Response to the Government's Draft Bill on Corporate Manslaughter

Centre for Corporate Accountability

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INDEX

	Paragraphs
Executive Summary	
Introduction	**1 – 13**
To whom does the Offence Apply	**14 – 21**
CCA View	21
Relevant Duty of Care	**23 – 51**
CCA view	51
Senior Management Failures	**52 – 61**
CCA view	56 – 61
Causation	**62 – 65**
CCA view	65
Assessing the Breach	**66 – 68**
CCA view	68
Jurisdiction	**69 – 72**
CCA view	72
Investigation and Prosecution	**73 – 74**
CCA view	74
Private Prosecution	**75 – 77**
CCA view	80
Sentencing	**78 – 80**
CCA view	80
Individual Liability	**81 – 82**
CCA view	82

Summary of Response of the Centre for Corporate Accountability

1. We support the general thrust of these proposals. However, in this response, we do propose changes to the Bill to which we attach great importance.

1. The CCA will not, in this response, deal with the absence in the Bill of any secondary offences for company officers. However it is important to note that the evidence concerning the lack of accountability of company directors for existing offences is overwhelming – and the Government needs to consider as a matter of urgency what changes are required to deal with this continuing failure.

1. In relation to whom the offence should apply:
   - We are supportive of the decision by the Government to remove Crown immunity – though concerned about how other sections of the Bill restrict the extent to which the offence will actually apply to them.

   - We think that the offence should apply to all employing organisations.

   - support the Government's position that the new offence should apply to police forces; though concerned that other sections of the Bill restrict its application to deaths of employees.

   - do not accept that it is necessary for activities of the armed forces "in preparation for" combat to be excluded from this legislation.

4. In relation to the requirement that there to be a breach of a relevant "Duty of care"
   - We accept the Home Office's argument that the management failure must be linked to existing 'duties" to act.

   - We think, however, that there is a strong argument that the gross breach in question should not only be a breach of a 'duty of care' but also a breach of the main statutory obligations relating to safety, in particular breaches 2-6 of the Health and Safety at Work Act 1974.

- we thing that only reason to specify a list of relevant duty of care relationships - as set out in section 4(1) of the Bill - would be to provide greater certainty, not as a way of limiting the duties of care that currently exist or may develop in the future. We propose, therefore that there need to be another sub-clause with words to the effect: "or any other duty of care".

- In particular, the exemption of public bodies involved in providing a service to members of the public – but not 'supplying' a service – should be removed.

5. In relation to specific exemptions relating to deaths arising from "public policy decision-making' and 'exclusively public functions"

- We think that these exemptions are likely to be found in breach of the Human Rights Act 1998. A legal opinion states the exemptions are:

> "potentially so widespread as to introduce a substantial species of crown immunity 'through the back door' …. and we believe that such a limited and arbitrary availability of the new offence would be incompatible with the European Convention on Human Rights and the Human Rights Act …"

- Specifically in relation to public policy decision-making we think that the immunity given to those public bodies causing deaths when the management failure involves a decision about matters of public policy is far too broad. When a public authority has a duty of care or a statutory obligation and it makes a grossly negligent management failure involving public policy decision making – it is our view that the new offence should apply.

- Specifically in relation to the 'exclusively public function' exemption, we have real principled concerns that this clause will allow the police and the prisons and other law enforcement bodies (including private ones) exemption.

- We do not think that the Home Office is correct in arguing that existing mechanisms of accountability are adequate and can in any way be seen as replacements of the need for corporate manslaughter investigation and prosecution in appropriate cases

6. In relation to the 'senior management failure' test

- we support to wording of "the way in which any of the organisations activities are managed or organised" as the basis of the offence.
- we accept that the original Law Commission offence was probably drawn too widely and could have meant that any serious failure at any level of management – including at supervisory level – could have resulted in the company being prosecuted for manslaughter.
- It is our view however that the offence is not so restrictive that the failure in question must have been the responsibility of a too narrow band of individuals. This would risk a situation where companies would delegate safety responsibilities to those within the organisation that could not be deemed to be a 'senior manager'. We think that the Home Office should consider the following two changes to the offence:

(a) widening the definition of senior manager so that in effect individuals who manage large units, construction sites, or factories set up by the company fall within the definition of 'senior manager'. We are suggesting that this could be done by changing the word 'substantial' in clause 2(a) and (b) to 'significant'; and;

(b) having an additional basis of liability by which a company can be found guilty of an offence – where it would need to be shown that there was (a) a management failure within the organisation; (b) that this failure was a very serious one and a cause of the death and (c) <u>that a senior manager knew or ought to have known that there was a management failure and did not take reasonable steps to rectify the failure.</u> This proposal has some similarities to one of the tests in the new Canadian principle of liability.

7. In relation to the issue of 'causation', we think that the Home Office position is probably sound but we have not been in a position to seek legal advice on this matter.

8. In relation to 'assessing the Breach,:

- we support the test of "falling far below what could reasonably be expected".
- we accept that there may be room to set out criteria to assist juries in determining whether or not an organisation's conduct has fallen far below what could reasonably be expected. However we are of the view that the criteria "sought to cause the organisation to profit from that failure" is problematic. We propose that it could be changed to asking the juries to consider "the reason for the failure"
- we support the general definition of "health and safety legislation or guidance" as set out in the Bill - though we are of the view that it should also include other guidance – industry or otherwise (i.e. British Standards) that is **supported** by the HSE or relevant authority.

9. In relation to jurisdiction, we think that the rules should be widened to allow the offence to apply to situations where the management failure took place in Britain and the death took place abroad.

10. In relation to State investigation and prosecution, the CCA supports the Government position that investigation responsibility should remain in the hands of the police and prosecution in the hands of the Crown Prosecution Service
11. In relation to the right to a private prosecution, we think that the Home Office should revert back to the position as set out in the Law commission 1996 report – that there should be no requirement to obtain the consent of the DPP.

12. In relation to sentencing , the CCA does not respond to this issue in any detail – since we feel that the Home Office has not given any proper consideration to the many alternative options of sentencing organisations.

INTRODUCTION

1 This is the Centre for Corporate Accountability's (CCA) response to the Home Office's Draft Corporate Manslaughter Bill. The CCA is a charity[1] concerned with worker and public safety focusing on issues of law enforcement and corporate criminal accountability. We are the only national organisation in Britain providing free and independent advice to families bereaved from work-related deaths on investigation and prosecution issues[2]. In addition we undertake research on the criminal justice system's response to death and injuries resulting from corporate activities.

2. The CCA has been involved in arguments for reform of the law of corporate manslaughter since we were established in 1999. In 2000 we sent in a detailed response to the Home Office Consultation document and, in 2003, we were involved in a more informal consultation process with the Home Office as part of which we submitted an additional written response.

3. As part of preparation for this response we sought expert legal advice from a number of lawyers. In relation to the application of the Human Rights Act 1998 to the proposed legislation, we sought an opinion from Tim Owen Q.C. and Henrietta Hill[3] at both Matrix and Doughty Street Chambers; in relation to certain issues involving 'duty of care' we sought an advice from David Travers.[4] These are attached and form part of our response. We have also sought advice more informally from a wider network of lawyers[5]. The views in this response are however the views of the CCA alone.

4. We would like to make three general points in introduction to our response.

5. We support the general thrust of these proposals. However, in this response, we do propose changes to the Bill to which we attach great importance.

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[1] We are a company limited by guarantee with a Board of nine directors comprising lawyers, academics, NGO workers, and bereaved families.

[2] We have recently been awarded a Legal Services Commission Quality Mark. We have, at the time of writing about 100 active cases as part of our Work Related Death Advice Service.

