means those individuals are frequently interviewed, there are statements from them, and frequently blame is identified as a result of those particular actions. So I do not see it actually changes matters.

Q86 Natascha Engel: The recommendation of the LCCSA is that management failure should be that of managers in general and not just of senior managers. You mentioned that before, but do you think that is really fair?

Mr Caplan: What I have said is, why use the word “senior” manager; why can it not be a manager, for example, who plays a significant role in the management of the company? What does “senior manager” actually add to it? The difficulty is that in one organisation someone may be a senior manager; in another organisation they are not but they are carrying out the same functions.

Q87 Natascha Engel: Do you not think that would be the same problem with the word “manager” as with “senior manager” in terms of definitions?

Mr Caplan: I think it is better to have “manager” than “senior manager” but take away “manager” if you like; someone, whatever level you want to do it at, who plays a significant role in the organisation. I was thinking about this over the weekend. You may have someone who is at a very low level, if you look at the structure of a company, who does play a
significant role in a very large company, whereas in
a small company the same role is played at the very
top of the management tree. What does “senior” add
to it?
Mr Antoniw: I thought the 2000 Bill put it very well
when it said a corporation is guilty of corporate
killing if a “management failure” by the corporation
is a cause or one of the causes of a person’s death. I
thought that was a far more acceptable term because
it left it open to properly ascertain what had
happened without trying to find ways of avoiding
individual liabilities along the way.

Q88 Natascha Engel: I cannot remember who made
the point about definitions of “significant” and
“substantial”. We were thinking about whether it
would just make a lot of work for lawyers trying to
nail down those definitions, and an awful lot of
uncertainty for companies. What is your opinion
on that?
Mr Caplan: You have to have some definition, and
certainly we may well touch on this later on, but if
you look at the legislation which has been proposed,
if you pause and think for a moment of the judge and
the directions he has to give to the jury, it means the
jury have to go through a number of hoops before
they can come to a decision. Do you take the view,
as I do personally, that you should try to make this
as simple for the jury as you can, and put before
them a definition which would be a matter for them?
Whether you use “significant”, greater or less,
whatever definition you use, but one which perhaps
they have to interpret, so when you talk about work
for the lawyers, I would have thought it may well be
more headaches for the judge and the jury.

Mr Antoniw: I represented two of the four people
killed on the Avon Bridge. There were clearly
decisions being taken at a very senior level to get the
project moved forward quickly and within certain
budgets, and pressure was put much lower down the
line to deliver. When you get to that situation, where
you have individuals at a much lower level who are
effectively being kicked around to deliver, which
often means cutting corners, cutting costs and so on,
so you have someone at a much lower level who has
management responsibility, whether they be a
foreman or a project manager or a works manager
on site, they are therefore taking decisions, but those
decisions are the product of much more complex
pressures that are coming from above.

Mr Antoniw: That is why the senior manager who
was causing that situation, with the corporate
manslaughter issue in mind, is the person that the
prosecution should be looking at. The evidence
would come from the person who is on the ground,
the foreman who is trying to get the job done on time
because of the pressures upon him, and he or she is
likely to be a witness for the prosecution against the
manager further up who was just pushing that
pressure down on them.

Q90 Natascha Engel: Is what you are saying that
actually, the case itself will define the person at fault,
or identify where the responsibility lies?
Mr Donnellan: That is the position I came from, and
I put a slightly different position, as you appreciate,
from the other two, because sometimes it is difficult
to define what a senior manager is going to be until
you look at the company structure—or the
Government body it might well be in this case—and
see who really is the person who is playing the
significant role. I appreciate there are other
comments about the word “significant” and
“substantial”, that is why I threw them in, but it is
an important role in that structure. That is what you
have to concentrate on, looking at corporate
manslaughter.

Mr Antoniw: That is why I think the term
“management failure” is a far more acceptable
phrase.

Q91 Colin Burgon: One of the other issues we are
looking at is obviously the definition of a relevant
duty of care. Mr Donnellan, the Law Commission
proposals do not require a duty of care to be owed.
Does the offence need to be limited to existing legal
duties owed by organisations to those who are
affected by their activities?
Mr Donnellan: I am sorry. I do not quite understand
the question you are seeking to ask me.

Q92 Colin Burgon: It is a difficult question. In that
case, Mr Caplan, I know you have probably dealt
with elements of this before.

Mr Caplan: Yes. I think what is really happening is,
once you link it to the law of negligence, in the civil
sense, you are moving towards recklessness and that
area, and as lawyers, recklessness is very difficult to
try and define. Certainly, our view is that obviously
you have to have some kind of test, but in fact I think
you merge not only the question of the relevant duty
of care, but then you look at the jury which has to
look at certain other issues, such as profit, and that
is one issue in the Bill, and the question is what test
do you have? Our view is, if you are going to link it
to the law of negligence, then you are really looking
at some kind of civil test, which is much wider than
the criminal test.

Q93 Colin Burgon: Would you concur with your
colleague on that?

Mr Donnellan: The duty of care has been used as the
basis for the prosecution of individuals for gross
negligence manslaughter already, and the duties
have been identified by the court, and they are
clearly set out but, because there is a wide range of
common law and law of negligence to draw upon,
and because the categories of duties of care will
never in fact be closed; there may be new ones that
we have not come across but still a situation could
arise where the duty will be imposed by the court.
One of the advantages of leaving it, again, slightly
open is that it gives the flexibility to look and see whether a situation presenting itself where a fatal incident has occurred, whether there was in fact a duty between the corporation or the company and that individual, and it may be—and it is sensible to put it into the Bill—that it can only be determined by the judge first deciding whether it is capable of being a duty of care. Once that decision has been made, the jury can consider whether there ought to be a duty of care in those particular circumstances and that particular fact. It is a useful two-stage process.

Q94 Mr Clappison: I just wonder if you could help us a little bit, because the Law Commission proposals as I understand them did not require a duty of care to be owed. I am just wondering, listening to what you are saying, which may be absolutely crystal clear to a lawyer, but putting this to a jury, it just sounds like one other thing which complicates the picture as far as the jury are concerned when they are sent out and told, “This might be a duty of care but it is up to you to work out whether in fact it is one.” What is being gained here by having a duty of care in there? Why not just simply have it as gross negligence causing death?

Mr Antoniw: I agree with that sentiment, and I think probably the way round it is that, as well as a duty of care, there also has to be reference to the breach of statutory duties, because as well as a general, common law duty of care approach, the company may well be in breach of specific statutory responsibilities, and if you combine the two, I think that makes it a lot clearer, and you are just left with the grossness of the breach of duty.

Mr Donnellan: I would not necessarily address a jury, if I were prosecuting a case, by saying to them, “I am a lawyer and therefore I am going to use legal phrases of tort and negligence and everything else.” I would give an example that the basic idea of the duty of care has been expanded over the last century, and very much looking at who is my neighbour. Who do I owe a duty to? On that concept, it is fairly easy to develop a straightforward explanation that every case can follow. Do I owe a duty to another person to be careful of them? Once you go through that test, I think you can explain the duty of care to a jury for them to be able to say, “Yes, I think in those circumstances there ought to be one in place on these facts.”

Q95 Colin Burgon: Mr Antoniw, based on your experience, can you think of any situation where a company’s serious management failures have caused the death of a worker or a member of the public where there would not be a duty of care under the law of negligence?

Mr Antoniw: No, I cannot. I am not aware of any, and that is why I think it is perhaps a bit of a cul-de-sac as far as it goes. I have not come across any situations like that.

Q96 Colin Burgon: If it is decided that the offence should be tied to an existing legal duty in this way, is the Home Office right to use the duty of care under the law of negligence rather than other legal duties such as those, say, under the Health and Safety at Work Act?

Mr Antoniw: I do not think it is necessary to specifically tie it in with duty of care. It seems to me there has been a deliberate decision to bring in the common law of negligence as the sort of standard for this legislation. Maybe that ties in with the aspect of not having imprisonable offences. That is specifically excluded. What I am more concerned with is the clarity: did the company owe a responsibility? Did it fail in its responsibilities or its statutory obligations? That seems to me to be exactly what it is about, and the danger of bringing in the duty of care is that it provides ample opportunity for all the legalistic pedantry that might subsequently arise in court cases.

Q97 Colin Burgon: I think the duty of care issue in that way has been covered. Mr Caplan, I think that the London Criminal Courts Solicitors’ Association has commented upon the roles of the judge and jury in terms of determining things. Who do you think should decide whether a defendant organisation owes a relevant duty of care to the deceased? Should it be the judge or the jury? How can a jury determine whether there is a duty of care under the civil law of negligence?

Mr Caplan: You are talking about a legal concept, and our view is that we cannot see any reason why the judge cannot determine as a matter of law whether a duty of care is owed, as in many criminal cases a judge has to determine a number of other legal issues, and that is in fact one less issue for the jury. He can say a duty of care is not owed in this case and if you are pinning it to that, that is the end of the prosecution, or a duty of care is owed in this case; that is not a matter the jury have to decide upon. They can decide upon other matters. It is really pinned to the other factor, which we may well come on to, that there are a number of other issues which a jury are going to have to decide, and if we are talking about the law of negligence, our view is that really could be decided by the judge as a matter of law.

Q98 Colin Burgon: Mr Donnellan or Mr Antoniw, have you anything to add to that?

Mr Donnellan: No, I have nothing to add.

Mr Antoniw: No.

Q99 Chairman: Can I just put to you something which came out of last week’s session? The Centre for Corporate Accountability very directly said—we were discussing regulatory burdens, which we will come on to later—that if a company is following all its statutory duties, there is no danger of them being found guilty of corporate manslaughter under the draft Bill as it stands. Having listened to the discussion about duty of care vis-à-vis statutory duties, I get the impression at least that you are all saying that there is actually some element of doubt there, that duty of care could embrace certain things that companies did or failed to do that were outside
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their statutory responsibilities. Is that right, and therefore is the Centre for Corporate Accountability not quite right?

Mr Antoniw: I see it as a bit of a paradox, because if a company is following all its statutory duties, I cannot see how the event has occurred, except by act of God. That is the difficulty. The statutory obligations are fairly broad and in many cases very specific. The duty of care is a general duty to look after the wellbeing of individuals, but, just as the question was put to me, I cannot think of any circumstances where a company has been in breach of its duty of care, which has resulted in a death, where there have not also been statutory breaches.

Q100 Gwyn Prosser: I want to ask you about the definition of “gross breach” in the Bill. First of all, Mr Donnellan. Clause 3(2) of the Bill would require jurors to consider a number of factors in order to decide whether there has been a gross breach. Do you think these factors will help jurors make their decision or will it allow the prosecution more opportunities to make a very complicated decision even more complicated?

Mr Donnellan: The first concern I have about the clause itself is that I am not entirely sure, when I read it, whether one can be taken on its own, whether they all have to be taken together, or how. That is the first thing. It needs clear drafting. Are they “and” or are they “or” or can we take them all into account? The points are well made; they are the points that should be considered, but any one of them could be sufficient. For the word “gross” generally, the current law on gross negligence manslaughter deals with the fact that “gross” is something that is “very bad”. I know it sounds ridiculous to say so, but it is clear. We are not talking about some failings; we are talking about the really bad failings. The criteria that are set out here are really how serious was the failure to comply with what needs to be done to run a safe operation? That is clearly the primary one. Then looking at the other aspects of it, we think that all of those should be factors that can be considered. One is enough, but all three or four should be included. I do not think it is too complicated for a jury, no. I think juries can be greatly underestimated. When 12 people have sat through a trial—and often they are, sadly, fairly lengthy trials—in my experience, they have grasped the issues, sometimes very quickly, sometimes with a bit of help, but often in the longer trials they are ahead of many of the lawyers before you get to the point you are going to make, because they can see it coming. Do not underestimate their ability to recognise something that is a gross failing when they see it.

Mr Caplan: I entirely agree with Mr Donnellan that you should never underestimate the ability of a jury. This is not the time and place to discuss juries but I am concerned about what you are going to give the juries to consider, the hoops they are going to have to be told by a judge to go through, and sometimes the difficulty arises in the judge having to give complex directions to a jury. If you just look at clause 3 at the moment, you are talking in terms of, firstly, the health and safety legislation. Next, any guidance under it. Presumably you have to go through that. A judge may have to spend some time bringing to the attention of the jury those matters which they are meant to go away to consider. They have then got to consider the serious nature of failure, what “serious” means, whether it is a matter just for a jury whether someone knew or ought to have known of the existence of a particular duty, etc. These are hoops or questions you put to a jury which they have to go through, and I think that is quite a complex matter, more complex particularly because so often a direction may be given to a jury which is not entirely clear, which leads to an appeal, which everyone wants to avoid. Having gone this far, you will no doubt have some sympathy for judges having to direct a jury on these particular matters. Then you have to come to the question of profit. What does “profit” mean in these circumstances? It is just economic profit or does it mean something else? How are you going to gauge that? I, frankly, have some concern with the length and breadth of clause 3 as it stands. I can see it causing some difficulty in the future, and potentially lengthening trials, because when you see all this type of information, you begin perhaps to see all the type of information which will have to be brought before a jury by all sides, which will lengthen the process.

Mr Antoniw: I would reiterate some of that, but I am concerned about this “and/or”. I think the intention must have been “or” because, if read in conjunction with paragraph 4, at the bottom, there is a whole series of other factors that the jurors can take into account. So it seems to me what it is doing is setting off a couple of the main items a jury need to consider, but that they are “or”, because if it were not “or”, I would have considerable concerns about the “sought to cause the organisation to profit from that failing” because equally, companies profit in many ways: by reputation, getting a job done on time, which may have been achieved by cutting corners, etc. There are all sorts of ways in which a company can profit, and how you would actually prove that in court, that would be a major stumbling block. That point needs to be clarified, and if it is then taken in conjunction with paragraph 4, I do not have too much difficulty with it.

Q101 Gwyn Prosser: On the basis that it is “or”, is it an aid to decision-making for the jury, or is it an encumbrance?

Mr Antoniw: I think it is an aid, taken in conjunction with paragraph 4.

Q102 Gwyn Prosser: I want to move now to individual liability. We have had quite a lot of strong opinions on it. Mr Caplan, can you outline why your organisation believes that sanctions for individuals such as disqualification from directorships are necessary?

Mr Caplan: How does an organisation operate? It operates through its individuals. To have teeth, our view is that it is necessary to bring sanctions against individuals as well as the company, and our view is that if you show that individuals will be personally responsible for the activities, that they will be
accountable themselves personally, there is more likelihood that they will bring the company into line to make sure it complies with health and safety regulations. We find a difficulty, both with the way matters are left at the moment and also what we understood to be the concern earlier on, going back into history over the past few years, when individuals as well as the company were to be made accountable. The bottom line of it is, if you hit the individuals who are responsible for the company in some way with some kind of sanction, there is more likelihood in our view that the company itself will comply with the legislation and you will not get any prosecutions.

**Mr Donnellan:** We take the view that at the conclusion of the proceedings there may be individuals who have not been individually prosecuted who have been identified as having seriously failed in the organisation, and the concern is that there is no provision to deal with that aspect of the matter, and therefore we wondered whether it was appropriate use of an extension of the Disqualification of Directors Act to try and achieve that, subject, of course, to a fair hearing. It cannot just be done as a side issue. There has to be proper representation. The evidence about that failing will have been heard and that identifiable individual would need to have the opportunity to, if necessary, give evidence themselves but also perhaps have some of that evidence recalled on the issue of their disqualification. That can be a sub-aspect of the case after the main issue of corporate manslaughter has been determined.

**Q103 Gwyn Prosser:** Do you think that is a strong enough sanction against directors who are considered to share important liabilities in terms of public perception, for instance, and moderating and influencing the way that boards of directors take their decisions about matters concerning health and safety protection?

**Mr Donnellan:** If there are provisions in the Act in due course to cover that aspect, then people, directors of companies or senior managers of companies, will know in advance that there is that risk of a penalty being imposed upon them in some form, even though the charge is against the company and not against them as an individual. If they themselves as an individual are seriously at fault, then they should be individually charged with gross negligence manslaughter under the common law, which subsists behind this, irrespective of what is in this Bill.

**Mr Donnellan:** If “senior manager” is kept in, then it seems to me bizarre that you would not then have a penalty aimed at that where you have proved overwhelmingly a particular individual... If “senior” is taken out, so you are looking at management failure generally, then I think the key is in the actual sentencing provision of the Bill, because essentially fines alone I do not believe are sufficient. I think there does need to be, somewhere along the way, accounting in terms of the role and the duty of directors themselves, and I think that is a particular weakness. Corporate probation is one of the proposals that I have made in respect of this. That would be something where companies would be required to come back to the courts to show that they have implemented measures, that they are operating safely etc. The question then would be, if they are failing to do that, how do you then penalise the company? Do you solely use fines? For some smaller companies that might not be appropriate. You would want to look at what the role is of those individuals within the company who have responsibilities who are failing to carry out those responsibilities. How do you penalise them? One way may be disqualification from directorships. There may be others.

**Q104 Gwyn Prosser:** On the issue of defining statutory duties of directors, there is a view that to include those in the Bill would slow down the process. Would it be possible, do you think, to include statutory duties in different legislation to allow this Bill to proceed without further delay?

**Mr Antoniw:** Yes, you can do it perfectly well separately. It is just I think the range of penalties to make this Bill effective, without something that would come back to some form of accountability of directors, is a weakness.

**Q105 Mr Rooney:** Mr Donnellan, the Bar Council has commented that careful judgment needs to be made as to which functions of government should fall within the public policy exemption. Do you think that should be a decision for the courts or do you think the Government could do that by clarification in the Bill?

**Mr Donnellan:** We are suggesting that the clarification should be in the Bill, identified by way of a schedule or otherwise, to include all the functions of departments that you want to have included. It is important to make sure that there is as best as possible a level playing field between the public and private sector responsibilities, so that there is no get-out for whoever is in charge and whoever is responsible for the same sort of issues, and you cannot hide behind a public exemption. That should I think be properly stated in the Act of Parliament and not left to some sort of further interpretation in due course.

**Q106 Mr Rooney:** In the case of government, public bodies, who would be the person, in the event of a prosecution, whom you would see as ultimately responsible? Would it be the Secretary of State? Would it be an executive agency chief executive? Where would it lie?

**Mr Donnellan:** That is for you.

**Q107 Mr Rooney:** No; you are the lawyer.

**Mr Donnellan:** I am commenting on what has been proposed. It is the Government department, is it not, the department responsible for that activity? Whoever is put up as the figurehead is a matter for that department. The “senior manager”, if we for the moment use that term, as it is in the Bill, is not necessarily the senior managing director. It is the
company’s liability, not necessarily the senior managing director’s. You can have the same principle within a government department.

Mr Antoniw: It is effectively what happens in civil cases, where the writ is served against the Secretary of State.

Q108 Mr Rooney: Maybe. I may not have picked it up, but what about this concept of public function?

Mr Antoniw: It is clause 4(2), is it not? I accept that there is a need to not involve within this process people who are involved in having to take political decisions, priority decisions, spending decisions and so on, because I think if you went down that road, it would be opening Pandora’s box, and I do not think we would actually achieve anything. Is that the sort of area you were asking me about? I think 4(2) deals with that and I have no problem with 4(2) in the Bill.

Q109 Chairman: You made the statement that you would exempt public policy makers from, for example, taking decisions about the allocation of resources. Mr Donnellan in his evidence brings up the case that if Railtrack decided not to put enough money into rail maintenance and were held liable under those circumstances, if Railtrack were to be replaced with a public sector organisation, Network Rail, which had to work within a budget set by the Secretary of State for Transport which had the same consequences, is it right to say that one is potentially open to a charge for corporate manslaughter because it is a private company and the other one would not be because it is a politician taking, quite possibly, very sensible decisions about the best use of public money?

Mr Antoniw: I think probably no, it is not right, but I cannot see any other way of creating a certain cut-off point without effectively creating the sort of quagmire of litigation that will go round in circles for years. I do not think there is any clear, one-or-other answer to that. I think you have to draw a line somewhere, and even with companies there is a clear defence. If you had a government that was clearly taking political decisions that were in breach of statute, they would be open to challenge in other ways.

Q110 Mr Rooney: They may be open to challenge in other ways, but that is an administrative process, and in the mean time, to think of an extreme example, say the Government abolished whatever the medical licensing authority is called now so that drug companies were free to just throw things on the market and people took pot luck. From what you are saying...

Mr Antoniw: You then get to the bona fide of the decision-making process. If people are taking decisions that they know are clearly going to lead to deaths, then yes, they are open to challenge in all sorts of ways. The question is whether it should be a political sanction or whether it should be a legal sanction.

Q111 Mr Rooney: Do you think there is a clear distinction between public policy and public function?

Mr Antoniw: Not a clear one. There are distinctions, but I am not quite sure where I would draw the line on it.

Q112 Mr Rooney: You have expressed particular concerns about the exemption of deaths in custody and those resulting from police activities from the scope of the offence. Are these deaths already addressed by other forms of accountability, and what would accountability under the criminal law add?

Mr Donnellan: You have lots of accountability at the moment that already exists under the Health and Safety Act, and of course, it does apply to a number of bodies as well. So the fact that you have a different number of avenues to go against a body does not mean that you should not have the serious one where a death occurs and there is a serious failure in the organisation that is responsible for that death. We do not see the distinction that should be drawn in relation to deaths in custody. I am not making a comment about it as it appears to the public today. I am just saying as a potential that if a structure is not being run in a proper way and is ridddle, as the description in the original inquiry in the Herald of Free Enterprise, from top to bottom with failures, if the same structure were riddled from top to bottom and there was a death in custody, why on earth should not that responsibility lie with the more serious charge, whatever the other forms of accountability are? The public are entitled to have the same accountability explored and prosecuted, and it may be that it is in a sense notional but at least that public statement has been made and, in so far as you can, a punishment can be imposed, which we accept is perhaps something that would cause embarrassment within the department that has to pay a fine, but more particularly, it identifies that accountability in a very public way.

Q113 Mr Rooney: In terms of a police force, any fine levied on them would finish up being paid by council tax payers, would it not? The force itself would not suffer in that sense.

Mr Caplan: I was hoping to stay out of the argument but clearly I cannot. You could take out—and you do at the moment—cases of breach of health and safety legislation against the police, for example, and as you can against corporations. We are talking about organisations, prosecuting them for gross negligence manslaughter or whatever label you use, and it seems therefore why should you not do that against a police force if a police force carries the same responsibility? We have made it clear we see no reason why you should not do that. Indeed, we have raised the point—I will not go into it now—whether in fact there are human rights issues here under Article 2 and Article 13. Leaving those aside, the second part of your question, I think, was whether inquiries can adequately be dealt with through other fora, one of which is very interesting in the Government’s paper, inquests, because as I
understand it, it is being said on the one hand by the Government in their commentary to this draft legislation that one of the ways of doing this is through inquests, and we know they fulfill a very good function, especially, unhappily, in a situation where someone has died in custody in difficult circumstances or in a transport catastrophe, but on the other hand, we hear, as I understand it, the Government saying “We want to amend this and limit inquests.” Indeed, as we know, even if you get a finding of unlawful killing from an inquest, it does not necessarily follow someone is going to be charged, let alone convicted, of that offence. So I doubt whether in fact there are necessarily other ways in which these types of activities can properly be investigated. We come back to the situation where we could see no reason why you could not say that the police force as well as other government agencies should not be as accountable as a corporation.

Q114 Mr Rooney: Maybe. Mr Donnellan, can I come back to this public function? On the basis of the definition in the Bill, if you were advising a body like, say, a local authority about which of its functions would fall within that definition, would you feel comfortable doing that or do you think further work needs doing?

Mr Donnellan: I would not feel comfortable doing it and I think further work does need doing.

Q115 Mr Rooney: Finally, on military activity, again, the Bar Council has said it is important that deaths which occur in the course of normal military activity are not excluded from the offence. How do you, and can you in fact distinguish between basic elements of training and training for combat?

Mr Donnellan: It is the proximity to the combat. We are trying to say when it is a specific combat training, there is an operation about to happen, then at that stage it probably is protected, but what you must not do is put in the Act a clause that is too wide it can cover your basic training, which of course has some combat element in it, for the new recruit having just arrived, very raw, at the age of 16 or so. You have to make sure you confine any restriction or exemption to what it really needs to be confined to, and not make it so wide you can catch anything. At the moment it just is too wide, on our reading of it. You need to narrow that down so that the basic training and everything else, the same liability as everybody else, but when you come to a specific operation, you are going to have difficulty actually examining it in any event, and we can see the need for an exemption, but only then.

Q116 Mr Rooney: I understand what you are saying but I find it difficult to find a dividing line between basic elements of training and training for combat, in that from the minute you join the armed forces, you are being trained for combat. That is the whole raison d’être.

Mr Donnellan: Yes. The distinction I am making is a specific combat operation you can exempt, but general combat training you should not exempt.

Q117 Justine Greening: Obviously one of the other contentious issues of the draft Bill has been the concept of a limited territorial application in terms of when you can actually bring an offence. Given that UK citizens who commit manslaughter abroad can be tried in our courts, should not the same rule apply to UK companies?

Mr Antoniw: Yes.

Mr Caplan: I see no reason, except for this warning: the practicalities of it. I have been dealing quite recently with a matter which occurred outside the territorial boundaries of the UK, and it is all very well saying yes, we should do this, but when you look at the practicalities of getting evidence, of interviewing people, bringing that evidence here, and if we are talking about death as well, in maybe very difficult circumstances, I just add that warning.

Mr Donnellan: I have nothing to add to that. It is the practical difficulties, and we agree with the Law Commission’s view on this, that is, not to extend. It may be that in due course it can be, but it is complicated, and it is better to get a Bill up and running and then see whether it is possible to extend the territorial aspect.

Q118 Justine Greening: Just to investigate the practicalities of it a bit further, why should the place where harm is sustained determine whether a company can be tried in our courts? Should we not also look perhaps instead at whether the company is incorporated here and whether the grossly negligent behaviour occurs here, and have the input into the scenario determine what happens to it rather than just where the output takes place?

Mr Donnellan: The first thing is, we do not want to just limit the prosecution to companies which are incorporated in England and Wales. We want to be able to prosecute any company which is responsible while operating here. You do not want to confuse that aspect of it with the territorial question. With harm occurring elsewhere, you have the practical difficulties of investigating it in another jurisdiction. There may also be other proceedings in that jurisdiction in respect of that same harm. Obviously, it does depend on where it is. These are the difficulties that Mr Caplan has referred to. It comes back to that same point.

Q119 Justine Greening: Which elements of the offence do you think would be the most difficult to establish in terms of these practical considerations for the territorial application?

Mr Donnellan: I am not really sure, is the answer to that question.

Q120 Justine Greening: Is there one aspect of it that you think would be more troubling to pursue than, for example, other aspects of bringing the case, depending on where the territorial application was decided?

Mr Donnellan: It can be something which is very easy when you are dealing with one external jurisdiction and extremely difficult with another. It may be that most of the operation has been conducted here and a very small amount there. It...
may be that almost none of the operation has been conducted here and all of it in another jurisdiction. It is very difficult to identify when it would be easy and when it would be difficult.

**Q121 Justine Greening:** So it is just the overall complexity?

**Mr Donnellan:** There are a number of factors.

**Mr Antoniw:** There are always complications on the civil side. We have taken cases for many years of people who are injured abroad working for a UK company. There are always difficulties, and there are difficulties in that we do not succeed. The same equally applies I think in terms of this legislation. If the evidence cannot be got together, then there will not be a prosecution, but I do not see any reason why it should be excluded.

**Q122 Justine Greening:** Moving on to which body should be able to pursue and prosecute an offence, again, Mr Donnellan, the Bar Council has commented that in appropriate cases a health and safety enforcement agency should be able to prosecute the offence as well. Obviously, the draft Bill suggests that this should be left to the CPS and the police. To your mind, what might an appropriate case be and would there be any advantages to a health and safety agency actually prosecuting it?

**Mr Donnellan:** I think the simple answer to that is yes, there may be. The health and safety prosecution is an area where the Heath & Safety Executive have conducted investigations. The only comment was really not to restrict it, not to say it could not be, and not to leave it to one agency to prosecute. If there are people with expertise, use that expertise is all we are saying, and whoever prosecutes and whatever expertise they have, make sure they work together—that is a protocol; it is not a statutory matter—to make sure that the case is conducted properly and investigated properly.

**Q123 Justine Greening:** In making that statement, do you have any special instances where you have felt the Health & Safety Executive as an agency would be better placed to investigate than the CPS or the police, or was it just to not exclude them from that possibility?

**Mr Donnellan:** Yes.

**Q124 Justine Greening:** You talked about the way in which the agencies need to work together. In your view, is that already happening or is that something that needs to be improved further?

**Mr Donnellan:** I do not have any experience of it recently so I could not answer that question from recent knowledge, but in a case I was involved in some years ago, there was a great deal of cooperation between the Health & Safety Executive inspectors and the Crown Prosecution Service, who were conducting the prosecution. I do not see it as a problem.

**Q125 Justine Greening:** Obviously, the fact that you may have several bodies able to pursue the prosecution of an offence may mean that you could potentially have multiple prosecutions. Do you think it is appropriate that multiple offences could be brought by various different agencies? Do you think these mechanisms would be used in conjunction with one another, or do you think one of them should take priority in leading the prosecution?

**Mr Donnellan:** It is quite clear that, if you are dealing with something as serious as the death of people, and the charge is of corporate manslaughter, and perhaps an individual can be prosecuted for the same issue, then clearly there should be one prosecution; it should not be done piecemeal. But you will find that is already the process that will happen. If there is proper case management, which is when the court takes control of the case, in so far as it can, if there are outstanding charges, or if there are investigations that have not been concluded, if there are going to be charges, they should either be brought within the main proceedings or left and not brought. You cannot keep on having another go and another go and another go. The courts will simply not allow that to happen. I do not think there is a real fear that that is a practical outcome of having different agencies working on an investigation and a prosecution. On a completely different level, there have been occasions when the CPS and local authorities have perhaps prosecuted different aspects of an incident, but they do cooperate. They work with each other. There are no Chinese walls: “We have some charges we are not going to tell you about.” They do cooperate and try and minimise the number of charges, because what you are trying to reduce is the effect on the people who are going to be witnesses, often the victims of these matters. You do not want to have to be calling them time and time again and making it far worse for them than it is already. So the courts are going to be very severe on any attempt to bring a multiplicity of proceedings. It simply will not happen.

**Q126 Justine Greening:** So it is in the courts where it will be decided which mechanism is used in order to bring the various aspects of a prosecution, to your mind?

**Mr Donnellan:** The practical reality is you are not going to have two different agencies both trying to bring different corporate manslaughter charges. There will be one corporate manslaughter charge. The agencies will have to sort out between themselves which one is the lead prosecution team.

**Mr Antoniw:** I have some direct experience of that, and I would say two things. First of all, where individual deaths are concerned, the cooperation between the Health & Safety Executive and the police is very variable and often quite poor. Where there are big public incidents, the cooperation has been very effective and quite exemplary. It is that variability, and where the individual is concerned, I think there is a genuine lack of interest in actually considering the existing possibility of manslaughter charges. One particular case I am involved in at the moment, we are about to judicially review the Crown Prosecution Service for not bringing manslaughter charges. Whilst that is taking place,
the existing prosecution under the Health and Safety at Work Act has been suspended or adjourned pending the outcome. If we are successful, no doubt the two will work together and there will be one single set of charges brought, with no doubt the Crown Prosecution Service leading the prosecution.

Mr Caplan: I do not think I can usefully add anything.

Q127 Harry Cohen: On penalties, firstly fines, how should the courts determine the level of fine to be imposed?

Mr Antoniw: There are a number of legal authorities which have set various criteria that the courts have to consider as regards penalties. It will be the nature of the undertaking, the size of the undertaking, the seriousness of the particular offences and also whether there is a risk to members of the public if something arose. I mentioned the Avon Bridge case, where there was pressure to impose high penalties for the four deaths that occurred on that. The judge felt that the legal authorities prohibited him from going into the £1 million-plus penalties, because he did not consider that the public were at risk as a result of the negligence that had occurred. If they had been, there would, no doubt, have been a much greater penalty. In the event, two major corporations were fined £250,000 each.

Mr Donnellan: The courts are very familiar with dealing with fines at all levels, and the principles remain the same. You look at the gravity of the offence, and clearly, where the gravity involves the death of somebody, the fine is going to be very high, but then you also look at the size of the undertaking, as has just been said, to tailor that fine to the means of the person that is paying the fine, which is another basic principle that you have to take into account. You will have seen from the fines that were imposed at the end of the Hatfield trial that, where the court thinks that a very large fine should be imposed, it will impose a very large fine. There should be no ceiling on the fine.

Q128 Harry Cohen: Let me get this clear. If you say there should be a link with what the company can afford to pay, perhaps that is a link to the company’s turnover. Are you suggesting that that is something reasonable that a judge should take into account? Then should it be higher than health and safety fines that would be imposed? The third point that you are making is you are saying there could be a very punitive fine if beyond the life of a worker being at risk, the life of members of the public is jeopardised.

Mr Antoniw: Yes. If, for example, there are members of the public that are killed or are seriously at risk of being killed, you are talking under the guidelines about penalties that go into the £1 million plus, £2 million, etc. Below that, prosecutions under the Health and Safety at Work Act average roundabout £30,000 or so.

Mr Caplan: You must realise that it is not what we particularly think; it is what on authority the courts have decided they can do. It is what the courts have said.

Q129 Mr Rooney: Do you think there is ever a case for punitive damages as against a fine, or in addition to a fine?

Mr Antoniw: I think there is. In the submission I made, one of the suggestions I put there was punitive damages, because when you look at punitive damages in terms of the victims, or you can talk about a punitive fine that does not go to the victims, there are two particular options. I actually quite favour the concept of punitive damages, a punitive penalty that is actually paid to the victims, the families of the victims, that may well be decided by the jury, what they think actually reflects the public feeling, what they think is an appropriate payment to punish the company for its gross negligence which has resulted in the death of a family member. To some extent, that then encompasses at least some form of justice which is heading towards the victims’ families themselves.

Mr Caplan: Much as that may be attractive, the difficulty is that judges will always say to the jury “The question of sentence is a matter for me and not for you. You decide whether someone has committed the offence.” The second difficulty is you are beginning to blur the boundaries between someone being sentenced for the offences and damages, which is a civil matter. I think there are dangers in that course.

Mr Antoniw: Except we already have a situation where if somebody is assaulted and someone is prosecuted, they can be ordered to pay compensation to an individual.

Mr Caplan: Certainly, yes, but I think there is a difference between that and the words used by Mr Cohen.

Q130 Harry Cohen: That was a helpful exchange. In an earlier evidence session we had, one woman who gave evidence argued for the possibility of freezing a company’s assets, a restraint order really, to avoid them going bankrupt till a decision could be made. Would you favour that as a course, a restraint order to freeze a company’s assets, and at what stage could it be done, even while it is being investigated?

Mr Caplan: Yes, it can be done now in other matters under the Proceeds of Crime legislation. For other offences it can be done, therefore there seems to be no reason why in suitable cases it could not be done if a company is going to be prosecuted, especially if you think, firstly, there is a real risk of that company, for example, going into administration and there would be no money for a fine, or by taking its funds elsewhere. So the legislation is in force for other offences, and I do not see why you could not do it here.

Mr Antoniw: On the basis that there might be civil remedies anyway, there is already the prospect of injunctions to prevent assets being disposed of, or to preserve them.
Mr Donnellan: That is the distinction I would make. It is not to confuse what we are dealing with, which is a criminal offence with a criminal penalty, but that fact does not preclude there being civil proceedings over that same matter. A road accident is a classic example. If you prove in court that somebody drove dangerously, that effectively establishes a liability for the civil action, and in civil actions you can restrain the assets, you prove the civil liability easily, and you get the damages, or go straight to the issue of damages. Compensation is a very difficult issue in the crown court, where simple compensation can be ordered and that can be done, but if there is any complication, the authorities say that you should not order compensation; you should leave people to their civil remedies to sort that other matter out, because compensation is a short-circuit of the civil proceedings.

Q131 Colin Burgon: Just on this question of penalties, would it be an argument you would put forward for the disqualification of directors, for instance, if they were in contravention of any proposed legislation surrounding corporate manslaughter?

Mr Antoniw: Yes, I think so. I think if you can identify that there are individuals there who are failing in their duties and/or are subsequently failing to remedy actions themselves, or by reason of this event and previous past history you consider they were not fit to carry out those duties, I think that is perfectly proper and desirable.

Q132 Harry Cohen: My colleague, Terry Rooney, put this question in a different context about if it is Crown, the taxpayer pays, the taxpayer is fined, but I want to get it clear. Do you think the same sanctions, the same penalties, should apply across the board, to corporations and the Crown, or should they be differentiated in any way?

Mr Antoniw: I think they should, but the problem is that at the moment the only real penalty talked about is a fine. I think there are many more imaginative forms of penalty that could be introduced. If the objective is to actually get an organisation to change its ways so that you prevent further fatalities and so on, I think you need to look at things like the specific role and duties of directors. I think you also need to look, for example—and I think it was introduced in Canada—at this idea of corporate probation, where a company has been told “You have committed these outrageous acts which have resulted in deaths. We will put you on corporate probation”, maybe the Health & Safety Executive will effectively be the probation officer, but the company has over a period of years to show that it has not just paid a fine and that is the end of the matter, but it is genuinely remedying its ways and properly considering failings and problems that have occurred within the company that have led to deaths, and report back periodically to a judge. If they fail to satisfy the court that they have genuinely changed their ways, there are options in terms of the actual operation of safety or the role of directors of penalising directors, disqualifying, suspending directors. There is a whole number of far more imaginative options.

Q133 Harry Cohen: Crown corporate probation?

Mr Antoniw: Absolutely.

Mr Donnellan: I take a slightly different view to this extent, that I think the power to order the breach in Clause 6 of this Bill is in effect a form of probation that has just been described. It is the probation you really want, you do not want them just generally to get on and be good chaps, what you want them to do is remedy what they have done wrong and show that they have remedied it. That is why we would ask that Clause 6 be clearly identified and a structure put in place. It is rather loose at the moment, the court will do it but really there needs to be clear identification of who is going to investigate that the compliance has been met and who is then going to be in a position to bring the charge under Clause 6(4) when that failure has not been dealt with or, alternatively, to deal with it as a contempt of court, or whatever, and bring it back before the court in that way.

Q134 Harry Cohen: There are already remedial orders under Health and Safety legislation, which I do not think are ever used. Why should they be used any better under this new legislation?

Mr Antoniw: I think with a one-off remedial order I am not sure it adds very much to the existing powers there are. My other concern is that by the time you get to court, to have a remedial order made, the contract has probably come to an end. If it is a building site they will have moved on somewhere else. The remedy in terms of that particular project is too late to do very much about it, unless you are talking about the way in which the company operates and its structure. If you are talking about that, then you need something far more sophisticated than a bland order, you need something like a form of corporate probation that is far more holistic in the way in which it analyses the operation of the company.

Q135 Chairman: Briefly, have courts got the ability and the expertise to set up a remedial order? It is one thing to identify a serious management failure, it is another thing to tell a company how to do things differently.

Mr Caplan: I think the answer to that is obviously a judge normally as the judge will not himself have the expertise but he is going to rely on recourse to him from those who do and he will give the party an opportunity to address him as to what should be done. It may well be the prosecution will advance one report which says some order should be in place for a certain length of time and the defendant or prospective defendant, if there is some kind of interim relief, will be saying “No, it should not be and here is our expert”. Judges are very used to determining and making decisions which one it should be.
Q136 Chairman: Mr Antoniw raised the issue of the company where remedial may be too late by the time a remedial order is made, alternatively it may be obvious at the very beginning of a case that there are some serious problems in the management of a company, irrespective of whether a conviction is finally achieved. Is there any case for enabling the court in some way to make I suppose you would call them interim remedial orders, some early action to put things right before the criminal case gets to the end of its hearing?

Mr Caplan: Again, yes, there should be potential power but I think the Health and Safety Executive do have the power to order a company in certain circumstances to take remedial works. They can issue a notice and effectively, I think, from my memory, close down a company if they do not comply with that. My colleague is nodding so I am rather relieved that I may be right on this point.

Q137 Chairman: One very final point, prompted by the earlier exchange where you all seemed to acknowledge in one way or another the fact that a fine might be related to the turnover or comparative size of the company, as people doing criminal law does that cause you any difficulty? The Home Secretary recently said he was not planning to introduce fines that were related to the individual’s ability to pay in normal criminal offences but we would be introducing that principle into the criminal offence of corporate manslaughter, or is it the only practical way to deal with this issue fairly?

Mr Donnellan: I would say it is the only practical way because if you are going to make somebody pay something, you have to assume they can pay it. If you impose a fine on somebody they can never pay—just talking in general terms—then it brings the use of the fine into disrepute. In the end you do have to tailor it in some way. I am not suggesting turnover—was a phrase that was thrown out at me—I was not suggesting that at all, it might be against their assets or whatever. Any sentence that has got to be imposed has to be something which can be seen through to an end, otherwise it becomes pointless.

Chairman: Fine. Thank you. Can I thank all three of you, it has been a very helpful session.

Witnesses: Professor Frank Wright, University of Salford, Mr Lawrence Waterman, President, and Mr Michael Welham, Member, IOSH Council of Management, Institution of Occupational Safety and Health, examined.

Q138 Chairman: Good afternoon. Thank you for joining us. Perhaps each of you could introduce yourselves briefly for the record.

Mr Waterman: Lawrence Waterman, President of the Institution of Occupational Safety and Health, and it is in that capacity I am here this afternoon.

Mr Welham: Michael Welham, I am also here for IOSH. It might be worth just saying up until January of this year I was with the Health and Safety Executive and actually investigated and helped to prosecute manslaughter at work cases. I have two hats, if you want, with knowledge coming here under the IOSH umbrella.

Professor Wright: I am Professor Frank Wright. I have been researching in the area of health and safety law for 30 years. I have served as an expert over that period for the International Labour Organisation, the European Commission and the Health and Safety Executive. Probably at this point I should say I have just completed two major studies on director disqualification for the Health and Safety Executive, and I can talk about that if you wish.

Q139 Chairman: Thank you very much indeed. Could we start with you, Professor Wright. You have looked internationally at things and you said specifically to us that the Government might have looked more at the European experience. What do you think we should learn from looking at the way that other EU Members plus Netherlands and Finland have addressed the question of liability for corporate crime?

Professor Wright: With respect, I think that as a nation which is very concerned about inward investment and about aligning ourselves with other successful industrial countries, we should seek to move along together with other countries in this respect, particularly I think with the United States and with the European Union. The standards which we apply should have some resonance I think in other countries, not least because many of the directors will be drawn from those other countries. There are a number of major companies in the United Kingdom which are in effect controlled by directors in the United States, for example, and also have European bases and have significant control from other parts of Europe, so we are very much inter-related nowadays and that is important, I think. Also I think it is important to recognise that this is a movement, we are not stuck in time, and the Council of Europe, the European Commission, have issued important reports recently indicating the bases for the development of this area of the law. I made particular example of two advanced countries in this context, the Netherlands and Finland. I think we have an emphasis in this Bill on culpable individuals, when I think, arguably, we are talking about organisational failure. I think we should bear that in mind, that some countries have characterised this as organisational failure, that is Finland and the Netherlands, and I think the Federal law of Australia also does that. There is evidence that other countries are considering this, so we ought to have this in mind at least, if we cannot do it now, well perhaps we should be thinking of that rather than focusing on individual blame of quite senior people. It may be that it is their “fault” but it may be that it is not.

Q140 Chairman: You say that there is a focus on the individual failure but, as I understand it, the individuals come into this only because it is a
necessary step, to get a prosecution on this law, to identify the level in the company to which responsibility lies, that of senior manager. The outcome—many people criticise the Bill for this—does not hold individuals liable, it is the company that is held accountable. Probably the bulk of evidence we have had from victims’ organisations and trade unions has said the problem with this Bill is that it does not hold individuals liable. Is it really fair to say that there is a focus on individual liability in this Bill or will be seen as that by somebody looking in from across the channel?

Professor Wright: It seems to hang around this question of culpability of so-called senior managers.

Q141 Chairman: Yes.
Professor Wright: I have some issues relating to that but I think what we are concerned about here—and we are dealing with all kinds of companies, not just the large ones, I suspect—we are really interested in organisational failure, whatever the size of the corporation. It is another issue, a very important issue, of course, as to whether there has been individual failure as well.

Q142 Chairman: If you follow through the implication of what you are saying, in the places that do not have an emphasis on identifying individuals, senior managers or whatever, is the consequence to make it easier or harder to secure a prosecution?
Professor Wright: That I cannot say with any reliance because I have not looked at that particular aspect about the chances of conviction.

Q143 Chairman: Okay. Can I ask, you said in your evidence you think the requirement to establish that management failure has caused a death will prevent successful prosecution, why is that?
Professor Wright: I thought that there was a problem in relation to clauses 2 and 3 of the Bill taken together. I think that 3(1) is perfectly reasonable, and one can understand that, but I think there are issues surrounding the “senior manager” that are identified here, there are issues surrounding the legislation or guidance element in relation to gross breach and also issues surrounding the provision “sought to cause the organisation to profit from a failure”, that aspect as well. I am not sure that there is a clear link between 3(1) and the rest, that causes me some concern.

Q144 Chairman: You heard the evidence—I know you were in the room—of the previous three witnesses who all said it would be a lot easier if we had the original Law Commission formation on causation in the Bill, do you agree with that statement?
Professor Wright: Yes.

Q145 Chairman: One different point, Professor Bob Sullivan, who I think you will know, has argued with others that we should forget about this entire enterprise of having a separate corporate manslaughter offence and just have aggravated versions of the existing health and safety legislation, what do you think about that?
Professor Wright: I think we have probably gone too far for that. I think in the public mind this is expected and that has to be taken into account.

Q146 Chairman: If we were not where we are now?
Professor Wright: That is right, if we were not where we are now we could have a different discussion, perhaps, but I think we have gone too far.

Q147 Chairman: Mr Waterman, what is your view about that?
Mr Waterman: I think there is more to it than simply looking at the scale of penalties in some spectrum and manslaughter happens to sit on the same spectrum. If I can cite the example of Nina Bawden regretting that there was not a manslaughter charge that could stick over the rail crash at Potters Bar. She talked about the fact that it meant that there would be no criminal prosecution. I think in the public mind health and safety at work offences are just in a completely different league from something called manslaughter. The level of public opprobrium that would be attached to a company convicted of this offence means that it would represent social disapprobation for what they have been responsible for, so just a completely different category.

Q148 Harry Cohen: Professor Wright, you said you had a number of issues surrounding the senior management test, I wonder if you can summarise some of those and how they could be addressed? Professor Wright: I think it is pitched too high. I think the problems that we found with Hatfield, the problems that were undoubtedly there in the consideration of Potters Bar, are probably going to be replicated in this legislation unless we make some changes because if you think in a large corporation “who is such a person”, there will be very few that are able to satisfy this test, I would say, because most of the decisions are made collectively or a number of people participate in them. It is quite rare, I think, in a very substantial company, such as those that were being considered in the Hatfield prosecution, for one person to be in this position, that is why I have a difficulty with senior manager in this form. If I might say so, I think the problem is that it is quite easy nowadays to convict the smaller company and the larger companies, if you like, take the spotlight but most of the companies fall between the two and the law is ineffective there. I think that is a problem, it would be ineffective with this Bill with this terminology.

Q149 Harry Cohen: Could you not have statutory duties on the company, which some have argued should be in this Bill anyway, and delegation of those perhaps to a manager or senior figure in the company? Do you think that would be helpful or not?
Professor Wright: It would mean that we would want to redefine the term senior manager to embrace others, not because we wanted to apportion liability
to individuals but because we wanted to deal with the true problem, which is that of organisational failure.

Q150 Harry Cohen: Mr Waterman?
Mr Waterman: If I could comment: we understand at the Institution why the wording has been selected because it is meant to distinguish between individuals who are making decisions that are the equivalent of frolics of their own and the extent to which there was something systematically going wrong in the organisation that has given rise to a death and trying to draw the distinction. The way it has been worded runs the risk of reproducing the controlling mind problem that we have got at the moment. At the moment you get to a large organisation, no single decision is made, it is a whole series of very small judgments that give rise to the outcome that you are trying to pin down. We think that the earlier wording—agreeing with the previous witnesses—which talked about falling below standards to be reasonably expected, management failures, et cetera, that sort of wording clearly obviates the risk of getting back in to “can you pin this to a few senior people in the organisation and thereby sustain a conviction for corporate manslaughter”. We were happier with the earlier position I think.

Q151 Chairman: Can I just ask, Professor Wright, is it true that all research to date has supported the introduction of statutory health and safety duties on directors? This point was put to us by the CCA last time, and you said you had done pieces of research on the statutory duties of directors so we thought we would ask.
Professor Wright: The Company Directors Disqualification Act of 1986 is the statute in question. Powers available under section 2 of that Act for the disqualification of directors for a whole host of reasons have not been widely used, but they could have been. It is not that legislation needs to be introduced—

Q152 Chairman: No, we need to use the legislation we have got.
Professor Wright: That is right, and we can but we do not. It is widely used, as many of you will know, in the area of insolvency, 30 disqualifications a week in that area.

Q153 Chairman: The point is it was suggested to us in the last session that whatever research had been done on this issue, which looked at whether or not those powers should be brought into force, have come out in favour of them. Can you confirm whether that is true or not?
Professor Wright: Yes. I think the problem is this: much advice and guidance which is referred to here has been directed at management incorporations; it has not been directed at boards, it has not been aimed at directors. If you look at the guidance which is available for directors it is very sparse indeed and

Q154 Chairman: If you did that, do you think the effect on health and safety and avoiding the sort of killing that we have been concerned about would be beneficial?
Professor Wright: It would be beneficial if we developed the direct guidance and then proceeded from there.

Q155 Chairman: You give guidance and then you make legal binding duties and they follow those?
Professor Wright: Yes.

Q156 Chairman: You would be in favour of that?
Professor Wright: Yes.

Q157 Colin Burgon: Coming to the issue of the relevant duty of care, some of the submissions we have had so far from the unions and the CCA have said that sections 2–6 of the Health and Safety at Work Act probably are more effective pieces of legislation and probably could trump what is intended in the draft legislation. Would it make more sense to base the offence on breaches of the statutory duties contained in those clauses in the Health and Safety at Work Act rather than the duty of care in negligence or would you say it would be better to avoid the whole concept of duty of care altogether?
Professor Wright: No, I think that a decision has been made earlier on to use the duty of care in negligence, I do not see anything which is particularly damaging in doing that. They are in effect fairly similar, although the duties in sections 2–6 of the Act are wider. I do not think that it is going to defeat the purpose of the Bill to stay with the duty of care as it has been expressed, with the caveats that we had in the previous discussion; I thought what the three gentlemen said there was fine, I would agree with those.

Q158 Colin Burgon: Mr Welham?
Mr Welham: In addition to that, the Health and Safety at Work Act section 2 and section 3 in particular—section 2 it is the duty of every employer to ensure so far as reasonable and practical health, safety and welfare at work of all its employees, and section 3 it is those who are not employed but affected by that activity—that encompasses what we are talking about here. If you look at failures under the Health and Safety at Work Act, very often it is because of the management failure that we have ended up with an incident.

Q159 Colin Burgon: IOSH have been critical of the proposed limitations on the situations in which a relevant duty of care would exist. You have been looking as well at the Health and Safety at Work Act. Why should the duties set out in section 3 of the Health and Safety at Work Act 1974 be treated as relevant duties for the purpose of the offence?
Mr Waterman: Essentially section 2 says if you employ people you have a duty so far as is reasonably practical towards them for their wellbeing and section 3 simply extends it to the rest of the universe. Those two sections are extremely useful, in two paragraphs they summarise a general duty to conduct your undertaking in a way that does not result in foreseeable harm arising where you can take reasonably practical steps to avoid that harm or at the very least mitigate it should it arise. Because we are talking about health and safety failures, management failures, being able to discuss that in the same language in the Corporate Manslaughter Act, as in health and safety legislation, lends itself to a degree of clarity. That is why we believe that accompanying this with, perhaps, our recommendation would be not a change in statute but an Approved Code of Practice for directors’ good behaviour. Then breaches of that Approved Code of Practice could be cited in any move to disqualify directors. That would put a wrapper of health and safety law around all of the offences that we are dealing with and around the descriptions of good and best practice. This would lead to clarity and avoid conflicts in the language being used to describe the different breaches because of the outcome being different. If you can be prosecuted under section 2 or 3 because what has happened has not resulted in a death, it would be extremely useful if the discussion around the offence associated with an outcome which did include a fatality could be in the same language, using the same definitions.

Q160 Colin Burgon: Do you take the same view, Professor Wright? Professor Wright: I do not have a valid disagreement with what has been said.

Q161 Colin Burgon: Does that mean you agree? Professor Wright: I just want to allow matters to proceed. I am wondering if we make such a radical suggestion at this stage whether it might stop the process.

Q162 Colin Burgon: Mr Welham, do you want to add anything? Mr Welham: At the moment, the Health and Safety Executive’s Approved Codes of Practice are used because it sets down a standard and the judiciary and juries are able to read very clearly what is required. We already have directors’ responsibilities issued by the Health and Safety Commission. Now if what was in there was expanded and developed into an approved code of practice, first of all senior management, whatever they may be termed: boards, at that level: will know and understand what is required of them and so will the courts when there is an infringement and they are prosecuted.

