CENTRE FOR CORPORATE ACCOUNTABILITY

Corporate Manslaughter and Corporate Homicide Bill

Briefing on Amendments

Committee Stage –-Standing Committee B, 19 October 2006 onwards

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

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Amendments covered in this briefing

- Amendments relating to "**Senior Manager Test**" (Clause 1 and 2)
- Amendments relating to "**Duty of Care and Public Body Exemptions**" (Clause 3, 4, 5, 6, 7 and 8)
- Amendments relating to "**Application to unincorporated bodies**"
- Amendments relating to "**Private Prosecution**" (Clause 16)
- Amendments relating to "**Jurisdiction of offence**" (clause 23)

18 October 2006

THE SENIOR MANAGER TEST (Clauses 1 and 2)

The CCA supports the amendments tabled by Ian Stewart MP, Tony Lloyd MP and Jim McGovern MP set out here:

1. *Revised form of senior manager test*

Clause 1, page 1, line 3:
replace subsection (1) with
"An organisation to which this section applies is guilty of an offence:
(a) if the way in which any of its activities are managed or organised;
(i) causes a person's death
(ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, and

(b) the gross breach could have been prevented had all reasonable precautions been taken and all due diligence been exercised by all those at a senior manager level within the organisation."

2. *Removing senior manager test entirely*

Clause 1, page 1, line 4 (sub clause (1)):
leave out "by its senior managers".

Clause 1, page 1, line 16:
leave out subclause (3) (a).

Clause 2, page 2, line 7:
leave out whole clause

This new amendment would allow an offence to be committed in the following way.

1. there must be a management failure – at **any** level within the organisation;
2. this management failure must be both (a) **a cause** of the death, and (b) have fallen far below what could reasonably be expected (i.e gross). Only the most serious failures within a company could trigger the offence;
3. this failure could have been prevented "all reasonable precautions been taken and all due diligence been exercised" by all of those at a senior manager level.

The concept of "due diligence" is well known within business circles as it is used in financial control, consumer protection and product safety legislation. It is also well known in the health and safety context as it is a defence under Control of Substances Hazardous to Health Regulations 1988.[1]

It would also deal with the Government's view that it would be wrong "if organisations were prosecuted on the basis of isolated or unrelated management failings at relatively low levels of the organisation."

[1] It is a test for example that the British Retail Consortium suggested to the Home Office in the consultation process.

What is the senior manager test?

Clause 1(1) of the Bill states:

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

The Government is correct when it says that the new test means that it would no longer be necessary to prosecute a director or senior manager in order to be able to prosecute the company; the culpability of the company is therefore no longer connected with a prosecution of an individual. This is welcome.

However, under the new test the conduct of directors and senior managers remains absolutely crucial to whether or not a company will be able to be prosecuted. Indeed, although such an individual will no longer need to be prosecuted, it will still be necessary in effect to show that the conduct of one or more senior managers was 'grossly negligent' in order for the company to be prosecuted.

This is because the test says only failures **on the part of** senior managers will open up the company to prosecution; failures at other manager levels – however serious – will not allow the offence to apply. It would also be necessary to show that these **senior manager** failures were a cause of the death, and had fallen "far below what can reasonably be expected".[2]

This means that if an investigation shows that a death was the result of a number of different failures within an organisation – some at a senior manager level, and others at middle and junior manager level – it will only be those failures at a senior manager level that can trigger a prosecution. Where the failures at a 'middle/junior' level were grossly negligent, but the failures at a senior level were serious but not grossly negligent the company could not be prosecuted.

What is wrong with this test?

Fails to deal with 'systemic failures': The proposed test fails to achieve the purposes that the Home Office itself appears to consider should be achieved by this Bill. These purposes have been articulated in various ways by the Government:

- to deal with "large companies with complex management structures [that] have proved difficult to prosecute for manslaughter under the current law;"[3]

[2] The Home Office has suggested to us that these words have a different meaning to the obvious meaning which we have set out. In private conversations, the Home Office has argued for example that it would not, under their test, be necessary for failures at a senior manager level to (a) have caused the death or (b) fallen far below what could reasonably be expected. The Home Office told us that the failures at the heart of the test could in fact be at **any level within the organisation**, as long as they are linked to conduct within the sphere of responsibility of those **at a senior manager level**. It was suggested to us that the failure at a senior manager level does not have to be serious nor to have caused the death – as long as long as senior managers in some way contributed to the gross failures elsewhere in the organisation. We do not think that any ordinary understanding of the words means what the government suggests.

