SUPPLEMENTARY MEMORANDUM FROM CCA TO HOME OFFICE AND WORK AND PENSIONS SELECT COMMITTEE SCRUTINISING CORPORATE MANSLAUGHTER BILL

We are sending you this second written evidence to clarify certain points that we made in our oral evidence as well as in response to other oral evidence that the Committee has received. This evidence contains some important points that we hope you will find useful in your scrutiny process

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PUBLIC BODY APPLICATION

There are a series of issues that primarily relate to the application of the offence to public bodies

(a) Grounding the Duty: Duty of Care v Health and Safety duties

1.1 As the Committee knows one of our main concerns about the current proposal is that the offence is grounded in the civil law "duty of care" – the existence of a 'relevant duty of care' is the first part of the proposed legal test. The draft bill makes it clear that not all accepted civil law duties of care will ground a prosecution – they have to be 'relevant' ones as set out in the bill itself. The bill uses the concept of 'relevance' as a means to exclude many public bodies decision-making and other activities from being subject to the offence.

1.2 The pertinent issue is this: should Section 1(1)(b) state that the failure "amounts to a gross breach of *a relevant duty of care owed by an organisation to the deceased'* or that it "amounts to a gross breach of a relevant duty of care owed by an organisation to the deceased *or a duty imposed by statute*[1]' This is about how to circumscribe the scope of the offence – which organisations in relation to which deaths could potentially be subject to the offence. Further to our written and oral evidence on this matter that we would like to make a number of further points

The narrowness of duty of care principles

1.3 A key question is whether there are deaths which would be gross breaches of section 3 of the HASAW Act 1974 (1974 Act) but where there is no 'duty of care'?

1.4 In the evidence sessions, at question 163, the following exchange took place:

> **Q163 Chairman**: Just so I am clear, is there a serious possibility that somebody could die as a result of a breach of section 3 but because of the way the duty of care is framed in the draft legislation the company could not be prosecuted for corporate manslaughter? Is that part of your reason for wanting to bring section 3 in?
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> Mr Welham: I think why we are saying section 2 and section 3 is because it is very easily and very clearly worded, and it is well established through the Health and Safety at Work Act now.
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> **Q164 Chairman:** I may have misunderstood, does the danger I have described exist?

[1] Or some such wording. It may be necessary to set out in a schedule the statutory obligations included in this: i.e Health and safety at Work Act, Merchant Shipping Act etc

Mr Welham: No, I do not think so.

Mr Waterman: We do not think so.

Chairman: I may have just misunderstood. Thank you.

1.5 The question asked here is a key foundation of our concern about the Home Office's failure to use statutory duties as the basis of the offence; it is our contention that there will be circumstances where a death will result from a gross breach of section 3 of the HASAW Act and those circumstances would not result in a civil law 'duty of care', and therefore could not result in a prosecution under the proposed offence. This will in particular apply to deaths resulting from public bodies. And it is easy to see why when one understands how courts determine whether duty of care relationships exist.

1.6 When civil law courts rule on whether or not a 'duty of care' relationship is created between a public body and a person who is suing for compensation, they quite understandably have taken into account public policy factors that relate to the fact that it is a claim for compensation. The courts have therefore given consideration to, for example, whether it is appropriate, in time and expense, for a public body to have to defend hundreds or thousands of *compensation* claims and then having to pay our damages. As a result of these reasons – which are distinctive to civil liability issues - the courts have stated that certain public body activities do **not** raise 'duty of care' relationships.

1.7 Section 3(1) of the HASAW Act however imposes duties upon employers – including these very same public bodies – that does not take into account these factors. This states:

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

1.8 As a result there will undoubtedly be deaths resulting from management failures of public bodies which the civil courts have determined do not raise a 'duty of care' relationship (and therefore are immune from prosecution) but are breaches of section 3.

Criminal law has a different public purpose

1.9 Following on from this point, it is important to recognise that criminal law has its own particular public policy objectives that are often different from those under consideration when civil law courts assess whether there should be a 'duty of care' for compensation purposes (which will often not involve deaths and will not involve gross negligence).

1.10 This point was discussed in Court of Appeal case of Wacker[2] which involved the prosecution for manslaughter of the driver of the lorry in which Chinese immigrants suffocated to death. It was argued by the lorry driver's lawyer that there could be no 'duty of care' between the lorry driver and the people he was smuggling into the country as they were part of a joint criminal act and it was an established principle of *civil law* that in such circumstances there was no duty of care – a doctrine known as 'ex turpi causa'.

1.11 However in the Court of Appeal, the court held that this doctrine did not to apply in the criminal law. It stated at paragraph 33:

> "Why is there, therefore, this distinction between the approach of the civil law and the criminal law? The answer is that the very same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law. ….
>
> "Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time, or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Public policy, in our judgment, manifestly points in totally the opposite direction. "[3]

1.12 This paragraph sets out exactly the reasons why it is entirely inappropriate to ground the manslaughter offence on a civil law doctrine which is based around a set of public policy issues entirely different from the needs and purpose of the criminal law.

Duty of Care and Parent companies

1.13 In our original response to the proposals the CCA did not comment on its application to parent companies – however we would now like to raise this issue with you. The Home Office says in its paper that:

[2] [2003] 1 Cr App R 329
[3] Para 33 and 35

> "Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of one of the activities covered by the offence and a gross management failure by its senior managers caused death"

1.14 In our view this is a rather misleading and disingenuous assertion – since it gives an impression that parent companies could - assuming gross negligent conduct could be found at a senior management level of a parent company – be prosecuted. This assumption has been carried over in questions by members of the committee[4].

1.15 However the Home Office fails to mention that English/Welsh civil law courts have not ruled that parent companies have a 'duty of care' in relation to the activities of their subsidiary companies. There is no established principle that there is a duty of care between a parent company and an employee of one of its subsidiary companies[5]. The fact that some parent companies may require subsidiaries to act in a particular way in relation to safety does not under the current law impose a duty of care upon the parent company.

1.16 If the concept of 'duty of care' is retained as a requirement in the offence, the possibility of prosecuting a parent company for the death of a worker in its subsidiary is not possible. The only legal obligation that parent companies have is that imposed by section 3 of the HASAW

116a The key point here is that if the offence requires there to be a duty of care, parent companies will not be able to held to account – even though the Home Office favours this. In order to create a possibility of prosecution, the Home Office would need to ground the offence not only in relation to duty of car but also statutory offences.

1.17 Comments by Justice Ivor Judge, HSC and the Minister
A number of comments were made on this issue in your last evidence session – some of which need to be commented on.

1.18 **Ivor Judge**: The following exchange took place:

> **Q506 Mr Dunne:** Can we talk about the relevant duty of care? We have had slightly conflicting views expressed as to whether it is appropriate in criminal cases to use the terminology of "negligence" and "duty of care" because of the confusions that can arise. The Law Commission in particular have suggested that there are some difficulties there. If we were to use their proposals that there was no requirement that there be a civil law duty of care, what would be the legal implications?

