

CENTRE FOR CORPORATE ACCOUNTABILITY

Corporate Manslaughter and Corporate Homicide Bill

Briefing on Amendments

Lords Committee, 11 January 2007

The Centre for Corporate Accountability is a charity concerned with promoting worker and public safety. It has specific interest in the role of state bodies in enforcing health and safety law and in investigating and prosecuting work-related death and injury. It is the only national body advising bereaved families on investigation and prosecution issues following work-related deaths. It has been lobbying and briefing regarding corporate manslaughter legislation over many years.

If you would like further information on the matters discussed in this briefing, please contact either of the following:

David Bergman, Executive Director, at david.bergman@corporateaccountability.org.
Bethan Rigby, Casework/Policy Officer, at 020 7490 4494
bethan.rigby@corporateaccountability.org

CCA, Fourth Floor, 197/199 City Road, London EC1V 1JN
www.corporateaccountability.org

INDEX (with Amendments)

| | |
|--|-----------|
| Summary | 3 |
| Senior Manager Test | 4 |
| (New amendment, para 1.20) | |
| Unincorporated Bodies | 10 |
| Duty of Care and Public Body Exemptions | 12 |
| Duty of Care | 14 |
| Duty of Care and Parent Companies | 16 |
| Public Body Exemption | 17 |
| (New amendment para 3.24 and para 3.29) | |
| DPP's Consent for Private Prosecution | 19 |
| (New amendment para 4.10) | |
| Jurisdiction | 23 |
| (New amendment para 5.10) | |
| Sentencing | 25 |
| (New Amendments para 6.4) | |

Summary

The CCA welcomes the reform of corporate manslaughter law represented by this Bill. However we have a number of serious concerns about the efficacy of elements of this Bill. In summary our concerns are:

- the amended **senior manager test** will still allow large companies to evade accountability where they should be able to be prosecuted;
- the exclusion of **unincorporated bodies** from the scope of the Bill will lead to injustice;
- the requirement to show a breach of a **civil law 'duty of care'** rather than a breach of statutory ones, is inappropriate for a serious criminal law offence, and provides a loophole for public bodies;
- the series of **blanket exemptions of public bodies** undermine the claim to remove Crown immunity, and inappropriately limit the circumstances in which public bodies would be culpable;
- we are particularly concerned that deaths of member of the public resulting from the **activities of the police or prison staff** are excluded given the lack of effective alternatives for obtaining accountability in such cases;
- the requirement to seek permission of the Director of Public Prosecutions to launch a **private prosecution** is unnecessary and unfair;
- the exclusion from the jurisdiction of this offence of cases where the management failure causing harm took place in the UK but the harm itself did not makes this Bill at odds with the law for individuals on manslaughter, and fails to make companies accountable for **deaths overseas** resulting from acts of extreme negligence committed in the UK.
- the lack of sentencing powers given to the courts.

All specific references to the Bill are to the version printed on 5 December 2006.

1. THE “SENIOR MANAGER” TEST (Clause 1(1) and 1(3))

- 1.1 These new clauses in the Bill are crucial to the application of the offence. It is our view that these clauses remain unsatisfactory and do not resolve the problems that were almost universally perceived in the original clause 1.
- 1.2 We are concerned that there appears to be a view in both the Commons and the Lords that the Government’s amendments on the senior manager test are satisfactory. In the third reading of the Bill in the Commons no member of parliament spoke about these clauses and, in the second reading of the Bill in the Lords only two out of the 24 Lords referred to the new test.
- 1.3 Further consideration by the Lords of these clauses is essential. At the end of this discussion we propose a new amendment - a version of which was debated at the Committee stage in the Commons but subsequently withdrawn.

Original Bill

- 1.4 Clause 1 of the original Bill had stated:

“An organisation to which this section applies is guilty of an offence if the way in which any of its activities are managed or organised **by its senior managers**—
(a) causes a person’s death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”.

- 1.5 This was criticised as it would have:
- encouraged companies to delegate safety responsibilities outside of the circle of senior managers in order to escape the possibility of prosecution;
 - prevented systemic failures within a company (which inevitably involve failures below senior management level) from being subject to a successful prosecution. It was these failures, identified in disasters including those at Hatfield, Zeebrugge and Kings Cross which the Bill was supposed to engage.
- 1.6 This has now been amended to:
- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
(a) causes a person’s death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior

management is a substantial element in the breach referred to in subsection (1).

1.7 Rather than it being necessary that the relevant failure, deemed to be a gross breach and a cause of death, was **wholly** that of senior managers, it is only necessary that a **substantial element** of the failure must be that of the ‘senior management’.

1.8 Although there is a change in language from senior ‘managers’ to senior ‘management’, the definition of senior management remains similar to the previous definition of senior manager. Clause 4(c) states:

“senior management”, in relation to an organisation, means **the persons** who play significant roles in—
(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
(ii) the actual managing or organising of the whole or a substantial part of those activities.

1.9 The CCA accepts that this amendment was an improvement from the original test – but there remain significant problems that will prevent the offence having the impact for which it was intended.