[3] Corporate Manslaughter: The Government's Draft Bill for Reform (2005), para 9

- to ensure that prosecutions following disasters like the Zeebrugge disaster ("from top to bottom the body corporate was affected by the disease of sloppiness"[4]) and the Hatfield disaster ("the worst example of sustained, industrial negligence in a high-risk industry"[5]) are more likely to be successfully prosecuted in the future;[6]
- to hold to account "systemic failures in the company or corporate organisation as a whole;"[7]
- target failings where the "corporation as a whole has inadequate practices or systems for managing a particular activity";[8]
- to allow the courts "to look at collective management failure within an organisation;"[9]
- to allow "the consideration of the institutionalised, systemic fact of failings at a lateral level, not just among the top people;"[10]
- to establish a test "that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies;"[11]

There is a mismatch between what the Government wants this test to achieve and what it actually will achieve.[12] To say that a company has complex management systems means, in the context of safety, that safety responsibilities are located with different individuals who are at different management levels within the organisation – and that it is difficult to identify where responsibility lies. To say there is serious corporate negligence – sometimes described as 'systemic' negligence or 'collective' failures – also means that the failures within the company are at different levels within an organisation, some at a lower and middle manager level, others at a senior manager level. It also tends to mean the failures at a mid/lower level within an organisation can be linked to some kind of failure, though not necessarily a serious one, at a senior manager level and that whilst any one failure within an organisation may not be grossly negligent, in aggregation they are.

This relationship between individual and collective failure is well illustrated by the prosecution that took place following the Hatfield train crash. On the one hand the judge stated that this was "one of the worst cases of industrial negligence" he had ever seen; but on the other hand he ruled that there was insufficient evidence against any directors and senior managers for either manslaughter or health and safety offences (for which only proof of 'neglect' is required). Since the proposed homicide test requires there to be grossly negligent failures at a senior manager level, prosecution under the new offence would **not** have resulted in any different result against the companies responsible for the Hatfield train crash. This also applies to the Zeebrugge disaster. As the Sheen Inquiry stated, "from top to bottom the body corporate was affected by the disease of sloppiness". These were failures at all levels – none at a senior level serious enough to be deemed gross in the eyes of the Judge, who ruled that the prosecution case should be quashed.

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[4] Sheen Inquiry
[5] Judge in sentencing companies for health and safety offences.
[6] Corporate Manslaughter: The Government's Draft Bill for Reform (2005), para 10; and Home Minister's speech at second reading of the Bill, Hansard, 10 October 2006, para 192.
[7] Home Minister's speech at second reading of the Bill, Hansard, 10 October 2006, Column 194
[8] Corporate Manslaughter: The Government's Draft Bill for Reform (2005), Para 28
[9] Home Minister's speech at second reading of the Bill, Hansard, 10 October 2006, column 196
[10] Home Minister's speech at second reading of the Bill, Hansard, 10 October 2006, Column 198
[11] Corporate Manslaughter: The Government's Draft Bill for Reform (2005), para 25
[12] It should be noted that the Government said in the consultation document that it wanted to target "failings in the strategic management of an organisation's activities" – something which is very different from dealing with the other objectives set out in the list above. It would, of course, be inappropriate for this offence simply to deal solely with high level serious strategic failures.

It is difficult to see what is the purpose of a new offence if these two cases would not be likely to have resulted in a conviction when the proposed test is applied to it.

Simply removing the need to prosecute a senior manager or director for manslaughter – as the new Bill does - will not achieve these ends. It must be replaced with a test that allows consideration of **systemic failures**, which this test does not.

Delegation to make companies 'manslaughter proof': Under the proposed test, senior managers will be able to make their companies 'corporate manslaughter proof', not by improving safety management, but by delegating down their own safety responsibilities to those in the company who are not 'senior managers'. This incentive goes against the stated policy objective of the Government and Health and Safety Commission to make directors and their equivalents take on greater responsibility for safety issues within their organisation.

There is, of course, no problem with senior managers delegating certain responsibilities to competent individuals within an organisation; what we are concerned about is that this new offence provides an incentive for senior mangers to delegate too much, or delegate even when it is not appropriate or where the person receiving the responsibility is not competent to discharge it. This kind of delegation would almost certainly never be regarded as sufficiently negligent to allow a company to be prosecuted for manslaughter or homicide; it could however result in more dangerous companies.