[4] See Qs 192-199
[5] This point was in fact made in para 7 of the Memorandum submitted by Serco-Ned Railways. Ev 328; and para 11 of Evidence of EEF, Ev 230

Sir Igor Judge: There you have hit, if I may say so, on a point that did rather trouble me about the direct reference to the law of negligence, because if you open up the standard textbook on the duty of care in the law of negligence in the civil world, it is not quite as big as that, but it is a very large amount of literature and the issue has gone to the House of Lords for a decision very many times in the past ten years. I was very troubled about the possible consequences but I think that if you make this a question of law for the judge, depending on whatever facts he has to find under section 4(3), I do not think it presents a problem. I think in truth it does identify that there is a duty, that you are concerned with neglect, and therefore it has that strength. I myself do not think it matters whether it is in or not, provided it is for the judge to decide whether it is a duty situation. I think that is an answer to your question. I hope it is.

Q507 Mr Dunne: Thank you. We have also had some evidence that we do not really need to go much further than the statutory duties which are comprised in sections of the Health and Safety at Work Act 1974 sections 2-6. Do you see any legal obstacles if the Government were to decide to link the offence to breaches of statutory duties under that Act?

Sir Igor Judge: *I think that we have to appreciate there is a very significant difference between what looks like a regulatory statute, health and safety, and manslaughter, which on any view says that this was a killing. I think there is an important public perception about this and I do not think we should ignore that. I think there is a public perception that there are occasions when a killing should result in a conviction for manslaughter. To say it is all basically covered by the Health and Safety Act does not actually to me seem quite appropriate if the criminal law is to keep reasonably in step with the way the public looks at things, and it should.* The way in which the link is done seems to me to be entirely sensible, if I again may say so, by saying that when the jury is considering all the different ways in which the breach might reasonably be described as gross, it directly links it to the health and safety legislation, but says that is only one piece of evidence. You may be able to show that there was a breach of a relevant piece of health and safety legislation but nevertheless not be guilty of this offence, and you might well have an indictment - I do not know - which said "Corporation: count one, manslaughter; count two, failure to comply with whatever section of the Health and Safety Act." I have no problem with that - and possibly "Count three, X, the individual, you did this and so you too are guilty of manslaughter by gross

1.19 We are very concerned that the Committee recognises that in his second answer – see the italicised part above – Mr Judge was **not** answering the question that was asked or what was clearly meant to be asked. It is clear that Mr Dunne was asking a question about whether the duty around which the offence should be grounded should be limited by either a civil law duty of care or by statutory duties. It appears from the answer that the judge understood the question to be suggesting that a simple breach of health and safety law resulting in a death could result in a prosecution for manslaughter, or some such question. Otherwise it does not make sense

that he is saying that there must be a clear distinction between regulatory offences and manslaughter – which of course we agree. It is clear there is a misunderstanding since what the Judge himself says about there needing to be a difference between 'what looks like a regulatory [offence] and manslaughter is of course equally true of a "beach of a 'duty of care'" and an offence of manslaughter.

1.20 The CCA does not know what the judge actually thinks is the answer to the question that was meant to be put to him – but it is important that the committee recognises that the Judge, whose evidence is of course significant because of the position that he is in, does not respond to it. If the Committee was intending in any way to rely on this answer in its report to answer in favour of the retention of 'duty of care', we would first urge it to seek further clarification from the Judge.

1.21 **Fiona MacTaggart**: The Minister made the following comments to the committee:

> "It seems to me that requiring a duty of care defines clearly the circumstances in which a new offence might apply and it is important to have an offence of a failure to act. This is key because an offence of not doing something could lead one to have a successful prosecution. That is not usual in most offences that I can imagine of manslaughter. Because failure to act could be as significant in a prosecution like this as action it is necessary to make clear when companies are liable. The best way to do that is to depend on the duty of care which is the kind of framework of our basic legislative approach in these things."

It is of course that the case that alll of this could equally be said of health and safety statutory obligations – that are surely better understood and known that civil law duties of care.

1.22 The following exchange then took place:

> **Q581 Chairman:** I may be wrong, Minister, but I have got an idea that the argument that a duty of care is necessary in order to deal with a failure to act rather than the commission of an act is not an argument that has been put to us previously over the last few weeks. Is that the one that you rest the inclusion of duty of care on? I may be wrong. We may have had loads of evidence on this.
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> Fiona Mactaggart: It is the one that I have found most compelling but I will give my advisers an opportunity to see if there are others.
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> Mr Fussell: That is right. One of the questions we have had with the Law Commission offence is how do you link the victim to the defendant corporation? What is it that means that the defendant corporation should have been taking steps to ensure the safety of the victim? We were very keen to have an offence which did not impose any new standards. We do not want to rewrite the circumstances when companies ought to be taking

> action to safeguard people's safety, and the duty of care is a mechanism which defines that relationship and the company knows that if it could be sued for something in negligence it can be prosecuted under this offence.

The Minister is right that you do need to ground the offence on the basis of there being a 'duty to act'; in order to say that an organisation should have done something it is necessary to be able show that the organisation had some form of obligation towards the safety of the person[6]. Mr Fussel is therefore also correction in saying, "What .. that means [is] that the defendant corporation should have been taking steps to ensure the safety of the victim. We do not want to rewrite the circumstances when companies ought to be taking action to safeguard people's safety, …" However, the point is – and the Home Office has acknowledged this to the CCA in informal conversations - that there were two options available for achieving this: through the restrictive 'civil law duty of care' or the broader 'statutory duties.' The reason why the Home Office chose to use civil law duties of care is to narrow the potential application of the offence.

1.23 This is clear for example, from what the Minister goes onto say:

> If, however, a health authority was deciding how to provide health services in an area or even a social services department was deciding, "How do we provide the whole generality of social services in this area", they would not in those circumstances owe a duty of care to every single resident in that area. Nor do I believe that we ought to make this offence apply in those circumstances, because a manslaughter offence is not a proper way to deal with something which is clearly a public policy matter.

The Health Authority has a duty under section 3 of the Health and Safety at Work Act, to act in a way in relation to conduct of those whose activities may affect them. However, as the Minister acknowledges, there is no duty of care relationship. If in making a decision about a particular aspect of social services care in the area, the Health Authority acted in a way that could be deemed grossly negligent – in for example failing to take account of key information about particular danger etc that they were informed about - and a death resulted, then in our view it should be appropriate, in theory, for the Authority to be held to account. If in section 1(1)(b) you retain 'breach of a relevant duty of care; - that would not be possible; if in section 1(1)(b) you changed it to "breach of a relevant duty of care or statutory obligations' then it would be possible.

(b) Public policy decision making exemption

2.1 We would like to make two further comments about the public policy decision making exemptions – which as you know we have serious concerns.