[3] From Matrix Chambers and Doughty Street Chambers respectively

[4] From 6 Pump Court

[5] A note from John Halford, Bindmans Solicitors, is attached as part of this response and is referred to in para 51(i)(b)

6. The Second, point relates to the individual accountability of directors and senior managers. In this regard it is worth repeating the words of the Home Office in its 2000 consultation:

> "The Law Commission's report argued that punitive sanctions on company officers would not be appropriate in relation to its proposed corporate killing offence, since the offence would deliberately stress the liability of the corporation as opposed to its individual officers. The Government is, however, concerned that this approach:
> (a) could fail to provide a sufficient deterrent, particularly in large or wealthy companies or within groups of companies; and
> (b) would not prevent culpable individuals from setting up new businesses or managing other companies or businesses, thereby leaving the public vulnerable to the consequences of similar conduct in future by the same individuals".

7. As a result it proposed that

> "any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death, should be subject to disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain."

and went onto say that:

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

It then went onto add that the Government was also considering – though it had itself no firm view – whether

> "it is right in principle that officers of undertakings, if they contribute to the management failure resulting in death, should be liable to a penalty of imprisonment in separate criminal proceedings."

8. The Bill does not include either of these individual reforms. It should be noted that, as far as we know, the Government has nowhere explained why it does not now support these proposals or what its view is of its own analysis that had underpinned them.

9. The Government has also made it clear that there is a separate process by which the issue of directors' responsibility/accountability is being dealt with at a Government level – and the Health and Safety Commission will be reporting to the Department of Work and Pensions in December on whether it considers that legal duties should be

imposed upon directors in relation to safety. The CCA supports the introduction in law of safety obligations upon directors.

10. In this context the CCA will not, in this response, deal with the absence in the Bill of any secondary offences for company officers. However it is important to note that the evidence concerning the lack of accountability of company directors for existing offences is overwhelming – and the Government needs to consider as a matter of urgency what changes are required to deal with this continuing failure.

11. The CCA accepts that the relationship between corporate and individual accountability is a complex one – and whilst sometimes it is easy to recognise that a particular failure should be put down to the organisation, rather than any individual (or vice-versa), in many cases difficult judgments have to be made about whether a particular failure is primarily an individual failure, a corporate one or both. In addition there are arguments on both sides about whether it is 'better' in terms of justice and deterrence to prosecute the organisation, or the individual. When individuals are prosecuted, people may ask why the company itself can continue its activities untouched by the death; and when the company alone is prosecuted people may ask why individuals have got off 'scot-free'. These are difficult questions.

12. It is however the CCA's view that for reasons of justice and deterrence, effective means of establishing both 'corporate' and 'individual' culpability, where appropriate, is crucial. We also recognise that corporate prosecution should not, as now, depend upon individual ones. It is also the CCA's view that there are many cases where there are very serious failures within organisations that cause death that cannot result in prosecutions of individuals.. This draft Bill deals only with changing the law in relation to the prosecution of the organisation – and the CCA therefore reluctantly accepts the need to respond on those terms whilst making it clear that the government must tackle the issue of director accountability as a matter of the urgency

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13. The third point relates to the question of Crown and public bodies. As is clear from our full response, we are very concerned about the exclusions contained in the Bill. The Bill does indeed take a very important (though long overdue) step in removing Crown

immunity – but then hedges this with a great many restrictions. This will result, for example, in prison authorities and the police being immune from prosecution in relation to deaths of people in their custody. This is in our view totally unacceptable. One must ask whether the Home Office is genuinely able to make objective and proper decisions in relation to the application of this offence when it comes to the police and prisons, when it is the Home Office itself that is responsible for both these bodies? This is the most stark of the issues relating to Crown immunity - where deaths are not uncommon, and investigations have often illustrated clear negligence by the authorities.

TO WHOM DOES THE OFFENCE APPLY

14**.** **Corporate Bodies**: The Bill intends for the offence to apply to 'corporations'[6] – whether they be private companies or corporate bodies set up by statute (e.g. NHS Trusts and Local Authorities). The only type of company that could not be prosecuted is a corporate sole[7].

15. **Crown Bodies**: The offence is intended to apply to those Crown bodies that are corporate bodies or those set out in a schedule to the Bill[8]. It should be noted that, if enacted ,this would be the first offence ever in England and Wales for which a Crown body could be prosecuted. The Home Office consultation document states that:

> The schedule currently focuses on Ministerial and non-Ministerial Government Departments. Further work is required to develop this list, particularly to consider the position of executive agencies and other bodies that come under the ambit of Departments."[9]

16. The Ministry of Defence is included in the schedule but certain activities of the "armed forces" – defined to include naval, land or air forces – are immune. These are activities

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[6] See section 1(2)(a) and section 5

[7] In the Home Office 2000 consultation, a corporation sole was defined as "a corporation constituted in a single person in right of some office or function, which grants that person a special legal capacity to act in certain ways. Examples of corporations sole include many Ministers of the Crown and government officers eg the Secretary of State for Defence and the Public Trustee and a bishop (but not a Roman Catholic bishop), a vicar, archdeacon, and canon. The Law Commission proposed they be excluded because a corporation sole is a legal device for differentiating between an office holder's personal capacity and in the capacity of the holder of the office." (footnote 8, p.15)

[8] See section 1(2)(b) and section 11.

[9] Para 39

carried out in the "course of or in preparation for, or directly in support of any combat operations" or the "planning of any such operation". Combat operations includes simulated training. This could be interpreted very widely indeed - meaning that deaths resulting from <u>activities in support of planning, of the preparation of simulated combat activities</u> could not result in a prosecution! The Home Office consultation document states that:

> "It is … important that the ability of the Armed forces to carry out and train for combat and other warlike operations is not undermined. The law already recognises that the public interest is best served by the Armed forces being immune from legal action arising out of combat and other similar situations and from preparation of these and this is recognised in the offence. We also consider it important that the effectiveness of training in conditions that simulate combat and similar circumstances should not be undermined and these too are not covered by the offence."[10]

17. Crown bodies that the Home Office says will not be included at all in the schedule are the security and intelligence agencies. The consultation document states that:

> "It is important … we do not adversely affect matters of national security or the defence capability. Investigation into and prosecution of the security and intelligence agencies run a high risk of compromising the necessary secrecy under which they must operate and we do not prose that the new offence should apply to these bodies."[11]

18. **Unincorporated Bodies**: The offence however does not apply to unincorporated bodies – that is to say partnerships or unincorporated associations - 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. Although the Home Office acknowledges that there is no procedural problem in prosecuting unincorporated bodies, the consultation paper goes onto say 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".[12]

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[10] Para 40
[11] Para 40
[12] Para 42

19. It should be noted that the initial Home Office consultation document[13] proposed that the new offence should apply to all employing organisations – 'undertakings' as they called them – whether or not they were incorporated. It made the following comments in its consultation document:

> "3.2.2 The Law Commission accepted that many unincorporated bodies are in practice indistinguishable from corporations and, arguably, their liability for fatal accidents should be the same. However, they concluded that it would be inappropriate to recommend that the offence of corporate killing extend to unincorporated bodies at present. Unincorporated associations which include partnerships, trusts (including hospital trusts), registered Friendly Societies and registered trade unions, would not be caught by the Commission's proposals. The Law Commission took the view that under the existing law, individuals who comprise an unincorporated body may be criminally liable for manslaughter - as for any other offence - and so the question of attributing the conduct of individuals to the body itself does not arise. If the Law Commission's proposal in this respect were accepted, it would not alter the present position of such organisations".
>
> "3.2.3 The Law Commission's proposals are straightforward and would bring within the ambit of the offence the main subject of public concern - companies incorporated under the Companies Act. 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. The Law Commission recommended limiting the proposals to corporations in the first instance before deciding whether to extend it further.
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> "3.2.4 An alternative is that the offence could apply to "undertakings" as used in the 1974 Act. Although an "undertaking" is not specifically defined in the 1974 Act, HSE have relied on the definition provided in the 1960 Local Employment Act where it is described as "any trade or business or other activity providing employment". This definition could avoid many of the inconsistencies which would occur if the offence was applied to corporations aggregate but not to other similar bodies.
>
> "3.2.5 Clearly, the use of the word "undertaking" would greatly broaden the scope of the offence. It would encompass a range of bodies which have not been classified as corporations aggregate including schools, hospital trusts, partnerships and unincorporated charities, as well as one or two person businesses e.g. self-employed gas fitters. In effect the offence of corporate killing could apply to all employing organisations. We estimate that this would mean that a total of 3½ million enterprises might become potentially liable to the offence of corporate killing. However, such organisations are already liable to the provisions of the 1974 Act.
>
> "3.2.6 The Law Commission did not consider in detail which bodies might fall outside the definition of a corporation and have commented that they would like the offence of corporate killing to be as inclusive as possible. The Government too does not wish to create artificial barriers between incorporated and non-

