THE GOVERNMENT REPLY TO THE FIRST JOINT REPORT FROM THE HOME AFFAIRS AND WORK AND PENSIONS COMMITTEES SESSION 2005-06 HC 540

Draft Corporate Manslaughter Bill

Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

March 2006

Cm 6755 £8.00

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Draft Corporate Manslaughter Bill: The Government's response

Introduction

The Government is strongly committed to safety in the workplace and to having effective laws in place to prosecute organisations where they have paid scant regard to the proper management of health and safety with fatal results. Current laws on corporate manslaughter link a company's guilt to the gross negligence of a person senior enough to embody the organisation. This fails to reflect the complexity of modern corporate life and there is strong support for reform.

The Government published a draft Corporate Manslaughter Bill on 23 March last year. This will make it easier to prosecute companies and other organisations where gross negligence leads to death. It will replace the need to find a "directing mind" – a key difficulty with prosecutions in the past – with a focus on the overall management of activities. And it will lift Crown immunity to prosecution for the first time, ensuring that Crown bodies will be accountable in the same way as their private sector counterparts when performing similar functions.

The Home Affairs and Work and Pensions Committees considered the draft Bill over the summer and autumn, publishing their final report in December. The Committees took evidence from a wide range of interested organisations and individuals and we have given very careful consideration to the Committees' comments and recommendations.

The Government warmly welcomes the Committees' strong support for a statutory offence of corporate manslaughter and key aspects of the Bill such as the need to target the offence at systematic failures, the importance of a high threshold for liability and the lifting of Crown immunity. We appreciate the concerns that the "senior manager" test has given rise to and accept the recommendation that a new test should be brought forward that better captures the essence of corporate culpability.

The Government, like the Committees, is keen to ensure that the circumstances where the new offence might apply are clearly defined. The current law of gross negligence manslaughter applies where a common law duty of care is owed and we are satisfied that that remains the right starting point for the new offence. We welcome the Committees' conclusion that decisions of public policy should not be covered by the new offence. We are also satisfied that it is appropriate that accountability for the management and organisation of some public functions properly lies elsewhere and that the draft Bill drew an appropriate line in this respect. However, we will look again at where exactly the line is drawn and whether the Bill can be clearer. As far as individuals are concerned, the law already makes provision for holding individual directors and others to account where they themselves have been grossly negligent or have contributed to health and safety failures. We do not agree that the Bill should be used to revisit this framework. However, a conviction for corporate manslaughter will raise important questions about the management of a company and the Government is looking further at the interaction between legislation on disqualification of directors and the new offence.

The Government would like to express its thanks to those individuals and organisations who submitted evidence to the Committees and to the Committees

themselves for their thorough and careful scrutiny of the Bill. Whilst we are not accepting all of the Committees' recommendations, these will play an important part as we revise the draft Bill, and we are confident that the process of pre-legislative scrutiny will result in a number of important improvements to the Bill.

The Committees urged the Government to proceed with legislation this Parliamentary session. We remain strongly committed to reforming this important area of the law and intend to legislate without delay as soon as Parliamentary time allows.

Chapter 1 Background to the draft Bill

1. We welcome the Government's proposal to introduce a statutory offence of corporate manslaughter. (Paragraph 16)

2. We are concerned at the length of time it has taken the Government to introduce a draft Bill since it first promised legislation on corporate manslaughter. We believe there should be no further unnecessary delay. We urge the Government to introduce the Bill, including our recommended changes, by the end of the present parliamentary session, making provision for carry-over if necessary. (Paragraph 49)

The Government warmly welcomes the Committees' endorsement of the need for reform and for a new statutory offence. The law dealing with the prosecution of companies and other organisations for manslaughter is in urgent need of reform. It is vital that organisations should be held criminally responsible where their gross negligence results in death. The Government's draft Bill makes a number of very significant proposals for putting the law onto an effective basis, including a new approach to assessing gross management failure in a organisation and seeking the extension of criminal liability for manslaughter to Crown bodies for the first time.

The Government is firmly committed to taking the process of reform through to completion and is keen to do so without further delay. This is an important area of the law and involves a number of complex questions. The Government has addressed these carefully and drafted robust proposals aimed at tackling key defects in the law. We are very grateful for the Committees' careful consideration of the draft Bill and have sought to take their views on board as far as possible. We believe that their recommendations will lead to a number of positive changes to the construction and drafting of the Government's proposals. However, the Government is also keen to make swift progress in response to the report and introduce a revised Bill at the earliest opportunity. This has guided our approach on the extent to which it would be sensible to revisit some fundamental aspects of the proposals, or explore issues which go wider than the new offence itself, which would have risked significant delay. We will be looking to introduce a Bill without delay as soon as parliamentary time allows.

Chapter 2 Application of the offence

3. As the Government's proposals stand, it will be possible to prosecute corporations under the provisions in the draft Bill, and individuals running smaller unincorporated bodies will be able to be prosecuted under the common law individual offence of gross negligence manslaughter. However, a gap in the law will remain for large unincorporated bodies such as big partnerships of accounting and law firms. We are concerned that such major organisations will be outside the scope of the Bill and would recommend that the Government look at a way in which they could be brought within its scope. We urge the Government to provide us with statistics in order to support its claim that the inability to prosecute large unincorporated bodies does not cause problems in practice. We would be particularly interested in seeing statistics detailing how many large unincorporated bodies have been prosecuted and convicted of health and safety offences. (Paragraph 62)

The Government's draft Bill provides a new basis for prosecuting incorporated bodies, tackling a significant gap in the law generated by the identification principle. This ensures that the Bill will apply to the sort of circumstances which have given rise to particular public concern in the past and which have typically involved large companies or other corporate organisations. It is clearly right that reform should apply equally to all incorporated bodies and this achieves wide coverage of both the private and public sectors (including NHS trusts, local authorities and police authorities). The Government also considers it right that the new offence should apply to the Crown, a proposal which has attracted wide support.

The Committees were concerned that this approach might leave a gap in the law in respect of unincorporated bodies and sought statistics on health and safety prosecutions. The Health and Safety Executive does not record information relating to the corporate status of organisations prosecuted for health and safety offences so it is difficult to provide statistics in these terms. They have however extracted some information relating to prosecutions in sectors where some types of unincorporated bodies such as partnerships and trusts are typically found. From available information about cases brought in the last five years, only a small number have involved these sorts of body – approximately 90 cases, amounting to less than 2% of all cases prosecuted following HSE investigation. The vast majority appear to have involved smaller businesses such as building firms and sole traders and relate to agricultural or construction activities. In these cases the majority of prosecutions appear to have been brought against individuals, although in some circumstances the organisations themselves have been prosecuted. Information on the prosecution by local authorities of predominantly office-based service industries (such as estate agents, law or accountancy partnerships and management consultancies) is held by individual local authorities and not the HSE; however the HSE confirm that there are very few recorded prosecutions or other enforcement actions in these industries.