What the Government has said about the new test

1.10 In the Third reading in the Commons, the Under-Secretary of State said:

“The test for the offence had been improved during the Bill’s consideration. The ‘Senior Manager’ test has been removed, replaced by a wider formulation that is based on the management of the organisation’s activities. There remains a need to show a substantial failing at a senior level. We are satisfied that that gets the balance right. The question is whether the organisation as a whole failed, and a key factor in that must be the conduct or omissions of its senior management. It also means that senior management must take their responsibilities seriously or risk the possibility of prosecution.”¹

1.11 Earlier at the Committee stage, he stated:

“We do not think that it is right that an organisation could be guilty if there was only a minimal element of senior management failure in the gross breach.”²

“There has also been an accusation that by making senior management failures part of the test, we will somehow encourage senior managers to delegate responsibility for health and safety—a point made by the hon. Member for Kingston and Surbiton. That is clearly wrong. The new test reinforces the Government’s message

¹ 4 December, Column 116

² Column 20, day one of committee

that health and safety should be led from the top of organisations. Only companies whose senior managers take seriously their responsibility for health and safety can be sure of avoiding liability for prosecution for the offence.”³

1.12 We have the following concerns about these statements:

- It is not correct that the ‘senior manager’ test has been removed. It remains clearly present. A gross failure within the management of an organisation will not result in the organisation’s prosecution unless a substantial element of the gross failure is at a senior management level.
- It is not correct to say that the question at the heart of the offence is ‘whether the organisation as a whole has failed’ – since there will be no offence unless senior management played a substantial part in the gross failure that caused the death.
- It is highly debateable whether the offence creates an incentive for senior management to take their responsibilities seriously. The offence continues to create more of an incentive on the part of senior management to delegate their responsibilities down the chain of management – and as long as that delegation was not that unreasonable, the company will escape prosecution however serious the failures at a lower level within the organisation. For same reason, we do not accept that, the “new test reinforces the Government’s message that health and safety should be led from the top of organisations” – since immunity from prosecution can be ensured if top management take minimal responsibility for safety.
- The Government says that that an organisation should not be found guilty if there was only a “minimal element of senior management failure in the gross breach.” In our view this is the wrong way to put it. Rather, we think that an organisation should not be found guilty if it had taken all reasonable steps to avoid a gross failure at a lower level within the organisation. This articulation – which is at the centre of our proposed amendment – does very clearly support the Government’s message that health and safety should be led from the top of organisations.

Issue of Systemic Failure continues

1.13 However, perhaps the most significant concern we have about this new test is that the change in the requirement from needing **all** of the gross failure to be at a senior manager level to the requirement that there be a **substantial** element of the gross failure at the senior manager level does not ensure that companies whose systemic failures cause deaths would be brought to account – and therefore does not satisfy the original purpose of the legislation.

1.14 These purposes have been articulated in various ways by the Government:

³ Column 21, day one of committee

- to deal with “large companies with complex management structures [that] have proved difficult to prosecute for manslaughter under the current law;⁴”
- to ensure that prosecutions following disasters like the Zeebrugge disaster (“from top to bottom the body corporate was affected by the disease of sloppiness”⁵) and the Hatfield disaster (“the worst example of sustained, industrial negligence in a high-risk industry”⁶) are more likely to be successfully prosecuted in the future⁷;
- to hold to account “systemic failures in the company or corporate organisation as a whole;⁸”
- target failings where the “corporation as a whole has inadequate practices or systems for managing a particular activity”⁹;
- to allow the courts “to look at collective management failure within an organisation;¹⁰”
- to allow “the consideration of the institutionalised, systemic fact of failings at a lateral level, not just among the top people;¹¹”
- to establish a test “that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies;¹²”

1.15 There continues to be a mismatch between what the Government states that it wants the offence to achieve and what the offence actually will achieve. To say, in the context of safety, that a company has complex management systems means that safety responsibilities are located with different individuals who are at different management levels within the organisation – and that it is difficult to identify where responsibility lies. To say there is serious corporate negligence – sometimes described as ‘systemic’ negligence or ‘collective’ failures – also means that the failures within the company are at different levels within an organisation, some at a lower and middle manager level, others at a senior manager level. It also tends to mean the failures at a mid/lower level within an organisation can be linked to some kind of failure, though not necessarily a serious one, at a senior manager level and that whilst any one failure within an organisation may not be grossly negligent, in aggregation they are.

1.16 The new test does not capture deaths resulting from these kinds of management failures.

⁴ Corporate Manslaughter: The Government’s Draft Bill for Reform (2005), para 9

⁵ Sheen Inquiry

⁶ Judge in sentencing companies for health and safety offences.

⁷ Corporate Manslaughter: The Government’s Draft Bill for Reform (2005), para 10; and Home Minister’s speech at second reading of the Bill, Hansard, 10 October 2006, para 192.