[6] See our original evidence

- In the new Canadian and Australian federal Codes containing new principles of corporate/organisation culpability – no such exemption exists;

- We are representing a family whose family member committed suicide in a mental health hospital. One of the main issues in this particular case relates to whether the failure to remove a particular ligature point in a room where she committed suicide (despite repeated requests from NHS Estates and others that ligature points should be removed) could be considered grossly negligent. The question that we are concerned about is whether this or similar set of circumstances might result, under the proposed public policy exemption, in the public body arguing successfully that this was a matter of public body decision making. What would be the situation if the public body, for example, stated that they did not proceed with removing ligature points as they had to balance the expense of doing this with other costs and therefore it was a matter of 'the allocation of public resources'? What would have happened if for example the NHS estates had itself not provided the advice because it was the outcome of the 'allocation of public resources or the weighing of competing public interests" - although there was clear evidence that knew about the serious risks of not removing ligature points and had been advised to instruct Health Authorities to remove them,

(c) Application to the Police, Prisons and fire service

3.1 We have read the oral evidence given by ACPO – and have the following comments.

3.2 ACPO notes that they are willing for the offence to apply to police forces but that they do not consider it appropriate that the offence should apply to operational matters. It says this because (a) there is sufficient accountability already and (b) it would result in a risk averse system. It says it wholly supports health and safety law applying, as it does now, to police including operational matters.

3.3 We would like to point out a serious contradiction in ACPO's response. It says that it is happy to comply with health and safety law – and there must therefore be an assumption that health and safety law compliance does not cause any particular problems of risk adverseness. ACPO also notes that individually and organizationally the police are willing to be held account for health and safety offences. If this is the case, then it is difficult to see what are the particular problems that the police would face in relation to the new offence. If they seek to comply with health and safety law – then they have nothing to fear from the new offence and it is difficult to see what additional risk averseness would exist. Senior police officers would simply have to ensure that their force complies with existing health

and safety law – as presumably these senior officers seek to do now. All that the offence will do is to place greater incentives on these senior officers to comply with health and safety law – which of course is one of the ultimate purposes of the offence.

3.4 The same issue applies in relation to points made by AFPO. Their witness said the following in response to whether the proposals would have a risk adverse effect:

> It may cause me as a chief officer to say to my crews, "When you arrive at that incident, unless you have every piece of kit by your side, do not take any action. Do not go into the water unless the boat is there. Do not go into that burning building unless you know you have all the pumping appliances lined up alongside you." It will cause me as a chief officer to give instructions to my staff that may be risk averse and I do not want to do that.[7]

3.5 It is difficult to understand why this could be so if the chief officer already has to ensure that fire authorities comply with health and safety law and to do what is being suggested above is not even necessary for health and safety law.

3.6 We do not understand what the 'draconian constraints over the service' are, as referred to by ACPO.[8] Such an allegation could only be relevant if the police did not want to comply with existing health and safety law or the new offence imposed new duties – neither of which is the position. It is therefore difficult to see what any additional constraints might be.

3.7 ACPO supports the role of the Independent Police Complaints Commission (IPCC) in ensuring appropriate 'levels of scrutiny, independence and confidence' in the police[9] – but since the IPCC would be the body responsible for investigating this offence, it is unclear what concerns ACPO can have.

3.8 ACPO infers that the current law of gross negligence manslaughter is itself appropriate for holding the police to account for deaths in custody[10]. It implies that holding individuals to account within the police force is sufficient. But the purpose of the offence is to look at organisational culpability – to look at organisational failures which are grossly negligent. Deaths in custody are often alleged to be the result of systemic police failures at a very high level of negligence where it is not possible to identify a particular individual. The current offence of manslaughter cannot deal with this situation – which is why a new offence is appropriate.

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[7] Q. 444
[8] Q 418
[9] Q 441
[10] Q. 425

3.9 **Minister comments**: The Home Office explained to the Committee why in the Government's view the new offence should not apply to police forces for operational areas:

> Fiona Mactaggart: Because the way in which you hold public bodies to account is different from having a criminal prosecution. If, for example, there is a death in custody, which is one of the exclusions, the Prisons and Probation Ombudsman investigates that individual death; there is sometimes a public inquiry about it; you, Members of the House of Commons, hold the Minister to account; it is up to you to decide, for example, the legislative framework that we make these decisions within. We should not substitute the courts for a form of parliamentary accountability. What we were seeking to do was to retain proper parliamentary accountability rather than to give that accountability to the courts for Government action.
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> Mr Fussell: May I just add, that one question which needs to be asked in terms of removing any of these immunities, is how would the remedial order powers work, for example, with a death in custody situation, and that feeds into the point the Minister has made about accountability and who is taking decisions about how these core public services are run.[11]

3.10 However, the following points need to be made about this:

- custody deaths are dealt with differently – depending on whether they are in police or prison custody. If they are deaths in police custody – then they are investigated by the IPCC who can prosecute individuals for manslaughter or for health and safety offences. The argument that the IPCC makes is that it is just as appropriate for them to be applying any new proposed offence as either of these other two offences.

  Deaths in prisons are not subject to investigations that can result in criminal offences. This is of course itself rather anomalous – and as a result deaths in prison are not subject to anywhere near the level of accountability as deaths in custody.

- it remains unclear whey parliamentary accountability should exclude the option of criminal accountability where appropriate. In any case, in the real world, the level of parliamentary scrutiny for the vast majority of deaths in prison or police custody is cursory – and of course the information that parliament has access to is often limited

- public inquiries take place in very limited circumstances – and Governments usually are not supportive of them, and are often have to be forced to set them up after a High Court judicial review proceedings. So for example, there is about to start a High Court judicial review of a decision by the Government not to hold a public inquiry into the death of 16 year old Joseph Scholes. Public inquiries

[11] Q. 586

cannot therefore be seen as part and parcel of any normal inquiry into a death in custody. In any case, again a public inquiry does not preclude the need for criminal accountability.

- we do not understand the potential problem of imposing a remedial order on the police or prison service (though see our comments below in general about remedial orders.)

3.11 The Minister goes onto say the following:

> But there is an issue in relation to, for example, the specific authority which the state has to detain someone in custody where it would be inappropriate I believe for saying that - let us take a real situation - to detain someone who has previously attempted suicide, which is the case with something over half of women in prison, could be said to be recklessly risking them inflicting their own death. It is not appropriate for that kind of matter to be dealt with through a manslaughter charge.

The minister, however, seems to be missing the point here. Clearly it would be inappropriate for prisons to be held accountable for suicides per se: however they should be held to account if they have failed to take reasonable care in relation to those whom they know to be suicide risks, and, in our view, should be subject to the possibility of criminal prosecution, if they have been grossly negligent in the care that they provide and the death was caused by the gross negligence. It is difficult to see why this should not be the case.