[13] Published in the summer of 2000

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. "

20. **Police forces**: The Home Office believes that Police forces should be the one exception to the lack of application to unincorporated bodies.[14]

> "We do not consider that in principle, police forces should be outside the scope of the offence and our intention is that legislation should in due course extend to them."[15]

CCA's Position

21. Our views are as follows::

   (i) Crown Bodies: We are very supportive of the decision by the Government to remove Crown immunity. However, as we discuss below, we are concerned about how other sections of the Bill restrict the extent to which the offence will actually apply to them.

   (ii) Unincorporated Bodies: We think that the offence should apply to all employing organisations for the following reasons – some of which the Home Office set out in its first consultation document.

   (a) There is often very little difference in practice between an incorporated and unincorporated body;

   (b) To distinguish between the two would represent an arbitrary distinction and is likely to fall foul of the Human Rights Act 1998. See para 25 and 26 of the legal opinion attached as an appendix to this document;

   (c) We do not think that the Home Office arguments against application are persuasive.

   - *unincorporated bodies have no existing duty of care*. It is correct to say that since unincorporated bodies have no separate legal identity – they have no recognised duty of care as an organisation. However, it would be quite straightforward to deal with this problem by inserting a clause to the effect

[14] Police forces are neither corporate bodies nor are they Crown bodies. Police Authorities are corporate bodies and could in principle be prosecuted – though they are not 'employers' and do not have the obligations of employers.

[15] Para 44

that "for the purposes of this legislation, the management board of any unincorporated body has the same duties as those of corporate bodies" .

- *unincorporated bodies have no permanent personnel and an ever changing membership*. This may be the case with some bodies, but for many if not most, the organisation has as much permanence as a company – law firms, large partnerships, trade unions, and schools for example. In our view it would certainly be appropriate for the new offence to apply to these organisations, as they have the same permanent characteristics as a company.

(d) the Government accept that there is no procedural reason against reform in this manner.

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(e) At a meeting CCA had with the Home Office, the CCA was asked whether or not it was really important to ensure that the offence applied to unincorporated bodies. It was stated that the background for this offence emerged out of the difficulty in prosecuting large companies and that extending the offence to unincorporated bodies was as a result perhaps not necessary. We were asked for examples where a death arose as a result of conduct of the part of an unincorporated body – and problems of accountability arose.

Although, the CCA is not itself aware of any such deaths, we are sure such deaths do take place and the failure of this legislation to apply in these situations – where had the organisation been a corporate body it would have been prosecuted - may well cause great injustice. If Government is to create this law it should all encompassing, rather than exclusionary.

(iii) Police forces: we are supportive of the Government's position on police forces; however, as is set out below, we are concerned that they would be exempt from the application of the offence involving deaths of members of public. (see paras 23-51)

(a) In relation to the general issue of the offence's application to police forces, we would like to make the following comments. At present *police forces* have no

legal obligations of any kind in relation to safety. Indeed it was not until the Police (Health and Safety) Act 1997 that the 'police' had to comply at all with health and safety legislation. This had the effect of making, for the purposes of health and safety legislation, each force's "Chief Office of the Police" the 'employer' of constables in the force.[16] As a result all health and safety duties were imposed upon the Chief Office of the police, and it was he who personally could be held responsible for any breaches. If prosecutions were necessary, it was he would be personally charged. This Act has subsequently been amended so that the Chief Officer of the Police was not individually responsible as an employer; only the position of the Chief Officer of the Police. In the CCA's view this is highly artificial and inappropriate – it is the police force (as an organisation) that should have the duties, and the police force that should be prosecuted if necessary for any organisational breaches.

(b) It is important to understand this background, as if police forces are to be able to prosecuted for corporate manslaughter it would be necessary for the above legislation to be further amended so that health and safety duties are imposed upon *police forces*. The easiest way to do this would be to change the law so that for the purposes of the application of health and safety and corporate manslaughter law, police forces would be a corporate body.

(iv) Training and armed forces: we do not accept that it is necessary for activities of the armed forces "in preparation for" combat to be excluded from this legislation. This is for the following reasons:

(a) The definitions used in the bill are simply too wide and could be used by the armed forces to cover too wide amount of training activities that they undertake;

(b) the armed forces currently have to comply with the health and safety law in relation to these activities – so it seems entirely inappropriate to make them immune from prosecution when these activities cause a death following a management failure that constitutes 'gross negligence';

[16] This was necessary due to the complicated employment relationship of police constables – where neither the police force nor the police authority was 'the employer'

(c) Such an immunity in our view reflects a relationship that the Ministry of Defence has with its employees that is simply not appropriate for the 21st Century. Soliders and others should simply not be put at such risk through grossly negligent management failures prior to combat during training;

(d) It would be in breach of the Human Rights Act 1998 - see para 32 of the attached legal opinion.

(v) Clarity: Discussions with lawyers indicate that there is a lack of clarity in relation to the relevant sections dealing with which bodies the offence applies. Section 1(2)(a) states:

"The organisations to which this section applies are:
(a) a corporation;
(b) a government department or other body listed in the Schedule

Section 5 states that:

"Corporation" does not include a corporate sole but include any body corporate wherever incorporated.

It has been stated – and we agree – that these sections lack clarity. Whilst we understand that it is the intention of the Home Office to apply the offence to corporate bodies as set up by statute, the use of the term 'corporations" and the way it is defined make it uncertain. The confusion comes with the way corporation is defined in section 5 to include "any body corporate wherever incorporated" – which may not include statutory corporate bodies since they are not 'incorporated' as such. Perhaps this clarification can be made by simply defining corporation to include "any body corporate wherever incorporated as well as those established by statute."

As a result of this and the way section 1(2) is drafted, it is not crystal clear whether the offence applies to corporate bodies that are also statutory bodies but which are not listed in the schedule to the Bill.

THE OFFENCE

22. The constituent parts of the offence are as follows:
    - the organisation must owe a "relevant duty of care" to the person who dies;
    - the way in which any of the organisation's activities are managed or organised by senior managers
      -causes a person's death
      -amounts to a gross breach of the duty of care".

RELEVANT DUTY OF CARE

23. Under the Bill, in order for there to be a prosecution, the first issue to be determined is whether or not there was a 'relevant duty of care' between the organisation that might be prosecuted for the death and the person who died. If the organisation is found not to have owed a 'relevant duty of care' the offence will not apply.

24. The Bill states that it is a question of law as to whether there is a relevant duty of care – and is therefore a matter that will be decided by the judge and not the jury.

What is a "duty of care"?

25. In civil law, whether or not there is a 'duty of care' is generally determined by reference to three broad criteria: (a) is the damage foreseeable? (b) is the relationship between the defendant and victim sufficiently proximate? (c) is it fair just and reasonable to impose such a duty?

26. The courts have set down categories of relationship where it is clear that a 'duty of care' exists. As the Home Office consultation paper states:

    > Duties of care commonly owed by corporations include the duty owed by an employer to his employees to take reasonable care for their health and safety and by an occupier of buildings and land to people in or on, or potentially affected by the property. Duties of care are [also owed] by transport companies to their passengers."[17]

    Duties of care are also owed in certain circumstances by public bodies to members of the public - particularly where a service is being provided to the public.