⁸ Home Minister’s speech at second reading of the Bill, Hansard, 10 October 2006, Column 194

⁹ Corporate Manslaughter: The Government’s Draft Bill for Reform (2005), Para 28

¹⁰ Home Minister’s speech at second reading of the Bill, Hansard, 10 October 2006, column 196

¹¹ Home Minister’s speech at second reading of the Bill, Hansard, 10 October 2006, Column 198

¹² Corporate Manslaughter: The Government’s Draft Bill for Reform (2005), para 25

- 1.17 This relationship between individual senior management failing and collective failure is well illustrated by the prosecution that took place following the Hatfield train crash. On the one hand the judge stated that this was “one of the worst cases of industrial negligence” he had ever seen; but on the other hand he ruled that there was insufficient evidence against any directors and senior managers for either manslaughter or health and safety offences (for which only proof of ‘neglect’ is required). Since the proposed homicide test requires there a substantial element of the grossly negligent failures must be at a senior manager level, prosecution under the new amended offence would **not** have resulted in any different result against the companies responsible for the Hatfield train crash. This also applies to the Zeebrugge disaster. As the Sheen Inquiry stated, “from top to bottom the body corporate was affected by the disease of sloppiness”. These were failures at all levels – and it is unclear whether the senior level conduct would be deemed a substantial element of the gross breach that caused the death.

Drafting Concerns

- 1.18 We also have some drafting concerns about the current offence. Since it is necessary that a substantial element of the failure must be that of the ‘senior management’, and senior management refers to “the persons”, it would seem that it would be necessary to show that more than one person at senior manager level must be substantially involved in the failure. At least the following changes would need to be made:

- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised **by one or more persons at a senior management level** is a substantial element in the breach referred to in subsection (1).

“senior management **level**”, in relation to an organisation, means the persons who play significant roles in—

- (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- (ii) the actual managing or organising of the whole or a substantial part of those activities.

- 1.19 In addition the new ‘senior manager’ test involves an additional level of complexity to an offence that is already quite complicated. In addition to proving duty of care, causation, and gross failure, the senior manager test now requires proof that:
- a ‘**substantial**’ element in the breach is conduct on the part of individuals deemed to be at a senior manager level
 - the individuals must have played a **significant** role in the making of decisions/actual managing or organising of at least a **substantial** part of the organisation’s activities.

This would not be easy for members of the jury to understand.

New Amendment

- 1.20 The CCA accepts that in order for an organisation to be prosecuted for a manslaughter or homicide offence:
- there must be a gross management failure within the organisation;
 - this failure must be a cause of death;
 - this failure cannot simply be an isolated gross failure at a low level within an organisation;
 - there must therefore be **some failure at a senior level** within the organisation.
- 1.21 However, it should not be necessary to show that a substantial part of the **gross failures** identified within the organisation were actually at a senior manager level, as long as it can be shown that senior management failed to take all reasonable precautions that would have prevented the gross failure – in short that they had exercised due diligence.
- 1.22 An organisation should be liable to be prosecuted for a corporate manslaughter offence, where there is (a) death caused by (b) gross management failure within the organisation and (c) reasonable precautions at a senior manager level would have prevented this death.
- 1.23 We therefore would propose an amendment along with following lines:
- “An organisation to which this section applies is guilty of an offence:
- (a) if the way in which any of its activities are managed or organised;
 - (i) causes a person’s death
 - (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, and
 - (b) the gross breach would have been prevented had all reasonable precautions been taken and all due diligence been exercised by those at a senior management level within the organisation.”
- 1.24 The concept of “due diligence” is well known within business circles as it is used in financial control, consumer protection and product safety legislation. It is also well known in the health and safety context as it is a defence under Control of Substances Hazardous to Health Regulations 1988.
- 1.25 This would also make the offence reflect the doctrine of ‘command responsibility’ that characterises international war crimes law, and is enacted in English law in Section 56 of the International Criminal Court Act 2001¹³.

¹³ (1) This section applies in relation to -

(a) offences under this part, and
(b) offences ancillary to such offences.

(2) A military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where -

(a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, and

Here a military commander is guilty of an offence if (a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, and (b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

- 1.26 In our proposed amendment, the company is guilty if there was a failure at senior manager level to take action to prevent grossly negligent failures that cause a death.

(b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is responsible for offences committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates where -

(a) he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offences,

(b) the offences concerned activities that were within his effective responsibility and control, and

(c) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(4) A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.

(5) In interpreting and applying the provisions of this section (which corresponds to article 28) the court shall take into account any relevant judgment or decision of the ICC.

Account may also be taken of any other relevant international jurisprudence.

2. UNINCORPORATED BODIES (clause 1(2))

2.1 The offence does not apply to unincorporated bodies - for example, schools, clubs, parish councils, or business partnerships, including many solicitors' firms and trade unions. The reason given by the Home Office for this exclusion is that, unlike corporate bodies, unincorporated bodies do not have a distinct legal personality. The consultation paper said that the lack of legal personality:

“has implications for the proposed offence. Care needs to be taken when considering what duties of care could and should be assigned to an unincorporated body itself for the purposes of the offence. The concept of manslaughter failure has less ready application in the absence of a recognised structure where designated post holders must be appointed and formally represent the company. And there are questions about the appropriateness of prosecuting a body with no separate status and with a potentially changing membership for an offence that seeks to identify failings within the organisation that can be considered as failings of the body itself”.¹⁴

2.2 These arguments are however unpersuasive.

- Whilst It is correct to say that since unincorporated bodies have no separate legal identity, they have no recognised duty of care as an organisation, it would be quite straightforward to deal with this problem by inserting a clause to the effect that “for the purposes of this legislation, the management board of any unincorporated body has the same duties as those of corporate bodies”.
- Whilst some unincorporated bodies have no permanent personnel and an ever changing membership - for many if not most, the organisation has as much permanence as a company – law firms, large partnerships, trade unions, and schools for example. These have the same permanent characteristics as a company.