Q163 Chairman: Just so I am clear, is there a serious possibility that somebody could die as a result of a breach of section 3 but because of the way the duty of care is framed in the draft legislation the company could not be prosecuted for corporate manslaughter? Is that part of your reason for wanting to bring section 3 in?

Mr Welham: I think why we are saying section 2 and section 3 is because it is very easily and very clearly worded, and it is well established through the Health and Safety at Work Act now.

Q164 Chairman: I may have misunderstood, does the danger I have described exist? Mr Welham: No, I do not think so. Mr Waterman: We do not think so.

Chairman: I may have just misunderstood. Thank you.

Q165 Justine Greening: Moving on to the gross breach test and obviously juries’ ability to look at existing health and safety guidelines in determining whether a gross breach has occurred, in fact they are required to do by clause 3 of the draft Bill. Do you think they should be required to do that? Is that a good proposal in the Bill or not, Mr Waterman?

Mr Waterman: We are very satisfied with that test. One of the aspects of health and safety law is that it ceases to be very detailed and prescriptive as to exactly what you should do but more obliges you to engage in certain processes and make judgments that will change over time as new technology becomes available in order to control a risk or knowledge becomes available about something which hitherto you had not understood was a risk. That is why having a general duty to do what is reasonably practicable means that as an employer you are obliged to review guidance and make judgments about what good practice looks like, what reasonably practicable means. For 30 years juries have been reasonably competent at looking at that good practice, evaluating evidence presented in court and making a judgment as to finding the defendant guilty or not guilty on health and safety offences on that basis.

Q166 Justine Greening: Do you think there is a risk that if health and safety guidance proliferates it is unreasonable perhaps to expect every single piece of guidance to be adhered to and that any one can be used as a proxy, if you like, for saying that a gross breach has occurred?

Mr Waterman: To come back to the facts of the case, it would be very difficult to mount a prosecution based upon an obscure sub-clause of a leaflet that was around in a particular sector of industry for just a few months. I think when you are talking about gross breach, you mean that there is a whole sequence, that at various points management really should have availed themselves of knowledge of what was going on and recognised that it was falling below standards which similar employers in their sector, for example, were preventing happening because of the way that they managed their businesses. I think the use of the word “gross” would prevent the inappropriate prosecution based upon obscure guidance proliferating or otherwise.
Q167 Justine Greening: Thank you. Mr Welham, anything in addition?

Mr Welham: The only thing in that section which does cause a little bit of concern is the profit element and how you determine profit and get to grips with that, that becomes a bit difficult. I think, as was said earlier, between the various subsections it is and/or which should be introduced there and that gives the option and flexibility for those who are prosecuting and even defending.

Q168 Justine Greening: Professor Wright, I think in the context of the health and safety law and guidance, in your submission you did comment that the codes of practice were not originally intended to be used in this manner. Does that really matter at all, do you think?

Professor Wright: I think it might matter in terms of your proliferation point because there are more than 400 local authorities which could issue this guidance. There is much guidance which is issued by the Health and Safety Executive, by the Health and Safety Commission. It has been issued at different times, it has been written by different people, it is not governed in the same way as legislation or approved codes of practice. It might be possible to find conflicts, certainly it is a situation where there are many gaps where guidance is not issued in relation to some areas, even quite dangerous areas, because it is left to the industry to do it, for example, and that is not covered here. I am concerned at the bottom end, if you like, by the proliferation and the quality of the guidance which is available.

Q169 Justine Greening: Mr Waterman, I think in the submission IOSH put in you wanted to extend the concept of what relevant guidance would be to include trade or advisory bodies and guidance that had been issued. Do you think there is a danger that if that happens such bodies might be quite reticent about bringing forward more guidance in the future?

Mr Waterman: Most trade bodies issue that sort of guidance to benefit the reputable members of their organisations and partly to protect them from unfair competition from people who are skating on rather thinner ice in terms of health and safety. Increasingly, looking at the Health and Safety Commission’s Ten Year Strategy, it is quite likely that industry guidance published by trade bodies and others is going to become the norm rather than plugging odd gaps. We think it is important that is recognised as contributing, in a way the industry is saying to itself “We have defined this as a reasonably practicable way to run this sort of business in this sector addressing these risks”. Again, the test of gross breach we think would protect organisations from nit-picking prosecutions. It would have to be fairly clearly a falling below standards which were the norm in that particular sector.

Q170 Justine Greening: Within those companies, obviously, then they have to apply the guidance or not in their decision. Do you think there is a danger, also, that in a sense they will not look for risks in case if they find one they are then potentially prosecutable because they did not address it? Do you think that is a danger as well?

Mr Waterman: Being ignorant of a risk is not really much of a defence, it is a bit like saying you are ignorant of the law, “I did not realise this was a speed-controlled zone” or whatever. Part of the argument about a gross breach is that if you are putting your workers or members of the public at risk then you have got an obligation to ask serious questions about what risks are going to arise from this activity and what should we be expected to do about it, and seek competent advice and contact your trade bodies to find their guidance or whatever. I think it is covered on the basis of normal good practice right across commerce and industry.

Q171 Justine Greening: One of the aspects of the Bill that has been debated is the aspect of territorial application, as to whether a company can be prosecuted for deaths occurring abroad for example, and the draft Bill proposes that it should be limited to deaths occurring in England and Wales. How do you respond to the Home Office’s suggestion that the offence would be unenforceable if it did apply to operations abroad of English and Welsh companies and that it would be quite difficult to gain the evidence that was needed to bring such a prosecution, Mr Waterman?

Mr Waterman: We agree that it would be very difficult to adduce the evidence but we would like to see a bit more effort in exploring how it might be done. If the chain of decision-making of the central responsibility resides in a company, for example, headquartered in England and Wales, and the decisions that had been made were being implemented in another jurisdiction, we think that there ought to be serious consideration as to whether or not it would be proper to investigate that and if necessary raise a prosecution. It could be on the basis that there can be all sorts of bilateral agreements so that if there are similar laws in a country where the death occurred and the enforcing authorities in that country were to investigate them, they would take precedents, et cetera. We are not coming up with a hard and fast “this is the way it ought to be” proposal but we think it has been dismissed rather too readily in the Home Office’s position, that is all we are saying. It deserves, we think, rather closer scrutiny. I quite liked what one of the witnesses in the previous session said which was that perhaps it would not be appropriate to delay the bringing in of this Bill while that was being explored, but it could be that Parliament was minded to revisit this for subsequent development of the law.

Q172 Justine Greening: Professor Wright, would you have anything to add to that?

Professor Wright: I hope that we might be able to see some progress in this area within the European Union.
Q173 Justine Greening: Again to IOSH, you do propose that we should at least consider having an offence applied to deaths abroad which are caused by grossly negligent behaviour which occurs in England or Wales. Do you think this may dissuade high-risk businesses from running their operations in England and Wales?

Mr Waterman: Our experience, for what it is worth, I represent 28,000 members and we polled them, and just under 2,000 people responded to the poll and over 80% of them were in favour of this Bill but with some of the qualifications which we are expressing here. Companies that are multinational and operate on a world scale tend to be companies which recognize the cost of good health and safety management is good business. I have yet to see an example of a company operating on that kind of multi-state basis which would argue that tight health and safety regulations in one place or another were inimical to them doing business.

Mr Welham: If I may just add in there, a classic example is the North Sea where we have very stringent regulation in the North Sea for oil and gas extraction but worldwide where they are exploring, such as Russia and other parts of the world where there is not the comparable legislation there, the companies still continue to operate and they still operate to the high standards.

Q174 Natascha Engel: Moving on from that point, do you think that this Bill would increase the regulatory burden, the red tape generally, and looking at the business case for it?

Mr Welham: I do not think it will because I see it as an extension of the Health and Safety at Work Act as it stands now. This is an extension, we are now looking at a more serious breach and failure. If a company is doing what it should be doing with all the systems in place, and working on doing it properly, then it becomes very difficult for the regulator to prosecute because you are looking for the thing called evidence and evidence is very difficult if they have got everything in place, and there has just been some small breach. What in some cases might be corporate manslaughter in others will remain as a Health and Safety at Work Act offence.

Mr Waterman: There will be some small transitional additional costs. Those of us involved in health and safety practice are aware of the huge number of boardroom briefings, director training courses, et cetera, which always get stimulated, they have been the three times this issue has come up through the Law Commission. There will be an increase in awareness amongst directors and that has got a penalty in terms of time commitment but that would be beneficial and we think it would encourage greater seriousness. I think there is a general recognition that what this new Act would mean is introducing some fairness. I think in a lot of larger organisations there is recognition that very small businesses can be prosecuted currently because the controlling mind argument can be proven whereas in large companies with multi-layer decision making they know that this is not fair. There will be some small transitional cost but if you are complying with health and safety legislation you will be able to defend yourself against any possible prosecution in connection with this offence.

Q175 Natascha Engel: Did you want to add anything?

Professor Wright: I do think that we are reaching the point of over-regulation, that is not to say that I think this Bill should be stopped on that basis but I think we need to keep a very careful watch on these things. When one looks at the progress of regulation since the 1970s, for a whole host of reasons we have quite a huge statute book in this area and we need to look at that carefully for business efficiency reasons and so on.

Q176 Natascha Engel: Another very general point: do you think that as a result of this Bill, if it was introduced, health and safety standards generally would be improved?

Mr Waterman: I think, for the reasons that I was referring to earlier, in general you can argue that this is a bit of a strange piece of legislation in that the same incident that could be a breach of section 2 or section 3 of the Health and Safety at Work Act because of the accidental happenstance of the outcome results in a company being prosecuted in this way. There is no doubt that having a manslaughter charge as a possibility will further focus minds, concentrate senior managers and directors, trustees of charities, et cetera, on making sure that they really are managing their organisation in compliance with accepted standards. We think it encourages good practice but it needs that directors’ and trustees’ code of practice in order to make it clear what those standards are.

Q177 Natascha Engel: Mr Welham?

Mr Welham: I have had practical experience where a company we were investigating lost work, they did not get contracts because they were under the umbrella of a potential corporate manslaughter charge and other people did not want to be associated and they lost a considerable sum of money. When I spoke to the board of directors after that—it is a very large company—they said that, combined with their legal bill, it had changed the face of that organisation. The fact that corporate manslaughter is potentially looming under the current legislation, it does focus the mind. We might well have a Bill and hopefully we will never use it but potentially it does focus the mind because from Health and Safety at Work Act offences you have suddenly moved into in such cases corporate manslaughter and that is a big effect.

Q178 Natascha Engel: Professor Wright, do you have any comments?

Professor Wright: I think it increases the fear factor. I think the task then for us is to ensure that we engage boards of directors in this process which leads me back to the point which I first made which is that we must give better guidance to directors about their roles and responsibilities. It will help with that because it will cause, as I say, a new level of fear.
Q179 Gwyn Prosser: Mr Welham, as you know the Bill provides powers to the court to put remedial orders in place. We had a discussion about that with our friends from the legal sector. There is the thought of would the court have the expertise and knowledge to safely do that, and that advice could come from the Health and Safety Executive or other experts. Do you think that is a practical proposition? Mr Welham: Yes, because that is what happens now. Initially when there is a serious or a fatal accident anyway the police and the HSE are involved. Generally—I have to use the word generally—the HSE will issue a prohibition notice and stop a particular job going on until it is investigated, reviewed and it is safe to continue with that process. If there is a requirement they can issue an improvement notice and specify what they want done to improve the standards and development. That is there now so that will continue but rather than the HSE issuing the notices immediately, if there was any concern then the court can authorise or order for that work to be carried out, and make that an order as opposed to the HSE with their system. You use the professional bodies with their experience and knowledge.

Q180 Gwyn Prosser: Finally, Mr Waterman, in the IOSH memorandum you recommend that it might be appropriate to suspend penalties and fines until remedial orders are satisfied and the court is satisfied the work has been done. Is there a danger that will be diluting further the sanctions against companies? Mr Waterman: What we are arguing, I think, is that there is a general move in the HSE to discuss what are usually referred to by the HSE and the Commission as innovative penalties in order to leverage improvements in organisations. What we are suggesting is that a mechanism which could be explored would be to say “Normally we would be fining you X and we are going to fine you something less than X but the full fine comes into force if you do not satisfy us that you are taking other remedial steps”, particularly where those remedial steps are a little vaguer than sometimes can be drafted in an improvement notice to get senior management and directors to be a bit more committed to health and safety, to develop their own knowledge and expertise and to begin to drive the organisation in a different direction. The idea was to perhaps assign a financial incentive for organisations to do that in the medium term in addition to the immediate penalty and the opprobrium of having been convicted of such a serious offence.

Chairman: Good. Thank you very much indeed. It has been a very helpful session.
Monday 7 November 2005

Members present:

Mr John Denham, in the Chair

Mr James Clappison
Harry Cohen
Mr Philip Dunne

Justine Greening
Gwyn Prosser
Mr Terry Rooney

Witnesses: Mr Adrian Lyons, Director General, The Railway Forum; Mr Aidan Nelson, Director of Policy and Strategic Initiatives, Rail Safety and Standards Board, examined.

Q181 Chairman: Good afternoon. Thank you very much indeed for joining us. This is the third public hearing the Committee has held looking at the Draft Corporate Manslaughter Bill. I wonder if you could introduce yourselves for the record?

Mr Lyons: My name is Adrian Lyons. I am director general of the Railway Forum.

Mr Nelson: Aidan Nelson, director of policy and strategic initiative for the Rail Safety and Standards Board.

Q182 Chairman: Can we start by looking at the question of the costs for companies that are implied by the Bill? As you know, the Government has suggested that there would only be any major costs arising from this Bill if companies already do not have adequate and proper health and safety arrangements in place. Would you agree with that?

Mr Lyons: Yes. I would not want to start with costs because the issues are much larger. We are dealing with very serious matters of corporate behaviour but in broad terms I think you are correct. The direct costs fall into two groups. One, the legislation under such enactments tends to be very expensive. Therefore, any Bill that turns into an Act must have some chance of success of prosecution. We have been through a number of cases where costs have lain between £2 and £15 million so the taxpayers' interests need to be protected. Secondly, the other direct cost. Despite what is said, I am pretty sure that two things will happen if this reaches the statute books. Firstly, companies will need to look at their corporate governance structures, particularly the more general slow down that took place across the rail network after the Hatfield crash. The reality there is complex, organised businesses, and that is going to be reasonably expensive; and smaller companies for different reasons because they are small. Although they may be told that just following health and safety at work legislation is fine, they will be very worried and cautious about this Act, but cumulatively we are talking about costs in the low millions across the railway industry. Those are not big issues. The big issue is indirect costs. One has to worry for an industry that has been through the grinder. The issues of risk aversion have brought costs to the industry which have been very considerable.

Mr Nelson: I concur with the Railway Forum's view that the direct and indirect costs relating to litigation are relatively low. My concern and that of the Rail Safety and Standards Board is that we do not drive in inappropriate behaviours, that we are not so risk averse that people keep backing off decisions which would drive cost into the railway industry.

Q183 Chairman: Can we talk about risk aversion? You have already been prosecuted for pretty much the same offences as corporate manslaughter under health and safety legislation, though the title would be different. Can you explain what drives risk aversion in the railway industry and why you think this Bill might lead to more risk aversion when other legislation does not directly drive it?

Mr Nelson: In part it is linked to the concern of individuals that they are going to be subject to litigation. With the Bill as currently drafted, that is not the core proposition. We need to make sure that there is appropriate education within industry, that this is not about not taking decisions. It is not about putting off or even escalating decisions. If you run your business in good practice, within the scope of the commissioning regime that there is now for railways and there is a clear understanding that there is not about not taking decisions. It is reasonable to assume, is it not, that if this Act does reach the statute books, the fewer loose ends it has the better because loose ends will lead to confusion. If people...
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Q185 Chairman: Mr Nelson, do you want to add anything to what you have just said about education, particularly how you think that education should be carried out?

Mr Nelson: It is a tripartite responsibility in that the trades unions are involved, the management and other regulators of activity are involved, both in terms of general health and safety and in terms of railway specifics. I believe that the parties need to discuss how they are going to take this forward to provide appropriate reassurance to people that this is not inappropriately targeting individuals.

Q186 Harry Cohen: In both your memoranda you argue that individual liability is separate from corporate liability and remains as such, but we have already heard evidence that fines, for example, can be pretty meaningless or unfair in the way that they apply. Some of the safety representatives said that a company cannot change its behaviour unless you get to the decision makers in that company and you have a real incentive to change. How do you respond to the fact that you can only get a company to change if you get to the decision makers?

Mr Lyons: You are right to have these concerns. On the other hand, we are talking about a Bill which is effectively based on corporate behaviours. It would be a very big jump to move from taking a Bill associated with corporate behaviours and making it apply to individuals and to have specific action taken against individuals. I do not think you want to underestimate the impact of fines on business. They bring severe reputational risk with them as well and of course the individuals who are involved—again, I speak for the railway industry which is small and close knit—are well identified. It is a very unpleasant process to go through for all concerned. The businesses would go a very long distance not to be involved in anything like this sort of activity.

Mr Nelson: I agree entirely. What we are addressing here is failure of a company’s management system and in particular the safety management system of that company. That is a company system that has quite a pervasive impact on the company. I do not think that is the right vehicle for dealing with gross negligence of an individual for which the statute already provides a way ahead. Indeed, in a railway context, the 1861 legislation is still in place to deal with that, along with the general provisions in the Health and Safety at Work Act. I believe it is about management systems and management systems having that responsibility.

Q187 Harry Cohen: It has not dealt with any individuals in relation to the recent big railway accident cases, has it? There have been fines on the companies and boards but not on any individuals.

Mr Nelson: I have to be careful in that I am not sure if we are out of time for an appeal on Hatfield. We are certainly sub judice on Tebay. That comes to trial in the New Year. On the others, investigations are still continuing. I cannot comment on whether the CPS and the police have looked at the other legislation that is there.

Q188 Harry Cohen: This Bill is a vehicle for individual penalties. Would you favour statutory duties being imposed on directors?

Mr Nelson: My view and that of the RSSB is that we do not support such an approach in that the Health and Safety at Work Act provisions already provide for the exclusion of someone from the office of director. Therefore, the statute already provides that. I do not think it is appropriate for this Bill.

Mr Lyons: Under section two or three of the Health and Safety at Work Act imprisonment is also potentially there.

Q189 Harry Cohen: Can we move to the senior manager test? There is a definition in the draft Bill that, in your memoranda, you express concern about. To paraphrase, it talks about a person who plays a significant role in the making of decisions, how the activities are managed or the actual managing or organising for a substantial part of those activities. What is wrong with that? Does that not identify a senior manager?

Mr Lyons: Yes. It is the first time the term “senior manager” appears in English law and there must be a natural reluctance to take on another term. The majority of the industry—certainly that which I represent—recognises that there are some major problems with the term “senior manager” because there is a great disproportionality of businesses in the industry. Take one side of the business, Network Rail, with a multibillion a year turnover and there are many other engineering firms with £10 million or £20 million a year turnover. A senior manager in Network Rail is a person who deploys budgets of billions, literally. A senior manager in a small engineering company may have a budget of only £500,000. You are dealing with very different scales of human operation and interaction. However, one of the problems we have is that suggesting something better is extremely difficult. I would just hope that the guidance notes that accompany this Act would try and be as full as possible.

Q190 Harry Cohen: In your memoranda you talk about the size difference in the railway industry, with some very big corporations and some very small. I appreciate that would apply in a different way but why should it be any different particularly in the sense that, if it is somebody in the carrying out of their managerial functions who brings about
a death or neglect brings about a death, it is a manager of Network Rail or one of these family businesses, if it is directly connected?  
Mr Lyons: Of course it should not. Any death that results from a gross breach of duty is a very deeply serious issue and action must be taken. I think there is a slight danger of disproportionality building in. Also, remember that with a large corporation, the putative senior manager of Network Rail has a significant staff around to protect them to some extent from any possibility of a gross breach occurring. When you are dealing with a much smaller business and the relationship between senior management and line of duty—in certain cases you can envisage some of these businesses where the senior manager is doing some of the job himself—the division of responsibility becomes much more blurred. One has to be slightly concerned that one is setting up a structure that may make small sized businesses feel very worried. What have they to do and what have they to audit and so on? I know the reassurance is given in the guidance notes here that any organisation following the Health and Safety at Work Act does not need to worry, but that is not the way a lot of managers of small companies think. They are very worried about this sort of legislation. They do not have the time to understand the full issues and are pushed to find time. They get themselves into a bit of over-concern about the impact of this legislation when they should not really have to be worrying about it.

Q191 Harry Cohen: Should not a smaller subcontractor in the railway industry only enter into the contract if he can do the job safely?  
Mr Lyons: I hope this would not occur. We work in a very over-arching contractual relationship with the industry. This is a permissioning regime. You cannot if you are Network Rail pass over some of your responsibilities to a subcontractor. It is the responsibility of Network Rail and others to supervise the activities of their contractors in certain aspects related to safety. We are talking about gross breaches here and I would hope the railway industry structure will cover it, but I am still concerned that small companies, particularly those that work not just in the railway industry but across the boundaries, because a number of them deal with other sectors as well, will find (a) there is a consistent approach and (b) there is one that is not going to cause very significant concern that they have to have complex auditable trails of decision making.

Q192 Mr Clappison: Is it ever justified to make a parent company liable for the acts of a subsidiary and, if so, when?  
Mr Nelson: You have to look at the chain of responsibility and the influence that people within the parent company and particularly subsidiary companies have had. There are some quite complex trading relationships between parent and any number of subsidiaries that exist. Therefore, if you start with the logic of what is the chain of responsibility and you flow into the parent company, because it does not devolve authority for certain decisions to a subsidiary but retains them at a group level, that may take you into a parent company situation.

Q193 Mr Clappison: You are happy with that, provided the chain of responsibility extends upwards into the parent company?  
Mr Nelson: Indeed, and that the concept of grossness of the offence is capable of sustaining application along that chain.

Q194 Mr Clappison: Have you any views on the operation of the duty of care in these circumstances and how and when a parent company might owe a duty of care to those killed as a direct result of the actions of its subsidiary? Would that follow?  
Mr Nelson: It could follow in that I can conceive of situations where major investment decisions are taken by a parent company and, if there is a gross breach in that context, it is there as part of the chain of responsibility and I can see a logic that takes you there.

Q195 Chairman: We have had in previous sessions the argument that one of the flaws in the Bill is that within a single company people would push the responsibility for health and safety further and further down until it got below the level of senior manager. The answer to that which we have been given is that no; if there was any audit trail suggesting you had pushed it too far down, you would get the directors of the company for having done that. It sounds as though you are saying in the case of a subsidiary you think it would be quite legitimate for a parent company just to say, “We are making our subsidiaries fully reasonable for health and safety” and that will be okay. Therefore, the parent company will always be immune from the corporate manslaughter created by its subsidiaries. Is that right?  
Mr Nelson: That is not what I was saying.  
Chairman: You were talking about how the line of accountability goes. It almost sounded as though, if the parent company severed it—  
Mr Clappison: That was my understanding of what you said.

Q196 Chairman: Perhaps you could clarify how that would work.  
Mr Lyons: Would it be helpful if I set an example? There are in the railway industry a number of franchises which are jointly operated by two separate companies. In certain cases railways are not their only business; they cover a huge range of activities. What should be looked at very carefully there is where is the appropriate level to manage various types of risk. Those elements of risk which are probably related directly to railway business should be with the intermediate company, with the parent company making sure there is governance oversight. However, there may be aspects of risk which are regarded as so important that the parent company retains responsibility for them. You have
to address it on a case by case basis. It could also be made clear in the Act that the concerns I sense from some individuals and groups that companies would set up businesses and wind up the company before it got to court are inappropriate behaviours and these could be quite carefully indicated as being areas which the DPP would take a very dim view of indeed.

Q197 Mr Dunne: Would you anticipate that if this became an Act it would encourage corporate Britain to move towards either a US or continental model where we have a non-executive board and all executive decisions get taken down the chain of command? Would it have an impact on that or not?

Mr Nelson: The last time I came across that was in the structuring of Railtrack Group over Railtrack plc. at a time when it was still within the state sector, I have not considered this as a point here. I have considered whether there would be any practice of seeking to devolve health and safety responsibility below a point at which that body thought senior management applied. I think the answer is no because in the railway business, if you get it wrong, your reputation is very much on the line. Therefore, my experience of working in the railway business is that the parent companies are very reasonable and take a great deal of interest in how their rail division operates and how, within their rail divisions, the individual franchises operate. They hold resources at a corporate level to ensure good oversight.

Q198 Chairman: This is a pretty important issue. When I came here today on the train from Winchester to London, which is a franchise operated by a company which is part of a much larger group, which has very extensive interests in public transport which have nothing to do with railways, you seem to be saying to me, Mr Lyons, that if something had gone wrong the appropriate level of responsibility would lie just with the subsidiary that operates the rail franchise, not with the parent company that has the overall interest. I am wondering whether, as a potential victim, I should be happy with that or whether I would want the right to see the issue pursued all the way up to the company at the top.

Mr Lyons: That would have to be a decision for the main board to make. This is Stagecoach. The structure of the South West franchise is relatively simple. There is Stagecoach and there is South West Trains which is an entirely owned subsidiary of Stagecoach. In that situation there could be a very straightforward dialogue between the main board and its subsidiary to decide how risk was apportioned. Clearly, the day to day operational risk, I believe, would lie with South West Trains and I believe the main board should absorb certain other risks, but it should all be well audited and managed. I do not think those are going to cause the problems. The bigger issue is when you have more complex structures of ownership and how the risk is managed in those. What you do not want to do is to get two or three groups all handling the same sort of risk and coming to confusing solutions amongst themselves as to where responsibility lies. In the railway industry there has to be a very clear path for how risk is managed. We need to ensure that we leave the position open so that we can create those structures and manage risk if this Act enters the statute book.

Q199 Mr Clappison: Could I move to the question of allocating responsibility or blame when something does go wrong? Can I make clear a bit of a constituency interest because I do represent Potters Bar. In the case of previous high profile disasters on the railways, how difficult has it been to attribute blame for the incidents between the many bodies involved in regulating, maintaining and running the network?

Mr Nelson: First, one must establish the cause. The Rail Safety and Standards Board has since its inception and through its predecessors supported the creation of an independent asset investigation branch. The prime responsibility for investigation to establish immediate and underlying causes should be with that body. It is in light of that that the other authorities that can prosecute must determine whether there is action that they need to take forward. Personally, not having been involved in Potters Bar, I have only seen the media reports on the decisions that various players took. From my perspective, it is unhelpful to jump to conclusions and suggest any particular cause of an accident beyond the control of your company in advance of there being a clarity as to what exactly did cause the accident. If you have an objective analysis in establishing, without reference to liability, the immediate and underlying cause of the incident, it should in light of that, I believe, bring some clarity.

Q200 Mr Clappison: There were some very interesting suggestions as to the causes of the Potters Bar crash that generated headlines which have not subsequently been sustained by inquiries. Can I ask if you see the draft Bill having any impact on the situation which you describe?

Mr Nelson: No, I do not. I think the existing legislation is sufficient and the basis on which civil litigation is pursued is appropriate. Any responsible industry that does not wish to have its reputation tarnished will ensure that the needs of the victims are properly taken into account and addressed up front without the blame issue as to who was responsible getting in the way. The industry ought to be responsible and able to do that.

Q201 Mr Clappison: Where do you see subcontracting fitting into this? Should not the company that contracts out its work always be reasonable for the work of its subcontractors?

Mr Nelson: Again, it is the same point about subsidiaries and parents. The chain of responsibility needs to be clear. You need to be absolutely clear what you are contracting and you need to be absolutely clear as to the client. At each stage there could be several layers of
subcontracting in some projects. There has to be clarity as to responsibility, as to management arrangements and ultimately the client needs to be satisfied that he has in place a regime where by way of contract work is to be delivered safely without harm to those working on it or the subsequent owners of it.

**Q202 Mr Clappison:** Even where responsibilities are clear, should not the main contractor always be responsible for the work of the subcontractor?

**Mr Nelson:** The client or the main contractor moving down towards subcontractors should be responsible for ensuring that the arrangements the contractor has in place will deliver the work safely. Yes, of course, and that is the way it works on the railways. A subcontractor is not just handed a piece of track and told to get on with it. The key issue is the gross breach. It is possible to imagine a subcontractor, for hopefully completely bizarre reasons, not doing what he is meant to and the management deciding for various reasons not to, in which case the gross breach can go no higher than the subcontractor. It has to be proved that it was the person placing the contract who committed the gross breach and led the subcontractor into a situation for this to come within the terms of this Bill.

**Q203 Harry Cohen:** Should he not also have a monitoring role to check that it has been carried out by the subcontractor?

**Mr Lyons:** Yes. On the railways it is hopefully difficult to envisage a situation where the present structures would lead to a subcontractor committing a gross breach because—you are right—there is checking and there is also very specific involvement in the work being carried out.

**Q204 Chairman:** All those situations we have read about where casual people are taken on and not given proper training have stopped, have they? That is the sort of thing that makes people worry and think that contractors are not really responsible.

**Mr Nelson:** The industry put in place through Railtrack a system called Sentinel, which is a secure registration system for track workers and others in varying degrees of competency. I cannot give you the detail of the last audit that Network Rail performed but they do perform regular audits and they are demonstrating high levels of compliance with the people they find on site being certificated as competent.

**Q205 Chairman:** What is a high level of compliance?

**Mr Nelson:** 99% in that area. If you would like I could provide the detail.

**Chairman:** That would be useful. Thank you.

**Q206 Gwyn Prosser:** I want to ask about the provisions in the Bill which require an occupier of land to show a duty of care, in particular looking at the issue of deaths on the railway, trespassers and suicides. Do you consider it desirable or appropriate that there should be provisions in the Bill to apply corporate manslaughter in certain circumstances and, if so, perhaps you could elaborate?

**Mr Nelson:** The case of British Railways Board v Herrington (House of Lords 1972) led to the 1974 Occupiers Liability Act. It demonstrates that there is a duty of care in relation to trespassers. It can be construed in the way in which society operates, that it sees a greater duty of care to, for example, children without the maturity to understand the risk as opposed to an adult male who has had too much to drink on a Friday night and thinks the shortcut across the railway is acceptable. You have to take the expectations of society into account in determining the point at which a gross breach has occurred. It is only reasonable to go so far in taking precautions to prevent access to the railway. If you have an 11,000 mile railway, you have 22,000 miles of boundary fence. It is necessary to provide fencing appropriate to the risk. When you come to deal with the suicide issue, you have to start from the point of view that it is a mental health problem. If you do identify patterns in relation to suicide, it is incumbent upon you as a duty holder to do that which is reasonable, perhaps in association with the operation of the mental health facility. I am aware that in a number of places work is ongoing that takes this into account. We have to recognise that if we divert people from suicide on the railway we may in some cases prevent suicide because the urge to take one’s life passes as someone perhaps gets back to medication or whatever. In other cases, what we will do is create a diversion to another mode of suicide. Therefore, you have to start looking at this in the round as a mental health issue. The railways have a part to play but at the moment I do not conceive of a situation, so long as they do that which is reasonable in relation to the patterns of trespass and suicide, where a gross breach is likely to occur.
addressing that. What we were concerned about were some of the more fanciful ideas. I do not put laminated glass and seatbelts in the realm of fantasy: I put those in the area where the industry is doing serious work to identify what is reasonably practicable, but there were others that were essentially fanciful and we must avoid any of those which capture the public attention that are unreasonable as being cited as an element of a gross breach for not following what was offered as an option. More seriously, when bodies make recommendations, many of them will be accepted. In some cases it may be appropriate that a recommendation from an independent body investigating an accident is rejected. So long as the reasons for that rejection are sound—the railways are working in a permissioning regime—and it is acceptable in that context, the failure to comply with that recommendation should not be capable of being cited as an element of a case for gross breach.

Mr Lyons: This also covers remedial issues. There are very sophisticated systems in the industry, building on decades of good practice. It has been very much tested in recent times. We have had the Rail Accident Investigation Branch, the Office of the Rail Regulator and the Rail Safety and Standards Board. Those all have very clear remits. Their job is to ensure that safety is maintained and enhanced. I do not think it would be the case that if something was awaiting prosecution under this Act it would be in any way stop improvements being made to the railway. I think it would be a very unfortunate outcome if that was even a possibility.

Chairman: Mr Lyons, do you think the courts were going throughout areas but he must leave it to the existing statutory bodies to do their job.

Q208 Gwyn Prosser: In the earlier discussion on whether this Bill should take action against individual directors rather than corporates, you cited the 1861 legislation. Perhaps I should know but under that legislation can you give us some examples of the most serious prosecutions that have taken place against individual directors of companies?

Mr Nelson: I cannot cite any successful ones in the railway industry in recent times. I used the 1861 legislation as making the point that there were already provisions for dealing with people who, by neglectful intent, cause harm to people on the railway. I am sorry I cannot answer your specific question. We can attempt to find out.

Chairman: That would be very helpful.

Q209 Justine Greening: We started to touch on some of the lessons that are pulled out from accidents and you had hundreds of proposals that came in. In terms of moving on to get the learnings from these accidents so that they cannot happen again, do you think there is a danger that, if we see an increase in corporate manslaughter prosecutions, whilst the courts are going through that process of prosecuting the case, because of the risks of contempt of court, we will now see a huge delay in the time when we can have a proper inquiry or investigation to take the learnings from the accidents so that they will not be continued and that will end up perversely delaying those learnings from taking place?

Mr Nelson: I do not think that is the case. The industry's track record is that, when learning is there and there are things that can be fixed to prevent a recurrence, whether it comes out in the first days of the investigation or subsequently, the industry is professionally responsive. I do not see the threat of litigation in this way as doing other than incentivising people to demonstrate that, when learning of a failing, they took the appropriate action, taking into account whether it was reasonably practicable or not.

Mr Lyons: That will end up perversely delaying those learnings. That was the state exercising its power on health and safety to impose fines. One of the potential proposals in the draft Bill is that they could also force remedial action to be taken. I understand both your organisations have expressed some concerns about that. Could you tell us a bit more about why you are concerned about the proposal to have remedial orders?

Mr Lyons: There are very sophisticated systems to make sure that there is an external audit of safety standards and oversight from various bodies. I believe to leave it to a judge whose main focus is not on the safety process to make recommendations that could be binding on the industry would be particularly unsound in many cases. It is conceivably possible that he could point out areas but he must leave it to the existing statutory bodies to do their job.

Mr Nelson: I agree. I think there is a good example in the relatively recent past where the state determined that it wished to regulate to require a change of state of the infrastructure and rolling stock on the railway. Regulations were laid before Parliament and accepted, which led to the train protection and warning system being installed and to mark one rolling stock being eliminated from the mainline railway. That was the state exercising its authority to bring regulations and, in bringing those, it is about satisfying Parliament essentially that it is acting in the societal interest in so proceeding. If I may go back to the previous question, one of the points that I would like to get across is that evidence to what had been the industry's formal inquiries—we now have RAIB investigations—is essentially confidential. That is
an important part of ensuring that we get full cooperation. If someone is looking for a gross breach, what they cannot do is start from the evidence that has been given in a formal inquiry and now in the RAIB inquiries. It is important we do not compromise an investigation process to establish an immediate and underlying cause because we have a premature determination to bring action to demonstrate gross breach.

Q212 Justine Greening: Do you think that fines are an effective way of punishing companies?

Mr Lyons: I believe they are. Not only do they hurt the company financially; they bring significant reputational risk issues with them. No firm likes to be the subject of a fine. No board of directors likes to be fined. They are very severe judgments on a particular company. I believe all the indications we have had in the railway industry, where there have been major incidents, that clearly there has been some blame lying with the companies, show that you have seen major changes in those companies as a response to those accidents. In Railtrack’s case, it was a very dramatic change and other companies as well have had to significantly rethink their management procedures and structures as an outcome of these various incidents which have taken place on the railways.

Mr Nelson: I entirely agree. The key issue is one’s reputation.

Q213 Mr Rooney: You have talked about blame and reputation etc, but all these things happen after a very serious event. They never happen before. In the civil aviation industry, it is effectively a no blame culture that probably encourages more openness. Do you think, if the same extended to the railway industry and maritime, we might have a better managed system and much less risk of major incidents?

Mr Lyons: I am a great believer that good safety cultures are not fear driven. That is a contradiction in terms. Good safety cultures are everybody in the organisation pursuing an overall quality product and making sure that safety is an integral part of it. I naturally have a preference in such a circumstance for no blame cultures to get to the bottom of problems that arise. We are now in the situation on the railways that, where things go wrong in safety terms, they go wrong for very complex sets of reasons. If they were easy to spot, they would have been put right. It is interactions which, in a particular way, lead to unsatisfactory safety outcomes. The only way to put it right is to get all those involved together and monitor how it is never going to happen again. To answer your question, I believe that is the direction in which to go. I would be worried if this Act were seen to be bringing fear back into the safety debate. I do not think it will but it is an issue that we must always bear in mind with enactments like this.

Mr Nelson: I agree. Fear is not the best way of learning lessons. We need a culture that is open, progressive and based on competence. It is about aligned behaviours, aligned beliefs, aligned attitudes, people working together. I do not go as far as saying there is never a point at which blame needs to be dealt with because, if you find that someone with willful intent seeks to hide behind the fact that you have an open culture, then we do not have a just culture.

Chairman: Thank you very much indeed, gentlemen.

Witnesses: Mr Peter Commins, Chairman, Mr Andy Sneddon, Health and Safety Director, Construction Mr Keith Batchelor, FEng, Fellow, Royal Academy of Engineering, examined.

Q214 Chairman: Thank you, gentlemen. Could each of you briefly introduce yourselves and the organisation you are from?

Mr Smith: Jeff Smith. I am the managing director of a mining and minerals consultancy.

Mr Batchelor: I am Keith Batchelor. I am director of an engineering construction company and I am here representing the Royal Academy of Engineering.

Mr Commins: I am Peter Commins. I am chairman of the Construction Confederation.

Mr Sneddon: Andy Sneddon. I am director of health and safety for the Construction Confederation.

Q215 Chairman: Thank you for your written evidence. Mr Batchelor, it is interesting to see in your memorandum that some of your members questioned whether there was any need for the offence at all. Can you set out why that was?

Mr Batchelor: There was a view that there is already health and safety environmental legislation extant and that this to some extent overlaid that and could be seen perhaps as reflecting public sentiment. We are concerned that we should not allow that to get in the way of the real issue, which is to make sure that we improve public safety.

Q216 Chairman: The majority welcomed it and said it was an improvement on the existing law. Can you explain what those members saw in this Bill, which is presumably useful to them professionally in terms of understanding their responsibilities?

Mr Batchelor: I believe that overall it is felt that companies that have a well structured HSE management system feel it provides clarity over their responsibilities and perhaps improves behaviour in companies that are not quite so well established.
Q217 Chairman: It could be that some of your members in particular who in some cases run companies, but I guess in many cases do not, can see the advantages of making sure that their companies have good corporate governance?

Mr Batchelor: Yes.

Q218 Chairman: Can I ask each of the two organisations: is the Government right to think that the costs for legal advice and training that arise from the Bill will be relatively small?

Mr Commins: Yes. We believe there will not be a substantial increase to our members whatsoever. We believe we carry out proven health and safety procedures and therefore we do not believe that additional costs will apply.

Mr Smith: It is an interesting philosophical point because it is surely a matter of bad luck as to whether a serious accident progresses from serious injury to death. It depends on the health of the victim and the particular circumstances. I suppose, to put it crudely, it would be a question of waiting to see if the victims die before this particular offence can be mounted. It is a philosophical point as to whether you include serious injury in that because in a lot of legislation serious injury and death are very closely coupled, but this is a Manslaughter Bill so it is very specific. I think there is an argument for extending it in time.

Mr Batchelor: Yes.

Q219 Chairman: What was Andy was talking about is to have fully qualified workforces. We lobby Government hard to make sure that we strive to do that. Currently, we have

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Q220 Chairman: The idea of a Corporate Manslaughter Bill has been around probably as long as the professional careers of some of your various members. Could you give us an assessment of how good or poor the current awareness is of the current proposals, now that we are closer to the statute book than ever?

Mr Smith: It is difficult to say how much aware our members are of the proposals. There has always been the facility for manslaughter at common law. That has been in existence for quite some time but it has been demonstrated that it does not work very well. The general feeling amongst our members is that this new offence probably plugs the gap that is there at the moment. Whether or not our members are generally aware of this particular development I am uncertain.

Mr Batchelor: Yes.

Q221 Mr Dunne: Could I ask both organisations whether you feel the scope of the Bill goes far enough? We have had some evidence that suggests, given the number of deaths from gross negligence is relatively slight and can be measured in hundreds, whereas the level of serious injury can be measured in tens of thousands, it extends beyond the present scope. Would you like to comment?

Mr Smith: In the construction industry the development of a Bill from its early stages has been trailed by the construction press and by specialist health and safety publications so there is a basic understanding. The network, in terms of consultation, for this Bill is somewhat different to mainstream health and safety legislation, where it is well established and people understand the new regulation. I would say it is somewhat lower than it might be for comparable health and safety regulations. Notwithstanding that, there seems to be an understanding in most of the large companies in our membership of some of the key issues, particularly in the move now towards collective responsibility rather than individual liabilities. Most of our members, I would hazard a guess, are aware of that.

Q222 Mr Dunne: Would your organisation share that view?

Mr Batchelor: Yes.

Mr Commins: We believe we carry out proven health and safety procedures and therefore we do not believe that additional costs will apply.

Mr Smith: I agree.

Q223 Mr Dunne: How do you hold people responsible on complicated sites? This is particularly relevant in the construction sector. The example was given of the Wembley Stadium project where there are many different contractors on site at the same time. How do we hold corporate entities responsible? Should it be through the subcontracting route we discussed earlier? How do you suggest the Act should apply in such cases?

Mr Sneddon: We accept the case made during earlier evidence. The responsibility shifts all the way down the supply chain. That is a fact of life in the construction industry when a main contractor engages subcontractors. Before a contractor starts work, on well run projects, there is a clear understanding of where the level of ownership is in terms of risk and health and safety. It is particularly relevant to the Bill that we are looking at. Construction is unique in some respects.

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Mr Batchelor: Yes.

Q220 Chairman: The idea of a Corporate Manslaughter Bill has been around probably as long as the professional careers of some of your various members. Could you give us an assessment of how good or poor the current awareness is of the current proposals, now that we are closer to the statute book than ever?

Mr Smith: It is difficult to say how much aware our members are of the proposals. There has always been the facility for manslaughter at common law. That has been in existence for quite some time but it has been demonstrated that it does not work very well. The general feeling amongst our members is that this new offence probably plugs the gap that is there at the moment. Whether or not our members are generally aware of this particular development I am uncertain.

Mr Batchelor: Yes.

Q221 Mr Dunne: Could I ask both organisations whether you feel the scope of the Bill goes far enough? We have had some evidence that suggests, given the number of deaths from gross negligence is relatively slight and can be measured in hundreds, whereas the level of serious injury can be measured in tens of thousands, it extends beyond the present scope. Would you like to comment?
about 75% qualified workforce in the construction industry and we strive for 100% in 2010. The Government probably spends 40% of all construction spend and really they need to take the message and deal with that.

Q224 Mr Dunne: Would that preclude unskilled, navvy type activities?

Mr Sneddon: It would certainly raise the bar to entry. In our industry, there is virtually no bar to entry. On poorly managed sites the level of skills that individual workers bring—never mind their awareness of basic health and safety provision—is at a very low level. Amongst our membership and other employers’ organisations, there is a real push. We have a scheme similar in intent to the Sentinel scheme for the rail industry. It is run on a tripartite basis with our colleagues from the trades unions and with Government. We have had some success in pushing that. In 65, 70 or 75% of major projects in the UK, you will find that the vast majority of the workers there are identifiable in terms of the core skills for their particular field but also in terms of their understanding of the health and safety issues. There is a real push there to try and raise the barriers to entry.

Mr Batchelor: As well as the skill set, it is a lot about process, making sure that anybody entering the site for the first time is given proper induction and training. That is certainly what we would seek to do. In the overall process from the CEO of the largest body corporate involved, cascading right down to that induction process, we make sure that is happening and that there is not any corporate body anywhere that provides just lip service. Similarly, when there is any incident, however minor it may be seen, that is reported right back up the chain as a matter of record immediately and very quickly.

Q225 Chairman: When you were talking about a large site with a major contractor and lots of subcontractors, your answer seemed to be similar to the railway industry: that you would need to explore the connection between each layer within the process. Would it not be simpler to say that if you are a prime contractor on a major construction site the buck should always stop with you, no matter whatever happens further down the line?

Mr Commins: I do not believe we said it did not stop at us.

Mr Smith: I think that is a difficult one. Under these proposals here we are looking for gross failures of safety management, and that encompasses training and instruction and certification procedures and so forth. I think in terms of engineering design, where clearly the design is at fault and that results in a serious incident and death, it would have to be proven that there was a corporate failure there rather than a failure of a design—which might be cutting-edge design; construction is always pushing the boundaries out. There are always risks to be taken with some of the designs. Usually the risks are disregarded them, I do not see how you could hold the main contractor totally responsible for the subcontractor’s actions.

Mr Batchelor: It is the test of gross negligence. If the main contractor or somebody in the subcontracting chain has acted diligently and either an employee or a subcontractor has acted in a totally maverick, irresponsible and insubordinate fashion, you cannot claim that is gross negligence higher up the chain.

Mr Sneddon: What is particularly interesting to construction is that we have certain regulations that explicitly state the key functions for these kinds of people. For a main or principal contractor, there are legal obligations on that company to set the management framework for a project. The trail of evidence in the event of a fatality, in search of a failure, would be guided by those statutory provisions that set out quite clearly what the different actors must do legally.

Q227 Chairman: I suppose what I am trying to get at in my own mind is whether the existence of an industry that is fragmented into a series of subcontracting relationships is or should be fundamentally different in terms of the accountability of the people at the top to a major company that might employ just as many people on a single project but where there are no complexities of deft legal entities down the system. We know in a single company how you would deal with the question of the maverick employer, employee and all the rest of it. The question is whether, if you have a subcontractor, and you have a maverick one, that makes it easier for the person at the top to get off the charge than if it had been in a single organisation.

Mr Commins: I do not think it makes it easier. Again, it goes back to the circumstances, and I think what you have to do is examine whether those procedures were set out clearly, whether they were understood, how the management implemented those procedures as to really where the blame would lie, if you are going in for blame.

Q228 Mr Dunne: My last question is in relation to how engineering companies conduct themselves. Where you have a major design failure in a construction project which is clearly held at the door of the designer rather than the contractor, to whom should the engineer hold the duty of care in those circumstances?

Mr Smith: I think that is a difficult one. Under these proposals here we are looking for gross failures of safety management, and that encompasses training and instruction and certification procedures and so forth. I think in terms of engineering design, where clearly the design is at fault and that results in a serious incident and death, it would have to be proven that there was a corporate failure there rather than a failure of a design—which might be cutting-edge design; construction is always pushing the boundaries out. There are always risks to be taken with some of the designs. Usually the risks are
under control. I do not believe that we get any significant incidents resulting from failure of design because our design standards are so good, the checking is so good, the certification is so good. I think there are probably measures in place to cover for design failures anyway.

Mr Batchelor: The engineering industry is by process and habit now subject to a lot of studies that are well codified, and I think if a designer could be shown not to have followed industry best practice in those reviews, there is a clear culpability. Engineering is not an exact science and sometimes things go wrong, but, providing proper processes that could be demonstrated have been followed, I think that is a defence.

Q229 Mr Rooney: I think this is for Mr Sneddon. If a trespasser on a building site is killed, when, if ever, might it be appropriate to prosecute the company managing the site under corporate manslaughter?

Mr Sneddon: I could imagine a lot of scenarios where it would be appropriate to prosecute the contractor, depending, as ever, on the circumstances, but in our industry there are well-established standards for what is appropriate in terms of securing a site, particularly from children. It is unfortunate that there is a long accident record with children treating construction sites as playgrounds and, sadly, we have a small number of fatalities on a regular basis. So I do not think our industry would feel that the Bill was going too far if it brought about occasional prosecutions where a member of the public lost their life through trespassing. Having said that, with the scale of construction activities we see in the UK, and a lot of small-scale construction, there are real difficulties in maintaining site security. I do not underestimate the difficulties but certainly it does not cause construction the same sort of problems as it would cause the railway industry.

Q230 Mr Rooney: Looking on as a totally innocent, unknowing person, it strikes me that the industry spends an awful lot of money securing sites in terms of anti-theft, which I know is a major problem on construction sites. Do you think the same regard is given to expenditure for anti-invasion and safety risks?

Mr Commins: We think it serves a dual purpose. The money spent is not just anti-theft. It is to prevent trespass also. Trespassers do pinch your materials off site, but clearly people can get hurt on building and construction sites, so we take both into consideration.

Q231 Mr Rooney: Perhaps more controversial: is it not true, bearing in mind the submissions you have put in, that without individual liability, the boardroom can simply look at this offence as a financial risk to the company rather than a risk to the individual directors and then render the legislation ineffective?

Mr Commins: We do not believe so. We do not believe fear drives a good health and safety culture, and we think if you point the finger at individuals, that is exactly what you will get. Most contractors, construction companies, businesses as a whole, run to make a profit. They do not want to have fines imposed upon them that affect their bottom line. Ultimately, if they are not producing the profit levels or shareholder value, then that board is not in place anyway.

Mr Sneddon: I think again construction absolutely understands the price of loss of reputation, because construction clients, construction contractors, have explicit legal duties to assess the competence of those organisations they engage. If Peter manages a company which has been prosecuted for corporate manslaughter, he is not going to get work, and he will not get work until there is a major change of management at senior level to demonstrate that there has been a change of culture. Our industry absolutely understands what the bottom line is. We work on tight margins and loss of reputation could put a company out of business.

Q232 Gwyn Prosser: I think you are all resisting the suggestion that there should be individual criminal liability against directors, and no doubt we will be hearing that echoed again later this afternoon. It certainly does not satisfy, as you might expect, the victims’ groups and the victim support groups, of course. Do you not think, putting that aside, that if during a prosecution for corporate manslaughter it emerges in evidence that an individual director is explicit in bringing about or allowing a death to take place, there should not at least be recourse to take some secondary action for a secondary offence against that individual, or at the very least debar him from future directorships?

Mr Batchelor: I think that legislation already exists, does it not?

Q233 Gwyn Prosser: Within this legislation?

Mr Batchelor: Not within this but it exists in legislation already on the books. If you have a director that causes death through an act of negligence, I think they can already be debarred.

Q234 Gwyn Prosser: But in the real world decisions would be made to take one piece of legislation rather than prosecute through the health and safety for this and prosecute through corporate manslaughter for that.

Mr Batchelor: I think one of the views we have is that we should not get that confusion, that there should be an alignment of the legislation in one Bill, yes.

Mr Smith: I think at the moment this Bill is very clear: it is for corporate negligence. If you introduce a secondary charge which duplicates a route that is already there, I agree; for a cowboy, a director or somebody who can be proved to be negligent, there is a prosecution route there already, which goes beyond being debarred; there are fines and imprisonment threats already there.
**Q235 Gwyn Prosser**: Except that even witnesses who take your line on this say that that is a very difficult prosecution in which to be successful.

**Mr Sneddon**: It is. I would venture to say that there are two sides to the argument here. One is do we want a Bill that will address the concerns of those who have lost loved ones in accidents and bring about redress, or do we want a Bill that will drive better health and safety so we have less fatalities in the long run? I passionately believe that if we take the route to increasing the individual liability of managers, yes, we will address the quite understandable need for redress for those who have lost loved ones, but we will end up with more fatalities, because I have absolutely no doubt that we will have a scapegoat culture. It is painfully easy to construct a management system that isolates the decision-making to one or two individuals and leaves the rest of you remote from that, and that is exactly what would happen if we went for individual liability.

**Q236 Mr Rooney**: Can I just say to you that those exact phrases were used in 1973 in the debate on the Health and Safety at Work Act. Just bear that in mind. You have made much play in your submission about this risk aversion, which I find quite staggering. Surely this is an industry that takes risks big risks, financial ones, every time you sign a contract, but that is a management risk, whereas dealing with potential deaths would somehow induce fear and timidity. How do you square those two?

**Mr Sneddon**: I am not quite sure what you mean by “risk aversion”. Perhaps you could clarify that. Certainly in our submission we do not feature that.

**Mr Batchelor**: The risk aversion I would not make great play of, frankly, but I think our greater concern is one of concealment and not getting through to the lessons learned. I think that is the greater fear that we have, if you personalise it too much.

**Q237 Mr Rooney**: I am trying not to personalise it. As soon as people start recording these things, the three big industries for deaths at work have been construction, agriculture and paper making. Over the years the numbers dying at work in those industries have plummeted, but they are still top of the league. That reduction is partly being driven by industry itself, and some nasty people being got rid of, but it is very much driven also by the legislative side, particularly the Health and Safety at Work Act. Do you not think that something like corporate manslaughter with individual liability will further drive out those parts of your industry that give you all a bad name? Do you not think it would have an effect in raising standards?

**Mr Commins**: No. I do not think we would agree that legislation is driving health and safety betterment. I go back to this fear factor. I cannot see any initiative that benefits from fear. It is about collective responsibility, working together, attitude, as opposed to being driven by fear.

**Q238 Mr Rooney**: So if in a construction company they are looking at a £75 million project and the finance director is assessing things for everybody else, and there is a fear factor there that they might get it wrong, that is acceptable, that is part of everyday business, but a fear factor about killing somebody is not?