[17] Page 37, para 20

27. In situations where the relationship between the defendant and the claimant is not straightforward, the courts assess whether there is a duty of care by reference to the principles set out above. These are continually evolving. Some of the more difficult cases involve compensation claims against public bodies and the circumstances in which the courts consider it appropriate that a public body should pay compensation. In relation to these sorts of cases judges will in particular consider the questions: "Is it fair, just and reasonable to impose such a duty of care?" Determining what is 'fair, just and reasonable' seems to involve (amongst other things) weighing the total detriment to the public interest in holding a class of potential defendants liable against the total loss to all prospective claimants if they do not have a cause of action in response of the loss they have suffered as individuals[18].

Implications of using duty of care

28. The requirement of a 'duty of care' relationship hitches the criminal law of corporate manslaughter to the civil law of negligence. This is because the 'duty of care' concept is one that is fundamental to whether or not a compensation claim due to negligence is to succeed. No claim can succeed unless the defendant can be shown to have owed the claimant a 'duty of care'.

29. It should be noted that the adoption of a 'duty of care' requirement is already part of the current offence of manslaughter – that is to say in order to prosecute an individual for manslaughter you have to show that s/he owed a 'duty of care'[19]. Since the prosecution of companies for manslaughter, at present, requires the prosecution of an individual for the offence, the linkage between duty of care and corporate manslaughter is therefore not a new one. As the Home Office says in its consultation document[20],

> "We think [using duty of care] provides a sensible approach because organisations will be clear the new offence does not apply in wider circumstances than the current offence of gross negligence".

30. However, it should be noted that the Law Commission in its 1996 report on involuntary manslaughter stated that:

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[18] As per Lord Brown-Wilkinson in Barrett v Enfield LBC, [2001] 2 AC 550
[19] R v Adomako.
[20] Para 17

> "It is however clear that the terminology of negligence and duty of care is best avoided within the criminal law because of the uncertainty and confusion that surround it"[21].

As a result the Law Commission proposed offences - reckless killing, killing by gross carelessness and corporate killing – avoided linking the offence to the language or concepts of negligence. Indeed the Law Commission did not state against what duties the conduct of the organisation should be judged.

31. In relation to this, the Home Office says in its consultation document:

> "The Law Commission proposed that a new offence be based on a failure to ensure the health and safety of employees or members of the public. However, the relationship between this and duties imposed by health and safety legislation as well as duties imposed under the common law to take reasonable care for the safety of other, was left undefined. We do not consider that this is satisfactory; the offence needs to be clear on the circumstances in which an organisation has an obligation to act".

32. The issue of clarity is important. The law of manslaughter has been criticised in the past for uncertainty and it is important that any new offence should, as much as possible, provide clarity. However, it is important to recognise that the offence need not have centred solely upon there needing to be a breach of 'duty of care'. It could also have been linked to statutory duties like the Health and Safety at Work Act 1974 (which imposes duties on employers to take reasonable and practicable steps to ensure the safety of their employees and others affected by their activities) or the Merchant Shipping Acts. There was no need to use 'duty of care' – or at least 'duty of care' alone. The relevant part of the offence could therefore have stated that there must be "a gross breach or a duty of care or other statutory obligation set out in appendix".

33. Pinning the duty by which the failure will be judged to key health and safety statutes has important advantages. It is clearer. Health and Safety at Work Act 1974 has been around now for more than years. Organisations are constantly being judged by it and should have a good understanding of the requirements[22]. It therefore provides a level of certainty that is not provided by duty of care principles.

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[21] Para 3.14

[22] Please note for example presentation of Mark Tyler from Cameron McKenna LLP who made this very point at the TUC/CCA conference on Corporate Manslaughter in June 2005

34. The Home Office's concern about using health and safety legislation appears to surround section 3 of the Health and Safety at Work Act 1974 and it's broad implications for public bodies. However, Crown and other public bodies have had to comply with section 3 since the introduction of the legislation (though Crown bodies could not be prosecuted for a breach).

When is a duty of care "relevant"

35. In the Bill, however, not only must there be a duty of care – but a 'relevant' duty of care. These are defined in the Bill as duties of care owed by an organisations in their role:
    - as an employer towards the safety its employees
    - as an occupier of land and premises towards the safety of those affected by the land and buildings
    - as a supplier of goods or services – whether paid for or not - to the safety of those who use them. This would include services provided by public bodies – such as local authorities or NHS Trusts where the service is provided free
    - of carrying out of any activity on a commercial basis.

36. So a relevant duty of care would arise in the following circumstances:
    - a death of an employee as a result of conduct on the part of an organisation which is his or her employer;
    - a death of a person as a result of conduct of an organisation which is an occupier of land (i.e. member of the public falling down a hole on a construction site; or tenant dying as a result of defective maintenance of a building);
    - a death of a person as a result of a defectively manufactured product.

37. Whilst the duties of care that are deemed to be 'relevant' are wide and pretty comprehensive – it does appear to exclude certain activities. This is principally in the way that it deals with "services" provided by the state. Section 4(1)(c)(i) states that there is a relevant duty of care in connection with "the supply by the organisation of goods or services (whether for consideration or not)". The key word here is 'supply' of goods or services. This has the effect of excluding a great deal of activities undertaken by public bodies – since whilst the police and prisons and social services for example might provide a service, they do not 'supply' a service. As a result this excludes:

- deaths of members of the public resulting from police conduct
- deaths of members of the public in a Government prison[23]
- deaths resulting from failures by social services
- Government inspection regimes.

38. In addition, by defining the circumstances of a 'relevant duty of care' in such a circumscribed manner, the offence will not be affected by evolving definitions of 'duty of care' – which is somewhat odd in relation to an offence that has been defined around that concept.

Specific exemptions

39. There are in addition two specific exemptions. The first exemption states that those organisations which either:

(a) supply goods or services or

(b) carry out any activity on a commercial basis

do not owe such a 'relevant' duty of care – when it is undertaken "in the exercise of an exclusively public function"[24].

40. An exclusively public function is defined as:

> "a function that falls within the prerogative of the Crown or is by its nature exercisable only with authority conferred –
> (a) by the exercise of that prerogative, or
> (b) by or under an enactment"[25].

41. An example of (a) could be the provision vaccines by government in a civil emergency; an example of (b) could be the function of lawfully detaining individuals by the police or by the prison service.

42. The Home Office emphasises that the function in question must "by its nature" be carried out by statute and states that the exception "would not cover an activity simply

[23] Private prisons would be caught by 'other activities on a commercial basis'. However they are exempted by another exclusion 'otherwise in the exercise of an exclusively public function' (see below).

[24] Section 4(1)(c) It should be noted however that the way the Bill is drafted makes it unclear whether this exemption has wider effect to 'employers' and 'occupiers of land'.

[25] Section 4(4)

because it was one that required a licence or took place on a statutory basis. Rather the nature of activity involved must be one that requires a particular legal basis"[26].

43. It should be noted that this clause does not just concern Crown or other public bodies but any organisation (public or otherwise) performing that particular kind of function. This would mean that private prisons and private prisoner escort agencies, which carry out an activity on a commercial basis, would not owe a relevant duty of care. This is because the nature of their function – lawful detention – is one provided for only by law.

44. However, it is important to note that the activity in question must 'by its nature' be exercisable by or under an enactment. The Home Office say that a private prison – for example - would still owe a relevant duty of care towards someone who died as a result, for example of an 'e-coli' outbreak from the prison kitchen or from Legionnaires' disease. Though a public prison would not.

45. The second exemption relates to those bodies that are a 'public authority'. The definition of public authority is taken from section 6 of the Human Rights Act 1998 – and so includes not just public bodies but other organisations some of whose functions are those of a 'public nature'[27].

46. The exemption states that these bodies do not owe a duty of care:

> "in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests)".

47. So where a death is the result of public policy decision-making then the organisation, even if the organisation owes a duty of care to the person who died under the ordinary civil law of negligence, cannot be prosecuted. An example of this might be where a primary care trust purchased one kind of medicine rather than another for cost reasons – and someone died because there were not enough appropriate drugs to go around.