As we highlighted in the consultation on the draft Bill, there are particular complications in seeking to apply this offence to unincorporated bodies because they have no distinct legal personality. And we wonder, in light of the information set above, whether the legal complexities outweigh the need to extend the offence in this way. That said, we agree with the Committees that there should be no readily avoidable gaps in the law and will consider further whether there are any straightforward ways of extending the application of the offence to some types of unincorporated body.

4. We welcome the certainty provided by an exhaustive list of government departments and other bodies and believe that the alternative, providing a statutory definition, could prove very difficult if not impossible to achieve. We agree with the Home Office that the draft Schedule needs "further work" to ensure that a number of other bodies, including a range of executive agencies, are included. It should also be reviewed by the Home Office on an ongoing basis, and formally every six months to ensure it is up to date. We think it might also be useful to extend clause 7 to ensure that bodies which are successors to bodies included in the Schedule are treated as "organisations" to which the offence applies. (Paragraph 65)

5. We recommend that the Home Secretary's delegated power to amend the Schedule should be subject to the affirmative resolution procedure rather than the negative resolution procedure. (Paragraph 67)

We welcome the Committees' endorsement of the Schedule. As Crown bodies do not commonly have their own legal identity, distinct from the Crown itself, the Schedule serves an important function in identifying with a degree of certainty those organisations who operate on behalf of the Crown and against whom proceedings for the new offence could be taken. We are continuing to develop this for introduction.

It will be important to ensure that the Schedule remains up to date. In many cases, the creation of new public bodies will not require the Schedule to be changed, for example, where that body does not have Crown status or is incorporated by statute. In other cases, there will be a recognisable prompt, such as a restructuring of Government Departments. It will be important for the Home Office to remain alert to such events. We are satisfied that the provisions on transfer of functions (clause 9) are adequate to ensure that a Crown body taking over the functions of another can be prosecuted, provided it is listed in the Schedule. This will be the case even though it was not listed (and potentially did not exist) at the time the death took place. It would not, however, be possible to prosecute that body in respect of a death that occurred before it was listed and which was not connected to functions transferred to it. This would *not* be appropriate as it would involve prosecuting a body for circumstances not covered by the offence at the time the death occurred.

The Government considered that orders to amend the Schedule would frequently be consequent upon a restructuring of Government Departments and therefore should be made by negative resolution (in other words, the order would take effect after a specified period unless a member of either House specifically sought to debate it). We think that remains the appropriate procedure for orders of this nature. However, we recognise that an order might have the effect of excluding (or covering) a particular area of Government, involving more substantial issues. We will consider whether it is possible to make these orders subject to the affirmative procedure.

6. It is appropriate that police forces as well as police authorities should be subject to the proposed new offence. We welcome the Government's assurances that the Bill when introduced will contain such provision. (Paragraph 71)

We welcome the Committees' endorsement that the new offence should apply to police forces as well as police authorities, a proposal also supported by the Association of Chief Police Officers and the Police Federation for England and Wales. It remains the Government's intention that the Bill should extend to police forces through an appropriate mechanism when introduced. This will ensure that the offence covers responsibilities to ensure safe working practices for police officers and safe condition of premises occupied by police forces. As the report recognises (Chapter 10), the extent to which the offence should cover

operational activities involves difficult questions of public policy. These issues are further considered in the Government's response to Chapter 10.

Chapter 3 Death

7. We welcome the Government's proposal that the offence not be limited only to the deaths of workers. (Paragraph 74)

8. We believe that organisations should be punished where their failings cause serious injury but are not convinced that gross negligence resulting in serious injury needs to be brought within the scope of the draft Bill. If the draft Bill was amended in this way, it might lose its current clear focus on manslaughter, and the ensuing controversy and drafting difficulties might further delay the introduction of the actual Bill. We would, however, urge the Government to consider the possibility of using the Corporate Manslaughter Act as a template for introducing further criminal offences, such as an offence of corporate grievous bodily harm, in due course. (Paragraph 81)

9. We are satisfied that the Bill as currently drafted covers long-term fatal damage to health as well as deaths caused by immediate injury. However, we would urge the Government to ensure that sufficient resources are available and appropriate procedures in place to make certain that in practice prosecutions are brought for deaths related to occupational health causes. (Paragraph 84)

10. We are satisfied that the title of the offence should be "Corporate Manslaughter" not "Corporate Killing". (Paragraph 88)

The Government welcomes the Committees' supportive conclusions and recommendations on these issues.

The draft Bill marks a new departure for the criminal law for holding companies and other organisations to account in an effective way for manslaughter. This is as important where the fatality involves a member of the public as it is in cases involving employees. We agree with the Committees that the Bill should remain focused on cases involving death. It is not uncommon for the law to mark out cases involving death in a particularly serious way, given the unique gravity of the consequences involved. Extending the proposed offence to cover serious injury would move the police and CPS into an area that is already well covered by health and safety legislation and enforcement by HSE and local authorities. There is a risk here of causing confusion over roles and responsibilities, particularly in terms of what sort of offence should be pursued in any given case, with no evidence that the change would lead to a greater deterrent effect or other benefits. Nevertheless, the Bill will represent a new approach to attaching criminal liability to an organisation, which might be utilised for future criminal offences if appropriate.

We agree that the offence is currently sufficiently wide to capture cases of long term fatal damage to health, as well as deaths related to one-off injuries. The Government and the Health and Safety Commission take occupational ill health very seriously and the Commission's Strategy to 2010 and beyond includes the "Fit for Work, Fit for Life, Fit for Tomorrow" (Fit 3) Strategic Delivery Programme, aimed at reducing the incidence of work-related ill health by 6% by 2008. It is important that the Commission's resources are properly prioritised to achieve best effect: in this respect to achieve significant reductions in ill health from failures to properly control hazardous substances. Establishing a causal connection between identified management failure and damage to health from sustained exposure to harmful agents or the contraction of diseases with long latency can pose particular difficulties for prosecutions that relate to specific cases of ill health. The more effective enforcement route may therefore be to prosecute for breaches of regulations relating to the control of risks or hazardous substances.

Chapter 4 Causation

11. We recommend that the Government provide certainty on the law of causation, as it applies to corporate manslaughter, by including the Law Commission's original clause in the Bill. (Paragraph 94)

We have considered carefully the Committees' recommendation to retain the Law Commission's draft provision on causation, but have concluded that no explicit provision is needed to achieve the substantive position that both we and the Committees wish to see.