**Mr Sneddon**: If we are talking about projects of the scale in the example you give, £75 million, the vast majority of companies working at that kind of level will manage risk at a senior level in the context of broad risk management across the business. It will get equal priority billing against financial risk, programme, quality and all those things. An argument which I think carries a lot of weight in terms of your point is that gross negligence manslaughter as it stands now has only been successful where there have been small companies, where the directing mind of the company is very close to the decision-making process, yet, as you rightly point out, our industry still kills 70-odd people every year. That is absolutely unacceptable, but the vast majority of those deaths take place on small construction sites where exactly that kind of employer operates. To my knowledge, the threat of gross negligence manslaughter has not deterred those people from operating.

**Q239 Mr Rooney**: On construction, we are not just talking about the death of an employee—and an employee death of itself would not always generate a manslaughter charge but, thankfully, I cannot think of a recent one, but who built Ronan Point?

**Mr Commins**: I do not see the analogy.

**Q240 Mr Rooney**: There are something like 90,000 non-standard construction housing units in this country that have had to be demolished that were built by the big construction companies to faulty design, and faulty workmanship in a lot of cases. One company, I think it was Bovis, actually closed down in Britain and moved all its assets to the Cayman Isles so it could not be prosecuted. So we are not just talking about the individual at work; we are talking about the things that you actually build and the potential for a much more serious offence. That is not to diminish the death of an employee, but a corporate manslaughter charge I think would be much more likely to arise out of faulty construction of a building that then either collapses or whatever than the individual employee at work on site.

**Mr Commins**: I do not think you have a true analogy there. I have been in the industry for over 30 years, and I have never seen a financial director go to prison for assessing the risk wrongly on his commercial risk analysis.

**Q241 Mr Rooney**: No, but I bet you have seen him sacked.

**Mr Commins**: Certainly.

**Q242 Chairman**: Can I just pursue one point that has come in and out of this discussion? I can understand the argument about having no-blame
Mr Rooney says it is well recognised in the airline industries, and increasingly in the Health Service, for example, so you do not automatically penalise people for a mistake, but there is a distinction, is there not, between that being the general case for most employees in an organisation where you want people to report near-misses and near-accidents, and so on, and actually having individual directors of companies liable? I cannot see how the argument about no-blame cultures really applies at board level, although it might well do elsewhere in the organisation. Can you explain to me why you extend it all the way up to board level?

Mr Batchelor: What you are describing there is somebody who was negligent. Says it is well recognised in the airline industries, and increasingly in the Health Service, for example, so you do not automatically penalise people for a mistake, but there is a distinction, is there not, between that being the general case for most employees in an organisation where you want people to report near-misses and near-accidents, and so on, and actually having individual directors of companies liable? I cannot see how the argument about no-blame cultures really applies at board level, although it might well do elsewhere in the organisation. Can you explain to me why you extend it all the way up to board level?

Mr Rooney: I do not think we are getting anywhere. I will just toss a final one at you. I do not want an answer. You can look back at the number of companies that carried on using high-alumina cement long after it was well known what that would cause, and the subsequent problems and deaths that have been caused. Those were decisions by directors with a specific agenda, and you are quite happy that those directors as individuals should be exempt from prosecution under this Bill. Frankly, I think that is untenable.

Mr Commins: Surely, if that was the occurrence, the main driver would have been profit, money. 

Mr Batchelor: Does he not have to be negligent? as you have said, and I think you used the term “tight margins”, in a cost-driven industry. There could say. without any slack in them, and part of that I think leads on to some of these accidents and deaths. Do you take the view that if we had a law like this that would mean more slack in those contracts, or perhaps if the main contractor—a bit like the Gate Gourmet thing—does not have enough slack, he could take responsibility. How do you see that impacting on that over-tight contracts?

Mr Rooney: Do you c against the Bill as it stands because we think that by reinforcing collective responsibility you have nowhere to hide.

Mr Batchelor: I think perhaps the two issues are getting tangled together. I think there is a separate argument that relates to directors and senior managers in construction employment and I think there is a real prospect that directors will see the threat of a custodial sentence and loss of liberty as an overwhelming driver to distance their involvement in key decision-making on health and safety so that in the event of a fatal accident they are in a defendable position.

Mr Sneddon: Absolutely. We wholeheartedly support the Bill as it stands because we think that by reinforcing collective responsibility you have nowhere to hide.

Mr Rooney: But under this Bill the company would potentially be held liable for corporate manslaughter but the individual would not be. We are coming to the point that under circumstances like that, should we not make provision in this Bill to charge the individual directors with corporate manslaughter in a situation where the company as a whole can be charged with corporate manslaughter?

Mr Sneddon: I think that is a poor example, because if we go back to 20-30 years ago, there was not a benchmark in terms of statutory provision about what was appropriate in terms of the use of asbestos. Our country was advocating and quite happily buying thousands of tons of asbestos for use. If that scenario were replayed now, from 1999 we have had an absolute ban on asbestos products, so clearly we would have an absolute demonstration of gross negligence.

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Mr Commins: I think perhaps the two issues are not a benchmark in terms of statutory provision getting tangled together. I think there is a separate discussion about what was appropriate in terms of the use of asbestos. Our country was advocating and quite happily buying thousands of tons of asbestos for use. If that scenario were replayed now, from 1999 we have had an absolute ban on asbestos products, so clearly we would have an absolute demonstration of gross negligence.

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as private projects kill people. It is not just about fines. We recognise that, but there will be a real driver there, there will be something tangible that will say to a client or say to a main contractor that here is something that will absolutely affect the viability of your company going forward if you do not fight your corner and ensure that you get the proper provision when you cost for a job. That is quite right. At the moment construction companies exist on a 1% margin. There is no room for manoeuvre there. I do not defend that. I just say it is a fact of life in British construction.

**Chairman:** Gentlemen, thank you very much indeed. That was a very helpful session.

**Witnesses:** Mr Geraint Day, Head of Health, Environment and Transport Policy, Patricia Peter, Head of Corporate Governance, Institute of Directors, Mr Peter Schofield, Director of Employment and Legal Affairs, and Ms Louise Ward, Health and Safety Adviser, EEF, examined.

Q250 **Chairman:** Good evening. Thank you very much indeed for joining us this evening for the third part of the hearing. I wonder if, as with the other witnesses, each of you could introduce yourselves and your organisation briefly.

**Ms Ward:** My name is Louise Ward. I am a Health and Safety Adviser with EEF, the manufacturers' organisation.

**Mr Schofield:** I am Peter Schofield. I am Director of Legal and Employment Affairs at the EEF.

**Ms Peter:** I am Patricia Peter. I am Head of Corporate Governance at the Institute of Directors.

**Mr Day:** I am Geraint Day, Head of Health, Environment and Transport Policy at the Institute of Directors.

Q251 **Chairman:** I will start with a general question. Do both of you as organisations feel pretty pleased with yourselves at the moment? A number of commentators on this Bill suggest that most of the changes the Government have made along the way have been in response to business lobbying. Would that be a fair comment on how the Bill has evolved?

**Mr Schofield:** I do not know the background to that. I do know that we are pleased that the Bill has moved towards the direction we were seeking.

**Mr Day:** I concur with that. We have been involved with it for about five years, but the important thing is to bring about a great improvement in a very sad existing situation, I think, to better benefit the country.

Q252 **Gwyn Prosser:** Yes, but at the same time, you would want to be satisfied that the structures you have in place and the reporting mechanisms and the monitoring mechanisms, are robust and safe enough to deliver a safe regime of work.

**Ms Peter:** You do, but I think probably, if the liability became individual, beyond the level in the existing law for individual liability—and I do not think we have ever said that no director could ever be liable for manslaughter on a personal basis, but I think if you move beyond that, you would actually be upsetting really the way in which a board can work, because you would tend to find that one director would be the person who would be liable for this issue and you would not get the overall review, and looking at risk, looking at all the risks that are inherent in any business operation, you have to look at them together; they do not sit in isolation, your financial risk, your health and safety risk or your other risks.

Q253 **Gwyn Prosser:** What about Mr Schofield?

**Mr Schofield:** We do not say that directors should not be individually liable where they have committed an existing offence. What we are concerned about is adding an offence to a Bill which is actually designed to deal with corporate liability, and we would say, first of all, to answer your question directly, that you must not underestimate the effect, the damage to the corporate reputation that this Bill would bring about, the damage to the business in the market place. You must not underestimate the effect that will have on the directors of that business. So there is a sanction. They will be clearly focused on that. The really important point is there is a panoply of existing laws which can be brought to bear. The issue is whether they are brought to bear, not whether we should add another offence of aiding and abetting to this Bill.

Q254 **Gwyn Prosser:** But do you not agree that the remedies which are in place at the moment to take action against individuals are very difficult to prosecute and the track record is pretty abysmal, and that is why those who have been campaigning
for safer working regimes and protection of workers are so disappointed and have been pressing for this?

**Mr Schofield:** I am not sure that that is actually true. This Bill was designed to deal with a particular problem, which is attributing liability to the corporation for the acts of individuals, and that is what this is all about. If you are looking at individuals, then it is a question of a decision of the prosecuting authorities whether to take the step, but it is clear to me that if, for example, you undid the clause which says that there is no offence of aiding and abetting corporate manslaughter, if you created that offence, then, as the Law Commission said in its 1996 report, the great majority of those who could be convicted of that offence, because of the requirement for the state of mind to be guilty of aiding and abetting, would themselves be guilty of gross negligence manslaughter. For those who would not be guilty of gross negligence manslaughter, I would ask the question what is the justice in convicting and sentencing someone for manslaughter when by definition they did not commit it? There are also the offences under section 37 of the Health and Safety at Work Act, which make directors or senior managers liable where an offence under section 2 or section 3 is committed, and that will almost inevitably be the case where a death is occasioned through negligence at work. If the directors neglected their duties or connived or turned a blind eye to what went on, they will be liable, and the range of sentencing there is as much as the judge wishes to impose, in effect, as much as there would be available for gross negligence manslaughter. If a director is an employee, the director has a duty of care and can be prosecuted. So there is a range of offences already in existence. The question is whether the authorities choose to use them as opposed to adding another one which has, as the Law Commission pointed out in its report, inherent difficulties in its application.

Q256 Gwyn Prosser: In your first remarks you mentioned that this is a Corporate Manslaughter Bill so this is for corporate matters rather than individuals, but is it not right that the earlier drafts and the first intentions of the Government were very clearly under the same heading of Corporate Manslaughter Bill to take action against individuals?

**Mr Schofield:** Yes, it is true, and it is true that we amongst other business groups lobbied for the removal of it.

**Mr Day:** Just to reiterate, one of the difficulties of the existing law is that about half the work force works in small and medium size enterprises and the other half works in big organisations. We consider it a great unfairness that it has been historically easier to pursue individual action against directors of small organisations at a time when sad things have been happening in the economy as a whole. One of the main parts of the existing draft is actually to address that issue, and not just in the business sector but also in that part of the economy—in the public sector, for example—that also employs a large number of people, quite often in large organisations. I think that is one of the important developments as we would see it.

Q257 Gwyn Prosser: Can I take it from the answers I have heard so far that even in a case where during the prosecution of corporate manslaughter it emerged that an individual director was complicit in a negligent act and bore responsibility for a death, then you see no reason for a provision in this piece of legislation to take action against him under some secondary offence or by disqualification?

**Mr Schofield:** Let me say first that I have no objection to that individual director being prosecuted, and being prosecuted successfully. What I object to is, from a practical point of view, from a pragmatic point of view, adding an offence of aiding and abetting corporate manslaughter to this Bill which adds nothing in legal terms, given the need in law before you can charge someone with aiding and abetting to prove that they had the requisite mental state, which means, as the Law Commission said, they will be in most cases guilty of gross negligence manslaughter. I have no objection if they are guilty to charging them with gross negligence manslaughter. If they are not, they may well have neglected their duties or turned a blind eye to health and safety risks or connived and be guilty under section 37. If they are not, they may have failed to take reasonable care for health and safety and be liable under section 7 if they are employees of the company. So there are ways in which you can bring people to book. We are not saying that people who are guilty should not be brought to book. EEF are saying it is a mechanism.

Q258 Mr Clappison: I think you have made a very important point about individual liability through corporate manslaughter, but the point you make about individual prosecutions apart from corporate manslaughter, individual prosecutions for manslaughter through gross negligence has not been used on many occasions. Can you really put your hands on your hearts and, notwithstanding the important point you have made about individual liability, say that you feel that the public interest really has been satisfied here with the range of sanctions that are presently proposed by the Government?

**Mr Day:** We at the IoD have been in discussion with a number of regulators, not just the Home Office, in this regard but the Health and Safety Executive over the environmental aspects of reforms to business, and actually, part of that dialogue is a willingness to engage with various forms of alternative penalty, some of which would be substantial fines, as being the main course of action proposed in the current draft.

Q259 Mr Clappison: Would your minds be open to the beefing up of the remedial orders and perhaps even a stronger form of order?

**Mr Day:** We are in dialogue at the moment with one of the regulators about those sorts of options. It can be the case that in extremis—and it would...
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not necessarily be under corporate manslaughter but under health and safety—a punitive fine could put out of business an economic entity, which could actually punish people who have not been part and parcel of any procedure, management or otherwise, that may have led to that offence. I think preventing recurrence, educating and setting a good example is something we are more than prepared to enter into a dialogue about.

Q260 Mr Clappison: I am talking not just about beefing up a remedial order but would you consider other types of order as well?

Ms Peter: I think we would. It is one thing we have said in our previous submissions on this, that we do think very often the issues are probably behaviourial and the remedies might need to be behavioural rather than financial. We are alert to the issue that if you impose a fine on a company, the people who actually suffer the loss ultimately are the owners of the company, not the directors, although the directors do very often, particularly in major companies, actually lose their positions if they are involved in companies which are prosecuted for these sorts of offences.

Mr Schofield: One of the issues we have discussed is based on the idea of restorative justice, where the relevant senior managers and the victims' families come together to resolve how to deal with the aftermath of the event and its implications for the future, and managers have to acknowledge the impact of the business's failings on the families, and the victims can have their loss acknowledged and discussions can take place about recompense and so on. That is an idea, but we too have been open to the idea that there may be other forms of remedy. We are not particularly happy with the notion of remedial orders as it appears in the current draft Bill because we feel that it takes a long time for a manslaughter case to come to trial and actually, in terms of improving health and safety, what you want very often is a swift order. There is already an existing power in the Health and Safety Executive to issue prohibition and improvement notices, and this is in effect contrary to the idea of better regulation in that you have a duplication of the power, and the HSE or the enforcement authority is more likely to be in a position to judge what will work from the point of view of the business and better health and safety rather than a judge, after the event, hearing only part of the story about the whole running of the business, making a remedial order.

Q261 Mr Rooney: You brought up the point of gross negligence. In my mind, gross negligence involves a failure to do something. Where then does it lie with the positive decision to actually do something that causes harm and death?

Ms Peter: If that were to be a deliberate act . . .

Q262 Mr Rooney: It is different to gross negligence, is it not?

Ms Peter: It is actually beyond gross negligence really. It depends. I suppose you could say very often you make a deliberate decision to do something—a company, board, some part of the company, management—without taking regard of the implications, and that makes it gross negligence. I suppose it depends on whether you are saying, “We know all about this, we know or we have a 99% certainty that it will cause an incident which has a high certainty of causing death”, then you are really at the very top end of the scale. Very often things are not quite as clear-cut as that, because, particularly in larger organisations, you are going to have the layers of technical knowledge, technical information, and the board will be operating at the level of making the strategic decision and will be asking questions about the risks associated with doing something in a particular way. They will not actually be saying, to quote your example, “We are making a decision to use high-alumina cement because this is going to cause problems.” They are actually going to be saying, “We are going to be using it for a variety of reasons: sourcing, cost,” whatever, without taking proper regard or asking the proper questions about the implications of doing that. Rather than making a deliberate decision to do something they know to be wrong, they are very often just not asking the questions about whether there is something wrong in doing it.

Q263 Gwyn Prosser: Would you or your members welcome the introduction of statutory duties for directors?

Ms Peter: Under the Company Law Reform Bill, which was introduced last week, there are going to be statutory duties for directors. Personally and as an organisation, I think these should always be kept as general as possible. The problem when you start introducing very specific duties is that people concentrate on the narrow focus of what is in the statute, sometimes to the exclusion of those things coming from the side or other things which they really ought to be concentrating on as well.

Mr Schofield: We wonder whether it would really add anything to what is already there, again. It might have a symbolic effect, but, first of all, directors' duties are owed to the company and not to third parties. The current duties are. The general law of negligence already imposes duties on any of us where we can reasonably foresee that our actions will injure someone. Section 7 of the Health and Safety at Work Act imposes duties on those directors who are employees to take reasonable care of the health and safety of others, and, as I have already mentioned, Section 37 imposes duties where there is neglect or connivance. We wonder really whether this will add to the improvement of health and safety management where, in our view, the evidence is that what is important is that responsibility is diffused throughout a business rather than that it reposes simply in one person or one group of persons.
Q264 Harry Cohen: The Bill focuses on senior management failure, and you plainly prefer that to targeting an individual manager or director, but would any of your members be concerned if a corporate manslaughter prosecution would effectively result in senior managers being tried in the eyes of the public without the opportunity to participate in the proceedings? If they do, are they right to take that view?

Ms Peter: This concern has been expressed but, I have to say, not by many of our members. In surveys and seminars we have conducted on this subject that really did not come out as the issue. It was more a few small questions around the definition of “senior management” and what falls far below the standard.

Mr Schofield: We agree with that.

Q265 Harry Cohen: So you always think there will be an opportunity for an individual manager . . .

Mr Schofield: Whether there is a full opportunity is another matter but they will inevitably be witnesses.

Q266 Harry Cohen: What did you think of the Law Commission’s initial proposals that the offence should focus more generally on failures in the way a corporation manages or organises its activities?

Ms Peter: I think we did feel that was probably too general and really would possibly make it actually quite difficult to secure successful prosecutions.

Q267 Harry Cohen: Also presumably, although you do not want to prosecute or target individual managers, it would not bring out whoever was held responsible, if you take that view?

Mr Schofield: We certainly think the focus should be on the strategic level within the company. If the corporation is going to be liable, then the focus should be on the activities of those who run it at the strategic level. We are happy with the focus; we are not quite sure the wording has got there yet, but we are happy with the focus as described in the consultation document, if not in the draft Bill.

Q268 Harry Cohen: In earlier evidence sessions, and indeed in other evidence submitted, the risk has been put up that health and safety in larger companies would be delegated well below the level of senior manager to avoid liability for the offence. What thoughts do you have on this? How would you suggest that could be avoided?

Mr Day: One anecdote from the Institute of Directors: one of the things we have been trying to do in recent years working with HSE and with others is to get over the message that, just as with any other aspect of corporate performance, health and safety, or in this case in extremis, where that results in death, is something that should be taken very seriously indeed by those people at the level who direct the resources, who are in general directors, or in the public sector it might be the cabinet in the council or similar. As we understand it, in terms of the present draft, the board, for want of a better term, would not be able to wash its hands and say, “We delegated this” because it would not be doing such things as, for example, getting reports on what is going on in terms of health and safety activities in the organisation, it would not be having an eye to the culture, which is quite often, I think, in what I know of the many circumstances where deaths do result, a culture within an organisation. It is easier to say that than to address it, but nevertheless, the current Bill as drafted, if it is not changed, would not allow that board of directors to absolve itself of that responsibility and would not permit it. In fact, if it had said, “We have devolved that responsibility”, then I think any court or any investigator would say, “You shouldn’t have done that.”

Mr Schofield: We do not quite share the same confidence. I have to say. We are slightly nervous that there is a risk of delegation or even the other direction, off-shoring responsibility, if you like, for this. We confess we cannot come up with a perfect definition ourselves but we are interested in exploring with the Home Office the notion that it is managers having the authority to take strategic decisions that would have prevented this. That is what we are focusing on. If we can be assured that that is what the legislation does, that is what we are looking for.

Ms Peter: We have talked about this in the context of, rather than being the person who does do something, rather than somebody who is at a level who does or should be playing a significant role, again, if you try to avoid it by not doing something, you should not be absolved.

Q269 Harry Cohen: I hear what you say and I will have a look closely at the actual comments but is there not a risk arising that, albeit the board cannot negate their own responsibility, they may just seek to pin it—maybe rightly—on someone well down the chain, and therefore say “We are not responsible” or “We have acted against whoever was to blame”? Is there not a risk that it could be pushed lower down instead with the law coming in? They might use that as a defence in the law.

Mr Day: I think there is another aspect, going back to the more general factors that affect perception of an organisation’s behaviour in terms of their reputation. Finance was mentioned in the earlier evidence, I think, and there are all sorts of factors that cause people to have their reputation affected. This is a slightly extreme example of that. As I say, one of the things we have found in dialogue with our own members is that it is the case, unfortunately, that for some people, a minority of people, aspects to do with health and safety can be regarded by that minority as merely a technical issue. We would say that is no more the case than is the observance of accountancy law or the observance of food hygiene. The organisation nevertheless has to address a whole range of complex laws, and one would hope that it would not seek to avoid laws on taxation or VAT or submission of accounts any more than it would seek to avoid a health and safety law.
Q270 Mr Dunne: In the introduction to the Bill the Government has said they are not trying to stifle entrepreneurial endeavour. Is it the view of your organisation—I would like to hear from both organisations—that that is correct and that as the Bill is currently drafted, it should not have any impact on recruitment of either executive or non-executive directors to companies in high-risk sectors?

Ms Peter: I think, certainly as it is drafted, our members have not really shown—a few have, but the majority do not think it will have that effect, and that would be an unfortunate and unintended consequence if it did. Really, I do not think we think that it would have that effect. I think it would have that effect if it moved into the area of individual liability beyond the current area of gross negligence manslaughter for individuals.

Mr Schofield: I agree with that. For well-managed businesses, legislation like this draft Bill should not affect the way the business is managed and therefore should not affect the attraction of a role as a director.

Q271 Mr Dunne: Do you share the view if this were to go down the individual line?

Mr Schofield: Yes.

Q272 Mr Dunne: Looking at it from the victims’ perspective, if the Bill does not stop companies from being averse to risk that could threaten lives, will it have been effective?

Ms Peter: No. Businesses always have to weigh risks. Unfortunately, life is not risk-free. One hopes that prosecutions would be taken where it was shown that the risks had not been properly evaluated and then managed. The risks of life will never be totally eliminated, but what we are, I think, trying to do is to ensure that companies in all their activities are managing and weighing the risks at all times. We were talking earlier about the railways. The cost of making every single railway line 100% secure from anybody ever being able to climb on to them would far outweigh the benefits secured. That is something that companies always have to do, and that is an area the courts, in evaluating and making decisions on prosecutions under an Act such as this, would have to be very alert to. It is not the fact of an incident occurring; it is what has led to that unfortunate incident.

Q273 Mr Dunne: Mr Schofield, can I ask you a second question? Do you believe that the number of work-related fatalities and injuries will reduce as a result of this Bill?

Mr Schofield: Our view is that it is probably unlikely that this Bill will have this effect. This is not, in our eyes, essentially a measure to improve health and safety. It is about retribution, if you like; it is about appropriately stigmatising the behaviour of companies in certain situations. It is not really about the sorts of things that the Health and Safety at Work Act is about, which is improving the management of health and safety.

Q274 Mr Dunne: You would not say the discussions about this Act over the last number of years that you have been involved in have had an impact on health and safety regimes within your members?

Ms Peter: I actually think they probably have. We are certainly aware of much greater awareness and interest amongst our members in actually making sure it is something they look at strategically within organisations. They establish cultures that go right through organisations; they receive reports on activities and incidents. So I do think, in a way, the publicity surrounding the lead-up to the Bill has probably had an effect. Whether there would be a much greater effect if the Bill is passed, I do not know.

Mr Schofield: We have no evidence either way on the point, I have to say, but you have to remember that, in terms of keeping the numbers of fatalities down, the UK is the world leader. Our death rates, our fatal accident rates, are very low compared to our competitors.

Q275 Mr Dunne: Could I ask you a final question? In your evidence you talk about the need for a code of practice as a briefing document to sit alongside the Act.

Mr Schofield: Yes.

Q276 Mr Dunne: Can you explain the reasoning behind that?

Mr Schofield: It is a question of better regulation, in a sense. It is a question of transparency, so that businesses know not only what is expected of them, but what is not expected of them in terms of compliance with this legislation. We mentioned, for example, in our response the fear that some will unscrupulously exploit the passing of the legislation in order to generate business to convey false messages about what actually is required. So we think companies should know what this requires. Actually, for the average layman, I do not think reading this is going to help you a lot. Reading the preamble to the Bill may help you, and a document drafted in that sort of language would help and would also be something which the prosecuting authorities would rely on in order to bring a prosecution, so there would be transparency in terms of the standards that you are expected to adhere to.

Q277 Mr Clappison: Can I ask the Institute of Directors about the application of the Bill? In your comments on the Bill you criticise the decision not to extend the application of the draft Bill to unincorporated bodies. Can I ask you if you feel, with the offence only applying to companies, companies will be placed at a competitive disadvantage vis-à-vis unincorporated bodies?

Mr Day: As far as we are concerned, from the point of view of the customer, from the point of view of the external world, it should not matter what corporate form an organisation has. We should not have to know that. I have already mentioned the application to
Crown bodies—we have some reservations about some of the proposed exclusions. Yes, there are all sorts of other laws—disability discrimination, finance, and all sorts of other laws of the country—that any organisation, if it is an employer, has to take account of. So I think in principle—and it is not to victimise any particular sector of the unincorporated associations—as I say, it should not be a factor to be taken into account by a user.

Q278 Mr Clappison: Can I ask Mr Schofield if he shares that view?

Mr Schofield: I think we share the view that there ought to be a level playing field, if it is possible, but, wearing my lawyer’s hat, I do see difficulties in imposing liability on something that does not exist in law, that does not have a legal personality. EEF is an unincorporated association but we do by statute have quasi-corporate personality; in other words, we can be prosecuted and we can be sued, but it seems to me you would have to make judgments about clubs and other associations whether it was appropriate to make them quasi-corporate for this purpose. I do not think you can just put a blanket clause in. You would have to look at the whole range of clubs and associations before deciding that it was appropriate to attribute, as trade unions and employers associations have, quasi-corporate personality.

Q279 Mr Clappison: Mention has been made of Crown bodies. In the field of equality, do you think the Government really has achieved its aim of treating public and private bodies equally when they perform equivalent functions?

Mr Schofield: Certainly we are happy that where they are providing equivalent functions, we think that has been achieved and that is what we were seeking. We are not entirely sure about the drafting, again, of the provision but we understand this is more work in progress.

Q280 Mr Clappison: Is that your view as well?

Mr Day: I used to work in the NHS at one point, so I am familiar with some of the culture. I think there is a learning exercise there to be had, but I think at the end of the day, again, it should not matter whether it is a private, independent health care facility or an NHS health care facility. It is the same standards of high performance, and in this case observing good health and safety procedures, and essentially it is something that should be shared by any body, whatever its corporate form. But I think there is still a learning exercise going on in the corporate sector. In the public sector there is another area of effort to focus the mind there.

Q281 Mr Rooney: To what extent, if any, do you think the Bill as drafted would create a level playing field between very large companies and SMEs?

Ms Peter: I think it will help to level the playing field. At the moment I am not even sure there is a playing field, let alone that it is level. The problem will always be that in any large organisation the complexities of the structure will be more difficult to disentangle and actually, it is why I think it is very important that we do try to create an offence that looks not just at what those in senior positions have done but at what they should have done or they have failed to do, because I think that will be an easier route through to many larger organisations than the sort of positive action by them. So I think it goes some way to it. I think it would depend ultimately how the courts approach the issue and how juries actually are able to disentangle evidence in particular cases.

Q282 Mr Rooney: Do you think this level of inequality, wherever it is at, will be affected by the quality of legal representation that bigger companies can afford?

Ms Peter: That is true in any area of legal life. I do not think this will be unique in that respect.

Q283 Mr Rooney: So they win again.

Ms Peter: They will probably get better quality prosecution as well.

Q284 Chairman: While we are mentioning juries, clause 3(2) and the list and so on: do you think listing the factors for juries is helpful or not in disentangling evidence in particular cases.

Q285 Chairman: Do you share that view?

Mr Schofield: We do not share the view that it is unhelpful to list factors. We share the view that this particular list of factors is not helpful. There are a number of problems with the list as it stands. In particular, this is legislation that focuses on a gross breach of a duty of care and yet the list of factors does not mention the sorts of issues that are appropriate to establishing whether there has been a breach of a duty of care in the first place, such as the likelihood of damage occurring, the extent of it, the cost of avoiding it and so on. So those are factors that ought to be in first before you move to benchmarking the level of failure against a general standard, which is what I think 3(2) is aimed at doing but does not really do appropriately.
Mr Schofield: Freezing assets is in itself a punishment, which is used, for example, in the case of contempt of court. That would be a punishment in itself. So you would be saying guilty until proved innocent. To freeze a company’s assets is a substantial penalty on the company.

Mr Schofield: It should not be an automatic response that companies might do this but if there was evidence that companies were doing it, it might be appropriate.

Ms Peter: Such as possibly by a previous course of dealing by those involved. That is the sort of circumstance.

Q287 Chairman: In the case of a small company—and we all know there is a problem with companies putting themselves out of business and then starting up soon afterwards—there is a real issue here, is there not, about the ability of companies and therefore their directors to avoid liability? If you think it is inappropriate to freeze assets, how then should the courts ensure that that does not happen?

Mr Schofield: It may be that it is possible where there is real evidence that this is going on, and we have not explored this in detail.

Q288 Chairman: If it was fit for purpose, if there were no particular reason to do it rather than willy-nilly?

Mr Schofield: It may be that it is possible where there is real evidence that this is going on, and we have not explored this in detail.
Thursday 10 November 2005

Members present:

Mr John Denham, in the Chair

Colin Burgon
Mr James Clappison
Harry Cohen
Natascha Engel

Witnesses: Mrs Eileen Dallaglio, member, and Mr John Perks, member, Marchioness Contact Group, examined.

Q290 Chairman: Could I welcome you this morning. As you know, this is one of a series of oral hearings that we are having on the draft Corporate Manslaughter Bill. We have also received a large amount of written material, which gets published and on which we will draw heavily for our final report. I wonder if you could briefly introduce yourselves and explain the aims of the organisation.

Mrs Dallaglio: I am Eileen Dallaglio. I am a founder-member of Disaster Action, a founder-member of the Marchioness Action Group, and currently with the Marchioness Contact Group. The aims have always been very clear. At the time of that disaster, when 51 young people lost their lives, we went in search of truth and justice as to how such a tragedy could come about in the middle of London, within a hand’s stretch of this building. Being a former air stewardess, in charge of health and safety on an aeroplane carrying 130 people, I had a very good training, and I was very concerned about the manner in which my daughter died along with 50 other people. We pressed for an explanation and truth and justice, pushing for an inquiry into river safety. It started with the Hayes Inquiry, but went on to the coroner’s court—that was a massive battle—truth and justice—and realising that we were extremely restricted by the laws. It then went on to Lord Justice Clarke’s public inquiry into river safety—which threw out a few more facts—and then finally on to Lord Justice Clarke’s report that branded Ready Mix Concrete, Tidal Cruisers, East Coast Aggregates and South Coast Shipping guilty in their failures to implement a safe system of safe navigation of their vessels on the River Thames. In fact they appointed themselves, ie the managing director of East Coast Aggregates, in charge of health and safety. Our aims have always been the same: that that should never, ever happen again. People in this building—and this is the only place you are ever going to get any justice, because the courts certainly did not mete it out—should have ordered an immediate inquiry following that disaster under section 55 of the Merchant Shipping Act. It was actually held some 13 years down the line by Lord Justice Clarke. In his words, “We are today where we should have been 13 years ago.”

Mr Perks: Correct.

Mrs Dallaglio: Those are our aims. They continue now. We want some peace from this disaster and we want to make sure that this Bill for corporate accountability and corporate responsibility is pushed through Parliament. We realise the difficulties you have. We do not have a witch hunt on the corporate companies—let us make that very, very clear. There are a few that are rogues and those people have to be brought into line. It means that they must be made accountable, either on the criminal side or on the civil side—which in 16 years after the Marchioness none of them have been: furthermore they have successfully handed us the liability for their negligence.

Mr Perks: My name is John Perks. I will not go through what Mrs Dallaglio has just said. I am a part founder-member myself over the last 15 years, so I concur with everything she has said. To tell you a little bit about myself gives the background to how strong I feel about the health and safety issues and what you ladies and gentlemen are up to to get this Bill through however or whichever way it goes.

Q291 Chairman: To be helpful, I hope you will be able to cover the specifics about the issue here.

Mr Perks: Yes, from questions from the Chair, obviously.

Q292 Chairman: Having established who you are, I will try to move through this, and I will try to make sure that if there are issues we are not covering that you have the opportunity to bring those in.

Mr Perks: I will be very brief, because Eileen has said all of that, and obviously that is the direction we are going in. For the last 10 years, I have been involved in the construction industry as a project manager, so our committee is aware, through my discussions with them, what is on board here. I have written the CDN documents, the method assessments, the risk assessments, so basically there is a background for the whole of our committee to glean information from myself.

Q293 Chairman: Thank you very much indeed. The aim of this Bill, as the Government have put it to us, is to ensure that where people are guilty of corporate manslaughter there can be criminal convictions. In your view, why did the manslaughter prosecutions under the existing law fail you in the Marchioness case?

Mrs Dallaglio: I do not think the proper charges were brought in the first place. I think there should have been an immediate inquiry under section 55 and that would have quickly established who was guilty of those deaths. It was a massive loss of life...
here in the middle of London. In Lord Justice Clarke’s words: “It cried out for public scrutiny” yet it got none. I could not believe, as the years went by, starting from the trial of the Master of the Bowbelle, you were up against future Lords and Law Lords of this country representing the corporate companies. There is no legal aid available to anybody to fight a case for negligence. It was quite clear very early on that some person or persons had been negligent in those deaths, and yet we went into a court of law where we were looking at arcs of visions and strobe lights—from day one in Douglas Henderson’s two trials—and nowhere, but nowhere, did they ever address issues of how, where, why and by what means 51 people lost their lives.

Q294 Chairman: Is it your sense that it was not necessarily the law itself that stopped there being a conviction but the way in which the case was handled and pursued? Is there—and this is central to our inquiry—a fundamental problem with the way the manslaughter law currently exists which made it impossible to get a conviction, even though elsewhere in the process there had been a verdict of unlawful killing?

Mrs Dallaglio: That became clear over the years. That became very, very clear. I attended every court hearing in the land, or every hearing outside the courts pertinent to this inquiry and even others—the rail disasters. We have people bringing cases against those responsible for those deaths in the Ladbroke rail disaster, and they damn well know that under the present structure of the law in this country they are not going to get a criminal conviction against the directors of those companies, who have been found causative of failure in their duty to protect the public at large. That is something that I feel very strongly about, because it is a total and utter waste of public money in the present manner, and this building has a duty to put it right, to ensure that all of the facts are looked at, and that these people, these individuals who have a malaise—

Q295 Chairman: I am really sorry to cut you off, because I can quite understand why you want to express your views so forcefully.

Mrs Dallaglio: I am sorry.

Chairman: But I am keen in the limited time we have that we should cover a number of quite specific questions. I do not want to cut you off but I am worried that we might lose the opportunity to gain some insight on some specific points. Could I turn to Mr Prosser.

Q296 Gwyn Prosser: Good morning. You have just made the point that there was no redress, there were no means of pursuing criminal prosecutions at that time or since. You have been closer than anyone to these matters and you have rehearsed these issues lots and lots of times, but could you tell the Committee why it is so important in the case of the Marchioness, for instance, that criminal prosecutions against individuals should have taken place rather than what happened: the public inquiry and inquest.

Mrs Dallaglio: I think there has to be something set out in law whereby, if these people do not put in place proper procedures to protect the public, they will be held accountable. At the moment—and I am not a lawyer, but, by God, I have learned a lot about the law over the years—these people know that they are not going to be held accountable. They sit there with impunity and laugh at you. Those in this building have a duty to protect the likes of us. They have a duty to do that. And that is what I want to see in the future. I never want to see that sort of thing happen again.

Mr Perks: The view that the Marchioness Committee holds is that the existing punishments for gross, blatant breaches of health and safety laws are totally inadequate. They are not a sufficient deterrent. They do not reflect the public desire for retribution when people are unlawfully killed as a result of those breaking the law. That is what is happening in construction and on our public transport systems, and it has to stop.

Q297 Gwyn Prosser: You have made the point Mrs Dallaglio that directors can act with impunity and the law does not touch them. Under the present existing law, if loss of life can be related directly to the actions or inactions of an individual (for gross negligence, etcetera) then charges can be taken against that individual and the penalty can go as far as life imprisonment. Why do you think this particular piece of legislation should include direct personal liability for directors and others?

Mrs Dallaglio: We have seen prosecutions. We have come a long way since 1989. The Selby rail disaster: one individual. There are several others. But we have not had a successful prosecution of a director or directors who have continuously allowed a malaise to exist within their corporation, where they have failed to set in place the correct health and safety procedures which are necessary to protect the public and the individuals that work for them. For God’s sake: if they do, they have nothing to fear. Nobody mixes with corporate people more than I do within the Twickenham organisation, the RFU, and, quite frankly, we have the highest standards over there, every time I go to watch a match there and over 100,000 people go in and out of the turnstiles. They have nothing to fear if they put into place the correct procedures to protect people. But, over many, many years, many, many rail disasters, they have not put those things in place. They have appointed themselves health and safety directors, in charge of large vessels the size of a football pitch on the River Thames.

Mr Perks: We do not follow the mandate that was put down in government, that we find the legal system or the courts processed that as it should be processed. We find constantly that you will have companies that just wriggle. I say “wriggle”: they have vast armies of QCs, solicitors, barristers to call upon, and they seem to deflect those responsibilities that they are charged with as a director of a company. Many times they wriggle and wriggle and away they go. This, we say again, has to stop. The people in this House, you are the
people who can change this for the people of this country. It is our politicians we are addressing this to now. You are the people who can address what is wrong within that system.

**Q298 Gwyn Prosser:** On this specific issue of the personal liability of directors, some of the other witnesses from other victim support groups have given us their opinion that without personal liability being attached to the Bill—and it is not there at the moment—we might as well not bother. What is your view of that?

**Mrs Dallaglio:** Personal liability. In every respect in the Marchioness tragedy, from my own experience and what I have experienced within our committee, these companies took Francesca's life unlawfully, and she had a right to it under Article 2.2 of the European Convention. They handed us 15 or 16 years of non quality of life and a horrendous path—something I would not bestow it on my worst enemy—and I thank God that I have survived it. And then, to add to everything else, they have handed us the financial liability for it as well.

**Q299 Chairman:** Mrs Dallaglio, perhaps I could address you on Mr Prosser's point because it is quite an essential issue for the report that we write at the end of this process. Obviously we cannot re-run the hearings, but would you suppose for the sake of argument the law we are now discussing was in place and it proved possible to convict the companies involved in the Marchioness disaster for corporate manslaughter under this Bill. As the Bill stands at the moment, the companies would be convicted, but there would be no individual convictions for liability on directors. Is the Bill in that form worth having? You get part of what you want, a conviction of the companies, but you would not have liability for directors. It is a hard question, but—as close to a yes or no as you can—is it worth pursuing a bill that does not have individual directors if at least you can convict the companies?

**Mrs Dallaglio:** It is a bit of a red herring, but it is a step in the right direction.

**Mr Perks:** It is not the answer, Chairman. Nowhere is it sufficiently near to becoming the answer. Responsibility and accountability is not apathy in the boardroom. Those guys are there to look after the welfare also, but what they go out to do is find where the profits are and what is payable.

**Chairman:** That is very helpful. Thank you very much indeed.

**Q300 Natascha Engel:** In your submission you argued that you believe there must be imposed a legally binding safety duty upon directors. Why do you believe that health and safety duties for directors are necessary?

**Mr Perks:** It is the same situation as I was talking about just now. Otherwise, they just wriggle and wriggle away. There might be derisory fines, aimed possibly at the company—it depends on the organisation, how big the corporation is. They could be derisory anyway. If you look at the net profits of companies in relation to some fines, they are appallingly bad. But, until somebody in the boardroom, a director or chairman, is imprisoned then we are not going to go anywhere down this route. He has to be picked off because he is responsible. If you are responsible in an organisation, that is your response. You hand down responsibilities, although you must be aware of where you are giving those responsibilities and who is answerable what to you.

**Q301 Natascha Engel:** In the case of the Marchioness, do you think there was evidence that directors had taken insufficient account of health and safety?

**Mr Perks:** Indeed, yes. You had people wandering about . . . Can I say it, Chairman? The companies?

**Q302 Chairman:** It is—

**Mr Perks:** That would not be helpful. You know the companies anyway, so . . . Obviously they walked away clapping their hands. We saw them across the road.

**Q303 Natascha Engel:** Do you think there was a specific breach of health and safety legislation by individual directors?

**Mr Perks:** Yes. Yes.

**Mrs Dallaglio:** If you put a man in charge of a vessel the size of a football pitch and you set him loose on the River Thames without checking his CV to say what his previous experience is—

**Q304 Natascha Engel:** I appreciate. The issue is why it was that existing health and safety legislation could not be used in order to identify that somebody had been in breach of that.

**Mrs Dallaglio:** You are asking me. I am not a lawyer. I was a woman who was highly traumatised for a lengthy period of time by the loss of my daughter. I put that in the hands of you people here. I looked up to the law—to those who make the laws, those who administer them, those who carry them out.

**Q305 Natascha Engel:** The point I am trying to get to, again moving on a little bit, is do you think that we should amend existing legislation such as health and safety law in order to cover what it is that you feel is needed? Or do you think a separate piece of legislation on corporate manslaughter needs to be introduced?

**Mr Perks:** Government legislation in the past has protected these organisations and corporations. Let us come in from there. Whatever is decided in this House, whatever we do we must not get into the situation that again there is boardroom apathy in certain companies. That might be 10% or 20%, but, until we change that, I do not believe the existing laws and even the legislation that you are proposing now is going to be anywhere near sufficient to be a deterrent for these powerful people. You can ask other pressure groups or trade unions and I think you will find a similar thing to what we are saying. Anything would be helpful, but we have been trying
to get help for 15 years. We did not just put a flag up two weeks ago and say, “Yes, we need to come up and see you guys because of . . .” We have been through every court in the land. We are still saying, yes, there is boardroom apathy, and, until in this House it is changed, we are going to have a problem, the public is going to have a problem. I think yourselves have a duty of care to the public. That is your first duty as politicians. I think now is the time to think deeply about that. Think deeply about it.

Q306 Chairman: I understand it is the responsibility for us as legislators—
Mr Perks: I am sure you are aware, Mr Denham.
Chairman: — rather than for you to write the law for us. I think we accept that responsibility.

Q307 Mr Clappison: You will be aware that the Government’s original consultation paper five-years-ago proposed that there should be no requirement that individuals obtain the consent of the Director of Public Prosecutions to bring proceedings for the new offence. However, the Bill as it has now been published requires the consent of the Director of Public Prosecutions before such a private prosecution can be brought. Do you have views on that?
Mr Perks: Our experience of the Director of Public Prosecutions is quite appalling over the years—I will not bore you with that. So I would be saying, “Don’t waste your time.” We have been to the Director of Public Prosecutions. I have so many letters—the pile must be this high over 15 years. Waffle, waffle, waffle. Five years later: here we go again—swings and roundabouts—we cannot do that and we cannot do this. I would say bypass them.

Mrs Dallaglio: It is a delaying process. The quicker you get to what really brought it about, the better.

Q308 Mr Clappison: I guess the counter-argument to this—and I can imagine what your view is going to be—is that the ability to bring private prosecutions might give rise to some ill-founded prosecutions. How do you respond to that theory?
Mrs Dallaglio: Ivor Glogg brought a private prosecution in the case of the Marchioness and that caused a lot of dissent at the time because we felt we were on the verge of a public inquiry into the disaster. But, you know, he lost his wife, and it was his right to do so. He felt very strongly about it. He had his own company. They bankrupted him, these corporate companies. They bankrupted him. He went through God knows how many courts. I attended all of them. Again, bogged down with areas of visions, technicalities of law, points of law, they were thrown out, and he had to find another £50,000 for judicial review to get back into the courts again.

Q309 Mr Clappison: Just to make it absolutely clear from what you have said: he brought a private prosecution and at that stage you felt you were close to getting a public inquiry, but the fact that a private prosecution had been brought then affected the decision on a public inquiry.

Mrs Dallaglio: Exactly. Yes. Initially we had what is now known as a flawed report at the MAIB under Captain De Coverly which the Government of the day instigated, and that really set the basis for a lot of the injustice that occurred—at Glogg’s private prosecution and any other court hearings, and, indeed, at the coroners’ courts as well.

Q310 Natascha Engel: One of the issues about private prosecutions is that people may not be in a position to take financial risk. You said the gentleman spent £50,000 on a private prosecution.
Mrs Dallaglio: No, he spent his entire money. He was bankrupt. And, most incredibly, the thing I could not understand when it finished, when it finally finished, was that he never had the money to take it to the crown court; he was on the verge of going to the crown court then but did not have enough money. They had bankrupted him.

Q311 Natascha Engel: If you have private prosecutions, then people who are not in that financial position in the first place would be dissuaded from doing so, whereas if you go through the DPP, it means it is public funds. That is a very important thing to remember.

Mrs Dallaglio: You say that, but my own experience, from what we have witnessed in the Marchioness tragedy, is that when they finally did bring some charges against the operators of both vessels—two minor charges. I might add, for their failure to keep a proper lookout and failure to arm the crew with walkie-talkie radios—it was always going to fail because the charges were not . . .

Q312 Mr Clappison: To take you back to the private prosecution you mentioned, he only got as far as the magistrates’ court, did he?
Mrs Dallaglio: Exactly. He got to the stipendiary magistrate at Bow Street court. I saw Glogg after that—I had a cup of coffee with him afterwards, and I was heartbroken, obviously, because yet again it had been thrown out. He had been sent into an ante room and he came back into the court and he was given all of his expenditure from public funds. I could not understand, why if you lose a case in any court you pick up the liability for it, and I went and had a cup of coffee with him afterwards and I said, “What in God’s name did you do? Did you accept a pay off or what?” He said, “Eileen, I have gone as far as I can go. I cannot take any more. They have bankrupted me.”

Q313 Mr Clappison: In that process, did the stipendiary magistrate find that there was a case to answer or not?
Mrs Dallaglio: It was a technicality of law. It had been thrown out. If you reached a point where the stipendiary magistrate or the judge was going to reach a decision to commit them to the crown court, then they came up with some other
highfaluting argument or technicality, and it was thrown out again. Glogg went through five or six courts like that.

Q314 Mr Clappison: The blame of what you are telling us briefly is that the—
Mrs Dallaglio: The evidence was always there. This is what I am trying to tell you. It was always there and nobody looked for it.

Q315 Mr Clappison: But it is difficult and impractical for an individual to do that on their own.
Mrs Dallaglio: Absolutely. Impossible.

Q316 Harry Cohen: I would ask you to try to be quite specific in your answers. In your evidence you say that the courts must be provided with the powers to impose stronger sentences. Sentences I think means two things. One is money. From what you have said I think I have got the gist that you want stronger monetary sentences. We have seen, by the way, a recent case where there was something like a £10 million fine on one company. I want to ask you, first, if you mean money. Secondly, we have dealt with the individual liability or not aspect, but this Bill just talks about unlimited fines and/or remedial order. When you say stronger sentences, do you mean additional sentences other than that? If so, what would you want them to be? So there are two specific points there: money and additional sentences.

Mr Perks: I think I said earlier that some of the fines were derisory with a view to the companies. I am not talking about Joe Bloggs down the road who puts a few bricks in the wall—you know, we can have him any day of the week, we can put him away for five years. We are saying, “Yes, realistically you are talking bigger money now than the other very, very small sums”—I mean, the sort of sums we have been looking at in the past are pocket money for them for the weekend—but imprisonment . . . If somebody, a high-profile figure in this country at boardroom level, is imprisoned for a minimum of five years, then you will get the answers to your questions on health and safety in this country and the transport systems. Imprisonment. Higher fines? You can go as high as you like. Some of these guys can wriggle out of millions. Accountability and responsibility.

Q317 Harry Cohen: But on the companies themselves do you want higher fines?
Mr Perks: Yes, indeed, higher fines. Put them out of business. If they are negligent, reckless, incompetent companies, put them out where they should be, not earning a living. We should not have a bunch of cowboys running these industries, or some of them, scot-free. They walk away. Every time they walk away. You look at the Paddington people’s faces, our faces, at the tragedies we have had. It has got to stop, gentlemen.

Q318 Harry Cohen: On the stronger sentences beyond fines, do you have any other policies that you want other than what you have mentioned already?
Mr Perks: The responsibility and accountability that goes with that devastation, whether it be in the workplace or a public place. But what never filters through to those victims—and that is the journey to hell for the rest of their lives—

Q319 Harry Cohen: Are you saying compensation?
Mr Perks: No, I would say cover costs or damages. I am not saying compensation. Costs and damages for a start.

Mrs Dallaglio: Could I come in on that one. The very first thing I heard a corporate lawyer say in a court of law which I entered—the very first one—“My Lords, we accept full liability.” Their liability under the Fatal Accidents Act of 1976 and the Miscellaneous Act 1982. I went on to learn, was limited to your funeral expenses. To this day, ladies and gentlemen, these two corporate companies, that 13 years down the line the line were banded causative of my daughter’s death along with 50 other people, have not even paid the funeral expenses. Two or three years ago I went back to college and I did a computer course at the age of 64. With my husband, I did a direct and indirect cost account on that computer. I am not talking about compensation—there is no compensation. I am not talking about legal fees. I am talking about direct and indirect costs attributable to this disaster through what we have achieved in these groups—and that is immense. Those are the pluses of what we have been through in the last 15 years: five lifeboats on the River Thames—that have saved 91 lives in 18 months and been called out 394 times. Tom Luce’s inquiry into coroners and coroners’ practices—no coroner will ever treat another family like Knapman treated our family then. They, to me, are the pluses. Now, to be actually here with you today, to be pleading—and not only for us, all the public out there, but for you as well—because any one of you could find yourself in the position that I found myself in and Mr Perks found himself in 1989. The direct and indirect costs, ladies and gentleman, amounted to £156,000. And the compensation took 10 years to arrive. That arrived on 10 October 1999, 10 years after the disaster, and it totalled £310,46. And in the case of Mrs Garcia, £20—because we dared to question it. We dared to question it. And we were not looking for compensation in those courts we went into; we were looking for truth, justice, and we were also looking for people to take on the responsibility that these companies had taken our children’s lives. What they had imposed on us was a life sentence and no quality of life for nearly 15 years.

Q320 Harry Cohen: That is a good point there about improved—
Mrs Dallaglio: Forgive me, but I feel very strongly about these points. I think you would each feel the same if you were in my position.
Q321 Harry Cohen: I think that is a good point made there about improved contributions to the victims’ families in the legal process. That is certainly worth taking on board. Aside from the issues covered so far, do you have any other concerns about the drafting of the offences in the draft Bill at the moment?

Mr Perks: I do not want to cover ground again, but, as I said, there are strong points. I think the other thing we must look at—which I did make a note of when sitting in the corridor—is that people have nothing to fear from laws that are put in place to protect the public and everybody within the public system. Responsible executives—and there are thousands and thousands—managing directors, if they are all equipped with the knowledge to deal with such matters of health and safety—not themselves but those people who are answerable to them—have no fear of new laws. Especially in construction, you have the CDM cushion. Safety plans, method statements and risk assessments, all these are in place. If we are looking for that controlling mind, if all these things are aware for these responsible executives, what do they have to fear? Nothing. Nothing at all. If you do not put those in to protect you and be conversant with them, you should not be running the company in the first place.

Mrs Dallaglio: Could I raise one other point that caused me a great deal of concern in the question of liability and who they handed the liability to. In the case of the Marchioness tragedy, within about five months of the disaster, Lord Justice Sheen set up his court and all the lawyers were there for both sides, plus steering committees and what-have-you. The companies were there to limit their liability and they were allowed to limit it to the tune of £870,000. Given that the Marchioness is a passenger vessel and was carrying 131 passengers that night—and 51 lost their lives and God knows how many were traumatised—by law that vessel had to be insured for £6 million. That £6 million was paid into court. Under Lord Justice Sheen, the judgment debt rate at the time was 15%, and Lord Justice Sheen agreed that it should remain at 15% for the duration of those claims, for a lengthy period of time. Needless to say, interest rates from about 1993 began to drop, as a result of which, as my case came to court for Francesca’s civil claim, they were then fighting—cross-summonses went in—to make sure they got below the Calderbank offer by lowering the judgment debt rate to 8% from 1993. I had a High Court judge, a Court of Appeal judge, who took a point of law made by an eminent judge, upheld by another judge at divisional court level, and, on a purely subjective view, turned it around. It was as if he was saying to me, “Not only am I not going to increase these damages, but I am effectively going to decrease them by 8%,” hence the cheque for £310,46. I had to mention that because it is food for thought.

Q322 Chairman: Those of us who have been watching Bleak House on Sundays would think that not much has moved on since Jarndyce v Jarndyce in Charles Dickens’ day.

