THE CENTRE

FOR

CORPORATE ACCOUNTABILITY

RESPONSE TO HOME OFFICE

CONSULTATION DOCUMENT

"REFORMING THE LAW ON INVOLUNTARY MANSLAUGHTER: THE GOVERNMENT'S PROPOSALS"

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THE CENTRE FOR CORPORATE ACCOUNTABILITY

1.1 The Centre for Corporate Accountability is an organisation which aims to decrease the level of deaths, injuries and disease that result from corporate and other organisational activities. The Centre appreciates that there are many factors that determine the extent to which companies (and other organisations) operate safely; it is however our view that many companies - and many individuals who run companies - will only give an appropriate priority to safety when the law is properly enforced. **The CCA's work therefore primarily centres around law enforcement issues.**

1.2 Law enforcement can take many forms. It is not the Centre's view that every breach of safety law should result in a prosecution. Many detected breaches can be dealt with through the imposition of legal notices, the withdrawal of licenses or through the use of other regulatory powers. It is however our view that when serious harm has resulted, or may have resulted, from criminal conduct on the part of companies, and (more importantly) of those individuals that control them, law enforcement – and the goal of public safety - requires a criminal justice response. It is this second area of law enforcement which the CCA is particularly concerned.

1.3 In the CCA's view, a criminal justice response requires that deaths, serious injuries and disease resulting from corporate activities should, at the first instance, be subject to adequate and proper levels of criminal investigation. The investigation must be sufficiently thorough to ensure that any offences by companies or their senior officers will be detected. If evidence of an offence is discovered, and the conditions set out in the Code of Crown Prosecutors are met, a decision should be made to prosecute. Finally, it is important that any sentence imposed upon companies or individuals is, amongst other things, sufficiently punitive to ensure a deterrent effect.

1.4 **The Centre is however not only concerned about the enforcement of the law, but also the law itself.** Even the best investigative practices and the most committed prosecutor will be worthless unless the law itself makes particular conduct – considered to be particularly reprehensible – "criminal". For example, in relation to the offence of manslaughter – the subject of this Home Office consultation - there has been long standing concern that even when an investigation does uncover the most serious failings on the part of company directors, they do not come within the definition of manslaughter and the law governing companies often precludes the prosecution of the company itself. **It is therefore crucial that appropriate criminal laws exist to ensure that companies and their directors can be held accountable for blameworthy conduct.**

1.5 The Centre does not seek the investigation, prosecution and, where appropriate, imprisonment of directors as an end in itself. We would rather that companies operated safely and their directors did not place workers or the public at unnecessary risk so making it unnecessary for the police to conduct criminal investigations or courts to impose punitive sentences. However, since company directors do cause death and serious injury as a result of their negligent or reckless conduct, it is necessary that there are proper systems of law and investigation to hold them accountable and deter others from acting in the same way.

SUMMARY OF THE CENTRE'S RESPONSE TO THE HOME OFFICE PROPOSALS

2.1 **Focusing Attention on Directors**: In our view, it is crucial that public policy in this area focuses upon assessing and influencing the conduct of directors. It is often forgotten in discussions about safety and "corporate accountability" that company directors control companies, they decide what companies can and cannot do, and it is their conduct that ultimately determines whether or not a company operates safely. In our view, although the accountability of "companies" is important, public policy demands that criminal sanctions should be primarily directed at the criminal conduct of company directors.

2.2 The Home Office consultation document, however, has instead concentrated on making it easier to prosecute companies. Although we support many of the changes proposed in relation to the accountability of "companies", the government has failed to give sufficient thought and attention to the accountability of company directors. It sometimes appears from the consultation document that the government believes that dangerous systems of safety management within companies take place "spontaneously" - rather than more often than not being the result of conduct on the part of their directors. **[Para 3.4]**

2.3 **Directors and the proposed Individual Offences**: A fundamental concern about the current law is that it allows company directors to escape prosecution for manslaughter. There are two obstacles in the way of prosecuting even the most culpable directors. The law requires, first, that there must be a civil law 'duty of care' between the director and the person who has died. Such a personal 'duty of care' on the part of directors however will not exist except in the most exceptional circumstances and will be particularly rare in the context of a director of a large company. It is companies, not their directors, who have the 'duty of care' towards their employees or others affected by the company's activities. **[Para 3.21]**

2.4 The second obstacle is the requirement that no 'omission' or 'failure to act' on the part of an individual can form the basis of criminal liability, unless there is a positive legal duty on the part of the individual to have acted. This rule is very significant in relation to directors because most allegations against them relate to their failures and omissions (not their actions), and company directors have no legal duties to act in relation to the safety of their company. These two rules have meant that although hundreds of people are killed each year as a result of corporate activities, only three directors have ever been successfully prosecuted for manslaughter. **[Para 3.31]**

2.5 The new individual homicide offences are a step forward. Crucially, it would no longer be required to prove that a "duty of care" existed between the accused and the person who died. This is an important change. **[Para 3.39]**

2.6 However, the Home Office, and indeed the Law Commission reports upon which Government's proposals were based, failed to consider how the requirement to find a positive 'duty to act' affected directors whose failures were in all other respoects seriously culpable, and requiring conviction. It is not our view that the rule itself on omissions should change. The Home Office, however, should have recognised that

this rule seriously impeded the accountability of directors and that imposing safety duties upon them was the only way to ensure successful prosecutions. **[Para 3.40]**

2.7 It is our view, that the Home Office must immediately enact its new individual homicide offences and at the same time impose statutory safety duties upon directors. Unless both these reforms are made, company directors will continue to escape accountability for 'manslaughter'. **[Para. 3.46]**

2.8 **Directors and the offence of 'corporate killing'**: The government proposals suggest that company directors should be able to be *disqualified* if it is found that their conduct has "contributed" to the company committing the offence of Corporate Killing. The Government also says it "would welcome comments" on whether company directors should be able to be *prosecuted* for such conduct. It is our view that company directors should be able to be prosecuted for these "secondary" offences, and on conviction face the possibility of imprisonment. Disqualification is not sufficient a penalty. But company directors should not be prosecuted for these offences when, in fact, it is their primary conduct which has resulted in the company operating dangerously and is a cause of the death. In this situation company directors should be prosecuted for one of the individual homicide offences. **[Para. 3.54]**

2.9 **Companies**: Our view on company directors does not mean that we think that "corporate" accountability is unimportant. It is wrong that the only way in which a company can be convicted of manslaughter is through the conviction of the company director or senior manager. There will be many situations where a death has been caused by a company's management systems operating dangerously and no director is either to blame or to blame sufficiently to allow a manslaughter prosecution. In such a situation it is important that the courts can assess whether the company itself should be prosecuted for a manslaughter offence.

2.10 That is why we are in support of the new proposed offence of "corporate killing". However, a company should only be prosecuted for this offence when culpability on the part of company directors has been ruled out, or where the company is being prosecuted in addition to a company director. Prosecutions against companies for "corporate killing" should not be used as an excuse not to prosecute company directors. **[Para. 5.1]**

2.11 **Parent Companies**: We support the Home Office proposals that parent companies should be able to be prosecuted for the offence of corporate killing when their own serious management failures have been a cause of deaths through the activities of a subsidiary company. However, this could have very little impact as parent companies have no legal safety duties in relation to the activities of their subsidiary companies. The Government must therefore look at what safety duties need to be imposed upon parent companies. **[Para. 5.16]**

2.12 **Other Organisations:** We also support the Home Office's proposal to extend the application of the offence of corporate killing to a far wider range of organisations than simply "companies". It is our view that schools, hospitals and other non-corporate bodies should be able to be prosecuted for this offence **[Para. 5.12]**

2.13 **Crown Bodies**: We do not however support the Government's proposals to allow Crown Bodies immunity from prosecution for the offence of corporate killing. It is our view that all government bodies should, in principle, be able to be prosecuted for this offence. Individual ministers and civil servants can under current law be prosecuted for manslaughter offences and it is difficult to see what can be the justification for protecting Government bodies – like prisons - from prosecution when very serious management failures on their part have resulted in deaths. It is just as important to deter central government organisations from placing people at serious risk of injury or death as it is to deter local government authorities (which are not crown bodies) or private companies and other organisations **[Section 6]**

2.14 **Jurisdiction**: We also critical of the Government's proposals concerning jurisdiction. Whilst the government is proposing that British citizens who cause the death of a person *outside* Britain should be able to be prosecuted *in* Britain for the new manslaughter offences, it is proposing that English/Welsh companies that cause death abroad should be able to escape prosecution. It is our view that companies (and other organisations) should be treated no differently from individuals. It seems extraordinary that the whilst the Home Office is proposing that British companies that commit corruption offences abroad should be able to be prosecuted in Britain, companies that commit homicide abroad should escape accountability. **[Section 7]**

2.15 **Workers**: Another concern about the current law is the way it fails to protect "junior employees" from manslaughter prosecution, even when their failures, or the consequences of their failures, are simply the result of them having been part of an unsafe system of work of which they had no control. The manner in which companies operate means that the *immediate* cause of many deaths resulting from corporate activities is the actions or failures of "junior employees" - the people who work near the bottom of a company's hierarchy. It is not company directors who have to close the bow doors, but the assistant boson, and he may not be able to perform this task - or his failure to do so may have calamitous consequences – simply as a result of unsafe systems of work established or sanctioned by the company's board of directors. Whilst there may well be circumstances where it is appropriate for these employees to be prosecuted for manslaughter, it is our view that the law needs to give them a degree of protection. The Government proposals fail to consider this issue at all. **[Section 4]**

2.16 **Investigation and Prosecution**: Our final concern relates to the Home Office proposals concerning the investigation and prosecution of the new homicide offences. Although as noted above, the law makes it very difficult to prosecute company directors, this is exacerbated by current practices that do not ensure that deaths resulting from corporate activities are subject to rigorous investigation. The police have not been given adequate training and there is insufficient collaboration between the police and the appropriate regulatory agencies like the Health and Safety Executive. This means that prosecutors are often in no position to make informed decisions about whether there is sufficient evidence to prosecute. In addition to this, it is also our experience that the Crown Prosecution Service (CPS) often takes a unreasonably conservative view when deciding whether to prosecute companies and their senior officers for manslaughter. **[Section 8]**

2.17 Although reform is clearly needed in this area, the Home Office proposals fall far short of the solution. It is suggesting that the investigative and prosecution

responsibilities - currently in the hands of the police and the CPS – should be given to regulatory agencies like the HSE. This would in our view result in less rigorous investigation, even fewer prosecutions against company directors, and send entirely the wrong message to companies. In our view it is crucial that the police and the CPS should continue to be responsible for all homicide investigations and prosecutions and that deaths resulting from corporate activities should not be hived off to under-funded regulatory agencies with little experience in the investigation and prosecution of serious crimes. **[Para. 8.6]**

2.18 It is our view that reform is however required to the way in which deaths resulting from corporate activities are investigated. In particular, police forces must establish specialised units to investigate these deaths. **[Para 8.9]**

2.19 **Sentencing:** The Home Office has failed to give any proper consideration to how to sentence companies and other organisations convicted of the proposed homicide offences. Unless, courts can impose proper punitive sentences that will deter recidivism, the new corporate killing offence may well have little impact. It is our view that the Home Office should establish a tough sentencing regime for companies. This would include allowing the courts to impose fines pegged to the profits or turnover of a company or organisation, and sentence public companies to 'equity' fines. **[Section 9]**

THE HOME OFFICE PROPOSALS AND COMPANY DIRECTORS

3.1 In our view serious attention needs to be given to the manner in which the Home Office proposals deal with the conduct of directors – the individuals that *control* and *direct* companies – as well as companies themselves.

3.2 In relation to the effect the Home Office proposals will have on company directors, there are three issues that need to be given consideration.

- the new individual homicide offences:
  - reckless killing
  - killing by gross carelessness
  - unlawful killing
- the proposal to impose sanctions upon directors when their conduct contributes to the proposed new offence of "corporate killing"
- proposals to allow regulatory agencies to investigate and prosecute these offences rather than the police and the Crown Prosecution Service.

This section deals with the first two legal proposals. The third set of proposals is dealt with elsewhere in this document.[1]

3.3 Before considering the effect of these proposals, we shall first consider why it is so important that that the criminal law should focus on the conduct of company directors

THE IMPORTANCE OF FOCUSING ON COMPANY DIRECTORS

3.4 In our view, in debates about "corporate accountability" there has been a historic failure on the part of policy makers to recognise that:

- companies are "directed" and "managed" by directors
- it is the action taken by directors that will determine the extent to which a company operates safely.
- as a result, criminal sanctions should, at first instance, be directed at the criminal conduct of company directors rather than companies.

3.5 This failure is unfortunately repeated once again in both the Home Office Consultation document and the Law Commission reports upon which the Government's proposals are based. In relation to deaths resulting from corporate activities, the focus in these documents is almost solely on "corporate" rather than "director" accountability. There is no mention of either (a) the reasons why public policy demands that the law should focus on the conduct of company directors, or (b) the particular problems encountered by the law in prosecuting company directors for manslaughter.[2] We set out below the analysis that, we believe, should have underpinned the government's proposals.