The Law Commission considered that a provision was necessary to ensure that the relevant management failure was not treated as a "stage already set" and therefore not causally linked to the death. However, the law has moved on since the Law Commission's report. We considered that, at the point that the draft Bill was published, the law had already developed sufficiently to hold in appropriate cases that conduct of this nature could be a cause of the consequences that flowed from it, even if these were more directly caused by another person: *Environmental Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22. Overall, we are confident that in light of Empress Car the courts will adopt a sensible approach to causation in the context of corporate manslaughter. We note that the courts have not experienced difficulties in other cases relating to gross negligence manslaughter where managerial failure has been at issue (for example, *R v Yaqoob* [2005] EWCA Crim 1269, *R v Kelly* [2005] EWCA Crim 1061).

On the other hand, including the proposed provision might suggest that the Empress Car position was not achieved in the absence of this wording, undermining the application of that case to other offences where management failure is involved. Or it might suggest that something further than the Empress Car position is established for the new offence, but with no indication of what that might be. This leaves a considerable degree of uncertainty. Equally, whilst the proposed provision would clarify that a management failure *could* be considered a cause of the death, notwithstanding the more immediate cause, it would give no guidance on when it was appropriate for the causal chain to be broken.

A further problem in going down the Law Commission's route is that the proposal would only operate for the new offence. There are however circumstances in which the management failure in question might be the responsibility of one person (particularly in the case of a smaller company), who might in addition be prosecuted individually for gross negligence manslaughter. In these cases, the causal question would be subject to different tests for the individual and corporate offences. We do not think that that would be either equitable or satisfactory, leaving open the possibility that the same conduct could be ruled to have caused the death for one offence but not the other.

Chapter 5 Relevant duty of care

12. We propose that the Home Office should remove the concept of 'duty of care in negligence' from the draft Bill and return to the Law Commission's original proposal that the offence should not be limited by reference to any existing legal duties but that an organisation should be liable for the offence whenever a management failure of the organisation kills an employee or any other person affected by the organisation's activities. We also recommend 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. Organisations are already required to comply with duties imposed under such legislation and so should already be familiar with them. (Paragraph 105)

13. If the Government does decide to continue to base the offence on duties of care owed in negligence we do not believe the common law concept concerned should be limited by introducing categories where a duty of care must be owed. We are particularly concerned that the material accompanying the draft Bill did not highlight the use of the word "supply" and its intended purpose of automatically excluding certain activities "provided" by the state. (Paragraph 108)

We very much agree with the Committees' assessment that the offence needs to make clear the circumstances in which an organisation has an obligation to act. The question is how best to achieve this.

The need for a duty

Many cases that are likely to come within the ambit of this offence are ones where it is alleged that an organisation has failed to act in a way that it ought to have done. We do not think that question can be adequately addressed without reference to an organisation's duties to take reasonable care. By contrast, the Law Commission's original proposal, that an organisation should be liable whenever a management failure causes death, would leave this aspect of the offence fundamentally at large. This approach would create uncertainty about the range of new circumstances in which a court might hold that an organisation was under an obligation to act, and by finding liability in novel circumstances effectively impose new obligations on organisations. Whilst a new offence needs to provide a new way of attaching liability to organisations, we do not think that it should in itself seek to redefine the circumstances in which an organisation must act.

Defining new duties

One option would be to draw up new rules governing an organisation's responsibility for management failure, specifically for the purposes of this offence. However, that would be a very complex and lengthy exercise, substantially delaying the Bill and risking significant gaps and overlaps with existing statutory and common law requirements. And such a fundamental look at an organisation's duties does not seem an appropriate exercise to be driven by the criminal law. In our view, therefore, the more practical option is for the offence to relate to existing legal obligations on organisations to take reasonable care.

Health and safety duties

One possibility here, as was suggested to the Committees, is to build the offence on statutory health and safety duties, such as those imposed by the Health and Safety at Work Act 1974 and Merchant Shipping Act 1995. However, those

duties are primarily designed to establish regulatory safety regimes, and whilst some requirements are very specific, other duties are drafted very widely to afford enforcers a wide degree of flexibility in securing safe working practices. Their focus, therefore, is not to identify the particular circumstances when organisations have a duty to take reasonable care, but to provide both broad and specific obligations designed to secure safety at work. As such, we do not consider that they are offer a suitable way of defining the scope of this new offence. However, we agree with the Committees that the framework of statutory health and safety responsibilities, and the substantive requirements they impose, will be an important factor in assessing whether an organisation has indeed taken reasonable steps to discharge its obligations to take reasonable care.

Common law duty of care

We believe the right starting point for the scope of the new offence must be the existing criminal law test for gross negligence manslaughter, under which companies and other corporate organisations can currently be prosecuted. The leading House of Lords ruling in this area, setting out the accepted definition for this offence, states that "the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died": *Adomako* [1995] 1 AC 171. Since the Law Commission's report in 1996 this has been confirmed on a number of occasions as the applicable test. Proposing to rely on the common law duty of care is not therefore a departure for the criminal law in this area.

The common law duty of care provides a long developed framework for establishing circumstances in which organisations (and others) ought to be exercising reasonable care for the safety of others. It includes tests of foreseeability of damage, proximity of relationship and whether it is fair, just and reasonable to impose a duty. Where questions of management failure are concerned, we see sense in having a coherent approach to the duties organisations are under.

The Committees were particularly concerned that some aspects of the civil law might cause particular problems, for example, the doctrine of *ex turpi causa non oritur actio*, which can preclude liability to people engaged in a criminal enterprise. However, we do not consider that this doctrine raises any specific problems: as a defence to a civil claim it would not prevent a duty of care from being owed for the purposes of the new offence.

The Committees were also concerned that requiring a duty of care added unnecessary complexity. However, there are already a number of well established categories of duty of care (for example, an employer's duty of care for his employees, an occupier's duty towards those in his premises, a train operator's duty towards its passengers) so in many cases this issue will be easily resolvable. In some cases the question will be more complex. A pragmatic response is to make the existence of a duty of care a question for the judge to determine, and the draft Bill makes provision for that to be the case. This does not in anyway interfere with the jury's key task of determining whether the conduct in question amounted to a gross management failure.

Categories

We are therefore satisfied that the common law duty of care provides the appropriate starting point for considering whether there has been management failure in an organisation. However, we also recognise that whether a duty of care is owed or not will not always be a settled question and is a developing area, particularly in relation to the liability of bodies carrying out public functions. The proposal to lift Crown immunity also prompts difficult questions about the functions of Crown and public bodies and how accountability for failure to exercise these properly ought to be secured.