2.3 In addition, in principle, the exclusion of unincorporated bodies from this Bill is unnecessary and unfair. Many unincorporated organisations have the potential to cause death through gross negligence to employees and members of the public and this legislation could be amended to fairly hold them to account.

2.4 **Human Rights:** Further, as Andrew Dismore MP noted during the Report stage debate:

“The Human Rights Committee said that it could lead to our being in breach of article 14 of the European Convention on Human Rights, when applied in conjunction with the right to life in article 2, because of the discrimination within the system whereby if one person was killed an offence would be committed, but if another person was

¹⁴ Para 42

killed in identical circumstances an offence would not be committed simply because one happened to be killed by a company and another by a partnership or trade union, school or other unincorporated association. That cannot be right.”¹⁵

2.5 A concern had been raised at Commons Committee stage that such inclusion might lead to unfairness. It was suggested that this could happen for example if one partner in a two-partner operation was grossly negligent and the other had no knowledge of this, it would not be appropriate to prosecute the organisation¹⁶. However, this is exactly the same situation faced now – and would be faced in the future - in relation to small *companies* with two directors (one of whom is grossly negligent and the other is not). Should the company be prosecuted in such a situation? Now, as in the future, prosecutorial discretion – and the application of the Code for Crown Prosecutors – would mean that in practice the organisation would not be prosecuted.

2.6 **Reversal of Previous Position:** the Home Office consultation document¹⁷ in 2000 proposed that (in conflict with the Law Commission proposals at the time) the new offence should apply to all employing organisations whether or not they were incorporated. The Home Office made the following comments in its consultation document:

“3.2.3 However, as the Law Commission acknowledged, there is often little difference in practice between an incorporated body and an unincorporated association. The Law Commission's proposal could therefore lead to an inconsistency of approach and these distinctions might appear arbitrary.

“3.2.6 The Government too does not wish to create artificial barriers between incorporated and non-incorporated bodies, nor would we wish to see enterprises deterred from incorporation, which might be the case if the offence only applied to corporations. The Government is therefore inclined to the view that the offence should apply to all “undertakings” rather than just corporations.”

¹⁵ 4 Dec 2006, column 82

¹⁶ this was discussed at the Report stage, 4 Dec 2006, column 83

¹⁷ Published in the summer of 2000.

3. DUTY OF CARE AND PUBLIC BODY EXEMPTIONS (clauses 2, 3, 4, 5, 6, and 7)

3.1 Although the Bill removes Crown immunity in part, it contains a number of wide exemptions that act, principally, to provide effective immunity to public bodies that cause deaths of members of the public in a wide range of circumstances – however grossly negligent their conduct. In its recently published report, the Joint Committee on Human Rights noted:

“the combined effect of ... provisions in the Bill restricting the definition or the scope of application of the offence is substantially to restore the legal or de facto immunity from prosecution enjoyed by many public bodies under the present law.”¹⁸

3.2 In summary, the Bill will **prevent** the following deaths from resulting in a prosecution however negligent the public body involved has been:

- any death of a member of the public at the hands of a public body, where the courts have not already ruled that there is a ‘duty of care’ relationship within the explicit ‘duty of care’ relationships set out in the Bill;
- any death of an employee or a members of the public resulting from “public policy decision making (including in particular the allocation of public resources or the weighing of competing public interests).”;
- any death of a person arising from inspection activity by a State body;
- any death of army personnel, police officers or members of the public who die either (a) during different kinds of operations in which armed forces or police forces come under attack or face the threat of attack or violent resistance or (b) during training of a hazardous nature or training carried out in a hazardous way in relation to these operations;
- any death of a member of the public arising from:
 - police or prison custody;
 - response by emergency services to an emergency situation;
 - activities of local authorities, local probation board and other public bodies whilst carrying out their responsibilities under the Children Act and other legislation.

3.3 These exemptions are brought about through:

- underpinning the offence using civil law ‘duties of care’. This limits the circumstances when public bodies can be held responsible for deaths of members of the public.
- a set of specific exemptions which further limit and specify the application

¹⁸ Para 1.39

of the offence.

- 3.4 In addition, the underpinning the offence with a duty of care principle also means that parent companies will not be able to be prosecuted.

Duty of Care

- 3.5 In order for an offence to have been committed under the current Bill, it is necessary for there to have been a breach of a 'relevant duty of care', as defined in clause 2.

- 3.6 We think that not only should any breaches of duties of care result in a prosecution but also that any gross breach of any statutory duties that have been imposed upon companies and public bodies. The reasons for this are set out below.

- 3.7 **Duty of Care principles are insufficient to underpin a corporate manslaughter offence:** It is insufficient for a criminal law offence like manslaughter to be limited in its application by a set of civil law principles which – in the context of public bodies - were drawn up in the context of deciding whether or not public bodies should and could afford to pay compensation in situations which most often would not have involved deaths or gross negligence.