Mrs Dallaglio: It is a joke. The trouble is it would not, because there has been set a precedent in law. That is what upset me. Not that this wretched judge did not increase the damages—that did not upset me at all. What really upset me was that he took a point of law, made by an eminent judge, upheld by another judge, and on a purely subjective view, because he was in the Court of Appeal—huh!—he turned it around. And people who might follow my tragic path in the future, looking for that controlling mind, if all these they will quote that point ... the money. The money what do they have to fear? Nothing. Nothing at all. Iyoudonotputthoseintoprotectyouand

Mr Perks: To finish your question, if I may—and I will be very brief: it is our experience and there is a groundswell in the public that these companies and organisations are directly dictating to this House.

Q323 Chairman: Mrs Dallaglio and Mr Perks, thank you very much indeed. You have put your points very forcefully and very clearly. I think, quite fairly, you say it is the responsibility of Members and in due course the laws in this House to tackle these matters. I think you have helped us enormously, both in the detail but also in giving the background as to why this legislation is coming in front of us now. I hope we will be able to reflect some of what you have said when we report on the legislation in the House.

Mrs Dallaglio: May I thank you all, and you personally, because you are the Chairman, obviously, who makes the major decisions here, and I thank you for inviting us to give verbal evidence. We are not lawyers. We are ordinary simple people who were thrown into a major disaster and had to cope with it.

Mr Perks: May I also add to that response. Thank you Chairman, thank you Committee members, for listening to us today. I hope you can take on board some of the answers we have hopefully provided to the questions.
Witness: Mr Alan Ritchie, General Secretary, Union of Construction Allied Trades and Technicians (UCATT), examined.

Chairman: Good morning, Mr Ritchie. Thank you for joining us. Before we come to you, Mr Cohen.

Harry Cohen: I just want to declare to the Committee that I am on the Parliamentary Panel of Advisors for UCATT. There is no financial gain personally, but I wanted to make that clear.

Q324 Chairman: Thank you very much indeed. Mr Ritchie, perhaps you could introduce yourself briefly and then we will go to questions.

Mr Ritchie: My name is Alan Ritchie. I am General Secretary of the construction trade union UCATT. We have 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 our industry and it attributes to 9% of the GDP in the UK. UCATT have a longstanding campaign for safer sites and have consistently raised the issue of the disproportionate high levels of fatalities, injuries and ill health which affect construction workers. Since the beginning of April 2005 there have been 40 fatalities amongst construction workers. It would only be right for me to pay tribute to George Brumwell, the General Secretary and my predecessor, who died on Tuesday. George was a long campaigner for corporate manslaughter legislation to come into our industry. I would like to quote a speech he made at the conference in April 1992 when he stated that he wanted “proper investigation, proper accountability, radical changes to the criminal justice system and new criminal offences to cover corporate recklessness where life and limb are put at risk or in danger.” UCATT believe that is the only way we can achieve what some people would consider to be a radical line — and I know we have ruffled a few feathers so far as construction employers are concerned. When you listen to the points that were made, such as, “Well, a company might go out of business” or “It might put some financial strain on a company,” we ask: What does it do to the families of the people who are killed in our industry? George Brumwell made the point that it was time that we called a halt to unnecessary deaths in our industry. The question really is about whether there is a will within the industry or on the part of the police who are there to protect us; the HSE, who are supposed to be there to enforce and protect; and on the part of the courts, who are there to protect and enforce the rights of the individuals. Our campaign really is concerned with highlighting the weakness that exists in all those areas.

Chairman: Mr Ritchie, I do not want to cut you short but I hope we understand the general points and I hope we can cover all the issues of concern to you. With the events in the House this week, I had not heard of the George Brumwell’s death. He would have been known to a number of members of the Committee, so, please, would you pass on our condolences. If we could now go to the questions.

Q325 Colin Burgon: Good morning, Mr Ritchie. I met George Brumwell several times and he certainly was an outstanding figure in the construction industry. Several trade unions have given evidence to us, including Amicus and T&G. Why for UCATT is the statutory offence of corporate manslaughter such a priority?

Mr Ritchie: We are a specialised trade union, not a general union, and we deal mainly with the construction industry. If you look at the HSE league tables, we are at the top. We are twice as high as agricultural. As general secretary and when I became a regional organiser, I had to go to the widows of some of our people who had been killed on sites and I had to explain to them the tragedies, what had happened, and the justice system of where we are. Even to this day, this year alone, I was up in Dundee, where the company went into court and pleaded guilty: “Yes, we breached the Health and Safety at Work Act — fair cop, Guv’ — and we killed the employee.” The judge was scathing on the company and then fined them £7,500. We think that is a scandal. I cannot justify that to the dependents or to the widow, that that is justice. There is no consistency in law. When you are a drunk driver and you go behind the wheel of a car and you knock someone over, you face a custodial sentence. But, in this country, if you are a construction worker and you break the Health and Safety at Work Act and you kill your employee, you face an average fine of about £7,000. It is scandalous. Not only that, I have met some of these directors in my role as regional secretary for Scotland and now as general secretary, and one of the directors put it to me in this way: “Alan,” he said, “one of your contracts has got £20,000 a day plus penalty clause for every day it is late. For us to introduce health and safety and to be rigid on it could possibly put that contract behind, whereas, if we break the Health and Safety at Work Act and kill the employee, we face an average fine of £7,000. It is a big choice for us as a company, isn’t it?” That is where the injustice to the law is. That is why construction is very important. By the end of this week, another two people will have been killed. To be fair to George Brumwell, George Brumwell was campaigning for this legislation for the last 20 years. We have seen a lot of construction workers killed in that time. We do not want any more delays in this legislation.

Q326 Colin Burgon: People who have submitted evidence to this Committee have told us that the Bill, as it is currently drafted, will add to what is called the regulatory burden on companies and it will not dramatically improve safety at work. What is your response to that?

Mr Ritchie: I just do not accept it. I have heard it all from construction employers. Some construction employers say that this could put a further burden on us. Construction employers who are playing it by the book have nothing to fear with this legislation. They are doing everything that is right. It is the ones who are not who have everything to fear from this legislation. I heard this about red
tape. I was out in Dubai this year on a construction project that was there for the ILO. In their health and safety there is a lot left to be questioned. There are no real regulations as we have here. The construction paper there said to me, “Look, we are trying to get the facts and figures of how many people were killed last year in Dubai construction.” The contractor, once he had come back home, told me that 700 Indians alone were killed in the construction industry—that is deaths—because there are no regulations, there is no safety net there. And, by the way, there are British companies working out there. You have got to turn round and ask yourself: If you did not have that red tape, if you did not have that regulation, what would it be like compared to at present in the construction industry? I do not accept that this red tape, or so-called red tape, is going to be a further burden. As I am saying, there are a number of good companies out there who are playing it by the book and are doing everything properly and right, who have nothing to fear, as I am seeing it. The people who have to fear are the companies who are just turning Nelson’s eye to the whole situation of health and safety. Not only that, the statements we have heard from the Health and Safety Executive are saying by far over 80% of the deaths in construction could have been avoided if proper planning in health and safety was implemented.

Q327 Colin Burgon: In your memorandum to the Committee you highlighted that in the year 2003–04 there were just short of 5,000 workers who sustained serious injury in the industry. Would you argue that we need a statutory offence of causing serious injury by gross negligence?

Mr Ritchie: Yes. We did include in our submissions the “over three-day injuries”. We are saying that major injuries are amputations, fractures. We think they are important as well as corporate manslaughter. We are saying that the seriousness of these injuries should be taken into consideration, and, also, that if the situation has been gross negligence then we believe the Bill should cover that. As I say, we have criticisms of the Bill but we have got to see it as better than nothing and we are going to support it and hope it is going to be implemented.

Q328 Mr Rooney: As you are probably aware, on Monday we heard from industry representatives. They were arguing that the prospect of individual liability would increase the “fear factor” of individuals and organisations but would not necessarily lead to any improvement in health and safety. How do you respond to that?

Mr Ritchie: Again, what I have already said, that if a company is implementing a proper health and safety policy they have nothing to fear. If they are turning round and saying that it is going to introduce a fear factor, then there is no fear factor at the present time. We have got some good construction sites going at the present time, where proper health and safety is being managed and is being implemented, with the T5 and sites like that—massive construction sites. They have nothing to fear from corporate manslaughter. The only people who have anything to fear is if their company is totally ignoring health and safety procedures at the present time.

Q329 Mr Rooney: I might come back to that in a minute. You have argued that secondary liability should not be excluded, but that should only be applicable to senior managers. Why do you think it should not go down the line below that, so that if people have aided, abetted, counselled or procured, then the offence of corporate manslaughter below the level of senior managers?

Mr Ritchie: The problem we have got with that is that we have a lot of subcontracting within the construction industry. You see some of these big contracts and over the site there is a big board up with the name of the company. They do not employ anyone on the site, they will subcontract a subcontractor to a subcontractor, and it goes right down the line. Our fear is that that responsibility is then shifted to these wee subcontractors. The main contractor is responsible. He is responsible for his site. We would be fearful if that responsibility was then going to be shoved on to somewhere else.

Q330 Mr Rooney: Just to clarify this, are you saying that in all cases liability should lie with the main contractor, irrespective of what any other subcontractors does, no matter how big that subcontractor is?

Mr Ritchie: The main contractor should have a policy for the subcontractors and the procurement, and he sets out the guidelines to those subcontractors and says “Look, here you are, here are the conditions I want you to work on site; here is the health and safety practice I want you to follow.” If he does not do that and says to the subcontractor, “Oh, it is up to you,” our fear is the subcontractors—as happens a lot in the construction industry—will then declare themselves into liquidation. The main thing is that if there is going to be control on the site and health and safety, the onus should lie with that main contractor.

Q331 Mr Rooney: I understand what you are saying, but could I clarify this. Your argument is that the main contractor should be responsible and the person held responsible for all health and safety issues, including deaths.

Mr Ritchie: Yes.

Q332 Mr Rooney: If he does what you just said and lays down conditions for subcontractors as to how they should work, and one of those subcontractors breaches that, why should the main contractor be held responsible?

Mr Ritchie: It just does not happen when a death occurs on the site. What normally happens—and I am saying with this main contractor—is that the main contractor goes in there and lays down the conditions for the subcontractor and he says, “Look, this is what I want.” He should be policing that subcontractor to make sure he is carrying out his duties. Now, if a situation suddenly is highlighted to that main contractor, then he can remove the
subcontractor off the site. The problem and the
danger that I see is that, if you start putting that
responsibility down the line, sort of thing, then you
are giving a cop-out clause to the main contractor:
“It was not me, Guv’. It was him.” That is our fear.
That is why we are saying the main contractor is
responsible. He is responsible for driving health and
safety on the site. He is responsible for hiring the
subcontractor; he should be checking that
subcontractor before he comes on the site: Is he
going to comply with the legislation? What is his
track record? What is his performance in other
contracts? That is the responsibility of the main
contractor. If we turn round and say that
responsibility can be passed on, we see a fear for us.

Q333 Mr Rooney: Do you not think that statutory
duties for directors could be dealt with in other
legislation, not least to prevent this legislation being
further held up?
Mr Ritchie: No. The problem I have got is we have
waited 20 years, as I have already said for this
legislation to come through, and I do not mind the
legislation being held up as long as it will only be
processed at the one time and it is not going to be a
wait of another 20 years. That is why we would say,
“Yes, it should all be part of the one Bill.” But if it
has got to be that for making it a better
implementation of the policy, then we would not be
opposed to that separate legislation, as long as it is
all going to be enacted at the one time, as long as we
are not going to be sitting here in time saying “We
still have a problem with this and we are going to go
back into it to amend” or whatever. That is the
danger of it. But, yes, if you were turning round and
saying to us, “Well, would you prefer to allow that
delay?” yes, we would go down that road of
delay but making sure that it is all being
implemented at the one time would be essential for
us.

Q334 Colin Burgon: A slight delay, not a long one.
Mr Ritchie: No.

Q335 Natascha Engel: My question moves on from
Terry’s, but about senior management within one
organisation. In previous evidence sessions we have
had a lot of debate about definitions of senior
management but also about what defines the passing
of, the devolving of responsibility. The Law
Commission has made a very strong point about the
fact that health and safety should be the
responsibility of management more generally. What
is your view? What are your anxieties about the
definitions of senior management and laying that
firmly at their door?
Mr Ritchie: We are saying obviously that senior
managers and directors at the very top of the
companies are going to be held responsible. We have
always said that with the first prosecution that comes
up with a director of a construction company for
breach of the Health and Safety at Work Act and
killing an employee, we believe there would be a jolt
in our industry which then would be reflected in
better health and safety standards. We think that it
is the senior people who have to be held accountable
as individuals. That is why it has to be directors and
those senior managers that are there.

Q336 Natascha Engel: Do you not think there might
be a problem with that, in that it makes those people
less likely in practice to take on that responsibility
for health and safety because it is such an individual
responsibility?
Mr Ritchie: No, I do not think so. I think the
situation is that first of all some senior directors have
got to make sure that someone responsible comes in
and there has got to be a senior manager who has to
be responsible for that. Again, I do not think they
have anything to fear as long as they are operating
proper health and safety structures at the present
time. But they have got everything to fear if they are
not. I will tell you one thing, one of the points is that
if you want to murder someone in this country, the
best thing to do is to employ them in the
construction industry: get them as a subcontractor
and kill them and you would face a fine of £7,000.
That is how ludicrous it is.

Q337 Justine Greening: Part of the draft Bill is about
what organisations it should encompass. At the
moment, the proposal is that it should exclude
partnerships, sole traders, and other incorporated
bodies, for example clubs. I know that in UCATT’s
submission you thought it should include all
employing organisations. Do you not think that
those small organisations that would be captured by
your proposal are already covered by the individual
manslaughter offence?
Mr Ritchie: We are saying that a lot of
unincorporated companies in construction are
small—so-called small businesses, one-man band
types of thing. Often, though, their actions lead to
deaths. We are saying, “Yes, it should cover
everyone. It does not matter the size of the
company.” May I just say that you could be pointing
at me and I could turn round and say, “Yes, trade
unions should be excluded as well because we are a
charity and we are not a company,” but I do think
we are responsible to our employees and we should
be included.

Q338 Justine Greening: Another part of your
submission concerns the duty of care that an
employer owes. We have already talked in these
sessions today about the fact that on many
construction sites you have a principal contractor
and then lots of subcontractors. You have said that
the principal contractors should be responsible but
do you think there is a way in which the legislation
could be drafted better in order to make sure that
subcontractors are ultimately held responsible if it is
true that they are in breach of the legislation?
Mr Ritchie: Yes. I think compliance with the health
and safety legislation should be sufficient—they
should be the guidelines and the rule of thumb. If
subcontractors are not complying with HSE and
their recommendations, then they should be
prosecuted. But if there is a clear sign there that it is
the subcontractors, and the company is complying
with the legislation, then that should be sufficient in itself. If there is a subcontractor who breaches the Health and Safety at Work Act, we believe he should be prosecuted, as under the law just now. But, again, I go back to the main thing: the main contractor is the person who is responsible to make sure that his subcontractors implement proper health and safety structures.

Q339 Justine Greening: To press you, it sounds like you are happy with the way the legislation is worded at the moment, but you feel that if it incorporated your suggestion of the principal contractor that would be sufficient.

Mr Ritchie: Yes.

Q340 Chairman: Could I pursue this. I think we are pretty much there, but it is the same theme, which is probably the most important one for the construction industry. Would you like the legislation specifically to say, in a situation where you have a principal contractor and subcontractors, that the principal contractor would always have legal responsibility under this Act, even if the subcontractors also individual have a liability?

Mr Ritchie: Yes. I think the specific duties we see would be placed in directors of the main contractor. We would see that as important.

Q341 Chairman: We raised this in a previous evidence session, with the construction industry, as I recall. They did not argue that there were not circumstances where the principal contractor should be held responsible but they said it should be on a case by case basis, that it is something that the courts and the prosecutors should investigate on a case by case basis. Sometimes it might be a principal contractor, sometimes just a subcontractor. What is your argument against doing it on a case by case basis?

Mr Ritchie: I think there is a problem there. Obviously it gives you the chance to give it back and to try to find a loophole. And, again, I am talking about the bad contractors, where they are looking for that loophole, where it is business as usual and they will just carry on. The situation under the present law, the way it stands just now, is that the main contractor is responsible for everyone on site. To be consistent in law and your drafting of the legislation here—

Q342 Chairman: — that is health and safety.

Mr Ritchie:— you have got to carry on just now.

Chairman: That is very helpful.

Q343 Gwyn Prosser: As you know, the Bill, as it is drafted, requires a jury and judge to take into account a series of factors before deciding whether there has been a breach and whether they have fallen far below the level of safety. One of the considerations is whether a company has “sought to profit”. UCATT have made the point in their written submission that that is a loophole because it would be difficult to have a paper trace and prove that they have sought to profit. Albeit that particular element is not a requirement of prosecution, it is just something that they wish they must consider. How strongly do you feel about that?

Mr Ritchie: Again, it is about these loopholes. I can just imagine it in court: “Is there any documentation or minutes of a meeting to say that this company went out of their way to breach the Health and Safety at Work Act?” “No.” “Well, there you are. There is no evidence there.” We are saying you will never get a minute from the directors to say we are going to go out today and break the Health and Safety at Work Act. They will never do that. Pressures come on the job: the job is behind; penalty clauses are all over it; the pressure is on the directors. Things will happen. Constructions will go out. It is not down in black and white. It is not taken as a minute. That is the danger when you turn round and say there has to be evidence or proof to say that a company went out of their way to breach the Health and Safety at Work Act. Again I go back to a case in Scotland. They were digging a trench and the site agent contacted the company and said, “Look, this needs to be shored. I’ve got to get machinery in to put the shoring in.” “Well, how long will that take?” “About a couple of days.” “Look, get the job done.” The JCB came in, dug the hole, the lad went down directing the pipes in, it caved in on top of him. Dead. The company went in and said, “Yes, that is right. We are guilty.” As I say, they were fined £7,500. You will never find a minute to that effect. You will never be able to turn round and say, “Here’s the evidence here, my Lord. Here you are, the directors took that decision.” You will not find that and that is the problem if you are saying there should be proof or evidence.

Q344 Gwyn Prosser: I take the point and it is a very strong point that you make. However, bearing in mind that the Bill does not actually require that to be a necessary element to prove guilt, is it not useful to have it in place, because there will be elements where it will have an important bearing? My own view is that the reasonable judge, listening to the evidence of the particular case you have cited, will say, “What other motivation would that company have for taking the cheap option?”—for taking this fast route, to profit from it.

Mr Ritchie: It is just this written evidence. That is the problem with this—a proof. We are saying that that could be used in a court of law.

Q345 Gwyn Prosser: I want to ask one question about sanctions. You have made the point this morning, again very clearly, about small financial sanctions against a company which has huge penalties against it: that if they just make the calculation on paper, then they certainly will profit from taking the cheap and the unsafe route. You have argued in your submission that, because of that, fines—even unlimited fines—are not sufficient. Putting aside for the moment the personal liability of directors, which my view the Committee is getting closer and closer towards supporting—and that is for the Committee
to decide later—putting aside that particular element, what other innovative sanctions would UCATT recommend should be in the Bill?

**Mr Ritchie:** One of the things about sanctions against a company and why we say that the directors should be responsible is because we believe that companies do not kill people. It is not just this bland thing, that a company goes round and decides to kill. It is individuals who take decisions, and that is why we are saying that there. Sanctions in themselves—if it was an option for the judge to say, “What we will do is we will just give a sanction to the company”, a big fine or whatever—that can always be taken—

**Q346 Gwyn Prosser:** Are there no sanctions that can be taken against the company corporate? I have sympathy personally with the view of the individual liability but, putting that to one side, are there no further innovative sanctions you can take against the corporate body other than just fines?

**Mr Ritchie:** Again, it is a question of interpretation of law. We heard evidence this morning, where the judge will say, “Oh, there’s a court case back there, 20 years ago. That’s a precedent. We will need to look at that”. The problem is, once you start saying, “Take that away from the individual’s responsibility”, there is an alternative there of sanctions against the company and, “We’ll just go for the sanction against the company”. We are saying that again would be a cop-out. That is why we are saying it has got to be the directors who are held personally responsible.

**Q347 Chairman:** Two last points from me. I want to go back to that previous discussion you had which was very interesting, about the evidence on gross breach. In the case that you described in Scotland—the very distressing case—how big was the company involved?

**Mr Ritchie:** A big company, a large company.

**Q348 Chairman:** So there was a long way from any senior managers to whoever it was on the site who said, “Do it that way”?

**Mr Ritchie:** Yes, but I would also refer to our submissions. We have an example of a prosecution in the construction industry and we name the defendants and the dates. A trench collapsed, resulting in fatalities; the fine was £3,500; the company was found guilty of breaching health and safety—£185. These are resulting from deaths.

**Q349 Chairman:** It is a big company, so a long way from any senior managers to whoever it probably was on the site who took that decision about how to dig the trench. In terms of the point Mr Prosser was asking about, about the guidance that is in the current legislation of the factors the jury has to consider and your concern that there may not be evidence, in the sense that somebody at a senior level has taken the decision that led to the death—as a point of interest, has your union had any legal advice from your own advisers on whether this test would have helped the jury in any of the cases you have dealt with recently?

The point you have made is a very important one for us, namely as to whether the guidance in the Act will be helpful to a jury or whether it will get in the way of a prosecution. You have suggested to us this morning that it could actually get in the way of a prosecution, in the absence of an e-mail or the recording of a phone conversation, or whatever else. It is important that we look at this very carefully in our report. I wonder whether you have had any legal advice as a union that this would be the case, that this would be the problem.

**Mr Ritchie:** In the discussions we have had with our lawyers, what the lawyers are saying is that we have to try to make it as watertight as possible, and to leave any loopholes in there would leave the chance then to make the Bill useless. That is what concerns us.

**Q350 Chairman:** I should know this, but have you submitted that in your memorandum—your legal advice? If not, if you are able to do so it would be very helpful. We may have it already and, if so, we apologise. The final point we have half-covered already. We obviously do not know what goes on within governments. We only read the newspapers, like everybody else! It is fairly open knowledge, however, that there have been some debates in Government about bringing this legislation forward at all, and this is one of the reasons why it has taken so long. This may be a question you just throw back to us and say, “You have got to decide”—but if, for example, Mr Prosser turned out to be right and we produced a report that said we were very sympathetic to the idea of introducing individual liability as opposed to just corporate liability, that might have the effect of reopening the entire debate within Government about whether to do this legislation now or not. If you were caught between that sort of rock and that hard place, would your choice be to go with what is there, because at least after 20 years there is some success for the campaign that George Bromwell launched, or would it really be to say the weakness would be so great that it would be worth carrying on the campaign for a bit longer?

**Mr Ritchie:** We would like to see the legislation in this term of Parliament; but if there was a situation where delay would strengthen it, then we would accept that. The thing is, again, it is the time limits on that delay. If you are saying to me, “We are going to have to change this. It will take us another 20 years”, then no, I would not go for that. But if we could get it clearly defined that it would, maybe not in this session of Parliament, certainly go in the next session; that we have got to tighten the Bill; tighten up these loopholes; make sure that these unscrupulous employers are not going to get away with murder—which is what they have been doing—then, yes, we would live with that delay. But, as I am saying, it is a limited delay that we would live with.

**Q351 Chairman:** Mr Ritchie, thank you very much indeed. It has been a very helpful session.

**Mr Ritchie:** Thank you very much for inviting us.
Witnesses: Dr Janet Asherson, Head of Health and Safety, and Mr Michael Roberts, Business Environment Director, Confederation of British Industry, examined.

Q352 Chairman: Thank you very much indeed for coming in. I think that you have heard a bit of the preceding session and you know that this is one of the hearings we are having on the Bill. We are pleased that you have been able to join us, because you were not able to when we had the EEF and the Health and Safety legislation properly, you are very pleased that you have been able to join us, because the hearings we are having on the Bill. We are proceeding session and you know that this is one of the controls.

Mr Roberts: My name is Michael Roberts. I am the Director of Business Environment at the CBI.

Dr Asherson: I am Janet Asherson. I am the Head of Health and Safety for the CBI.

Q353 Chairman: Can we start with an issue that you have made, with a number of other employers. It is the question of risk aversion. Your evidence, and indeed that of some other employer organisations, has warned of a culture of risk aversion. The first point is why should it? The legal advice we have had fairly consistently is that any company which follows health and safety law properly will not be at risk of prosecution under this. So why should this create risk aversion?

Mr Roberts: The extent to which there is a concern about this issue stems from concern about areas of the draft Bill which at present stand unclear: issues around what exactly is meant by senior management; what is meant by management failure. Those issues of lack of clarity raise a concern about the extent to which this Bill might encourage greater risk aversion. We conducted a survey together with the legal firm CMS Cameron McKenna, and I think they have submitted evidence separately. That survey did suggest quite strongly from the respondents that there would be an increased risk aversion in companies as a result.

Q354 Chairman: Is that not just a snapshot of a poor state of understanding, which exists long before the legislation has become law? Presumably organisations like the CBI—if you share the view that if your company is doing proper health and safety law you will not be at risk—should, by the time any law comes into force, be able to turn round those conceptions, make sure the understanding is good and make sure there is not a problem.

Mr Roberts: We would certainly see ourselves as having a role in trying to share an awareness of what the law, once it is enacted, means. However, until there is clarity on some of those issues that I mentioned, there will be this concern that—

Q355 Chairman: Hopefully we will come to the areas that you want clarified. It is true, is it not, that to some extent we want more risk aversion in precisely those companies that are most likely to do things wrong?

Dr Asherson: The important thing is that we want managed risk assessment. There are many drivers at the moment that are making companies risk-averse: aspects of reporting and making sure that every I is dotted and T is crossed. This is just one other area where people feel they have to add bureaucratic systems that may not necessarily be adding to the outcome of better health and safety controls.

Q356 Chairman: If it is the case that if you follow health and safety legislation properly, you are very unlikely to be found guilty of an offence of corporate killing, is it not just reality that that is reflecting the fact that the possibility of heightened sanctions is making companies more aware of their existing legal liability?

Mr Roberts: I am not sure it is immediately obvious that heightened sanctions necessarily equates to improved health and safety performance by itself.

Q357 Chairman: No. I am talking about the risk aversion. It sounds from what you are saying that it is basically the case that, if you follow good health and safety legislation and practice, you are not likely to be prosecuted under this Bill. That is certainly the advice that we have had so far. If it is leading to risk aversion, therefore, that may be because companies are not necessarily giving the priority they should be to decent health and safety. The fact that they might be prosecuted in a more serious manner may be increasing fears, but those are the sorts of fears we should be increasing, are they not?

Mr Roberts: I do not think it is immediately obvious that companies, at least in this country, are not treating health and safety with the seriousness it deserves, when you look at all the available evidence. Comparing incidence rates of fatalities in the workplace between the UK and other developed economies, we have one of if not the lowest incidence rate of fatalities. That does not mean that more cannot be done, and clearly we all support further work; but, on the face of it, it is not immediately obvious that this is not being treated seriously by companies in this country.

Q358 Chairman: Do you think that, inasmuch as you can assess it, work-related injuries and fatalities will actually fall as a result of the Bill?

Mr Roberts: It is difficult to find evidence that would suggest that. If you take the case in France—and it is only one example, to exemplify the point—which does have an offence of corporate homicide, it also has an incidence of fatalities in the workplace which is twice that we find in the UK. So, again, prima facie it is not immediately obvious that there is a connection between a change in the law, which is perhaps a toughening in the law, and improved health and safety in the workplace.

Q359 Mr Clappison: Turning to the question of regulatory costs, broadly speaking the Government’s case is that regulatory costs will only fall on those companies which currently fail to have proper health and safety systems in place. Do you agree with that or not?

Mr Roberts: Reflecting my earlier comments, I would say yes, if indeed the intention of the Bill is carried through in terms of practice. If, however,
there are residual areas of uncertainty, then I think what might occur is that companies, particularly at the larger end, may feel that there is a need for, if you like, more paper-based audit trails to cover or to track decisions as they go through an organisation. There may be some implication in terms of the insurance that companies will need to take, and which they do take at the moment, in the event that they need to defend themselves against prosecutions. There may be an increase in premiums, if there is a degree of uncertainty or perceived uncertainty about how the new law would work. So I think that “it depends” is the essence of my answer.

Q360 Mr Clappison: I think that we all want to avoid generating unnecessary costs because of uncertainties which should not be there. Are you confident that your memorandum sets out all the areas which you regard as being of uncertainty that cause you concern?

Mr Roberts: I believe so.

Dr Asherson: Yes, picking the major ones, I think that we have covered those areas where the uncertainty is such that we have concerns.

Q361 Mr Clappison: The Government have also argued that the costs for legal advice and training on the new proposals will be relatively small. Do you agree with that?

Dr Asherson: This is an area where, again, it depends on how the Bill comes out. Most companies have a legal requirement for training and they have courses that they run already. They already refer to solicitors before taking much action, and the legal advice is there. Undoubtedly there will be some companies who have sufficient in-house expertise to evaluate exactly what they do and do not need to have, and whether any consultants’ advice is necessary. Our concern is that there are some companies that do not have these resources, which will be beguiled by consultants offering advice, and they will take that on board and perhaps it is not necessary. Obviously the CBI would wish, when there is clarity in the final Act, to be able to assist businesses in assessing exactly what is required.

Q362 Mr Clappison: How do you assess the current level of awareness and understanding of the proposed offence amongst your members?

Dr Asherson: Amongst our members it is quite high. Many of them have trawled the publication; they are planning ahead; they have been planning ahead for some time. This has been a very long, slow fuse already.

Q363 Mr Clappison: May I ask Mr Roberts this? You made certain remarks about France, the existence of corporate homicide there, and the level of fatalities in the French industry. Have you any evidence to date that the discussions surrounding the possible creation of this offence have improved health and safety compliance or not?

Mr Roberts: I do not think there is any evidence that it has made any difference either way—the discussions around the draft legislation. Again, that probably reflects my earlier comments around the fact that the UK has a strong track record in health and safety in the workplace.

Q364 Justine Greening: Looking at small and medium enterprises, obviously they sometimes face different financial challenges to the larger ones in dealing with new laws and regulations. What impact do you think this Bill will have on them?

Dr Asherson: We do not have any evidence to differentiate, but a general feeling is, as I said previously, they do not have the resources to evaluate for themselves whether or not they should be taking a quantum leap in activity. So they will tend to rely perhaps on sources of information that might over-emphasise the need for consultancy, more legal advice. They may well overreact and pay more, comparative to their profit base or to their running costs.

Q365 Justine Greening: Do you not think that, on the flip side of the argument, there is also an argument to be made for saying that this actually levels the playing field for small and medium enterprises? In fact, many of the companies argued that the costs for legal advice and training from foreign companies in Britain may look at this legislation, are you aware the CBI would wish, when there is clarity in the final Act, to be able to assist businesses in assessing exactly what is required.

Mr Roberts: To the extent that the intent behind the draft legislation is to change the arrangements governing prosecution affecting larger companies, then I think that your point is valid. However, if indeed, as the Bill has been presented, it does not make a material difference to what is currently required under health and safety at work, then you would not expect to see much change either way.

Q366 Justine Greening: Moving on to how overseas companies which may be considering investing in Britain may look at this legislation, are you aware of any evidence that that is happening? If so, do you think that it will have a material impact on inward investment from foreign companies in Britain at all—if this law goes through?

Mr Roberts: If it goes through, my instinct is that it probably would not make a material difference, because companies, whether they are inward investors or indigenous companies, do not automatically go into business with the intent of causing harm, either to employees or to consumers. So in a sense they should have nothing to fear, if the law is well crafted. Where I would suggest a caveat is whether the intent of Government, that the new law should lead to something of the order of five prosecutions under the new Act per annum—if that intent does not materialise and in practice we see a significantly larger number of prosecutions being brought, whether or not they are successful, then, while I would not want to overstate the point, it might send an outward signal to inward investors.
about the operating environment within which they would find themselves if they came to the UK, and that would be an unfortunate and negative perception that they would have. However, I would not want to overstate the importance of that.

Q367 Harry Cohen: Can I first ask you a general question. I was looking at your evidence and you put in a bullet point, “Generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance”. What is then?

Dr Asherson: I think that there are many drivers. Some surveys of companies’ motivation about compliance with health and safety come up with a very strong answer: that it is morally right to do so. There are other drivers in terms of litigation fears, but I think that penalties and laws are one amongst many motivators of the whole health and safety package and the drive for good performance in this area for most of the companies—most of the companies within CBI membership.

Q368 Harry Cohen: You say that you do not want it to apply to individual directors. If, during a case for corporate manslaughter under this law, it becomes clear that actions of neglect of an individual director contributed to the death, should there not be some sanction against him? Perhaps that he should not be in charge of or be an officeholder in another company or that particular company in the future? Would that not be reasonable?

Mr Roberts: Our view would be that there are already existing sanctions against individuals under existing health and safety legislation. So it is not immediately obvious that there is a case to introduce an individual liability for the corporate failure.

Q369 Harry Cohen: I understand that, but if an individual has been pretty well tied down to the offence, or it looks like he is going to be, and it is proven during those cases—notwithstanding that he must have a right to defend himself in that process—should there not be a sanction of his not being an officeholder?

Dr Asherson: You have to look at the totality. Again, it is a matter of facts and evidence and it would depend on the case. If you are looking at somebody who had the responsibility and authority and could remit resources to manage an issue, then he may well be caught under company legislation in any case. We think that one of the issues in looking at directors’ responsibilities in relation to health and safety is that there is no such discipline as health and safety within a company; it is a broad batch of activities, for which there are industrial relations on one side, financial responsibilities on the other. You have to look much more holistically at a director’s duty. However, if they were personally responsible in terms of gross negligence and could themselves be found culpable of manslaughter, then that is a separate offence which should be considered in any case.

Q370 Harry Cohen: We have heard in the other sessions that these offences are often taken as a cluster. You might have the corporate manslaughter and other individual cases together. Is it not reasonable that, as part of that cluster—again if the evidence is pointing to that director—he could be found guilty of a secondary offence and perhaps punished for it?

Dr Asherson: I think that the cherry-picking of offences is very concerning to the variety of enforcing authorities that are involved, and very concerning to companies—where you have one bite of the cherry and, a year later, there is another bite of the cherry. There is an argument that this should be considered much more holistically, and the issue of corporate manslaughter does bring certain elements on the health and safety side together. However, we also have to look at the developments in terms of the company law and the directors’ duties—under that activity—where I think you are going to look at a more holistic and cohesive view.

Q371 Harry Cohen: Let us come on to directors’ duties. You have argued that they should be treated in a separate way from this legislation, in separate debates—I suspect that there you mean separate legislation. However, is there not an advantage to putting in this legislation, or the guidelines that come with the legislation, specific duties on directors to do with health and safety? Because if they were complying with it, they could use that as a defence if they were subsequently accused.

Dr Asherson: In this offence, I think that we are looking at the level of senior management team commitment and team activity, which is all about delivering health and safety, and where corporate manslaughter will fall. It is very, very rare in corporations that it is ever the obligation or fault of a single person. I think that it is this collective activity at a senior enough level to be identified with the corporation that has to be addressed. Individual directors and their culpability is already recognised under health and safety legislation, which is much more specific, or under general duties under the Companies Act legislation.

Q372 Mr Rooney: In your memorandum of evidence you express this concern about the concept of a senior manager and restricting the offence to that. Accepting that, would you be satisfied with going back to the original Law Commission proposals, such as general management failure?

Dr Asherson: We have looked very carefully at our members’ view of what a senior manager is. There are very few people in a company who actually recognise themselves in that description. The more general issue of management failure seems to be making it even more questioning as to who exactly bears the responsibility that links to the corporate identity. We would be seeking to ensure that the failure reflected a level of management where the authority and the responsibility to direct the company and to
make disbursements of resources clearly links to the corporate image. I think that is the challenge for the Bill.

Q373 Mr Rooney: Does that not then extremely narrow the field of who could or would be held responsible?
Mr Roberts: I would draw your attention back to the intent of the draft legislation, which is not to impose anything more than is currently required under health and safety law. As you are more than well aware, at the moment to secure a prosecution of corporate manslaughter you have to show that there is a directing mind. Our concern is that if you replace that concept with a concept that focuses on senior managers, in some way it seems to be changing the burden of any failing within a company, which seems to us to be contrary to what the law is intended to do here.

Q374 Mr Rooney: But the whole intent of this Bill is to overcome the hurdle of the controlling mind. The “controlling mind” condition has meant that large numbers of cases have failed where, by anybody’s measure, convictions should have been secured. That controlling mind issue has prevented successful prosecutions—in all sorts of horrendous cases, not run-of-the-mill cases. That is the intent of the Bill—to remove that.
Mr Roberts: To remove that test, but I think the essence of what is behind is that you are trying to retain the focus of the draft law on corporate failure at a senior level, at a very high level, to complement the existing sanctions which exist for individuals under existing health and safety law. Our concern is that if you talk about “senior managers” in the rather loose terms that the Bill currently talks of, you are actually widening the scope of potentially liable individuals, whose decisions may or may not lead to a fatality. That, to our mind, does not seem to be consistent with the intent of the Bill, which is to focus on senior, significant corporate failure.

Q375 Mr Rooney: Take a huge multinational company. You can have people managing units of that company that are far bigger than even an average SME, but who by your definition would not be classed as senior managers where, in an individual company of that size, they would be. Is there not a contradiction there?
Dr Asherson: No, I think that you are seeking to define something where the balance of authority and responsibility is relevant and if, at that level within that subsidiary company, it satisfies that test, then that is fine; but that is not necessarily called a “senior manager”. That term, in business, is certainly somebody who will not have the responsibility across the piece, to direct resources that will lead to such a catastrophic failure as to have the corporate manslaughter charge seized of the company.

Q376 Mr Rooney: Do you agree there is a risk that responsibility for health and safety in large companies will be delegated below the level of senior manager—if we can ever agree a definition of “senior manager”—to avoid liability for the offence? Is there a danger of that?
Mr Roberts: There may be a risk, but I challenge whether that would actually happen. In the event that that happened, or was shown to have happened and that it had led to a fatality, I think that it could be argued in court that was a clear incident of management failure. It was a clear attempt to absolve a more senior person of responsibility—possibly to people who are not capable of exercising that responsibility. It would seem to me that it would be arguable in law that that constituted a serious management failure, in which case you would secure a prosecution.

Q377 Chairman: Can I pursue the same point, because I am still not wholly clear on your view on what should come in place of the senior manager test. You say in your evidence that you wanted to capture the real level of decision-making. Most people who have argued against the senior management test have actually said, “Let us go back to the original Law Commission proposal”, which you do not like either. So what would you put any body’s measure, convictionsshould have been secured. That controlling mind issue has prevented successful prosecutions—in all sorts of horrendous cases, not run-of-the-mill cases. That is the intent of the Bill—to remove that.
Mr Roberts: To remove that test, but I think the essence of what is behind is that you are trying to retain the focus of the draft law on corporate failure at a senior level, at a very high level, to complement the existing sanctions which exist for individuals under existing health and safety law. Our concern is that if you talk about “senior managers” in the rather loose terms that the Bill currently talks of, you are actually widening the scope of potentially liable individuals, whose decisions may or may not lead to a fatality. That, to our mind, does not seem to be consistent with the intent of the Bill, which is to focus on senior, significant corporate failure.

Q378 Chairman: That would only work, would it not, if you were able to accept in the same piece of legislation that directors were, by definition, responsible for what happened at management levels below them—because they were directors in the company? Otherwise, you would repeatedly be in the position of saying, “There is no evidence that an action by the directors led to this and therefore there is no prosecution”.
Mr Roberts: If the intent of the Bill is to try to show that there is some form of management failure, then—

Q379 Chairman: The Australians have a concept, and I will not get the term for it right, but it is basically a failing of corporate culture. I am sure that you are more familiar with it than I am. You know the idea: that basically if a company is run in such a way as to give rise to the death of somebody, then that is a ground for prosecution and that, almost by definition, then comes back to the board of the company, because a company, through its social and corporate responsibility, is responsible. Would that concept be a better way of capturing this? It seems to me that if you narrow it down to try to look at specific decisions of directors, the scope for evading prosecution will be huge.
Dr Asherson: You have to look at specific decisions that allow the systems to be set up. You are looking at that level of management, or directors, or
whatever we like to call it, where they have the authority and the resources to set up the systems throughout the company. That may be systems and culture, because actually they will go together, but I think that is the level you are looking at. Then they should have the authority to ensure that those systems reflect their original good intentions.

Q380 Chairman: Would you have an objection to introducing, perhaps on the face of the Bill or in the list of factors that the jury has to take into account, some sort of concept of the corporate culture?

Dr Asherson: That is more preferable than allowing them the latitude to look at absolutely everything. It is another one of those phrases that is a bit of management-speak that would perhaps need to be teased out more generally, so that people understood what a good corporate culture looked like in practice.

Q381 Chairman: You have also pointed out that you have different structures of organisations, so that there will be what you would call an inevitable inconsistency between the treatment of different situations where somebody is killed. I think that the Government themselves have recognised that if you owned one warehouse you might be held responsible; if you owned 20 warehouses, the same incident might not lead to anybody being prosecuted—not under this legislation, at least. You say that it is an inevitable problem; it is a serious problem. Do you think that there is a way of resolving this inconsistency within the law, or is it just something where essentially the Government will say, “We are going to have to live with that, because we can’t find a way round it”?

Mr Roberts: It may well be the latter. Again, I draw you back to the intent of the Bill, which is to focus upon the worst examples of corporate failure that can be proven; that this should lead to a very limited number of prosecutions in any year. If that is the case, inevitably you are drawn to some way of defining, more tightly than more broadly, who are the people whose decisions are relevant. It seems to me that is a legitimate ambition, given that on the one hand we have a good safety record in this country and, on the other hand, we do not want unduly to catch so many people in the net that you actually encourage what you suggested might or might not be the case, which is a risk-averse culture throughout the organisation.

Q382 Chairman: I do not know if you heard Mr Ritchie’s evidence from UCATT. You have dealt in part of your evidence with complex companies and subsidiaries. He obviously, coming from the construction industry, was particularly concerned about subcontracting, where it is not the same company at all. The same problem of inconsistency exists and is probably multiplied many times over in those situations. He said to us very strongly, “You really should, in law, be making the prime contractor on a project responsible by definition, even if you can also prosecute individual subcontracting companies”. That would clearly bring some consistency into it. What would your view be of that?

Mr Roberts: I will turn to Janet in a moment, but I think this is a developing area, if I understand it—the whole concept of how far things like duty of care extend from a contractor to a subcontractor. Logically, you would expect there to be some degree of responsibility on the prime contractor. The issue is about how far and how detailed that execution of responsibility should be. If a prime contractor asks reasonable questions of a subcontractor about what health and safety management systems they have in place, do they have well-recognised, accredited schemes in place in terms of their operations, and the answer back is positive to all of those, then I think that it is reasonable to say that the prime contractor has carried out their due responsibility. If it is then shown that in fact the subcontractor did not have those things in place, I think that many prime contractors in that situation would find it a not satisfactory situation to be in, if they were then in some way being found responsible.

Q383 Chairman: So in principle, if the law were structured in a way that did not exclude a prime contractor from the frame just by virtue of a contractual relationship and, clarifying it, it leads to the draft Bill ensuring that happened, you would not in principle have any objection to that—as long as the actual test was applied fairly in individual cases?

Mr Roberts: I think that is correct.

Dr Asherson: Yes.

Q384 Chairman: We are at the moment unclear about whether the law does do that or not. Some of our witnesses have talked as though it definitely does and others have said that it does not.

Mr Roberts: I think that it is a shared uncertainty.

Chairman: That may be one of the areas you want clarified.

Q385 Gwyn Prosser: Clause 3 seeks to clarify the definition of gross breach. It goes on to list a number of factors which the jury would be required to consider. It makes it clear that it is not an exclusive list and it invites the jury to consider other matters, or certainly it allows them to do so. The CBI have been critical of this arrangement, because I guess you think it is too loosely worded or does not define matters so closely.

Dr Asherson: It appears to me that you are giving an enormous latitude about perhaps personal prejudices that may reflect knowledge, concerns, beyond the issues that are truly relevant to the case. It does say “relevant duties”, but what is relevant to an individual juror might be very different from what would be considered relevant to society in general. I think that is just the risk. There needs to be a little more guidance and direction that it should be very relevant and pertinent to the facts of
the case, rather than the general catch-all, “Oh, well, if you can think of anything, then you can throw that in”. I think that has dangers.

Q386 Gwyn Prosser: Would it not be reasonable to allow the judge to identify something in evidence and direct the jury to consider this as an addition to the list?
Dr Asherson: Yes, and the judges will have freedom to do that anyway.

Q387 Gwyn Prosser: So it is just the issue of the jury making their own decisions?
Dr Asherson: Yes, it is on the face of the Bill then, that it allows that latitude. Perhaps the phraseology is not drawn up tightly enough to be on the face of the Bill.

Q388 Chairman: One of the things that would be excluded under the Bill would be the deaths of prisoners in custody—part of the police functions. Some companies, probably some of your members, now run police custody suites. Is your understanding that those private companies would be covered by this by virtue of being private companies, or excluded from this by virtue of providing public activity?
Mr Roberts: I think it is fair to say that it is unclear.
Dr Asherson: Yes, you may well ask!

Q389 Chairman: That is two or three we have got now!
Dr Asherson: We have trawled through the draft and been back and forth through the drafting, and it seems to me that there are three main levels of concern. The duty of care—it is not clear in law as to whether some Crown establishments and public authorities do have a duty of care. There is the element of whether they are acting in terms of public policy or execution. That is a very large grey area. Then there is the possibility of the secretary of state making regulations to prescribe where prosecutions may be taken. So there are three huge areas of uncertainty, where our members are simply not sure whether they are in or out and their competitors in the public sector would be treated in a similar fashion.

Q390 Chairman: I think we have got from your evidence that you are not convinced that the Government are saying that a level playing field has been achieved, as it stands at the moment.
Mr Roberts: I agree with that. It is partly the lack of a comprehensive list of all of those public bodies—I use the term “public bodies” loosely—which ones are covered by the Act or not covered by the Act. Then, as Janet indicated, there is this grey area regarding the function of public policy versus executive function, which it seems to me potentially opens up an non-level playing field. For example, to the extent that executive functions in a hospital are directly the result of policy decisions on resources in the health service, it is not quite clear how any final responsibility for acts which may or may not lead to a fatality operate in that environment.

However, when you compare that with the situation of, say, a private sector hospital, where the management has both the strategic responsibility for deciding resourcing and the executive decisions which flow from that, it would seem from the way the law is currently drafted that they would be liable in the event that those decisions led to a fatality.

Chairman: That is helpful, and we have one or two other sessions, including one with the Minister at the end of this, and that is useful material for us to clarify what the Government are trying to achieve in those areas.

Q391 Harry Cohen: A number of witnesses have expressed concern about companies possibly going into liquidation to avoid fines. What they are suggesting is that there should be a power to freeze the company’s assets if a corporate manslaughter prosecution is going to be underway. What is your view of that suggestion?
Mr Roberts: Our basic view is that would be contrary to our concept of natural justice. If the prosecution has not actually been concluded and found against the defendant, then one would assume that the company that is being prosecuted is innocent until that point in time. To freeze their assets until that point in time would be contrary to natural justice.

Q392 Harry Cohen: What about the natural justice of using a loophole, in effect, or going into liquidation and setting up another company down the road, to avoid what would be a legitimate penalty?
Mr Roberts: Janet may want to come in on this, but I take you back to the context within which we are operating, which is a country in which health and safety in the workplace is taken extremely seriously and where our record is perhaps second only to one, which is Sweden. How big is this problem?

Q393 Mr Rooney: I want to follow this because there has been, not necessarily liquidation, but incidents in the past of very large corporations facing significant liabilities who have shifted all their assets to Belize, the Cayman Islands, or wherever, to avoid penalty. Do you not think that there should be some means in the law of protecting potential victims from that sort of escaping justice? I accept that freezing assets totally is a draconian step; but do you not think that the courts should have some powers—because these things do not just happen, you get wind of them—to stop that happening?
Mr Roberts: If you were going to go down that route, you would have to do it in a way which achieved two things. First, it did not prevent the legitimate operations of that company prior to the successful conclusion of prosecution and, secondly, in a way that did not impute guilt to that company until such a point in time as that had been proven.
Q394 Mr Rooney: By the very action of shifting their assets abroad it is almost an admission of guilt.

Mr Roberts: I do not think that would stand up in a court of law.

Q395 Mr Rooney: No, but the same applies to what you are saying: there should be a presumption of innocence. By taking action to prevent a penalty being collected, they take action.

Mr Roberts: An innocent company—subsequently proven to be innocent—might be behaving entirely rationally in trying to avoid the freezing of assets, or whatever is your sanction, in advance of the conclusion of the court. It would be entirely rational, even if they were innocent.

Q396 Mr Rooney: Let us just step back one. It is not a general principle in the Bill, freezing assets. What I am saying is this. Where a prosecution is underway and a company then seeks to remove its assets from the jurisdiction of the court, the court should have the power to take some action—pending the outcome of the case.

Dr Asherson: Then you are talking about another set of evidence where, once the prosecution had been charged and it could be shown the extent to which they were shifting assets—and even possibly where they were shifting assets to—that could be questioned by the court. However, it might be something that would be prudent, and in the interests of shareholders, to protect the reputation of the company. If you start looking at motives in that area, you need the appropriate checks and balances to make sure that you are trying to identify the motives behind it. It is a very difficult area.

There are some times when we are going to get it wrong and the courts are going to get it wrong; but if that ruins a company that was innocent and is unnecessarily charged, then you must have some sort of means of redress. So there is a lot of discussion round that area, and I am sure that we can get cleverer in the means of being able to put things perhaps into escrow accounts, in the event that serious wrongdoing is heavily suspected—but there are a lot of caveats round that.

Mr Roberts: We are mindful of the reason why you are asking the question. My challenge back to yourselves, or anyone else promoting this idea, would be to show the extent to which this has been an issue in the past. Currently, it is possible to impose unlimited fines on companies for health and safety offences. If it could be shown that there has been a material problem here, that companies have been engaging in this sort of unfortunate behaviour in order to avoid the financial liability in the event that they are found guilty of an offence, then maybe there is an issue to be addressed. I am not aware of any such evidence.

Q397 Chairman: You make the point that it may be hard to impose sanctions on foreign-registered companies, and we probably need to clarify whether any of our extradition treaties apply to companies as opposed to individual directors.

Dr Asherson: We do not have a view that they should be foreign-registered. We think on grounds of failure to collect or whatever is your sanction, in advance of the structure of the law. We are just asking that there should be some serious thought put into what can realistically be achieved in this area. This law is rapidly developing and it is something that we should keep under review when we are looking at the structure of the legislation; but we do not have a view that it should not be in there necessarily.

Q398 Chairman: To turn it round, if a British citizen commits a crime overseas, they can be tried in this country—for murder or child abuse, for example, and things like that. There are a number of clearly established practices in law. Why should a British company operating overseas, albeit the local standards on health and safety may be far lower, be free from prosecution under British law if they commit a crime overseas?

Dr Asherson: We do not have a view that they necessarily should not. We just question that putting an obligation in the Bill which in practice requires incredible resources, and international law as well, needs further investigation. The main problem in most of these areas is getting the evidence, crossing barriers and national jurisdictions, rather than the aspects of the structure of the law. We are just asking that there should be some serious thought put into what can realistically be achieved in this area. This law is rapidly developing and it is something that we should keep under review when we are looking at the structure of the legislation; but we do not have a view that it should not be in there necessarily.

Q399 Chairman: Looking at national jurisdictions rather closer to home, as a Committee we have not yet decided but we may look at the same areas of concern that you have about whether what emerges in Scotland will be the same as in England and Wales, because there is a parallel process going on. If there were to be different regimes in England and Wales, Scotland, and Northern Ireland, are you able in any way to quantify what the real business cost of that would be? There is an obvious case in terms of equity and fairness and all the rest of it, although the criminal justice systems are different in the countries; but have you been able to look at what the real implications would be for British businesses of having to operate to different standards?

Mr Roberts: At this stage it is impossible to assess with any confidence what the impact might be. One could just infer what might be the case. If there is a
difference between the two jurisdictions, one could infer that companies—particularly those companies that have operations on both sides of the border, for example, utility companies, retailers which have chains across the UK—would put in place systems within their organisations which seek to meet the most stringent of the two jurisdictions, if I can use that terminology. The concern that we would have would be whether or not the more stringent of the two jurisdictions would be something that is appropriate, given what we are trying to achieve here—which takes us back to some of the earlier comments that we have made about the proposals in England and Wales. However, to be fair, we are dealing in the realms of the hypothetical here.

Q400 Chairman: Have you at all, as an organisation, engaged with the Scottish Expert Group?
Dr Asherson: Yes.

Q401 Chairman: Do you have a sense of what is emerging there and whether there is an actual issue here about which we should be concerned?
Mr Roberts: We have had a CBI representative on the group that was looking at the issue in Scotland. There are all sorts of rumours around, but we do not know exactly where this is going to end up.
Chairman: It has been a very useful session. Thank you very much indeed.
Monday 14 November 2005

Members present:

Mr John Denham, in the Chair

Colin Burgon
Mr James Clappison
Harry Cohen
Mr Phillip Dunne

Natascha Engel
Justine Greening
Gwyn Prosser
Mr Terry Rooney

Witnesses: Mr Des Prichard, Chairman, Association of Principal Fire Officers, Mr Andrew Hopkin, Browne and Jacobson, Solicitors, Deputy Chief Constable Jon Stoddart and Detective Chief Superintendent Mark Smith, Association of Chief Police Officers of England, Wales and Northern Ireland, examined.