Companies are "directed" and "managed" by Directors

3.6 The debate on safety and accountability has often omitted the obvious - that companies are "directed" and "managed" by directors. As one judge put it: "The company itself cannot act in its own person … it can only act through directors."[3]

3.7 In law, company directors are seen as the "directing" and "controlling" mind of the company. In 1915 one judge stated:

> "[A] corporation is an abstraction. It has no mind of its own any more than it has a body; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation"[4]

3.8 In a more recent 1972 case, the judge stated

> "A company in many ways may be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does."[5]

3.9 Although these cases make it clear that in law it is not only directors, but also managers who may be considered the "controlling" officers of the company, there is no doubt company directors are the most important of these controlling officers. Indeed, whilst there may be some doubt whether a manager is a "controlling" officer, there is never any doubt about the position of a director. A company's memorandum of association establishes their premier position; it is company directors who ultimately control the activities of the company's managers – even though the managers can in particular circumstances be seen as embodying the company.

It is the action taken by directors that will determine the extent to which a company operates safely.

3.10 In light of the above it should be clear that, no other individuals within a company have as much power or influence as company directors over whether a company operates safe systems of work, and pose minimum risks to its employees and the public. For example:

- it is directors who will decide the level of resources that the company puts into safety. This can affect staffing, training, instruction, safety equipment etc and the general priority given to safety within the company.

- it is directors who will determine how the company balances the objects of safety and "production" and the extent to which other managers within the company prioritise safety. They will determine, for example, whether or not there should be "no expense spared" when it comes to safety or whether "production" always come first.

- it is directors who will decide whether or not their company is subject to proper safety audits, whether or not employees are encouraged to inform the company about safety concerns, whether or not the company is proactive in identifying unsafe practices and, if so, at what speed, these practices will be changed.

- it is directors who determine the duties of senior managers involved in safety, the financial and others contexts in which they operate, the power the managers have to fix safety problems at the cost of production, etc.

3.11 The relationship between the conduct of directors and the safe operations of a company is well known and, indeed, entirely uncontroversial. For example, the Health and Safety Executive states that:

> "Organisations that are good at managing health and safety create an effective framework to maximise the contribution of individuals and groups. Health and safety objectives are regarded in the same way as other business objectives. They become part of the culture and this is recognised explicitly by making health and safety a line management responsibility. The approach has to start *at the top*. Visible and active support, strong leadership and *commitment of senior managers and directors are fundamental* to the success of health and safety management. Senior managers and *directors are fundamental* to the success of health and safety management. Senior managers communicate the beliefs which underlie the policy through their individual behaviour and management practice. *Health and safety is a boardroom issue and a board member takes direct responsibility for the co-ordination of effort.*" (emphasis added)

And the British Standards Institute states:

> "Ultimate responsibility for occupational health and safety rests with top management. Here best practice is to allocate to a person at the most senior management level (e.g. in a large organisation, a board or executive committee member) with particular responsibility for ensuring that the [occupational health and safety] management system is properly implemented and performing to requirement in all locations and spheres of operation within

the organisation... Senior management should demonstrate by example their commitment by being actively involved in the continual improvement of occupational health and safety performance."

3.12 Moreover, reports of the public enquiries into disasters have emphasised the importance of company directors to the safety failures of the companies. For example, the Law Commission itself quotes from a passage of the Sheen report into the Zeebrugge disaster which stated that:

> "The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover/Zeebrugge run."

3.13 The report did criticise others levels of management within the company, but what is clear is this: ultimately, only action by the company directors could have ensured that the company operated in a safe manner. Even if every employee within the company had, on the day the disaster had taken place, done everything they should have done, the company would still have been operating a dangerous system which could only have been corrected by action on the part of the company directors.

Criminal sanctions should be primarily directed at assessing the conduct of company directors.

3.14 Considering:

- the extent of the control which directors have over the operations of their companies and
- the extent of the control that company directors have in ensuring that their companies operate safely,

the primary focus of the criminal justice system should be on assessing the conduct of company directors. This would serve a number of goals.

3.15 **It would identify the real "offenders"**. In many, if not most cases, the real offender is the company director – because it is *their* failure to ensure that their company has proper safe systems of work which is the reason why the company is dangerous and a person has died. It is, of course, often true that serious failures are not always at a boardroom level but are either systemic or are made at a lower management level. It is for this reason that consideration needs also to be given to the prosecution of *companies* for serious failures. But too often it is assumed that failures are "corporate" when in fact they are due to failures or actions on the part of company directors.

3.16 **It would locate the blame where it really lies.** It is inappropriate for the company to take all the blame when responsibility in fact lies with the company's directors. Public policy surely demands that directors should not use the company as a shield to protect them from personal accountability for serious offences.

3.17 **It furthers "individual" responsibility and accountability**. The criminal justice system places great stock on personal responsibility and this principle should not be abandoned simply because it is the conduct of company directors which is in question. Whilst there is an important place for "corporate" accountability,

prosecuting the company will in many cases mean that it is being scape-goated for the culpable conduct of the company director.

3.18 **It would promote deterrence**. One of the principal goals of the criminal law is to deter offenders from recidivism as well as to deter others from committing the offences in the first place. Deterrence will only work if the offenders or potential offenders know that there will be some punitive response, which will directly impinge upon them, if in fact they do offend. Prosecuting companies – when it is the directors who are really to blame – will not achieve deterrence since company directors will often be unaffected by a prosecution of their company. The directors themselves are not being charged, they have no need to go to court and the fine itself will not affect them. In some cases a prosecution against the company will have an impact upon the directors[6]; but whatever impact corporate convictions have upon company directors, it is an *indirect* one. Directors would be much more efficiently deterred from placing the lives of workers and public at risk if they knew that they themselves could face serious sanctions unless they ensured that their companies were safe.

3.19 An example of how little corporate convictions affect company directors and induce them to take action is provided by the record of Tarmac Construction Ltd. This single company was itself prosecuted over 20 times between 1988 and 1998 – some of which concerned death and serious injury. The company also had dozens of prohibition and improvement notices imposed up it.[7] At no time during this period were any of the company directors prosecuted under health and safety law – even though many of the same failures, which resulted in prosecution or prohibition notices were being repeated again and again. Most, if not all, of these offences could have been prevented had action been taken by company directors. Or put it another way, failures on the part of company directors resulted in the company committing many of these offences. It is our view that these offences would not have taken place had the Health and Safety Executive investigated the conduct of the company directors and, where evidence allowed, prosecuted them. The prosecution of the company, time and again, appeared to have no impact at all in ensuring that recidivism did not recur.

PROBLEMS WITH THE CURRENT LAW OF MANSLAUGHTER IN RELATION TO DIRECTORS

3.20 There are two main *legal* reasons why so few company directors are charged with manslaughter[8]:

• the requirement, at least since 1995, to prove that a director had a civil law "duty of care" towards the person who died.[9]

• the long standing common law rule that individuals can not be convicted for manslaughter in relation to an "omission" or a "failure to act" on their part unless the law has imposed a duty on that person to have acted in that way.

We shall consider these in detail to indicate how the current law is such an obstacle to accountability and requires serious and immediate reform

The "duty of care" problem

3.21 In 1995, a House of Lords Judgement in the case of *Adomako,* set out a new test to determine whether an individual was guilty of manslaughter. Lord Mackay stated that:

> '... 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 [person], was such that it could be judged criminal'

3.22 This is the test of "gross negligence" manslaughter. In order to successfully prosecute any individual, including a company director, for manslaughter it is necessary to prove that

- the person had a 'duty of care' towards the person who died;
- that he breached that duty;
- that he breached that duty in a way that can be characterised as "gross";

3.23 It is the first part of this test - the need to prove that an individual had a "duty of care" towards the person who died - that has made it particularly difficult to prosecute company directors for manslaughter since 1995.

3.24 The term "duty of care" is a legal term of art used by the civil courts to determine whether an organisation (though the concept also applies to individuals) should pay compensation to a person who has suffered financial, physical or other harm. Established statutory and common law duties often make it clear whether a "duty of care" is owed between a particular organisation (usually a company) and an injured person. So, for example, it is clear:

- a company as an "employer" owes a duty of care towards the company's employees and others that may be affected by the company's activities.
- a company as a "manufacturer" owes a duty of care towards those who use or are affected by the company's products.

3.25 However the fact that *a company* owes a duty of care does not mean that *a company director* owes a duty of care. The courts have made it clear that, "the fact that an individual is a director of a company does not, of itself, give rise to a duty of care on that person's part to a third party who is injured by the company's activity."[10] This is because, in law, the conduct of a company director is not seen as the director's own individual conduct but conduct that the director undertakes on behalf of the company. The director's "negligent" conduct may well make the company liable for compensation but it will not make him personally liable as an individual. This is because his negligence is not in law considered to be his own individual negligence but rather the company's negligence.

3.26 This protected legal position is the direct result of "incorporation". If a person, for example, set up a construction business (without setting up a company) he will as an employer owe a direct duty of care towards his employees and others affected by the company. There would therefore, in principle, be no problem in prosecuting such a person for manslaughter. However, if this person set up a company to do exactly the same business, and made himself a director, the duty of care that he

once owed to his employees and the public would now be owed by the company. Now, as a director, he would be safe from a manslaughter prosecution even if he conducted himself in exactly the same way which would previously have resulted in criminal charges.

3.27 The courts have held that there are some limited circumstances where conduct on the part of a director does result in the director himself (as well as, or instead of, the company) owing a personal "duty of care" towards employees or others. These are situations where there was evidence that:

- the director personally "procured, directed or authorised" the company to commit the unlawful act in question which resulted in the harm; and
- the director had acted in such a way towards the person who had suffered injuries so that it could be said that he has "assumed" a personal responsibility towards the injured person so to create between them, "a special relationship".

3.28 Although judges have set out these exceptions[11] – it is not at all clear what they mean in practice and how they apply in relation to a typical set of facts that could result in a manslaughter charge against a director. For example

- it is not clear whether the two exceptions set out above are alternatives or whether they are in fact one and the same test. [12]
- in relation to the first exception, it is not clear which "unlawful" act must be "procured, directed or authorised". Must the director have "authorised" the act of an employee that directly resulted in the harm in question or is it enough that he authorised an unsafe system of work which was itself a cause of the harm. [13]

3.29 In addition, since 1995, there have been a number of deaths that have resulted in a company director being successfully prosecuted for manslaughter. It must be assumed that in each of these cases a personal "duty of care" was found by the courts. Yet it is not clear from reports of these trials how the judges in fact came to that conclusion – though it must have been significant that in each of these cases, the companies were very small, almost "one-man bands".

3.30 Whatever the law actually is on the application of these exceptions, it appears to be the current view of the Crown Prosecution Service – responsible for deciding whether or not a company director should be prosecuted – that a company director will only owe a duty of care in a very limited set of circumstances. This is clear from a recent paper given by Richard Lissack QC[14] – a senior lawyer who acted for the Crown Prosecution Service in the prosecution relating to the Southall Train crash. He states that:

> "It will be appreciated that the consequence of the law as it stands is that in the event of a person being killed as a result of a companies unsafe system of work, notwithstanding the approval of that unsafe system of work at the company's highest level, there will be no conviction for manslaughter; directors will not be liable in manslaughter because they owed no duty of care …. Put provocatively high, it follows that
>
> - nobody will be convicted of manslaughter where deaths result from the failure, however negligent, to devise a safe system of supplying services to the public where those services are supplied by a limited company.
> - the setting up of a limited company will be a way of avoiding conviction for manslaughter."

Omissions

3.31 Even when it is possible to prove a "duty of care" on the part of the director, there is an additional problem that may well seriously preclude a successful manslaughter prosecution against a director. This is because there is a common law rule that "it is not a crime to cause death or bodily injury, even intentionally, by any omission." [15] The only exceptions to this is where "the law imposes a duty to act".

3.32 This rule will affect company directors since (a) it is likely that any conduct on their part which could or should be the subject of a manslaughter prosecution will in many if not most cases be the result of "omissions" or "failures to act" rather than "actions";[16] and (b) the law does *not* impose any positive duties upon company directors to ensure that the company is safe. The only positive duties concerning safety are placed upon the *company*.

3.33 There are two types of duties which could in principle be imposed upon company directors.

- a duty towards ensuring the safety of *the company's employees and others affected by the company's activities*. As we have seen above, this does not exist.
- a duty towards *the company* to ensure that the operations of the company are safe. Again this does not exist. [17] The only exception would be where a company director has signed a contract of employment or some other contract with the company that imposed upon him certain responsibilities for safety. Although this duty is owed to the company (and not to the person who has died) it can still ground a prosecution for manslaughter.[18] However, assuming such a director had signed such a contract, whether or not these duties required him *to act* in the particular set of circumstances would, of course, depend upon how narrowly or widely these duties were drafted. The duties may be constructed so narrowly that they failed to require him to act in other than the most cursory manner.

3.34 It would, of course, not be necessary to prove that the director had a "duty to act" if it was alleged that an *action* on his part was the cause of death. However, it is the nature of the way companies operate that it will be far more likely that a director's "failures" rather that his "actions" will be under scrutiny. Although it is true that many such "failures" can be articulated as "actions" - a failure by the director to set up a proper safe system of work, for example, is also a positive decision on his part to have an unsafe system of work[19] - courts can be reluctant to accept that conduct which is most naturally spoken of as "failures to act" should be deemed to be "actions".

3.35 In summary, assuming the court has accepted that a director has a duty of care, any conduct on the part of a company director that is considered to be an omission will not result in a successful manslaughter prosecution since the law does not impose any positive duty to do what it is he is alleged to have failed to have done.