3.12 The CCA is at present, representing a family whose child committed suicide in a mental health hospital. The death has resulted in a criminal investigation, and the Crown Prosecution Service is actively considering whether managers within the hospital and individuals within the health authority have committed manslaughter. It is difficult to see why a prison should not be subject to the same level of investigation and possible prosecution into suicides of this kind as a hospital and its health authority. (See also above, para 2.1[12])

3.13 In response to question 592, the Minister talked about the improvements that the prison service is allegedly making in relation to reducing deaths in prison custody. But this kind of response is similar to a private company saying, after a death, that we have made or intend to make the following changes. That does not answer the question why, if the death was the result of organisational gross negligence, the prison should not be held to account.

[12] With the clients consent, and under strict confidentiality we may be able to provide you further information about this case if required

3.14 We would also like to note that the Minister in response to all the Committee's questions about deaths in custody talked about deaths in prisons, and not the police.

SENIOR MANAGER TEST

4.1 This has been a key area of questioning by the committee and we would like to clarify some of the evidence that we gave as well as looking at this issue afresh.

4.2 It appears that the government is trying to craft a new form of liability. This involves an assessment of:

1. whether or not there has been a failure in the way in which the organisation is organised and managed
2. whether that failure fell far below what could reasonably be expected
3. whether that failure was a cause of the death
4. Whether that failure was a failure at a senior manger level within the organisation.

4.3 The Government says it is new principle since it does not require identification of particular individuals; it is an identification of a failure at a particular level within an organisation. Inevitably however, in assessing whether a failure is at a particular level it will be necessary for the courts to determine whether particular individuals responsible for particular failures are at a particular level.

We would like to make the following points about this test

4.4 It should first be noted that if a death was a result of a number of different failures in the way in which the organisation was organised and managed (all of which could be causative of the death and be deemed grossly negligent) and some of them were failures below senior management level, the court would only be able to consider those failures that were at a senior manager level.

4.5 In a situation where the failures at a 'middle/junior manger' level were grossly negligent but the failures at a senior level were serious but were not grossly negligent, the company could not be prosecuted.

4.6 The question that needs to be determined is, therefore, at what level of management should the failure be before it can allow the company to be prosecuted.

4.7 Director level?: It may well be worthwhile dealing first with an argument made by some of the employer groups in evidence to the Committee - that the failures should be at a director level before a prosecution should be

able to take place.[13] Putting to one side the delegation issue which is discussed below (see para 2.17), the result of putting the test at a director level would in effect be simply to retain the current identification principle under a new name.

4.8 This would be the case since it is unlikely that you would find in a large company more than one director having responsibility for health and safety issues – so to say that the failure was at a director level, would in effect be to say that the failure was the failure of a single director. Therefore, only if there is a director who has been grossly negligent would you be able to prosecute the company. In fact, it is arguable that the proposal is in some ways more limited than the current identification doctrine, which has been defined as wider than individuals who are directors.

4.9 There may of course be some cases where a director level failure is a failure of a number of directors – however, we would argue that this scenario will be very uncommon indeed, and would certainly not be the case in large companies where directors have no legal obligations in relation to safety.

4.10 We would therefore argue that any further restricting of the level at which failure could result in a prosecution is totally unsustainable.

4.11 **Senior Manager level**: What about the senior manager level – as defined in the bill. The Home Office states that the attempted definition in the bill is to target 'failings in the strategic management of an organisation's activities, rather than at relatively junior levels."[14]

4.12 As soon as one talks about those involved in 'strategic management' – you are referring to very senior managers indeed. "Strategic management' fails to include all those managers responsible for <u>establishment, implementation and monitoring</u> of safe systems of management. The only time when managers responsible for 'strategic management' are the same managers responsible for 'establishment, implementation and monitoring' of safe systems', is in a small and perhaps a medium sized company. In large companies, managers responsible for these tasks are not 'strategic/senior' managers.

4.13 Therefore gross failures at 'establishment/ implementation/ monitoring' levels in large companies will **very rarely** result in the company being prosecuted. In our view this is entirely wrong since this is exactly the failure that the offence should deal with. It is important to note that one of the main purposes of the bill was to deal with the lack of accountability of

[13] See for example Q 377 to CBI and DBI's Written Evidence, Evidence 250 Written evidence of Network Rail EV 341. Written Evidence of British Energy, Evidence 270, para 5

[14] para 28 of Home Office paper

large companies; the senior manager test will simply not deal with this justice gap.

4.14 Another important point around the senior manager test concerns the nature of 'systemic' failure in companies. Again one of the key purposes of reform in this area was to deal with holding to account companies where there are failures of different people at different management levels within a company. So for example, the Sheen Inquiry into the Zeebrugge disaster concluded that: "From top to bottom, the body corporate was affected by the disease of sloppiness". It is extremely unclear whether or not under the proposed offence, P&O European Ferries would be successfully prosecuted for this offence – since only those failures at a senior manager level could be taken into account. This analysis is supported by other written evidence that you have received.[15]

4.15 Indeed as the Home Office says, "large companies with complex management structures have proved difficult to prosecute for manslaughter under the current law."[16] We do not see how the senior management proposal deals with this issue. Companies with complex management structures are likely to continue to escape accountability as safety responsibilities and therefore safety failures will be located at different points in their management hierarchy, many not at a senior manager level.

4.16 An argument in response to this may be that gross failings at lower levels within an organisation will be able to be traced back to gross failings at a senior level within the organisation; that whenever there is a gross failure at a middle-management level there would always be an identified gross failure on the part of senior managers to have monitored the gross failure taking place at a lower level.

4.17 However, again it would be highly unusual. Although managers at senior management level may have some responsibility monitoring, their failure to do so will rarely be able to be deemed as grossly negligent (though they may sometimes appear to be serious failures). There would be some many potential justifications for inaction – involving lack of knowledge and delegation.

4.18 This brings us on to delegation. A number of your witnesses, stated that even though the senior manager test may induce the company to delegate responsibilities down the management chain, it would be possible to prosecute companies as a result of grossly negligent delegation. So for example the following exchange took place with the CBI:

> **Q376 Mr Rooney:** Do you agree there is a risk that responsibility for health and safety in large companies will be delegated below the level of

[15] See Evidence by Rebecca Huxley Binns and Michael Jefferson, Evidence 27, para 13
[16] para 9, p.8. Note that this was quoted in approval by the Institute of Directors (Evidence 44 para 9)

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

4.19 It is true if a company delegated responsibilities to a person with no proven competence, skill or experience – then it may be possible to prosecute the company on the basis of a grossly negligent delegation. However when we are raising the issue of the problem of delegation we are talking about strategic delegation to make the company manslaughter proof.

4.20 In this situation, delegation will be perfectly reasonable – or at least not particularly unreasonable – individuals. What will happen is this; the delegation from senior manager level will be to people within the company who are competent. It will also not be a delegation of all responsibilities – so some relatively minor supervisory responsibilities may remain with the senior managers so that there does not appear to be a total abrogation of responsibility by the senior manager. In such a situation, it would simply not be possible to prosecute a company for gross negligent delegation, and the company will have successfully made it corporate manslaughter proof – not by improving safety management, but through organisation of safety responsibilities - since all the gross failures will be below the senior manager level. This may not even be deliberate strategy of the company – but simply a reflect of the flatter management structures of companies.