Home Office Justifications for exemptions

46. There are two basic justifications given by the Home Office for these two exclusions.

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[26] page 38, para 35
[27] Section 4(4)

The first is that these exclusions ensure that there is a level playing field between private and public bodies:

> The effect is to create a broad level playing field between public and private sectors. Both are treated in the same way in their roles as employer and occupiers of premises and when providing goods and services or operating commercially".

49. The second justification is that deaths resulting from such circumstances are more appropriately matters for "wider forms of public and democratic accountability". In relation to this the consultation document states that:

> "There are important differences between public bodies and bodies in the private sector and the new offence must apply in a way that recognises this. In particular, an offence of corporate manslaughter is not an appropriate way of holding the government or public bodies to account for matters of public policy or uniquely public functions. Government departments and other public authorities are subject to a range of accountability mechanisms including through Ministers in Parliament, the Human Rights Act, public inquiries and other independent investigations, judicial review and Ombudsmen. These provide the appropriate forum for the scrutiny of such issues. A new offence needs to complement, not compete with, this accountability." [28]
>
> "[W]here government bodies are not themselves providing front line services, but are setting the framework within which these must operate or are centrally procuring goods or services supplied by others, then it must be possible to explore and debate the wider policy issues involved". (para 20)

50. In relation to detention activities, the document says:

> "[T]he offence does not apply to activities that the private sector either does not do, or cannot do without particular lawful authority which are areas more appropriately subject to other lines of accountability."[29]
>
> "Deaths in prisons are, for example, already subject to rigorous independent investigations through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest." [30]

CCA Views

51. Our views are as follows:

    (i) **<u>Duty of care</u>**: We accept the Home Office's argument that the management failure must be linked to existing 'duties" to act. We think, however, that there is a strong argument that the gross breach in question should not only be a breach of a 'duty of care' but also a breach of the main statutory obligations relating to safety, in particular breaches 2-6 of the Health and Safety at Work Act 1974. We do not

[28] Para 18
[29] Para 24
[30] Para 22

understand why, if there is a gross breach of a statutory obligation relating to safety – and not one of 'duty of care' - a manslaughter charge would not be appropriate. Such an amendment would not impose any new duties upon organisations – since these duties currently exist in lawand have done for over thirty years. Breach of these duties already allows for 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 gross breaches of statutory obligations. In addition to this and the points discussed above (paras 28-34), we would add the following in support of this change:

(a) a failure to provide for a prosecution in such circumstances could be in breach of the Human Rights Act. As stated at paras 29(2)-(3) of the legal opinion attached:

> "Article 2 authorities we cite above make clear that the availability of a criminal law remedy is not determined by whether a civil claim would also lie, but whether the nature and gravity of the breach in question requires a criminal remedy in of itself. Indeed *Ramsahai* would indicate that the lack of availability of an effective civil remedy is a reason which militates *in favour* of there being a criminal remedy, rather than against it;
>
> ….. there may well be situations where Convention jurisprudence requires a criminal law remedy to be available even if, under domestic law, the balancing exercise dictates that no civil claim need lie;

(b) a failure to allow such a prosecution would in effect turn the principles underlying Article 2 of the European Convention – the right to life - on its head. Matters which fall directly within the responsibility of the State are considered to be those were Article 2 protection (in all it forms) need to be at their highest, because typically these are areas of life where there is a very significant imbalance of power and because this may be exacerbated by the vulnerability of the individual. However, a death resulting from a public body could be deemed a breach of health and safety law and prosecution/Crown censure could result – but a manslaughter prosecution could not.[31]

(ii) '**<u>Relevant' duty of care</u>**: This clause would have less impact if the Home Office accepted that a breach could relate to certain duties under statutory law. However, in our view the only reason to specify a list of <u>relevant</u> duty of care relationships -

[31] This point in made by John Halford, a Solicitor at Bindman and Partners in a note attached to this document

as set out in section 4(1) of the Bill - would be to provide greater certainty, not as a way of limiting the duties of care that currently exist or may develop in the future. If a duty of care in negligence exists – then, in our view, the new offence should apply[32]. There would therefore need to be another sub-clause with words to the effect: "or any other duty of care".

In particular, the exemption of public bodies involved in providing a service to members of the public – but not supplying a service – should be removed. As set out above, this allows certain public bodies – police, prisons, and regulatory bodies in the context of their relationship with the public, to be exempt from prosecution.

(iii) **Assessment of Government Justifications for exclusions**: 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 around the difficulty in prosecuting medium- to large-sized private companies and were not focused around State bodies. However the environment in which the Bill is now being discussed has changed – and there is now a legitimate view that deaths resulting from the kinds of activities that Crown and other public bodies perform, whether or not private bodies undertake them or not, should, in the most serious cases, result in criminal accountability. Simply saying that there is a 'level playing field' between private companies and public bodies is not enough when certain activities of public bodies are being given immunity even if they cause death through very serious management failures.

We do not think that extant mechanisms of accountability – set out by the Home Office in its consultation documents - 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 circumstances where there is a duty of care or where there are statutory safety obligations upon those who have failed, and a death has resulted. In relation to these 'alternative' mechanisms of accountability, we would like to make the following points:

[32] Or, the gross breach was of either statutory obligation or duty of care, then if there was no statutory obligation but there was a duty of care – the offence should apply

- Ministers may or may not be questioned in Parliament about a particular death – but when this does happen it is hardly a forensic and searching forum to find 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 a death – and 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;
- It is only rarely that 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, about the adequacy of which many people – including judges – have serious concerns.
- 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.

(iv) **Implications of Human Rights Act 1998**: In relation to the exclusions set out in the Bill – that primarily affect public bodies - it appears that the Home Office has failed to give proper consideration to the implications of the European Convention on Human Rights. A legal opinion that we have sought and which is attached to this document states that the exemptions are:

> "potentially so widespread as to introduce a substantial species of crown immunity 'through the back door' …. and we believe that such a limited and arbitrary availability of the new offence would be incompatible with the European Convention on Human Rights and the Human Rights Act …"[33]

[33] para 31

It goes on to state:

"…we cannot accept that the premise of these exemptions that prerogative or policy decisions should be exempt from prosecution for the new offence - is sustainable in Convention terms. In simple terms, if the State is culpable for a death in the circumstances set out in *Oneryildiz*, the Strasbourg jurisprudence requires that a criminal remedy be available in order to ensure proper vindication of Article 2, 3, 8 and 13 rights, regardless of whether the State's "mitigation" is one based on prerogative or policy.

There is again an Article 14 issue, because what is being created is a further arbitrary two-tier system of justice where the availability of a criminal law remedy can turn on something as finely balanced as whether the function in question stemmed from prerogative or from policy, and we do not believe that such a distinction can be objectively justified;

We cannot accept the Government's comment that as there are other remedies available, such as inquests and inquiries, an offence of corporate manslaughter is not "an appropriate way of holding the government or public bodies to account for matters of public policy or uniquely public functions" (paragraph 18 of the Consultation Paper). This ignores the fact that (a) as we have said, on some occasions Article 2 *requires* a criminal remedy regardless of the other remedies available, and regardless of whether the Government considers it "appropriate"; and (b) in several recent high-profile cases the domestic courts have held that the other principal remedy, the inquest regime, is not a sufficient means of the state discharging its Article 2 liabilities ….; and

We are very concerned that many deaths in breach of Article 2, 3 and 8 can in fact be categorised as deaths which occurred during the exercise of the prerogative or a power under "an enactment"; or "explained" by policy or resources issues, which means that these two exemptions may well have the effect of removing the vast majority of deaths at the hands of public authorities from the remit of the new offence. "[34]

(v) **Public body decision making**: In our view the immunity given to those public bodies causing deaths when the management failure involves a decision about matters of public policy is far too broad. When a public authority has a duty of care or a statutory obligation and it makes a grossly negligent management failure involving public policy decision making – it is our view that the new offence should apply.