THE EFFECT OF THE LAW COMMISSION/HOME OFFICE PROPOSALS ON COMPANY DIRECTORS

3.36 There are two parts of the Home Office proposals relating to company directors that need to be considered.

- its new individual homicide offences
- issues in connection with the proposed offence of "corporate killing"

New Individual offences

3.37 It should be noted – as indicated earlier – that both the Law Commission report and the Home Office proposals do not actually consider how the law of manslaughter applied to or should apply to company directors. At the beginning of its final report, the Law Commission set out the reason why it wanted to consider how the law of manslaughter dealt with deaths resulting from corporate activities:

> "First, as we will show, a number of recent cases have evoked demand for the use of the law of manslaughter following public disasters, and there appears to be a widespread feeling among the public that in such cases it would be wrong if the criminal law placed all the blame on junior employees who may be held individually responsible, and did not also fix responsibility in appropriate cases on their employers, who are operating and profiting from the service they provide to the public, and may be at least as culpable. Secondly we are conscious of the large number of people who die in factory and building site accidents and disasters each year: many of these deaths could and should have been prevented. Thirdly there appear to have been only four prosecutions of a corporation for manslaughter in the history of English law, and only the last of these cases resulted in a conviction: significantly this was a "one man company."

3.38 Right from the start, therefore, the Law Commission saw the problem principally as one about "corporate" accountability. The Law Commission jumped from its concern that individual "junior employees" were taking all the blame to arguing that the blame should be shared with the "employers" – that is to say companies. Whilst, it was indeed appropriate that the Law Commission did consider this question, the Commission did not stop to consider the position of those individuals who actually controlled the company - the company directors - and whether or not the law should place blame on them.[20]

3.39 The Law Commission reports therefore do not consider the position of company directors. That being said the Law Commission's proposed new offences ('killing by gross carelessness' and 'reckless killing') have, coincidentally, removed one of the two key obstacles preventing company directors from being prosecuted – the need to prove "duty of care". The final report recognised that the language of "negligence" and "duty of care" was problematic. It stated that:

> 3.10 .. problems arise out of the Lord Chancellor's use of the terminology of "duty of care" and "negligence" and his linkage of the civil and criminal law in his speech. The meanings of these words are not entirely clear in a criminal law context, nor is it clear to what extent they mean the same things in tort and in criminal law.

3.11 As we explained in the Consultation Paper No 135, "negligence" in the context of the crime of manslaughter probably means nothing more than "carelessness": it does not carry the technical meaning that it has in the law of tort, where it depends on the existence of a duty of care owed and a breach of that duty. The Lord Chancellor said in *Adomako* that "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." This equation of the civil and criminal law concepts of negligence causes no problems where, as in *Adomako* itself, a death is caused by a badly performed positive act of the accused, because it is virtually certain that both tort and criminal law would hold that a duty was owed to the deceased not to injure him by a *positive* act.

3.12 It is possible, however, that the courts in future cases of omission might feel obliged to apply the decision in *Adomako*. If so they would run into difficulties, because it is by no means certain that the scope of liability for negligent omissions in the same in criminal law as it is in tort. ….

3.13 It is possible, therefore, that the decision in *Adomako* may have changed the criminal law in relation to liability for omission, by equating it with the civil law of tort. … The law on this subject is so unclear that it is difficult to tell whether the effect of Lord Mackay's speech was indeed to change the law, and if so, what the implications of this change might be. It is, however, clear that the terminology of "negligence" and "duty of care" is best avoided within the criminal law, because of the uncertainty that surround it."

In drafting its new individual offences, the Law Commission avoided using the language of negligence. The new offences proposed by the Home Office would not require proof that a director owed a "duty of care" to the person who has died. We strongly support this change.

3.40 The Law Commission did not however deal with the second legal obstacle – the problem of "omissions causing death" and the requirement that there be a "positive duty". As with the "duty of care' question, the Commission did recognise in general terms that the need for "positive duties" did limit prosecutions against individuals. This time, however, the Law Commission decided to stick with the status quo.

3.41 This is reflected in section 3 of the Law Commission's Bill which states that:

> "A person is not guilty of an offence under section 1 or 2 above by reason of an omission unless the omission is in breach of a duty at common law."

The Home Office commentary on this section states:

> "The clause refers to a person not being guilty [for reckless killing and killing by gross carelessness] by reason of an omission unless the omission is in breach of a duty at common law. The Law commission have made it clear that they wanted to ensure that all those duties including statutory duties, which apply at present to involuntary manslaughter should continue to apply to the new offences. The government intends to give effect to this intention."

3.42 It is not our view that the principle itself should be changed. However it is crucial that the Home Office acknowledges how this principle directly impacts upon the criminal accountability of company directors. **It is our view that unless positive duties relating to safety are placed upon company directors, the law will continue to allow company directors to escape prosecution for manslaughter even when the death is the result of the most serious failures on his part to act. This must change.**

3.43 There is also another reason why positive duties need to be imposed upon company directors. The proposed new offence of "killing by gross carelessness" states, in part, that:

> A person who by his conduct causes the death or another is guilty of killing by gross carelessness if –
> (a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position"

It goes on:

> "There shall be attributed to the person referred to [above] –
> (a) knowledge of any relevant facts which the accused is shown to have at the material time; and
> (b) any skill or experience professed by him

3.44 For a company director to be prosecuted for this offence, it would therefore have to be proved that the risk, that his conduct would cause death or serious injury, would have been obvious to a reasonable director in his position.

3.45 In our view, if the law does not impose safety duties upon company directors it may well be difficult to show that this risk should have been "obvious" to a reasonable director. What should have been "obvious" to a reasonable director who has no safety obligations? This could be particularly problematic in situations where a company director ensured that he was insulated from being informed about issues relating to safety even though the company's safety systems were very dangerous. How could it be argued that the risks were obvious when a reasonable director had no obligation to be informed about the safety within the company?

3.46 **The Centre's Proposals on Director's Duties**: In our view there are the following options:

- impose upon company directors safety duties which they owe to the company's employees and others affected by the company's activities
- impose upon company directors safety duties which they owe to the company itself.

3.47 The first option may be criticised because:

- it might be considered to drive a "coach and horses" though the principle of limited liability which demands that company directors only owe duties to companies and not to any one else.
- it would have a serious impact upon civil liability for compensation - since it would create an entirely new "duty of care' on the part of directors.

3.48 The second option has the advantages of

- staying within the commonly understood notions of "limited liability", since the duties would only be owed to the company;
- not affecting civil liability since it would not introduce a new "duty of care".

3.49 Our initial view is that the safety duties imposed upon company directors should be owed to the company.

However in order for these positive duties to impact upon the new manslaughter offences, the current section 3 would need to be changed. It would have to read:

> "A person is not guilty of an offence … above by reason of an omission unless the omission is in breach of a *statutory duty* or a duty at common law to *whomever it is owed."*

3.50 Unconnected to the Home Office proposals, the Department of Environment Transport and the Regions, have committed the Government to some sort of legal changes relating to director duties. A recent document states that:

> "• The Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in conjunction with stakeholders. It is intended that the code of practice will, in particular, stipulate that organisations should appoint an individual Director for health and safety, or responsible person of similar status (for example in organisations where there is no board of Directors).
> • *The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities."*[21] (emphasis added)

3.51 We have a number of comments on these proposals:

- a "Code of Practice" setting out "director's responsibilities of health and safety" will not have any legal status. It will not, crucially, impose a 'positive duty to act', as would be necessary if it was to have any impact upon prosecuting company directors for the new "manslaughter" offences.
- it is not clear what is meant by the Government's "intention to introduce legislation on these responsibilities". Are these responsibilities to be imposed upon every director or just a nominated director?
- are these duties "free-standing", owed to the company or owed to the company's employees etc

3.52 It is our initial view that:[1]

- a general duty – owed to the company - relating to safety should be imposed upon **all** company directors (including shadow directors).
- this duty should be phrased along the following lines: "to define, implement and monitor safety and other policies of the company, so as to ensure, to the standard

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set down by law, that the company's activities are managed and organised to ensure the health and safety of persons employed in or affected by those activities."

- as part of fulfilling this duty, company directors should nominate amongst themselves a director with particular responsibility for safety. This director, should be obliged to:
  - inform the other directors of the company about safety problems within the company;
  - propose to the Board changes that should be made within the company's operations etc

3.53 It is important that the duty should be imposed upon all company directors and not just on a nominated directors. This is because:

- directors duties are, traditionally, "indivisible". All current financial and fiduciary duties are placed equally upon all directors:
- it will ensure that a "nominated" directors can not be "scapegoated". Companies can not simply leave safety to this nominated director and the failure of these other directors to act when informed by the nominated directors of problems could expose them to potential culpability.

Directors and the new offence of Corporate Killing

3.54 The Home Office has proposed two possible legal reforms which – though not concerning the new individual "manslaughter" offences - would have a direct impact upon company directors. This relates to the proposed offence of "corporate killing" which is itself discussed in section five below..

3.55 **Option of Disqualification**: The Home Office is proposing that a director or other company officer "who could be shown to have had some influence on, or responsibility for, the circumstances" which resulted in *a company* being convicted for its proposed new offence of corporate killing, "should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain." It is proposed that the "ground for disqualification would not be that of causing death but of contributing" to company's "management failure" which resulted "in the death". It is suggested that there would, in most cases be separate (presumably civil) proceedings taken against the director, once the company had been convicted of the offence.

3.56 Under the Company Directors Disqualification Act 1986, directors can now be subject to a disqualification order if he has been *convicted* of an "indictable offence" concerned with the "promotion, formation, management, or liquidation of a company".[22] At present, therefore, a company director convicted of either manslaughter or a health and safety offence[23] could be subject to disqualification. What the Home Office is now proposing is that the director could be disqualified even when he has not been convicted of any offence - though there would have to be evidence, that satisfied the civil law burden of proof, that the conduct of the company director "contributed" to the "management failure" committed by the company.

3.57 **A new Offence?**: The Home Office document also contains a suggestion – upon "which the government has reached no firm view" – that there should be an additional criminal offence which would allow the prosecution of a director who

"substantially" contributed to the offence committed by the company. Such an offence would, in effect, be intermediate between:

- a regulatory offence – where it is necessary to prove that a health and safety offence committed by the company is the result of "neglect, consent or connivance" on the part of a director or manager[24] ; and
- one of the individual new homicide offences.

3.58 It is not entirely clear whether the Home Office is suggesting that the second option of a new offence would displace its disqualification proposal, or whether it is proposing one of the two options below:

- that the same evidence about the conduct of a director could be used *either* as a foundation for prosecution *or/and* as the basis for disqualification proceedings; or
- that there would be a clear distinction between the levels of evidence required for disqualification on the one hand and prosecution on the other. For example, is it being suggested that disqualification could take place simply on the basis that the director "had some influence on or responsibility for" the company's management failure, but that prosecution could only take place if there was evidence of a higher level of contribution (i.e. a "substantial" or "significant" contribution).

3.59 **The Centre's Views:** In our view, for reasons set out in paragraphs 3.4 to 3.19 above, that it is crucial to focus on the conduct of company directors - since it is they who control companies. Even if the Government imposed safety duties upon directors, permitting prosecutions against them when they have caused death through reckless or grossly careless omissions, the number of prosecutions is unlikely to be very high. The most serious culpable conduct would be required of directors before they could be prosecuted. Safety duties and manslaughter prosecutions would therefore only effect the most culpable company directors.

3.60 It is therefore important that sanctions are available against company directors who are "culpable" – in that their conduct has directly resulted in the safety failure of their company – but not culpable enough to allow for a homicide prosecution. We support the view set out in the Home Office document that:

> "the public interest in encouraging officers or undertakings to take health and safety seriously is so strong that officers should face criminal sanctions in circumstances where, although the undertaking has committed the corporate offence, it is not (for whatever reason) possible to secure a convictions against them for either of the individual [homicide] offences."

It is crucial that company directors and others at the top of a company are appropriately deterred from putting the lives of people at unnecessary risk. It is always going to be difficult – because of the nature of seriousness of the offence - to prosecute individual managers and directors for homicide offences, and it is therefore important that conduct, that does not merit prosecution for the individual homicide offences, but is still seriously culpable, can result in a prosecution for an offence with proper stigma and penalties attached.

3.61 It is not enough in our view for such a person to be subject to civil proceedings for disqualification. Apart from anything else, this could otherwise have rather bizarre results. It could mean that where a director's "consent, connivance or neglect" has

resulted in his company "failing to comply with a duty", the director could be prosecuted under the HASAW Act 1974 (and indeed be subject to imprisonment if the Government amends the act as it says that it intends to[25]), but where he contributes to his company causing the death of a person through gross carelessness, he will only be disqualified.

In our view, a company director should be able to be prosecuted if he has "significantly"[26] contributed to his company's "management failure". Disqualification in civil proceedings is not enough.

3.62 What about the Home Office's disqualification proposal? **In addition**, to the new criminal offence, should a company director be able to be disqualified even though he has not committed any offence? On balance, we think that this option should also be available. It should be noted that this option would only be available in a limited set of circumstances: where (a) a death has taken place; (b) it is the result of gross carelessness on the part of the company's management and (c) that the director had some responsibility for the management failure. No disqualification could take place without a death and a corporate conviction for a homicide offence. However it would be important, to avoid confusion with the criminal offence, for this sanction to be available at a lower standard of proof than the criminal offence. Proof of "significant contribution" should not be necessary.

WORKERS AND THE NEW INDIVIDUAL HOMICIDE OFFENCES

4.1 A concern that we feel has not been addressed in the Law Commission/Home Office proposals is the potentially unfair application of the offence of manslaughter to "shop-floor" workers or other employee's low down in an organisation's hierarchy. The government's failure to address this issue is really the corollary of not giving proper consideration to the position of company directors.