This was the point made by Sir Igor Judge when he gave evidence to the Parliamentary Scrutiny committee[13]:

> "There is nothing to stop a senior manager delegating to apparently competent staff and, if the apparently competent staff are people that it was sensible to delegate to, you can delegate all the way down. I think that is a concern. It is a concern I would have. The Law Commission, I think, suggested - I may be wrong - that what you should be looking at is a management failure and that, of course, goes to the management and organisation of the corporation. I am not making a policy comment, but I would have thought myself that might be a better way to avoid a series of "Not me. I passed this responsibility down", so that you end up with some very, relatively speaking, junior employee, who suddenly has to carry the can for what is in effect an unfair assignment of responsibility to him".

This is not just speculative thinking. Research, undertaken by the Health and Safety Executive to find out whether companies had appointed a director in charge of health and safety, found that: "in relationship to those companies that had delegated responsibility down, one of the main reasons why the companies had done that was because of the forthcoming corporate manslaughter legislation".

And the Parliamentary Scrutiny Committee stated in its report:

> "we are very concerned that the senior manager test would have the perverse effect of encouraging organisations to reduce the priority given to health and safety."[14]

[13] Q. 501
[14] Home Affairs and Work and Pension Report (Dec. 06) para 136.

UNINCORPORATED BODIES (clause 1)

The CCA supports the amendments tabled by Dominic Grieve MP, James Brokenshire MP, Michael Fabricant MP, James Duddridge MP, and Jeremy Wright set out below:

Clause **1**, page **1**, line **10**, at end insert—

'(aa) an unincorporated association or body;

(ab) a partnership (as defined in section 1 of the Partnership Act 1890 (c. 39);'.

Problems with the current Bill's stance on unincorporated bodies

The offence does not apply to unincorporated bodies - for example, schools, clubs, parish councils, or business partnerships, including many solicitors' firms and trade unions. The reason given by the Home Office for this exclusion is that, unlike corporate bodies, unincorporated bodies do not have a distinct legal personality. Although the Home Office acknowledges that there is no procedural problem in prosecuting unincorporated bodies, the consultation paper goes on to 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".[15]

Why should the Offence should apply to Unincorporated Bodies?

Reversal of Previous Position: the Home Office consultation document[16] in 2000 proposed that (in conflict with the Law Commission proposals at the time) that the new offence should apply to all employing organisations – 'undertakings' as they called them – whether or not they were incorporated. The Home Office 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

[15] Para 42
[16] Published in the summer of 2000

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.

"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-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."

Home Office arguments against application are unpersuasive

- *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 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.

DUTY OF CARE AND PUBLIC BODY EXEMPTIONS (clauses 3, 4, 5, 6, 7, and 8)

The CCA supports the amendments tabled by Dominic Grieve MP, James Brokenshire MP, Michael Fabricant MP, James Duddridge MP, and Jeremy Wright MP set out below.

Duty of Care Amendments

Clause 3, page 2, line 17
after "any", insert "duty imposed on it by statute or any"

This amendment would allow organisations to be prosecuted for corporate manslaughter where a person is killed as a result of the gross breach of a duty imposed on them by Parliament, for example under the Health & Safety at Work Act etc Act 1974.

Clause 3, page 2, lines 17-18,
delete "of the following duties" and insert "duty".
Clause 3, page 2, line 18, at end insert "including, but not limited to -"

At present the Bill contains an exclusive list of relationships in which a relevant duty of care might exist. As a result of this amendment, the list of relationships would become indicative rather than exhaustive.

Public Body Exemption Amendments

Removal of Public Policy Decisions and Exclusively Public Functions

Clause 4, page 3,
Stand Part

Removal of Miliitary Activity Exemption

Clause 5, page 3,
Stand Part

Removal of Policing, Law Enforcement and Emergency Services exemption

Clause 6, page 4, Stand Part
Clause 7, page 5, Stand Part

Removal of Child Protection and Probation Exemption

Clause 8, page 6, Stand Part

The problem with the current exemptions

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

> "the combined effect of .. provisions in the Bill restricting the definition or the scope of application of the offence is substantially to restore the legal or de facto immunity from prosecution enjoyed by many public bodies under the present law."[17]

In summary, in the Bill will not allow the following deaths to result in a prosecution however negligent the public body:

- any death of a member of the public at the hands of a public body, where the courts have not already ruled that there is a 'duty of care' relationship within the explicit 'duty of care' relationships set out in the Bill (section 1(1)(b) and section 3);