[34] para 31(ii) – (iv)

(a) It should first be noted that there are limited circumstances where a 'duty of care' arises. Indeed the Home Office itself states that:

> "Cases under the law of negligence already make it clear that public authorities will rarely owe a duty of care where a decision involves weighing competing public interests dictated by financial, economic, social or political factors which the courts are not in a position to reach a view on." [35]

(b) The Home Office appears to want to set in stone the current state of the law on this point. If the courts do not develop this principle then there is no purpose to this provision within the Bill itself. If the courts, however do progress this principle, with the effect of widening or narrowing the duty of care, it would seem to us appropriate that the offence reflects these developments.

(c) We do appreciate that public policy decision making raises sensitive questions. Decisions involving the use of limited public funds can involve a difficult balancing of public interest factors in which the use of limited funds will need to be considered. But as long as the Government bodies have policies to ensure that decision makers take into account relevant factors so that a balanced decision on the basis of the facts known to him/her (or which should have been known to him/her) can be taken into account - which we assume the Home Office and other public bodies consider to be the case in these decisions - then there would simply be no chance of a prosecution. There is a very high threshold before prosecution can take place - the failure must be one that 'falls far below what could reasonably be expected'. It would seem to us that any set of decisions that did fall as low at this and did result in death should not be immune from prosecution. If this was not the case a very inappropriate message would be sent out: that public bodies who either have a duty of care (or a statutory obligation), can make decisions that result in death in a grossly negligent manner but would remain immune from prosecution.

(d) It may be the case that the Home Office is concerned not about prosecution in such circumstances, but the impact that investigations would have. In relation to

[35] Para 23

this, the current experience of the police in the investigation of work-related deaths is relevant. In most cases, the police very quickly come to a decision that there is no gross negligence involved – and don't continue their investigation beyond a few hours or days. This would surely be the case in relation to almost all deaths reported following public policy decisions. One must assume that only in a small number of cases will the police need to carry out more extensive investigations – and such inquiries would in our view be justified if there was evidence to support a contention that very serious management failure had taken place.

(vi) **Exclusively public function**: As stated above, we have real principled concerns that this clause will allow the police and the prisons and other law enforcement bodies (including private ones) exemption. A large number of deaths result from the activities of the police and prisons – some of which raise serious issues about they way in which police forces and prisons are managed. Both bodies already have to comply with existing health and safety law. In addition to our position in principle we have the following concerns:

(a) it will appear to result in differing application to a death resulting from the police and private security bodies. The police would be immune, but a death arising from citizens powers of arrest on the part of a private security body would appear not to – as citizens power of arrest are not exercisable 'under an enactment' and as a result have no immunity';

(b) there are a number of activities undertaken by the Local Authorities which can only take place because they have legal authority to do so – and therefore they would be excluded by the provision.

(c) the Home Office emphasises that the function, must 'by its nature' be exercisable under an enactment – however it is very unclear how this would work. If a death takes place in a prison as a result of an e-coli outbreak from the kitchen, would the prison be able to be prosecuted because 'provision of food' is not by its nature exercisable under an enactment? Surely the people who died could only have been in prison because they were detained under lawful enactment.

SENIOR MANAGEMENT FAILURE

52. In the Bill, once a judge rules that a 'relevant duty of care' exists it is then necessary to show that:

> "the way in which any of the organisations activities are managed or organised by senior managers
> - causes a person's death
> - amounts to a gross breach of the duty of care".

It would seem to be necessary to show that a death:

(a) was caused by the way the organisation was managed or organised – i.e. lack of training, supervision, proper delegation, instruction etc – or combination of such factors;

(b) that the particular failure or failures in question were the responsibility of a person or persons deemed to be a senior manager;

(c) any failures that may have contributed to the death that were not the responsibility of senior managers would not in themselves be relevant to the offence".

53. What is being judged by this offence is "**the way in** which any of the organisation's activities are managed or organised". Although the manner of management of the organisation must be that of the senior managers, the emphasis in this Bill is on *how* this is done, not on their individual conduct as such. The Home Office document states:

> "The heart of the new offence lies in the requirement for a management failure on the part of its senior managers. This is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies.
>
> "The test for management failure focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or indeed for the unpredictable maverick acts of its employees, instead, it focuses responsibility on the working practices of the organisation. It also ensures that the offence is not limited to questions about the individual responsibility of senior managers but instead considers wider questions about how at a senior manager level, activities were organised and managed.
>
> "In particular this allows senior management conduct to be considered collectively, as well as individually. This does not mean that we have replaced the requirement to identify a single directing mind with a need to identify several, nor does it involve aggregating individuals' conduct to identify a gross management failure. It involves a

different basis of liability that focuses on the way the activities of an organisation were in practice organised or managed.

"The proposals require a management failure by the organisation's senior managers. This ensures that the new offence is targeted at failings in the strategic management of an organisation's activities, rather than failings at relatively junior levels. Our intention is to target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity. It is in these circumstances that the Government considers it appropriate for liability for causing death to be attributed to the organisation."

54. It goes onto say that:

> "The offence is … designed to capture truly corporate failings in the management of risk, rather than purely local ones. It therefore applies to management failing by an organisation's senior managers – either individually or collectively"[36].

55. Crucial to the above is who is defined as a senior manager. Managers must have a 'significant' role over at least a 'substantial' part of the organisation's activities – either in the actual managing of them or making decisions about them. The Home Office consultation document states that:

> the definition of a senior manager is drawn to capture only those who play a role in making management decisions about, or actually managing the activities of the organisation as a whole or a substantial part of it. The term "significant" is intended to capture those whose role in the relevant management activity is decisive or influential, rather than playing a minor or supporting role.
>
> What amounts to a "substantial" part of an organisation's activities will be important in determining the level of management responsibility engaging the new offence. This will depend on the scale of the organisation's activities overall. It is intended to cover, for example, management at regional level within a national organisation such as a company with a national network of retail outlets, factories or operational sites. And where an organisation pursues a handful of activities in roughly equal proportion (for example, a company that has manufacturing, retail and distribution operations), those responsible for the overall management of each division. Levels below this will potentially be covered depending on whether business units can sensibly be said to represent a substantial part of the organisation's overall activities. The definition will apply with different effect within different organisations, depending on their size. Management responsibilities that might be covered by the offence within a smaller organisation, such as a single retail outlet or factory, may well be at too low a level within an organisation that operates on a much wider scale. This reflects the intention to criminalise under this offence management failings that can be associated with the organisation as a whole, which will capture different levels of responsibility depending on the size of the organisation."[37]

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[36] Para 14
[37] Para 29 and 30

CCA's View

56. *Focus on Management Failure*: The wording of "the way in which any of the organisations activities are managed or organised" is taken from the 1996 Law Commission report and in our view is an appropriate form of words. Although (as is discussed below) the management failure must be that of a senior manager – it is not necessary to show that the conduct of the senior manager was a cause of the death, or that the conduct of the senior manager was grossly negligent. It is the way in which the activity was organised and managed that must be a cause of the death and be grossly negligent. This is a very important distinction and we welcome the new focus of the offence.

57. The wording however differs from the Law Commission offence in that it requires that the management failure must be that of 'senior managers'. We accept that the Law Commission offence was probably drawn too widely. It appears that its loose wording could have meant that any serious failure at any level of management – including at supervisory level – could have resulted in the company being prosecuted for manslaughter. If a failure takes place which is solely the responsibility of a supervisor should the company be prosecuted? This is a difficult position to justify.

58. At the same time however, it is important that the offence is not so restrictive that the failure in question must have been the responsibility of a too narrow band of individuals. This would risk a situation where the company would delegate safety responsibilities to those within the organisation that could not be deemed to be a 'senior manager'. The Home Office's response to this is that if decision to delegate or the supervision of the delegation was in itself not grossly negligent then the company could not be prosecuted however serious the management failure was within the company.