4.2 This is a tricky area that must be considered with great care. There may well be situations where it is entirely appropriate for "workers" to be prosecuted for manslaughter and the discussion in this section is not intended to exonerate their conduct when it is seriously negligent or reckless. However a number of factors can make the position of workers low down in a company's hierarchy particularly vulnerable to inappropriate legal action.

4.3 Unlike company directors, workers have very limited ability to control anything beyond the particular task they themselves have been told or employed to do. Moreover, their ability to do this competently and safely will depend upon the training, information, instruction, equipment , supervision that *others* within the company – often company's directors – should have organised. It will also depend upon the risk assessment and methods of work that others have prepared and indeed the financial resources that the company is willing to put into safety. They may well be one of a team of people over whom they have no control. On a more abstract – but no less important level their ability to work safely will depend upon the organisation's safety culture and their systems of reporting safety problems - again over which they have no control.

4.4 As a result of this, the manner in which workers carry out their tasks is often hugely dependent upon others within the company – particularly the way in which the company directors have organised the company. What this means is that it will usually be inappropriate to blame a worker whose conduct may well be an "immediate" cause of a death since the particular set of circumstances would not have happened had the company provided him proper training, instruction etc.

4.5 Professor Celia Wells has explained this point well in relation to the Zeebrugge disaster which resulted in the prosecution of seven employees including two directors. She states that:

> 'It is clear that the involvement of each was not only of a different magnitude but of a different order. The company's failure was the provision of a safe operating system. The Assistant Boson's failure was to fall asleep on the job, in circumstances in which he was one member of a large team over whom he had no control.'

She goes on to state:

> 'There may be good reason for exonerating (partially at least) the immediate cause actor where his or her action was itself a product of management policies ... The Sheen report emphasised the conflicting instructions under which the Chief Officer had to work and the extremely long hours which may have contributed to the Assistant Boson's sleeping though the call for "harbour stations". If supervening "abnormal" events can break the chain of causation, then it seems possible to mount an argument based on supervening employment requirements.'[27]

4.6 Not only are the perceived failures of a worker often the actual failures of systems of management within a company; but systems of management can result in a worker being in a position where a relatively minor error on his part can have tragic consequences. For example, the absence of other safety mechanisms can place a huge burden of responsibility upon the conduct of a single worker. In such a situation a small error on a junior employee's part can have calamitous consequences.

4.7 Ironically, just as the law protects company directors – the individuals in full control of the company – the law provides no obstacles in the way of the prosecution of workers who, as we have seen, have very limited control and power. First, because the conduct in question is often the immediate cause of the death, it is much easier for the courts to find a personal "duty of care". Secondly, since it is often "actions" rather than "omissions" on the part of a worker, which is alleged to have been a cause of the death, there is no need to find the positive duty to act; indeed even when it is an "omission" in question, the duty to act may well be found within the contract of employment. Thirdly, it is easier to prove "causation" between the workers conduct and the death, than for example, the conduct of the company director.

The Law Commission/Home Office proposals fail to discuss the above points and the proposed reforms fail to change the situation. The Home Office must given serious consideration to this problem.

4.8 There are a number of possible solutions which the Government should consider. These include:

- provision, in the statute, of a legal defence available for "employees" charged with manslaughter. The defence could allow such an employee – who could be defined as an employee "not considered to be a director, manager or similar officer of the company" - to argue that he was not guilty because the "overriding" or "dominant" cause of the death was a management failure on the part of the company.
- there could be changes made to the Code of Crown Prosecutors. At the moment the Code of Crown Prosecutors does not allow the Crown Prosecution Service (CPS) to consider the adequacy of the safety systems of management within a company in deciding whether or not to prosecute a worker. This could be made into a criterion.

MANSLAUGHTER BY A COMPANY

5.1 At present the only organisation that can be prosecuted for manslaughter is one that has been "incorporated". Under the current law a company will be found to have committed an offence of manslaughter – or indeed any other offence requiring evidence of intention, recklessness or gross negligence –when a person, considered to be a "controlling mind" of the company commits the offence himself or herself. The guilt of the individual becomes the guilt of the company; there is no separate test of "corporate" culpability beyond the issue of individual guilt.

5.2 This test has been criticised on a number of grounds, but the main concern is that it allows companies – whose management practices are clearly to blame for the death – to escape prosecution for manslaughter, simply because it may not have been possible to pinpoint responsibility upon an individual director or senior manager. One solution would be to make it easier to prosecute directors – by, for instance, imposing safety duties upon company directors [see section 3 above]. However, this does not deal with situations where deaths are not the result of an individual failure at the top of a company sufficiently serious to justify a manslaughter prosecution, but the result of a combination of failures at different levels within the company's management – some at board room level, some at middle management level - which together could and should be judged as a serious corporate failure.

The Home Office Proposals

5.3 The Home Office is proposing that in the future, companies can be convicted through two separate routes:

- through the existing "identification" doctrine. Companies will be able to be convicted of all three individual homicide offences – death by gross carelessness, reckless killing and the third unnamed offence - if a senior manager or director (a 'controlling mind') is convicted. **We agree with the Government that this should continue to be one way in which a company can be found guilty of the new homicide offences.**
- through a new offence of "corporate killing":

(1) A corporation is guilty of corporate killing if:
(a) a management failure by the corporation is the cause or one of the

causes of a person's death; and

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

(2) For the purposes of sub-section (1) above:

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

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

Consideration of the Wording of the Offence of Corporate Killing

5.4 This offence is intended to reflect the core test of the individual offence of "killing by gross carelessness" – i.e. that conduct should fall "far below what can reasonably be expected". However, instead of needing to consider "individual" failure, the offence is proved through evidence of "management" failure.

We agree that the manner in which a company is "organised and managed" in relation to safety is an appropriate way to assess the culpability of a company in relation to this sort of offence.

5.5 The Law Commission in its report stated that this offence "ought to be one of last resort, available only when all the other sanctions that already exist seen inappropriate or inadequate, and that, therefore, the negligence in question must have been very serious."[28] We agree with this and consider that it is right that the management failure must be proved to have fallen "far below what can reasonably be expected" – similar to the test in the individual offence of "killing by gross carelessness".

5.6 However, the corporate offence does not contain any criteria to assist the jury in determining "what can reasonably be expected" of the company. In the individual offence, there is a section which states that: "In determining … what can reasonably be expected of the accused regard shall be had to the circumstances of which he can be expected to be aware, to any circumstances shown to be within his knowledge and to any other matter relevant for assessing his conduct at the material time."

5.7 The question is: should there not be a similar section assisting the jury about when a management failure "constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances."? As the offence reads at the moment, there is a problem about what "circumstances" are being referred. For example, if a company has financial problems, would it not be possible, as the offence stands, for that company to argue that "in the circumstances" requires the jury to take into account of its financial position? If so, this is a serious problem that needs to be overcome; safety standards should be not be dependent on a company's balance sheet.

5.8 There is one other differences between the individual and the corporate offences which may be significant. In the individual offence, there is a requirement that the risk of death or serious injury would be "obvious" to a reasonable person in his position; the corporate offence however does not include such a test.

5.9 The Law Commission argued that:

> "the foreseeability of the risk, either to a hypothetical person in the defendant's position or to the defendant itself should not be included in the definition of the corporate offence."

It went on:

> "this will not prevent juries from finding (in general terms) that the risk was, or should have been, obvious to any individual or group or individuals within the company who were or should have been responsible for taking safety measures in deciding whether the company's conduct fell below the required standard. Nor would we wish to discourage the jury from approaching its task in that way. We are simply concerned in formulating the new offence, to remove the legal requirement under the present law to identify individuals within the company whose conduct is to be attributed to the company itself."

5.10 In our view, the Home Office should reconsider this position. The Law Commission states that it wanted "to remove the legal requirement under the present law to identify individuals within the company whose conduct is to be attributed to the company itself." Yet, to place a test of "obviousness" into the corporate offence would not necessarily be doing this. The test for example could take the following form:

(a) it should have been obvious to the company that such a failure created a risk of death or serious injury taking place
(b) in determining whether a risk should have been obvious to a company consideration should be given to whether the risk should have been obvious to any person within the company who had or should have had some level of responsibility for the safe management of the company.

5.11 We are aware that the drawback of adding such an additional requirement (or something similar) would be that it would make it more difficult and complex to prove the offence. However it is important to ensure that the corporate offence can not be accused of being too "easy" an offence to prove, and become, in effect, a "super-regulatory" offence.

Potential Defendants

5.12 The Home Office proposes that the offence should extend beyond corporations (other than corporations sole) to "undertakings". This is a term used in the Health and Safety at Work Act 1974, and defined in the 1960 Local Employment Act where it is defined as "any trade or business or other activity providing employment." This would allow the offence to extend to Hospital Trusts, partnerships (like law firms), and schools, as well as to one or two person businesses. As the Home Office states "in effect the offence of corporate killing could apply to all employing organisations." This is a proposal over and above what the Law Commission suggested.

5.13 The main argument the Home Office gives for this suggestion is that it does not "wish to create artificial barriers between incorporated and non-incorporated bodies, nor would we wish to see enterprises deterred from incorporation which

might be the case if the offence only applies to corporations". **We support this proposal**. It would certainly be an anomaly if, for example, Hospital Trusts or other unincorporated businesses could not be prosecuted for this offence.

5.14 However, this has implications. To ensure consistency, senior managers of these organisations (of a similar status as company directors and their officers) should also be able to be prosecuted and disqualified (in the same way as company directors and managers) for contributing to the organisation's management failure.

5.15 **The Name of the Offence**: The name of an offence is significant since it symbolises the stigma and culpability attached to it. Even though the new offence would apply to organisations beyond corporations, it is our view that the offence should continue to be called "corporate killing". However, if the name of the offence remained then it would be necessary to have a section in the offence which states something like the following:

> "for this offence, a corporation includes all incorporated bodies and any trade or business or other activity providing employment"

Application to Parent Companies

5.16 The Government is proposing that the law should allow a parent company to be prosecuted for the offence of corporate killing where management failures on its part were a cause of the death through the activities of its subsidiary companies.

5.17 The Government gives two reasons for this. It argues that:

- this is necessary to avoid "holding" companies attempting "to evade possible liability on a charge of corporate killing through the establishment of subsidiary companies which most readily give rise to charges of corporate killing."
- it is concerned that a subsidiary company within a large group of companies might have "insufficient assets to pay a large fine, and that in such cases liability could not be transferred to a its parent company."

We strongly support the view that parent companies should be able to be prosecuted for the offence of corporate killing. Parent companies are often in direct control of the activities of subsidiary companies; decisions made by the parent company may well be a direct cause of the death a person employed by the subsidiary or a person effected by the activities of the subsidiary.

5.18 However, the Home Office needs to be aware of a number of issues:

- the sorts of decisions made by, or actions of, a parent company - that one might want to make the subject of a corporate killing charge - may not fall, in any straightforward way, within the definition of "management failure".
- it is, in any case, not clear "what can reasonably be expected of" a parent company. There are no clear duties imposed upon parent companies in relation to the activities of its subsidiary companies. The only legislative provision that does exist is section 3(1) of the Health and Safety at Work Act 1974. This states that:

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as it reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

5.19 One would imagine that the greater the actual control exerted by the parent company over its subsidiary companies, the greater the safety obligations that "would be expected of the parent company". But what about a parent company that decides to allow its subsidiary companies to continue to operate in a dangerous manner and not do anything about it. If a person dies within one of the subsidiary companies, the parent company might be able to successfully argue that the law does not expect it to anything in relation to this subsidiary company.

In our view, therefore, the Home Office needs to give further thought to clarifying how the offence will apply to parent companies, and whether there needs to be clarification in law about the duties required of a parent company towards its subsidiary companies.

5.20 In addition, whilst the government's intentions are positive, one should note that the current proposals on parent companies do not really solve the two problems which the Home Office outlined:

• holding companies will still be able to establish separate subsidiary companies – and hive off to them any of its hazardous activities - and in this manner evade any prosecution of corporate killing

• parent companies would still be able to move money around its companies so as to avoid having to pay fines.

THE POSITION OF CROWN BODIES

6.1 The Home Office proposes that one groups of organisations - government departments and other organisations closely linked to the government, known as "crown bodies" - should not be able to be prosecuted for the offence of 'corporate killing'. It does however argue that crown bodies "should be held accountable where death occurs as a result of a management failure." The Home Office therefore proposes:

> "to adopt an approach similar in effect to that taken in the Food Safety Act 1990. That Act applies the same standards to the Crown, thus requiring Crown Bodies to allow access to relevant enforcement agencies, but rather than applying criminal liability provides for the courts to make a deceleration of non-compliance with statutory requirements, which requires immediate action on the part of the Crown Body to rectify the shortcoming identified."

6.2 If the Food Safety Act 1990 route was applied, this in effect would mean that no Crown Body could be prosecuted for the offence of "corporate killing'; instead the High court could declare that that the Government body in question had acted 'unlawfully' and require it to remedy the situation.

We do not support the Home Office position on Crown Bodies. It is our view that crown bodies should be able to be prosecuted in the same way as other organisation. We set out below our reasons why (i) it is in the public interest for Crown Bodies to be prosecuted and (ii) why there is no legal obstacle to prevent it.

What is a Crown Body?

6.3 It is important to note that whether an organisation is a crown body – and therefore under the Government proposals able to be prosecuted for "corporate killing" - is in itself rather arbitrary..

