



The manufacturers' organisation

**EEF Response to the Home Office  
Consultative Document  
'Reforming The Law On Involuntary  
Manslaughter: The Government's  
Proposals'**

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**Consultation  
Response**

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## ABOUT US

EEF, the manufacturers' organisation, has a membership of 6,000 manufacturing, engineering and technology-based businesses and represents the interests of manufacturing at all levels of government. Comprising 11 regional Associations, the Engineering Construction Industries Association (ECIA) and UK Steel, EEF is one of the UK's leading providers of business services in health, safety and environment, employment relations and employment law, manufacturing performance, education, training and skills.

## BACKGROUND

In preparing our response to the Home Office consultation paper 'Reforming the law on involuntary manslaughter: The Government's Response', the EEF has consulted with its regional associations and member companies. Our response focuses on the proposed new offence of corporate killing.

## SUMMARY

1. The EEF is committed to improving health and safety in business. We welcome initiatives aimed at raising standards of health and safety and reducing the number of fatalities in the workplace.
2. The EEF recognises that existing legislation can make it difficult for corporations to be held criminally liable for deaths at the workplace. We accept the need for a change in the law to make undertakings properly accountable for deaths in the workplace, where the undertaking's performance falls far below that which could be reasonably expected in the circumstances. We therefore support the introduction of a new offence of corporate killing in principle. However, we do have some serious reservations about the specific nature of the Government's proposals.
3. In our view, the main purpose of the legislation should be to improve health and safety in businesses and to encourage undertakings to make health and safety a key part of their culture. We are concerned that parts of the Government's proposals could have the opposite effect, with undertakings vesting responsibility for health and safety in just a few people and making individuals and companies reluctant to share information openly with the enforcing authorities.
4. In brief, our main concerns about particular aspects of the proposal are as follows:
  - There is a danger that making individual managers personally liable for the offence of corporate killing will lead to the scapegoating of those individuals and the abrogation of responsibility for health and safety matters by others in the undertaking, leading to lower rather than higher safety standards.
  - The definition of corporate killing requires more explanation. In particular, it is unclear what is meant by 'management failure' and 'conduct falling far below what could reasonably be expected'. These need to be explained in the context of existing health and safety concepts and principles.
  - The freezing of company assets is inappropriate and would act as a major deterrent for organisations to enter a guilty plea.
  - We have serious reservations concerning HSE's expertise to investigate and prosecute these proposed new criminal offences.
  - The proposals should be considered together with other Government health and safety initiatives, such as '*Revitalising health and safety*'.

## DETAILED RESPONSE

### The definition of corporate killing

1. The proposed definition of corporate killing requires more explanation. First, we are concerned about how the words ‘conduct falling far below that which can reasonably be expected’ will be interpreted. Businesses, courts and juries will need guidance as to what type of conduct falls far below that which could be reasonably expected. It is also unclear who is the arbiter of reasonableness. For example, is the standard of reasonableness that which ‘the man in the street’ would expect or that which is expected by current good practice in a particular industry? In our view, it should be the latter. The legislation should specify that the following factors, which were recommended by the Law Commission, should be taken into account when deciding whether particular conduct falls far below that which can be reasonably expected:
  - Likelihood and possible extent of harm
  - Cost and practicability of taking steps to eliminate or reduce the risk of harm
  - Extent to which the particular practice is acceptable within the industry.
2. Second, we are concerned about how the phrase ‘management failure’ might be interpreted by the courts. For instance, what level of management could be held responsible for a failure that leads to a death?
3. Third, contractors are often used in the engineering industry. The consultation paper does not address the issue of liability of clients in relation to the acts or omissions of contractors which result in a fatality. Businesses need further guidance on this issue. In our view, where the client has adequate systems of health and safety management, it should not subsequently be held responsible for a death resulting from the failure of the employing contractor to adequately fulfil its responsibilities.
4. A Code of Practice or Guidelines are essential to assist businesses to meet their obligations and the courts and enforcement agencies to enforce the legislation consistently given the expected rarity of prosecutions and the diversity of businesses, industries and conduct that judges will have to deal with. Any such Code of Practice or Guidance should be clear and readily understandable. The relationship between good health and safety practices and this new criminal offence should be explained. This will assist companies to comply with the proposed new law on corporate killing and to assess what, if any, changes they need to make to the management and operation of their health and safety systems, the practical effects of the legislation need to be explained in the context of well established health and safety concepts and principles.
5. For example, a company carries out a suitable and sufficient risk assessment and monitors and enforces this carefully. A fatality then occurs in circumstances which were not identified as posing a risk in that risk assessment. This could occur when an accident is caused by the aberrant behaviour of an individual which is in clear breach of an undertaking’s rules on