Q402 Chairman: Good afternoon. Thank you very much indeed for joining us for this fifth session on the draft Corporate Manslaughter Bill. I wonder if you could introduce yourselves to the Committee, very briefly, and then we will get underway.

Mr Hopkin: My name is Andrew Hopkin, from Browne and Jacobson, solicitors, in Nottingham. I have been advising the Association of Principal Fire Officers in connection with the Bill.

Mr Prichard: I am Des Prichard. I am the Chairman of the Association of Principal Fire Officers.

Mr Smith: I am Mark Smith, I am the Detective Chief Superintendent for British Transport Police and a member of the ACPO homicide working group.

Mr Stoddart: I am Jon Stoddart. I am the Deputy Chief Constable of Durham Constabulary and I am Chairman of ACPO Homicide working group, standing in for Ian Johnson.

Q403 Chairman: Thank you very much indeed. Perhaps if I can start with the ACPO representatives. At the moment, as you know, looking at the Bill, police forces are not covered by the exemptions. Leaving aside the exemptions for public functions, are you happy with the Government’s plans to bring police forces within the scope of the Bill at some time?

Mr Stoddart: We welcome the Bill, Chairman. We believe the police service should be part of the statutory framework and the legislation that is proposed. We take our responsibilities as an employer extremely seriously. In the non-operational context we feel that we have our responsibilities and we should be liable, as any other employer, in respect of the day to day running of our business. Not operationally, that is where we do feel that there are issues of public concern. Policing is often a very dangerous business and we do engage with vulnerable people. We believe that the existing statutory framework and legislative framework serves us adequately in terms of personal responsibility and liability in terms of voluntary and involuntary manslaughter. We believe that to introduce more legislation would create a risk averse service and could well undermine public confidence in the police service.

Q404 Chairman: We will come back to some of those points in detail in due course. Although the Government has only said in principle it would like to cover police forces, and they are not currently covered by the draft Bill, you would like the Government to resolve the legal issues about that so you are brought within the Bill now rather than brought in by some later amendment to the Bill?

Mr Stoddart: I believe on behalf of ACPO that is the right way to do things. We should move forward, embrace it, this is positive, other than, as I say, in the operational arena.

Q405 Chairman: That is very helpful. To the fire forces: within the Bill you are incorporated bodies. We got the impression slightly from your evidence that you feel this is possibly not right because the police forces are not going to be within the Bill. The police forces are attempting to be covered by it.

Mr Hopkin: I think what we do is share some of the points which were made a few moments ago by Mr Stoddart. Our concern is that, like the police force, we face on the ground some very difficult operating decisions in a high pressure and high risk environment. In that sense I think we share the role of the police are operating within. I think our submissions, varied though they were, also focused upon the “exclusively public function”. In general terms, the work environment in which fire officers operate often is beyond their control. They arrive at the scene of a particular incident, whether it be at the road side, factory or wherever, and often they have moments to make decisions about how things should be taken forward. As far as the question of the Bill itself is concerned, we do see proper similarities between ourselves and police services in a sense.

Q406 Colin Burgon: These questions can go to both ACPO and APFO. First of all, I noted the comments that Mr Stoddart made about qualifications that you have got. Underlining the aim of the Government in this Bill is to ensure that public bodies are treated in the same way as private bodies where they are performing the same activities in equivalent circumstances. Do you generally agree with this proposition?

Mr Stoddart: Very much so, Chairman. We are employers, the same as private business, whether it is Tesco’s or Durham Constabulary, we have to take our responsibilities. We believe that in the Bill as drafted, although clearly we will negotiate some of
the areas of concerns we have, it is right that the police service are held to account as employers in the non-operational environment. There are lots of examples that I can give you later on where we think, rightly, we should be held to account.

Mr Hopkin: My point would be similar, save that of course the fire service is very much focused. The police service has a broader range of responsibilities, the fire service are dealing, however, as the 2004 Fire and Rescue Services Act showed, with emergencies, attending the scene of a disaster of one form or another. I do think we are distinct in that sense. The majority of our work is focused on operational matters and parts of the Bill do cause us a concern in that sense.

Q407 Colin Burgon: In what types of situations have either of your organisations been held to owe a duty of care in negligence to those who have been killed in the context of their activities?

Mr Stoddart: There have been examples over the years of police officers standing trial, charged with manslaughter, whether this is in pursuit of a firearms’ operation, a death in police custody or maybe manslaughter in a public office rather than manslaughter, but certainly I know they have been charged in both, and in pursuit of stolen cars or suspected stolen cars. There are a large number of circumstances where the police has a very broad remit. The legislation, at the moment, we believe is fit for purpose because it identifies individual breaches and yet it will also identify where there are leadership, command and control or even policy issues. We are highly accountable, the police service, ultimately through committees like this to Parliament, through our police authorities to the media and to the communities. The IPCC is also a welcome and transparent investigative body who are able to conduct inquiries into this kind of issue where there are fatalities, and do, and exercise those powers in a transparent and open manner. We believe to bring the operational side of policing into this legislation would not be good.

Mr Hopkin: I would agree with those points. I would add to that, that of course the Health and Safety at Work Act which applies quite properly to the fire services includes within it section 37 which deals specifically with senior managers and those with similar roles, section 7, dealing with the responsibility of one employee to another, and that does very much focus the minds of those in positions of responsibility because they can be on the receiving end of prosecution. Gross negligence manslaughter applies in its current form to those within the fire services. Misfeasance in public office also in theory, although I recognise that few prosecutions are brought in respect of it. There is a significant level of accountability by reference to the existing legislation you could say. Of course—perhaps a different matter—the financial penalty proposed in this Bill is not dissimilar to that within the Health and Safety at Work Act in the form of an unlimited fine. We say the existing framework does accord a significant level of accountability.

Q408 Colin Burgon: The next two questions are really related. Should a police or fire authority be prosecuted for this offence if its gross negligence causes a firefighter or police man or police woman’s death? If not, why not?

Mr Stoddart: I think ACPO’s position on this is that the police authority’s position is slightly different. If there is a policy that is either unlawful or quite clearly failing then there should be a liability attached to that, yes.

Mr Hopkin: We would assert that the existing legislation, whilst not allowing a direct causal link to death, allows the mater to be thoroughly investigated and a liability accorded under the Health and Safety at Work Act.

Q409 Colin Burgon: If that was the answer to the firefighter, police man or police woman, what is your response to the death of a member of the public in similar circumstances?

Mr Stoddart: Could you maybe give an example? Some of these are very situational, I think you have to be careful.

Q410 Colin Burgon: Could you highlight the possibilities that we are talking about here? Your experience is far greater than mine. I am trying to move on from looking at how it affects the force that you are responsible for to the public at large, and how you would respond to that?

Mr Stoddart: As an employer, I can think of a number of areas where certainly we would be liable. Things like training, maintenance of our fleet, welfare of staff, non-operational contact with the public where people may enter buildings which are fundamentally dangerous, mismanagement of our estate. We would argue that that, in our belief, is appropriate to be brought into the corporate manslaughter side of the legislation. Our concern is the operational side but otherwise, yes, we feel that would be appropriate.

Q411 Colin Burgon: Members of the public in your employ and within your estate, certainly not in terms of your operational activity?

Mr Stoddart: That is right.

Q412 Colin Burgon: That is your big sticking point?

Mr Stoddart: That is right. Also, for visitors, contractors, site visitors, members of the public who enter non-operationally into the estate or are given lifts in vehicles and so on, obviously we have a duty of care.

Mr Hopkin: Dealing with the question of the public, naturally the fire service have a responsibility, fire tenders do attend non-operational events, but I would point, once again, to the provisions of the Health and Safety at Work Act. Section 3 deals specifically with the question of a duty to the public. I wonder whether the question of the level of breach is a matter for sentencing, as it is currently under Health and Safety legislation.
Mr Prichard: Chairman, if I can give some particular examples to your Committee from the fire service perspective, both on employees and members of the public. In September 2004 at Bolton Crown Court, Greater Manchester Fire Authority and the Chief Officer were at court. Five years prior to that a fire officer had drowned in a lake. The fire tender had been called to a lake where a young person was in the lake swimming with his friends and went under the water. The friends called the fire service and when they arrived, 15 minutes after the call, because it took them 15 minutes to get there, the young person was under the water. The friends pointed out where they had last seen their young friend. The fire officer tied a rope around his waist and swam out while his colleagues, on the side of the lake, held on to the rope. The fire officer swam around and dived under the water looking for this young person but could not find him. He got into difficulties and the crew attempted to pull him back and they pulled him back but the line had sunk just beneath the water and it snagged on a branch, unbeknown to him and the crew. The result was he drowned, the fire officer drowned with a line tied around his waist. The HSE sought a prosecution against Greater Manchester Fire Authority there. This is the operational environmental in which the fire and rescue service operates. Also, just a few years ago at the Blue Lagoon in Bedfordshire, there was a case which was well-reported. A member of the public parked his car on the Blue Lagoon, a clay pit. Some of you may recall the car rolled over the edge and 20 feet down into the clay pit. It was on its front end with its rear end towards the water but underneath the water. When the fire crew arrived, there were members of the public in the water, trying to rescue these young people who were still trapped in the car. The fire and rescue service, it was Bedfordshire, entered the water and then put a ladder into the water to assist in the rescue. The ladder is not designed to go into the water and they climbed down into the lake and then swam under the water without the right equipment to try and rescue these young people. Sadly, three children died in that car. This is the operational context in which the fire and rescue service will find itself and the risks which fire officers may put themselves in.

Q413 Chairman: Was there a prosecution in the Bedford case as well?
Mr Prichard: No, there was not. The HSE investigated that incident and decided not to proceed.

Q414 Chairman: What was the outcome of the prosecution in the first case?
Mr Prichard: In Manchester, the prosecution failed.

Q415 Chairman: The prosecution failed, in principle, though, is there a fundamental reason why every single type of operational issue should be excluded from the possibility of prosecution? The logic of what you are saying is that it should be excluded from HSE?

Mr Prichard: No, the Health and Safety at Work Act applies to the Fire and Rescue Service. We wholly support the Health and Safety at Work Act and other associated legislation.

Q416 Chairman: In which case then, given we have been told consistently from witnesses from pretty much all sides of the debate, employers that abide by existing health and safety guidance and best practice are not going to be successfully prosecuted under corporate killing legislation, what is the reason for saying that this legislation should not apply to circumstances where the health and safety legislation should apply? Surely there are circumstances where the responsibilities of management are sufficiently strong, but the higher sanction that comes with this proposed legislation should apply?

Mr Prichard: Chairman, if I can answer that from my Association’s perspective. We are not convinced it would be in the public interest in the operational environment to have this legislation apply to the fire and rescue service; we are not convinced this proposed legislation will make the public or our employees any safer. We absolutely, as an employer, understand, welcome and support our responsibilities under the Health and Safety at Work Act and associated legislation, absolutely.

Q417 Chairman: But the two cases you have given seem to support the view that people could suffer serious penalties at the moment, but in practice things are investigated; occasionally there will be prosecutions that fail and that is the nature of the criminal justice system; and in other cases, things are investigated and nothing happens. I do not entirely understand though why, in principle, there cannot be a breach of management responsibility so serious that this offence would be the appropriate one.

Mr Prichard: The concern of the fire and rescue services is that there will be a risk-averse approach to these types of incidents. What you will instruct, crews in the Manchester example is when they arrive at the side of the lake they do not enter that water until a boat arrives and so the crew will be formally instructed by their senior management not to undertake any rescues until they have the necessary equipment including a boat.

Q418 Chairman: Is it not the case at the moment that one of the neat effects of the provision you draw on at the moment is that individual officers might well find themselves up in court on manslaughter charges but senior managers in the police service are unlikely to?
Mr Stoddart: I think to say it is unlikely is not necessarily true. There are current inquiries which we cannot touch upon obviously, but the fact of the matter is, I agree with my colleagues from the fire service, that this is about risk aversion and undermining public confidence. If we have such draconian constraints over the service, we could well end up with a completely risk-free policy, risk-free strategy and risk-free leadership.
Q419 Chairman: I understand that, but I put it to you that at the moment that individual members of police service and fire authority put their lives at risk as part of their normal split-second judgments they make. The way the law currently stands is that those individual frontline officers may well find themselves being caught on a manslaughter charge for an individual misjudgement. The only difference about this legislation is that it extends some of that responsibility to senior managers in those services who are unlikely to be caught at the moment.

Mr Smith: Yes, from my perspective, even with the current provisions, if the senior management of the force were found to be negligent in any of the chain of events that caused the death, they could currently be prosecuted equally as a frontline officer. Certainly when an incident occurs, with a frontline officer, there will always be that examination of policy and process that led him or her there. I would say that the opportunity to prosecute senior managers within the police force is there at the moment, albeit with things like discharging a firearm, which is heavily dependent on the discretion of the officer at the time even so that issue about policy and procedure is there. It was one of the things we sought some clarity on, because with the exclusive public function definition it is sometimes very difficult to separate policy and procedure from the frontline activity. That was one of the issues we sought some clarity on with the final legislation.

Q420 Gwyn Prosser: Mr Stoddart, you both use this phase “risk aversion” and we have a lot of definitions from other witnesses, that is why I was comparing it with yours. Recently there have been a number of reports of the police receiving a report of the discharge of a firearm in a house perhaps—I will not go into details—arriving at the scene and then holding off, sometimes for a matter of hours, and consequently, tragically, there is loss of life, people bleed to death, et cetera. Is that a very stark example of risk aversion taking place now?

Mr Stoddart: That is exactly the kind of issue and it is one of the cases that I have in my mind’s eye that we are clearly thinking about. I understand exactly where you are coming from, Chairman, but it should not be about trying to pinpoint and apportion blame to the most vulnerable, least well paid and the person carrying the can for someone like me. The fact of the matter is, my colleague here has already identified, the chain of command is very clear. If I determine strategy and policy in firearms operations, which I do on a weekly basis, then I am equally liable to the scrutiny of the IPCC within the existing legislation. If it is the same level of burden of proof, gross negligence, as we are talking about within corporate manslaughter, if that can be shown, and I am sure there are circumstances in the future where that can be shown, then that is the appropriate line to go down, to prosecute those people who have taken individual decisions that have impacted upon an operational delivery. It might be that the policy was quite wrong, the decision taken by me was quite wrong, and the execution of it was correct but ultimately unlawful or potentially unlawful, and I believe that the existing legislation caters for that well. I just think that risk aversion is something we are concerned about. We see many heroic acts by police officers, fire brigade, ambulance and other emergency services, heroic acts by members of the public. I am very concerned we will have a delineated jobsworth culture not just from the bosses but that will creep in right the way through because we will be saying, “We will not get any back up”. We need this operational freedom and clarity and we are seeking some clarity on this from the Committee and the draftsmen.

Q421 Harry Cohen: Let me just move on from there, although I am sure we will probably come back to aspects of that in due course. I want to clear up, firstly, a point about the duty of care definition because one of the component parts in the definition includes the supply by the organisation of goods and services whether for consideration or not. We had another witness earlier who raised this question of the supply, basically, and said Home Office people had told him that that was speak really to exclude a whole range of services including, for example, general policing activities. I know it is a definitional point, but is there a real difference between provision and supply here or not, in your opinion?

Mr Hopkin: From the firefighters’ point of view, I would say that the more important term by our ground rules is the “exclusively public function”, and I know that is not the direct question you are asking. As far as the supply of services is concerned, it may be that that does include the provision of fire services which naturally flows on to attendance at all fire incidents. We have focused primarily on that including the fire service but the “exclusively public function” potentially excluding the fire service would be our position.

Q422 Harry Cohen: If we sought to mock this up by having both provision and supply, would that create a problem for you?

Mr Hopkin: Not from our perspective.

Mr Smith: Or from us.

Q423 Harry Cohen: Thank God. That got rid of that one!

Mr Stoddart: Basically this Parliament is willing it to go and then it is pretty much immaterial.

Q424 Harry Cohen: That is fair enough. To ACPO then: you put in your evidence that you think it requires absolute clarity that police will not be held accountable under the proposed legislation for deaths relating to police operational conduct, but human rights law recognises that criminal accountability is particularly important where a state body is responsible for a death. How do you respond to the assertion that this legislation should apply to deaths in custody as the current mechanisms of accountability for deaths in custody are not proving sufficient in practice to prevent such deaths?
Mr Stoddart: I might sound a bit repetitious here, but I think the existing framework serves us well and defines what can and cannot be done. Duty of care to the police, if there is a special relationship, we understand that we have a duty of care for people like informants, special witnesses, always for people coming into our custody, police detention and the police environment. As well as our responsibility there, we have civil liability and I believe that the Independent Police Complaints Commission provides that level of scrutiny, independence and confidence in the service that this legislation hopefully—we believe hopefully—does not need to take into account.

Q425 Harry Cohen: I know from my history and taking up issues of deaths in custody, and other Members have as well, that there are a lot of concerns about procedures, including the existing ones that operate, and certainly families of the victims do feel aggrieved. You say the existing framework is satisfactory and you have got the police complaints authority or whatever but, say, the matter came before a coroner, which is under the existing framework, and the coroner said, “Well, there is some serious neglect here”; somebody mentally ill was thrown into a cell with no care or whatever, all sorts of reasons, and the coroner looking at it said, “I think there would be, if the law applied, a corporate manslaughter aspect to it” because of the way he was held. Why should the police have a blanket immunity to that? Why should that happen?

Mr Stoddart: First of all, can I say to try and reassure you, we are not complacent about deaths in police custody. We are absolutely committed as a service to try to reduce the opportunity for these to occur. I know there is ACPO-led work ongoing, as we speak, looking at all issues of people coming into contact with the police in custody in particular and to try and learn the lessons and make sure we reduce the opportunity and those instances where people do die. We are dealing with vulnerable people; people who come into our custody are vulnerable whether through mental illness, drink or drugs, and again I believe that the circumstances you are talking about there in terms of the coroner would fit very well with gross negligence manslaughter. That may be an individual act or an individual decision or poor practice that leads to a chain of events leading to someone’s untimely death.

Q426 Harry Cohen: Surely, in those circumstances, duty of care leading on to possible corporate manslaughter would be greater not less?

Mr Smith: From my understanding, the duty of care exists, but it is an area where we would see, on the reading of the draft Bill, that the exclusive public function exemption comes in because we are operating within the bounds of the Police and Criminal Evidence Act and other legal provisions. That was our understanding; no lessening of the duty of care, in fact it is an area where it is obviously present.

Q427 Harry Cohen: Let me move on a little bit then because a lot of the functions of people in custody in prisons are now being taken on board by private organisations. Should the law be different for where people are in private custody or not? Should they be free from corporate manslaughter?

Mr Stoddart: In short, no. They should be treated in the same way as we are. They carry out the same function and I believe that it would be unjust if they were treated in a different way simply because they are a commercial organisation.

Mr Smith: If I could add, my understanding from the draft Bill is that private enterprises that are delivering those sort services, which would come within the exclusive public functions, would also be covered by that exemption and liability.

Q428 Harry Cohen: I hear what you are saying, but, on the one hand, you are saying in previous answers the police have higher standards quite rightly, and that gives them special exemptions and special standards in the arrangements. These private companies often will not have the same sort of standards as the police. Why should they get the same benefit of the exemption?

Mr Smith: Going back to some of the notes and the intention specified in the Bill, in the explanatory notes in the foreword, was that liability hinged on things that we did that the private sector did not; and where they did things of a similar nature, they should be covered by the same provisions in terms of the exclusive public function. I think there is an obvious need to ensure there is proper scrutiny of what they are doing and the management systems that are there, but it would be difficult to have two different sets of standards for doing the same job essentially.

Q429 Chairman: Do you think for one moment it would be publicly acceptable if a member of the public died in a custody suite run by a private company, then to find out there was no prosecution under this legislation because of that general protection? Surely this legislation would not survive 10 minutes of public scrutiny at the hands of the media or anybody else? It is a big trend now to have privately-run custody suites on contract to the police service. Surely the whole Bill would be subject to a huge amount of criticism if these companies are excluded, but if you do not exclude the companies, you cannot exclude the police themselves from that responsibility, can you?

Mr Smith: I think the existing provisions of gross negligence manslaughter are still there to be used. The Health and Safety at Work Act is still there to be used and raises a wider debate about the appropriateness of contracting out those types of services if we are not going to treat people the same way.

Q430 Chairman: Can I put it to you that death rates in custody have fallen significantly over the last few years because senior management started to take the issue seriously under public pressure that had not been taking seriously. That does suggest that deaths
in custody respond directly to the quality of senior leadership and senior management. This Bill in the private sector is designed to tackle failings in senior management and not taking risks seriously. I am still struggling to understand why in an area like this where the number of deaths might be directly related to the attention given to it by senior management, the police should be subject to different standards from anybody else.

Mr Stoddart: Chairman, I think it has been said, I think we fundamentally disagree about it, that the legislation I believe is there. There is malfeasance in public office, voluntary and involuntary manslaughter, and if it can be shown that the neglect was gross then the same burden of proof would be required. I would ask whether or not it is in the public interest necessarily to look for people at the top or senior management within this. I think that is where I stop.

Chairman: We will otherwise go round in circles. I will not ask it any more and you do not have to answer it any more!

Q431 Harry Cohen: Let me move on now to APFO. In your evidence you argued for the need for a separate factor, basically on the point about these time critical situations which you referred to earlier. Is that concern not already addressed by the fact that a gross breach involves “conduct falling far below what could reasonably be expected in the circumstances”. Clearly in the circumstances they tend to ignore those?

Mr Prichard: As a chief officer, I have looked at that and I am not entirely clear from a legal perspective what that sentence means. I will pass over to my legal adviser here because I think that opens up a lot of questions and need for legal clarification in my position as a Chief Fire Officer.

Mr Hopkin: The difficulty with that definition is that unlike the definition in the Adomako case, where of course gross negligence has been looked at by the courts quite clearly, there is case law and there is reference to the criminal nature of the Act so a jury can understand. It seems to just open it up again to a much more general approach for the jury. Our concern is that test is not clear enough and really the Adomako test would be better applied within the Act itself.

Q432 Harry Cohen: Can you spell out that test? 

Mr Hopkin: The Adomako case is in effect whether the jury take the view that the evidence they have heard amounts to something criminal. I can give you a reference to the case, if you wish.

Q433 Chairman: Can you write to us.

Mr Hopkin: Certainly.

Q434 Mr Dunne: To ACPO: you raised in your evidence the question of territoriality of jurisdiction and you have a particular ability to answer this question which others have not. To use your example, if there was an incident involving a company which was overseas incorporated, how would you go about investigating the claim arising against the board overseas?

Mr Smith: We feel that currently we would encounter significant difficulty. At the moment, if we need to gather evidence abroad we go through a process asking for a letter of request through the CPS and the relevant international channels to allow inquiries to be undertaken. The response really depends on the jurisdiction of whom you ask the question. Some jurisdictions require you to have instituted proceedings which puts the cart before the horse here because often it is that we would need initial information about the structure of the organisation abroad, the roles and responsibilities of people in authority before you could ever institute proceedings. Some applications to some countries may be more successful because they allow a more informal process, they allow contact between police forces to get certain things done, but I would suggest that if we had a company with all of their senior managers, as maybe defined under the Act, working and posted abroad, then our ability to go over to such a country and gather the documentation and interview the individuals, which is we would require to do to be able to further the investigation, is an area where we would have some significant difficulties. In some jurisdictions you may have to go before a magistrate who would direct what investigations you can perform. It may be that in some jurisdictions we would have to ask the local law enforcement agencies to do those inquiries on our behalf.

Q435 Mr Dunne: It varies from country to country?

Mr Smith: It does.

Q436 Mr Dunne: Are there any parallels in other parts of the law where you encounter these difficulties?

Mr Smith: Yes, there is the fraud area where we have to go through similar processes. Often you do not have to do the in-depth type of investigation to prove culpability of people abroad. You are looking for information that would support an investigation in this country. One of the things we were thinking about, a means for perhaps trying to deal with this issue, would be some sort of protocol or agreement. We know there is a European Safety Directive which, although it never seeks to apportion blame, I believe, it is to do with blame-free safety related investigations into disasters and accidents, it does form a platform and a standard with which each country that is a signatory to it complies. We thought perhaps some sort of protocol along those lines might allow us to progress our inquiries and ultimately they are safety related in many cases anyway. Those were our concerns.

Q437 Mr Dunne: Similarly, if an incident happens overseas for a UK incorporated entity the same issue arises presumably?
Mr Smith: Yes. There is jurisdiction in certain circumstances abroad for UK police. There is jurisdiction on the death of a British citizen abroad and the draft Bill, as I understand it, provides jurisdiction on British vessels, British controlled aircraft outside our territorial area. In most circumstances we are probably better able to conduct inquiries if the death is somebody outside of the UK but the people or the company are incorporated here. It is probably not as difficult, but the process is generally the same in terms of gathering evidence about the death itself. I do not think we would have any jurisdiction on the death of a foreign national abroad caused by management failures of a corporation in this country as it stands.

Q438 Natascha Engel: The Home Office has accepted it is important for the Health and Safety Executive expertise to be harnessed in the role of investigating prosecution. What do you think about that? Do you think the Health and Safety Executive should be given the powers to investigate and prosecute corporate manslaughter offences?

Mr Smith: Obviously we recognise the need to work closely with the Health and Safety Executive. I have done so closely on many occasions. We have a work-related deaths protocol to ease that process. What we do have a difficulty with is the concept of homicide offence being taken outside of the police arena. The work-related deaths protocol makes a distinction between criminal conduct which is contrary to the Health and Safety at Work Act and serious criminal offences which relate to the current homicide law. I think if we were to take the investigation of this offence away from the police then I think that might be seen as perhaps watering down the seriousness of the offence and aligning it with health and safety breaches which, albeit serious offences in their own right, are not seen with the same stigma necessarily as homicide prosecutions.

Q439 Natascha Engel: Just to take that a bit further, how do you work with the Health and Safety Executive at the moment? If this draft Bill was introduced, how do you think the arrangements that you currently have would differ?

Mr Smith: There is a particular issue that we have in mind relating to the powers that the Health and Safety Executive use. At the moment if we have a death in the workplace the protocol sets out the response by the police, the response by the HSE or other local government authority. Basically, where there is evidence to support a homicide or gross negligence manslaughter type case then the police will lead, the HSE will support, often providing expert evidence, but sometimes there can be a conflict between the powers used by the HSE and those that would be used in a criminal trial, the powers of compulsion of witnesses in particular. We have to be very careful in what we do in a joint endeavour in how we seek these things, but that is not necessarily a bad thing and it may be at some stage, once police inquiries are exhausted, the HSE may use their powers of compulsion. It has tended to lead to a serial process where the police go and search for evidence of gross negligence manslaughter, and if they cannot find it, and the CPS advises it is not there, then the case goes to the Health and Safety Executive. What can happen then is the HSE will complete their investigation and, unlike with a homicide case that the police may be pursuing, the coroner would generally hold his inquest before the HSE prosecution takes place. If the coroner’s verdict comes back as unlawful killing then you can see the case go back to the police and the CPS. In the past this has led to delays of many years which have been the subject of adverse comment by bereaved families. There is an opportunity here to improve that process with this new offence. One thing that I feel particularly strongly about is this, whoever investigates these offences, and we say that should be the police, those agencies currently charged with investigating corporations have got limited powers of compulsion, the powers to demand production of information which will show you what structures look like, who has responsibility for what, minutes of meetings and things like that. Also if you think there is going to be no opportunity to detain or question an individual for this offence we require caution them because they are not liable to an offence so somebody who is a witness only against their own corporation may be less than willing to help a police led inquiry. For that reason, the Serious Fraud Office and the Health and Safety Executive have powers to compel people to give evidence to them such as section 20 of the HSWA. The caveat with that is that evidence is not admissible against the individual who made it, however it can be used against the corporation. We say without those powers then the opportunity to exploit the benefits that this legislation brings in being able to expedite inquiries quickly will be lost because the police ability to get to the heart of these matters can be hampered by current provisions under the Special Procedure Material under PACE where we have to ask for the documents and material first, in general terms, and if they then refuse we have to go before a judge. Organisations can often say they will provide you with the material and then it is drip-fed over two years.

Q440 Natascha Engel: I will come to a conflict of interest between organisations in a second. Quite specifically, you have asked that access to material relevant to an investigation of the corporate manslaughter offence should be granted by a warrant from a justice of the peace rather than a judge as required by PACE. What evidence do you have to support your claim that the current arrangements requiring a hearing before a judge jeopardises the investigation process?

Mr Smith: It is not our contention that it should go before a Justice of the Peace. Our contention is that there should be powers of production that could be granted by a senior police officer or, if it was deemed necessary, by perhaps a prosecutor. The difficulty with the current arrangements is that most of the
material that is relevant to this type of investigation falls within the definition of special procedure material. That is held to be material of a confidential nature kept in the course of business. Most organisations will contend that most of their business records come under that definition. Some will come under legal privilege. Section 9 of PACE provides for police to make an application before a judge for production of special procedure material. That process can be quite long winded. In the first instance, you have to be able to be very specific about the material that you require. You have to make sure that you have given them the opportunity to provide it which, in the past, has led in my experience to organisations saying they will give voluntary disclosure but then using their own internal processes, especially when it is electronic data held on electronic medium, providing it over a very extended period of time. Then you have to go through a period of analysis as well. We say that a much better option would be, especially to expedite the inquiry, for an order very similar to the section 20 powers the HSE enjoys to ask for production of relevant material of the company.

Mr Hopkin: We align ourselves with the view that the police should investigate. One of the points about the Bill is that it will be arguably more difficult to prove in health and safety offences. That concept involves new concepts—for example, causation, the relevant duty of care and gross breach—concepts which the police will be more familiar with but which will be new for the Health and Safety Executive. Whilst I think it is an important role for the HSE to supplement the investigation, the legal mechanics of the Bill will require the police and the CPS to be properly enforcing it. In addition, I agree with the point made in regard to the section 20 powers. Those are significant powers of considerable assistance to the HSE in the investigations they do.

Q441 Mrs Engel: If the defendant in a corporate manslaughter case is a police authority, a law enforcement agency or a prosecuting authority, will there not be a conflict of interest if the police and the CPS are investigating and prosecuting the offence?

Mr Stoddart: In terms of prosecution, the Police Complaints Commission have the power to conduct an independent investigation if it is a complaint or there is an issue like this. There would not be a conflict of interest. They would almost invariably commission an independent police force to assist them in terms of the investigation, in that way ensuring probity and integrity.

Q442 Mrs Engel: What do you think of the proposal that all prosecutions would require the prior consent of the Director of Public Prosecution?

Mr Stoddart: From our perspective, we welcome that. We think this is an extremely important area of business. It is going to be potentially extremely complex and quite a difficult piece of legislation, as past experience has shown with some of the previous legislation, to take through the judicial process. We think, as well as the officer’s expertise, we would want corporate matters in, we want to make sure that we have a consistent prosecution policy and we want to ensure that we develop this practice and standards to the highest possible standard.

Mr Hopkin: It would likewise be our view that it is appropriately brought via that way, rather than by a private prosecution. In particular, it is appropriate to consider that families are constantly kept informed in relation to these sorts of investigations and likewise there is a number of examples of judicial reviews brought by families to decisions taken by the CPS not to prosecute that result subsequently in proceedings, so there is scrutiny in that sense by families and those with a quite proper, legitimate interest in the outcome of the investigation.

Q443 Mr Clappison: Could I come back to APFO on the question of the potential risk aversion effects of the legislation? You have already given us certain examples, particularly the Manchester example. Does it remain your view that, although you are currently subject to the health and safety regulations and those regulations are specifically taken into account on the face of the legislation in the question of deciding whether there is a gross breach or not, additionally this would carry with it some additional element of risk aversion which would affect your operations?

Mr Prichard: Potentially we see this legislation as sitting behind the shoulder of an officer taking critical command decisions on the ground. The current health and safety legislation is robust enough to ensure that the fire and rescue service manages its operations properly and looks after its employees. It is a public service; it is not beholden to shareholders. It is a public service that is there for one purpose only and that is to serve the public. In the dynamic environment in which the fire and rescue service works, officers take split second decisions at times. They are not equipped for every scenario they go to because I cannot tell you today in intimate details what actions the fire and rescue service is doing. It could be a flood, a fire, a building collapse, a person trapped on a cliff. It is a whole variety of scenarios and the reality is that the fire and rescue services do not have every piece of kit and equipment available to them immediately to take an effective response in terms of the proposed legislation. Fire fighters are walking into the burning building as everyone else is leaving. It is a different environment. We are not saying that the Health and Safety legislation should not apply to us to ensure that as organisations we manage our businesses and services effectively, but we are not convinced with the way this legislation is currently crafted and the concept of corporate manslaughter. We see it as sitting behind the incident commander as a potentially risk-adverse measure and it may impact upon their decision making process to the detriment of the public.
Mr Hopkins: In terms of legalities, the way the offence is currently drafted will inevitably involve significant criticism of senior managers because it is those individuals who will be in the witness box and it is their failures that are being addressed by reference to establishing the apparent corporate failure. It focuses very much on and names senior managers.

Mr Prichard: It is not our on the ground commanders necessarily that are taking instant decisions that will face prosecution. It is the senior officers. Senior officers accept their responsibility absolutely.

Q444 Mr Clappison: You think it will have a risk adverse effect?

Mr Prichard: It may cause me as a chief officer to say to my crews, “When you arrive at that incident, unless you have every piece of kit by your side, do not take any action. Do not go into the water unless the boat is there. Do not go into that burning building unless you know you have all the pumping appliances lined up alongside you.” It will cause me as a chief officer to give instructions to my staff that may be risk adverse and I do not want to do that.

Q445 Mr Clappison: On the question of individual liability, specifically to ACPO, you have said that you feel the Bill should have given consideration to some form of sanctions against individuals established as having been significant contributors to the gross breach. We have heard other evidence from industry and others who say this is not needed because such individuals could be liable for the offence under the Health and Safety at Work Act. How do you respond to that?

Mr Stoddart: There is a need not to prosecute the body corporate but to sanction behaviour that is grossly negligent and to ensure that there is some form of secondary penalty in the form of a disqualification from directorship or the like. It is about public confidence and showing that the legislation has some teeth.

Q446 Mr Clappison: There are sanctions. Are you happy with those?

Mr Stoddart: Yes, we are but we do think this secondary sanction is also appropriate.

Q447 Gwyn Prosser: ACPO have argued that the Bill should allow compensation to be paid to the bereaved who have recourse to the civil courts. We have had other evidence from an eminent QC who took the view that that would blur the distinction between the two courts and the two proceedings. He believed that damages should be sought through a civil court. Do you want to argue your case for that?

Q448 Mr Clappison: On the question of individual liability, specifically to ACPO, you have said that you feel the Bill should have given consideration to some form of sanctions against individuals established as having been significant contributors to the gross breach. We have heard other evidence from industry and others who say this is not needed because such individuals could be liable for the offence under the Health and Safety at Work Act. How do you respond to that?

Mr Stoddart: There is a need not to prosecute the body corporate but to sanction behaviour that is grossly negligent and to ensure that there is some form of secondary penalty in the form of a disqualification from directorship or the like. It is about public confidence and showing that the legislation has some teeth.

Chairman: The division bell is going. There were some other questions but we will leave those. Thank you very much.
Witnesses: Ms Jan Berry, Police Federation of England and Wales, Mr Geoff Dobson, Prison Reform Trust, and Ms Sally Ireland, JUSTICE, examined.

Q448 Chairman: Thank you very much indeed to the second group of witnesses for coming in this evening. Perhaps you could introduce yourselves briefly.

Ms Berry: My name is Jan Berry and I am the chairman of the Police Federation.

Mr Dobson: Geoff Dobson, deputy director of the Prison Reform Trust.

Q449 Chairman: The second time in four working days before the Home Affairs Committee.

Ms Ireland: I am Sally Ireland. I am the senior legal officer for criminal justice at JUSTICE.

Q450 Chairman: The government have said that in due course the legislation should apply to the police force. Is it your view that they need to make sure that it does in this Bill as it goes through rather than having some later amendment?

Ms Berry: I think that is our view. It took considerable time for the police to come under the health and safety legislation and this Corporate Manslaughter Bill has taken a fair amount of time from the Law Commission report to now. Our fear is if we miss this opportunity we are not quite clear when the next opportunity will arise so we would like to see it go through with the Bill itself.

Q451 Chairman: Some of the problems seem to be technical, legal problems rather than ones of principle because of the particular legal status of the police. Does the Federation have any views legally on what the government ought to do to the Bill to include police forces?

Ms Berry: I do not think that is within our line of expertise but it would appear that, in the same way as the government have chosen to add a schedule and a whole list of government departments to that schedule, I am not sure why it is not possible to add police forces to that list.

Q452 Mr Rooney: Are there any special considerations that you think Parliament should take into account if they were to bring the police force wholly within the Bill?

Ms Berry: No. I take a different view to the view taken by ACPO. If the Police Service is brought within it, which it is agreed in principle it should be, all aspects of policing should have the capability.

Q453 Mr Rooney: Including operations?

Ms Berry: Yes.

Q454 Mr Rooney: Justice is concerned—some might say surprisingly—that public confidence in the police could be severely undermined if there is a successful prosecution for corporate manslaughter. Is this a reason not to extend the cover to police activities?

Ms Ireland: No. It is one concern that we have. It does not just extend to the police. It extends to all public authorities. Unlike private companies, the public generally do not have a choice about whether to continue using the services of public authorities. It is a slightly anomalous position for a public authority to subsist with a very serious criminal conviction against it. That applies all the more where it is a law enforcement or prosecution agency or a police force but to an extent, although it is a concern, we accept that it is perhaps more theoretical than practical and we would not use it as an argument to avoid extending the Bill to police forces because I think there are more important considerations in favour of its extension.

Q455 Mr Rooney: Do you not think there has been in certain cases, which we will not go into individually, great opprobrium on the police because nobody was prosecuting? Does that not undermine it even more if the police seem to be exempt from the criminal justice system?

Ms Ireland: Yes. It is important to maintain public confidence that you have accountability. The question is how is that accountability generated. On balance, extending this offence to the police will help, particularly in areas such as deaths in custody, where other mechanisms of accountability have not been seen to be effective.

Ms Berry: Operational matters should come within the Act when it comes in.

Q456 Mr Rooney: JUSTICE has recommended that there should be no general exemption for exclusively public functions. Can you provide any specific example of an exclusively public function where government would be justified in exempting? Ms Ireland: No. The obvious one that springs to mind in considering potential public functions that could be exempted is the emergency situation which I know you had evidence on in the previous session. For example, a natural disaster, the aftermath of a terrorist attack. Bearing in mind that the test that is required is gross negligence causing death, which is not an easy threshold to reach, I think it is appropriate that even in an emergency situation workers and members of the public should be protected in principle. If there was a genuine case because in a certain area the extension of liability could lead to defensive action or a lack of action, say, on the part of the public authority, that could be scrutinised but we should be slow to exempt any public function from the offence and should really carefully scrutinise any representations that anyone should be exempted.

Q457 Mr Rooney: You do not think there should be any exemption for exclusively public functions but you have said that you think the police should be exempt?

Ms Ireland: I have not said that. Perhaps I have not expressed myself properly. We do not think that the police should be exempt. We think it is a concern that the machinery of justice is brought into disrepute by a serious criminal conviction but on balance we favour the extension of the offence to the police.
Mr Rooney: You favour no public exemptions; you are in favour of the police being included and you are in favour of the police prosecuting, but you have concerns about the effect of a successful prosecution in terms of police standing and status in the community?

Ms Ireland: Yes. It is possible to be in favour of something on balance but obviously recognise that there are other arguments and that is our position.

Mr Dobson: Yes. The Prison Reform Trust function is limited. Our interest is limited to prisons. Our belief is that no institution exercises greater power than a prison does over its inmates. We were surprised and disappointed to see that the guidance to the draft Bill argued for those custodial powers to be exempted. We are obviously arguing that they should be included. We produced a couple of years ago a guide to the Human Rights Act jointly with the Prison Service. I will read a couple of sentences from that. “Public authorities including the Prison Service must not intentionally cause anyone’s death. They also have an obligation to protect the right to life of people in their care”, a very clear acceptance of that duty of care for prisoners. We also have a concern at what is an increasingly vulnerable population in our prisons.

Mr Dobson: I answered a similar question from of sentences from that. “Public authorities including the Prison Service must not intentionally cause anyone’s death. They also have an obligation to protect the right to life of people in their care”, a very clear acceptance of that duty of care for prisoners. We also have a concern at what is an increasingly vulnerable population in our prisons. To give you an example, 20% of male prisoners and 37% of female prisoners report having previously attempted suicide prior to their reception into prison. We think there is a very strong onus on those running our prisons to exercise their duty of care to the highest standards.

Ms Ireland: I am not sure whether you are suggesting I do. Very clear acceptance of that duty of care for prisoners. Our obligation is to protect everyone’s life. I think it is important that deaths of those in prison are covered by the Bill. Although prisoners may face in relation to deaths in custody. I have given evidence here before on the level of training that is given to custody officers and senior officers in the Police Service. I am not satisfied that we train people ahead of expecting them to take on responsibility for some of these functions.

Chairman: Can you explain what seems to be the slightly surprising position where ACPO are arguing that front line officers may suffer risk aversion if this Bill is brought in and not do some things they might otherwise do that the public would want them to do; and yet the Police Federation that represents those front line officers argues that this Bill should cover policing?

Ms Berry: I can argue risk aversion in both directions. I can understand that some people in fear of a prosecution being taken against them may choose not to take a certain course of action. Policing and the Fire Service are dangerous jobs. What we are saying is that we should do everything possible to try and reduce the dangers and make them safe as possible but we understand that there are going to be risks associated with that. For example, on the risk aversion side, it is not to do with death but I think it demonstrates the point. Stop and search is something which has attracted a fair amount of attention and I do not think there is any doubt that a lot of police officers stopped using stop and search in circumstances where it may have been more appropriate because of the fear of action being taken against them. There was some work undertaken in one part of the country where they actively trained police officers in stop and search powers. Following that piece of training the powers were used far more effectively than they ever had been previously and therefore the quality of the searches was much better. The arrests that came from them was much better. If you are a learning organisation, if you make sure that your training is right and use the operational experience to good effect later and you train people properly, risk aversion does not have to be taken into account.

Chairman: Can you explain why you believe it is important that deaths of those in custody are not exempted from the Bill?

Ms Ireland: Our obligation effectively is to have a framework of adequate deterrents in place to protect the right to life. In the first part of my written submission, I talk about Article 2 of the European Convention and the Court has stressed that people in custody are vulnerable and that the state has a duty to protect them. Obviously, they are people over whom the state exercises one of the greatest levels of control. I am very worried about this exemption. I think it is perhaps the worst thing about the Bill. Although prison officers and police officers remain individually liable, it is very difficult to prosecute individuals for these offences. One explanation is that the failures are collective.
Another explanation is that there are evidential Ombudsman, who is charged with conducting investigations into deaths in custody, that position is not even on a statutory basis at the present time. It is an executive appointment. If we look at inquests, just this afternoon I received notice of an inquest to start tomorrow and this is fairly typical. It relates to the death of a 20 year old, Andrew Barclay, who died in HMP Norwich on 24 April 2003. It is very commonplace for inquests to begin two, three or even four years after the death of a prisoner. That does not seem adequate. If we look at the investigative powers of the inspectorate, we have real concerns about current proposals from the Government to subsume the prisons inspectorate within a criminal justice inspectorate which we feel would be dominated by the police because of their size, the amount of work and the number of staff. We have real concerns about the current investigative measures for deaths in prison custody.

Mr Dobson: It is important to remember that we are not just talking about self-inflicted deaths. There has been a lot of attention to suicide. We are also talking about cases where one prisoner might have killed another prisoner and there is a very high profile inquiry going on at the moment about such a case. We are talking about cases where a prison officer or prison staff member might be suspected or where there has been neglect, where somebody's care might have been neglected while they have been in custody. There is a variety of cases. When we were asking the Bill team about their intentions or what they thought the intentions of the Bill were, we asked them whether hospitals would come under this Bill in terms of their responsibility and duty of care to patients. They said they would. We then asked whether colleges and universities would come under this draft Bill in terms of their responsibilities to students and members of the public. They said they would. It seems to us to be almost beyond belief that prisoners who are in a very powerless situation in an institution should be exempt. We find it very difficult to understand the rationale.

Ms Ireland: It is not providing an adequate deterrent. We can see that from the numbers. Evidently, the threat of criminal sanction, primarily individual criminal sanction at floor level but for senior management staff, even corporate criminal sanction as well, is the most effective deterrent and the most effective spur to make sure that the right procedures are in place. At the moment, we have an inquest verdict of unlawful killing and no prosecution which seems quite an anomalous position.

Mr Dobson: The fifth point is to distinguish between means and ends. A conviction for corporate manslaughter denotes the commission of a very grave criminal offence. That is the main reason why we think this should apply. Looking at our secondary concerns that relate to the point of your question, if we look at the Prison and Probation Ombudsman, who is charged with conducting investigations into deaths in custody, that position is not even on a statutory basis at the present time.

Q466 Harry Cohen: You said prosecutions concentrate the mind. Some people have referred to that as a culture of fear in other contexts. Do you think that will reduce deaths in custody, the fear of senior officers being prosecuted?

Ms Ireland: It is important to remember that we are not talking about the individual prosecution of senior managers here or of senior officials. I think it would.

Q467 Harry Cohen: Why are we not talking about that, because it is their policy.

Ms Ireland: The individual officer in question is not being prosecuted. It is a corporate offence. We need to bear that in mind. We also need to bear in mind that it is a strict test. It is gross negligence that is required for this offence. Any officer carrying out his or her duties competently and to the best of their ability should not have to worry about prosecution for corporate manslaughter. One consequence that might be very useful is that if, in these circumstances, there is a serious criminal offence in place, what that could mean is that we have things like the preservation of evidence, which I think may be one problem surrounding deaths in custody which may help to found a successful prosecution.
It is also important to bear in mind the role of the private sector. The possibility of a very large fine will concentrate the mind of the private sector organisations almost more than anything. **Ms Berry:** From a sanctions point of view, I do not think the fear of prosecution necessarily is going to resolve the situation and make the Police Service the learning organisations we would want to see. I think there are other sanctions that can do that. A fine from a policing point of view would reduce a policing service to other people. I am not sure if that would be a proper use of public funds but you have to look at what sanctions could be brought to bear against a police force to ensure that lessons are learned and that such a finding was not just forgotten. It has to have real teeth and I am not convinced that what we have at the moment has teeth.

Q468 **Harry Cohen:** I do not know if you heard the previous session. It is the same question. Should the same law apply to both or should private people be treated separately?

**Mr Dobson:** Our view is that it is essentially the same duty of care, whether it is the public sector or the private sector or the independent sector. It is not beyond the bounds of possibility within the new world of contestability to think of a voluntary sector organisation that could be running a secure training centre in years to come. We think the same duty of care applies whoever the provider is and there should be a level playing field. All should be held accountable. **Ms Ireland:** I agree that both should be accountable and the duty should be the same. The case is even stronger in the private sector than the public sector, although that is not to denigrate the case for extending it to the public sector. In relation to private prisons, I think it is open to question what kind of accountability there really is at the moment. You may have read about recent events whereby some of the Home Office team were not allowed into a secure training centre to investigate the use of restraints. They underline this. I am not an expert on the types of contracts the Home Office makes with private sector providers but it would seem to me that the threat of a contract being removed is open but that relies on the Home Office taking action. It is a market place where there seem to be only a small number of providers and it is not practical to keep changing every six months the organisation that is running the prison. Therefore, we need this criminal sanction.

Q469 **Gwyn Prosser:** As you know, the draft Bill currently gives exemption to public authorities even if they make grossly negligent public policy decisions which might have caused death. What is your view of that part of the Bill? **Ms Ireland:** Extending the liability to public policy decisions could be very difficult. I can see an argument in favour of it where death is caused and there is gross negligence but, firstly, liability might be unlikely to arise because there may be issues about remoteness or causation. Secondly, gross negligence would be hard to establish and also there may be issues there about the separation of powers. That one may be a little bit too difficult to get into this Bill and I think would require more thought. **Ms Berry:** There are issues with regard to public policy about how you use your resources. That would be very difficult to incorporate within a Bill of this nature. You have to prioritise. You cannot have police officers and all your resources everywhere at all stages. The Police Service has worked really hard to develop tools such as the national intelligence model to use that to as much effect as possible. I think it would make it very complicated for it to be included within this Bill.

Q470 **Gwen Prosser:** Going beyond the issue of the burden of proof of gross negligence decisions, can any of you think of an area of public policy decision making by a public authority in the past which might have come anywhere near the bounds of this clause? **Ms Berry:** No.

Q471 **Chairman:** A few years ago a couple of police forces announced they were going to buy and use tasers before they had been approved by the Home Office for use by police forces. If one of those police forces had bought and used tasers and somebody had died of a heart attack when they were first used, does that not open up an area where you have a public policy decision which, if it had been taken with a proper reference to scientific evidence and so on, should be open to this sort of criticism? **Ms Berry:** A taser is a prohibited weapon and would need to be properly registered. The forces were foolish, to say the least, to have taken that course of action. I take your point. There always have to be trials but in this day and age we need to ensure that trials are undertaken in a more safety conscious environment than maybe has previously been the case. We are more transparent and accountable than we have ever been in our history.

Q472 **Chairman:** It may be possible to conceive of a type of public policy decision that was so irresponsible that it would be frustrating if you could not use this law. **Ms Berry:** If this was the only course of action but there are other vehicles that you could use in public policy decisions.

Q473 **Justine Greening:** The draft Bill relates specifically to corporations, not individuals. In the Bill it expressly excludes secondary action. Can you explain a bit more about why you think the Government should include individual liability for counselling and procuring an act of corporate manslaughter? **Ms Ireland:** Yes. This relates to the questions about the review of the law of murder and hopefully the review of the whole law of homicide. Murder will be reviewed in the next year. What we would prefer to see, rather than a corporate manslaughter offence followed by the review of murder, would be a new law of homicide that could be more comprehensive
and fit together better with this. What we have here is a law that applies specifically to corporations. Having this law apply simply to corporations may make it difficult to prosecute individuals who may be guilty of gross negligence manslaughter alongside corporations where it is a jury applying two slightly different tests. It is possible but difficult. There have been suggestions that there could be difficulties even resulting in an abuse of process argument to do with things like separate trials or individuals being tried together. There should be scope for accessorial liability for this offence. It should be made clear that the standard concepts of accessorial liability in participating in the offence may not be appropriate because the level of culpability required could be very low. It is one of the characteristics of this offence that it is made up of a chain of actions by a large number of people. What you do not want is somebody being labelled with a manslaughter conviction who objectively has only committed something of very low culpability. Having looked at the current law on accessorial liability on counselling and procuring, I think it should be necessary that the defendant intended that the offence or an offence of the same type be committed. That is the law. That makes it quite difficult because it relies on the negligence so what would be needed would be some statutory drafting, rather than just relying on the general principles. It may be better to incorporate that aspect into the review of the law of homicide that is coming up.

Q474 Mr Clappison: Is it your view that somebody could be tried alongside a corporation with the individual standing trial for the existing offence of gross negligence which is already in existence, together with the company standing trial for the corporate manslaughter offence? Is it your view that they could be tried together in the same proceedings?

Ms Ireland: It is my view that it is possible. It might give rise to legal argument from defendants that that would be unfair to them. It could cause problems evidentially as well because the person you would be trying in relation to the individual offence you may want to call as a witness in relation to the corporation. It could be very difficult. It would be better to ask somebody like a judge if you want a definitive answer.

Chairman: We will.

Q475 Justine Greening: If we get to the stage where a senior manager was eventually convicted of corporate manslaughter, do you think it is appropriate to disqualify them for a period of time from holding that office in the future?

Ms Ireland: Yes. That would be an appropriate sanction and perhaps a very effective deterrent sanction. The question originally was when might it be appropriate to disqualify a senior manager from holding a similar position. I would emphasise that what we cannot have is a situation where people are being disqualified on the back of their corporation being charged because that amounts to conviction without trial. I can see why it might be thought to be desirable but it would be contrary to principle.

Q476 Mr Dunne: Is that not slightly contradictory to what you have just said?

Ms Ireland: No. If somebody is able to be charged alongside the corporation, that should be done whether it be with manslaughter or with a health and safety offence. What we cannot have is a situation where the corporation is charged but no individual is charged and, at the end of proceedings, an individual is disqualified.

Q477 Mr Dunne: I thought I heard you say you thought it was not an appropriate penalty if a conviction is secured against a corporation that the individual should be disbarred.

Ms Ireland: No. It is an appropriate penalty if an individual is convicted.

(14 November 2005 Ms Jan Berry, Mr Geoff Dobson and Ms Sally Ireland

Q478 Justine Greening: In terms of its ability to connect a number of acts, a chain that then leads to a gross breach, do you think wrongdoing within an organisation can be identified without finding individual acts of wrongdoing by people who work in the organisation?