- 3.8 Criminal law has its own particular public policy objectives that are entirely different from those under consideration when civil law courts assess whether there should be a 'duty of care' for compensation purposes.

- 3.9 This point was discussed in Court of Appeal case of Wacker¹⁹ which stated:

“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.

¹⁹ [2003] 1 Cr App R 329. 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'.

“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 [which meant that there was no duty of care relationship]. Public policy, in our judgment, manifestly points in totally the opposite direction.”²⁰

- 3.10 This paragraph sets out exactly the reasons why it is entirely insufficient to ground the manslaughter offence solely on a civil law doctrine which is based on a set of public policy issues entirely different from the needs and purpose of the criminal law.
- 3.11 The Parliamentary Scrutiny Committee also proposed that “the Home Office should remove the concept of ‘duty of care in negligence.’”
- 3.12 Civil law duty of care principles are more limited in their application to public bodies than existing statutory duties. The Home Office may well be right to argue that the ‘management failure’ at the heart of the offence should be circumscribed by explicitly stated ‘duties’ to act; that is to say that there can only be a management failure if there is a corresponding duty to act.²¹ However the Home Office has chosen the more limited set of duties contained within civil law ‘duties of care’ than the wider set of obligations contained in statutes – in particular those contained in section 2 of the Health and Safety at Work Act 1974 (HASAW). Whilst these duties are very similar in the context of employer relations towards employees, they are significantly different in the context of the duties of public bodies towards members of the public.
- 3.13 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 financial compensation, the courts quite understandably have taken into account public policy factors appropriate solely to the fact that it is a request for financial 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 have to pay out damages from the public purse. As a result of these reasons – which are specific to civil liability issues - the courts have stated that certain public body activities do **not** raise ‘duty of care’ relationships.
- 3.14 Section 3(1) of the HASAW Act, however, imposes duties upon all employers – including these very same public bodies – that do not take into account these factors. This states:

²⁰ Para 33 and 35

²¹ Though the Independent Parliamentary Committee did argue that “the offence should not be limited by reference to any existing legal duties”. Instead it recommended “that whether an organisation has failed to comply with any relevant health and safety legislation should be an important factor for the jury in assessing whether there has been a gross management failure.”

“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.”

- 3.15 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 of the 1974 Act.
- 3.16 Public bodies can be, and are, prosecuted for breaches of section 3 of the 1974 Act. It is our view that if there has been a gross breach of a statutory obligation relating to safety, and not one of ‘duty of care’, a manslaughter charge would be appropriate. Using statutory obligations rather than duties of care would not impose any new duties upon organisations, since these duties currently exist in law for over thirty years and can result in prosecution. In our view therefore, the new offence should apply not only to gross breach of duties of care that result in a death but also to gross breaches of statutory obligations.
- 3.17 **Duty of care principles prevent application of offence to parent companies:** The Explanatory Note on the Bill is silent about the culpability of parent companies. In its original consultation, the Home Office stated that:
- “Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of one of the activities covered by the offence and a gross management failure by its senior managers caused death”.
- 3.18 In our view this is a misleading and disingenuous assertion, since it gives an impression that parent companies could (assuming grossly negligent conduct could be found at a senior management level of a parent company) be prosecuted.
- 3.19 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.²² 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.
- 3.20 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 1974 Act.

²² 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

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

3.22 In its report, the Parliamentary Scrutiny Committee accepted this point. It stated:

“We are concerned by the suggestion that it may not be possible to prosecute parent companies under the current law, as courts have not ruled that parent companies have a duty of care in relation to the activities of their subsidiaries. This is an additional argument in favour of our recommendation that the offence should not be based on civil law duties of care.”

3.23 We agree with the suggestion made by James Brokenshire MP during the Commons Report Stage debate that “if a corporation whose subsidiary commits an offence has not taken all reasonable steps to prevent that, there may be further liability for which the sanction would be a fine.”²³

3.24 Proposed Amendment

Clause 2:

Page 2, Leave out lines 17-29 and insert, “duties owed by it under the law of negligence to any person or by statute”.

Public Body Exemptions

3.25 Apart from the application of ‘duty of care’ the Bill contains a raft of exemptions specifically relating to public bodies – some of which are specific to a particular public body. In our view any gross breach of a duty of care of statutory duty should result in a manslaughter prosecution.

3.26 The briefings by Liberty and Justice contain some detailed arguments about individual exemptions, which the CCA supports. The CCA would however like to make the following points.

Government justifications for exemptions are not adequate:

3.27 The CCA appreciates that when public demands were first articulated about need for reform in this area – after the failed prosecution of P&O European Ferries for the Zeebrugge disaster in 1991 - they were centred upon the difficulty in prosecuting medium-to-large sized private companies and were not focused upon State bodies. However fifteen years later the public’s concern has broadened, and there is now a legitimate view that deaths resulting from the kinds of activities that Crown and other public bodies perform, whether

²³ 4 Dec 2006 column 78

private bodies undertake them or not, should, in the most serious cases, result in criminal accountability.