health and safety (which are rigidly enforced). In our view, the company's conduct should not be said to have fallen far below what was reasonably expected of it. A Code of Practice or Guidelines should make it clear that unfortunately deaths can occur even in workplaces which have exemplary health and safety systems in place.

### **Potential defendants**

6. The EEF supports the Government's position that the offence of corporate killing should apply equally to all types of business. In our view, redress in criminal law should not be dependent upon the legal status of the employer's business. It should be noted that both more accidents and more serious accidents occur in small businesses, such as partnerships<sup>1</sup>. We do not believe that it would be in the public interest if accidents in these companies were taken less seriously than accidents in corporations. Further, the purpose of the new legislation should be to act as a deterrent and to increase awareness of the importance of health and safety issues amongst businesses. All types of business could benefit from such increased awareness.

### **Investigation and prosecution**

7. The consultation paper suggests that the HSE and local authorities should have the power to investigate and prosecute the offence of corporate killing, in addition to the police and the CPS. The EEF has the following concerns about this approach:
  - HSE inspectors do not currently operate under the Police and Criminal Evidence Act 1984 in the same way as police officers. The former simply have to 'have regard' to the statutory codes.
  - Control of evidence by the HSE has in the past not been as robust as it would be in a police investigation.
  - There may potentially be a conflict of interest if an HSE inspector investigates an incident where he has previously given advice.
  - In our experience, HSE inspectors do not always follow methodical criminal investigation techniques.
  - Police officers have the power of arrest; this is not available to HSE inspectors. Given the gravity of the individual offences it would seem appropriate that individuals could be arrested, charged and bailed.
  - HSE and LA inspectors' most important role is that of giving advice and guidance to businesses. This role does not sit well alongside the powers to enforce the proposed offence of corporate killing.
  - There may be inconsistencies in approach depending upon whether the police and CPS or the HSE are responsible for part or all of an investigation and prosecution. In the past, the police and the HSE have sometimes had incompatible aims when investigating the aftermath of an accident.

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<sup>1</sup> 'Small and large manufacturing workplaces' rates of workplace injury 1996/97-1997/98' Published by HSE/Government Statistical Service

- It may be unclear whether the police or the HSE should lead in a particular investigation. Immediately following an accident it is not always clear what offences, if any, have been committed.
14. The majority of respondents to our consultation favoured the creation of a separate investigation and prosecution service to be established within the HSE, which would include some personnel from the police. The HSE would benefit from police expertise in conducting criminal investigations and the police would benefit from HSE knowledge of the management of safety systems in the workplace. There would be consistency in approach in investigations and prosecutions following fatalities. At the start of an investigation it may not be clear whether an offence of corporate killing, one of the individual manslaughter offences or another health and safety offence has been committed and all may need to be considered. With one specialised unit, parallel investigations would be avoided and steps could be taken to ensure that evidence gathered was later admissible in court proceedings. The creation of a specialised unit would also address the issue of potential bias when the HSE investigate undertakings where they have already given advice.
  15. In addition, the overwhelming majority of those who responded to our consultation felt that it would be wholly inappropriate for local authority inspectors to be involved in the investigation and prosecution of the offence of corporate killing.
  16. If HSE inspectors are to be given investigatory and enforcement powers under the proposed new legislation it may be necessary to amend section 20 Health and Safety at Work etc Act 1974.
  17. The Government proposes that state consent should not be required to bring a private prosecution for corporate killing. It is also considering amending the Health and Safety at Work Etc. Act 1974 to enable private prosecutions to be pursued without the consent of the Director of Public Prosecutions.<sup>2</sup> We are very concerned that this could result in a presumption by members of the public that a work place fatality or accident should always lead to a prosecution. In turn, this could result in a large number of private prosecutions being pursued which are unlikely to succeed. This would place a continuing burden on businesses and individuals over a long period of time. In addition, an increase in the number of private prosecutions could be a drain on the resources of the enforcing authority. In our view, corporate killing is unlike individual manslaughter offences and consent should be required before private prosecutions are allowed to proceed.