Ms Ireland: Negligence is going to be due to the acts or omissions of individuals. There is a level of abstraction beyond which you cannot go theoretically. However, I think the current drafting of this Bill has worsened since the Law Commission’s version for two reasons. There is too much reference to individuals here. There is a focus on individuals. There are circumstances where it might be possible to ascertain that an activity has been managed badly by identifying exactly where in the structure the failure occurred and, as long as it can be established that it was not at the bottom rung, at worker level, we should be able to generate corporate liability on this basis. The offence as currently drafted is a sort of hybrid. It punishes the corporation but it refers you again and again to individuals and their activities. That would cause problems both in terms of court time and investigation time and what has to be looked at in order to establish liability; also in establishing liability, particularly with regard to larger companies and corporations.

Q479 Justine Greening: If you were a senior manager, however you want to define it, and you set in place all your process flow charts and all of those indicators as to how you want the corporation to run beneath you, if you have those in place do you think there is a danger that with this law managers would just make sure they had got the flow charts out to the organisation but then would stand back and think: I do not mind really whether they are followed or not under the day to day pressures of the job. The fact that I have them there
demonstrates that I have given some guidance to the organisation. Do you think there is a risk that you would still not be able to prosecute?

Ms Ireland: It is possible although you could say that the failure to supervise would be a failure in itself. The problem might be particularly in relation to large corporations that you could simply devolve responsibility. Imagine a multinational corporation with perhaps 100 factories saying to each factory manager, who might not be a senior manager for the purposes of this Bill, “You can have responsibility for health and safety procedures and health and safety policy” which might sound perfectly reasonable on the face of it. You would not be able to say to that senior manager, “It was entirely negligent for you to do that as your employees were incompetent”, but you will have insulated yourself from liability. It incorporates into this Bill some of the problems of the current law which have made it almost impossible to prosecute large corporations.

Q480 Justine Greening: If you did delegate downwards, that would be stepping back from your duties as a senior manager.

Ms Ireland: It would be hard to establish gross negligence on that basis unless the person to whom you were delegating was evidently incompetent to carry out the functions you were delegating to them. Remember, we are talking about the criminal standard of proof here as well. It would always be open to the senior manager to say, “He was qualified to do the job. He was perfectly responsible and we took the decision that health and safety should be determined at factory level” which sounds reasonable.

Q481 Justine Greening: Is that why you, to your mind, you think the concept of management failure is a better one than senior manager, because it enables you to say that there was still a problem at this level in the company, however big it was, and therefore that is still corporate manslaughter?

Ms Ireland: Yes. Management failure is better because it is less personalised and because it should be emphasised that it is the corporation that is being punished for the wrongdoing here, not the individuals. Secondly, the reference to senior managers will allow large companies to escape liability under this Bill and they will be very well legally advised and possibly told to devolve their responsibilities downwards a bit. Thinking about a large, international corporation, senior manager may be a very high level. Also, there is a principle of equality before the law. If your husband dies in a factory accident and it is a small, local factory employing 50 people, under those terms, it is easy to call it corporate manslaughter. If he dies in a factory accident in a large multinational, it is probably just going to be a health and safety offence. I do not think that will make sense to the public and I think it attracts the principles of both fair labelling and equality under the law. Although I am not an expert, it may increase the regulatory burden on small businesses as well in relation to their larger counterparts.

Q482 Mr Clappison: Can I turn to gross breach, particularly clause 3(2), the two constituent parts of that and the two constituent parts of clause (b)? These are subsections 3(2)(b)(i), (ii) and (iii)? These are the factors which juries are being required to look at in determining whether there has been a gross breach. What is your view on this process?

Ms Ireland: It is relatively unusual to specify factors like this which the jury must consider. There is no problem referring to health and safety legislation. I think that is sensible. Asking the jury to assess the seriousness of the failure to comply with it is again sensible. The factors in clause 3(2)(b) refer back to senior managers, thereby incorporating some of the problems I mentioned. Are we going to have to look at all senior managers of the organisation? Probably not, but it could be open to argument. Are we going to have to look at what lots of people knew or ought to have known individually? The court time and cost in relation to that could be enormous. Particularly problematic is the last one, the profit motivation, which to me seems highly illogical. It is clearly relevant to sentencing, particularly of individuals but possibly corporations as well. It is clearly relevant to the level of moral opprobrium or culpability but I do not think it is relevant directly to gross negligence because it is very clear that gross negligence does not require intention or a particular motivation. This will confuse a jury and make them think about a different test to what they should be thinking about. It is likely to make it difficult to get convictions in a lot of areas because so often there will not be a profit motivation.

Q483 Mr Clappison: One imagines the judge will have to direct the jury on each of these elements but not each of them will require to be proved for there to be a finding of corporate manslaughter.

Ms Ireland: That is my understanding from reading it. I do not think all three of these will have to be proved. It would be very difficult to get convictions if they did have to be proved. I do not think that is the intention of the legislation. It is however pushing a jury down the wrong route of inquiry. It also means that the prosecution will be shaped bearing in mind these factors. Defence addresses to the jury would be shaped around these factors. It could mean that you get acquittals where you should not.

Q484 Mr Clappison: Do you expect to see many convictions as a result of all this?

Ms Ireland: I do not expect to see a large number of prosecutions. I do not expect to see a large number of convictions particularly in the situation where the legislation has been felt to be so needed, such as in large railway accidents or large ferry accidents or large corporate failings of that nature. It is
disappointing that we have waited so long for this legislation and now it seems to be creating obstacles for itself.

**Q485 Mr Clappison:** Do you think the drafting of clause (2) could be improved?

**Ms Ireland:** Yes. You could leave out clause (2)(b) altogether. That would be the best way to do it. Foreseeability of harm is relevant to negligence but that could be incorporated in something like clause (2)(b) or in a judge’s direction. The danger in referring to foreseeability though is that you take it back to the conduct and knowledge of individuals. You could have some kind of objective test of foreseeability as there is in the civil law of negligence.

**Q486 Mr Dunne:** In your evidence, you raise the question of whether, where there is a public authority defendant, the police are the appropriate people to investigate. Do you see a role for a Health and Safety Executive investigation?

**Ms Ireland:** In relation to prosecutions of the police, the best investigators would be the IPCC who are used to handling offences by officers and who have the requisite level of independence. That would be much more appropriate. My concern with the HSE is that generally, where there is a suspected homicide, they hand matters over to the police. In relation to non-police prosecutions, that should continue. Where there is a role for the HSE is in relation to enforcement. We will be moving onto remedial orders later but if we are thinking about how judges will work out what remedial orders to institute and how those will be overlooked and enforced, there might be a very good role for the HSE in that regard because they have the requisite expertise.

**Q487 Mr Dunne:** You have already referred to the new law on homicide. Can you come up with a better name than corporate manslaughter? Corporate killing? Corporate homicide?

**Ms Ireland:** There is corporate killing; corporate killing by gross negligence perhaps. At the moment, corporate manslaughter is the offence that people know about and understand. It is a shame that this has come before the review of homicide. On balance however it should go ahead because we have been waiting a long time for it. It is going to create problems because it means that the law of corporate manslaughter will evolve separately to an extent from individual liability. Parliament could choose to completely redraft it again in two years’ time when there could be a new Murder or Manslaughter Bill but I do not think they will.

**Q488 Chairman:** They do not seem uncomfortable about giving instructions to us most of the time. That is a separate debate. We have heard the ACPO discussion earlier about the compensation mechanism being relevant. From the point of view of Justice, is that something that could be done or is that best left to separate procedures?

**Ms Ireland:** My understanding is that the courts already have jurisdiction to award compensation under section 130 of the Powers of Criminal Court Sentencing Act. It provides specifically that they can make payments for funeral expenses or bereavement. It also provides for compensation for personal injury, loss and damage. It does not matter if the person is dead for that to be awarded. What I am not sure about is to what extent it can cover things like loss of dependency, if the breadwinner is killed. There is also a surcharge created by the Criminal Justice Act 2003, which is not yet in force. I think that is destined for victims and I am not quite sure how that is going to work.
There are problems with treating criminal prosecution as a substitute for a civil claim. The courts do not have the same level of expertise. The Court of Appeal in the past has discouraged the criminal courts from embarking on complicated investigations. You can see how a complicated quantum hearing might not be appropriate in the criminal courts. For a start, the family will not be represented. It will be the prosecutor and the defendant. In relation to criminal compensation, my understanding is that the Bill does not need to do anything. The only thing it might need to do if this is required is to allow an award for loss of dependency. An award can be made. If that is insufficient, the family can take it to the civil courts.

Q490 Mr Clappison: I would find it very helpful if you could write to us setting out the point you make about loss of dependency and how you think it could be incorporated into the Bill.

Ms Ireland: From my reading of Archbold I was not sure whether it is already reclaimable under section 130, but I can let you know.

Chairman: Thank you very much indeed.
Monday 21 November 2005

Members present:

Mr John Denham, in the Chair

Colin Burgon
Mr James Clappison
Harry Cohen
Mr Philip Dunne
Natascha Engel
Justine Greening
Gwyn Prosser
Mr Terry Rooney

Witness: Rt Hon Sir Igor Judge, President of the Queen's Bench Division, examined.

Q491 Chairman: Thank you very much indeed for coming to give evidence to us this afternoon. We are hoping to draw on your criminal law expertise in what is the last oral evidence session we are having as a Committee. Obviously, we hope by this stage in the proceedings to have narrowed our questions down to some of the difficult areas of the Bill. I do not know if there is anything you want to say by way of introduction?

Sir Igor Judge: There is, if I may, please. You will realise that I am not giving you legal advice and I have to be extremely careful not to comment on matters which are actually policy matters for Parliament and which may be controversial in the very broad political sense, so I have various inhibitions on me. The other thing is that there is nothing like coming to the Committee and forcing oneself to think again. I have one or two further comments—I would like to make about the Bill as drafted, which may and I hope will be of some assistance to you. Assuming the Bill becomes an Act—and let us make that assumption—we are going to abolish the common law offence of manslaughter by gross negligence in so far as it relates to corporations. We are, though, going to keep the offence for individuals who are guilty of gross negligence resulting in death. So the Act will not exempt any individual from manslaughter by gross negligence even if it occurs in the sort of situation envisaged by the Bill. I am a little troubled about one aspect of section 3(2)(b)(ii), because I am anxious—and you might think this is sensible—that we do not have a different series of criteria for manslaughter by gross negligence for the individual and corporate manslaughter for the corporations.

My concern about paragraph (ii) is the risk of death with the additional words "or serious harm". At common law it is not "or serious harm"; that is not in issue. It has to be a risk of death. There is a decision of the Court of Appeal to that effect called Misra, and if your Secretary would look it up, it is 2005 1 Criminal Appeal Reports, page 328, paragraphs 49–52, and it makes it absolutely plain, and in this case it was a doctor who was convicted of gross negligence.

Q492 Chairman: It was at my local hospital.

Sir Igor Judge: You will be familiar with it. We do not want to be out of step about that and I thought I should mention that. The other thing that I am concerned about arises from your section 6. It is obviously for Parliament to decide what remedy there should be for failure to comply with an order to remedy a breach. However, I am very concerned though that we have an inconsistency here. You can be fined as an organisation that has failed to comply with an order to remedy but, under the Health and Safety Act section 33(1)(g) and (o), you are liable not only to a fine but also to two years' imprisonment. It is for you to say, not for me, but it seems inconsistent that an unremedied breach or a failure to abide by a court order under the Health and Safety Act should attract an imprisonment penalty on the person responsible but not the failure to remedy something which has resulted in death by gross negligence. That is an inconsistency which, if I may say so, I would like you to consider. There is a perfectly good remedy for the person who has done his best but is the victim of somebody else's failure, and you have that in section 36 of the Health and Safety Act at Work 1974, but there are many examples: there is section 24 of the Trade Descriptions Act 1968 and section 21 of the Food Safety Act 1990. It is a perfectly familiar defence to say the reason you have not complied is that somebody else has defaulted, you say who it is and we will get on and deal with it, possibly prosecuting him or her. Those are the two introductory points, if I may, Chairman.

Q493 Chairman: That is extremely helpful. Could I just ask you on the first of those cases, in case it does not come up in another place in our questioning, what would your suggestion be as to how the disparity between the two offences should be dealt with? Would it be by narrowing the scope within this legislation?

Sir Igor Judge: That would be my view. Parliament would be the only organisation that could amend the common law in relation to gross negligence manslaughter by an individual. I would just be worried about having two different schemes running alongside each other, because one of the things that it is possible to envisage, and I suspect you may be asking questions about this, is a joint trial of the corporation for corporate manslaughter and individual employees of the corporation who themselves personally have behaved in a grossly negligent way and are liable to be indicted for manslaughter by gross negligence.

Q494 Chairman: Thank you. That is very helpful indeed. Can I start the questioning by pursuing an area that has perplexed us a little both in terms of
its significance and also the law. We have had
evidence saying there would be legal difficulties in
extending the draft Bill to cover unincorporated
bodies. Firstly, do you regard that as a significant
issue, their exclusion at the moment, and if so, can
you suggest any way that problem might be
surmounted?

Sir Igor Judge: I am troubled about it. I do not
know what the answer is, I hasten to say, but the
trouble with an unincorporated body is you can
produce potentially serious miscarriages of justice.
Let us take two men, two people who run a
business. The example that was drawn to my
attention is the fitting of gas heating system.
Partner A is negligent, something goes wrong, the
elderly lady in the house has a cold and does not
smell the gas and she dies. Partner B is not there
at all; Partner B is working at another house doing
a job perfectly well and has no idea what Partner
A is up to. That partnership could end up with a
very heavy fine, rightly imposed for the negligence
of A, which has very serious effects on Partner B.
So we have to be very careful to make sure we only
catch those who are actually guilty, otherwise the
law is not just. So, I think there is a difficulty about
unincorporated associations. We have, after all, two
ways of prosecuting people in unincorporated
associations who behave inappropriately: one is
under the Health and Safety Act anyway, and
second, if they personally are guilty of
manslaughter by gross negligence, then by
prosecuting them personally.

Q495 Chairman: If it is possible to prosecute an
unincorporated body under the Health and Safety
Act, which presumably has the same risks of
injustice, why should it not be possible to pursue
that offence?

Sir Igor Judge: Because under the Health and
Safety Act you can be liable vicariously. The
organisation can be liable for anybody’s negligence,
vicariously liable, but under this Act, under section
1(5), the individual cannot be guilty of aiding and
abetting, counselling and procuring, and I do not
think you are envisaging vicarious liability; you are
envisaging the organisation being responsible for
the totality which has produced a grossly negligent
situation.

Q496 Chairman: You tell me you feel
uncomfortable about the division between policy
and other considerations but from your legal
perspective, you would be happier to leave that
legislation as it is rather than to try to amend it to
bring in the unincorporated bodies?

Sir Igor Judge: Yes.

Q497 Chairman: The second point of coverage is
about police forces which are not incorporated
bodies. There is a weight of evidence, and indeed
an assumption by everybody we have spoken to,
including the police themselves, that they should be
covered by the legislation. Do you have views as to
how that might be done?

Sir Igor Judge: As to whether it should be done,
that absolutely is policy.

Q498 Chairman: Even the police have come here
saying they should be covered by it.

Sir Igor Judge: It is still a matter of policy, but let
us pause to think. We are envisaging the police
behaving in such a way that either a police officer
is killed or a member of the public is killed because
somebody in the organisation has been grossly
negligent. In principle, I see no reason why it
should not apply to the police.

Q499 Chairman: But in terms of handling, given
that they are not an incorporated body, so at the
moment they are excluded by virtue of all
unincorporated bodies being excluded, do you have
a view, given the way the Bill is drafted, about the
most appropriate legal way to bring the police
within it, if that is the policy decision?

Sir Igor Judge: I do not have, because I think you
simply say that the police authority can be, or the
Act does apply to police authorities.

Q500 Mr Clappison: The Law Commission’s 1996
proposals suggest that the legislation should
contain a special provision on causation, which
would clarify that “the management failure may be
a cause of the death, even if the immediate cause
is the act or omission of an individual.” The Home
Office is arguing that no special provision on
causation is needed in the Bill because the case law
in this area has developed since the Law
Commission reported. Have you any views you can
express to us on that in the light of what you have
said about your constraints?

Sir Igor Judge: Yes. I have no problem with
constraints about that issue. What has to be
established for causing death is perfectly simple:
that the activities or, shall we say, the negligence of
the senior managers is part of the cause. If it is
minimal, it is minimal, and obviously does not
count, but if it is anything beyond the minimal,
then there is no problem with establishing
causation. So if you say a whole series of factors
contributed to this particular death, of which, shall
we say, managerial inefficiency and negligence was
only 20 per cent to blame, you would still be able
to establish that that had been a cause of death. So
I think the way the Bill is currently drafted actually
meets the Law Commission’s concerns, or at least,
is an answer to the Law Commission’s concerns.

Q501 Mr Clappison: Thank you. I think that is very
helpful and that clarifies it. How difficult will it be
to prove that a senior manager who delegated
responsibility to others for health and safety
matters caused the death of a worker or member
of the public?

Sir Igor Judge: Difficult. There is no doubt about
that. There is nothing to stop a senior manager
delegating to apparently competent staff and, if the
apparently competent staff are people that it was
sensible to delegate to, you can delegate all the way
down. I think that is a concern. The Law
Commission, I think, suggested—I may be wrong—that what you should be looking at is a management failure and that, of course, goes to the management and organisation of the corporation. I am not making a policy comment, but I would have thought myself that might be a better way to avoid a series of “Not me. I passed this responsibility down”, so that you end up with some very, relatively speaking, junior employee, who suddenly has to carry the can for what is in effect an unfair assignment of responsibility to him. Incidentally—again, this has been drawn to my attention; I cannot claim it is my own research, but there is quite an interesting Act in Australia which came into force in 2004, which is called The Industrial Manslaughter Act. You might just care to get somebody to look at that to see how they manage the arrangements as between different people who have responsibilities. If I just give myself a moment to look it up, Australia has this industrial manslaughter, and you may establish liability if—do you mind if I just take a moment, Chairman, to quote it? The company itself has the necessary state of mind and misconduct attributed to it if, I quote, “expressly, tacitly or impliedly the commission of the offence has been authorised or permitted” and that may be established by proving “(c) that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the contravened law or (d) proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.” I am not advocating to you that you should have it, but if you had some kind of provisions like that, I think it would meet what I think, if I may say so, is a very reasonable concern.

Q502 Gwyn Prosser: In your opening remarks you referred to clause 3(2) and the list of factors, and you brought our attention to a particular factor. Some evidence we have had from some witnesses suggests that the provision of a list of factors to prove gross negligence could be a hindrance rather than assistance to the jury. What is your view?

Sir Igor Judge: I am quite sure there is no problem about getting the jury to understand what the principles are. There has to be a duty of care, which as the Bill says is a matter of law, and the judge will direct them about that, and a breach of that duty. How bad? It has got to be gross, falling far below the expected standard. With causing death by dangerous driving, the test is the same. The test is that the standard of your driving fell far below the appropriate standard, and the jury makes up its mind about whether the evidence shows that that has happened or not. So I am not myself concerned about that. I think the Bill is in perfectly good shape to deal with that problem.

Q503 Gwyn Prosser: Would you want to add to that list of factors? Are there any other factors you think would be helpful to the jury?

Sir Igor Judge: There is a small difficulty. I have suggested to the Committee that, with respect, we need to have the same sort of system to run as between corporate manslaughter and personal or individual manslaughter. One of the slight problems with the individual offence is that the judge ends his directions to the jury about what gross negligence that it has to be so bad as to go beyond ordinary matters of compensation and to be stigmatised as criminal. He uses words like that. There is an argument—which I have rejected, but there is an argument—that that is circular. How do you know in advance whether a jury is going to say if it is criminal or not? But it is to get across to the jury that we are not now dealing with civil remedies; we are now dealing with crime, with penal consequences for the individual, prison, if he is convicted. If you use the phrase “falling far below what can reasonably be expected”, you are actually slightly changing the test about whether it is so bad as to be criminal, but I do not have a major difficulty because in truth the two standards elide and there is an equalisation. I do not think a judge dealing with a case with the individual in the dock and the corporation in the dock is going to have much difficulty saying, “Look, what you are after is whether this was that bad. If you are so satisfied, it was; if you are not, it was not.”

Q504 Gwyn Prosser: One of the factors which the jury is asked to consider, amongst others, is whether the managers or the company profited from the action or the omission. We have had some evidence which suggests that would be better replaced by “benefits” rather than “profits”. Do you have any strong feelings on the use of the words?

Sir Igor Judge: You could use both almost interchangeably. What you are really getting at is the company that chooses to turn a blind eye to its responsibilities in order to make money or profit or benefit. I do not actually see a great difference myself.

Q505 Chairman: Can I just pursue that point a little further to make sure that I understand? The argument that was put to us was that the way the Bill is drafted, juries might feel that if there is not evidence that a company did seek to profit, I suppose put crudely to us by some witnesses, if there is not an email saying, “Go ahead and do that will direct them about that, and a breach of that duty. How bad? It has got to be gross, falling far below the expected standard. With causing death by dangerous driving, the test is the same. The test is that the standard of your driving fell far below the appropriate standard, and the jury makes up its mind about whether the evidence shows that that has happened or not. So I am not myself concerned about that. I think the Bill is in perfectly good shape to deal with that problem.

Sir Igor Judge: It is not the judges you need worry about, and I do not think juries will have any problem at all with that either. It is a perfectly reasonable point for the defence to make that there was nothing in this for the company. It is just the same as saying “There was no motive for this in the individual; the prosecution have not proved it.” It
is an equally good point for the prosecution to make to the jury “We can show that the reason why this happened was to make a profit.” In the end, as section 3(4) suggests, the jury has to look at any matters they consider relevant to the question. I do not think there will be a difficulty getting convictions. It is a matter of evidence. The evidence is stronger if you can demonstrate that there was a blatant disregard in order to make a profit, I would have thought, but it does not mean that if you cannot demonstrate that, you cannot still show that this was a company on its uppers, doing its best but still grossly negligent. I do not have a difficulty.

Q506 Mr Dunne: Can we talk about the relevant duty of care? We have had slightly conflicting views expressed as to whether it is appropriate in criminal cases to use the terminology of “negligence” and “duty of care” because of the confusions that can arise. The Law Commission in particular have suggested that there are some difficulties there. If we were to use their proposals that there was no requirement that there be a civil law duty of care, what would be the legal implications?

Sir Igor Judge: There you have it, if I may say so, on a point that did rather trouble me about the direct reference to the law of negligence. If you open up the standard textbook on the duty of care in the law of negligence in the civil world, it is not quite as big as that, but it is a very large amount of literature. The issue has gone to the House of Lords for decision very many times in the past ten years. I was very troubled about the possible consequences. However, if you make this a question of law for the judge, depending on whatever facts he has to find under section 4(3), I do not think it presents a problem. I think in truth it identifies that there is a duty that you are concerned with neglect. It has that strength, provided it is for the judge to decide whether it is a duty situation. I think that is an answer to your question. I hope it is.

Q507 Mr Dunne: Thank you. We have also had some evidence that we do not really need to go much further than the statutory duties which are comprised in sections of the Health and Safety at Work Act 1974 sections 2–6. Do you see any legal obstacles if the Government were to decide to link the offence to breaches of statutory duties under that Act?

Sir Igor Judge: I think that we have to appreciate there is a very significant difference between what looks like a regulatory statute, health and safety, and manslaughter, which on any view says that this was a killing. I think there is an important public perception about this and I do not think we should ignore that. I think there is a public perception that there are occasions when a killing should result in a conviction for manslaughter. To say it is all basically covered by the Health and Safety Act does not seem quite appropriate if the criminal law is to keep reasonably in step with the way the public looks at things, and it should. The way in which the link is done seems to be entirely sensible, if I again may say so, by saying that when the jury is considering all the different ways in which the breach might reasonably be described as gross, it directly links it to the health and safety legislation, but says that is only one piece of evidence. You may be able to show that there was a breach of a relevant piece of health and safety legislation but nevertheless not be guilty of this offence, and you might well have an indictment—I do not know—which said “Corporation: count one, manslaughter; count two, failure to comply with whatever section of the Health and Safety Act.” I have no problem with that—and possibly “Count three, X, the individual, you did this and so you too are guilty of manslaughter by gross negligence.” Again, I hope that is an answer to your question.

Q508 Mr Dunne: I think so. Thank you. Another aspect following on from that: we have been given a list in the Bill by the Home Office in section 4(1) of the categories in which a duty of care must be owed. Do you see that as limiting the application of the offence just to those categories?

Sir Igor Judge: It does limit it. A relevant duty of care is confined to a duty owed by the corporation to its employees, those who are on its land—it might well extend to trespassers but those on its land—and then the supply of goods and services, and carrying on. I think the width is to be found in 1(c)(ii), “any other activity on a commercial basis”. It seems to me to actually meet the very broad concern and it goes way beyond employees and occupiers. I think 4(1) (c)(ii) is the wide catch all.

Q509 Mr Dunne: We have also had some issue over the interpretation of the word “supply”, in particular in relation to public bodies that do not necessarily supply a service; they may provide a service. Do you see any difficulty in interpreting that in court?

Sir Igor Judge: We could get bogged down in legal argument about what as a matter of contract law “supply” amounts to. If you were concerned about it, I think it would be wise to consider defining what Parliament had in mind for this, but if you think about it, gross negligence death, supply by goods—for example you can give somebody rotten food negligently. I am trying to think of occasions when this might happen. There could be quite an argument about whether services were being supplied, but in any event, that would be almost certainly caught by the “carrying on” by the organisation “of any other activity”.

Q510 Mr Dunne: “Supply” does not mean for payment? It does not imply payment?

Sir Igor Judge: No, because you say in terms whether for consideration or not. So, it could be an organisation handing out freebies, say bad food, negligently. “Supply” has contractual connotations that are not always straightforward in the criminal law but we do, after all, cope with the supply of, shall we say, a bladed knife; holding a bladed knife...
out available for somebody to buy. I do not think it is a major point but I think it is an area which could cause argument.

Q511 Colin Burgon: One of the things we have picked up from witnesses or respondents is the difficulty in determining what functions fall within the definition of an exclusively public function and public policy decisions in the exemptions to the offence. Drawing on your experience, would you advise that the Home Office could have provided more clarity in this area, and if there could have been more clarity, how would they have been able to do that?

Sir Igor Judge: I am not at all sure that I am not getting to the area where I actually—and you put it very nicely to me, but you are really asking me to comment on a policy issue. I think it would be happier, if it were not regarded as discourteous, not to answer that question. I think we really could get into some quite delicate areas, and you have to bear in mind, in 12 months’ time I might be sitting on a case and somebody may cite to me what I had said to you in support of an argument one way or another.

Q512 Colin Burgon: If a policy decision were taken, so therefore you are not actually taking that policy decision but you are responding to it, and it is not actually in the draft Bill, to make it possible for an individual to be guilty of corporate manslaughter as a secondary party, drawing on your experience, how would you recommend this could be done?

Sir Igor Judge: I think this actually is an issue of policy, but I am prepared to make this comment about it. We will have, assuming this becomes an Act, an offence of corporate manslaughter. You will not have abolished individual manslaughter, so individual responsibility will remain. I think that it would be very difficult to persuade anybody to take on the responsibility of senior manager within your definition if he were going to be liable to be found guilty for the inadequacy of the operation as a whole. So you have to make, or Parliament has to make a policy decision about this, but I do not see the way that the Act is drafted creates the sort of problems which could arise from persuading somebody to say in effect—forgive me for using a colloquialism—‘You will be the fall guy. You are the safety officer/manager or whatever it is. You are responsible for everything that goes wrong in the organisation.” I do not think anybody would do that job, because you are totally dependent on the quality of others, and those people not making mistakes. So your senior manager point seems to me to come back to the question that I answered Mr Clappison about. I do not think I can go any further than that.

Q513 Mr Clappison: I think the answer to this question may be implicit in what you have said already, but on what you are telling us, it would be possible for a manager or a member of the company or a senior manager to be charged with manslaughter on an individual basis whilst the company itself stood trial for manslaughter. So the company would appear on the indictment as facing a count of corporate manslaughter, a senior manager could face, if the evidence justified it, a charge of individual manslaughter under the existing law on the same indictment. Is that something which you envisage as being possible?

Sir Igor Judge: I have no doubt that is possible. The corporate manslaughter count one would be such and such a company; count two—forget the health and safety provisions—would be John Smith; count three would be Bill Jones. If the evidence is there to sustain it, there is no reason why that should not happen, and there would almost certainly—obviously, I cannot be totally certain—be a joint trial. The issues would be the Crown says that John Smith did this and this and this, and Bill Jones did that and failed to do the other. They are in fact senior managers; the company has a responsibility under the law. They are personally responsible for the death. No, I do not think there is any problem with that as a potential trial.

Q514 Natascha Engel: This goes to the heart of this. A lot of the respondents to this inquiry have expressed quite a lot of concern about restricting the offence to failures by senior managers and specifically that this will reintroduce an element of the identification principle, which has made it so difficult to convict under the current law. Do you share those sorts of concerns?

Sir Igor Judge: No, I do not share the concerns as a matter of principle. What I do say though is, of course, proof that an individual has himself or herself contributed to the death is difficult, and the more convoluted the company arrangements are, the harder it is. But as a matter of principle, there is no reason why, if X has behaved in a grossly negligent way and caused death, he should not be prosecuted, just like he would be if he were—and the Chairman is aware of it—a doctor who had behaved in what the jury found was a grossly negligent way. That is the law and you are not changing any of that.

Q515 Natascha Engel: So we are not simplifying it either?

Sir Igor Judge: I think you are simplifying it for the corporation, but you are not changing the law about potential liability for the individual who has behaved grossly negligently.

Q516 Chairman: In terms of the overall operation of the criminal justice system, it is conceivable, is it not, in the scenario that Mr Clappison outlined that a company could be found guilty of corporate manslaughter under the Bill as it is drafted, implying that a certain level of senior management had been identified as responsible, but at the same time any individual corporate manslaughter cases would fail on the same body of evidence.
Sir Igor Judge: Yes.

Q517 Chairman: Does that worry you in terms of how the public would view the criminal justice system if that were the outcome?

Sir Igor Judge: It would depend, if I may say so, how it was presented. We all rather depend on the newspapers we read, but there is a perfectly logical conclusion that the corporation, the combination of activities by different senior managers amounted to corporate manslaughter, but the prosecution failed to establish beyond reasonable doubt that individual A himself or herself was grossly negligent to the extent to justify a conviction for manslaughter. If the charge is brought and the jury is not satisfied, then the system working as it should.

Q518 Chairman: The possible difficulties of explanation stem at root from the decision to include the senior manager test as opposed to some of the other models that you highlighted for us earlier.

Sir Igor Judge: Yes.

Q519 Gwyn Prosser: If the Bill becomes enacted, in future could the very presence of the corporate manslaughter offence be used as a template to include other criminal offences such as grievous bodily harm against a corporation?

Sir Igor Judge: I am sure the answer to that is yes. Whether as a matter of policy there would be some reason for it would be another question, but yes. On the other hand, the likelihood is that if you take the example you gave of grievous bodily harm, actually, there are individual minds at work in such a plan. There is the chap who eventually uses the knife or the stick or whatever, but somebody way back there who may have organised it may be a senior manager, but if you can establish that Mr Senior Manager actually set this plan in motion to see off a rival or to exact revenge, the ordinary criminal law would cover that. So although it could in theory be a template, I doubt very much if it would extend in that way.

Q520 Gwyn Prosser: We are told that consideration is being given to review the law on murder and on homicide. What is the risk, if this Bill became enacted, of offences such as involuntary homicide tying the hands of the legislators who are trying to make reform to the law on homicide and on murder?

Sir Igor Judge: I think the answer to that question is this: that, however one may wish the law of homicide to be looked at by Parliament, it is not going to happen in terms of producing an Act of Parliament for some time. This is on the stocks. I myself would not think that you would want to hold it up pending some possible eventual review. By the time some eventual review takes place, Parliament will know how this Act is working. Speaking for myself, I would be astonished if the Act failed to work reasonably as Parliament would like it to, and if anybody then thought that the review of the law of homicide should have any impact on it at all. You might have the impact in the context of what I call individual gross negligence manslaughter but not in terms of the corporation’s responsibility.

Q521 Gwyn Prosser: Would any potential conflict or muddying of the water be removed by changing the definition in this Bill from corporate manslaughter to corporate killing?

Sir Igor Judge: You would be setting off a lot of argument that would enable lawyers to argue that if the word “killing” was being used for this Act, it demonstrated that the word “killing” was the appropriate word to use for any form of criminal death, and that of course would affect the whole debate about murder and manslaughter. If I may say so, you might be causing a lot of very powerful arguments to be developed.

Gwyn Prosser: It would make the water even muddier.

Chairman: Do not go there! Sir Igor, thank you very much indeed. You have been very, very helpful.

Witnesses: Mr Bill Callaghan, Chairman, Health and Safety Commission, and Mr Jonathan Rees, Deputy Chief Executive, Health and Safety Executive, examined.

Q522 Chairman: Good afternoon, Mr Callaghan and Mr Rees. Thank you for joining us. I think you have been able to listen in to the first session. Is there anything that you want to say to us at the outset, or shall we go straight into the questions?

Mr Callaghan: Chairman, given the time, probably to plunge straight into the questioning, but to emphasize that the Commission do support reform of the law as set out in the Home Office document.

Q523 Chairman: Thank you very much, indeed. To follow on from that really, we have had a number of people who have said, I suppose, in Hatfield and other recent cases that the courts seem to be changing, we are getting higher penalties in any case for prosecutions under the Health and Safety at Work legislation. Is this legislation now needed in the way that it might have been when the campaign for it started 20 years ago?

Mr Callaghan: The clear answer is yes. I think the Health and Safety at Work Act is working well, and evidence for that is the fact that we have one of the best safety records in Europe, but—and this is a big “but”—I do not regard the current level of workplace fatalities of around 220 as acceptable and I think we can do better. As Sir Igor was arguing earlier, we are distinguishing those rare
occasions where actions by a corporate body are truly\ntruly criminal from the regulatory offences which\ndeal with by HSE and our local authority\npardners. So we are looking at a limited number\nof cases but I think it is important that, where society\ndoes think that organisations have fallen way below\nthe standards which are acceptable, there should be\nbe a way of marking that.

Mr Callaghan: If a death occurs under those\ncircumstances it is clearly unacceptable, and I think\nthat is why the criminal offence is being introduced.\nDo you actually believe that we will see a\nreduction in the number of deaths if this law is on\nthe statute book? Clearly, it is possible that one\ncould have higher penalties and a criminal\nconviction for those responsible but that it actually\nwould not change practice.

Mr Callaghan: I think, to revert to your earlier\nquestion, higher penalties do send out a very\npowerful deterrent message, and certainly the\nTransco case and the Balfour Beatty and Network\nRail, as it was, sent out some very powerful\nmessages, but I do think the courts should be\ntaking health and safety offences seriously. I would\nhope they would take corporate manslaughter\nseriously. There is a strong reputational penalty\nthat companies would pay if they are found guilty\nof corporate manslaughter. I do not believe any\ncompany would want to be tarnished in that way.\nJust talking to companies who are anticipating the\nintroduction of this offence, they are beginning to\ntake action to make sure that they are taking\npreventive measures to make sure they are not\nfound guilty of such an offence.

Q524 Chairman: So if we look five or ten years\ndown the line, you would actually expect there to\nbe a reduction in the number of deaths, all other\nthings being equal?

Mr Callaghan: All other things being equal, and it\nmight be quite difficult to disentangle that, but I\nthink one purpose of health and safety law and I\nthink of the new law of corporate manslaughter will\nbe to send a very powerful deterrent message.

Q525 Chairman: What difficulties does the\nHSE face when prosecuting such an offence?

Mr Callaghan: Section 37? Jonathan may want to\npick up on the point. I think it is fair to say that\nsection 37 has not been used extensively in recent\nyears though there has been an increase in the\nnumber of cases taken. As the Committee will\nknow, before a section 37 case can be proved, there\nhas to be an offence under the general sections of\nthe Health and Safety at Work Act.

Mr Rees: It is worth underlining, as the Committee\nprobably knows, that it is much easier to make a\ncausal link in a small firm between what the, as we\ncall it, duty holder or the employer or director did\nand the actual breach. So in practice, nearly all of\nour successful prosecutions under section 37 have\nbeen against small firms.

Q526 Natascha Engel: Again, this is within the\nframework of a very good health and safety record\nin this country, but why do you think that so few\ncompany directors have been convicted of an\nindividual offence under 37(1) of the Health and\nSafety at Work Act?

Mr Callaghan: Just to give the Committee some\nidea of the orders of magnitude, last year there were\n712 HSE prosecutions in total: 25 were against\nindividuals and nine were directors or managers\nunder section 37, and the other individual\nprosecutions were therefore under section 7 of the\nAct. I think the reason for that is that we see that a\nlarge proportion of health and safety breaches arise\nfrom organisational systemic failures of\nmanagement systems rather than the action of one\nindividual person. HSE’s enforcement activity\nunder the existing Health and Safety at Work Act\nreflects that. So when we look at why incidents\nhappen in the workplace, we are looking at systemic\norganisational factors and looking at root\ncauses rather than necessarily at one person.

Q527 Natascha Engel: Do you actually believe though that we will see a\nreduction in the number of deaths if this law is on\nthe statute book? Clearly, it is possible that one\ncould have higher penalties and a criminal\nconviction for those responsible but that it actually\nwould not change practice.

Mr Callaghan: As I understand the Bill, we are\ntalking about offences by a corporate body rather\nthan an individual. The Commission support the\nbroaId outline of the Bill because it is directed at a\nlacuna in the system. You have talked, obviously,\nalot about the problem of the identification\nprinciple, and the inability to prove that someone\nhad a directing mind in large organisations has\nhad a big problem with the current law as is\ndrafted. So I think the current common law\nposition is unsatisfactory and that is one reason for\nchanging the law. I have to say the whole issue of\nindividual director’s liabilities is quite a

Q528 Natascha Engel: Do we have had a number of\nindustry representatives who have argued very\nstrongly in their evidence that introducing\nindividual liability in the draft Bill would actually\nundermine a good health and safety culture at\nwork. Do you agree with that?

Mr Callaghan: As I understand the Bill, we are\ntalking about offences by a corporate body rather\nthan an individual. The Commission support the\nbroad outline of the Bill because it is directed at a\nlacuna in the system. You have talked, obviously,\nalot about the problem of the identification\nprinciple, and the inability to prove that someone\nhad a directing mind in large organisations has\nhad a big problem with the current law as is\ndrafted. So I think the current common law\nposition is unsatisfactory and that is one reason for\nchanging the law. I have to say the whole issue of\nindividual director’s liabilities is quite a

Q529 Natascha Engel: Do you know how many\nhave been of those you have listed?

Mr Rees: Between 1994 and 2004 there have been\nabout 86 section 37 convictions. The number of\ndisqualifications is much lower than that. Given\nthat we run roughly, let us say, 1,000 prosecutions\na year over 10 years, you are talking of less than
one per cent. So it is very small, and indeed, that is part of what the Chair said. That is one of the issues which the Health and Safety Commission will be looking at at its meeting on 6 December, because clearly there is a link between directors’ duties and directors’ disqualifications.

**Mr Callaghan**: Can I add that the Hampton Report looked at regulators in general and whether the existing penalty regime was working adequately, and we are looking at undertaking a longer-term review of penalties in the light of what Hampton said.

**Mr Rees**: Just to be absolutely clear on that figure, it is ten disqualifications since 1986. There is not naturally a link between cases against directors and disqualifications. We do take cases and disqualify people who might be prosecuted under section 2, 3 or 7 of the Act but it is very, very small. That is clearly the main point.

**Q531 Colin Burgon**: Could I ask Mr Rees this question? Mr Callaghan was helpfully expansive on the duties of directors, and indeed, he said it was a controversial question, so I will give Mr Rees the chance to enter into this controversy. Many of the witnesses that have given evidence have told us that the Bill should have been used really to introduce statutory health and safety duties on directors. What is your view of that? Do you agree with that thrust of argument, and if you do, where would be the appropriate place to do so?

**Mr Rees**: Obviously, they are very linked issues, but this is a Bill about corporate manslaughter. There is a separate debate to be had about whether or not the existing law under section 37 needs to be strengthened. As we know, there are very strong views between, on the one hand, the TUC and some of the trade union people who you have had who have come along and said, “We actually think that section 37 ought to be made more positive” and equally there are strong views from the CBI, EEF and IoD who have said, “No, we don’t really think that is the right way to go.” We will have to put a paper to the Commission for the meeting when it discusses it and we will try and set out what the arguments are for and against, but ultimately it will be a political judgement. The fact is that what drives behaviour in terms of trying to improve health and safety is not a simple causal link. There is no doubt that fear of prosecution or fear of jail actually drives behaviour. It is not the only thing that drives behaviour, and our policy over the last five years has been to try and get directors to understand what their existing duties are. I just underline the point that directors do have existing duties under the existing health and safety legislation. The question is, are they sufficient? Could they be better? But there is no doubt that they have existing duties, and we too could look at whether we can do more in terms of prosecution under the existing legislation.

**Q532 Chairman**: Our problem is that at the time you are meeting we have to finalise our report, and a lot of people have said to us that this Bill is flawed because it does not provide for individual liability and they are not happy with the route of the individual manslaughter by gross negligence. One of the ways of resolving that clearly would be potentially to have these duties of directors under health and safety legislation. So although you say it is a separate issue, in terms of the way Parliament might put this, the outcome of your decision might have major implications for the way in which this Bill should be drafted. Would you accept that?

**Mr Rees**: I am pretty sure if a Bill is introduced, there will be amendments to either change or strengthen section 37. So yes, I think it is very important that we come out with a clear view, and the constitutional position is that the Executive will advise the Commission, who will advise Ministers.

**Q533 Chairman**: In terms of your overall view as an organisation, irrespective of the rights and wrongs of it, there is a body of evidence that has been put to us that says it is an illusion to think that you can in one piece of legislation incorporate both corporate liability and individual liability. Given your experience, where so little of your activity ends up in individual liability at director level, so much of it at corporate responsibility, do you think that is actually true and are we better just to concentrate on the corporate offence?

**Mr Callaghan**: If I could express a view, I have been in this job now for just about six years, and one of the first things I did was to reply to a Home Office consultation paper on this very topic. I think we have been waiting for the legislation for some time and my personal view is that I would like to move ahead with the Bill as drafted. I cannot see any reason that the absence of individual liability would make it more difficult to prosecute companies for manslaughter, and that is the big gap in the present legislation which I think everyone recognises. So that is the immediate issue. I think the issue then is what should then be the responsibilities of individual directors more broadly in health and safety law? That is something which the Commission will be discussing. I think it is fair to say that all of the Commission are agreed that directors ought to be taking health and safety more seriously and we have made some considerable progress in promulgating our guidance for directors, and evidence suggests that more companies are considering health and safety at board level. Whether we should go one step further, either by changing section 37 or recommending changes to other pieces of legislation, I cannot anticipate the outcome. I think one thing I should also say is that the Commission do think that it would be wrong, thinking about the law of unintended consequences, to come up with a system whereby individuals effectively become scapegoated or that the responsibility could be “subcontracted” from a senior manager to someone else. So we have to make sure that we do not run into those laws of unintended consequences.
Q534 Chairman: You heard our discussion earlier about unincorporated bodies. You are able to prosecute unincorporated bodies. Do you in practice see any reason why they should not be included in this legislation?

Mr Callaghan: Our view is that the net should be cast as wide as possible. As I say, I am not such an expert as Sir Igor in looking at these issues, but I think it should be cast as wide as possible.

Q535 Chairman: Do you know how many unincorporated bodies you have successfully prosecuted?

Mr Rees: No, we do not. We asked for that information and we do not keep it in that form.

Q536 Chairman: You are not aware of significant problems in that area?

Mr Rees: No. Obviously, the majority of prosecutions will tend to be in the more traditional manufacturing area. Unincorporated companies, even large ones, will tend to be in the services area, which do have significant problems, but we do not record the information in that way.

Q537 Mr Clappison: You have already made some comments about the status of health and safety legislation. Of course, you have had the opportunity of hearing Sir Igor Judge’s comments on it, but perhaps I can give you an opportunity to comment on what some respondents to our inquiry have said, because they have raised concerns about the requirements in the draft Bill that jurors consider whether or not a company has complied with health and safety legislation and guidance when determining whether there has been a gross breach of a duty of care. They argue that health and safety legislation is not comprehensive and was not designed for this purpose. Do you have any view on that?

Mr Callaghan: I share Sir Igor’s view. I would distinguish between the regulatory offences under the Health and Safety at Work Act from a matter which is clearly criminal, which is manslaughter.

Mr Rees: I agree.

Q538 Mr Rooney: Are you concerned about the exemptions in the Bill for exclusively public functions and public policy decisions?

Mr Callaghan: I am glad that the document says that corporate manslaughter should in general apply to the Crown, and obviously there are some exemptions in the draft Bill—I was going to say limited exemptions. I have to say, Chairman, there is a danger that these could prove to be wide-ranging. If I could just elaborate concerns on this, section 10 deals with the armed forces, so if I could take that first, we fully recognise the need for our armed forces to be combat-ready but the combination of clause 10(1)(a) and 3(b) seems to be quite wide-ranging, because if you read 10(1)(a) and 3(b), they could be covering almost any activity, it might be argued. So I would want that to be looked at. Turning to the matters which are raised in clause 4, I recognise the argument for public policy and also “exclusively public functions” but I have to say that there would be concern amongst all of my Commission colleagues if the interpretation of this were to lead to widespread exceptions. I have to say that would come from the employer members, those employers who are bidding for work in the public sector who would feel that competition was not fair, and from my trade union colleagues who would draw attention to differing standards of protection. So I do not see any reason why the vast bulk of public sector employment should not be covered by the provisions. You have to recognise there is a need for some limited exceptions. Perhaps one last point on this, Chairman, if I may. Crown immunity in general is one of the issues that has held up this matter for so long, and I would hope, first of all, that Parliament would take the opportunity to remove Crown immunity for Health and Safety at Work Act offences, but having established that this Bill does in general apply to the Crown, my personal view is I would not want to spend another five years debating the details of Crown immunity; I would rather get on with it, I have to say.

Q539 Mr Rooney: Can I just pursue this slightly? You have mentioned this in relation to employees but of course, in all the big disasters, it is actually the public that has suffered, not employees. I am not picking on any particular bit, say the Food Standards Agency, but perhaps there is some outbreak, E. coli, salmonella, whatever, and somebody is grossly negligent in the advice that is given and there are numbers of public deaths. At the moment they could not be prosecuted because they are not in the schedule, so they are excluded under public function. Am I right in thinking you are not happy with the limited numbers of people that are in the schedule? You think it should be as wide as possible? What I am more interested in is who you think should be exempt. You are in favour of abolishing Crown immunity. You seem to want to extend it. Is there any part of government that you think should be exempt?

Mr Callaghan: In terms of, as the Bill explains, matters of public policy, I can understand why that exception is there, that of people who are giving advice, and those decisions, of course, can be challenged through other means. In terms of public sector employment, and the activities either of those bodies to employees or to members of the public, I would not want to see widespread exceptions.

Q540 Harry Cohen: The draft Bill gives the courts the power to set remedial orders. Some of our respondents thought this was a bit of a duplication with what the HSE already has. Do you think it is a duplication?

Mr Rees: Perhaps I could comment. Obviously, the HSE has the power under the existing Health and Safety at Work Act to issue what we call improvement notices or prohibition notices. So on the assumption that there was a case for corporate manslaughter involving premises or activities that
we regulated, it would be pretty inconceivable that we would not already have taken action long before the case got near the courts to deal with whatever the problem was, but the Health and Safety at Work Act itself in section 42 gives the power to courts to issue remedial action in certain circumstances, and clearly, this Bill is not just about the Health and Safety at Work Act. So it seems to me that there is a case for a remedial power but I think in practice, certainly for the territory covered by the Health and Safety at Work Act, I would be very surprised if it were used very greatly.

Q541 Harry Cohen: Can you just explain to me how the courts get the necessary expertise to put a remedial order in place under your existing system?

Mr Rees: I was talking to our legal department this afternoon and they were unable to identify any cases where the courts have done it. Let us assume that the courts did use these particular powers, almost certainly they would want to take advice, if it was a health and safety issue, from us. I think to say that they should clearly take advice—I am not sure the particular clause does—from the appropriate regulatory authority seems to me perfectly sensible.

Q542 Chairman: Why do they not use them?

Mr Rees: Because in practice we will have already taken the necessary action. Let us say that there is an accident in a factory—

Q543 Chairman: Okay, I understand that, but in terms of this law that we are looking at now, are we introducing a punishment that might turn out to be similarly redundant?

Mr Rees: I think that corporate manslaughter does not just deal with health and safety offences. As you said, it could deal with issues around food safety or fire safety. I do not know whether other regulatory authorities have the same powers as us; I am pretty sure that they do not have the same powers. I think that there could be scope for it to be used.

Q544 Harry Cohen: The Government’s consultation paper in 2,000 invited views on whether the Health and Safety Executive, the enforcing authorities, should be given powers to investigate and prosecute the new offence. That has been dropped here. Could you comment on this role of the Health and Safety Executive in assisting the police and the Crown Prosecution Service in investigating and prosecuting? You are a regulatory body, would this investigating role, possible prosecuting role, be one that would be appropriate?

Mr Rees: At the moment if it is an issue of manslaughter, both under the existing law or individual manslaughter, we have the work related deaths protocol. The position is that the police would do the initial investigation and if they believed it was a manslaughter case they would continue the investigation, clearly working closely with us. If at some stage they decided it was not a manslaughter case then it would be transferred to us to deal with under Health and Safety at Work legislation and we would then take the prosecution. I think it is perfectly sensible for this Bill to match or mirror what the existing provision is on manslaughter. We would not want to be in the position of prosecuting manslaughter cases which are by their very nature much, much more complex and require a degree of specialism that we do not necessarily have.

Q545 Harry Cohen: But you would expect to assist the police in that process?

Mr Rees: We would obviously update the protocol but we work very closely with the police and then in due course the Crown Prosecution Service when cases are taken, and cases are often taken both under manslaughter and health and safety legislation, but always by the CPS if there is the greater case of manslaughter.

Mr Callaghan: Remember, environmental health officers also prosecute under the Health and Safety at Work Act, not just HSE.

Q546 Harry Cohen: Those are residual powers. The Health and Safety at Work Act 1974 gave health and safety inspectors some interesting powers, including powers of entry to premises, examination and investigation, and to take a constable along if they felt there was some sort of obstruction. When we had ACPO here, for example, they asked for comparable powers in those manslaughter investigations. If health and safety inspectors were required to obtain a court warrant before exercising powers of entry, as the police are required to do under PACE, do you believe the delay would jeopardise your investigation?

Mr Rees: Yes. The position is that clearly under the 1974 Act in some senses we have very, very wide-ranging powers and I think what you are saying is that those powers are greater than those available to the police.

Q547 Harry Cohen: Yes.

Mr Rees: One of the issues clearly is when we are doing investigations the evidence that we take under our powers cannot necessarily be used by the police for that very reason. I do not think, but then you would expect me to say this and we have not looked at it in detail, there is a case made for curtailing our powers. It is not something we have looked at, indeed not something we have huge complaints about.

Q548 Harry Cohen: Let me turn it round the other way. Really, I was trying to get to it round the other way.

Mr Rees: I thought you might be.

Q549 Harry Cohen: Should the police have the same powers that your inspectors have got?

Mr Callaghan: I do not have a view. In one sense, that is for Parliament to decide. As you say, the section 20 powers are quite wide-ranging but this is in the context of regulatory offences and it is
understood, I think, by duty holders and, as Jonathan says, there have been no complaints about the powers that inspectors have. It is the context within which they are operating. I think the context of corporate manslaughter will be different.

Q550 Harry Cohen: Can I pick up a point you made in your earlier answer. You have got wide-ranging powers and you said they cannot be used by the police. Clearly this is a serious investigation if you are going to investigate corporate manslaughter, should they not be able to use evidence that you have gathered from your powers directly in a corporate manslaughter investigation?

Mr Rees: In practice if it is clearly going to be a corporate manslaughter case we and the police are very clear as to who is going to take evidence under what powers. It is not a question that we troop along, as it were, mob handed and trample all over the scene using our powers. Broadly what happens is if it is a corporate manslaughter case the police will go ahead first and use their powers to get evidence. What might then happen is they decide that it is not corporate manslaughter, it is not a manslaughter case, in which case we will use our powers, which as it happens are slightly greater, to take different evidence. We do have to be very careful obviously about abiding by the distinction in powers which Parliament has given us.

Q551 Harry Cohen: That slightly extra power you have might make the difference in the appropriate evidence to make a corporate manslaughter charge stick.

Mr Rees: It might. I do not know that anybody has looked at this. We are happy to look at it further. I have not heard it put in the past. The difficulty of making the case stick is not really a question of regulatory powers; the difficulty is clearly finding the necessary audit trail and the causal links between actions and omissions and what has happened. I do not think it is really a powers question but we are very happy to look at it and write to the Committee further.

Harry Cohen: Thank you for your help.

Q552 Chairman: Just one very final point, to go back to the question of directors’ duties. Do you have any indication from Government that they will be minded to act on whatever you recommend on directors’ duties?

Mr Callaghan: They have asked for our advice and I think the Commission need to give Government its clear advice on what should be done.

Q553 Chairman: If you were to recommend any changes, have you got any indication of what sort of timetable the Government might have in mind?