The proposal to set out various categories of activity is intended to delineate the scope of the offence in a clearer and more accessible way than the duty of care can alone, by drawing a clear line around the sort of activities to which it applies. We believe that this will give the public, organisations subject to the offence and investigators a much clearer picture of the sort of situations to which the offence applies and enable early decisions to be taken in some cases about whether to pursue an investigation without considering detailed questions about the duty of care. We consider this to be a useful general approach and one which we propose to retain.

The categories have both clarifying and substantive effects. They are generally intended to be comprehensive of the sorts of activity where duties of care are currently owed. To this extent, the effect is not to exclude activities that would otherwise be covered but to clarify that the offence does not apply to a range of functions, notably in the public sector, where duties of care either do not arise or are speculative (for example, when setting regulatory standards or providing guidance to public bodies). But there are wider questions about the extent to which the offence ought to apply to public functions where a duty does exist, which the categories also play a part in delivering. These issues need to be considered substantively in their own right and are addressed in the response to Chapter 10. It is then primarily a matter of how best to deliver the scope of the offence through the categories and other mechanisms such as specific exemptions.

14. We agree that it should be possible to prosecute parent companies when a gross management failure in that company has caused death in one of their subsidiaries. (Paragraph 113)

15. 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. (Paragraph 115)

The draft Bill offers a clear way of establishing, and holding companies to account for, gross management failure, related to the obligations they owe to their employees and members of the public to take reasonable care in carrying out their activities. That offers a considerable advance over the current position. The question of parent companies looks beyond this, to the position amongst a group of companies. Each company in a group is a separate legal entity with its own rights and obligations, regardless of ownership, and must be managed in a way that discharges the duties that fall upon it: it would be no defence for the directors to argue that they were acting on instruction from another in the group.

The consultation paper on the draft Bill proposed that a parent company should be liable where it owed a duty of care to the victim and was guilty of a gross management failure. For the application of the offence itself, we believe that this remains the right approach: the offence proceeds from the basis that the defendant owed a duty to take reasonable steps to safeguard a particular person and was grossly negligent in doing so. Whether a parent company owes a duty of care to the victim will be a matter for the usual tests for determining whether such a duty exists (which the Committees set out in paragraph 95 of the report) and will therefore turn on the particular facts of a case. However, because companies within a group will owe separate and individual responsibilities, duties of care owed by parent companies to, say, the employees or customers of a subsidiary are likely only to arise in a narrow group of circumstances.

Consultation by the Department of Trade and Industry preceding the Company Law Reform Bill looked at whether changes should be made to the liability of parent companies for the torts of subsidiaries, and decided not to change the law. This was because it would be difficult to define when subsidiaries were being used abusively to reduce risks to litigation, because no other jurisdictions make parents automatically liable for the torts of subsidiaries and because of the lack of evidence that companies used group structures abusively. Similar considerations arise in the context of the new offence. In particular, we do not consider it would be appropriate for the offence to apply in different terms to different organisations.

There have been some concerns that the effect would be to apply the offence differently in circumstances where an organisation structured itself as a group or within one company. However, this different application reflects the different responsibilities arising in the two structures, one involving a group of distinct legal persons with separate responsibilities and the other a single organisation with responsibility for all its activities. We do not believe that the new offence will be a dominant consideration for structuring decisions, which are more likely to be taken for reasons of tax, limited civil liability, effective collaboration in a joint venture or local regulatory conditions.

More widely, however, the fact that a company is part of a group can be acknowledged. For example, when sentencing a company for health and safety offences, the courts have shown that they are able to take into account the relationship between the parent and subsidiary company.

16. We believe that, where a death of an agency worker or of an individual in a subcontracting company was caused by a gross management failure by an employment agency or main contractor, it should be possible to prosecute these organisations jointly to establish either collective or individual corporate liability. We urge the Government to ensure that the Bill provides for this. (Paragraph 119)

17. We believe that principal contractors and employment agencies should take responsibility for the health and safety conditions of their sub-contractors and workers but that it is a step too far to provide that they should always be liable when a death has occurred. Principal contactors and employment agencies should only be liable when their own management failure is at fault. Anything more than this might encourage sub-contracting companies and those employing agency workers to ignore their health and safety responsibilities. (Paragraph 122)

The draft Bill proposed that any corporate body should be capable of prosecution where a gross management failure on its part caused a death, assessing that failure against the common law duties the organisation owed to take reasonable care. Under this approach, companies in the position of main or subcontractor will be covered by the offence where they grossly fail to discharge their obligations for the safety of a building site or the safety of their own employees or other workers who they are responsible for supervising. Companies acting as employment agencies will also, in principle, be covered, although it is more likely that others will have responsibility for the actual systems of work used by the workers they supply. The concept of "collective" guilt suggests that a number of defendants ought to be capable of prosecution even if none of them is individually guilty of the new offence. We do not agree that this would be a satisfactory way of proceeding: it is a key principle of the criminal law that a person is convicted for their own wrongdoing and not that of another. However, there may be circumstances in which more than one

[1] Modern Company Law for a Competitive Economy: Completing the Structure. DTI November 2000.

organisation owes a person a duty of care and gross management failures on the part of each of the various organisations involved are responsible for his or her death. In such a case, prosecutions against each of the different organisations may well be warranted.

Contractors

The main contractor on a building site will normally owe a duty of care as **occupier**. The offence will therefore extend to their responsibilities to take reasonable care to ensure the site is safe for subcontractors and their employees. This will not usually include supervising the work of a contractor they regard as competent, unless they know or suspect them to be using an unsafe system of work but will include taking reasonable care to those on the site in respect of dangerous activities. The offence will also extend to the duties of care a main contractor owes to their own employees, as their **employer**, as well as duties to those in a similar position including the employees of subcontractors and other non-employed workers, where the main contractor has responsibility for directing their work. Main contractors will also be covered where they assume responsibility for coordinating the activities of subcontractors or for ensuring health and safety compliance on a site, as well as for plant or equipment that they supply. In assessing whether a management failure has occurred in any of these scenarios, the Bill directs a jury to consider the statutory framework covering these matters, including, for example, the Construction (Design and Management) Regulations 1994. These require the systematic management of projects from concept to completion. For projects over a certain size, a planning supervisor and principal contractor must be appointed. The latter's key duty is to co-ordinate work during construction to ensure the effective management of health and safety.

This will not, however, relieve subcontractors of their own responsibilities to provide safe systems of work for their employees. And we agree with the Committees that the offence should not be drawn up in a way that encourages a less rigorous approach in this respect.