### **Legal advice**

18. We are most concerned about individuals being denied the right to legal advice and legal aid when questioned in connection with the offence of corporate killing. It is very possible that these people could be unaware of their rights during questioning in relation to the offence of corporate killing or in relation to one of the individual offences, such as reckless killing or killing by gross carelessness. These are criminal offences carrying serious

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<sup>2</sup> Action point 10 'Revitalising health and safety' June 2000, published by DETR

penalties, including imprisonment. Further, it is possible that it will be difficult to rely on evidence in an individual prosecution which was obtained from a person who was denied access to legal advice.

### **Enforcement against companies not incorporated in Great Britain**

19. We agree that it should be possible to prosecute companies incorporated outside Great Britain and Northern Ireland for corporate killing if they commit the offence within the jurisdiction of the English courts. We share the view that it would be unacceptable if companies who carried out much of their business in the UK were able to escape prosecution by incorporating overseas. However, the Government will need to consider carefully the practical difficulties of enforcing any penalties effectively against companies which are incorporated overseas.
20. In this context, we are concerned about the effects of devolution and feel strongly that equivalent laws need to be introduced in Scotland and Northern Ireland.

### **Liability within groups of companies**

21. In principle, the EEF agrees that anti-avoidance measures may be required to prevent parent or group companies from deliberately escaping liability for a fatality in another group company. However, a parent or other group company should only be liable for corporate killing when it can be shown that the management failures of the parent or other group company were a direct cause of the death concerned and that the conduct of the parent or other group company fell far below what could reasonably have been expected.
22. We are concerned that these measures, which are designed to catch rogue companies from deliberately avoiding liability, could have a detrimental effect on good health and safety practice within many other groups of companies. There is a real danger that groups of companies will be discouraged from developing health and safety management systems which place responsibility at group level, because they would not want to spread the risk of prosecutions throughout the group. It is best practice for health and safety to be taken seriously and monitored at all levels in an organisation.
23. We also concerned that there may be practical difficulties in investigating the role of parent or other group companies in a fatality which occurs in another group company. HSE investigators may not have the necessary expertise to carry out efficient and effective investigations where there are complicated group structures. It will also no doubt be extremely difficult to investigate the liability of a parent company for a death at a workplace in England and Wales where the parent company is based abroad.

### **Enforcement against a director or other company officer**

24. We agree that one purpose of the legislation is to penalise undertakings who commit the offence of corporate killing. We recognise that the sanctions for the offence of corporate killing must be sufficient to have a deterrent effect and accept that for some companies the

threat of a fine and/or a remedial order may not be an effective deterrent. Whilst we agree that individuals who are proven to be directly culpable for deaths in the workplace should in some circumstances be subject to severe penalties, serious consideration needs to be given to the effect that imposing penalties on individuals might have on the way that health and safety issues are managed within businesses. In our view, the main purpose of the legislation should not be retribution, but should be to improve health and safety systems within undertakings.