4.21 This is of course exactly the point that was made by Sir Igor Judge when he gave evidence to you[17]:

> Mr Clappison: … How difficult will it be to prove that a senior manager who delegated responsibility to others for health and safety matters caused the death of a worker or member of the public?
>
> Sir Igor Judge: Difficult. There is no doubt about that. There is nothing to stop a senior manager delegating to apparently competent staff and, if the apparently competent staff are people that it was sensible to delegate to, you can delegate all the way down. I think that is a concern. It is a concern I would have. The Law Commission, I think, suggested - I may be wrong - that what you should be looking at is a management failure and that, of course, goes to the management and organisation of the corporation. I am not making a policy comment, but I would have thought

[17] Q. 501

> myself that might be a better way to avoid a series of "Not me. I passed this responsibility down", so that you end up with some very, relatively speaking, junior employee, who suddenly has to carry the can for what is in effect an unfair assignment of responsibility to him

4.22 It is interesting to note what the Minister in her evidence to the Committee said concerning the Hatfield disaster:

> The court on the one hand said that individuals were guilty of no more than errors of judgment. On the other hand the judge thought that the facts as presented to him represented one of the worst cases of industrial negligence he had ever seen. What that indicates is that there is a very urgent need to be able to put these sorts of cases to the jury on a different basis than what individuals were doing.[18]

In this case although directors and senior managers of two companies were prosecuted as individuals for either manslaughter or health and safety offences (for which only proof of 'neglect' is required) the judge did not think it appropriate that any of these individual cases went to the jury. Yet at the same time he considered this to have been 'one of the worst cases of industrial negligence he had ever seen'. It is difficult to see how there would be a different result if these companies were prosecuted under the new proposal – when the judge did not find even 'neglect' on the part of key senior managers. How could there have been gross negligence at a senior manager level when not one senior manager could even be convicted for an offence that only requires 'any neglect' and which does not require proof that the neglect was a case of the deaths? Clearly what the Judge in this case was referring to was negligence at all levels of the company – some at a senior level and some at a more junior level. And it is clear from the reasons given by the judge that he considered many of the serious failures within the companies to have been at a level below the senior manager level.

4.23 It is difficult to see what is the purpose of a new offence if it is likely that "one of the worst cases of industrial negligence' would not have resulted in a likely conviction when the proposed test is applied to it.

4.24 **Beyond senior management?:** This all brings one back to the key question – what grossly negligent conduct within a company or organisation should result in a company being prosecuted for manslaughter. In our view, this should be much wider than grossly negligent failures at a senior management level. It should include failures within a company at different levels of management – which may or may not include senior management failures - which either alone or when aggregated together could be viewed as a grossly negligent failure. It should be noted that the new federal criminal codes in both Canada and

[18] Q 566

Australia contains the concept of aggregation. In Australia for example in relation to organisational crimes of negligence, the revised code states:

> "that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers)."

4.25 It is interesting to note that the Criminal Law Officers Committee of the Standing Committee of Attorneys General explained its proposed reforms by by referring to the 'flatter structures' and greater delegation to junior employees in modern corporations"[19]

4.26 A company is not just the senior management of the company – they may have the most power and control within the company – but they do not and should not alone represent the company in this particular context; grossly negligent failures at non-senior management levels within the company should allow the company to be prosecuted for a manslaughter offence. This is the only way to ensure the offence can engage with complex management systems or systemic failures. The proposals with the senior manager test simply does not deal with the particular defects with which it was supposed to.

4.27 Companies should expect to suffer serious sanctions when gross negligence at any managerial level within a company causes death. It is the responsibility of a company – the senior management within the company – to prevent these grossly negligent failures from taking place.

4.28 It is difficult for us to see why as a company grows and gets bigger and bigger, it should not continue to be able to be held accountable for the same failures that it would have been held responsible for when it was smaller.

4.29 So lets say that there is a company with 100 employees where the hierarchy in the company is: shop-floor worker, supervisor, senior manager, director. In such a situation *any* management failure will almost certainly also be a senior manager failure within the definitions of the draft bill.

4.30 As that company gets bigger, there will be increased layers of management – and indeed the company may be divided at different locations and perhaps different divisions. If exactly the same incident takes place in that company (as it had in the smaller company) at one location, why should the bigger company not be held accountable. Why, as the company gets bigger, should the company have less responsibility for serious management failures within it. Surely, as the company gets bigger, they should be putting in systems to ensure that the activities

[19] Report published in 1992

remain equally as safe within all its different parts as when it was a smaller company. And if the bigger company does not do so, and those failures are gross and cause death – then the company should be able to be prosecuted in the same way as a smaller one. The Rail Safety and Standards Board written evidence puts this point well:

> To illustrate the effects of this, consider an accident in which gross negligence was alleged on the part of both a large company and a smaller company working together in the same environment (a situation that could potentially arise in the railway industry). We suggest that it would be easier to secure a conviction against the smaller company because its "senior managers" (as defined in the bill) would be closer to the decision-making that led to the accident. Or, put in a different way, the larger company would be able to defend itself, on the grounds that the decision makers involved were only in junior positions, in a way that the smaller company could not. We wonder whether justice would be seen to be done in such a scenario.[20]

4.31 **CCA Previous Proposal**: In our previous evidence we had suggested that one way of dealing with the problems with the 'senior manager' test would be to add an alternative test – so that a company could be prosecuted if:

- there was a grossly negligent management failure (at a junior/middle level) within the company, that was a significant cause of the death;
- a senior manager knew or ought to have known about the failure.

4.32 The Home Office have told us informally their concerns about this formulation:

- it brings in the need to identify an individual senior manager when the Home Office was trying to avoid the need to pinpoint individuals.
- there would then be difficulties in assessing how much of the failure would need to have been or ought to have been known about. What happens if a senior manager knew or ought to have known about some aspects of the failure but not others.

4.33 The first criticism could be allayed by stating that the failure was known about or should have been known about at a senor management level within the company.

4.34 We however agree with the second concern. We accept that it would be difficult to prove in court not only that a senior manager knew, but they ought to have known about particular failures, and that it would prove difficult to deal with a situation where senior managers knew about some elements of the failures but not others. Moreover, it would add a further level of complexity in the court process. It also does not deal with the issues that we set out in the paragraphs above.