6.4 There is no clear definition of what is a Crown body. The enabling statute of an organisation will often state whether or not a particular organisation should be treated as acting on behalf of the Crown. For instance the Radiological Protection Act 1970 provides that, with certain exceptions, that the Protection Board created by the Act "shall not be taken to be a servant or agent of the Crown of the enjoy and status or immunity of the Crown", and the National Health Service and Community Care Act 1990 states that "no health service body shall be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown". In contrast, however, the Building Societies Act 1986 states that the Building Societies Commission performs it functions "on behalf of the Crown." The general trend is for enabling statutes to state that the new organisation is not a crown body.

6.5 In relation to other public bodies – where the legislation does not clarify whether or not the organisation is or is not an agent of the Crown - the Home Office document accurately states that:

> "The question of whether an organisation can claim crown immunity depends upon the degree of control which the Crown through its ministers, can exercise over in in the performance of its duties. The fact that a Minister of the Crown appoints the members of such a body, is entitled to require them to give him information and is entitled to give them direction of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the Crown will be more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of Government."

6.6 There is no doubt that Government Departments are Crown bodies. The prison service – since it is also a department within the Home Office – is also a crown body. Police forces are however not crown bodies.

The Current Law

6.7 There are two types of criminal offences to be considered:

- common law offences, like murder or manslaughter.
- those contained in legislative statutes, like the offences contained in the Offences against the Persons Act 1861 or the HASAW Act 1974;

6.8 **Common Law Offences**: In relation to common law offences, there is some uncertainty whether or not "crown bodies" can be prosecuted for an offence like manslaughter.[29] The Home Office proposal takes the view that they cannot. However, in our view, this opinion could well have been brought into question by the 1993 case of *M v Home Office*. This involved proceedings for contempt of court against the Home Office Minister as well as the Home Office itself. In this case, Lord Woolf stated in the House of Lords:

"The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a minister of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, *I do not believe there is any impediment to a court making such a finding when it is appropriate to do so, not against the Crown directly, but against a government department or a minister of the crown in his official capacity."*[30] (emphasis added)

6.9 The case itself involved civil, not criminal contempt – and it would therefore (at first glance) not appear relevant to the prosecution of crown bodies for common law offences. However it was stated in the original court judgement – never challenged or overruled in the subsequent appeals - that:

"It is clearly established law, first that there now *exists no real distinction between civil and criminal contempt,* second that *a civil contempt of court is a criminal offence* and, third that *a civil contempt must be proved to a criminal standard of proof.* .... In short contempt is a drastic remedy which must be proved beyond reasonable doubt" (emphasis added)

6.10 If (a) there is no real distinction between civil and criminal contempt and (b) perhaps most importantly, a civil contempt, is in fact a criminal offence[31], then the fact that Lord Woolf in the House of Lords states that a department of Government could be in contempt of court, indicates that a crown body can be convicted of a "common law" offence. If this is the case, then there is no legal impediment to why, under present law, a crown body (if incorporated) could not be prosecuted for manslaughter through the prosecution of a "controlling mind".

6.12 This argument is important. **The Government's general position is that the historic legal protections provided to Crown Bodies should be removed. It would therefore be inconsistent for the Government to take an even more conservative attitude than the current legal position which appears to be that crown bodies (if incorporated) could be prosecuted for manslaughter**

6.13 **Statutory Offences**: As the law stands a crown body is not bound by the provisions of a statute – which would include those provisions creating criminal offences - unless the statute in question itself explicitly (or by 'necessary implication') states otherwise. The Offences against the Persons Act 1861 does not contain any provision relating to the Crown so the assumption is that these offences do not apply to Crown bodies (though of course they do apply to individuals including ministers[32]).

6.14 The Health and Safety at Work Act 1974 does however state explicitly that the sections of the Act that placed duties upon employers etc. "bind the crown" in the same way as other organisations but that those sections of the Act that allow for notices to be imposed or for employers to be prosecuted, do not bind the Crown.[33] So Crown Bodies can not be prosecuted for offences under the Health and Safety law, though they are under a duty to abide by the law. Again individual ministers/civil servants can be prosecuted as individuals for health and safety offences.[34]

6.15 In relation to statutory offences, the general principle therefore is that the Crown can avoid culpability for an offence contained in a statute if the statute does not explicitly state that the sections in the statute, which create the offence, apply to the Crown. This is not a historic or legal principle of "crown immunity" – as it is sometimes referred – but rather a rebuttable presumption that statutory offences do not apply to the crown. It is simply in the hands of parliament as to whether or not the Crown can be prosecuted.

6.16 In recent years, Parliament has not only increasingly "rebutted" the presumption that statutory duties should not apply to Crown bodies (as in the HASAW Act 1974) but also the presumption that Crown bodies should not be held accountable for criminal conduct. Parliament has however not gone all the way to proposing that crown bodies could be actually prosecuted for offences and be held criminally culpable. Instead it has enacted statutory provisions – in for example the Food Safety Act 1990 or the Environment Act 1995 - that allow the regulatory agency in question to take some action against crown bodies that appear to have committed regulatory offences. So for example, section 115 of the Environment Protection Act 1995 states that:

> Subject to the provision of this section, this Act shall bind the Crown . ….
> (3) No contravention by the Crown of any provision made by or under this Act shall make the Crown criminally liable; but the High court of in Scotland the Court of Session may, on the application of the [Environment] Agency or, in Scotland, SEPA declare unlawful any act or omission of the Crown which constitutes such a contravention."

6.17 This section goes further than the provisions contained in the Health and Safety at Work Act (which precludes any action if a crown body commits an offence), but still does not actually allow a prosecution to take place, but only a ruling in a civil court. The provision explicitly states that any declaration by the civil court would not "make the crown criminally liable."[35]

6.18 Conversations we have had with civil servants indicate that the courts have never made any declarations of "non-compliance". Instead, when inspectors discover unlawful conduct – however serious - on the part of crown bodies, they will simply require crown bodies to agree to remedy the situation. It is clear that crown bodies are treated in a separate way from other organisations – who may, for the same conduct, be prosecuted.

Beyond the Home Office Position

6.19 In our view, the Food Safety Act route – proposed by the Home Office is an entirely inappropriate procedure in relation to the homicide offence of "corporate killing". It is our view that Crown bodies should be able to be prosecuted in the same way as other organisations. We set out the reasons below

6.20 **A reversal of current law**: It is our view that that there are strong grounds for arguing that incorporated crown bodies can, at present be prosecuted for manslaughter – a common law offence. If the proposed Homicide Bill becomes law and does not state that these offences do bind the crown, then all crown bodies will become immune from prosecution for all of these offences. So whilst at present,

arguably, incorporated crown bodies could be prosecuted for manslaughter, the Home Office may well actually be reversing this current situation. Since incorporated crown bodies can arguably be prosecuted for manslaughter and other common law offences at present, there can be no objection in principle to allowing crown bodies to be prosecuted for the offence of corporate killing (and indeed the other offences contained in the statute)

6.21 **Ministerial Accountability**: An individual minister or senior civil servant can be prosecuted for manslaughter at present. If this is the case, what can the reasons be for allowing a government department to escape accountability?

6.22 **Arbitrariness?** It is a historically arbitrary as to whether an organisation is or isn't a crown body. It would be wrong for an organisation to be able to escape prosecution and conviction for a homicide offence simply because its originating statute stated that is was a crown body. All organisations should be treated equally. In addition, whether or not an organisation is controlled by a minister – who as an individual can anyway be prosecuted for manslaughter - should have no bearing on whether the organisation should or should not be prosecuted.

6.23 **Contrast to Local Authorities**: This absurdity in allowing crown bodies to be treated differently, is reflected in the way in which the law would treat local government different from central government. Local Authorities – all of which are incorporated and none of which are crown bodies – can under current law be prosecuted for manslaughter. They will continue to be able to be prosecuted for the new offence of corporate killing. Why should local government bodies be able to be prosecuted for this offence whilst similar central government bodies will not?

6.24 **Unincorporated Bodies**: The Home Office is proposing that unincorporated bodies should in future be prosecuted for the new offence of corporate killing. Since the government is broadening the application of the offence beyond corporations, it is appropriate that unincorporated government bodies should also be able to be prosecuted.

6.25 **Not a Regulatory Offence**: Homicide offences should not be treated in the same way as regulatory offences. As noted above, the sections in the Environment Protection Act 1995 and the Food Safety Act 1990 that create offences do apply to the crown but cannot result in a prosecution. A similar situation is being proposed for this new Homicide Bill. These two statutes contain offences which are no where near as serious as the offence of corporate killing: they are regulatory offences in which the crime committed is unconnected with any injury that might have been caused, and where a finding of simple negligence is sufficient to allow for a conviction. There is no necessity to prove a serious "management failure" that caused a death. Whatever the justification or rationale the Government may have for allowing Crown bodies to escape prosecution for these regulatory offences, it simply cannot serve to justify allowing Crown bodies to escape prosecution for a "homicide" offence.

6.26 **Against Government Policy?** Some government bodies have stated that crown bodies should be able to be prosecuted for these regulatory offences themselves. In the 1970's, the Health and Safety Commission supported the idea that crown bodies

should be "prosecuted" in relation to health and safety offence. In 1978, the Commission stated:

> "Crown bodies have the same obligations under the HSW Act as other employers but, unlike other employers, they can neither be issue with statutory improvement or prohibition notices, nor be prosecuted … The Chairman of the Commission has frequently drawn attention to our view that it is not right that Crown employers should be in a privileged position. From evidence given to us by the [Health and Safety] Executive we have concluded that the attitude of Crown employers to health and safety is in general no better and no worse than other employers and the same provisions relating to enforcement seem to be necessary if the legislation is to be effective in Crown establishment."[36]

It clearly was the view of the Commission at that time that crown bodies should be able to be prosecuted like any other employer for health and safety offences. Indeed the Government has recently suggested that it may reform the HASAW Act 1974 to allow prosecution against the Crown. In a recent document the Government has stated that "the Health and Safety Commission will advise Ministers on the range of options for introducing statutory health and safety enforcement against Crown bodies."[37] Whilst the document does go onto state the "the Food safety Act 1990 offers a possible model" – one in which prosecution is not allowed – the government appears to be considering going further than the Food Safety Act. The very fact that prosecution of Crown bodies is being considered in relation to health and safety offences, indicates how inappropriate it would be to use the Food Safety Act formula for the Homicide Bill.

6.27 **Public Safety**: Ensuring that Crown Bodies could be prosecuted for this offence would have important public safety benefits. It would ensure that organisations – which are crown bodies – give appropriate priority to the safety of the public. Management of crown bodies have as great an impact upon the safety of the public as do other organisations and it is important that they are deterred from placing the public at unnecessary risk. The stigma of prosecution would be an important deterrent.

6.28 **Requirements of Justice**: Lord Woolf, in the House of Lords case *of M v Home Office*, (noted above) asked what would be the point or prosecuting the Home Office for contempt? He answered, "the very fact of making such a finding would vindicate the requirements of Justice." In our view, this would be an even more important argument in relation to the far more serious homicide offence of "corporate killing". It is important that when a person has died as a result of the most serious management failures, the organisation should be able to be brought to account - whether it is a crown body or not.

6.29 **Violation of Human Rights Obligations:** It is also our view that the failure to allow prosecutions against crown bodies for "homicide" offences may well be in violation of the Human Rights Act 1998. Article 2 of the European Convention on Human rights requires the State to put in place effective forms of accountability mechanisms after crimes have taken place. Families of those who die as a result of

conduct on the part of a crown body, that would, if it were not a crown body, make it subject to a prosecution for "corporate killing", may be able to argue that the alternative civil remedy would not fulfil the State's obligation under the Right to Life.

JURISDICTION

7.1 The Home Office proposes that British companies or organisations that commit the offence of corporate killing abroad should not be prosecuted in English/Welsh courts. We do not support this view.

This question arises in relation to a death that results from the activities of:
- an English company based in another country;
- an English company based in Britain, but with operations abroad;
- an English parent company with subsidiaries abroad

7.2 As a matter of principle and public policy, British companies that commit homicide offences abroad should be able to be prosecuted in English courts. The proposed homicide offences are so serious – whether committed by companies or individuals – that the geographic locality of the fatal injury should be irrelevant. British companies should be in the same position as British citizens who can be - and will continue to be under the Home Office proposals - prosecuted for homicide offences.

7.3 It is unclear whether the law at present does allow *companies* to be subject to prosecution in English courts for manslaughter offences committed abroad. This question has been untested in the courts, though in our view there are strong grounds for arguing that current law *does* allow courts to prosecute companies in such situations. In our view, apart from all the positive reasons why English courts should have jurisdiction over these corporate crimes, the Home Office should not reverse what is arguably the current legal position. Moreover, if it did so, it would be acting in contradiction to its own policy in relation to corruption where it is proposed that companies that commit such offences abroad should be able to be prosecuted through the English courts.[38]

The Home Office Proposals:

7.4 In relation to its three proposed individual homicide offences - the government proposes a retention of the existing rule - that is to say individuals who commit these offences abroad can be prosecuted in this country. However, in contrast, it proposes that companies which commit the new homicide offence of "corporate killing" should not be able to be prosecuted in English courts. The Government states that:

> "Companies registered in England or Wales which commit corporate killings in the course of their work abroad will not be liable to prosecution here. That would be a matter for the courts in the country concerned … [W]e recognise that this will lead to a situation where a "natural" person will be potentially liable in the English courts to prosecution for an involuntary homicide committed abroad whereas an undertaking will not."

7.5 The Government gives two reasons why it believes that courts should not have jurisdiction. First it argues that is would create too many practical problems.