3.28 We do not think that extant mechanisms of accountability can be seen as replacements of the need for corporate manslaughter investigation and prosecution in cases where the most serious failures have taken place. In relation to the 'alternative' mechanisms of accountability referred to by the Government, we would like to make the following points:

- Ministers may or may not be questioned in Parliament about a particular death – but when this does happen it cannot be a forensic and searching forum capable of finding out the level of failure that has taken place. Those asking the questions may well have extremely limited information about the circumstances of the death. Whether or not ministerial 'accountability' takes place in a particular set of circumstances is entirely arbitrary and accidental;
- We are not sure how judicial review would be an appropriate remedy following such a death, or how that might bring accountability. If the offence does not apply, there is no decision in such a case not to investigate or not to prosecute that could be subject to a public law remedy – so judicial review for failure to investigate or prosecute manslaughter would never be an option for a bereaved family;
- It is only rarely that such deaths will be subject to public inquiries and independent investigations, and indeed a Government (including the current one) may often do all it can to prevent these taking place. New legislation on public inquiries has been passed recently, which many critics have indicated now makes it much more difficult to get a public inquiry at all;
- Ombudsman inquiries are of last resort and will only take place following other inquiries which are considered by the family as inadequate. They are concerned with maladministration and not the level of gross failure that would be the subject of manslaughter inquiries. In relation to prison ombudsmen, it is only recently that inquiries are undertaken by people 'independent' of the prison and discussions with lawyers and the organisation Inquest indicate that these inquiries can be cursory and overly favourable to the prison.

Serious Risk of breaching European Convention of Human Rights:

3.29 Over and above the points made by Liberty and Justice in their briefings, it is important to note that the Joint Committee on Human Rights concludes that the effect of the various exemptions means that the Government will be at serious risk of violating Article 2 of the European Convention on Human Rights – the right to life. This is worth quoting fully:

“1.43 In our view the effect of these provisions is to give rise to a serious risk that the UK will be found to be in breach of Article 2 ECHR in the particular circumstances of a future case where

the case-law of the Court requires that there be recourse to the criminal law. In particular, the effect of these provisions in the Bill is to preclude the possibility of prosecution for corporate manslaughter in precisely those contexts in which the positive obligation in Article 2 is at its strongest, and may require, in a particular case, that criminal prosecutions be brought: the use of lethal force by the police or army; deaths in custody; deaths of vulnerable children who should be in care, to name just a few examples. This would mean, in situations where responsibility for the death lay with the public body for a management failure, rather than any identifiable individual, recourse to the criminal law would not be possible.

- 1.44 In the Explanatory Notes the Government seeks to justify this restricted application of the new offence to public bodies, or bodies exercising public functions, by relying on the availability of other avenues of accountability. Yet it is precisely in these sorts of cases that the case-law of the European Court of Human Rights stresses the inadequacy of other mechanisms of accountability and the importance of the deterrent effect of the judicial system in place and the significance of the role that system is required to play in preventing violations of the right to life.
- 1.45 In our view one topical example suffices to demonstrate the point. The Office of the Commissioner of the Metropolitan Police is currently being prosecuted under the Health and Safety at Work Act in respect of the shooting of Jean Charles de Menezes. If, hypothetically, that shooting were established to be the result of gross negligence on the part of the senior management of the Metropolitan Police, but not attributable to one individual officer who could be described as the controlling mind of the organisation, under this Bill as drafted it would not be possible for the Metropolitan Police as a public authority to be prosecuted in respect of the death. It would still only be possible to bring proceedings against the Metropolitan Police as a public authority under health and safety legislation, for a much less serious offence. In such circumstances, it seems to us that there is a very strong likelihood that the UK would be found to be in breach of the positive obligation in Article 2 for the very same reason that Turkey was found to be in breach in *Oneryildiz*: that the criminal offences charged did not reflect the seriousness of the conduct which led to the death, and the “judicial system” in place was not adequate to secure the full accountability of State authorities for their role in the death.”

3.30 **Amendment**

Removal of Public Policy Decisions and Exclusively Public Functions

Clause 3, page 3,
Stand Part

Removal of Military Activity Exemption

Clause 4, page 4,
Stand Part

Removal of Policing, Law Enforcement and Emergency Services exemption

Clause 5, page 4, Stand Part
Clause 6, page 5, Stand Part

Removal of Child Protection and Probation Exemption

Clause 7, page 6, Stand Part

4. DPP'S CONSENT FOR LEGAL PROCEEDINGS (Clause 15)

4.1 Section 15 of the Bill states that:

“Proceedings for an offence of corporate manslaughter—

- (a) may not be instituted in England and Wales without the consent of the Director of Public Prosecutions;
- (b) may not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland”.

4.2 **Reversal of Position:** The need to obtain the consent of the Director of Public Prosecution (DPP) is a reversal of both the position of the Law Commission recommendation in 1996 and the Home Office's own consultation document in 2000 – both of which stated that there should be **no** requirement for individuals to gain consent from the DPP before bringing proceedings. The Law Commission stated in its 1996 report that:

“[T]he right of a private individual to bring criminal proceedings, subject to the usual controls, is in our view an important one which should not be lightly set aside. Indeed in a sense it is precisely the kind of case with which we are here concerned, where the public pressure for a prosecution is likely to be at its greatest, that that right is most important: it is in the most serious cases such as homicide, that a decision not to prosecute is most likely to be challenged. It would in our view be perverse to remove the right to bring a private prosecution in the very case where it is most likely to be invoked.”