[20] Evidence 30

4.35 **A new approach**: The best solution would probably be to retain the original Law Commission's 'management failure'. Another alternative that may work is to redefine the concept of senior manager so that it includes any individual who is a senior manager at a **workplace level or above**. This would require the following changes to section 1(1):

> "An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation's activities are managed or organised by its senior managers[21] –
> (a) causes a person's death, and
> (b) **when aggregated together**, amount to a gross breach of a relevant duty of care owed by the organisation to the deceased

and to section 2

> A person is a senior manager of an organisation if:
> (1) either he plays a significant role **at a workplace level** within the company in –
> (a) the making of decisions about how the whole or a substantial part of the **workplace's** activities are to be managed or organised, or
> (b) the actual managing or organising of the whole or a substantial part of those activities.
> (2) or is more senior than such a person"

4.36 The retention of the term senior manager – though at a workplace level - would avoid the concern that companies could otherwise be prosecuted as a result of gross failures at a very very low level of management within the organisation.

4.37 So this would mean if you had a very large company with 60 factories and a death took place in one of the factories – the company could be prosecuted if it could be shown that death was a result of one or more management failures at a senior level within the factory or at a higher level which when either alone or when aggregated together amounted to gross negligence.

4.38 The CCA is certainly not wedded to this option but it might form the basis of a formulation for the Home Office to consider.

[21] It may also be better rather than saying "are managed or organised by its senior managers" to say, "are managed or organised by managers at a senior level within the organisation"

LIKELY EFFECTIVENESS OF LEGISLATION

5.1 The new offence of corporate manslaughter should be intended to achieve at least two purposes:

- increase deterrence: the presence of an offence should encourage companies to comply with health and safety law and thereby decrease death and injury.

- increase accountability of companies: there is a widely perceived justice gap that large companies escape prosecution or conviction for manslaughter in situations where conviction would seem to be inappropriate due to the narrowness of the test.

5.2 In relation to whether the new offence will achieve the first objective – deterrence and improved standards – we have noticed that this has been a question that the Committee have asked many witnesses. In its written evidence, the CBI states:

> "However, generally prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance"

5.3 Clearly, what exactly will happen is unknowable – but it is important to note that whatever the CBI[22], the Railway Forum[23] or Construction Confederation[24], say the research evidence indicates the law and the fear of enforcement is a key and primary motivator, particularly amongst directors:

5.4 In the context of directors responsibilities, the Health and Safety Executive recently asked for an academic to peer review three reports on the role of law and the conduct of directors[25]. We shall quote this at some length as it is the most recent independent look at the role of law and enforcement in this area:

> **Role of general health and safety law**
> With regard to this issue, the HSL report makes reference to the work of

[22] In its written evidence it states: ""Generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance" and Dr Asherson stated in oral evidence: ""Generally, prosecutions and penalties are not the prime motivators for a company to deliver good health and safety systems and performance"

[23] Q 213

[24] Q 231 and 237

[25] Report by the Centre for Corporate Accountability, 'Making Companies Safe'; Report by Greenstree Berman, reviewing this report and a report by the Health and Safety Laboratories. The last two were themselves commissioned by the HSE. The reports are referred to in the quote as the CCA, Greenstreet Bethman and HSL reports respectively

O'Dea and Flin (2003) which highlights that legislation does motivate director level staff to take action on health and safety issues. It also, in common with the CCA one, refers to a postal survey of risk and finance managers undertaken by Ashby and Diacon (1996) to examine what motivates large UK companies to take measures to reduce risks of occupational injury to their employees. In both cases the reports note that the study's findings suggest, at least in 1993, when it was conducted, that compliance with the law and the avoidance of legal liabilities constituted the most significant sources of motivation.

The HSL report, along with the Greenstreet Berman one, also makes reference to the already mentioned Australian studies produced by Gunningham (1999) and KPMG. Both note that the Gunningham study concludes that regulation is the most important CEO driver and that the KPMG study found regulation and its enforcement, to be the second most important one, with the Greenstreet Berman additionally detailing the four most important such motivators identified in this second study as being, in order of importance:

• A sense of moral responsibility;
• Regulation and its enforcement;
• Commercial incentives, such as greater productivity and lower workers' compensation premiums, and
• Measurement and benchmarking of health and safety performance.

In relation to such findings as those of Gunningham and KMPG, the Greenstreet Berman report goes on to observe that there is a '*close association between the self-rated role of factors such as enforcement, the cost of accidents, reputational risk etc – such that organisations tend to be motivated (or not) by each of these drivers*' (Wright and Marsden, 2005: 9). In a similar vein, the HSL report notes that another recent study involving one of the same authors concluded that reputation risk and regulation compliance may be intertwined (Wright *et al*, 2005) and the CCA one effectively makes the same point in noting that the previously mentioned study by Baldwin and Anderson (2002) found that, among the 50 senior
staff from large UK companies interviewed, the main motivators of efforts to manage regulatory risks were concerns for corporate reputation, followed by fear of criminal convictions and fear of the competitive or market effects of criminal convictions.

Role of individual personal liabilities

As regards the motivational role of individual legal liabilities, the Greenstreet Berman report does not cite studies which provide evidence on this issue, although it does make the observation that it is '*hard to find evidence of whether (or how well) mandation of Directors' Duties would work, and exactly what requirements would work best, without actually trying it out or reviewing examples of such regulation overseas*' (Wright and Marsden, 2005) For its part, the CCA report draws attention to another of Gunningham's conclusions, namely that that '*the key to motivating CEOs and senior management to improve safety is to make them liable to personal prosecution and to actually enforce such provisions*'. It would appear, however, that the validity of this statement,

which is also alluded to in the HSL report, was not checked through the carrying out of a review of the various studies that Gunningham cites in support of it, namely those by KPMG (1996), Hopkins (1995), Purvis (1996), Braithwaite and Makkai (1991), Reiner and Chatten Brown (1989), Hammit and Reuter (1998), Cohen

(1988) and the Australian Industry Commission (1995). The CCA report does, though, rightly note that Brazabon *et al* (2000: 66), in their study of health and safety in the British construction industry, concluded that '*the majority of interviewees perceived that if the number of prosecutions of Directors and Corporate Manslaughter charges increased this could result in large improvements in health and safety standards as this may enforce the message that directors are responsible for the health and safety of their workforce*' No direct mention is, however, made in any of the reports to the discussion provided in the KPMG report concerning how the imposition of personal legal liabilities on directors can act to influence them to accord health and safety a higher priority. As a result, attention is not drawn to its finding that '*many CEOs cited their personal legal responsibility as a factor motivating them to attend to safety*', despite the fact that under, then, current Australian legal frameworks senior officers were rarely prosecuted, in part because of the difficulties of bringing such prosecutions, nor to the fact that CEOs in small firms were found to be slightly more likely to cite such liability as being a motivating factor (KPMG, 2001: 70). At the same time, it would seem, although this merits checking, that during the period of the KPMG research the personal legal responsibility of CEOs which existed in most, if not all, Australian jurisdictions, consisted of the type of 'negative' liability which currently exists under section 37 of the Health and Safety at Work Act. The above findings do not, then, necessarily point to the value of the imposing of 'positive' duties on directors. This uncertainty, it is suggested, consequently reinforces the point already, indirectly, alluded to concerning the desirability of examining the sources of evidence quoted by Gunningham in relation to the motivational role played by such personal legal liability. It remains the case, of course, that the Brazabon *et al* findings quoted above would, nevertheless, seem to suggest that steps to increase the number of prosecutions of directors and, by implication, make such prosecutions easier could act to encourage directors to accord a greater priority to the issue of health and safety at work. Indeed, this suggestion would seem to receive a good deal of reinforcement from the fact that the study by Wright *et al* concerned with evaluating how best to achieve compliance with the law found that 49 per cent of the 'employer' respondents considered that 'personal fines for directors' constituted the 'best way' of improving the enforcement of health and safety laws and that this option for improving enforcement was favoured by a greater percentage of those responding than a range of alternative ones mentioned in the questionnaire they completed (Wright *et al*, 2005: A106)11.