> "the Government considers that there would be very considerable practical difficulties if we were to attempt to extend our jurisdiction over the actions abroad of companies registered in England and Wales. These difficulties would mean that the prosecution of offences committed by English or Welsh companies within other states territory would be practically unenforceable. Our police have no authority to gather evidence abroad and contrary to the system prevailing elsewhere in Europe, where written evidence is admissible, out courts have a tradition of oral evidence and cross examination."

7.6 Secondly, it argues that it would not be appropriate for policy reasons:

> ".. the Government will only consider taking extra-territorial jurisdiction where dual criminality exists i.e. where the behaviour concerned constitutes an offence both here and under the laws of the country in which it happened. We apply this policy so that we cannot be accused of "exporting our laws".

7.7 The Home Office is silent on whether companies, which in addition to being prosecuted for the new offence of corporate killing, can also be prosecuted for the individual offences (through the current identification doctrine) if they commit them abroad.

The Current Legal Position

7.8 The general rule in English law is that English courts only have jurisdiction over crimes committed in England. One exception to this rule relates to homicide offences: English courts have jurisdiction over murders and manslaughters when they are committed by its 'subjects" outside England. Section 9 of the Offences against the Persons's Act 1861 states that:

> "Where any murder of manslaughter shall be committed on land out of the United Kingdom … and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case … shall amount to the offence of murder or manslaughter, …"

7.9 In effect what this means – when read alongside section 3 of the British Nationality Act 1948 – is that English courts have jurisdiction to try a British Citizen who is alleged to have *committed* manslaughter outside England and Wales. It has been held that a person *commits* manslaughter at the place where the death actually occurs not where the gross negligence or recklessness takes place.

7.10 What this means is this. English courts have jurisdiction over the offence of manslaughter:

- where it is committed by *any person*, as long as the death takes place in Britain (the normal rule of jurisdiction);
- where it is committed by *a British Citizen* with the death occurring outside Britain. It makes no difference whether the gross negligence that caused the death took place in Britain or outside.

7.11 **Companies:** Any company – whether British or not - that commits manslaughter in Britain can be prosecuted in English courts. What is the situation where a company may have committed manslaughter abroad? This could arise, for example, when a British Citizen who is a considered to be a "controlling mind" of a British company commits manslaughter abroad (whether he acted with gross negligence inside or outside Britain).

7.12 Clearly as an individual, the director can be prosecuted. Whether the company can be prosecuted at the same time depends upon whether a company is considered to be a "*subject* of Her Majesty" – the words used in the 1861 Act. There is no legal case on this point. Black's Law Dictionary defines a "subject" as

> "one that owes allegiance to a sovereign and is governed by his laws. The natives of Great Britain are *subjects* of the British Government. Men in free governments are subjects as well as citizens; as citizens they enjoy rights and franchises; as subjects they are bound to obey the law."

7.13 While the whole phrase "subjects of her majesty" seems to refer to citizens who are human beings, in our view, the argument that this includes legal persons (i.e. companies) is strong:

- One way of interpreting a statute is to look to the intention of the legislature. Clearly, when the OAPA 1861 was passed the word "subject" was meant to refer to a human being since companies in those days were collections of people and did not possess the distinct legal personality of today. However, another rule of statutory interpretation is that words and concepts can be updated to take account of change in conditions. Under this latter view, one could argue that a "subject" today means a "person" - which includes legal persons like companies - with some "nationality" bonds to the country. Whilst for human persons, nationality laws determine citizenship, for legal persons, it depends on whether they have registered in England. In effect, therefore, it can be argued that "subjects of her majesty" include companies registered in Britain.
- In addition, the concept of "subject" implies an agreement to be "subject to the laws" of the Sovereign. All companies are subject to the laws of the sovereign, but British companies, through the process of regulation, are subject to even greater level of legal control. They are therefore clearly "subjects" in this sense.
- The term "subject" in section 9 must refer to those persons capable of committing murder or manslaughter. Not only human persons but also legal persons are now deemed capable of committing manslaughter. This is another reason why companies should be deemed to be 'subjects'.

7.14 In conclusion, there is a strong argument to suggest that under current law, English/Welsh companies that commit manslaughter abroad – through the conduct of a British citizen who is a controlling mind of the person - can be prosecuted in English courts.

Why companies should be able to be Prosecuted for Homicide Abroad

7.15 In our view, there are important reasons of principle and public policy why the government should ensure that English courts have jurisdiction to prosecute companies that commit homicide abroad.

7.16 **Why the Home Office Reasoning is wrong:** The Home Office gave a number of reasons why English courts should not have jurisdiction over corporate killing offences committed abroad. We set out below why the Home Office reasoning is wrong.

7.17 *"Practical Reasons"*: In our view any practical difficulties can be overcome and should not be used as a reason to stop, in principle, the extension of jurisdiction. The Home Office argues that there would be "very considerable practical difficulties" in extending the jurisdiction in relation to the new offence of "corporate killing", which would result in these offences being "practically unenforceable". In particular it states: "Our police have no authority to gather evidence abroad and contrary to the system prevailing elsewhere in Europe, where written evidence is admissible, our courts have a tradition of oral evidence and cross examination."

7.18 However, whether this is or isn't the case, exactly the same practical difficulties exist in relation to individual homicide offences - yet the Government has not argued that these practical difficulties should result in there being no extra-territorial jurisdiction for these offences. The government has not argued why there are practical problems for "corporate" culpability, and none for "individual" culpability. Company directors could therefore be prosecuted for manslaughter committed abroad, but not the company! It is difficult to see why it would be practical to prosecute a company director who commits homicide abroad, but impractical to prosecute the company

7.19 Moreover, any so called "practical difficulties" in the investigation and prosecution of crimes committed abroad or partly abroad can be overcome. It is not uncommon for British police to be involved in the investigation of international fraud. They work in collaboration with police from other countries in many circumstances. No doubt there are practical difficulties in relation to these investigations – but they are overcome. There is nothing to suggest that most foreign states would not assist or authorise our police to gather evidence in their country in relation to possible crimes committed by English companies.

7.20 It is difficult to see why Britain's tradition of "oral evidence and cross examination" should have any bearing on the question of jurisdiction. Since evidence of the management failure may be in England, many witnesses may well already be in this country. In relation to those witnesses who live abroad, either they can be brought to Britain or they can give their evidence by a video link and be subject to cross examination.

7.21 In any case, any practical difficulties involved in proving the offence of corporate killing committed outside Britain may well be less than the difficulties involved in proving individual manslaughter committed abroad. In most traditional individual manslaughter cases, all the evidence will be located abroad – that is both the evidence of 'recklessness'/'gross negligence' and evidence about the 'cause' of the death'. However, in many cases of corporate killing committed abroad, the company in question will not only be registered but be based in Britain. Much of the evidence of the management failure – whether in board minutes, internal communications, etc. - will be in this country. Indeed the Parent company may be "directing" the offence from over here.

7.22 The investigation and prosecution of serious crimes will always be subject to practical difficulties of one kind or the other. The criminal justice system however overcomes them as otherwise it will only bring to justice offenders who commit easily detected offences. We do not want to deny that the international dimension of investigating and prosecuting corporate crime abroad will not result in some practical difficulties. The point however, is that these difficulties should not determine whether an offence should or should not have an extra-territorial dimension.

7.23 *"Dual Criminality":* The second reason given by the Home Office relates to the concept of "dual criminality" The Government states that it will only consider taking extra-territorial jurisdiction in relation to offences where dual criminality exists – that is to say where the offence in question is an offence both in England *and* in the country where the crime is said to have been committed. Although it does not state explicitly, the government implies that in its view there does not exist "dual criminality" in relation to the offence of "corporate killing"; that is to say there are no similar offences to the crime of corporate killing in other countries. It states that the reason why it applies this policy is so "that we cannot be accused of exporting our laws"

There are many problems with this argument:

7.24 • Exporting our laws? The Home Office seems to be misusing the argument relating to "exporting laws". A country only "exports its laws" when it tries to place obligations upon companies or citizens of another country. So for example, the United States could arguably be accused of "exporting its laws" when it tried to prevent the import of Bangladesh textiles manufactured through the use of child labour. It was in effect trying to place upon Bangladesh companies an obligation – over and above the obligations imposed by Bangladesh law - to comply with US standards. In relation to the question about the extension of jurisdiction over English companies committing crimes abroad, there is however no issue of placing obligations on any company other English companies. How, then, would this country be "exporting" its laws?

7.25 • What about individual offences?: The Government appears to assume that there is no problem of dual criminality in relation to its three individual homicide offences. This is not discussed in the consultation document, but just taken for granted. Yet, the government's assumption is dubious. Whilst most jurisdictions may well have an offence similar to one of "reckless killing" – involving subjective awareness - many will not have a homicide offence that can be proved through 'gross negligence'. Indeed even more jurisdictions will not have an offence similar to the proposed "third" homicide offence. Why is the "dual criminality" argument used in relation to the corporate but not individual homicide offences? Since the Home Office has not taken "dual criminality" into account in relation to its individual offences, then it is wrong that it should suddenly become a criteria for whether the corporate homicide offence should or should not be "extra-territorial".

7.26 • In any case, the Home Office is wrong to assume that other jurisdictions do not have an offence which criminalises the conduct that constitutes the proposed offence of "corporate killing". All that is required to pass the dual criminality test is

that the conduct in question "constitutes an offence under the law in force in that country or territory"[39] where the offence is said to have been committed. It does not have to be an offence with a similar name, nor indeed must it necessarily be treated equally seriously by the foreign jurisdiction. All that matters it that the conduct in question is a criminal offence in the foreign jurisdiction.

7.27 This is indeed the case in relation to the offence of corporate killing. Many countries will have, for example, regulatory or other similar offences which allow for companies to be prosecuted for failing to comply with safety duties etc. In fact there may well be more countries that criminalise negligent *companies* than criminalise negligent *individuals*. This is because many countries will only criminalise negligent conduct that causes death when it is committed by companies.

7.28 Indeed, the Law Commission argued that one of the reasons why it did not believe in extra-territorial jurisdiction for the corporate killing offence, was the very fact that such conduct could result in prosecution in the foreign jurisdiction. It stated that, "we see no pressing need for such a provision, since there might well be liability under foreign law in such a case."[40] The Home Office did not counter this view in its report; if the Law Commission view is correct – which in our view it is so - then there is no problem about dual criminality at all.

7.29 If the Home Office considers dual criminality to be such a critical issue for the corporate offence – which of course, in relation to the individual offences, it does not consider it to be – then there could be a clause in the new act stating that English courts would only have jurisdiction as long as the crime "constitutes an offence under the law in force in that country or territory". However, in our view, this is not necessary.

7.30 **Home Office Inconsistency**

As mentioned above, the Home Office has recently published a consultation document on reform of corruption offences.[41] It proposed that English courts should have jurisdiction over corruption committed abroad by both British citizens and companies[42]. How can the Home Office allow British companies that commit corruption, but not homicide, abroad to be prosecuted in English courts?

7.31 The report published a set of criteria – not even mentioned in the Home Office manslaughter report - that had previously been drawn up a few years earlier by the Home Office to assist it in considering whether offences should have extra-territorial effect. These "guidelines" had recommended that extension of jurisdiction could be considered where **at least one** of the following factors was present:

- where the offence is serious (this might be defined in respect of existing offences, by referred to the length of sentence currently available).
- where, by virtue of the nature of the offence, the witnesses and evidence necessary for the prosecution are likely to be available in UK territory, even though the offence was committed outside the jurisdiction;
- where there is international consensus that certain conduct is reprehensible and that concerted action is needed involving the taking of extra-territorial jurisdiction;
- where the vulnerability of the victim makes it particularly important to be able to tackle instances of the offence;

• where it appears to be in the interests of the standing and reputations of the UK in the international community;
• where there is a danger that offences would otherwise not be justiciable.

7.32 The Home Office does not appear to have considered it own guidelines - that it published just a few years ago - to determine whether English courts should have jurisdiction over companies that commit homicide offences abroad. Had it done so, it would have found that all these criteria exist to a greater or lesser extent, in relation to these offence.

• Homicide is undoubtedly a very serious offence, whether it is committed by individuals or companies.
• In many cases, the evidence of corporate killing would be in Britain, since the companies are likely to be based and have other businesses in this country
• There is international consensus that manslaughter – whether committed by individuals or companies - is 'reprehensible'. There is also international consensus against companies who fail to comply with health and safety standards, as it indicated by:
  - the ILO "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy";
  - the ILO Core conventions
  - the OECD "Guidelines for Multinationals Enterprises";
  - the report of the European Parliament on "EU standards for European enterprises operating in developing countries; towards a European Code of Conduct"
• In many cases, the victims of corporate killing would be in a vulnerable position. The workers who die may well not be unionised, receiving low pay and are easily "bought" off by the company. In fact, the corruption within the criminal justice system may ensure that the company is never prosecuted
• it is in the interests of the standing and reputation of the UK. The reputation of Britain would undoubtedly be seriously effected if it was known that British companies can commit manslaughter abroad, causing the death of foreign nationals, yet escape prosecution.
• There is a danger that British companies that commit homicide will not be prosecuted in the foreign jurisdiction – even when offences exist. There is therefore a problem with whether these offences are "justiciable".