Mr Callaghan: If the Commission were minded to go down the road of imposing new duties on directors there are different vehicles for that. There is company law, the Health and Safety at Work Act itself. As you know, some people have suggested that this might be given legal force by approved codes of practice which the Commission can recommend to Government. I am speculating at the moment, the Commission may or may not come to a clear decision on that in December. We will certainly let you know whatever the outcome is.

Chairman: Thank you very much, Mr Callaghan and Mr Rees, that has been very helpful. Both yourselves and Sir Igor have been so to the point that we are slightly ahead of ourselves. Thank you very much.

Witnesses: Fiona Mactaggart, a Member of the House, Parliamentary Under-Secretary, Home Office, Mr Adam Smith, Manager, Home Office Bill Team, and Mr Nick Fussell, Legal Adviser, Home Office, examined.

Q554 Chairman: Minister, thank you very much indeed, we are very grateful to you for joining us this afternoon. Could you ask your two officials to introduce themselves for the record?

Mr Smith: I am Adam Smith, Bill Manager in the Home Office.

Mr Fussell: I am Nick Fussell from the Home Office Legal Adviser’s Branch.

Q555 Chairman: Thank you particularly for getting here ahead of the schedule we gave you, Minister, we made good progress earlier. Is there anything you want to say to us by way of introduction or shall we go straight into the questions?

Fiona Mactaggart: Thank you very much indeed. I think the most important thing for me to communicate is that this has been quite a slow process to date. In 1997 the Labour Party Conference said that it would introduce legislation on corporate manslaughter and it was in our manifestos in 2001 and 2005, and I am determined that we should succeed in getting a Bill which can command support and which can get on to the statute books. I think that in this draft Bill we have provided a more effective offence for prosecuting companies by getting rid of the identification principle and by expecting courts to look at the issues of wider management failures in a company. I also think that the reporting of this has under-emphasised the importance of the lifting of crown immunity within this Bill. This offence will apply to Government departments and other crown bodies when they are in the same position as industry, and I think that is a very important step forward.

Chairman: Thank you very much indeed.

Q556 Mr Dunne: Good evening, Minister. We have had evidence from a number of victims’ groups in particular and employee organisations arguing in favour of bringing individual liability within the scope of this Bill. We have also had conflicting evidence from the employers’ organisations, which
you might expect. Today we have had some rather compelling evidence from Judge Judge, and I have been looking forward to saying "Judge Judge" this evening and I am pleased to be the first person to do so. Could you give us your views as to why it is inappropriate for individual liability to fall within the scope of the Bill?

Fiona Mactaggart: The reason why there has been a commitment to producing legislation is to deal with the issue of corporate failure. We needed to create a structure where you could frame a corporate offence. I think that is the first important thing. The starting point was to find a way of attributing very serious management failures within an organisation to the companies and enabling them to be prosecuted for that as a company. Cases in the past have highlighted difficulties where it is difficult to pinpoint specific failures of individuals but overall insufficient care has been taken. We think that this offence, which directs it at corporations, really does do that. If we were to put the energy on directors and senior managers, where there are capacities within, for example, the existing offence of gross negligence manslaughter and health and safety offences, it seems to me the hole in the law is that we cannot successfully proceed against corporations, particularly those large corporations which have given rise to the biggest concerns in these offences. We have successfully proceeded against small companies but consistently failed to proceed against large corporations. This Bill is designed to fix that problem. It is not designed to fix everything. One of the problems about discussing the Bill is that people say, "Ah, but there is this other failure in the law that you could do in this Bill". In my view, it having had slow progress to date, it might be a good thing to do the most important thing and the most important thing is to be able effectively to prosecute the larger companies which have not been able to be prosecuted in the past.

Q558 Mr Dunne: Can we just move on a bit to the next stage of directors’ duties. At the moment there is not a statutory framework for health and safety responsibilities, and we have had evidence from some parties that we should try and remedy this as part of the Bill. It is not part of the Bill at the moment. Do you envisage the Government bringing in regulations in due course to make health and safety responsibility a statutory responsibility of directors?

Fiona Mactaggart: You will be aware that the Health and Safety Commission is reporting to the Government shortly on this issue and I do not think it would be right to pre-empt their report about how it should be taken forward. The same objection that I had to your earlier point to some degree applies here. We have a Bill here which has a degree of internal consistency, it makes sense, it is based on a duty of care, it is based on existing legal obligations and it deals with the biggest problem, and the sensible thing that we need to do in my view is to make progress with this Bill.

Fiona Mactaggart: The reason why there has been a commitment to producing legislation is to deal with the issue of corporate failure. We needed to create a structure where you could frame a corporate offence. I think that is the first important thing. The starting point was to find a way of attributing very serious management failures within an organisation to the companies and enabling them to be prosecuted for that as a company. Cases in the past have highlighted difficulties where it is difficult to pinpoint specific failures of individuals but overall insufficient care has been taken. We think that this offence, which directs it at corporations, really does do that. If we were to put the energy on directors and senior managers, where there are capacities within, for example, the existing offence of gross negligence manslaughter and health and safety offences, it seems to me the hole in the law is that we cannot successfully proceed against corporations, particularly those large corporations which have given rise to the biggest concerns in these offences. We have successfully proceeded against small companies but consistently failed to proceed against large corporations. This Bill is designed to fix that problem. It is not designed to fix everything. One of the problems about discussing the Bill is that people say, "Ah, but there is this other failure in the law that you could do in this Bill". In my view, it having had slow progress to date, it might be a good thing to do the most important thing and the most important thing is to be able effectively to prosecute the larger companies which have not been able to be prosecuted in the past.

Q559 Mr Dunne: Could the Government have used the Companies Law Reform Bill to introduce these duties?

Fiona Mactaggart: Well, the Companies Law Reform Bill is more about the way that companies are set up and run and their corporate management rather than about the kinds of issues that are directly dealt with here. When you are talking about company directors’ responsibilities to shareholders, for example, it is not my field but to put directors’ duties in relation to health and safety offences into that, I do not know what impact that would have on that legislation. If I was managing that Bill I might feel as though someone was trying to stick some other things into a Bill where they did not necessarily fit. As I understand it, that Bill is designed to codify existing common law duties which directors have to the company. I think that is rather different from putting what at the moment is guidance on a statutory footing and obviously we would need consultation as to how we should do that.

Q560 Gwyn Prosser: Minister, in your opening remarks you said on this issue of individual liability the starting point was that this was a Bill designed to prosecute corporations, and large corporations, and you made some reference to Labour Party discussions. Would you not agree with me that during the discussions and the speeches made at the 1997 Labour Party Conference, and subsequent manifesto promises, individual liability of directors was also at the heart of those discussions? Is it not true that our Government’s first proposals for a Corporate Manslaughter Bill included individual liability?

Fiona Mactaggart: It did. Part of the difficulty that that fell into was that the original proposals created some objections from other interests. You have raised the issue of the Labour Party’s own internal discussions. The Labour Party had quite profound internal discussions about this and the Warwick
Agreement agreed that the approach set out in this Bill should be an approach which could command support, partly because it was able to balance the different aspirations for dealing with the issue of corporate manslaughter in a way which could command consent from different parties. I think that is the reason why that happened at that meeting at Warwick.

Q561 Gwyn Prosser: Do you think that it would be unfair to say that the Government’s initial thinking, supported by the Party itself, has been thrown off course by pressure from big business and from the CBI in particular?

Fiona Mactaggart: No, I do not. First of all, the issue of individual liability for manslaughter within a corporate failure is inevitably going to be difficult to prove in a big company. What one effectively needs is first of all to make sure that in big companies we can hold the company to account. Secondly, to make sure that where individuals have individual responsibility for failing, that they can be held to account under health and safety legislation. The question then is, is there a sufficient penalty for an individual in those circumstances. One of the things that happens is that under health and safety legislation there are unlimited fines. These are not very often applied in a very substantial way and one of the things that we need to look at is whether some of those offences can be more effectively applied. This is quite a simple Bill in a way, it has got intellectual coherence and I think in that regard we can command support for it. So far someone has always thought of something more important and more urgent to do. I am very keen that we do not find something more important and more urgent to do and we have a Bill that will not be pushed off course.

Q562 Harry Cohen: Can I follow up very briefly on the Warwick Agreement. You said the Warwick Agreement agreed corporate manslaughter legislation but surely it did not go into any detail about what that legislation should be.

Fiona Mactaggart: The draft Bill was published at the time of the Warwick Agreement.

Q563 Gwyn Prosser: Surely it did not in any explicit way exclude any individual liability?

Fiona Mactaggart: No, I do not think it did but, as I say, the draft Bill was published at the time. I was not a party to the discussions but I am quite sure that all the parties were aware of what was the probable proposal.

Q564 Chairman: Just very briefly, hopefully we were told in an earlier evidence session that if this Bill is enacted as it stands we anticipate five prosecutions a year, that is all.

Fiona Mactaggart: Five additional prosecutions. I imagine that many of the existing prosecutions will be more likely to be successful.

Q565 Mr Rooney: I specifically asked if there was any instance of a major prosecution in the last 15 years that failed that would succeed under this Bill, and I was told no. I would suggest to you that the Bill as currently in place will not achieve the objectives that the Home Office seem to have set for it. If we go back to the Herald of Free Enterprise, the Marchioness, all of these, none of those would have succeeded under this Bill. That is what we were told.

Fiona Mactaggart: You asked about past cases which might have had a different outcome under the new offence, and of course it is very difficult to say if a past case would have a different outcome. That is because the jury has to decide whether the behaviour amounts to gross negligence. The problem with past cases is that in many of the difficulties of prosecution there had to be the question of a directing mind, a responsible—

Q566 Mr Rooney: I understand that. I asked this specific question of the people who were in this room: had this Bill been in force would any of the major prosecutions in the last 15 years that failed have succeeded and I was told no. That suggests to me that the Bill is in some way deficient.

Fiona Mactaggart: I was not the person who told you no. I have been advised, and I do not know if Adam would like to add to this, that in past cases the identification principle—if you look at the Herald of Free Enterprise there was criticism of sloppy management and so on—and that is because the principle has prevented prosecution, so there might have been cases which were not prosecuted, or led to a failed prosecution. I do not know if you would like to add to that on past cases because you are more aware of the history of litigation in this field than I am.

Mr Smith: I think the point is that there is a very high threshold in the offence of gross negligence which applies now which makes it very difficult to go back over cases and say, “We can now say without any doubt that X company in X position was guilty of gross negligence” when there have been findings that those companies are not guilty. Two things are clear. The first is that when the Law Commission was considering the approach on which this Bill is based, their view was that the Warwick Agreement. You said the Warwick Agreement agreed corporate manslaughter legislation but surely it did not go into any detail about what that legislation should be.

Q567 Chairman: Just very briefly, hopefully we were told in an earlier evidence session that if this Bill is enacted as it stands we anticipate five prosecutions a year, that is all.

Fiona Mactaggart: Five additional prosecutions. I imagine that many of the existing prosecutions will be more likely to be successful.
other hand the judge thought that the facts as presented to him represented one of the worst cases of industrial negligence he had ever seen. What that indicates is that there is a very urgent need to be able to put these sorts of cases to the jury on a different basis to what individuals were doing.

Q567 Chairman: What the Minister is saying to us, if we take the Hatfield case, is: suppose this law had been in place and it had been possible to have a prosecution for corporate manslaughter; the companies may have been convicted but the position so far as the individuals were concerned would be absolutely unchanged because there will be no increased liability for individuals. What we need to be perfectly clear about is that that is the Government’s position, that that is the best obtainable outcome under this legislation. Is that right?

Fiona Mactaggart: Yes. Can I add one particular way in which things would change? With the lifting of crown immunity there is a whole class of cases which currently could not be prosecuted which would be.

Q568 Natascha Engel: This is about the senior management test which again has been an issue during most of the inquiry. Many witnesses have argued that the restriction of the offence to failures by an organisation’s senior managers is problematic. We have also heard evidence that the Law Commission’s proposals were too broad as they would include management even at supervisory level, so a sort of delegation. Given that there has been a massive debate about definitions and the senior management test, has the Home Office done any more thinking on this particular issue and do you have any suggestions as to how any of the problems that have come out during this inquiry about the senior management test might be resolved?

Fiona Mactaggart: I suppose one of the things that I was hoping was that your scrutiny might help us to deal with this problem, let us be quite honest about it, because you are quite right that the Law Commission’s initial arrangement could potentially capture some supervisory level, a shop manager or someone, who is merely not following the standard company procedure, and that is not what we intend to be the outcome of this. Is the way that we have framed the test a way which genuinely can capture the major management of an enterprise, those who are profoundly fundamentally responsible? We hope so, but if it does not then we would certainly wish it to. We did not think that management failure at a low level should be able to be caught but our aim is to make sure that wider corporate management failings, those who are actually responsible for the corporate business of the company, should be the right test. I would certainly welcome the advice of this committee about whether we have got the focus right or whether there is a different way of casting that particular test. If we share a view that it should be at a senior level I would very much welcome advice on how to frame that as the kind of thing which pre-legislative scrutiny can help to drill down into and, I hope, end up with a better Bill as a result of it.

Q569 Natascha Engel: From what you were saying before though, about trying to target the very large corporations which are not captured at the moment, that again goes right into the issue, which is that it is a distinction between the larger corporations and the small companies. The smaller companies and the directors of smaller companies are the ones that are successfully prosecuted. Is that what you are saying, that the emphasis will be on those larger corporations?

Fiona Mactaggart: No, I am not saying that. What I am saying is that the problem with the present offence is that you need to find the directing mind. That is very difficult to do in a large complex corporation so we have tried to provide something which is a simpler test which requires a senior level of management but does not drill down to the directing mind point. It is going to be different between different companies of different sizes and different complexity. What we do not want to do is catch the relatively junior manager who is operating in the context of a company policy which somebody is responsible for, if you see what I mean. As to whether you need to say that that seniority requires you to have some engagement on the broader company policy, I do not know how exactly we frame that. We hoped that the senior manager test did that. If it does not do that we want a test which does that rather than deals with the person who is just dealing with a part of the operation or something which is, say, a branch of Gap as opposed to the whole of Gap, if you see what I mean. I am sorry to pick on one particular company. It seems to me that to get a corporate manslaughter charge for someone who is at a relatively senior level it does not need to be a person. It needs to be a process at a relatively senior level that is responsible for this.

Q570 Harry Cohen: Minister, you said right at the beginning that you wanted this to apply to corporate bodies, but what about unincorporated ones—partnerships, sole traders and others, such as clubs and associations, which are excluded from the scope of this offence under the current Bill? Organisations like the Transport and General Workers’ Union have told us that that would lead to “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”, and they argue for the employing organisations to be in the Bill. Should not unincorporated bodies be included as a matter of principle?

Fiona Mactaggart: Employing organisations have responsibilities in health and safety law. Sole traders are individuals who could be individually prosecuted. There are quite a lot of organisations which are generally thought of as unincorporated associations who have used some of the new incorporated forms of associations, so that, for
example, a large number of partnerships which are traditionally unincorporated have now become corporate bodies. What we are seeking to do is to try and get an offence which is directed at organisations that exist, not at the individuals who are responsible but at an organisation that exists. You need an organisation and that is why it is a corporate manslaughter offence, that is why we have focused on corporations. There is a risk, and I do not think there is a big scale issue here and we are not trying to dink it, for some small unincorporated bodies, voluntary organisations and so on, who do not have a corporate existence to become very fearful as a result of this legislation and extremely risk averse. I was advised of a voluntary body which was providing transport services on a community basis which felt that it would require them to individually check at every booking the licence and insurance of the individual driver at every point. That was due to a misunderstanding of the kinds of health and safety obligations that were upon them but that is the sort of anxiety which is most likely to arise in the kinds of unincorporated bodies which do not have the infrastructure that corporate entities do on the whole—there are, of course, some unincorporated associations which do have quite substantial infrastructure—but that class of body might be quite destroyed by their fearfulness of the risk of doing this. And it might be, for example, that some of these bodies do not have the same people at the time you get around to a prosecution from the time when the offence actually occurred and there is no corporate body. That is really why we focused on using bodies that exist for this corporate manslaughter offence. If there is somebody who is a partner or a responsible individual as part of a partnership or some unincorporated association, they can be proceeded against individually, but you need a body to proceed against corporately.

Q571 Harry Cohen: I understand that point and I think it is right to focus on the corporate side. Nevertheless, on this point of being fearful and risk averse, they might have caused a death by their actions, it may have been an employee or a member of the public, and they would have this safeguard presumably if they met the appropriate standards of health and safety (or whatever the duties were) as a defence anyway. Surely what we are creating here is a bit of a loophole for some of these organisations. Health and safety legislation, for example, applies to some unincorporated bodies, so why could that not apply to them?

Fiona Mactaggart: Let us be completely clear: all employers are responsible for the health and safety of their employees. They have a health and safety duty as an employer and they have a responsibility to ensure that the appropriate standards are adhered to in terms of their health and safety duties. What this offence is about is punishing bodies when as a body they have committed this very serious offence of manslaughter. You need a body to commit it, if you see what I mean. I do not think that you can say that you can punish a body which is not a body. That is our difficulty. If there is no such body to do that, it makes little sense. You could prosecute them in terms of their health and safety liabilities as an employer, which is the most likely occasion on which it might arise, but actually I do not think you could give them a corporate responsibility if they are not a corporation.

Q572 Harry Cohen: I hear that but I think you are right about the health and safety powers there, and in fact individual manslaughter could come in.

Fiona Mactaggart: It would under these circumstances.

Q573 Harry Cohen: Let me just give you an example of an unincorporated firm. A lot of law firms are unincorporated but we would really recognise them as bodies or as an organisation that could have a legal entity if they took some policy judgment that caused the death of someone.

Fiona Mactaggart: I did discuss this with my advisers earlier today. Mr Fussell pointed out the status of a number of law firms. Can I hand over to him on that particular point and then I will come back?

Mr Fussell: As the Minister said earlier, many law firms now are limited liability partnerships but with the law firms that are not limited liability partnerships there is the issue that the Minister has highlighted, namely, that they have a number of partners who are the body on the day of the death and then a few years down the line who are you prosecuting if all the partners have changed if there is no corporate entity prosecuted?

Fiona Mactaggart: One of our difficulties is that we have to draw a line somewhere and the easiest way to draw a line is where there actually is a corporate entity rather than trying to turn something which is not an entity into an entity.

Q574 Gwyn Prosser: Minister, the Bill in its present form excludes police forces from its contents but we understand that the Government want to bring them back into the scope of the Bill. Can you tell us what difficulties there are in doing that and whether you have resolved them yet?

Fiona Mactaggart: We do intend to make it apply to police forces. There are two options about how to do that. One is to build on the way in which the Health and Safety Executive has held police forces accountable by prosecuting the office of the Chief Constable or by adding police forces to the list in the schedule of bodies. The mechanism about how to proceed is one that we have not come to a conclusion on and if the committee has views about that we would very much welcome them. There is also an issue of operational contact. How do we hold the police to account? Our mechanisms for the accountability of the police have developed over years. They are a tripartite arrangement with the Home Secretary, the Police Authority and the Chief Constable. We think those arrangements have operated pretty well. We do not want to disturb those basic arrangements for
accountability. There are also, of course, issues about the nature of police activities because they will frequently be involved in seeking to minimise the risk to others by their actions.

Q575 Chairman: Minister, if I can take you up on that, basically you have got two options, they will be in the Bill and you have not resolved which way to do it?
Fiona Mactaggart: That is correct.

Q576 Mr Rooney: It has been suggested that it is not certain that case law on the chain of causation has developed in the way the introduction to the draft Bill suggests, and we have had witnesses saying that. If we accept that the argument that case law has developed in this area are there any other reasons why the Government believe the Law Commission’s original provision on causation should not be included?
Fiona Mactaggart: The Law Commission’s evidence to this committee seems to suggest that we are proceeding in the appropriate way, and I think that to include a provision along the lines that the Law Commission originally recommended could risk this. Although their proposal makes clear that the most immediate cause will not stop the management failure also being the cause of death, it does not say when that chain of causation will be broken. That is important because it might lead to courts saying that the chain of causation is broken under different circumstances than under the general rules, and that could risk the law approaching differently the case of a senior manager causing death, for example, under the gross negligence manslaughter offence that exists at present, from the company causing death even if the failure was one and the same in this case. It seems to me therefore that it is necessary to have the way in which causation is understood for an individual prosecution, which could run side by side with a corporate prosecution, to operate in the same way and that is what we are seeking to do in this Bill.

Q577 Mr Rooney: We all accept that we have seen all too often individual prosecutions fail, do we not? Never mind. We need to move on. Some respondents have argued whether senior managers sought to “profit from failure” is not something juries should be required to adjudicate on. Have you had any further thoughts on this?
Fiona Mactaggart: Our intention in putting this provision was not to use profit merely in the sense of financial gain, but if it was to gain advantage. Our aim was, for example, to get at the kind of behaviour that companies might adopt in order to save money and get jobs done faster, for example, so it was not trying to tie a specific profit to a particular action. If the committee had a view that there was a way that one could get at this point differently from how we framed it, in my view this could be a matter which could perhaps more appropriately be dealt with in terms of its impact on sentencing rather than its impact on the criminal behaviour itself, and that is something that we should perhaps consider in the light of your report.

Q578 Mr Rooney: A number of witnesses from all sides of this argument have suggested that “benefit” would be a better word than “profit”.
Fiona Mactaggart: Absolutely. I welcome such a suggestion.

Q579 Mr Rooney: The Law Commission proposals contained no requirement that a duty of care be owed. Why has the Government decided to link the offence to a duty of care owed under the law of negligence?
Fiona Mactaggart: I think that they assumed that the duty of care was implicit in their original provision on negligence?

Q580 Mr Rooney: I have got a quote here that they said, “The terminology of negligence and duty of care is best avoided within the criminal law because of the uncertainty and confusion that surround it”, but then again they are lawyers. Do you not think it might be better to link the offences to breach statutory duties under sections 2 to 6 of the Health and Safety at Work Act 1974? Do you not think that would get round this?
Fiona Mactaggart: The health and safety duties are designed to be flexible in order to create and build a health and safety culture. There is obviously at the edge of health and safety duties some flexibility. The duty of care is a very clear body of law. It is well tested, there is not much argument about to whom you owe a duty of care and to whom you do not. There is much to be said for having clarity in how this offence should operate whereas health and safety duties are things that one would want perhaps to grow as one became more aware of how to improve the health and safety in a particular area of operation, for example.
Chairman: I may be wrong, Minister, but I have got an idea that the argument that a duty of care is necessary in order to deal with a failure to act rather than the commission of an act is not an argument that has been put to us previously over the last few weeks. Is that the one that you rest the inclusion of duty of care on? I may be wrong. We may have had loads of evidence on this.

Fiona Mactaggart: It is the one that I have found most compelling but I will give my advisers an opportunity to see if there are others.

Mr Fussell: That is right. One of the questions we have had with the Law Commission offens is how do you link the victim to the defendant corporation? What is it that means that the defendant corporation should have been taking steps to ensure the safety of the victim? We were very keen to have an offence which did not impose any new standards. We do not want to rewrite the circumstances when companies ought to be taking action to safeguard people's safety, and the duty of care is a mechanism which defines that relationship and the company knows that if it could be sued for something in negligence it can be prosecuted under this offence.

Chairman: I will pursue that point if I may because what the Bill then goes on to do is define the circumstances in which a duty of care is owed. In common law negligence no definition of the circumstances of a duty of care is needed because that is determined by the courts in individual cases. What is not quite clear is that a duty of care is being brought in but because of the difficulty of defining when a company is responsible we have then got in clause 4(1) a list of circumstances in which a duty of care is owed. It seems to me slightly having it both ways at the same time. We are trying to define it and we are also trying to rely on what is essentially a common law concept.

Fiona Mactaggart: That is largely because of trying to get efficiency in relation to prosecuting in these kinds of cases, that by drawing a bright line around where a duty of care is relevant in these cases we can stop some suggestions of areas where people might argue that there is a duty of care in this kind of case. I have been asking about whether people could come up with circumstances in which this list excludes potential actions and so far I have not found any.

Chairman: It has been suggested to us by some witnesses that by, for example, defining duty of care in a situation where someone supplies a service, the failure of a social services department to effectively prevent a death would be excluded from this, because social services are not regarded normally as supplying a service, they could be said to provide a service. Are you certain that by putting on the face of the Bill a list of the type of activities, you are not creating an area for endless legal argument about whether a particular type of service is actually covered?

Fiona Mactaggart: Yes, I have been absolutely advised that we are not. It is clear with the sort of service you are talking about, if you are providing a service to an individual, that you owe them a duty of care. If, however, a health authority was deciding how to provide health services in an area or even a social services department was deciding, “How do we provide the whole generality of social services in this area”, they would not in those circumstances owe a duty of care to every single resident in that area. Nor do I believe that we ought to make this offence apply in those circumstances, because a manslaughter offence is not a proper way to deal with something which is clearly a public policy matter.

Chairman: That is dealt with separately in the Bill under the exclusion of public policy functions.

Mr Fussell: That is correct. Public authorities are liable under the Bill effectively when they are doing the same things which private organisations are doing, but there are potentially some duties of care which public authorities owe which are excluded by the relevant duty of care criteria and the supply of goods and services. In many situations when public authorities are involved in the provision of services, they will not have a duty of care in any event, but it was considered important to try and make that explicitly clear on the face of the Bill by drawing this line and restricting the Bill to the supply of goods and services as well as the employer/occupier duties.

Chairman: So that part of the Bill which excludes public policy functions complements this but is separate?

Mr Fussell: That is correct. Public authorities are liable under the Bill effectively when they are doing the same things which private organisations are doing, but there are potentially some duties of care which public authorities owe which are excluded by the relevant duty of care criteria and the supply of goods and services. In many situations when public authorities are involved in the provision of services, they will not have a duty of care in any event, but it was considered important to try and make that explicitly clear on the face of the Bill by drawing this line and restricting the Bill to the supply of goods and services as well as the employer/occupier duties.

Chairman: We have just overlapped into two specific exemptions which are exclusively public functions and public policy decisions, questions the Chairman was asking. Just focusing on those specific exemptions at the moment, bearing in mind that the charge of corporate manslaughter is going to be used only in the most extreme, grave and serious circumstances, why should there be an exemption?

Fiona Mactaggart: Because the way in which you hold public bodies to account is different from having a criminal prosecution. If, for example, there is a death in custody, which is one of the exclusions, the Prisons and Probation Ombudsman investigates that individual death; there is sometimes a public inquiry about it; you, Members of the House of Commons, hold the Minister to account; it is up to you to decide, for example, the legislative framework that we make these decisions within. We should not substitute the courts for a form of parliamentary accountability. What we were seeking to do was to retain proper
parliamentary accountability rather than to give that accountability to the courts for Government action.

**Mr Fussell:** May I just add, that one question which needs to be asked in terms of removing any of these immunities, is how would the remedial order powers work, for example, with a death in custody situation, and that feeds into the point the Minister has made about accountability and who is taking decisions about how these core public services are run.

**Q587 Colin Burgon:** Dealing with deaths in custody, we are dealing here with prisoners under the control of the state, particularly vulnerable people.

**Fiona Mactaggart:** Absolutely.

**Q588 Colin Burgon:** How does the Government justify deaths in custody being exempt from the offence?

**Fiona Mactaggart:** I can envisage a situation where someone in custody was to die where one did owe a duty of care, for example, as an occupier of the premises, if there was inadequate ventilation, or something like that, in a prison, and as a result someone was to lose their life, and actually we would be responsible for that. But there is an issue in relation to, for example, the specific authority which the state has to detain someone in custody where it would be inappropriate I believe for saying that—let us take a real situation—to detain someone who has previously attempted suicide, which is the case with something over half of women in prison, could be said to be recklessly risking them inflicting their own death. It is not appropriate for that kind of matter to be dealt with through a manslaughter charge. It is proper, as has been done, for that matter to be dealt with by inquiries of this Committee, by legislation in the House of Commons, by inquiries by the Prisons and Probation Ombudsman when it relates to that particular point. However, if a prison as the occupier of premises leads to a death of a prisoner, that might engage this.

**Q589 Colin Burgon:** I deliberately used the phrase “prisoners under the control of the state” because it leads on to my next question. In your preamble to the Committee you talked about this Bill being aimed at corporations and companies. Why should private prisons be exempt?

**Fiona Mactaggart:** They would be in exactly the same position as the state in this case. As I pointed out, the prison as a provider of premises might have liability in terms of the way in which it constructed its cells, for example, but in terms of the decision to detain, it would not. Her Majesty’s Prison Service and a private provider, Securicor, whoever, would be in exactly the same situation in those circumstances, and that would be right, because the accountability for the initiation of detention is held by the Home Secretary.

**Q590 Colin Burgon:** Are you happy that private prisons would receive that exemption then?

**Fiona Mactaggart:** It is an exemption in relation to the decision which is that of the state, it is not an exemption in relation to every other thing, if you see what I mean. A private prison as an employer—if for example they did not look after their staff properly and they did not have proper management procedures which maintained the safety of their staff—they may have liability in that way, as would a public prison.

**Q591 Colin Burgon:** It is a question we will definitely be coming back to again in the future. One of the arguments that the Government uses for the exemption is that deaths in custody are subjected to very rigorous procedures and investigations. According to the last figures I have seen by the Joint Committee on Human Rights, between 1999 and 2003 there was on average a death every four years. Are you happy there are such rigorous procedures in place when those figures are so deplorable?

**Fiona Mactaggart:** There are a lot more than one every four years.

**Q592 Colin Burgon:** Every four days, I am sorry. It reinforces my argument. Thank you.

**Fiona Mactaggart:** It is very difficult to look at the figures about frequency of deaths because they are relatively small numbers—well, they are relatively high numbers—because of the fact we are not talking about a large cohort here. It is difficult to see whether the action which has been taken by the Home Office which we are driving through both public and private prisons—in terms of increasing safer custody arrangements, in terms of reducing litigation points in cells, in terms of reducing the distress prisoners face in their first reception into prison which is the time at which they are most at risk of self-inflicted death, in terms of improving risk assessment in regard to cell sharing and so on—it is quite difficult to say to what degree are interventions having a result, because you need to look at these figures over a period of time. But we are determined to reduce the incidence of deaths in custody. We do ensure that where the Prisons and Probation Ombudsman makes recommendations in his report, those are disseminated throughout the Prison Service. We have just announced that we will, for example, following the group of deaths at Styal Prison look at the particular experience of very vulnerable women prisoners and their likelihood—

**Q593 Chairman:** We had Baroness Scotland last week talking about prison suicides in general. A specific point: if a prison puts a psychopathic racist in a cell with a young black man and the young black man is killed, are the existing mechanisms adequate to hold people to account in those circumstances?
Fiona Mactaggart: I think they are. If you take the case which echoes the facts you have just described, you are looking at something which has been subject to very substantial public inquiry.

Q594 Harry Cohen: On the territorial application of the offence, the Government has limited it to a death sustained in England and Wales, but why should the place matter? If the company itself operates from England and Wales, why should it not, wherever it occurred, be subject to being tried in our courts?

Fiona Mactaggart: We need to be able to ensure that we can successfully prosecute in practice, and where a death occurs abroad there will be no control of the crime scene, there will not be evidence about the cause of death, and the health and safety standards which exist in the UK will not necessarily be those applicable in the country of operation. All of those things would mean that it was difficult in practice. While we expect those companies to operate to the kind of standards on which we make legislation here, we cannot export our health and safety legislation via this mechanism into other countries. It would be inappropriate and actually pretty impractical. While in terms of individual manslaughter we do have a wider jurisdiction, in practice it is not used frequently, and if we were to put that provision into this legislation I think we would really raise expectations about using corporate manslaughter legislation where we have a good capacity to prosecute here. That is one of the things I have been very keen on in making this Bill get into law, we have good capacity to prosecute successfully in the UK. We would create real expectations that where there are multinational companies which operate lower levels of safety standards in other countries that somehow we could export UK safety standards and have successful prosecutions in relation to deaths in other countries, and frankly I do not believe we would ever succeed in getting prosecutions and it would be misleading if we were to seek to do that.

Q595 Harry Cohen: Just a rhetorical retort, I think: you would be content really if a UK company, a British, English or Welsh company, caused the death abroad and was tried abroad perhaps to a lesser standard?

Fiona Mactaggart: I would never be content with any company which caused a death, let’s start from that point of view. But I do believe you need to create legislation which can work in practice. As I said at the beginning, one of the risks of this law is hooking on to it things we would like in a better world to be able to be done. I would like in a better world every country to have the health and safety standards which we have as the norm here in the UK. I do not believe we can use this piece of legislation to achieve that end and were we to try to any degree to do that the legislation could crack under the strain of it and it would not be a wise thing to do.

Q596 Harry Cohen: I know it is very new but this is about the Scottish Expert Group who came out with proposals for Scottish law which go a lot further than the proposals in this draft Bill. Are you concerned at the possibility that Scottish law could be very different from that in the rest of the UK? Have you had a chance to look at their proposals? Do you have any comments on that?

Fiona Mactaggart: I have looked briefly at them and I think that it reflects a fundamental difference in the way Scottish law operates and English and Welsh law operates. I think we could have different standards in this as we do in many other areas of law between England and Wales and Scotland.

Under the Scottish Expert Group report, they require prosecution to show “an obvious risk of harm”, and actually that is the requirement in effect which caused the failure of the Herald of Free Enterprise prosecution here. They do not have the same concept of duty of care that we have used to be able to direct the offence. I therefore think that you could not immediately import the duty of care habit into Scottish law, but we have got it here and it is actually a good framework upon which to put this legislation. So I think the difference actually reflects a difference in the development of law more generally.

Harry Cohen: That is helpful. Thank you.

Q597 Justine Greening: I have a supplementary to some of the earlier discussion we have had. It seems to me a lot of our debate and evidence we have had has been around the question of corporate identity and then the senior manager test, and I wonder if you could comment on this hypothesis, that you can either have a Bill which tackles corporate manslaughter but then has a corporate process style test of assessing whether that has happened, or you can have a Bill which has an individual director liability and then has a senior manager test at the individual level associated with that, but what you cannot do is have a Bill which has corporate manslaughter but then an individually-based senior manager test as to whether negligence has occurred. Do you think that is a fundamental flaw?

Fiona Mactaggart: I think this is a corporate Bill. It requires a senior management failure and I think it does not require you to identify in the framework of the Bill an individual senior manager. I think that therefore this is a Bill which is designed as a corporate offence. It does not require you to find an individual senior manager in the way the present legislation on gross negligence and manslaughter does, but it is about failing at a senior level and in the way it is constructed that is what we are seeking to do. I do not know whether Mr Smith can assist me in how that works.

Mr Smith: Were you asking whether you could have an individual offence based on corporate senior management failure?

Q598 Justine Greening: The point I was getting at was that the Minister talked about process, which I think is correct, but it strikes me, as someone who has worked in industry, that management process
is one of a number of things—first of all, it is setting policy, which you have referred to, but it is also reviewing whether that policy has been carried out arguably and then taking remedial steps to correct any issues. That whole process can take place over a number of levels in the organisation and therefore my question is whether you feel the senior manager test is at that point stretched too far, because by definition a senior manager may not be implementing the process and the policy they have put in place.

**Mr Smith:** I think the point there is that when you start looking at those levels of failure within the company, at what level should corporate liability for manslaughter kick in. So if what you have got is a system for managing health and safety which is adequate at the senior level and, say, a review process is appropriately delegated to a more junior level, if the failure is solely at that more junior level, do you want to make the company liable on a corporate basis for manslaughter? I think what the senior manager test aims to do is to say, “What we are interested in is a management level that is sufficiently high to say ‘This is how the company is failing. This is a failing that it is fair to say is of the company as a whole’” and it was to exclude the exclusively lower end. I think as the Minister has indicated, there may be a better way of capturing that. We have heard points about this might bring back elements of identification, personalise the prosecution, and those are valid points but they were not the intention of the senior manager test. We are looking for suggestions.

**Q599 Justine Greening:** Moving on to sanctions, many respondents to our inquiry have expressed disappointment that the draft Bill does not include more innovative sanctions. At the moment you have the possibility of remedial orders and also unlimited fines. Did the Government feel it did not have enough time to look at more innovative sanctions or perhaps nine years was not enough?

**Fiona Mactaggart:** There is capacity for substantial fines in this area and that is quite important. I actually rather welcome the fact that witnesses have suggested more innovative sanctions. The Government will shortly be publishing a discussion document on the penalty regime for corporations with a view to producing a report and recommendations in 2006. Clearly if we were to introduce alternative sanctions not of a kind which currently exist, we would need to consult properly about them, and the consultation to date has been about the structure of the offence and actually that is the most important thing to create consensus around. If we were to consider innovative penalties, alternative penalties, and if this Committee were to bring forward some suggestions, it seems to me absolutely essential that we have a proper consultation process. I would be reluctant to delay the Bill in order to do that, if I am going to be quite honest with the Committee.

**Q600 Justine Greening:** When would you, all other things being equal, plan to introduce the Bill?

**Fiona Mactaggart:** As soon as parliamentary time allows. I think I have made it pretty clear that I am not keen on further delay.

**Chairman:** Minister, thank you very much. You have been robustly direct and clear with us. Thank you very much indeed.
Written evidence

164. Supplementary memorandum submitted by Disaster Action

We are writing to thank the committee for the opportunity to give oral evidence yesterday, and also to take further a number of key issues where we believe some clarity is required.

As a point of principle, we wish to stress that Disaster Action is an organisation that has no political brief. Likewise, we have no agenda other than to seek appropriate redress, through law, where corporate conduct has led to death in a disaster. This not about scapegoating individuals, nor revenge.

In the light of Mr Dunne’s declaration of interest as a company director, we wish to point out that a number of our members are also company directors. Finding themselves on the receiving end of a disaster, they were scandalised not only by a corporate culture that appeared to take little account of the sanctity of human life, but also by a criminal justice system that offered them no hope of redress. In addition, those members whose professional careers were spent in the nuclear and oil industries, for example, were shocked to discover the scant regard for safe systems even in businesses engaged in other high-risk activities.

We would also like to clarify our position in terms of the person or persons whom might be construed as the company for the purposes of causing the death.

The previous proposed Bill stated that the death should have been caused by a “management failure”. This we supported. The present proposal seeks to identify a senior manager or senior managers—and nothing else. We feel that this is an unworkable return to the “directing mind” requirement, which is the fundamental problem of the current law, and it represents a disappointing and retrograde step. For this reason we felt the current Bill should contain—if “management failure” is to be discarded—as an alternative possible cause, the existence of a corporate culture, which caused the death. This is precisely what the Australian Criminal Code does, with a number of provisos, of course (for the committee’s reference, please see the attached).

We are of the view that the nature of the corporate culture, defined in the code, may not be so difficult to establish, identifying, for example:

1. levels of supervision;
2. corporate goals as communicated to management and employees;
3. training and monitoring;
4. how the corporation has reacted to past health and safety infringements or “near misses”. This is particularly important in our view: every company we have been involved with had mostly ignored explicit warnings, investigations, reports and recommendations before the disaster occurred;
5. explicit guidelines issued by senior management; and
6. institutional practices—for example, looking at what was routinely tolerated.

We hope that these additional comments will be of value to the committee in the preparation of their report, which we look forward to seeing.

In relation to the specific disasters that we represent, new, workable law will come too late. For those who will otherwise inevitably follow in our wake, it may represent the difference between life and death. Where a disaster occurs in circumstances whereby a company has sought to understand and minimise the risks attendant on their activities, such a company should have nothing to fear from the law.

October 2005

Annex

CRIMINAL CODE ACT 1995—SECT 12.3 Fault elements other than negligence

1. If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

2. The means by which such an authorisation or permission may be established include:
   (a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
   (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
   (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
   (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
3. Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

4. Factors relevant to the application of paragraph (2)(c) or (d) include:
   (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
   (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

5. If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

6. In this section:
   - board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.
   - corporate culture means 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.
   - high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

165. Memorandum submitted by the Rt Hon Sir Igor Judge

I am due to give evidence to the Home Affairs Select Committee on 21 November 2005. I am happy to answer any legal or procedural questions that the committee may wish to pose.

I do not intend to submit my own written evidence. Instead, I simply endorse the views of Lord Woolf set out in his letter of 6 June 2005 to the Home Secretary.

However, my views differ in one respect. If the government believes that a failure to comply with a remedial order should attract a sentence of imprisonment then it is not appropriate to deal with the breach by means of contempt of court proceedings. Contempt proceedings are cumbersome and difficult. It would be, if it is Parliament’s considered intention, more appropriate to have a sentence of imprisonment set out on the face of the statute. This would make the punishment more certain and more easily understood. However, it would be inappropriate for a Judge to advise on matters of policy. It should only be considered if the Government has taken a policy decision to make the offence imprisonable.

November 2005

166. Supplementary memorandum submitted by EEF—The Manufacturers’ Association

Thank you for allowing EEF the opportunity to present to you the views of its members on the Draft Corporate Manslaughter Bill during your evidence session on 7 November. We are writing, further to a request that you made during this session, to elaborate on a point of discussion which was not covered in our original written submission.

As you will recall from our written evidence, we do not feel that it would be appropriate for the Bill to include provision for remedial orders to be made in respect of the circumstances which resulted in a fatality, as there is adequate, more suitable and more timely provision already made within existing legislation. However, we did suggest that further consideration could be given to orders made following a corporate manslaughter conviction being based on the concept of restorative justice.

Anecdotally, some companies have reported positive experience of restorative justice following a serious accident in the workplace. The principle is to bring relevant senior managers together with the victim’s family to discuss the aftermath of the incident and its implications for the future for all parties. This provides an opportunity for the managers to acknowledge the impact of events on the family of the victim, it can be helpful to the family to feel that their loss has been properly acknowledged by the company, and can also help the managers to remember the human impact of their conduct of the business rather than allowing it to become “anonimysed” or “systematised” within the business. In this way, the importance of effective health and safety management is brought home in a direct way.
We are not expert in the field but we understand that similar methodologies have been used to very positive effect in the field of youth justice. Indeed, Government policy is now to maximise the use of restorative justice in the Criminal Justice System and, as the Home Office itself says, the evidence suggests that restorative justice can help to deliver the key objectives of improving victim satisfaction, reducing re-offending and building public confidence, all of which are germane to the present issue.

The restorative process seems to us to have the potential to recognise the understandable desire of families and the wider society to hold the management of the company to account whilst producing a positive outcome for the improvement of health and safety management.

We would be pleased to provide any further information we can to assist the committee on this or any other point and we shall seek to discuss the idea further with Home Office officials.

November 2005

167. Supplementary memorandum submitted by the Rail Safety and Standards Board

CONTROL OF RAILWAY TRACKWORKERS

When giving evidence to the Select Committee considering the draft Corporate Manslaughter Bill last Monday, I undertook to provide a written supplemental answer to the question posed concerning the control of the competency of trackworkers. Essentially, the attached report1 of the November 2004 checks undertaken by Network Rail confirms my oral answer that in excess of 99% integrity is being achieved through application of the Sentinel secure registration regime. Indeed, this report demonstrates that 99.6% was found in the large scale check of 2,307 track safety cards.

Network Rail have advised me that given the very high levels of compliance identified in November 2004 and at previous large scale national checks going back for three years, the decision has been taken to devolve and adopt a more targeted check regime. Network Rail has further advised me that they have not detected any cases of actual or attempted fraud or other illegal activity since the scheme started in 1999.

Clearly the adoption of the SENTINEL scheme has been effective in causing employers and individuals not willing to meet the required standards to withdraw from railway track and other infrastructure work.

Please let me know if the Committee would like further information.

November 2005

168. Supplementary memorandum submitted by the Centre for Corporate Accountability

We are sending you this second written evidence to clarify certain points that we made in our oral evidence as well as in response to other oral evidence that the Committee has received. This evidence contains some important points that we hope you will find useful in your scrutiny process.

PUBLIC BODY APPLICATION

There are a series of issues that primarily relate to the application of the offence to public bodies

(a) Grounding the Duty: Duty of Care v Health and Safety duties

1.1 As the Committee knows one of our main concerns about the current proposal is that the offence is grounded in the civil law “duty of care”—the existence of a “relevant duty of care” is the first part of the proposed legal test. The draft bill makes it clear that not all accepted civil law duties of care will ground a prosecution—they have to be “relevant” ones as set out in the bill itself. The bill uses the concept of “relevance” as a means to exclude many public bodies decision-making and other activities from being subject to the offence.

1.2 The pertinent issue is this: should Section 1(1)(b) state that the failure “amounts to a gross breach of a relevant duty of care owed by an organisation to the deceased” or that it “amounts to a gross breach of a relevant duty of care owed by an organisation to the deceased or a duty imposed by statute”. This is about how to circumscribe the scope of the offence—which organisations in relation to which deaths could potentially be subject to the offence. Further to our written and oral evidence on this matter that we would like to make a number of further points.

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1 Report of weekend Sentinel card checks are available at: www.sentinel.uk.net
2 Or some such wording. It may be necessary to set out in a schedule the statutory obligations included in this: ie Health and safety at Work Act, Merchant Shipping Act etc.
The narrowness of duty of care principles

1.3 A key question is whether there are deaths which would be gross breaches of section 3 of the HASAW Act 1974 (1974 Act) but where there is no “duty of care”?

1.4 In the evidence sessions, at question 163, the following exchange took place:

   Q163 Chairman: Just so I am clear, is there a serious possibility that somebody could die as a result of a breach of section 3 but because of the way the duty of care is framed in the draft legislation the company could not be prosecuted for corporate manslaughter? Is that part of your reason for wanting to bring section 3 in?

   Mr Welham: I think why we are saying section 2 and section 3 is because it is very easily and very clearly worded, and it is well established through the Health and Safety at Work Act now.

   Q164 Chairman: I may have misunderstood, does the danger I have described exist?

   Mr Welham: No, I do not think so.

   Mr Waterman: We do not think so.

   Chairman: I may have just misunderstood. Thank you.

1.5 The question asked here is a key foundation of our concern about the Home Office’s failure to use statutory duties as the basis of the offence; it is our contention that there will be circumstances where a death will result from a gross breach of section 3 of the HASAW Act and those circumstances would not result in a civil law “duty of care”, and therefore could not result in a prosecution under the proposed offence. This will in particular apply to deaths resulting from public bodies. And it is easy to see why when one understands how courts determine whether duty of care relationships exist.

1.6 When civil law courts rule on whether or not a “duty of care” relationship is created between a public body and a person who is suing for compensation, they quite understandably have taken into account public policy factors that relate to the fact that it is a claim for compensation. The courts have therefore given consideration to, for example, whether it is appropriate, in time and expense, for a public body to have to defend hundreds or thousands of compensation claims and then having to pay our damages. As a result of these reasons—which are distinctive to civil liability issues—the courts have stated that certain public body activities do not raise “duty of care” relationships.

1.7 Section 3(1) of the HASAW Act however imposes duties upon employers—including these very same public bodies—that does not take into account these factors. This states:

   “It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.”

1.8 As a result there will undoubtedly be deaths resulting from management failures of public bodies which the civil courts have determined do not raise a “duty of care” relationship (and therefore are immune from prosecution) but are breaches of section 3.

Criminal law has a different public purpose

1.9 Following on from this point, it is important to recognise that criminal law has its own particular public policy objectives that are often different from those under consideration when civil law courts assess whether there should be a “duty of care” for compensation purposes (which will often not involve deaths and will not involve gross negligence).

1.10 This point was discussed in Court of Appeal case of Wacker 3 which involved the prosecution for manslaughter of the driver of the lorry in which Chinese immigrants suffocated to death. It was argued by the lorry driver’s lawyer that there could be no “duty of care” between the lorry driver and the people he was smuggling into the country as they were part of a joint criminal act and it was an established principle of civil law that in such circumstances there was no duty of care—a doctrine known as “ex turpi causa”.

1.11 However in the Court of Appeal, the court held that this doctrine did not apply in the criminal law. It stated at paragraph 33:

   “Why is there, therefore, this distinction between the approach of the civil law and the criminal law? The answer is that the very same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state’s duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has

nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disappplied just because the civil law is disappplied. It has its own public policy aim which may require a different approach to the involvement of the law. . . .

“Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time, or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Public policy, in our judgment, manifestly points in totally the opposite direction.”

1.12 This paragraph sets out exactly the reasons why it is entirely inappropriate to ground the manslaughter offence on a civil law doctrine which is based around a set of public policy issues entirely different from the needs and purpose of the criminal law.

Duty of Care and Parent companies

1.13 In our original response to the proposals the CCA did not comment on its application to parent companies—however we would now like to raise this issue with you. The Home Office says in its paper that:

“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”

1.14 In our view this is a rather misleading and disingenuous assertion—since it gives an impression that parent companies could—assuming gross negligent conduct could be found at a senior management level of a parent company—be prosecuted. This assumption has been carried over in questions by members of the committee.5

1.15 However the Home Office fails to mention that English/Welsh civil law courts have not ruled that parent companies have a “duty of care” in relation to the activities of their subsidiary companies. There is no established principle that there is a duty of care between a parent company and an employee of one of its subsidiary companies.6 The fact that some parent companies may require subsidiaries to act in a particular way in relation to safety does not under the current law impose a duty of care upon the parent company.

1.16 If the concept of “duty of care” is retained as a requirement in the offence, the possibility of prosecuting a parent company for the death of a worker in its subsidiary is not possible. The only legal obligation that parent companies have is that imposed by section 3 of the HASAW.

116a The key point here is that if the offence requires there to be a duty of care, parent companies will not be able to held to account—even though the Home Office favours this. In order to create a possibility of prosecution, the Home Office would need to ground the offence not only in relation to duty of care but also statutory offences.

Comments by Justice Ivor Judge, HSC and the Minister

1.17 A number of comments were made on this issue in your last evidence session—some of which need to be commented on.

1.18 Ivor Judge: The following exchange took place:

Q506 Mr Dunne: Can we talk about the relevant duty of care? We have had slightly conflicting views expressed as to whether it is appropriate in criminal cases to use the terminology of “negligence” and “duty of care” because of the confusions that can arise. The Law Commission in particular have suggested that there are some difficulties there. If we were to use their proposals that there was no requirement that there be a civil law duty of care, what would be the legal implications?

Sir Igor Judge: There you have hit, if I may say so, on a point that did rather trouble me about the direct reference to the law of negligence, because if you open up the standard textbook on the duty of care in the law of negligence in the civil world, it is not quite as big as that, but it is a very large amount of literature and the issue has gone to the House of Lords for a decision very many times in the past 10 years. I was very troubled about the possible consequences but I think that if you make this a question of law for the judge, depending on whatever facts he has to find under section 4(3), I do not think it presents a problem. I think in truth it does identify that there is a duty, that

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4 Para 33 and 35.
5 See Qs 192–199.
6 This point was in fact made in para 7 of the Memorandum submitted by Serco-Ned Railways. Ev 328; and para 11 of Evidence of EEF, Ev 230.
you are concerned with neglect, and therefore it has that strength. I myself do not think it matters whether it is in or not, provided it is for the judge to decide whether it is a duty situation. I think that is an answer to your question. I hope it is.

Q507 Mr Dunne: Thank you. We have also had some evidence that we do not really need to go much further than the statutory duties which are comprised in sections of the Health and Safety at Work Act 1974 sections 2–6. Do you see any legal obstacles if the Government were to decide to link the offence to breaches of statutory duties under that Act?

Sir Igor Judge: I think that we have to appreciate there is a very significant difference between what looks like a regulatory statute, health and safety, and manslaughter, which on any view says that this was a killing. I think there is an important public perception about this and I do not think we should ignore that. I think there is a public perception that there are occasions when a killing should result in a conviction for manslaughter. To say it is all basically covered by the Health and Safety Act does not actually to me seem quite appropriate if the criminal law is to keep reasonably in step with the way the public looks at things, and it should. The way in which the link is done seems to me to be entirely sensible, if I again may say so, by saying that when the jury is considering all the different ways in which the breach might reasonably be described as gross, it directly links it to the health and safety legislation, but says that is only one piece of evidence. You may be able to show that there was a breach of a relevant piece of health and safety legislation but nevertheless not be guilty of this offence, and you might well have an indictment—I do not know—which said “Corporation: count one, manslaughter; count two, failure to comply with whatever section of the Health and Safety Act.” I have no problem with that—and possibly “Count three, X, the individual, you did this and so you too are guilty of manslaughter by gross.

1.19 We are very concerned that the Committee recognises that in his second answer—see the italicised part above—Mr Judge was not answering the question that was asked or what was clearly meant to be asked. It is clear that Mr Dunne was asking a question about whether the duty around which the offence should be grounded should be limited by either a civil law duty of care or by statutory duties. It appears from the answer that the judge understood the question to be suggesting that a simple breach of health and safety law resulting in a death could result in a prosecution for manslaughter, or some such question. Otherwise it does not make sense that he is saying that there must be a clear distinction between regulatory offences and manslaughter—which of course we agree. It is clear there is a misunderstanding since what the Judge himself says about there needing to be a difference between “what looks like a regulatory [offence] and manslaughter is of course equally true of a “beach of a ‘duty of care’” and an offence of manslaughter.

1.20 The CCA does not know what the judge actually thinks is the answer to the question that was meant to be put to him—but it is important that the committee recognises that the Judge, whose evidence is of course significant because of the position that he is in, does not respond to it. If the Committee was intending in any way to rely on this answer in its report to answer in favour of the retention of “duty of care”, we would first urge it to seek further clarification from the Judge.