5.5 It is therefore likely that a new offence of corporate manslaughter will have some value in incentivising those who run companies to improve their safety performance.

5.6 Whether the new offence will achieve the second objective – 'increased accountability' – will depend entirely on the nature of the test and in particular (a) whether the offence is grounded on only 'duty of care' or also on statutory duties. (b) the nature of the exemptions and (c) the nature of the management test.

5.7 In our view although the proposed offence may result in some increase of prosecutions – it will not capture the sort of corporate misconduct that would be generally accepted as being appropriate for a corporate manslaughter prosecution and we do not think these convictions will involve large companies – and to that extent it will fail to achieve this objective in the current form (see more below).

5.8 That is why there is so much disappointment amongst those who have been working towards a new offence. In trying to 'buy in' employer organisations to the whole project, the government has lost sight of one of the two fundamentals purpose of the reform – increased corporate accountability.

CBI Evidence and France

5.9 In its evidence the CBI referred to the situation in France. The exchange was as follows[26]:

> **Chairman**: Do you think that, inasmuch as you can assess it, work-related injuries and fatalities will actually fall as a result of the Bill?
>
> Mr Roberts: It is difficult to find evidence that would suggest that. If you take the case in France - and it is only one example, to exemplify the point - which does have an offence of corporate homicide, it also has an incidence of fatalities in the workplace which is twice that we find in the UK. So, again, *prima facie* it is not immediately obvious that there is a connection between a change in the law, which is perhaps a toughening in the law, and improved health and safety in the workplace.

5.10 In France. until 1995, it was not possible to prosecute any company for *any* criminal offence. In 1994, there was an introduction of the Noveau Penal Code – which allowed companies to be prosecuted for over 30 specified criminal offences – including homicide. Therefore in France there was no introduction of a special new offence of corporate homicide – only a change in the law that allowed companies to be prosecuted for homicide and many other offences under a principle of attribution that appears similar to that in England and Wales.

[26] Question 358

5.11 In effect the French situation in 1995 came to reflect the situation in England and Wales – and therefore is not a good example to make the point about the relative effectiveness of these laws. In addition of course there are so many other differences between OHS law and enforcement that a simple comparison made by the CBI is pointless.

INVESTIGATION POWERS

6.1 ACPO has sought additional investigating powers in relation to this offence.

- a power to enter premises upon authorization of a senior police officer to enter premises and seize material
- ability to compel an individual/company to provide specific information (which could not be used against him or her)
- provision of powers to experts assisting a police investigation.

6.2 We are in principle strongly supportive of these proposals. It is our experience (from our work-related death advice service casework) that companies (particularly large ones) and their legal representatives increasingly do what they can to prevent the police accessing information. This results in long delays to the investigation process – which the companies themselves then often complain about. It is our understanding that the information being sought is information that the police will usually eventually obtain – but because of obfuscation on the part of companies, the police may not get it for many many months. This delay will impact upon not only the speed but also the ability of the police to investigate the incident.

6.3 These are powers that the Serious Fraud Office has in relation to major fraud and we consider it appropriate for them to be available in relation to corporate manslaughter.

6.4 This is an issue that we know that the Home Office has considered – but we do not know why they have not taken this forward.

6.5 We do have an important caveat which needs to be explored. How would the presence of these powers impact upon evidence gathering in pursuit of an individual for gross negligence manslaughter? Clearly if an individual is going to be prosecuted for gross negligence manslaughter it would need to be on the basis of evidence that is collected under the current rules. This could result in a situation where some evidence is collected under new powers (to assist in the prosecution of the company) and other evidence collected under existing rules (to assist in the prosecution of an individual. We are concerned that this may complicate matters – we would like to know from ACPO how this would work.

6.6 We would also like to be clear that these additional powers are not in breach of the Human Rights Act 2000. We do not believe they are – since they exist in other parts of the criminal justice system – but this does need to be considered afresh.

REMEDIAL ORDERS, EQUITY FINES AND OTHER SENTENCING ISSUES

7.1 **Remedial Orders**: In its original response the CCA did not comment on the "remedial orders". In our view this is likely to be an almost worthless sentence to have available in this form, for the following reasons:

- it is inconceivable that the relevant regulatory body with powers over the activity that resulted in death – most often likely to be the HSE or Local Authority – would not have already used its enforcement powers to require changes to ensure the breach has been rectified;

- the power to remedy is very narrowly construed – the court only has the power to remedy the particular failure that was subject of the manslaughter prosecution.

7.2 Such an order would only make sense if the court was given wider powers, which would need to include:

- The power to ask a regulatory body or independent expert to undertake an audit of the organisation to consider its compliance with health and safety law beyond simply the offence that has been committed;
- The power to request that the regulatory body/expert report back on any recommendations for future action required;
- The power to order the organisation to make particular changes within a set time frame;
- The power to order the regulatory body/expert to report back to the court regarding compliance.

7.3 This would make the remedial order more like 'corporate probation' which is a power that exists in other jurisdictions and which would have a much greater impact and deterrent effect. Such a sentence should be used in addition to any cash fine imposed – and would be useful in relation to, for example, public bodies.

7.4 **Equity Fines**: The Committee asked a number of witnesses about 'equity fines'. An equity fine is a fine that can be imposed upon public limited companies. A court orders such a company to issue a certain number of new shares – that could be worth many millions of pounds. This would have the effect of lowering the value of all other shares, impacting upon shareholders who currently are unaffected by fines imposed upon a company despite the fact that they own it. This would allow the court to

impose much larger fines without affecting the ability of the company to continue to trade, or reducing the amount of money that the company can spend on safety.

7.5 The CCA supports this and indeed other sentencing proposals – for example, corporate probation, corporate community service, and adverse impact orders– but it would be our view that the Home Office is asked to look at all of the 'new' sentencing options in a holistic manner rather than selecting options without detailed and effective consideration. Many of these new sentencing options would be useful as part of a sentence imposed on public bodies.