7.33 **The Home Office must at the very least explain why it believes that the offence of "corporate killing" does not fulfil the criteria that the department has itself established.**

Comparison to Civil law Practice

7.34 We have also been advised by the Solicitors Human Rights Group, that the "Government's position on the territoriality of the offence of corporate killing does not accord with current practice relating to civil claims." Whilst civil law jurisdiction issues should not necessarily determine criminal law jurisdiction questions, it is important that the Government should be aware of the anomalies that could be produced if there is too much inconsistency in the two legal regimes. In relation to civil law claims involving injury in a foreign country where the responsible company is based in England:

• the double actionability rule – the civil version of the "dual criminality" rule - was abolished in 1996.

- under Article 2 of the Brussels Convention 1968 (as enacted into UK law by the Civil Jurisdiction & Judgements Act 1982) "persons domiciled in a contracting state should, whatever their nationality, be sued in the courts of that state". Under Article 53 of the Convention, the "seat" of a company shall be treated as its domicile. By s.42(3) of the Civil Jurisdiction & Judgements Act 1982, a corporation or association has its seat in the UK if
  - it was incorporated or formed under the law of a part of the UK and has its registered office or some other official address in the UK; or
  - its central management and control is exercised in the UK.
- under the draft Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (drawn up by the Hague Conference on Private International Law) "a defendant may be sued in the courts of the state where the defendant is habitually resident" (draft Article 3). For the purposes of the Convention, a non-natural person shall be considered to be habitually resident in the state:
  - where it has its statutory seat;
  - under whose law it was incorporated or formed;
  - where it has its central administration; or
  - where it has its principal place of business

7.34 Under these conventions, therefore, if a fatal incident overseas was caused by the negligence of an English registered company any civil proceedings relating to the incident should be brought in England. However, under the Home Office's current proposals the English courts would not have jurisdiction to investigate the company for a possible charge of corporate killing – even though the same evidence would be required for both investigations and indeed may have already been obtained during the civil investigation.

7.35 In addition, the co-operation between contracting states to the above convention and draft convention also counters the Government's assertion that there would be significant practical difficulties in investigating possible incidents of corporate killing abroad.

Principle and Public Policy.

7.36 There are also important points of principle and public policy, why extra-territorial jurisdiction should exist for the corporate offence

- **Deterrence?**: Without the threat of legal action and accountability, there is no incentive for English companies to improve or maintain acceptable standards of health and safety in the workplace or environment of the overseas operation. Often the vulnerable workforce, and the relatives of a deceased, will be non-unionised, have difficulty in obtaining legal representation or be intimidated against seeking a criminal investigation. The host state may have insufficient resources to conduct a criminal investigation or be reluctant to do so; even though criminal sanctions may exist on the statute books, they may therefore rarely be enforced. The current proposals, therefore, have no deterrent value for companies with dangerous overseas operations, particularly in the developing world. Yet the importance of deterrence has been acknowledged by the Home Office as being one of the reasons why it decided to allow English courts to have jurisdiction over *corruption* committed abroad by British citizens and companies. It stated:

> "we have also considered whether we should go further and extend nationality jurisdiction to such an offence, recognising that this could send a strong deterrent message that the UK is determined to act against corruption wherever it occurs. This is a message which would have real persuasive and dissuasive force and which would back up existing codes of conduct."

The Home Office could use these exact words in relation to corporate homicide offences. Unless English courts have jurisdiction over corporate homicide offences, there is no action that British courts could take against companies operating abroad – however recklessly or negligently they may have acted and however many people they may have killed. There would be no deterrence.

7.37 • **Equal treatment?**: If the Home Office proposals stand, companies (which are legal entities separate from the individuals which comprise them) will obtain preferential treatment compared to individuals who commit the offence of homicide. Whilst individuals that commit homicide offences outside Britain can be prosecuted in Britain, companies can escape any form of accountability for one of the most serious offences in English law. This inequality before the law is unacceptable. The same rules of jurisdiction should apply to homicide – whether committed by individuals or companies. Furthermore, if it is the case that companies under current law can now be prosecuted for manslaughter committed abroad (see above), then the Government will actually have decided to restrict jurisdiction of British courts over British companies that commit homicide offences abroad.

7.38 • **Bizarre results?:** The Home Office proposals could also have bizarre results. It could well mean that although a company could not be prosecuted for the offence of corporate killing when committed abroad, a company could still be prosecuted for one of the new individual homicide offences when committed abroad. This is because if a company director or manager was prosecuted, then the identification doctrine would apply, which could mean that the company (if deemed a "subject") could be automatically prosecuted. It simply does not make sense that a company could be prosecuted for homicide in one instance but not in the other.

7.39 • **Poor Corporate Conduct**: This Government increasingly recognises that some British companies do operate abroad without proper regard to the safety of workers of the public in that jurisdiction. It also acknowledges that when such behaviour takes place it is totally unacceptable. As Clare Short has stated, we cannot "tolerate abusive and hazardous working conditions, poverty pay, slave labour or the denial of the right to freedom of association." The Government is working hard to persuade British companies to operate safety and responsibly. In light of this concern, it is therefore totally inappropriate for companies to be allowed to commit homicide abroad with impunity. This is not about regulation, it is not a challenge to the Codes of Conduct. It is simply asserting that companies must not be above the law and the British courts have a proper role in taking jurisdiction over the most serious crimes that companies can commit.

7.40 • Either the offence of corporate killing is unlikely to be committed abroad by English companies (in which case the practical issues should be of little concern) or English companies do commit these offences abroad – in which case there is a

public policy reason why British companies should be able to be prosecuted in British courts if no action is taken in the country where the death took place..

Multinational Companies and Jurisdiction

7.41 The issue of jurisdiction is particularly relevant to the activities of English based multinational companies. The Home Office does acknowledge that group companies are often organised so that the company carrying out the riskiest activities may have minimal assets with the parent company having *de facto* control over it.[43] As noted above, the Home Office is proposing that Parent companies could be prosecuted for the offence of corporate killing. However, the proposals fail to recognise that these risky activities may well be hived of to subsidiary companies employing a dispensable "Third World" workforce. Under the current proposals, a parent company registered in the UK would not be investigated for overseas deaths ostensibly caused by its subsidiary, even where there is *prima facie* evidence that the parent company had *de facto* control over the subsidiary, and it is based in the UK with substantial assets in the UK.

7.42 The activities of MNEs in developing countries have been of considerable concern to the European Parliament (EP). In January 1999, the EP Committee on Development and Co-operation prepared a report on "EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct". In this report, the Committee emphasised that company voluntary codes of conduct cannot replace or set aside national or international rules or the jurisdiction of governments and must not be used as instruments for putting MNEs beyond the scope of governmental and judicial scrutiny.

7.43 It is disapointing that the Home Office does not apparently share the view of the European Parliament that the home states of MNEs have a role and responsibility in monitoring the overseas activities of MNEs and enforcing good practice. In this age of increasing globalisation, there is a duty on the UK Government to ensure UK companies behave responsibly abroad and are held accountable for their actions. We consider extending the territoriality of the proposed offence of corporate killing would help fulfil this duty.

INVESTIGATION AND PROSECUTION

8.1 The Home Office is proposing that the Health and Safety Executive and other regulatory agencies be given the power (along with the police and Crown Prosecution service) to investigate and prosecute both:

- the proposed new offence of corporate killing and
- the proposed new individual offences when they "arise from the context of the work being done."

8.2 It is our view that significant changes need to be made into the way in which deaths resulting from corporate activities are investigated and prosecuted. However, as we explain below, improvements will not be brought about by, effectively, removing the police and the crown prosecution service from involvement in these deaths. In fact, these changes would in our view:

- result in deaths being subject to less not more rigorous investigation
- result in even fewer prosecutions against company directors

• result in the offences – in the corporate setting - being perceived as "regulatory" offences

Current Investigation Practices

8.3 It should be noted that it has only been very recently that deaths resulting from corporate activities have been subject to police investigation and consideration given to whether the offence of manslaughter may have been committed. In relation to incidents resulting in multiple deaths, the sinking of the Herald of Free Enterprise in March 1987 was not subject to any police investigation until seven months after the disaster when an inquest jury returned a verdict of unlawful killing. Without that verdict, there would have been no police investigation. It has only been since April 1998 that individual work-related deaths were automatically subject to some sort of police investigation. Prior to that, the system depended on the Health and Safety Executive (HSE) referring to the police those cases which they considered appropriate. There are in addition many deaths resulting from corporate activities that are not subject to any police investigation.[44]

8.4 Most investigations into deaths resulting from corporate activities are work-related. The current procedures for their investigation are set out in a protocol.[45] This states that when there is a work-related death:

- A police detective of supervisory rank should "attend the scene" and "make an initial assessment about whether the circumstances might justify a charge of manslaughter" in which case the police will commence their "investigation". An "investigation" should take place when the police officer considers there to be "evidence or a suspicion of deliberate intent or gross negligence or recklessness on the part of an individual or company rather than human error or carelessness".
- If the police do initiate an investigation, the HSE will provide any "agreed technical support" to the police and will itself continue to investigate matters relating to any possible health and safety offences.
- if the police do not investigate, the "HSE will continue with its own investigation". The police will upon request provide "agreed local support" to the HSE.
- when during the HSE investigation "evidence indicates an offence of manslaughter may have been committed, HSE will refer the matter to the police without delay."

Problems with Current Practice

8.5 In our view, the protocol has been an important step forward in ensuring that deaths – that may be the result of "corporate" manslaughter - are subject to at least some level of police scrutiny. However, in our experience, there are many problems with the way the present system operates:

- the police who carry out the "initial assessment" may have never previously been involved in the investigation of a work-related death or any similar sort of incident, and will therefore not know what evidence they are looking for;
- there are no guidelines provided to the police about what evidence or what level of evidence actually justifies launching a police investigation;
- the "initial assessment" undertaken by the police – particularly when it concerns a death in a large company - will usually be insufficient to allow the police to have a proper understanding of whether the death was or wasn't the result of gross negligence at a director level;
- the police investigation, if it does take place, is likely to be undertaken by officers with no specialist training in the investigation of these kinds of deaths.

- once the HSE have been given charge of an investigation, its inspectors do not consider referring the cases back to the police. This is partly because of the nature of their investigation, and the fact that inspectors rarely spend time considering the conduct of directors and senior managers.[46]
- in practice, the collaboration between the police and the HSE is often inadequate.

Why The Home Office Proposals are Wrong

8.6 In our view, the way to respond to these inadequacies is not to pass the investigation into the sole hands of the Health and Safety Executive – as proposed by the Home Office. This is because:

- it is inappropriate for a regulatory agency to undertake the investigation of homicide offences. This is the job of professional crime investigators;
- the professional crime investigators in this country are the police. It is the police which investigates serious crimes of violence and have the resources and experience to undertake homicide investigations with the appropriate level of rigour.
- it is our experience that when the police do investigate the conduct of companies and their directors they are much more thorough than the regulatory agencies.
- it will result in a perception that there is a "two track system of justive". On the one hand there will be the deaths subject to police investigation and, on the other hand, there will be deaths resulting from corporate activities which will result in a lesser form of inquiry.
- it is inappropriate if only homicide offences involving "corporate" conduct are investigated by non-police bodies. It will tend to "de-criminalise" the conduct which is the subject of these offences. It will have the effect of decreasing the symbolism – an important part of the deterrent effect - that attaches to these criminal investigations and the prosecutions that follow.
- it will have a serious impact upon the way in which the offence of Corporate Killing itself is perceived. If prosecutions for this offence are the result of an investigation by regulatory agencies, the offence will inevitably be perceived as a "regulatory" not a "real" offence.
- the regulatory agencies simply do not have the experience or resources to undertake these investigations. The HSE has very limited resources; for example, it only investigates 10% of workplace major injuries. The HSE also has a very poor record in investigating the conduct of directors and managers for health and safety offences. Almost all the prosecutions it takes are against companies; only a handful are against directors. Between 1996 to 1998, it did not prosecute one director or manager in relation to any of the 500 deaths or 47,000 major injuries that it investigated.

Prosecution

8.7 The Home Office is proposing that the HSE, and other regulatory authorities should be able to prosecute companies and their directors for homicide offences. At present all manslaughter prosecutions are undertaken by the Crown Prosecution Service after the case is referred to them by the police.

8.8 We are aware that there are many problems with the way in which the Crown Prosecution Service has carried out this role. This has been particularly indicated by the successful judicial review of the CPS's decision not to prosecute the managing director of Euromin Ltd over the death of Simon Jones. In our view there needs to be many improvements made to the CPS's procedures and practices; however, for all its

faults, we believe that the Crown Prosecution Service is the appropriate prosecuting authority for *all* homicide offences. This is because:

- The Crown Prosecution Service is the body that is currently responsible for the prosecution of all crimes of violence.
- It is inappropriate that particular homicide prosecutions should be hived off to under-funded and less experienced regulatory agencies. It will result in these prosecutions being considered "less serious" than others.
- The HSE's prosecution policy is currently a "resource" based policy; it will not prosecute, if *it can not afford* to do so. No prosecution body with such a history should be given the responsibility for homicide prosecutions

The Centre's Proposals

8.9 It is our view, instead of the Home Office proposals, the following changes in investigation and prosecution practice need to be made:

- improve the police understanding of the offences in question and provide them with specialist training in the investigation of this sort of corporate crime. It is our view that each police authority should establish specialist units with the responsibility for the investigation of deaths resulting from corporate activities;
- improve the way in which the police and the HSE (and other regulatory agencies) work together in the investigation of these incidents. It is our view that the HSE has a great deal of expertise in both understanding the way in which companies should organise their safe systems of management, as well as assessing the appropriate role of company directors in relation to safety. This expertise needs to be incorporated in the investigation of work-related deaths. We have previously suggested that the HSE should establish specialist investigation units within each of its regional offices with inspectors solely involved in the investigation of death and serious injuries.[47] It is our view that when a death results from corporate activities, these HSE units could work alongside the police units in the investigation. This would mean that the investigation would benefit from the investigative and forensic talent of the police on the one hand and the health and safety expertise of the HSE, on the other. We do not think that the current arrangements of referring cases backwards and forwards between the police and the HSE works well.
- improve the way in which the Crown Prosecution Service deals with cases involving deaths resulting from corporate activities. It is our view that this area of crime is reasonably specialist and requires lawyers provided with proper training. We think that the CPS should set up specialist teams to deal with these cases, who should be able to gain assistance – if any is required – from HSE lawyers.