4.3 **Companies and Crown bodies in privileged position:** Moreover it is not clear why companies and Government bodies should be provided this additional right, since private prosecutions can be taken against individuals for manslaughter without the requirement for DPP consent.

4.4 Why are companies and Crown bodies being placed in this privileged category? The Law Commission in its 1998 report on “consents to prosecution” specifically rejected the idea that particular classes of defendants (like doctors) should be treated differently. The Government has failed to justify why consent is only required when prosecuting companies and Crown bodies for homicide offences.

4.5 **Against Law Commission 1998 Report on “Consent to Prosecution”:** In addition, the Government's current position directly contradicts the general conclusion of Law Commission's 1998 report that there should be only three categories of offences for which a consent provision should be required:

- “(1) where it is very likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;
- (2) those which involve the national security or have some

international element;

- (3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.²⁴

4.6 In relation to (3), the kinds of offences the Law Commission suggested were "misfeasance of public office" or an offence relating to "misuse of trade secrets". Manslaughter offences were not included. It should be noted that the Law Commission firmly concluded that "a consent provision cannot be used as a mechanism to prevent the harm caused by evidentially weak private prosecutions."

4.7 **Rejection by Independent Parliamentary Scrutiny:** The Home Office justified the need for DPP consent in the 2005 consultation by saying that "there was significant concern" amongst those that responded to the Home Office 2000 consultation document that:

"this would lead to insufficiently well founded prosecutions, which would ultimately fail and would place an unfair burden on the organisation involved with possible irreparable and personal harm. The Government recognises these concerns."

4.8 The Independent Parliament Scrutiny Committee stated that:

"We consider that the interests of justice would be best served by removing the requirement to obtain consent. We are persuaded that this recommendation would not lead to spurious and unfounded prosecutions, as there exist a number of other obstacles to bringing a private prosecution for corporate manslaughter. We recommend that the Government remove the provision ... requiring the Director of Public Prosecution's consent before a prosecution can be instituted."²⁵

4.9 The Committee had pointed out that costs are a very significant barrier to private prosecution and that manifestly unfounded prosecutions can be quashed by the Judge at an early stage in proceedings. In fact there has, till now, only ever been one attempt at initiating a prosecution following a work-related death.²⁶ The Committee also pointed out the potential conflict of interest that may exist when the DPP is considering whether or not to prosecute a Crown body.

4.10 Amendment

Clause 15, page 12, line 10:

Leave out the whole clause

²⁴ Para 1.24, Law Commission, "Consents to Prosecution (1998)

²⁵ Para 340. Home Affairs and Work and Pensions Committee (Dec 2005)

²⁶ Prosecution following the Marchioness disaster

5. JURISDICTION – APPLICATION TO DEATHS OUTSIDE BRITAIN (Clause 22)

- 5.1 Clause 22 sets out the rules of jurisdiction for this offence. It states:
- the offence applies to England and Wales, Scotland and Northern Ireland;
 - the offence only applies if the 'harm resulting in death' is sustained:
 - in these countries;
 - within the territorial sea adjacent to the United Kingdom;
 - on a UK registered ship or British-controlled aircraft or hovercraft (as defined in specified legislation);
 - on territory related to offshore activities (as defined in specified legislation).
- 5.2 In effect this means that any company, based in any country, can be prosecuted as long as the harm that caused the death took place in the UK. So if the management failure of the company took place outside the UK but the harm took place inside the UK, the company could be prosecuted. However the offence will **not** apply in either of these situations set out below:
- the management failure took place within the UK, but the harm took place outside the UK;
 - the management failure took place outside the UK, and the harm took place outside the UK.
- 5.3 **Inconsistent with application to individuals:** It is important to consider the issue of jurisdiction for this new offence within the context of the current principles of jurisdiction for the offence of manslaughter as it applies to individuals. Through the application of section 9 of the Offences against the Person Act 1861, the English and Welsh courts have very wide jurisdiction over the offence of manslaughter as it applies to individuals. Any British citizen who commits manslaughter outside England and Wales can be prosecuted in England and Wales. That is to say the individual could be prosecuted for the offence in the following situations:
- gross negligence inside England and Wales, death outside.
 - gross negligence outside England and Wales, death outside.
- 5.4 The CCA accepts that it may not be appropriate to simply reflect 1861 legislation in 2006/7, but since corporate manslaughter is a sister offence to the individual crime of manslaughter, Parliament should give greater consideration to how the question of jurisdiction should apply.
- 5.5 There may well be particular difficulties to applying corporate manslaughter to situations where both the management failures and the harm took place abroad, as this would in effect mean that UK health and safety legislation would have to apply outside Britain. (Though it should be noted that at present the police do sometimes investigate the conduct of individuals in these cases.)

However, in our view it is certainly realistic to allow the offence to apply to situations where the management failure took place in Britain but the harm resulting in the death took place abroad. This we think would in most cases be easier to investigate than the situation where the death takes place in England or Wales but the management failure takes place outside – where the new offence would apply.