- any death of an employee or a members of the public resulting from "public policy decision making (including in particular the allocation of public resources or the weighing of competing public interests)." (section 4(1));

- any death or a person arising from inspection activity by a State body (section 4(3));

- any death of army personnel, police officers or members of the public who die either (a) during different kinds of operations in which armed forces or police forces come under attack or face the threat of attack or violent resistance or (b) during training of a hazardous nature or training carried out in a hazardous way in relation to these operations (section 5 and 6);

- any death of a member of the public arising from:

    - police or prison custody (section 4(2)
    - response by emergency services to an emergency situation (section 7)
    - activities of local authorities, local probation board and other public bodies whilst carrying out their responsibilities under the Children Act and other legislation (section 8).

These exemptions are brought about through:

- underpinning the offence using civil law 'duties of care'. This limits the circumstances when public bodies can be held responsible for deaths of members of the public.

- a set of specific exemptions set out in section 4 to 9 which further limit and specify the application of the offence.

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

[17] Para 1.39

Duty of Care

In order for an offence to have been committed under the current Bill, it is necessary for there to have been a breach of a 'relevant duty of care', as defined in clause 3.

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

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

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

This point was discussed in Court of Appeal case of Wacker[18] which stated:

> "Why is there, therefore, this distinction between the approach of the civil law and the criminal law? The answer is that the very same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law. ….
>
> "Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time, or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise [which meant that there was no duty of care relationship]. Public policy, in our judgment, manifestly points in totally the opposite direction."[19]

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

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[18] [2003] 1 Cr App R 329. which involved the prosecution for manslaughter of the driver of the lorry in which Chinese immigrants suffocated to death. It was argued by the lorry driver's lawyer that there could be no 'duty of care' between the lorry driver and the people he was smuggling into the country as they were part of a joint criminal act and it was an established principle of *civil law* that in such circumstances there was no duty of care – a doctrine known as 'ex turpi causa'.

[19] Para 33 and 35

The Parliamentary Scrutiny Committee also proposed that "the Home Office should remove the concept of 'duty of care in negligence.'"

Civil law duty of care principles are more limited in their application to public bodies than existing statutory duties. The Home Office may well be right to argue that the 'management failure' at the heart of the offence should be circumscribed by explicitly stated 'duties' to act; that is to say that there can only be a management failure if there is a corresponding duty to act.[20] However the Home Office has chosen the more limited set of duties contained within civil law 'duties of care' than the wider set of obligations contained in statutes – in particular those contained in section 2 of the Health and Safety at Work Act 1974 (HASAW). Whilst these duties are very similar in the context of employer relations towards employees, they are significantly different in the context of the duties of public bodies towards members of the public.

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

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

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

As a result there will undoubtedly be deaths resulting from management failures of public bodies which the civil courts have determined do not raise a 'duty of care' relationship (and therefore are immune from prosecution) but are breaches of section 3 of the 1974 Act.

Public bodies can be, and are, prosecuted for breaches of section 3 of the 1974 Act. It is our view that if there has been a gross breach of a statutory obligation relating to safety, and not one of 'duty of care', a manslaughter charge would be appropriate. Using statutory obligations rather than duties of care would not impose any new duties upon organisations, since these duties currently exist in law for over thirty years and can result in prosecution. In our view therefore, the new offence should apply not only to gross breach of duties of care that result in a death but also to gross breaches of statutory obligations.

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

Duty of care principles prevent application of offence to parent companies: The Explanatory Note on the Bill is silent about the culpability of parent companies. In its original consultation, the Home Office stated that:

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

In our view this is a misleading and disingenuous assertion – since it gives an impression that parent companies could - assuming grossly negligent conduct could be found at a senior management level of a parent company – be prosecuted.

However the Home Office fails to mention that English/Welsh civil law courts have not ruled that parent companies have a 'duty of care' in relation to the activities of their subsidiary companies. There is no established principle that there is a duty of care between a parent company and an employee of one of its subsidiary companies.[21] The fact that some parent companies may require subsidiaries to act in a particular way in relation to safety does not under the current law impose a duty of care upon the parent company.

If the concept of 'duty of care' is retained as a requirement in the offence, the possibility of prosecuting a parent company for the death of a worker in its subsidiary is not possible. The only legal obligation that parent companies have is that imposed by section 3 of the 1974 Act.