8.10 We do not suggest that the HSE or other regulatory body should be sidelined in investigations. In general terms the Home Office is correct when it states that "in cases of work related death, HSE and local authority inspectors liase closely with the police who recognise that the health and safety enforcing authorities' knowledge and expertise is essential in determining both the immediate and underlying causes of death in such cases." It is important that the HSE do provide advice and guidance to the police or crown prosecution service on technical health and safety issues and indeed on any questions about "management failure" and assist them in other parts of the investigation where appropriate, but they should not be the lead organisation in either the investigation or prosecution of this offence. Police investigations into work-related deaths are much more thorough and rigorous than those of the HSE and whilst the CPS may have its faults, it is the body which is responsible for the prosecution of serious crimes, and it should continue to have this responsibility.

8.11 The Home Office says that there are "strong practical reasons" for its proposal. Whilst, there may be some practical arguments for allowing regulatory agencies to monopolise the investigation/ prosecution, they are seriously overstated and any extra efficiency would be at the cost of ensuring that the deaths would be subject to proper and rigorous investigations, as well as appropriate prosecution decisions.

- The Home Office, for example, states that the corporate killing test reflects the test applied by the HSE and other regulatory bodies, in the prosecutions for which they are now responsible, and that as a result they are in the best position to assess this sort of test. However, the Crown Prosecution service is perfectly able to deal with these questions. Furthermore the HSE has never had to deal with assessing a test of "gross negligence" – as the CPS has had to do for years – or questions of "causation"[48] – which again the CPS does all the time. This is not to say that the CPS may well need, from time to time, guidance from the HSE.
- The Home Office also argues that regulatory agencies will discover in the coarse of their investigation, evidence pertinent to the question of "management failure". It argues that to require the police to conduct "what would in effect be a parallel investigation would lead to duplication of effort". However, though it is preferable to avoid duplication, it is preferable that there is some duplication if the alternative is poor investigations. In any case, the duplication argument is somewhat overstated since there will be no need for the HSE to investigate again if the initial Police/HSE joint investigation is thorough.
- The Home office argues that its proposals would avoid the complexity of current arrangements for liaison with the police and referral to the CPS. However, there is no need for there to be complexity. If procedures are set in place to ensure that deaths are investigated jointly by the police and HSE (with the police as leaders) then the evidence that is collected is them simply referred to the Crown Prosecution service to make a decision. If they decide not to prosecute for any of the homicide offences, the HSE can then take over, or indeed the CPS could itself then proceed to prosecute for health and safety offences.

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SENTENCING

9.1 It is our view that the Home Office has not given sufficient consideration to the sentencing of companies and other organisations for homicide offences. The lack of appropriately punitive sentencing against companies convicted of health and safety offences has been routinely stated by Government and others over the years. It would be pointless to enact a new offence of Corporate Killing unless the courts had appropriate ssentencing powers. In our view the following reforms are required:

- establishing a system of "proportionate" cash fines so that fines are pegged to both the turnover/profits of the company/organisation as well as the seriousness of the offence;
- allowing courts to sentence companies to "community service";
- allowing courts to impose "probation orders" upon companies
- allowing courts to impose "equity fines.

9.2 Equity fines - proposed by the Canadian Law Commission - require a convicted company to issue a particular number of shares, equivalent to an expected market value to the cash fine necessary. This would allow large fines to be imposed without

there being negative repercussions on workers or consumers. The advantages of equity fines are the following:

> "Firstly, the costs of the penalty would be exclusively placed on the shareholder. A high fine would no longer carry a latent threat to employment or the community dependent on the company. The equity fine would have no more effect on the company's solvency than if an equivalent share dividend was issued. Secondly, much higher penalties in monetary terms could be imposed 'because the market valuation of the typical corporation vastly exceeds the cash resources available to it'. Thirdly, the penalty would directly affect the managers in control of the corporation because the 'resulting per share decline in the corporation's common stock following such a penalty will reduce the value of the stock options and other incentive compensation available to him'. Finally, it will directly encourage stockholders to take into account the risk of illegal behaviour."[49]

9.3 We are appending to this document, a section of a report published by Disaster Action, on the sentencing of companies which explains new sentencing options that should be considered by ths government.

9.4 The only new proposal which the Home Office puts forward is for the courts to have the power to impose "remedial orders" upon companies for "remedying the failure in question any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death." It is being proposed that the court will not be able to make such an order, except on "an application by the prosecution specifying the terms of the proposed order."[50]

9.5 It is important that there be a "rehabilitation" aspect to sentencing of companies, so the idea of a "remedial" order is a positive one. Courts should have a role in ensuring that companies act in a safe way in the future. It is not enough to rely on the Health and Safety Executive to impose improvement or prohibition orders – that may have to be limited in nature. Courts could be given the power to require convicted companies to undertake changes within its safety management which regulatory agencies are unable to force companies to make. For example, employing further safety officers or "buying in" specialist safety consultants etc.

9.6 However, it is not clear why the courts should not on their own accord be able to impose their own "remedial orders" without requiring the prosecuting authority to make an application.

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[1] See Section Eight

[2] In fact, the only mention of company directors is in the context of whether the law should allow directors to be sanctioned for their indirect contribution to the proposed new offence of "corporate killing". See Paras. 3.54 – 3.62

[3] Ferguson v Wilson (1866) LR 2 Ch App 77 at pp 89-90.

[4] Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705

[5] Tesco Supermarkets Ltd v Natrass [1972] AC 153

[6] It is, of course, our view that the Government should allow courts to impose new sentences upon companies which would have greater impact upon company directors. See Section 10 below.

[7] See Channel Four, *Dispatches*, May 1999, "Bosses in the Dock"

[8] These two reasons are interconnected – though we have separated them out for the sake of clarity. It appears, for example, that whether there is or isn't a "positive duty to act" will depend on whether there

is a "duty of care", and a "duty of care" may well be deemed to exist where there is a "positive duty" to act.

[9] This was also the requirement set down in the 1925 case of *Bateman* that was followed intermittently between then and 1995. See [1925] 19 Cr. App. R 8

[10] Crown Court Ruling in case of R v Great Western Railways. This has been confirmed in many cases and appears not to be in doubt. For example, in the case of *C Evans and Sons Ltd v Spritebrand* [1985] 2 All ER 415, the court held "The mere fact that a person is a director or a limited liability company does not itself render him liable for torts committed by the company during the period of his directorship .

[11] See Williams v Natural Life Ltd, 1998 WLR 830

[12] In the recent Crown Court ruling that resulted in the dismissal of the manslaughter prosecution of Great Western Trains over the Southall disaster, the Judge stated that "The law is careful as to the circumstances in which a director acting in his capacity as such is personally liable. It would ordinarily require that he procures, directed, or authorised a commission of the tort in question." Since the Judge did not mention in his ruling the need to prove a "personal assumption of responsibility" on the part of director, it would appear that the judge considered that it was not necessary to show such a personal assumption of responsibility. However, a few paragraphs on, the Judge quotes approvingly the conclusion of an article from the International Journal of Shipping Law (which stated that, "in the corporate context the requirements of establishing a duty of care may be highly significant and operate so as to restrict the personal liability of directors") even though the article had stated that "for a director to be held to owe a personal duty of care … it will be necessary to show that there was an assumption of personal responsibility on his part to the victim" and did not mention anything about the need to prove that a director "procured, directed or authorised" a tort

[13] In the same Crown Court ruling the judge indicated that the fact that Mr George was (i) in charge of the company's safety and (ii) that the company had an unsafe system of work, in no way imposed a "duty of care" upon him. This would appear to suggest, in the Judge's view anyway, that a director has to "procure, direct or authorise' something other than an unsafe system of work.

[14] As a result of the Judge's decision not to allow the prosecution of the company to proceed, the CPS appealed by way of an "Attorney General's Reference". However, the CPS decided not to bring before the Court of Appeal whether in fact the Judge was correct in his interpretation of the implication of "duty of care". One must therefore assume that the CPS shares the Judge's interpretation.

[15] Digest of Criminal Law (4th Ed., 1887), Art 212 quoted in Smith and Hogan p.45

[16] It should be noted that under the current law and its requirement to prove a "duty of care", this question may not even arise, since "omissions" are less likely than "actions" to elicit a "duty of care" in the first place.

[17] It is the case that the only duties owed by a company director are those that it owes to the company, but none of these duties concern safety. They are only of a financial or fiduciary nature.

[18] "A contractual duty may found a duty under criminal law to persons not party to the contract but likely to be injured by failure to perform it. In *Pittwood*, a railway crossing gate-keeper opened the gate to let a cart pass and went off to his lunch, forgetting to shut it again. Ten minutes later a haycart while crossing the line was struck by a train. He was convicted of manslaughter. It was argued on his behalf that he owed a duty of care only to his employers, the railway company with whom he contracted. Wright J held however that, "there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public … A man might incur criminal liability from a duty arising out of contract"" Smith and Hogan, "Criminal Law" p.48.

[19] One academic has put it in the following way: "Human conduct may often be described in either positive or negative terms, though usually one way rather than the other will appear more natural" PR Glazebrook, "Criminal Omissions: the Duty Requirement in Offences Against the Person" Criminal Law review July 1960, p.386 at 387

[20] In fact when the Commission report does refer to company directors, it is rather misleading. It stated that: "There has never been any doubt that the members of officers of a corporation cannot shelter behind the corporation and they may be successfully prosecuted as individuals for any criminal acts they may have performed or authorised."

[21] "Revitalising Health and Safety: A Strategy Statement" (June 2000)

[22] Health and safety offences are "indictable" offences and involve the "management" of a company. Therefore the HSE can at present seek a disqualification order against a director, if he has been convicted of an offence under section 37 of the Act.

[23] Under section 37 of the Health and Safety at Work Act, for example

[24] section 37 of the HASAW Act 1974

[25] See DETR, "Revitalising Health and Safety: A Strategy Statement"

[26] It is our view that the wording of the offence should be clear and not contain the words of "neglect, consent or connivance".

[28] C. Wells, "Corporations and Criminal Liability" (1993), p.135-8

[29] It is, however clear that *individual* ministers or *individual* civil servants working for the crown can be prosecuted as individuals for manslaughter even when the crime was "committed by them in their official capacity". See Halsbury's Laws of England, Volume 8(2), Fourth Edition para 388. Also see para 422: "All ministers and servants of the Crown are accountable to the courts for the legality of their actions and may be held civilly and criminally liable in their individual capacities for tortious or criminal acts"

[30] [1993] 3 All ER 537 at 566

[31] Halsbury's Law's states for example: "It has been stated that civil contempt of court is a common law misdemeanour which may in principle be tried on indictment, although it never is" Fn1 para 491, volume 9(1)],

[32] See footnote 1 above

[33] Section 48(1) Subject to the provisions of this section, the provisions of this Part, except section 21 to 25 and 33 to 42, and of regulations made under this part shall bind the Crown."

[34] See Section 36(2) of the HASAW Act 1974 which states that: "Where there would be or have been the commission of an offence under section 33 by the Crown but for the circumstance that that section does not bind the crown, and that fault is due to the act or default of a person other than the Crown, that person shall be guilty of the offence which, but for the circumstances, the Crown would be committing or would have committed, and may be charged with a convicted of that offence accordingly."

[35] See, p. 143 of C. Turpin, "British Government and the Constitution: Text, Cases and Materials" (Butterworths, 1995)

[36] Report of the Health and Safety Commission, 1977-78, paras 81-2. Taken from C. Turpin, op. Cit p143

[37] DETR and HSC, "Revitalising Health and Safety: Strategy Statement" June 2000, para 73

[38] See below para 7.30

[39] See Criminal Justice (terrorism and Conspiracy) Act 1998 Section 5 (1)

[40] Para 8.62, Legislating the Criminal Code: Involuntary Manslaughter, Law Com No 237

[41] "Raising Standands and Upholding Integrity: The Prevention of Corruption: The Government's proposals for the Reform of the Criminal Law of Corruption in England and Wales" (June 2000)

[42] The proposals do not make it explicit that this would be the case, but conversations with Home Office civil servants have made it clear that this is the intenion.

[43] Paras 3.4.5 and 3.4.6 of Home Office Consultation Document

[44] See "The Case for Corporate Responsibility", Disaster Action (2000)

[45] "Work-related deaths: Liaison with the police and Crown Prosecution Service" HSE, CPS and ACPO (April 1998)

[46] This is evidenced by the very few prosecutions taken against company directors or managerd. In fact between 1996 to 1998, the Health and Safety Executive did not prosecute a single manager or director for a health and safety offence

[47] See Evidence to Select Committee

[48] None of the offences prosecuted by the HSE are "result based offences"

[49] See Disaster Action (2000) "The Case for Corporate Responsibility", p.104

[50] Wordings comes from Section 5 of the draft bill on p.35 of the Home Office document