Employment agencies

Generally, because of their remove from the actual workplace and the fact that the host organisation will be in control of the systems of work employed, an employment agency will rarely owe a duty of care in this respect to the staff they supply. However, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 do place specific duties on these bodies to make enquiries to establish whether a person seeking work has the experience, training and qualifications required by the hiring organisation, any necessary professional qualification for the work in question and to ensure it would not be detrimental to the interests of that person to work for the hiring organisation.

We do not believe that it would be appropriate for this legislation to seek substantively to change the sort of duties owed by contractors or employment agencies in these circumstances, which requires a different consideration of the responsibilities of employers and others in control of work. The focus of the new offence is to define criminal liability for management failure, in the context of the duties that employers and others owe.

Chapter 6 Management failure

Chapter 7 Senior managers

18. 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. (Paragraph 136)

19. We agree that the offence does appear simply to broaden the identification doctrine into some form of aggregation of the conduct of senior managers. This is a fundamental weakness in the draft Bill as it currently stands. By focusing on failures by individuals within a company in this way, the draft Bill would do little to address the problems that have plagued the current common law offence. (Paragraph 140)

20. We are greatly concerned that the senior manager test will introduce additional legal argument about who is and who is not a "senior manager". (Paragraph 149)

21. We believe that the Government should be aiming for an offence that applies equitably to small and large companies. (Paragraph 154)

22. We note that the reference to senior managers might also have the unfortunate effect of discouraging unpaid volunteers from taking on such roles. (Paragraph 158)

23. We recommend that the Home Office reconsiders the underlying "senior manager" test. (Paragraph 159)

24. We believe that a test should be devised that captures the essence of corporate culpability. In doing this, we believe that the offence should not be based on the culpability of any individual at whatever level in the organisation but should be based on the concept of a "management failure", related to either an absence of correct process or an unacceptably low level of monitoring or application of a management process. (Paragraph 169)

Central to the offence is the type of behaviour which should be the basis for corporate liability. The draft Bill sets out a fundamentally new approach to criminal liability for companies and other bodies, based on failures in the *way its activities are managed or organised*. This would allow prosecutions to focus on systems of work and their implementation rather than solely on the actions of particular senior individuals within the organisation, the Achilles heel of the current law.

However, while accepting the Law Commission's proposals in this respect, the Government recognises that there are concerns that this test has the capacity to bring in liability for management failures occurring solely at a relatively junior level, where it would not be fair to hold the corporation as a whole responsible for an offence of this nature. In order to avoid this problem, the Government adapted the test to require a management failure by *senior managers*. We considered that this would retain the central focus on the way a particular activity was managed or organised, but ensure that this looked at a picture of overall management failing.

The Government recognises that the senior management test has been widely interpreted in a way in which the Government did not intend. The Government considers that the test represented a minimal development of the Law Commission's proposal, designed primarily to ensure that systems and processes throughout an organisation for managing a particular activity were considered and that, properly applied, would not in practice have had the adverse impacts

that witnesses were concerned about. However, because it is very important that the offence is clear, properly understood and commands confidence, the Government accepts the Committees' recommendation that the test should be reconsidered.

The Government is pleased that, despite differences in interpretation of the way the test has been drafted, the Committees support the Government's underlying policy for the circumstances in which management failure should properly be attributed to corporations: the Committees support the Government's view that the test should neither be limited to failures at director level nor so wide as to capture management failures exclusively at a low level; and the Committees support the Government position that a test should relate to inadequate management practices or systems.

Chapter 8 Gross breach

25. We appreciate the reason for limiting the application of the offence to gross breaches, if utilising a concept of duty of care. This targets this serious criminal offence at the gravest management failures. (Paragraph 172)

26. We welcome the general proposal to include in the draft Bill an indicative, not exhaustive, list of factors which jurors are required to consider when determining whether an organisation's conduct is a gross breach. However, given the levels of apparent confusion, we would urge the Government to provide a clear explanation of how such a list of factors would be used in court. (Paragraph 179)

27. We welcome the proposal in clause 3 of the draft Bill that the jury be required to have regard to whether the organisation has failed to comply with relevant health and safety legislation and guidance and that they be required to consider how serious was the failure to comply. This is an appropriate factor for juries to consider when determining whether there has been a gross management failure. We further recommend that after "legislation," the phrase "or any relevant legislation" be inserted in order to widen the scope of this factor. (Paragraph 187)

28. We recommend that juries should not be required to consider a factor which makes reference to senior managers in an organisation. However, if this factor is retained, we believe it should refer to the "risk of death" only and not the "risk of death or serious harm" as this would be inconsistent with the current law of gross negligence manslaughter. (Paragraph 191)

29. We are not convinced that the question of whether senior managers sought to cause the organisation to profit or benefit from the failure is relevant to determining whether there has been a gross breach. We therefore recommend that Clause 3(2)(b)(iii) be deleted. This factor should, however, be considered in sentencing. (Paragraph 194)

The Government welcomes the Committees' support on these points. Corporate manslaughter is indeed a grave criminal offence and so we believe should be targeted at only the most serious corporate failings. We have therefore retained the high threshold of a "gross" breach for the offence. This threshold is in line with the current law of manslaughter and reflects the Law Commission's proposals of behaviour falling far below what could reasonably be expected (which the Government and Committees accept is an appropriate way of defining this test).

Notwithstanding the difference in approach to the duty of care, the Government is pleased that the Committees appreciate the reasons for limiting the offence to the most serious failings and gross breaches of duties of care.

Under the draft Bill, the question of whether a breach of a duty should be categorised as gross is a matter for the jury to decide. In order to assist jurors, the Government set out in the draft Bill factors for them to consider when deciding whether or not a breach had been gross.

The Government is pleased that the Committees welcomed the concept of a list of factors. We acknowledge that there was a degree of confusion in how the factors would operate. The Committee is correct that these are not conditions that must be satisfied before a conviction can be secured but simply factors to assist the jury's consideration. As such, it would not be necessary for the prosecution to prove or adduce evidence on all or indeed any of them, although they are intended to highlight particularly relevant considerations. We will consider whether, and if so how, the Bill might be clarified in this respect.

As drafted the factors would require jurors to consider whether or not the corporation had failed to comply with relevant health and safety legislation and guidance, and if so how serious that failure was. Additionally, jurors would have to consider whether or not senior managers were aware of the failings, whether they were aware of the risks posed by the failings and whether they sought to profit from them.