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

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

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

Public Body Exemptions

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

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

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

We do not think that extant mechanisms of accountability can be seen as replacements of the need for corporate manslaughter investigation and prosecution in cases where the most serious failures have taken place. This would be in circumstances where there is a duty of care, or where there are statutory safety obligations upon those who have been negligent, and a death has resulted. In relation to the 'alternative' mechanisms of accountability referred to by the Government, we would like to make the following points:

- Ministers may or may not be questioned in Parliament about a particular death – but when this does happen it cannot be a forensic and searching forum capable of finding out the level of failure that has taken place. Those asking the questions may well have extremely limited information about the circumstances of the death. Whether or not ministerial 'accountability' takes place in a particular set of circumstances is entirely arbitrary and accidental;

- We are not sure how judicial review would be an appropriate remedy following such a death, or how that might bring accountability. If the offence does not apply, there is no decision in such a case not to investigate or not to prosecute that could be subject to a public law remedy – so judicial review for failure to investigate or prosecute manslaughter would never be an option for a bereaved family;

- It is only rarely that such deaths will be subject to public inquiries and independent investigations, and indeed a Government (including the current one) may often do all it can to prevent these taking place. New legislation on public inquiries has been passed recently, which many critics have indicated now makes it much more difficult to get a public inquiry at all;

- Ombudsman inquiries are of last resort and will only take place following other inquiries which are considered by the family as inadequate. They are concerned with maladministration and not the level of gross failure that would be the subject of manslaughter inquiries. In relation to prison ombudsmen, it is only recently that inquiries are undertaken by people 'independent' of the prison and discussions with lawyers and the organisation INQUEST indicate that these inquiries can be cursory and overly favourable to the prison.

Serious Risk of breaching European Convention of Human Rights:
Over and above the points made by Liberty in its briefing, it is important to note that the Joint Committee on Human Rights concludes that the effect of the various exemptions means that the Government will be at serious risk of violating Article 2 of the European Convention on Human Rights – the Right to Life. This is worth quoting fully:

> "1.43 In our view the effect of these provisions is to give rise to a serious risk that the UK will be found to be in breach of Article 2 ECHR in the

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

1.44 In the Explanatory Notes the Government seeks to justify this restricted application of the new offence to public bodies, or bodies exercising public functions, by relying on the availability of other avenues of accountability. Yet it is precisely in these sorts of cases that the case-law of the European Court of Human Rights stresses the inadequacy of other mechanisms of accountability and the importance of the deterrent effect of the judicial system in place and the significance of the role that system is required to play in preventing violations of the right to life.

1.45 In our view one topical example suffices to demonstrate the point. The Office of the Commissioner of the Metropolitan Police is currently being prosecuted under the Health and Safety at Work Act in respect of the shooting of Jean Charles de Menezes. If, hypothetically, that shooting were established to be the result of gross negligence on the part of the senior management of the Metropolitan Police, but not attributable to one individual officer who could be described as the controlling mind of the organisation, under this Bill as drafted it would not be possible for the Metropolitan Police as a public authority to be prosecuted in respect of the death. It would still only be possible to bring proceedings against the Metropolitan Police as a public authority under health and safety legislation, for a much less serious offence. In such circumstances, it seems to us that there is a very strong likelihood that the UK would be found to be in breach of the positive obligation in Article 2 for the very same reason that Turkey was found to be in breach in Oneryildiz: that the criminal offences charged did not reflect the seriousness of the conduct which led to the death, and the "judicial system" in place was not adequate to secure the full accountability of State authorities for their role in the death."

DPP'S CONSENT FOR LEGAL PROCEEDINGS (Clause 16)

The CCA supports the amendments tabled by Dominic Grieve MP, James Brokenshire MP, Michael Fabricant MP, James Duddridge MP, and Jeremy Wright MP set out below.

> **Clause 16, page 10, line 39**:
> Leave out the whole clause

What is wrong with the requirement to have DPP's Consent?

Section 16 of the Bill states that:

> "Proceedings for an offence of corporate manslaughter—
> (a) may not be instituted in England and Wales without the consent of the Director of Public Prosecutions;
> (b) may not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland".