OTHER GENERAL POINTS

Position of Directors

8.1 The Committee has asked witnesses a number of questions relating to the position of directors.

8.2 The CCA would like to note there are two separate though related issues concerning directors.

- liability/culpability: whether, attached to the new offence of corporate manslaughter, there should be an additional offence that would allow a director (or perhaps a senior manager) to be prosecuted for individually contributing to the offence by the company.

- directors' duties: this concerns a current gap in the law where directors have no positive obligations to ensure that their company complies with health and safety law. Directors' obligations are part of making companies safer; imposing such duties would not create any new offences, though it would also serve to make it easier to prosecute directors for existing safety and manslaughter offences.

8.3 It is important to note that the issue of directors' duties goes far wider than the issue of deaths. It would have general application, helping ensure that companies were safer. It would not be primarily about convicting directors.

8.4 Some witnesses have suggested that imposing duties should be part of this current Bill. We would suggest that this was not the right vehicle for such a reform – however as the Committee knows we are very supportive of this reform in a different legislative vehicle.

8.5 The Institute of Directors appears to suggest that individuals would not want to become directors if there was a real chance that if they acted with

gross negligence and caused a death, they might face prosecution[27]. Our response to this is as follows:

- there is no evidence from countries in Europe or from states in Canada/Australia which impose duties on directors or senior managers that directors are not willing to take up such positions'[28]

- directors at present face the threat of imprisonment in relation to breach of financial duties – and this does not seem to effect individuals wanting to be directors

- The Institute of Directors would surely not want to encourage individuals to take up directorships if as individuals they are not also willing to take certain steps to ensure that the company is safe.

Adomako Test

9.1 Witnesses from ACPO suggested that the new test should reflect the current common law test set out in Adomako[29]. The Adomako test is as follows:

> '... the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it could be judged criminal'.

9.2 This test has proved enduringly useful – but has been criticised for being circular. A crime has been committed if there is evidence of gross negligence; conduct is grossly negligent when conduct is considered to be criminal. It is therefore rather odd that ACPO suggests that it should be used as part of the new offence.

9.3 However the test of conduct being "far below what could be reasonably expected' is well understood in the context of dangerous driving and has not come under the same sort of criticism as the Adomako test.

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[27] See Q 251

[28] See "International Comparison of Health and Safety Responsibilities of Company Directors: Interim report". Research by the CCA for the HSE (2005)

[29] Q 431

Differences Between Safety and Manslaughter offence

10.1 It is important to distinguish between health and safety offences and the proposed corporate manslaughter offences.[30] These are as follows:

- the level of failure on the part of the company that is the basis of health and safety offences is failure to take all 'reasonable and practicable' care; for corporate manslaughter it is a failure that 'falls far below that could be expected.

- Health and safety offences can be proved through a reverse burden of proof – it is for companies to show that they took all reasonable and practicable measures; for corporate manslaughter, all elements of the offence must be proved beyond reasonable doubt

- a company will have committed a health and safety offence on the basis of failures on the part of *any* employee; for corporate manslaughter, under the proposed offence failures at a (senior) management level must be shown.

- for health and safety offence it is not necessary to show that the failure caused a death or any other event; for corporate manslaughter it is necessary to show that the failure was a 'significant cause' of the death.

Compliance with Health and Safety Law

11.1 Occasionally, the Committee has asked witnesses questions in which it was implied that there may be some circumstances when a company could be found guilty of the proposed offence if they complied with health and safety law[31].

11.2 We would like to make it clear that it could **never** be possible for a company to be prosecuted, yet alone convicted, of this offence, if they complied with health and safety law.

Numbers of Convictions

12.1 The Home Office has stated that it considers that there will be five new manslaughter prosecutions each year – and a number of witnesses have indicated that this is an appropriate number and it should not go higher.[32]

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[30] So for example, Q183 implied that these offences were similar: "So for example a question was asked of the railway industry. "you have already been prosecuted for pretty much the same offences as corporate manslaughter under health and safety legislation, though the title would be different. …. "

[31] For example Q 356 to the CBI, "If it is the case that you if you follow health and safety legislation properly, you are very unlikely to be found guilty …" and again Q.357

[32] See CBI, question 366

12.2 The CCA would just like to make it clear that – on the assumption that the Bill went though as proposed - the number of convictions should not relate to what the CBI or other bodies think appropriate. It should depend upon how many deaths are the result of failures that satisfy the legal test. It could be one case or it could be twenty cases – and it is not for the CBI or any other body, including ourselves, to say that this number is too small or too high. Such analyses are inappropriate during formulation of law, where the more appropriate question would be what is the appropriate legal test to hold organisations to account for grossly managed organisations that cause death

Main Contractor Issue

13.1 The Committee heard evidence that on a construction site the only company that should be liable to prosecution is the main contractor. In our view it is important not to confuse (a) the application of the offence on the basis of existing statutory duties/duties of care and (b) whether further duties should be imposed upon organisations.

13.2 There may be arguments for imposing new duties upon main contractors – as indeed there is for parent companies (see paras 1.13-1.16) - but any new offence would initially have to be applied under existing duties.

Imprisonment Under Health and Safety Law

14.1 This relates to the answer given by one witness to a question that inferred that imprisonment was available for breaches of health and safety law.[33]

14.2 A person can only be imprisoned for four technical offences: breach of a prohibition notices, offences involving explosives and two other such offences. A person can not be imprisoned in relation to general offences

Corporate Culpability Following Serious Injury

15.1 The Committee has asked two witnesses about serious injuries and whether there was a case for extending the offence to serious injuries[34].

15.2 It is not our view that this should be done at this point of time – however it is important to note that an offence similar to 'corporate GBH' does exist in a number of jurisdictions, including the USA and we are strongly supportive of the Committee asking Government to consider the introduction of the offence as part of future legal reform.

[33] Q 188
[34] Q 221 – 222

15.3 We support for example the arguments made by Rebecca Huxley Binns and Michael Jefferson[35].

Director Disqualification

16.1 Following on from Q 233 in the evidence session about director disqualification – it should be noted that under the present law only directors convicted *personally* of a health and safety or manslaughter offence can be disqualified.

Risk Aversion

17.1 At several points in the evidence session the issue of risk aversion has been raised, both in questions and in evidence given. We wish to make it clear that at no time has any actual evidence of risk aversion been cited - and indeed we do not know of any such evidence. reference to 'risk aversion' appears to be something that acquires truth through simple re-statement. Further, we would add that if any economic activity cannot be conducted whilst meeting minimal levels of occupational safety, then it is almost certainly right that it should not be conducted.

Unincorporated Bodies

18.1 We would just like to point out in the new Canadian Criminal Code which creates a a new principle of organisational liability, organisation is defined to include unincorporated bodies[36]. An organisation is defined as:

> "a public body, body corporate, society, company, firm partnership, trade union or municipality"

[35] Evidence 54, para 1
[36] To read about this see: http://www.corporateaccountability.org/international/canada/lawreform/new.htm