1.21 Fiona MacTaggart: The Minister made the following comments to the committee:

“It seems to me that requiring a duty of care defines clearly the circumstances in which a new offence might apply and it is important to have an offence of a failure to act. This is key because an offence of not doing something could lead one to have a successful prosecution. That is not usual in most offences that I can imagine of manslaughter. Because failure to act could be as significant in a prosecution like this as action it is necessary to make clear when companies are liable. The best way to do that is to depend on the duty of care which is the kind of framework of our basic legislative approach in these things.”

It is of course that the case that all of this could equally be said of health and safety statutory obligations—that are surely better understood and known that civil law duties of care.

1.22 The following exchange then took place:

Q581 Chairman: I may be wrong, Minister, but I have got an idea that the argument that a duty of care is necessary in order to deal with a failure to act rather than the commission of an act is not an argument that has been put to us previously over the last few weeks. Is that the one that you rest the inclusion of duty of care on? I may be wrong. We may have had loads of evidence on this.

Fiona MacTaggart: It is the one that I have found most compelling but I will give my advisers an opportunity to see if there are others.

Mr Fussell: That is right. One of the questions we have had with the Law Commission offence is how do you link the victim to the defendant corporation? What is it that means that the defendant corporation should have been taking steps to ensure the safety of the victim? We were very keen to have an offence which did not impose any new standards. We do not want to rewrite the circumstances when companies ought to be taking action to safeguard people’s safety, and the duty of care is a mechanism which defines that relationship and the company knows that if it could be sued for something in negligence it can be prosecuted under this offence.
The Minister is right that you do need to ground the offence on the basis of there being a “duty to act”; in order to say that an organisation should have done something it is necessary to be able show that the organisation had some form of obligation towards the safety of the person. Mr Fussel is therefore also correction in saying, “What . . . that means [is] that the defendant corporation should have been taking steps to ensure the safety of the victim. We do not want to rewrite the circumstances when companies ought to be taking action to safeguard people’s safety, . . .” However, the point is—and the Home Office has acknowledged this to the CCA in informal conversations—that there were two options available for achieving this: through the restrictive “civil law duty of care” or the broader “statutory duties.” The reason why the Home Office chose to use civil law duties of care is to narrow the potential application of the offence.

1.23 This is clear for example, from what the Minister goes on to say:

If, however, a health authority was deciding how to provide health services in an area or even a social services department was deciding, “How do we provide the whole generality of social services in this area”, they would not in those circumstances owe a duty of care to every single resident in that area. Nor do I believe that we ought to make this offence apply in those circumstances, because a manslaughter offence is not a proper way to deal with something which is clearly a public policy matter.

The Health Authority has a duty under section 3 of the Health and Safety at Work Act, to act in a way in relation to conduct of those whose activities may affect them. However, as the Minister acknowledges, there is no duty of care relationship. If in making a decision about a particular aspect of social services care in the area, the Health Authority acted in a way that could be deemed grossly negligent—in for example failing to take account of key information about particular danger etc that they were informed about—and a death resulted, then in our view it should be appropriate, in theory, for the Authority to be held to account. If in section 1(1)(b) you retain “breach of a relevant duty of care”;—that would not be possible; if in section 1(1)(b) you changed it to “breach of a relevant duty of care or statutory obligations” then it would be possible.

(b) Public policy decision making exemption

2.1 We would like to make two further comments about the public policy decision making exemptions—which as you know we have serious concerns:

— In the new Canadian and Australian federal Codes containing new principles of corporate/organisation culpability—no such exemption exists;

— We are representing a family whose family member committed suicide in a mental health hospital. One of the main issues in this particular case relates to whether the failure to remove a particular ligature point in a room where she committed suicide (despite repeated requests from NHS Estates and others that ligature points should be removed) could be considered grossly negligent. The question that we are concerned about is whether this similar set of circumstances might result, under the proposed public policy exemption, in the public body arguing successfully that this was a matter of public body decision making. What would be the situation if the public body, for example, stated that they did not proceed with removing ligature points as they had to balance the expense of doing this with other costs and therefore it was a matter of “the allocation of public resources”? What would have happened if for example the NHS estates had itself not provided the advice because it was the outcome of the “allocation of public resources or the weighing of competing public interests”—although there was clear evidence that knew about the serious risks of not removing ligature points and had been advised to instruct Health Authorities to remove them,

(c) Application to the Police, Prisons and fire service

3.1 We have read the oral evidence given by ACPO—and have the following comments.

3.2 ACPO notes that they are willing for the offence to apply to police forces but that they do not consider it appropriate that the offence should apply to operational matters. It says this because (a) there is sufficient accountability already and (b) it would result in a risk averse system. It says it wholly supports health and safety law applying, as it does now, to police including operational matters.

3.3 We would like to point out a serious contradiction in ACPO’s response. It says that it is happy to comply with health and safety law—and there must therefore be an assumption that health and safety law compliance does not cause any particular problems of risk averseness. ACPO also notes that individually and organizationally the police are willing to be held account for health and safety offences. If this is the case, then it is difficult to see what are the particular problems that the police would face in relation to the new offence. If they seek to comply with health and safety law—then they have nothing to fear from the new offence and it is difficult to see what additional risk averseness would exist. Senior police officers would

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7 See our original evidence.
simply have to ensure that their force complies with existing health and safety law—as presumably these senior officers seek to do now. All that the offence will do is to place greater incentives on these senior officers to comply with health and safety law—which of course is one of the ultimate purposes of the offence.

3.4 The same issue applies in relation to points made by AFPO. Their witness said the following in response to whether the proposals would have a risk adverse effect:

It may cause me as a chief officer to say to my crews, “When you arrive at that incident, unless you have every piece of kit by your side, do not take any action. Do not go into the water unless the boat is there. Do not go into that burning building unless you know you have all the pumping appliances lined up alongside you.” It will cause me as a chief officer to give instructions to my staff that may be risk averse and I do not want to do that.\(^8\)

3.5 It is difficult to understand why this could be so if the chief officer already has to ensure that fire authorities comply with health and safety law and to do what is being suggested above is not even necessary for health and safety law.

3.6 We do not understand what the “draconian constraints over the service” are, as referred to by ACPO.\(^9\) Such an allegation could only be relevant if the police did not want to comply with existing health and safety law or the new offence imposed new duties—neither of which is the position. It is therefore difficult to see what any additional constraints might be.

3.7 ACPO supports the role of the Independent Police Complaints Commission (IPCC) in ensuring appropriate “levels of scrutiny, independence and confidence” in the police—\(^10\) but since the IPCC would be the body responsible for investigating this offence, it is unclear what concerns ACPO can have.

3.8 ACPO infers that the current law of gross negligence manslaughter is itself appropriate for holding the police to account for deaths in custody.\(^11\) It implies that holding individuals to account within the police force is sufficient. But the purpose of the offence is to look at organisational culpability—to look at organisational failures which are grossly negligent. Deaths in custody are often alleged to be the result of systemic police failures at a very high level of negligence where it is not possible to identify a particular individual. The current offence of manslaughter cannot deal with this situation—which is why a new offence is appropriate.

3.9 Minister comments: The Home Office explained to the Committee why in the Government’s view the new offence should not apply to police forces for operational areas:

Fiona Mactaggart: Because the way in which you hold public bodies to account is different from having a criminal prosecution. If, for example, there is a death in custody, which is one of the exclusions, the Prisons and Probation Ombudsman investigates that individual death; there is sometimes a public inquiry about it; you, Members of the House of Commons, hold the Minister to account; it is up to you to decide, for example, the legislative framework that we make these decisions within. We should not substitute the courts for a form of parliamentary accountability. What we were seeking to do was to retain proper parliamentary accountability rather than to give that accountability to the courts for Government action.

Mr Fussell: May I just add, that one question which needs to be asked in terms of removing any of these immunities, is how would the remedial order powers work, for example, with a death in custody situation, and that feeds into the point the Minister has made about accountability and who is taking decisions about how these core public services are run.\(^12\)

3.10 However, the following points need to be made about this:

— Custody deaths are dealt with differently—depending on whether they are in police or prison custody. If they are deaths in police custody—then they are investigated by the IPCC who can prosecute individuals for manslaughter or for health and safety offences. The argument that the IPCC makes is that it is just as appropriate for them to be applying any new proposed offence as either of these other two offences.

— Deaths in prisons are not subject to investigations that can result in criminal offences. This is of course itself rather anomalous—and as a result deaths in prison are not subject to anywhere near the level of accountability as deaths in custody.

— It remains unclear whey parliamentary accountability should exclude the option of criminal accountability where appropriate. In any case, in the real world, the level of parliamentary scrutiny for the vast majority of deaths in prison or police custody is cursory—and of course the information that parliament has access to is often limited.

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\(^8\) Q 444.  
\(^9\) Q 418.  
\(^10\) Q 441.  
\(^11\) Q 425.  
\(^12\) Q 586.
— Public inquiries take place in very limited circumstances—and Governments usually are not supportive of them, and are often have to be forced to set them up after a High Court judicial review proceedings. So for example, there is about to start a High Court judicial review of a decision by the Government not to hold a public inquiry into the death of 16 year old Joseph Scholes. Public inquiries cannot therefore be seen as part and parcel of any normal inquiry into a death in custody. In any case, again a public inquiry does not preclude the need for criminal accountability.

— We do not understand the potential problem of imposing a remedial order on the police or prison service (though see our comments below in general about remedial orders).

3.11 The Minister goes onto say the following:

But there is an issue in relation to, for example, the specific authority which the state has to detain someone in custody where it would be inappropriate I believe for saying that—let us take a real situation—to detain someone who has previously attempted suicide, which is the case with something over half of women in prison, could be said to be recklessly risking them inflicting their own death. It is not appropriate for that kind of matter to be dealt with through a manslaughter charge.

The minister, however, seems to be missing the point here. Clearly it would be inappropriate for prisons to be held accountable for suicides per se: however they should be held to account if they have failed to take reasonable care in relation to those whom they know to be suicide risks, and, in our view, should be subject to the possibility of criminal prosecution, if they have been grossly negligent in the care that they provide and the death was caused by the gross negligence. It is difficult to see why this should not be the case.

3.12 The CCA is at present, representing a family whose child committed suicide in a mental health hospital. The death has resulted in a criminal investigation, and the Crown Prosecution Service is actively considering whether managers within the hospital and individuals within the health authority have committed manslaughter. It is difficult to see why a prison should not be subject to the same level of investigation and possible prosecution into suicides of this kind as a hospital and its health authority. (See also above, para 2.113.)

3.13 In response to question 592, the Minister talked about the improvements that the prison service is allegedly making in relation to reducing deaths in prison custody. But this kind of response is similar to a private company saying, after a death, that we have made or intend to make the following changes. That does not answer the question why, if the death was the result of organisational gross negligence, the prison should not be held to account.

3.14 We would also like to note that the Minister in response to all the Committee’s questions about deaths in custody talked about deaths in prisons, and not the police.

SENIOR MANAGER TEST

4.1 This has been a key area of questioning by the committee and we would like to clarify some of the evidence that we gave as well as looking at this issue afresh.

4.2 It appears that the government is trying to craft a new form of liability. This involves an assessment of:

1. Whether or not there has been a failure in the way in which the organisation is organised and managed.
2. Whether that failure fell far below what could reasonably be expected.
3. Whether that failure was a cause of the death.
4. Whether that failure was a failure at a senior manager level within the organisation.

4.3 The Government says it is new principle since it does not require identification of particular individuals; it is an identification of a failure at a particular level within an organisation. Inevitably however, in assessing whether a failure is at a particular level it will be necessary for the courts to determine whether particular individuals responsible for particular failures are at a particular level.

We would like to make the following points about this test:

4.4 It should first be noted that if a death was a result of a number of different failures in the way in which the organisation was organised and managed (all of which could be causative of the death and be deemed grossly negligent) and some of them were failures below senior management level, the court would only be able to consider those failures that were at a senior manager level.

4.5 In a situation where the failures at a “middle/junior manager” level were grossly negligent but the failures at a senior level were serious but were not grossly negligent, the company could not be prosecuted.

4.6 The question that needs to be determined is, therefore, at what level of management should the failure be before it can allow the company to be prosecuted.

13 With the clients consent, and under strict confidentiality we may be able to provide you further information about this case if required.
4.7 **Director level:** It may well be worthwhile dealing first with an argument made by some of the employer groups in evidence to the Committee—that the failures should be at a director level before a prosecution should be able to take place. Putting to one side the delegation issue which is discussed below (see para 2.17), the result of putting the test at a director level would in effect be simply to retain the current identification principle under a new name.

4.8 This would be the case since it is unlikely that you would find in a large company more than one director having responsibility for health and safety issues—so to say that the failure was at a director level, would in effect be to say that the failure was the failure of a single director. Therefore, only if there is a director who has been grossly negligent would you be able to prosecute the company. In fact, it is arguable that the proposal is in some ways more limited than the current identification doctrine, which has been defined as wider than individuals who are directors.

4.9 There may of course be some cases where a director level failure is a failure of a number of directors—however, we would argue that this scenario will be very uncommon indeed, and would certainly not be the case in large companies where directors have no legal obligations in relation to safety.

4.10 We would therefore argue that any further restricting of the level at which failure could result in a prosecution is totally unsustainable.

4.11 **Senior Manager level:** What about the senior manager level—as defined in the bill. The Home Office states that the attempted definition in the bill is to target “failings in the strategic management of an organisation’s activities, rather than at relatively junior levels.”

4.12 As soon as one talks about those involved in “strategic management”—you are referring to very senior managers indeed. “Strategic management” fails to include all those managers responsible for establishment, implementation and monitoring of safe systems of management. The only time when managers responsible for “strategic management” are the same managers responsible for “establishment, implementation and monitoring of safe systems”, is in a small and perhaps a medium sized company. In large companies, managers responsible for these tasks are not “strategic/senior” managers.

4.13 Therefore gross failures at “establishment/implementation/monitoring” levels in large companies will very rarely result in the company being prosecuted. In our view this is entirely wrong since this is exactly the failure that the offence should deal with. It is important to note that one of the main purposes of the bill was to deal with the lack of accountability of large companies; the senior manager test will simply not deal with this justice gap.

4.14 Another important point around the senior manager test concerns the nature of “systemic” failure in companies. Again one of the key purposes of reform in this area was to deal with holding to account companies where there are failures of different people at different management levels within a company. So for example, the Sheen Inquiry into the Zeebrugge disaster concluded that: “From top to bottom, the body corporate was affected by the disease of sloppiness”. It is extremely unclear whether or not under the proposed offence, P&O European Ferries would be successfully prosecuted for this offence—since only those failures at a senior manager level could be taken into account. This analysis is supported by other written evidence that you have received.

4.15 Indeed as the Home Office says, “large companies with complex management structures have proved difficult to prosecute for manslaughter under the current law.” We do not see how the senior management proposal deals with this issue. Companies with complex management structures are likely to continue to escape accountability as safety responsibilities and therefore safety failures will be located at different points in their management hierarchy, many not at a senior manager level.

4.16 An argument in response to this may be that gross failings at lower levels within an organisation will be able to be traced back to gross failings at a senior level within the organisation; that whenever there is a gross failure at a middle-management level there would always be an identified gross failure on the part of senior managers to have monitored the gross failure taking place at a lower level.

4.17 However, again it would be highly unusual. Although managers at senior management level may have some responsibility monitoring, their failure to do so will rarely be able to be deemed as grossly negligent (though they may sometimes appear to be serious failures). There would be some many potential justifications for inaction—including lack of knowledge and delegation.

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14 See for example Q 377 to CBI and DBI’s Written Evidence, Evidence 250 Written evidence of Network Rail EV 341. Written Evidence of British Energy, Evidence 270, para 5.
15 para 28 of Home Office paper.
17 para 9, p 8. Note that this was quoted in approval by the Institute of Directors (Evidence 44 para 9).
4.18 This brings us on to delegation. A number of your witnesses, stated that even though the senior manager test may induce the company to delegate responsibilities down the management chain, it would be possible to prosecute companies as a result of grossly negligent delegation. So for example the following exchange took place with the CBI:

**Q376 Mr Rooney:** Do you agree there is a risk that responsibility for health and safety in large companies will be delegated below the level of senior manager—if we can ever agree a definition of “senior manager”—to avoid liability for the offence? Is there a danger of that?

**Mr Roberts:** There may be a risk, but I challenge whether that would actually happen. In the event that that happened, or was shown to have happened and that it had led to a fatality, I think that it could be argued in court that was a clear incident of management failure. It was a clear attempt to absolve a more senior person of responsibility—possibly to people who are not capable of exercising that responsibility. It would seem to me that it would be arguable in law that that constituted a serious management failure, in which case you would secure a prosecution.

4.19 It is true if a company delegated responsibilities to a person with no proven competence, skill or experience—then it may be possible to prosecute the company on the basis of a grossly negligent delegation. However when we are raising the issue of the problem of delegation we are talking about strategic delegation to make the company manslaughter proof.

4.20 In this situation, delegation will be perfectly reasonable—or at least not particularly unreasonable—individuals. What will happen is this; the delegation from senior manager level will be to people within the company who are competent. It will also not be a delegation of all responsibilities—so some relatively minor supervisory responsibilities may remain with the senior managers so that there does not appear to be a total abrogation of responsibility by the senior manager. In such a situation, it would simply not be possible to prosecute a company for gross negligent delegation, and the company will have successfully made it corporate manslaughter proof—not by improving safety management, but through organisation of safety responsibilities—since all the gross failures will be below the senior manager level. This may not even be deliberate strategy of the company—but simply a reflect of the flatter management structures of companies.

4.21 This is of course exactly the point that was made by Sir Igor Judge when he gave evidence to you:

**Mr Clappison:** . . . How difficult will it be to prove that a senior manager who delegated responsibility to others for health and safety matters caused the death of a worker or member of the public?

**Sir Igor Judge:** Difficult. There is no doubt about that. There is nothing to stop a senior manager delegating to apparently competent staff and, if the apparently competent staff are people that it was sensible to delegate to, you can delegate all the way down. I think that is a concern. It is a concern I would have. The Law Commission, I think, suggested—I may be wrong—that what you should be looking at is a management failure and that, of course, goes to the management and organisation of the corporation. I am not making a policy comment, but I would have thought myself that might be a better way to avoid a series of “Not me. I passed this responsibility down”, so that you end up with some very, relatively speaking, junior employee, who suddenly has to carry the can for what is in effect an unfair assignment of responsibility to him.

4.22 It is interesting to note what the Minister in her evidence to the Committee said concerning the Hatfield disaster:

The court on the one hand said that individuals were guilty of no more than errors of judgment. On the other hand the judge thought that the facts as presented to him represented one of the worst cases of industrial negligence he had ever seen. What that indicates is that there is a very urgent need to be able to put these sorts of cases to the jury on a different basis than what individuals were doing.

In this case although directors and senior managers of two companies were prosecuted as individuals for either manslaughter or health and safety offences (for which only proof of “neglect” is required) the judge did not think it appropriate that any of these individual cases went to the jury. Yet at the same time he considered this to have been “one of the worst cases of industrial negligence he had ever seen”. It is difficult to see how there would be a different result if these companies were prosecuted under the new proposal—when the judge did not find even “neglect” on the part of key senior managers. How could there have been gross negligence at a senior manager level when not one senior manager could even be convicted for an offence that only requires “any neglect” and which does not require proof that the neglect was a case of the deaths? Clearly what the Judge in this case was referring to was negligence at all levels of the company—some at a senior level and some at a more junior level. And it is clear from the reasons given by the judge that he considered many of the serious failures within the companies to have been at a level below the senior manager level.

4.23 It is difficult to see what is the purpose of a new offence if it is likely that “one of the worst cases of industrial negligence” would not have resulted in a likely conviction when the proposed test is applied to it.

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18 Q 501.
19 Q 566.
4.24 **Beyond senior management?:** This all brings one back to the key question—what grossly negligent conduct within a company or organisation should result in a company being prosecuted for manslaughter. In our view, this should be much wider than grossly negligent failures at a senior management level. It should include failures within a company at different levels of management—which may or may not include senior management failures—which either alone or when aggregated together could be viewed as a grossly negligent failure. It should be noted that the new federal criminal codes in both Canada and Australia contain the concept of aggregation. In Australia for example in relation to organisational crimes of negligence, the revised code states:

“that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).”

4.25 It is interesting to note that the Criminal Law Officers Committee of the Standing Committee of Attorneys General explained its proposed reforms by by referring to the “flatter structures” and greater delegation to junior employees in modern corporations.20

4.26 A company is not just the senior management of the company—they may have the most power and control within the company—but they do not and should not alone represent the company in this particular context; grossly negligent failures at non-senior management levels within the company should allow the company to be prosecuted for a manslaughter offence. This is the only way to ensure the offence can engage with complex management systems or systemic failures. The proposals with the senior manager test simply does not deal with the particular defects with which it was supposed to.

4.27 Companies should expect to suffer serious sanctions when gross negligence at any managerial level within a company causes death. It is the responsibility of a company—the senior management within the company—to prevent these grossly negligent failures from taking place.

4.28 It is difficult for us to see why as a company grows and gets bigger and bigger, it should not continue to be able to be held accountable for the same failures that it would have been held responsible for when it was smaller.

4.29 So lets say that there is a company with 100 employees where the hierarchy in the company is: shop-floor worker, supervisor, senior manager, director. In such a situation any management failure will almost certainly also be a senior manager failure within the definitions of the draft bill.

4.30 As that company gets bigger, there will be increased layers of management—and indeed the company may be divided at different locations and perhaps different divisions. If exactly the same incident takes place in that company (as it had in the smaller company) at one location, why should the bigger company not be held accountable? Why, as the company gets bigger, should the company have less responsibility for serious management failures within it. Surely, as the company gets bigger, they should be putting in systems to ensure that the activities remain equally as safe within all its different parts as when it was a smaller company. And if the bigger company does not do so, and those failures are gross and cause death—then the company should be able to be prosecuted in the same way as a smaller one. The Rail Safety and Standards Board written evidence puts this point well:

— 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.21

4.31 **CCA Previous Proposal:** In our previous evidence we had suggested that one way of dealing with the problems with the “senior manager” test would be to add an alternative test—so that a company could be prosecuted if:

— there was a grossly negligent management failure (at a junior/middle level) within the company, that was a significant cause of the death;

— a senior manager knew or ought to have known about the failure.

4.32 The Home Office have told us informally their concerns about this formulation:

— it brings in the need to identify an individual senior manager when the Home Office was trying to avoid the need to pinpoint individuals.

— there would then be difficulties in assessing how much of the failure would need to have been or ought to have been known about. What happens if a senior manager knew or ought to have known about some aspects of the failure but not others.

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21 Evidence 30.
4.33 The first criticism could be allayed by stating that the failure was known about or should have been known about at a senior management level within the company.

4.34 We however agree with the second concern. We accept that it would be difficult to prove in court not only that a senior manager knew, but they ought to have known about particular failures, and that it would prove difficult to deal with a situation where senior managers knew about some elements of the failures but not others. Moreover, it would add a further level of complexity in the court process. It also does not deal with the issues that we set out in the paragraphs above.

4.35 **A new approach:** The best solution would probably be to retain the original Law Commission’s “management failure”. Another alternative that may work is to redefine the concept of senior manager so that it includes any individual who is a senior manager at a **workplace level or above**. This would require the following changes to section 1(1):

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“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) when aggregated together, amount to a gross breach of a relevant duty of care owed by the organisation to the deceased
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and to section 2

A person is a senior manager of an organisation if:

(1) either he plays a significant role **at a workplace level** within the company in—

   (a) the making of decisions about how the whole or a substantial part of the **workplace’s** activities are to be managed or organised, or

   (b) the actual managing or organising of the whole or a substantial part of those activities.

(2) or is more senior than such a person”

4.36 The retention of the term senior manager—though at a workplace level—would avoid the concern that companies could otherwise be prosecuted as a result of gross failures at a very very low level of management within the organisation.

4.37 So this would mean if you had a very large company with 60 factories and a death took place in one of the factories—the company could be prosecuted if it could be shown that death was a result of one or more management failures at a senior level within the factory or at a higher level which when either alone or when aggregated together amounted to gross negligence.

4.38 The CCA is certainly not wedded to this option but it might form the basis of a formulation for the Home Office to consider.

**Likely Effectiveness of Legislation**

5.1 The new offence of corporate manslaughter should be intended to achieve at least two purposes:

— **increase deterrence:** the presence of an offence should encourage companies to comply with health and safety law and thereby decrease death and injury.

— **increase accountability of companies:** there is a widely perceived justice gap that large companies escape prosecution or conviction for manslaughter in situations where conviction would seem to be inappropriate due to the narrowness of the test.

5.2 In relation to whether the new offence will achieve the first objective—deterrence and improved standards—we have noticed that this has been a question that the Committee have asked many witnesses. In its written evidence, the CBI states:

“However, generally prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance”

5.3 Clearly, what exactly will happen is unknowable—but it is important to note that whatever the CBI, the Railway Forum or Construction Confederation say the research evidence indicates the law and the fear of enforcement is a key and primary motivator, particularly amongst directors:

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22 It may also be better rather than saying “are managed or organised by its senior managers” to say, “are managed or organised by managers at a senior level within the organisation”.

23 In its written evidence it states: “Generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance” and Dr Asherson stated in oral evidence: “Generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance”.

24 Q 213.

25 Q 231 and 237.
5.4 In the context of directors' responsibilities, the Health and Safety Executive recently asked for an academic to peer review three reports on the role of law and the conduct of directors. We shall quote this at some length as it is the most recent independent look at the role of law and enforcement in this area:

**Role of general health and safety law**

With regard to this issue, the HSL report makes reference to the work of O’Dea and Flin (2003) which highlights that legislation does motivate director level staff to take action on health and safety issues. It also, in common with the CCA one, refers to a postal survey of risk and finance managers undertaken by Ashby and Diacon (1996) to examine what motivates large UK companies to take measures to reduce risks of occupational injury to their employees. In both cases the reports note that the study’s findings suggest, at least in 1993, when it was conducted, that compliance with the law and the avoidance of legal liabilities constituted the most significant sources of motivation.

The HSL report, along with the Greenstreet Berman one, also makes reference to the already mentioned Australian studies produced by Gunningham (1999) and KPMG. Both note that the Gunningham study concludes that regulation is the most important CEO driver and that the KPMG study found regulation and its enforcement, to be the second most important one, with the Greenstreet Berman additionally detailing the four most important such motivators identified in this second study as being, in order of importance:

- A sense of moral responsibility;
- Regulation and its enforcement;
- Commercial incentives, such as greater productivity and lower workers’ compensation premiums; and
- Measurement and benchmarking of health and safety performance.

In relation to such findings as those of Gunningham and KMPG, the Greenstreet Berman report goes on to observe that there is a “close association between the self-rated role of factors such as enforcement, the cost of accidents, reputational risk etc—such that organisations tend to be motivated (or not) by each of these drivers” (Wright and Marsden, 2005: 9). In a similar vein, the HSL report notes that another recent study involving one of the same authors concluded that reputation risk and regulation compliance may be intertwined (Wright et al, 2005) and the CCA one effectively makes the same point in noting that the previously mentioned study by Baldwin and Anderson (2002) found that, among the 50 senior staff from large UK companies interviewed, the main motivators of efforts to manage regulatory risks were concerns for corporate reputation, followed by fear of criminal convictions and fear of the competitive or market effects of criminal convictions.

**Role of individual personal liabilities**

As regards the motivational role of individual legal liabilities, the Greenstreet Berman report does not cite studies which provide evidence on this issue, although it does make the observation that it is “hard to find evidence of whether (or how well) mandation of Directors’ Duties would work, and exactly what requirements would work best, without actually trying it out or reviewing examples of such regulation overseas” (Wright and Marsden, 2005) For its part, the CCA report draws attention to another of Gunningham’s conclusions, namely that that “the key to motivating CEOs and senior management to improve safety is to make them liable to personal prosecution and to actually enforce such provisions”. It would appear, however, that the validity of this statement, which is also alluded to in the HSL report, was not checked through the carrying out of a review of the various studies that Gunningham cites in support of it, namely those by KPMG (1996), Hopkins (1995), Purvis (1996), Braithwaite and Makkai (1991), Reiner and Chatten Brown (1989), Hammit and Reuter (1998), Cohen (1988) and the Australian Industry Commission (1995). The CCA report does, though, rightly note that Brazabon et al (2000: 66), in their study of health and safety in the British construction industry, concluded that “the majority of interviewees perceived that if the number of prosecutions of Directors and Corporate Manslaughter charges increased this could result in large improvements in health and safety standards as this may enforce the message that directors are responsible for the health and safety of their workforce”. No direct mention is, however, made in any of the reports to the discussion provided in the KPMG report concerning how the imposition of personal legal liabilities on directors can act to influence them to accord health and safety a higher priority. As a result, attention is not drawn to its finding that “many CEOs cited their personal legal responsibility as a factor motivating them to attend to safety”, despite the fact that under, then, current Australian legal frameworks senior officers were rarely prosecuted, in part because of the difficulties of bringing such prosecutions, nor to the fact that CEOs in small firms were found to be slightly more likely to cite such liability as being a motivating factor (KPMG, 2001: 70). At the same time, it would seem, although this merits checking, that during the period of the KPMG research the personal legal responsibility of CEOs which existed in most, if not all, Australian...
jurisdictions, consisted of the type of “negative” liability which currently exists under section 37 of the Health and Safety at Work Act. The above findings do not, then, necessarily point to the value of the imposing of “positive” duties on directors. This uncertainty, it is suggested, consequently reinforces the point already, indirectly, alluded to concerning the desirability of examining the sources of evidence quoted by Gunningham in relation to the motivational role played by such personal legal liability. It remains the case, of course, that the Brazabon et al findings quoted above would, nevertheless, seem to suggest that steps to increase the number of prosecutions of directors and, by implication, make such prosecutions easier could act to encourage directors to accord a greater priority to the issue of health and safety at work. Indeed, this suggestion would seem to receive a good deal of reinforcement from the fact that the study by Wright et al concerned with evaluating how best to achieve compliance with the law found that 49% of the “employer” respondents considered that “personal fines for directors” constituted the “best way” of improving the enforcement of health and safety laws and that this option for improving enforcement was favoured by a greater percentage of those responding than a range of alternative ones mentioned in the questionnaire they completed (Wright et al., 2005: A106)11.

5.5 It is therefore likely that a new offence of corporate manslaughter will have some value in incentivising those who run companies to improve their safety performance.

5.6 Whether the new offence will achieve the second objective—“increased accountability”—will depend entirely on the nature of the test and in particular (a) whether the offence is grounded on only “duty of care” or also on statutory duties. (b) the nature of the exemptions and (c) the nature of the management test.

5.7 In our view although the proposed offence may result in some increase of prosecutions—it will not capture the sort of corporate misconduct that would be generally accepted as being appropriate for a corporate manslaughter prosecution and we do not think these convictions will involve large companies—and to that extent it will fail to achieve this objective in the current form (see more below).

5.8 That is why there is so much disappointment amongst those who have been working towards a new offence. In trying to “buy in” employer organisations to the whole project, the government has lost sight of one of the two fundamentals purpose of the reform—increased corporate accountability.

CBI Evidence and France

5.9 In its evidence the CBI referred to the situation in France. The exchange was as follows:27

Chairman: Do you think that, inasmuch as you can assess it, work-related injuries and fatalities will actually fall as a result of the Bill?

Mr Roberts: It is difficult to find evidence that would suggest that. If you take the case in France—and it is only one example, to exemplify the point—which does have an offence of corporate homicide, it also has an incidence of fatalities in the workplace which is twice that we find in the UK. So, again, prima facie it is not immediately obvious that there is a connection between a change in the law, which is perhaps a toughening in the law, and improved health and safety in the workplace.

5.10 In France, until 1995, it was not possible to prosecute any company for any criminal offence. In 1994, there was an introduction of the Noveau Penal Code—which allowed companies to be prosecuted for over 30 specified criminal offences—including homicide. Therefore in France there was no introduction of a special new offence of corporate homicide—only a change in the law that allowed companies to be prosecuted for homicide and many other offences under a principle of attribution that appears similar to that in England and Wales.

5.11 In effect the French situation in 1995 came to reflect the situation in England and Wales—and therefore is not a good example to make the point about the relative effectiveness of these laws. In addition of course there are so many other differences between OHS law and enforcement that a simple comparison made by the CBI is pointless.

INVESTIGATION POWERS

6.1 ACPO has sought additional investigating powers in relation to this offence.

— a power to enter premises upon authorization of a senior police officer to enter premises and seize material;
— ability to compel an individual/company to provide specific information (which could not be used against him or her);
— provision of powers to experts assisting a police investigation.

6.2 We are in principle strongly supportive of these proposals. It is our experience (from our work-related death advice service casework) that companies (particularly large ones) and their legal representatives increasingly do what they can to prevent the police accessing information. This results in long delays to the investigation process—which the companies themselves then often complain about. It is our understanding

27 Q 358.
that the information being sought is information that the police will usually eventually obtain—but because of obfuscation on the part of companies, the police may not get it for many many months. This delay will impact upon not only the speed but also the ability of the police to investigate the incident.

6.3 These are powers that the Serious Fraud Office has in relation to major fraud and we consider it appropriate for them to be available in relation to corporate manslaughter.

6.4 This is an issue that we know that the Home Office has considered—but we do not know why they have not taken this forward.

6.5 We do have an important caveat which needs to be explored. How would the presence of these powers impact upon evidence gathering in pursuit of an individual for gross negligence manslaughter? Clearly if an individual is going to be prosecuted for gross negligence manslaughter it would need to be on the basis of evidence that is collected under the current rules. This could result in a situation where some evidence is collected under new powers (to assist in the prosecution of the company) and other evidence collected under existing rules (to assist in the prosecution of an individual. We are concerned that this may complicate matters—we would like to know from ACPO how this would work.

6.6 We would also like to be clear that these additional powers are not in breach of the Human Rights Act 2000. We do not believe they are—since they exist in other parts of the criminal justice system—but this does need to be considered afresh.

REMEDIAL ORDERS, EQUITY FINES AND OTHER SENTENCING ISSUES

7.1 Remedial Orders: In its original response the CCA did not comment on the “remedial orders”. In our view this is likely to be an almost worthless sentence to have available in this form, for the following reasons:

— it is inconceivable that the relevant regulatory body with powers over the activity that resulted in death—most often likely to be the HSE or Local Authority—would not have already used its enforcement powers to require changes to ensure the breach has been rectified;

— the power to remedy is very narrowly construed—the court only has the power to remedy the particular failure that was subject of the manslaughter prosecution.

7.2 Such an order would only make sense if the court was given wider powers, which would need to include:

— The power to ask a regulatory body or independent expert to undertake an audit of the organisation to consider its compliance with health and safety law beyond simply the offence that has been committed.

— The power to request that the regulatory body/expert report back on any recommendations for future action required.

— The power to order the organisation to make particular changes within a set time frame.

— The power to order the regulatory body/expert to report back to the court regarding compliance.

7.3 This would make the remedial order more like “corporate probation” which is a power that exists in other jurisdictions and which would have a much greater impact and deterrent effect. Such a sentence should be used in addition to any cash fine imposed—and would be useful in relation to, for example, public bodies.

7.4 Equity Fines: The Committee asked a number of witnesses about “equity fines”. An equity fine is a fine that can be imposed upon public limited companies. A court orders such a company to issue a certain number of new shares—that could be worth many millions of pounds. This would have the effect of lowering the value of all other shares, impacting upon shareholders who currently are unaffected by fines imposed upon a company despite the fact that they own it. This would allow the court to impose much larger fines without affecting the ability of the company to continue to trade, or reducing the amount of money that the company can spend on safety.

7.5 The CCA supports this and indeed other sentencing proposals—for example, corporate probation, corporate community service, and adverse impact orders—but it would be our view that the Home Office is asked to look at all of the “new” sentencing options in a holistic manner rather than selecting options without detailed and effective consideration. Many of these new sentencing options would be useful as part of a sentence imposed on public bodies.

OTHER GENERAL POINTS

Position of Directors

8.1 The Committee has asked witnesses a number of questions relating to the position of directors.

8.2 The CCA would like to note there are two separate though related issues concerning directors.

— liability/culpability: whether, attached to the new offence of corporate manslaughter, there should be an additional offence that would allow a director (or perhaps a senior manager) to be prosecuted for individually contributing to the offence by the company;
— directors’ duties: this concerns a current gap in the law where directors have no positive obligations to ensure that their company complies with health and safety law. Directors’ obligations are part of making companies safer; imposing such duties would not create any new offences, though it would also serve to make it easier to prosecute directors for existing safety and manslaughter offences.

8.3 It is important to note that the issue of directors’ duties goes far wider than the issue of deaths. It would have general application, helping ensure that companies were safer. It would not be primarily about convicting directors.

8.4 Some witnesses have suggested that imposing duties should be part of this current Bill. We would suggest that this was not the right vehicle for such a reform—however as the Committee knows we are very supportive of this reform in a different legislative vehicle.

8.5 The Institute of Directors appears to suggest that individuals would not want to become directors if there was a real chance that if they acted with gross negligence and caused a death, they might face prosecution.28 Our response to this is as follows:

— there is no evidence from countries in Europe or from states in Canada/Australia which impose duties on directors or senior managers that directors are not willing to take up such positions29
— directors at present face the threat of imprisonment in relation to breach of financial duties—and this does not seem to effect individuals wanting to be directors
— The Institute of Directors would surely not want to encourage individuals to take up directorships if as individuals they are not also willing to take certain steps to ensure that the company is safe.

**Adomako Test**

9.1 Witnesses from ACPO suggested that the new test should reflect the current common law test set out in Adomako.30 The Adomako test is as follows:

“...the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it could be judged criminal”.

9.2 This test has proved enduringly useful—but has been criticised for being circular. A crime has been committed if there is evidence of gross negligence; conduct is grossly negligent when conduct is considered to be criminal. It is therefore rather odd that ACPO suggests that it should be used as part of the new offence.

9.3 However the test of conduct being “far below what could be reasonably expected” is well understood in the context of dangerous driving and has not come under the same sort of criticism as the Adomako test.

**Differences Between Safety and Manslaughter offence**

10.1 It is important to distinguish between health and safety offences and the proposed corporate manslaughter offences.31 These are as follows:

— the level of failure on the part of the company that is the basis of health and safety offences is failure to take all “reasonable and practicable” care; for corporate manslaughter it is a failure that “falls far below that could be expected;
— health and safety offences can be proved through a reverse burden of proof—it is for companies to show that they took all reasonable and practicable measures; for corporate manslaughter, all elements of the offence must be proved beyond reasonable doubt;
— a company will have committed a health and safety offence on the basis of failures on the part of any employee; for corporate manslaughter, under the proposed offence failures at a (senior) management level must be shown;

28 See Q 251.
30 Q 431.
31 So for example, Q183 implied that these offences were similar: “So for example a question was asked of the railway industry. “you have already been prosecuted for pretty much the same offences as corporate manslaughter under health and safety legislation, though the title would be different. . . .”
— for health and safety offence it is not necessary to show that the failure caused a death or any other event; for corporate manslaughter it is necessary to show that the failure was a “significant cause” of the death.

**Compliance with Health and Safety Law**

11.1 Occasionally, the Committee has asked witnesses questions in which it was implied that there may be some circumstances when a company could be found guilty of the proposed offence if they complied with health and safety law.32

11.2 We would like to make it clear that it could never be possible for a company to be prosecuted, yet alone convicted, of this offence, if they complied with health and safety law.

**Numbers of Convictions**

12.1 The Home Office has stated that it considers that there will be five new manslaughter prosecutions each year—and a number of witnesses have indicated that this is an appropriate number and it should not go higher.33

12.2 The CCA would just like to make it clear that—on the assumption that the Bill went through as proposed—the number of convictions should not relate to what the CBI or other bodies think appropriate. It should depend upon how many deaths are the result of failures that satisfy the legal test. It could be one case or it could be twenty cases—and it is not for the CBI or any other body, including ourselves, to say that this number is too small or too high. Such analyses are inappropriate during formulation of law, where the more appropriate question would be what is the appropriate legal test to hold organisations to account for grossly managed organisations that cause death.

**Main Contractor Issue**

13.1 The Committee heard evidence that on a construction site the only company that should be liable to prosecution is the main contractor. In our view it is important not to confuse (a) the application of the offence on the basis of existing statutory duties/duties of care and (b) whether further duties should be imposed upon organisations.

13.2 There may be arguments for imposing new duties upon main contractors—as indeed there is for parent companies (see paras 1.13–1.16)—but any new offence would initially have to be applied under existing duties.

**Imprisonment Under Health and Safety Law**

14.1 This relates to the answer given by one witness to a question that inferred that imprisonment was available for breaches of health and safety law.34

14.2 A person can only be imprisoned for four technical offences: breach of a prohibition notices, offences involving explosives and two other such offences. A person cannot be imprisoned in relation to general offences.

**Corporate Culpability Following Serious Injury**

15.1 The Committee has asked two witnesses about serious injuries and whether there was a case for extending the offence to serious injuries.35

15.2 It is not our view that this should be done at this point of time—however it is important to note that an offence similar to “corporate GBH” does exist in a number of jurisdictions, including the USA and we are strongly supportive of the Committee asking Government to consider the introduction of the offence as part of future legal reform.

15.3 We support for example the arguments made by Rebecca Huxley Binns and Michael Jefferson.36

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32 For example Q 356 to the CBI, “If it is the case that you if you follow health and safety legislation properly, you are very unlikely to be found guilty . . .” and again Q 357.
33 See CBI, question 366.
34 Q 188.
35 Q 221–222.
36 Evidence 54, para 1.
Director Disqualification

16.1 Following on from Q 233 in the evidence session about director disqualification—it should be noted that under the present law only directors convicted personally of a health and safety or manslaughter offence can be disqualified.

Risk Aversion

17.1 At several points in the evidence session the issue of risk aversion has been raised, both in questions and in evidence given. We wish to make it clear that at no time has any actual evidence of risk aversion been cited—and indeed we do not know of any such evidence. Reference to “risk aversion” appears to be something that acquires truth through simple re-statement. Further, we would add that if any economic activity cannot be conducted whilst meeting minimal levels of occupational safety, then it is almost certainly right that it should not be conducted.

Unincorporated Bodies

18.1 We would just like to point out in the new Canadian Criminal Code which creates a new principle of organisational liability, organisation is defined to include unincorporated bodies. An organisation is defined as:

“a public body, body corporate, society, company, firm partnership, trade union or municipality”

November 2005

169. Supplementary memorandum submitted by the Marchioness Contact Group

LIABILITY

Where there is unlawful killing corporate companies should not be able to limit liability by statute to a minimum ie Marchioness/Bowbelle £810. However long it takes to establish who is responsible, direct and indirect costs should be paid by the companies named causative of the deaths, not time barred by statute as in the Marchioness disaster.

November 2005

170. Further supplementary memorandum submitted by the Rail Safety and Standards Board

When I gave evidence to the Select Committee on the proposed Corporate Manslaughter Bill on 7 November 2005, the issue of other offences already on the statute book arose, and in particular, section 34 of the Offences against the Person Act 1861 (Unlawfully and maliciously endangering the safety of persons travelling on the railway). In answer to a question from the Committee, I agreed to forward such details as I could discover about the use of this section in the recent past in circumstances of railway fatalities.

Available British Transport Police (BTP) data, which is from 2002 onwards, reveals that there have been two instances where the section has been used by the BTP for fatalities since that date, albeit that one ended up being disposed of under other legislation. As a matter of note, the section has been used in 41 cases of railway injury in that time.

It is known that its use has been considered by the prosecuting authorities in at least two major railway incidents involving multiple fatalities in the last 10 years, namely Southall and Hatfield, although ultimately other charges were brought. It is believed that its use is being actively considered in at least one other outstanding inquiry.

As far as can be recalled, the last time anyone was charged under the section in the event of a multi-fatality railway accident was in respect of the Watford accident in 1996, when the driver was charged under both section 34 and with manslaughter. At the commencement of the trial the judge required the Crown to elect upon which count they would proceed and they chose manslaughter.

I trust that this is of assistance to the Committee in their deliberations.

November 2005

37 To read about this see: http://www.corporateaccountability.org/international/canada/lawreform/new.htm
171. Supplementary memorandum submitted by JUSTICE

1. The victims’ surcharge was established by the Domestic Violence, Crime and Victims Act 2004 which inserted two new sections, s161A and s161B, into the Criminal Justice Act 2003. It is my understanding that the money from surcharges goes into the Victims Fund. The Fund has provided money for schemes and projects, but I have been unable to determine conclusively whether, and if so, on what basis, it provides compensation to individuals. I doubt that it does so, and therefore it should not be regarded as an alternative source of compensation for family members where an offence of corporate manslaughter is committed. Compensation could be provided by the Criminal Injuries Compensation Authority.

2. I was asked to find out whether section 130 of the Powers of Criminal Courts (Sentencing) Act allowed awards for loss of dependency. I have not been able to find any case-law on this point. The section itself provides:

130 Compensation Orders against Convicted Persons

(1) A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as a “compensation order”) requiring him—

(a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or

(b) to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road;

but this is subject to the following provisions of this section and to section 131 below.

(2) Where the person is convicted of an offence the sentence for which is fixed by law or falls to be imposed under section [110(2) or 111(2) above, section 51A(2) of the Firearms Act 1968 or section 225, 226, 227 or 228 of the Criminal Justice Act 2003,] subsection (1) above shall have effect as if the words “instead of or” were omitted.

(3) A court shall give reasons, on passing sentence, if it does not make a compensation order in a case where this section empowers it to do so.

(4) Compensation under subsection (1) above shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor.

(5) In the case of an offence under the Theft Act 1968, where the property in question is recovered, any damage to the property occurring while it was out of the owner’s possession shall be treated for the purposes of subsection (1) above as having resulted from the offence, however and by whomever the damage was caused.

(6) A compensation order may only be made in respect of injury, loss or damage (other than loss suffered by a person’s dependants in consequence of his death) which was due to an accident arising out of the presence of a motor vehicle on a road, if—

(a) it is in respect of damage which is treated by subsection (5) above as resulting from an offence under the Theft Act 1968; or

(b) it is in respect of injury, loss or damage as respects which—

(i) the offender is uninsured in relation to the use of the vehicle; and

(ii) compensation is not payable under any arrangements to which the Secretary of State is a party.

(7) Where a compensation order is made in respect of injury, loss or damage due to an accident arising out of the presence of a motor vehicle on a road, the amount to be paid may include an amount representing the whole or part of any loss of or reduction in preferential rates of insurance attributable to the accident.

(8) A vehicle the use of which is exempted from insurance by section 144 of the Road Traffic Act 1988 is not uninsured for the purposes of subsection (6) above.

(9) A compensation order in respect of funeral expenses may be made for the benefit of anyone who incurred the expenses.

(10) A compensation order in respect of bereavement may be made only for the benefit of a person for whose benefit a claim for damages for bereavement could be made under section 1A of the Fatal Accidents Act 1976; and the amount of compensation in respect of bereavement shall not exceed the amount for the time being specified in section 1A(3) of that Act.

(11) In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the court shall have regard to his means so far as they appear or are known to the court.

(12) Where the court considers—

(a) that it would be appropriate both to impose a fine and to make a compensation order, but
(b) that the offender has insufficient means to pay both an appropriate fine and appropriate compensation,
the court shall give preference to compensation (though it may impose a fine as well).

3. I was also asked for JUSTICE’s views on the section of the written evidence submitted to the Inquiry by the Association of Chief Police Officers (ACPO) regarding investigative powers. I will deal with each of the suggestions in para 2.11 of that memorandum in turn:

**Urgent authorities**

4. ACPO suggest that urgent authorities, similar to Schedule 1 PACE, should be granted upon application to a senior police officer, 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.

5. The search of premises and seizure of documents can engage rights under both Article 6 (fair trial) and Article 8 (privacy) of the European Convention. Article 6 has been found to apply to companies in criminal proceedings against them and it is arguable that companies also have rights under Article 8 of the Convention; their employees certainly do. Although public sector corporations may not have similar rights, in our view the procedure should be the same for all corporations currently subject to the draft Bill. Adequate safeguards should be put in place to ensure that these rights are not subject to arbitrary interference. In our view, in these circumstances the need to apply to an independent judicial authority in order to obtain a warrant is a necessary safeguard against the arbitrary use of powers of search and seizure.

6. We therefore believe that the requirement for an application to a judicial authority should be maintained; we are not aware of any reason why it should not be before a Circuit judge, as presently. However, if urgency does not permit the traditional Schedule 1 procedure then we would recommend that: in circumstances of urgency the requirement to pursue an alternative method of obtaining the material (eg to request that it be handed over voluntarily) could be waived. If the court was satisfied that to alert the corporation would endanger the investigation then the hearing could take place without notice. Practical arrangements could also be made for an urgent determination—for example, allowing a telephone hearing. Consideration could also be given to an injunction procedure whereby police could obtain an injunction against a corporation forbidding it from destroying any documentation or disturbing a crime scene.

7. We also note that the disclosure notice procedure under the Serious Organised Crime and Police Act 2005 (SOCPA) discussed below could be extended to the offence of corporate manslaughter, although we believe that it is preferable to obtain a search warrant or order for the giving up of documents under PACE for the reasons discussed below.

**Compulsory questioning**

8. ACPO suggest that compulsory questioning powers should be provided in relation to this offence, on the authority of a senior police officer. Compulsory questioning directly engages the privilege against self-incrimination; its use should therefore be narrowly prescribed. In order to avoid breaching Article 6 of the European Convention, current compulsory questioning powers are subject to the caveat that the evidence obtained via such powers should not be used in proceedings against the defendant except for offences such as perjury or failure to answer compulsory questions, or in circumstances where he gives evidence inconsistent with the statement made under compulsory powers.

9. The police have been given powers of this nature in the context of a variety of offences by SOCPA (see sections 62–65). We were opposed to such a radical extension of compulsory questioning powers; however, these powers did exclude “excluded material” from their ambit. Excluded material, as defined by section 11 PACE, includes business records held by a person in confidence. Parliament evidently felt it inappropriate to allow excluded material to be surrendered to police under compulsory powers.

10. If such powers were given to police in corporate manslaughter cases on the proviso that no one providing material would be prosecuted on the basis of such material, the protection offered by this would be unclear in the context of a corporate offence, where the person providing the material is not being charged in all events.

**Use of experts**

11. Experts are, of course, frequently used in serious criminal investigations and often examine crime scenes as well as evidence that is sent to them. We are concerned that potential expert witnesses in a case should retain the correct degree of independence from the investigation. For that reason we have concerns at the idea that they should be given police powers while examining a crime scene.

November 2005
172. Supplementary memorandum submitted by the Health and Safety Executive

At the Committee hearing on 21 November I undertook to write to the Committee on the question of health and safety inspectors' powers. I am glad of the opportunity to clarify and expand on the some of the replies Bill Callaghan and I gave.

When working together following a work-related death, HSE work closely with the police. HSE will be seeking to determine whether there have been health and safety breaches, whereas the police will be looking at the possibility of manslaughter charges.

The powers granted to health and safety inspectors by sections 20–22 of the Health and Safety at Work Act are wide-ranging, and necessarily so. They include powers to gain access, seize items, require the disclosure of information and documents, and if necessary to prohibit work activities. These powers ensure that inspectors can take the necessary action to ensure that sources of imminent risk are discovered and removed, and that any evidence that may prove necessary for a prosecution is protected. They continue to be vital for inspectors' work.

As Bill Callaghan suggested, the context of gathering evidence for a possible corporate manslaughter charge is different from taking immediate action to secure safety. HSE and the police will both be investigating corporate failings, as they currently do, but with a view to different charges. In doing so they are guided by the Work-related death protocol and associated Investigators guide, which together help ensure that HSE and police coordinate their investigations effectively. Each must be careful to observe the distinctions between their respective powers. If HSE were to use its own powers for police purposes that would be likely to jeopardise a prosecution. The police can, however, use for their purposes and in any subsequent proceedings any evidence that inspectors properly obtain for their own health and safety legislation purposes. After HSE completes its investigation, the police will need to rely solely on their own powers to obtain any further evidence they consider necessary.

On the issue of whether the police should have broader powers akin to HSE’s, we note that ACPO favour this. We have some sympathy with this since it could avoid confusion and delay in some cases, but ultimately it is clearly a matter for Parliament.

December 2005

173. Supplementary memorandum submitted by the Rt Hon Sir Igor Judge

May I explain, again, my concern about remedial orders. I am not sure that my evidence was sufficiently clear. Naturally, an organisation that fails to comply with an order cannot be imprisoned. Nevertheless, where the activities of the organisation have been managed or organised in such a way as to amount to a gross breach of duty, it should be open to the court to identify the senior managers responsible for ensuring that the appropriate remedial steps should be taken. That does not imply that they are personally guilty of anything: merely that the organisation for which they are responsible was guilty, and that as the senior managers of the organisation, they have a responsibility for seeing that the relevant breach is remedied. Ultimate responsibility for seeing that the breach is remedied would rest on senior officers of the corporation.

Once it is accepted that an individual or individuals may be identified as the persons responsible for remedying the breach, there then is no reason why failure to remedy the breach should not be punishable by imprisonment. As I explained, of course, that does not mean that they may not delegate those functions, and if they do, and they delegate to an appropriate responsible employee they may then use the equivalent of section 36(1) of the Health and Safety Act or, for example, section 24 of the Trade Descriptions Act, or section 21 of the Food Safety Act as a defence.

The decision as to whether this is appropriate is a matter for Parliament.

December 2005