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

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

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

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

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

> "(1) where it is very likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;

(2) those which involve the national security or have some international element;
(3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm."[22]

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

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

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

The Independent Parliament Scrutiny Committee stated that:

> "We consider that the interests of justice would be best served by removing the requirement to obtain consent. We are persuaded that this recommendation would not lead to spurious and unfounded prosecutions, as there exist a number of other obstacles to bringing a private prosecution for corporate manslaughter. We recommend that the Government remove the provision … requiring the Director of Public Prosecution's consent before a prosecution can be instituted."[23]

The Committee had pointed out that costs are a very significant barrier to private prosecution and that manifestly unfounded prosecutions can be quashed by the Judge at an early stage in proceedings. In fact there has, till now, only ever been one attempt at initiating a prosecution following a work-related death.[24] The Committee also pointed out the potential conflict of interest that may exist when the DPP is considering whether or not to prosecute a Crown body.

[22] Para 1.24, Law Commission, "Consents to Prosecution (1998)
[23] Para 340. Home Affairs and Work and Pensions Committee (Dec 2005)
[24] Prosecution following the Marchioness disaster

JURISDICTION – APPLICATION TO DEATHS OUTSIDE BRITAIN (Clause 23)

The CCA supports the amendments tabled by Ian Stewart MP, Tony Lloyd MP and Jim McGovern MP, set out here:

A new clause 23(5) to be added:

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

We would in addition like to add the word 'substantially' before the words "within the United Kingdom".

What is wrong with the current jurisdiction as set out in the Bill?

Clause 23 sets out the rules of jurisdiction. It states:

- the offence applies to England and Wales, Scotland and Northern Ireland;
- the offence only applies if the 'harm resulting in death' is sustained:
  - in these countries;
  - within the territorial sea adjacent to the United Kingdom;
  - on a UK registered ship or British-controlled aircraft or hovercraft (as defined in specified legislation);
  - on territory related to offshore activities (as defined in specified legislation).

Any company based in any country can be prosecuted as long as the harm that caused the death took place in the UK. So if the management failure of the company took place outside the UK but the harm took place inside the UK, the company could be prosecuted. However the offence will **not** apply in either of these situations set out below:

- the management failure took place within the UK, but the harm took place outside the UK;
- the management failure took place outside the UK, and the harm took place outside the UK.

Inconsistent with application to individuals: It is important to consider the issue of jurisdiction for this new offence within the context of the current principles of jurisdiction for the offence of manslaughter as it applies to individuals. Through the application of section 9 of the Offences against the Person Act 1861, the English/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.

The CCA accepts that it may not be appropriate to simply reflect 1861 legislation in 2006, but since corporate manslaughter is a sister offence to the individual crime of manslaughter, the Home Office should greater consideration to how the question of jurisdiction should apply.

There may well be particular difficulties to applying corporate manslaughter to situations where both the management failures and the harm took place abroad, as this would in effect mean that UK health and safety legislation would have to apply outside Britain. (Though it should be noted that at present the police do investigate the conduct of individuals in these cases.) However, in our view it is certainly realistic to allow the offence to apply to situations where the management failure took place in Britain but the harm resulting in the death took place abroad. This we think would in most cases be easier to investigate than situation where the death takes place in England/Wales but the management failure takes place outside – where the new offence would apply. For example, whatever difficulties there may be in investigating a management failure outside Britain, or prosecuting a company based outside the UK, with the organisation based in England/Wales – these problems would be dramatically minimised.

The Parliamentary Scrutiny Committee accepted this principle:

> "We believe that in principle it should be possible to prosecute a company for corporate manslaughter when the grossly negligent management failure has occurred in England or Wales irrespective of where a death occurred. If this was not the case, there would be no incentive for such companies to improve or maintain acceptable standards of health and safety in the activities they conduct abroad."[25]

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

However the Anti-Terrorism, Crime and Security Act 2001 allows the British courts extra-territorial jurisdiction over corruption and bribery offences committed by both British companies and British nationals when these offences are committed abroad.[26] The Government has not explained why corruption by British companies is so much easier to investigate and prosecute when they taken place abroad compared to when deaths take place abroad.

As the Parliamentary Scrutiny Committee stated:

> "We also note that there is a general trend of increased extra territorial application for crime. Money laundering and sex trafficking are two such examples. The Attorney General also recently spoke proudly of having secured a conviction of a non-British citizen for torture committed in Afghanistan (using international war crime law)."[27]

[25] Para 253, Home Affairs and Work and Pensions Committee Report (Dec. 2006)
[26] Section 109, of the Act. Though the committee only recommended that this should apply to deaths in the European Union (para 254)
[27] Para 253, Home Affairs and Work and Pensions Committee Report (Dec. 2006)