5.6 The Parliamentary Scrutiny Committee accepted this principle:

“We believe that in principle it should be possible to prosecute a company for corporate manslaughter when the grossly negligent management failure has occurred in England or Wales irrespective of where a death occurred. If this was not the case, there would be no incentive for such companies to improve or maintain acceptable standards of health and safety in the activities they conduct abroad.”²⁷

5.7 **British companies can be prosecuted for corruption offences abroad:** The Home Office has stated that “there would be very considerable practical difficulties if we were to attempt to extend our jurisdiction over the operation of companies registered in England and Wales. Such difficulties would mean that the offence would in practice be unenforceable.”

5.8 However the Anti-Terrorism, Crime and Security Act 2001 allows the British courts extra-territorial jurisdiction over corruption and bribery offences committed by both British companies and British nationals when these offences are committed abroad.²⁸ The Government has not explained why corruption by British companies is so much easier to investigate and prosecute when they taken place abroad compared to when deaths take place abroad.

5.9 As the Parliamentary Scrutiny Committee stated:

“We also note that there is a general trend of increased extra territorial application for crime. Money laundering and sex trafficking are two such examples. The Attorney General also recently spoke proudly of having secured a conviction of a non-British citizen for torture committed in Afghanistan (using international war crime law).”²⁹

5.10 **Amendment**

A new clause 23(5) to be added:

“Section 1 also applies if the harm resulting in the death took place outside the United Kingdom, but the conduct set out in section 1(1) of this Act took place substantially within the United Kingdom”

²⁷ Para 253, Home Affairs and Work and Pensions Committee Report (Dec. 2006)

²⁸ Section 109, of the Act. Though the committee only recommended that this should apply to deaths in the European Union (para 254)

²⁹ Para 253, Home Affairs and Work and Pensions Committee Report (Dec. 2006)

Sentencing

- 6.1 The need for courts to have powers to impose sentences on organisations convicted of this offence beyond cash fines and remedial orders is clear. There is no point in having an offence of this nature unless the sentences fit both the crime and the kind of offender – and the offence and resulting sentences contain the power to deter. At the very late stage in the Commons, the Government accepted that it needed to give consideration to this – even though for over a year the CCA and other organisations have raised this issue with them.
- 6.2 The CCA has recently undertaken for the Health and Safety Executive research on sentencing in Australia, Canada, the USA, France, Germany, Sweden and Netherlands. Below are the list of sentences that are used in one of more of these jurisdictions against convicted companies for either health and safety or conventional crime offences:
- i. criminal fines;
 - ii. enforced donation orders;
 - iii. victim surcharge (compensation) orders;
 - iv. orders for the confiscation of offence related profits;
 - v. organisational reform orders;
 - vi. community service orders;
 - vii. publicity orders;
 - viii. orders for reparation, restitution and restoration;
 - ix. corporate probation orders;
 - x. revocation orders;
 - xi. disqualification orders;
 - xii. prohibition orders;
 - xiii. dissolution orders;
 - xiv. training orders;
 - xv. good behaviour bonds;
 - xvi. judicial supervision;
 - xvii. dissolution orders (the liquidations of an offending organisation or part of the organisation);
 - xviii. tender disqualification;
 - xix. share prohibition.
- 6.3 The House of Lords also needs to be aware that in 1988, the Council of Europe published a Recommendation “Concerning liability of enterprises having legal personality for offences committed in the exercise of their activities”.³⁰ In relation to Sanctions, this recommendation proposed a number of sanctions including the following:
- prohibition of certain activities in particular exclusion from doing business with public authorities
 - exclusion from fiscal advantages and subsidies

³⁰ R(88) 18

- prohibition upon advertising goods or services
- annulments of licenses
- appointment of a provisional caretaker management by the judicial authority
- closure of the enterprise
- winding up of the enterprise
- compensation and/or restriction to the victim
- publication of the decision imposing a sanction or measure

Amendments

6.4 The CCA is proposing the following amendments, based on provisions in Australian, Canadian and French criminal codes or statutes.

6.5 **Amendment 1: Compensation, Probation, and Publicity Orders.**

This amendment would allow a court to order the offending organisation to pay compensation to those affected by the offence, make changes to the organisation (much wider than those proposed by the remedial order in the Bill), publicise in a way prescribed to the court and at its expense details of the offence. In addition, it will allow the court to order the closing down of the whole or part of a company or to prevented it from tendering for public contracts.

“In addition to any fine, the court may

- (1) prescribe that the offender do one or more of the following:
 - (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
 - (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
 - (c) communicate those policies, standards and procedures to those the courts considers appropriate;
 - (d) report to the court on the implementation of those policies, standards and procedures;
 - (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
 - (f) provide, at the organisation’s expense in a format and media specified by the court, the following information to the public, namely,
 - (i) details of the offence of which the organisation was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organisation is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
 - (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

- (2) pass an order:

- (a) preventing the offender from making tenders for public contracts
- (b) closing temporarily or permanently all or part of an organisation's establishments."

6.6 Amendment 2: Community Service Order

This amendment would allow the court to impose a community service order involving work-related safety matters.

- (1) In addition to any fine, the court may order the offender, at its expense to carry out a specified project for the general improvement of health, safety and welfare of either workers or the public in general.
- (2) The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order.

**Centre for Corporate Accountability
January 2007**