The Government believes that whether or not relevant health and safety legislation and guidance had been complied with is a very important factor. It creates a clear link with existing regulatory obligations and well established requirements for securing health and safety, and the Government welcomes the Committees' endorsement of it. The Government agrees with the Committee that concerns about the inclusion of "guidance" are based on misunderstandings of the draft Bill. However, the Government recognises that the concerns, even if misplaced, might lead to risk averse behaviour and we will look further at whether this part of the Bill can be improved. The Government also agrees with the Committees that this factor should relate to all legislation which governs health and safety, including food safety and working time legislation. The Government is satisfied that the current wording is sufficiently wide to allow for that. Therefore, the Government does not agree with the Committees that the addition of "or any relevant legislation" would widen the scope of the factor and so is not necessary.

Given that the Government accepts that the test for senior management failure needs to be reconsidered, the Government also accepts the Committees' recommendation that the factors should not include the awareness of senior managers of health and safety failures and the risks posed by them. The Government further agrees that the reference to whether senior managers sought to profit from the failures should be removed. The Government agrees a profit motivation may nevertheless be a matter for sentencing and will bring this to the attention of the Sentencing Guidelines Council (see below in response to Chapter 12 Sanctions).

Chapter 9 Gross management failure

30. We urge the Government to consider returning to the Law Commission's original proposal as a starting point. We acknowledge the argument that the Law Commission's "management failure" test could cover failings within a company that occur at too low a level to be fairly associated with the company as a whole. Nevertheless, we recommend that the Home Office should address this specific concern without abandoning the Law Commission's general approach. We suggest that juries be assisted in their task by being required to consider whether there has been a serious breach of health and safety legislation and guidance or other relevant legislation. In assessing this they could consider whether a corporate culture existed in the organisation that encouraged, tolerated or led to that management failure. (Paragraph 199)

The Government agrees that the test for liability should continue to be based on the Law Commission's original formulation of management failure. As explained above (response to Chapters 6 and 7), the Government's "senior management failure" test had been designed to retain this approach but ensure that it applied in respect of the wider management of an activity by an organisation and could not be satisfied by failings solely at a relatively junior level. But we accept that it is generally perceived that the proposal has a much wider effect.

We have given serious consideration to how the test should be re-framed and in particular to the Committees' suggestion to deal with the issue of low level management failures specifically. We agree that would meet the policy objective, although we are concerned that a solution that simply sought to exclude liability in such circumstances would face many of the same criticisms that the senior management test does and would also raise new questions.

The Government notes that the Committees felt a key consideration here was to require a jury to consider whether a corporate culture existed that encouraged, tolerated or led to the management failures. We are interested in this idea and the way in which it reinforces the concept of wider, corporate management failures and consider that such a factor may well have a useful role to play. However, we are not satisfied that it represents the whole answer. In larger organisations it might not be sufficiently wide to include circumstances where individuals were able to engage in risky activities because of a lack of appropriate supervision. There are also some dangers in suggesting that such a corporate culture must always be found. For example, this may not be a very meaningful test in some small organisations and may not cover deliberate inappropriate risk taking by senior managers. The test needs to be flexible enough to cater for those circumstances. In Australian law, where this idea derives from, corporate culture is merely one part of a wider system for attributing corporate liability.

The Government therefore still considers that the management failure test in itself needs to be qualified in some way. In policy terms, the test should examine the way the organisation as a whole managed or organised a particular activity. By this we mean the prosecution should be based on not only the immediate events that led to the death but on the wider context in which those events were able to take place. The wider context could include concepts of corporate culture, if appropriate. It could also include a failure to have systems in place to control risks for the carrying out of particular activities or failure to enforce such systems; inappropriate delegation of health and safety responsibilities or inadequate supervision of delegated responsibilities.

This means that failures at any one level to manage the particular activity safely will not necessarily be a sufficient basis for a prosecution although such failures might be key. A lack of safety management of an activity at the top of an

organisation would not be a basis for corporate manslaughter if the safety management had been delegated appropriately and sufficient monitoring was in place. Similarly, the failure at a low level of management would not be a basis for corporate manslaughter if that occurred in a system that otherwise managed safety properly. The court should be presented with the wider picture of the company's management of an activity, both at supervisory and strategic levels, and consider the question of gross breach in terms of that overall picture.

We will bring forward a new test which, as the Committees recommend, retains the key element of management failure but is aimed at failures in the management overall of a particular activity, when we introduce the Bill.

Chapter 10 Crown immunity

31. We welcome the proposal to remove Crown immunity for the offence of corporate manslaughter. However, we consider that the force of this historic development is substantially weakened by some of the broad exemptions included in the draft Bill. (Paragraph 204)

32. We also note that five years have passed since the Government committed itself to removing Crown immunity for health and safety offences. We urge the Government to legislate on this issue as soon as possible. (Paragraph 205)

33. The definition of "exclusively public function" is unsatisfactory. If the Government does decide to retain this exemption, the definition would need further work to ensure that there is clarity about the situations in which it would apply. (Paragraph 213)

34. We are very concerned by the exemption for exclusively public functions and are not convinced by the Government's arguments for including in the Bill a blanket exemption for deaths resulting from the exercise of public functions. We do not consider that there should be a general exception under this heading since bodies exercising such public functions will still have to satisfy the high threshold of gross breach before a prosecution can take place, namely that the failure must be one that "falls far below what could be reasonably expected." We do not consider that a private or a Crown body should be immune from prosecution where it did not meet this standard and as a result, a death occurred. (Paragraph 217)

35. We believe that there is no principled justification for excluding deaths in prisons or police custody from the ambit of the offence. The existence of other accountability mechanisms should not exclude the possibility of a prosecution for corporate manslaughter. Indeed public confidence in such mechanisms might suffer were it to do so. We are particularly concerned that private companies running prisons or custody suites, which are arguably less accountable at present, would be exempt. Accordingly, we recommend that, where deaths in prisons and police custody occur, they should be properly investigated and the relevant bodies held accountable before the courts where appropriate for an offence of corporate manslaughter. (Paragraph 227)

36. We believe that there should be an exemption to the offence for public policy decisions. However, we believe that this should only apply at a high level of public policy decision-making. (Paragraph 233)

37. Although we recognise the unique position of the armed forces, we consider that the exemption is drawn too widely. We are concerned that "preparation" for combat operations would encompass routine training and believe that such a wide exemption cannot be justified. We therefore recommend that the words "in preparation for" be removed from clause 10(1)(a) so that the exemption is restricted to combat operations and acts directly related to such operations. (Paragraph 239)

38. We are concerned by the possibility that the inclusion of police and fire operational activities might lead to a culture of risk averseness. However, this could be countered by effective education. We believe that the Bill should be drafted so that emergency services' operational activities are only liable for the offence in cases of the gravest management failings. (Paragraph 245)

We welcome the Committees' endorsement of the Government's proposed extension of the new offence to Crown bodies. The Government recognises the very strong public interest in ensuring that Government departments and other Crown bodies are clearly and openly accountable for management failings on

their part. The Bill's proposals for lifting Crown immunity represent a very significant, and unprecedented, step and ensure a level playing field for public and private sector employers under the new offence when they are in a comparable situation. In particular, the Bill ensures that the Crown will be widely covered by the offence in respect of its responsibilities as employer and occupier. This represents a considerable extension of the law and will enable Crown bodies to be prosecuted for gross failings to ensure safe working practices for their employees or safe conditions in the workplace where these have had fatal consequences. This will provide important new opportunities for bereaved families to receive justice where Crown immunity currently leaves no scope.