59. It is useful to consider hypothetical cases in analysing how this aspect of the legislation might work in practice. Imagine there was a company that employed 5,000 people and they were evenly split between ten different factories. In one of the factories a person died and investigation showed that there had been a very serious management failure that caused the death, which was the responsibility of the most senior people within that

particular factory. In addition, although there were some failings of managers higher up within the company at head office level, none were so significant to justify a description of gross negligence. Should the company escape prosecution for corporate manslaughter?

60. The Home Office's answer is 'yes' - it should not be prosecuted. The Home Office would not categorise even the most senior managers of the individual factories as 'senior managers' under the Bill. It argues that unless the delegation/supervision of safety responsibilities by the senior managers at head office to a factory level could itself be deemed grossly negligent, the company should not be subject to prosecution for manslaughter.

    It should be noted that whether or not the example set out above would or would not be captured by the offence depends on how the courts will define 'substantial'. Is one of ten equally sized factories a substantial part of a company's activities? It is difficult to know how the courts will define substantial – but there is certainly a risk that it could be defined quite narrowly.

61. In our view this is not satisfactory. There are two ways in which this can be dealt within in the Bill.
    (c) by widening the definition of senior manager so that in effect individuals who manage units, construction sites, factories set up by the company fall within the definition of 'senior manager';
    (d) by having an <u>additional basis of liability</u> by which a company can be found guilty of an offence – where it would need to be shown that there was (a) a management failure within the organisation; (b) that this failure was a very serious one and a cause of the death and (c) that a senior manager knew or ought to have known that there was a management failure and did not take reasonable steps to rectify the failure.

    In relation to (a) and a wider definition of senior manager, we would argue that the word "substantial' be changed to 'significant'. In our view the word 'significant' is broader in

its meaning than substantial and would be likely to cover the 'factory' example set out above.

In relation to (b) it would be necessary to identify two failures:

(a) a serious management failure within the organisation that was a cause of the death and;

(b) a failure by a senior manager, who either knew or ought to have known about the failure and was in a position to take action to rectify the situation.

In our view both changes are required[38]. If we take another example – where a serious management failure within one supermarket (which is part of a 100 strong chain) causes a death. We would accept that this in itself should not result in the company being prosecuted.

- If, however, the serious management failure was (a) the responsibility of senior managers of that particular supermarket but (b) was not known and should not have been known about by senior managers at a company level – should a prosecution take place?

  In our view a single supermarket may or may not be deemed to be a 'significant' part of the whole company, and it is right that this be an issue for the jury and the courts to determine.

- If however a senior manager at a higher level within the within the company was aware of, or ought to have been aware of the serious management failure, should the company be prosecuted? In our view the answer is yes.

In conclusion, our view on this point is:

• in section 2 of the Bill, the word significant should replace substantial

• there should be an <u>additional basis</u> for the offence similar to the effect of the wording below

> "An organisation …. is guilty of the offence of corporate manslaughter if either

[38] It should be noted that the additional basis of liability is similar to the new liability as part of the new Canadian reforms – Bill C-45. Amendment to Canadian Criminal Code. See: http://www.corporateaccountability.org/international/canada/lawreform/main.htm

(a) the way in which any of the organisation's activities are managed or organised by its senior managers –
   (i) causes a person's death, and
   (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, or
(b) the way in which any of the organisation's activities are managed or organised
   (i) causes a person's death, and
   (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, and
   (iii) is known or ought to have been known by a senior manager or managers who could have rectified the failure."

CAUSATION

62. In its 1996 recommendations the Law Commission had stated that there should be the following clause - "such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual." The Home Office in its first consultation supported this position.

63. The Law Commission considered that this clause was required at that time as otherwise it might be easy for companies to argue that negligence on the part of a 'shop floor' employee was the cause of the death and not the management failure – that in effect the conduct of the shop floor worker broke the 'chain of causation'.

64. In the current Bill the Home Office has not included this clause. The consultation document states:

> "When they reported the Law Commission were concerned that the rules that at the time governed when an intervening act would break the chain of causation meant that it would be very difficult to establish that a management failure had caused death, as opposed to the more immediate, operational cause. ….
>
> The case law in the area has, however developed since the Law Commission reported and we are satisfied that no separate provision is now needed. An intervening act will only break the chain of causation it is extraordinary – and we do not consider that corporate liability should arise when an individual has intervened in the chain of events in a extraordinary fashion causing the death, or the death was otherwise immediately caused by an extraordinary and unforeseeable event."

65. The Home Office points to the cases of Empress Car Co (Abertillery) Limited v National Rivers Authority and R v Finlay[39] as justification for this approach. We think

[39] [1998] 1 All ER 481 and [2003] EWCA 3868 respectively

that the Home Office position is probably sound but we have not been in a position to seek legal advice on this matter.

ASSESSING THE BREACH

66. Section 3 states the following:

> (1) A breach of a duty of care by an organisation is a 'gross' breach if the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the circumstances.
>
> (2) In deciding that question the jury must consider whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance, and if so –
>
> (a) how serious was the failure to comply;
>
> (b) whether or not serious managers of the organisation –
>
> (i) knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;
>
> (ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;
>
> (iii) sought to cause the organisation to profit from that failure.
>
> (3) In subsection (2) "health and safety legislation or guidance" means
>
> (a) any enactment dealing with health and safety matters including in particular the Health and Safety at Work Act 1974, or any legislation made under such an enactments;
>
> (b) any code, guidance manual or similar publication that is concerned with health and safety matters and is made or issued (under an enactment or otherwise) by an authority responsible for the enforcement of any enactment of legislation for the kind mentioned in paragraph (a)
>
> (4) Subsection (2) does not prevent the jury for having regard to any other matters they consider relevant to the question.

67. In the consultation document, the Home Office states that:

> " The new offence is targeted at the most serious management failing that warrant the application of a serious criminal offence. It is not out intention to catch companies or others making proper efforts to operate in a safe or responsible fashion or where efforts have been made to comply with health and safety legislation but appropriate standards have not quite been met. The proposals do not seek to make every breach of a company's common law and statutory duties to ensure health and safety liable for prosecution under the new offence. The offence is to be reserved for cases of gross negligence, where this sort of serious criminal sanction is appropriate. The new offence will therefore require the same sort of high threshold that the law of gross negligence manslaughter currently requires – in other words, a gross failure that causes death. We have adopted the Law Commission's proposal to define this in terms of conduct that falls far below what can reasonably be expected in the circumstances, A number of respondents to the consultation exercise in 2000 were concerned that the term "falling far below" was sufficiently clear that further clarification or guidance was needed in respect of this. The draft Bill therefore provided a range of statutory criteria for providing a clearer framework for assessing an organisation's culpability. These are not

exclusive and would not prevent the jury taking account of other matters they considered relevant ".[40]

CCA's View

68. The CCA has the following views:

(i) we support the test of "falling far below what could reasonably be expected". It is currently the test for the offence of 'dangerous driving' and it is appropriate to reflect that wording.

(ii) we accept that there may be room to set out criteria to assist juries in determining whether or not an organisation's conduct has fallen far below what could reasonably be expected. However we are of the view that the criteria "sought to cause the organisation to profit from that failure" is problematic. It would be very difficult to prove that senior managers of an organisation wished to profit from a particular failure – and absence of proof might make juries simply acquit. It would be particularly difficult for juries dealing with the prosecution of public bodies. We understand from the Home Office that this subsection was supposed to capture the motive of senior managers. However senior managers may have lots of motives for failing to take action to comply with health and safety law – profit may be one, but not caring could be another. We would suggest that a jury should be simply asked to take into account "the reason for the failure". This would allow them to assess the relative importance of a senior manager failing to do something for profit or failing to do something because he could not care less. Although the rhetoric of 'profits before safety' is a common one - it should not be part of the offence itself.