25. The issue of personal liability for corporate killing needs to be considered together with other policy developments within health and safety. In particular the policy document '*Revitalising health and safety*' calls for the appointment of a director or other senior officer who is responsible for health and safety<sup>3</sup>. We have serious concerns about one person or a small group of people within an undertaking being made responsible for health and safety, either because the undertaking wants to limit any personal liability for corporate killing or as a result of a requirement that one senior person must be given this responsibility. In such cases, that one individual or small group of people could become scapegoats in the event of a death at work. On a day-to-day basis this would encourage a culture within the company that health and safety is only the responsibility of those named. The most effective health and safety systems instil a sense of responsibility for health and safety in all staff. In addition, fear of personal liability will undoubtedly make individuals less open and co-operative in internal and external investigations into fatalities. We would also anticipate that the threat of personal liability will make it difficult to recruit and retain people in positions which include health and safety responsibilities.
26. As for the particular proposal, this relies on an individual being shown to have '*..some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death*'. This definition is unacceptable. In our view, especially given the seriousness of the proposed penalties, an individual should only be convicted if he or she has far more than '*some influence*' or '*some responsibility for*' the management failure leading to the death.
27. We are concerned about how disqualification from acting in a management role would work in practice. It will be straightforward to disqualify individuals from being directors in companies. However, we foresee difficulties in assessing what roles count as management roles, as well as enforcing any disqualification from management roles in undertakings other than companies. If the Government decides that disqualification is not practicable for anyone other than office holders in companies, then we would be opposed to disqualification being used a sanction for anyone. Penalties must be consistent across all types of undertakings.
28. We accept that imprisonment should be the sanction in the most serious cases, provided that the sentence given is proportionate to the offence. The severity of the misdemeanour, rather than the number of deaths, should be taken into account when sentencing.

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<sup>3</sup> Action point 11, '*Revitalising health and safety*' June 2000, published by DETR.



Sentencing guidelines would be useful in ensuring consistency in sentencing, especially where the particular deaths have aroused much public interest.

### **Insolvency and dissolution of companies**

29. The EEF strongly opposes the freezing of a company's assets pending the institution of criminal proceedings for corporate manslaughter. As recognised in the consultation paper, this contravenes the general principle that a person is innocent until proven guilty. Freezing of assets would deal a serious blow to a company's ability to continue trading, before and after the prosecution, whether or not the company is acquitted. This could put many employees' jobs at risk. We are also concerned that if provision were made for assets to be frozen on a guilty plea, businesses would be discouraged from pleading guilty.
30. It is also proposed that it should be possible to continue prosecutions against companies, even where the company has become insolvent. It should be recognised that any sanctions imposed on insolvent companies are likely to be ineffective.

### **Remedial action**

31. In our view, remedial orders by courts will be of very limited value. HSE inspectors already have significant powers to issue prohibition and improvement notices (section 21 & 22 Health and Safety at Work etc Act 1974). Inspectors nearly always impose prohibition notices in the immediate aftermath of a serious accident at a workplace. Given the length of time it takes to bring a prosecution, any court making a remedial order would be doing so a long time after the event. In our view, there is also a possibility that courts might impose remedial orders which are not proportionate to the actual risks, but which respond to public outrage at a particular incident. Any provision giving the courts the power to make remedial orders should therefore be limited to requiring the defendant to do all that is reasonably practicable in line with health and safety requirements. In addition, there should be a right of appeal against a remedial order made by the courts.

### **Territorial extent**

32. We agree with the Law Commission and Government view that the extent for the offence of corporate killing should be limited to the UK and include offshore installations such as oilrigs.

### **Transmission of disease**

33. The Government proposes including death which results from the transmission of disease in the offence of corporate killing. The consultation paper gives examples of the transmission of infectious diseases, such as HIV/AIDS or hepatitis. However, depending on the drafting of the provisions, it would be possible that the proposed offence could also cover industrial diseases which are caused by exposure to particular agents or chemicals, such as mesothelioma caused by exposure to asbestos. This could significantly increase the number of prosecutions. With diseases such as these, not only will it be difficult to prove

what caused the disease, but it may be a very long time before any symptoms appear and death occurs.

34. We assume that the new offence will not apply to actions or omissions which occur before the date of commencement of the legislation, even if the death occurs after the commencement date.