The very broad and often unique responsibilities of public bodies raise more difficult questions for accountability for activities that affect the public. Public bodies frequently operate under a framework of statutory duties which require them to perform particular functions and they must often allocate resources between competing public interests with little (if any) option of deciding not to perform particular activities. Public bodies will also often hold special authority or perform functions that the private sector do not or cannot do on their own account. And their functions must be carried out in the wider public interest.

The special position of public bodies, deriving powers from and exercising functions on behalf of the state, means that these bodies are already subject to a strong and public framework of standards and accountability. These include, for example, national Inspectorates that examine operational practices on a thematic and institutional basis, Ministerial accountability to Parliament for the standards to which these organisations operate and how they perform, independent investigations into specific incidents and other public inquiries examining both the incident in question and wider issues, as well as specific remedies such as judicial review and the Human Rights Act. There are also important forms of democratic accountability, including Parliament and through that the public.

It is also important to recognise that the offence is not about the liability of particular individuals acting unlawfully: the criminal law will continue to apply to them with full effect. The offence is, uniquely, concerned with the overall management by an organisation of its activities. For private companies, other than internal accountability to those who manage or own the company, that is a matter for regulatory and criminal offences. However, there is a wider dimension for public authorities and in particular Crown bodies, which involves a strong measure of public accountability. The offence must consider and set out, against that wider dimension, where accountability for the management of a public body should be the concern of the criminal law.

At present, this is achieved in a number of ways in the draft Bill. These include basing the offence on the common law duty of care, setting out a number of activities to which a duty must relate and explicit exemptions covering public policy decisions, exclusively public functions and the armed forces. This ensures that the offence covers organisation's responsibilities to ensure safe working practices for their employees and safe premises and widens it to other circumstances in which a duty to safeguard members of the public is owed but does not apply the offence to matters that are intrinsically ones of government.

We welcome the Committees' conclusion that high level **public policy decision making** should be exempt from the offence. We welcome too the conclusion that the **armed forces** should be exempt in certain circumstances. The Committees were concerned about the potential width of this exemption. We are satisfied that the exemption ought to extend to acts preparatory to combat, which the current law on the duty of care recognises should not attract liability and might include such closely related activities as reconnaissance and tactical activities designed to prepare individual soldiers for operational conditions. In our view, this concept does not extend to cover issues such as routine training or basic recruit

training, training to new roles or equipment, adventurous training or the normal testing or evaluation of military equipment, which we intend should be covered by the Bill. We will consider whether this part of the Bill can be improved to make this clearer.

We note the Committees' concerns about extending the offence to **police and fire operational activities**. We are clear that the new offence should extend to responsibilities that emergency service providers have to ensure safe working practices for employees when performing dangerous activities. However, we share the Committees' caution about the circumstances in which the offence should cover the impact of carrying out these activities on particular members of the public. Risks that this might inappropriately skew the way in which these authorities perform their roles, which must be performed in the wider public interest, have been recognised in the context of the civil law, which imposes few legal duties of care on fire and police authorities to members of the public in this respect. We consider that represents a helpful starting point for where the offence ought to apply, although will consider further where exactly the line ought to be drawn.

We do not agree that the definition of "**exclusively public function**" is as wide as some have interpreted. It requires a function to be one that "by its nature" is exercisable only with statutory authority (or under the prerogative). This would therefore exclude only a relatively narrow band of activities of a sort that private companies could not carry out independently. But it would not exclude activities simply because they were provided under statute and therefore would have little effect on the vast majority of activities provided by public bodies which can also be offered by private companies independently.

However, we recognise the Committees' general concerns about the extent to which public functions are exempt from the offence. We are satisfied that it would not be appropriate to include the management of all public functions within the scope for the offence. There is, for example, already a strong framework for investigating and securing accountability for deaths in custody. All such cases are subject to independent investigation. Deaths in prisons, immigration centres and probation approved premises are subject to a police investigation and to an investigation by the Prisons and Probation Ombudsman. Deaths in police custody are investigated by the Independent Police Complaints Commission. Where circumstances warrant, individual prosecutions can be brought under the criminal law for manslaughter against those involved. All deaths in custody are also subject to a Coroner's Inquest, which is held in public, usually with a jury. The inquest, in combination with these investigations, is the main way of ensuring that the Government's investigative obligation under Article 2 of the European Convention on Human Rights is met.

Wider questions about the adequacy of arrangements for custody are subject to monitoring and inspection by national Inspectorates covering the Prison Service and police forces. This is reinforced in contracted prisons through contracts and their management and monitoring, processes that will be tightened and intensified across prisons generally as Regional Offender Managers commission and monitor services from a range of prison and probation providers. Parliament plays an important role both in setting the legislative framework for custody (including, for example, key legislation such as PACE and PACE Codes and Prison Rules) as well as by holding Ministers to account for the operation of the Prison Service. The report of the Joint Committee on Human Rights "Deaths in Custody" (December 2004) provided cross government scrutiny of deaths in custody. Police authorities and police forces are also accountable to their local communities. Both are under a statutory obligation to report annually to their local community and to Ministers. They must also consult directly with their local community, a process that should involve all aspects of people coming into contact with the police and how they are dealt with, whether in custody or on the street.

The Government is, however, willing to look further at exactly how the exemptions in the Bill operate, both in terms of their clarity and what substantively is excluded. We are not anticipating any major changes in the sort of activities that are not covered. But we will look further at exactly where the line should be drawn for the management of public functions and how to ensure this is clear and distinct.

The Government is committed to the removal of **Crown immunity for health and safety offences** and has indicated that legislation will be brought forward when Parliamentary time allows. A great deal of progress has been made recently in developing concrete proposals for legislating on corporate manslaughter, including the lifting of Crown immunity, which the Government is keen to put on the statute book. We are looking carefully at how far this could serve as the basis for removing this immunity also for health and safety and fire safety offences and, if so, whether the same vehicle could be used to achieve this, but would not want this to jeopardise the Bill's timetable.