(iii) we support the general definition of "health and safety legislation or guidance" as set out in the Bill - though we are of the view that it should also include other guidance – industry or otherwise (i.e British Standards) that is **supported** by the HSE or relevant authority. This is important as increasingly the HSE, for example, are not producing guidance but are working with industry bodies who publish their own.

[40] Para 32

JURISDICTION

69. The Bill states that the offence will apply if ”harm resulting in death is sustained in England and Wales”. It is important to note that it is not where the death took place but where the initial harm occurred.

70. Any company , based in any country, can be prosecuted as long as the harm that caused the death took place in England and Wales. So if the management failure of the company took place outside England and Wales but the harm took place inside, the company could be prosecuted. However the offence will **not** apply in either of these two situations:
    - the management failure is in England/Wales, harm caused outside England/Wales.
    - the management failure is outside England/Wales, harm caused outside England/Wales.

71. The Home Office consultation document states that:

    > “the new offence would not, however, have extra-territorial jurisdiction. As we set out in the consultation paper, there would be very considerable practical difficulties if 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.”

CCA’s View

72. The CCA has the following view:

    (i) 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. The English/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.

(ii) Since corporate manslaughter is a sister offence to the individual crime of manslaughter, the Home Office should give much more consideration to how the question of jurisdiction should apply. The CCA accepts that there are probably insurmountable difficulties to applying corporate manslaughter to situations where both the management failures and the harm took place abroad; this would in effect mean that UK health and safety legislation would have to apply outside Britain.

(iii) However in our view it is realistic to allow the offence to apply to situations where the management failure took place in Britain and 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/Wales but the management failure takes place outside – where the offence would apply as set out in the Bill. For example, there would be real difficulties in both investigating and prosecution a company when it is abroad. With the organisation based in England/Wales – these problems would be dramatically minimised.

(iv) Clearly, when the death takes place outside England/Wales the case may be dealt with by the country where the death took place or there may well be evidential difficulties in proving causation – where the crime scene was not secured. However these issues should be dealt with on a case by case basis. The Bill should not, in principle, exclude the jurisdiction of English/Welsh courts. There are sound public policy reasons for this: the British government should want to clamp down on companies, who in effect use England/Wales as a base for causing deaths abroad.

INVESTIGATION AND PROSECUTION

73. In its original consultation document, the Home Office proposed that health and safety enforcing bodies should be given powers to investigate and prosecute the new offence in addition to the police and Crown Prosecution Service. The draft Bill however does not change the current position. The Home Office now says:

"the Government recognises the importance of police involvement in clearly signally the position of the new offence as a serious offence under the general criminal law, rather than an offence that might be characterised as regulatory. The draft Bill proposes no change to the current responsibility of the police to investigate, and the CPS to prosecute, corporate manslaughter. It is of course important for the expertise of health and safety enforcing authorities such as HSE to be effectively harnessed in an investigation, not only to pursue questions of liability under more specific legislation, but also to provide advice and assistance to the police in investigation corporate manslaughter. The police already work jointly with the HSE and other enforcement authorities when investigating work-related deaths and protocol for liaison between agencies has been developed. The Government will continue to keep the adequacy and effective implementation of these arrangements under review."[41]

74. **CCA View**: The CCA supports the Government position on this point – though it is clear that the police should be given more and better training in relation to corporate manslaughter than they currently receive to enable them to investigate effectively.

PRIVATE PROSECUTION

75. The Home Office Bill states that:

> Proceedings for an offence under this section may not be instituted without the consent of the Director of Public Prosecutions"

This is a reversal of both the position of the Law Commission recommendation in 1996 and the Home Office's own consultation document in 2000 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."

76. In its current consultation document the Home Office statesthat "there was significant concern" amongst those that responded to the Home Office 2000 consultation document that:

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[41] para 58

> "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 .."

CCA's View

77. We have the following view

(i) For the principled reasons set out by the Law Commission in its 1996 report – and for reasons of access to justice - We think that the Home Office should revert back to the Law commission's position.

(ii) We do accept that since the Law Commission report there have been a number of changes in the policy of the Crown Prosecution Service

(a) providing written reasons of any decision not to prosecute;

(b) meeting with the family to explain those reasons and responding to any points made and

(c) reconsidering decisions on basis of points made by families if they are considered in some way significant.

In addition, it is also the case that the High Court has shown an increased willingness to review decisions made by the Crown Prosecution Service.

(iii) However, we are unaware of any evidence at all that removal of the need for the DPP's consent would lead to 'insufficiently well founded prosecutions'. Indeed there has only ever been one private manslaughter prosecution following a work-related death. In the absence of such evidence, we urge that the Home Office revert back to the position as set out in the Law commission 1996 report. There a many obstacles in the way of private individuals initiating private prosecutions – access to the evidence and witnesses and the huge cost. In any case, if a private prosecution is so manifestly unfounded, the case can be quickly quashed by the Crown court at an early stage.

(iv) Indeed, it is arguable that if crown bodies can be prosecuted it is all the more important to have the right of private prosecution - since the Crown Prosecution

Service, though theoretically independent, may well be under great pressure not to prosecute a crown body for the offence.

SENTENCING

78. There are two sentences available to the court. An unlimited fine or/and a 'remedial order'. In relation to the fine the Home Office consultation document says, "Where the circumstances of the case merit, a fine can be set at a very high level." In the Bill however no guidance is given to the court on what the level the fine should be. In relation to Crown bodies convicted of manslaughter the Home Office states:

> "There is a good argument, however, that fining a Crown body serves little practical purpose and simply involved a recycling of public money through the Treasury and back to the relevant body to continue to provide its service. … Whilst the draft Bill currently provides for a Crown body to be liable to a financial penalty, we would welcome thought son this issue."

79. A remedial order enables the court to make an order requiring the company to take steps to remedy the failure that was subject of the offence, or any matter that 'appears to the court to have resulted from that breach and to have been a cause of the death."[42]

CCA View

80. The CCA will not respond to this issue in any detail – since we feel that the Home Office has simply not given any proper consideration to the many alternative options of sentencing organisations. Five years have gone by since the 2000 consultation document – yet no thinking at all has been done by the Home Office on this crucial issue. We will simply make the following points:

    (i) It is important to note that the Financial Services Authority imposes on companies fines (without trial) that can amount to close to 10% of the overall turnover of the company. Whilst courts would be able to impose an 'unlimited fine' following conviction for the new offence of corporate manslaughter – the courts are given no guidance on this issue and it is perfectly reasonable to assume that the courts will

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[42] Section 6

continue to impose fines that fail to reach the levels of fine imposed by the FSA – even though they are dealing with far more serious offences..

(ii) In addition there are many alternative sentences that can be imposed upon companies – many of which are used in other jurisdictions – like corporate probation, community service, publicity impact orders, or equity fines. In our view the Home Office should immediately set up a committee that considers all the many alternative penalties for sentencing organisations – the CCA would be willing to consider being part of such an initiative.

INDIVIDUAL LIABILITY

81. The draft Bill does not have any impact on the accountability of individuals within an organisation. There are no secondary offences, and the possibility of prosecuting an individual for 'aiding ,abetting, counselling or procuring' the offence of corporate manslaughter is specifically excluded.[43] As indicated in the introduction, this is a reversal of the Home Office's position in 2000 when in its contemporary consultation document it expressed concern that without punitive sanctions against company officers there would be insufficient deterrent force to the new proposals. It suggested that individual officers contributing to a management failure could either be prosecuted or disqualified.

CCA View

82. There is a clear problem about individual accountability – in particular at a Board and senior manager level. In relation to this the CCA has previously proposed the need for the Government to legislate on directors' responsibilities, and we think this is the most effective way forward. The CCA accept that this Bill may not be the best vehicle for such a reform – but is strongly of the view that the Government should legislate in this area as they had promised to do so in a strategy document[44] published in 2000.

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[43] Section 1(5)

[44] "Revitalising Health and Safety: a strategy document", Action point 11. Department of Transport and the Regions. For further details of the views of the CCA on directors duties contact us