Chapter 11 Territorial application

39. We recommend that the offence be extended so that deaths that take place in the rest of the UK are within the scope of the offence when the management failure occurred in England and Wales. We also urge the Government to make provision in the Bill for the offence later to be extended at least to cover cases where deaths have occurred in the rest of the European Union. Although we understand that evidential and jurisdictional factors mitigate against the offence applying to UK bodies operating elsewhere in the world, we consider that the Government should take to itself a power to require information from the relevant UK body about such a death. (Paragraph 254)

The draft Bill proposes a new offence for cases involving gross management failure by companies operating in England and Wales and where their activities are subject to English law. In doing so, it covers corporate decision making aboard where this has had fatal consequences in England or Wales. This reflects our understanding of the jurisdiction of current laws on manslaughter for corporate prosecutions[1] and means that the offence will apply to companies pursuing activities that create risks to their employees in England or Wales or to members of the public here, or at sea or on ships, planes or oil rigs subject to English law.

We have considered carefully whether jurisdiction should be extended to deaths anywhere in the UK. Our understanding is that at present it is unlikely that the English courts would have jurisdiction where a death had occurred in Scotland or Northern Ireland. Indeed, even where English offences apply extra-territorially, special consideration is often given to other UK jurisdictions. For example, section 9 of the Offences Against the Person Act confers extra-territorial jurisdiction for murder committed by British subjects, but not in respect of offences committed in Scotland or Northern Ireland.

On balance, we are not satisfied that there would be clear advantages to covering deaths in other UK jurisdictions. Deaths will typically be associated with a corporate activity being carried out in that country and, where that has been responsible for a fatality, there would be a strong public interest in a prosecution in the country concerned. (Just as, where a death had occurred in England or Wales, there would be a high expectation for the case to be prosecuted here, even if the company involved were based in Scotland or Northern Ireland). In Northern Ireland public consultation has broadly favoured extending the proposed legislation for England and Wales to that jurisdiction, and there is therefore little practical consequence to how jurisdiction is defined between that country and England and Wales. This is, however, of potentially more interest in the case of Scotland, where different proposals for reform have been drawn up. However, creating a substantial overlapping jurisdiction, with distinct offences applying, would raise questions about where proceedings ought to be pursued and the scope to pursue proceedings in one jurisdiction if not successful in the other. We think that the better course is for jurisdiction to be as clear as possible where cross border activities are involved.

We agree with the Committees' conclusion that evidential and jurisdictional factors militate against the offence applying generally extra-territorially. We do not, however, accept the argument that the only incentive companies have to improve or maintain standards is the application of this offence and that the offence should at least apply to deaths in the EU. Such cases will also involve considerable practical difficulties for investigation and prosecution. Moreover, the proposed offence is closely associated with substantive requirements to

[1] See chapter 8 of the Law Commission's 1996 Report on Involuntary Manslaughter (Law Com report no 237).

safeguard health and safety, under legislation such as the Health and Safety at Work Act 1974 but also more widely, and the Government does not believe that it is appropriate to seek to apply UK standards abroad in this way. Furthermore, there is a range of EU legislation providing a comprehensive framework for the management of health and safety by companies operating within Member States. These ensure that a proper framework for protection exists across the EU but also leave it to individual countries to implement these requirements in an appropriate fashion[2]. The Government also notes that proposals to make service providers subject to the laws of their own country when operating abroad acknowledge that derogations may be appropriate in both the criminal and the health and safety fields. That would recognise the primacy of the law of the country where the service provider is operating.

We are not clear what purpose would be served by the information the Committees propose the Government should have a power to gather in other cases: the Committees accept that extra-territorial jurisdiction is not practical in these cases and the information would not therefore be gathered for criminal proceedings here. Nor is it clear how such a power would be effectively policed. Any such power would also potentially raise issues of self-incrimination in relation to any overseas proceedings, which would require careful consideration about exactly what information could be sought and its use.

40. Although we accept that it will be inevitable that there are some differences between the law on corporate manslaughter or culpable homicide in England and Wales and in Scotland because of the difference in the two legal regimes, the Government should be doing all it can to ensure there is as little practical variation as possible. We note that the recommendations in our report would bring the Government's draft Bill closer to the reforms proposed by the Scottish Expert Group. (Paragraph 259)

The Government recognises the importance of close co-operation with the Scottish administration on this issue and officials in the Home Office are in close contact with their counterparts in the Scottish Executive.

An important factor in considering culpability for this sort of offence will be the standards that organisations must adhere to in order to safeguard their employees and others. In many cases these will be duties that apply in the same or similar terms in both jurisdictions. For example, the main duties under the Health and Safety at Work Act 1974 are a reserved matter. The proposals will not, therefore, lead to companies and other organisations being asked to comply with different regulatory standards between the two jurisdictions – except to the extent that is already recognised that these should differ.

Beyond these underlying standards, differences in the development of the law in the two jurisdictions will inform the most appropriate way of framing a new offence. A central part of the offence proposed by the Scottish Expert Group is identifying "reckless" conduct. The law in England and Wales has already moved away from recklessness as the basis for the offence of manslaughter, and the Law Commission in 1996 rejected a concept of foreseeability underpinning the new corporate offence. We do not therefore consider that this would offer a suitable basis for a new offence here. There are, however, clearly important wider issues about the framing of the offence, and the Home Office will continue to remain in close contact with the Scottish Executive.

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[2] These include the "Six Pack" of directives covering the management of health and safety at work, safe use of work equipment, handling awkward and heavy loads and personal protective equipment. (Directives 89/391/EEC, 89/654/EEC, 89/665/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC).

Chapter 12 Sanctions

41. We welcome the higher sentences given in recent cases by courts following convictions for high profile health and safety offences which involved deaths. Nevertheless, the evidence suggests that there is a need for an improved system of fining companies. We recommend that, following the enactment of the Bill, the Sentencing Guidelines Council produce sentencing guidelines which state clearly that fines for corporate manslaughter should reflect the gravity of the offence and which set out levels of fines, possibly based on percentages of turnover. The Committee recognises that a term such as turnover would need to be adequately defined on the face of the Bill. It is particularly important that fines imposed for the corporate manslaughter offence are higher than those imposed for financial misdemeanours. We also believe that it would be useful for courts to receive a full pre-sentence report on a convicted company. This should include details of its financial status and past health and safety record. (Paragraph 268)

The Government, in common with the Committees, welcomes the high penalties seen in recent cases for serious breaches of health and safety legislation. The Government also supports the Committees' view that sentencing guidelines will be important for corporate manslaughter to ensure sentences are set at an appropriate level. This will be a matter for the Sentencing Guidelines Council (SGC), an independent body, who are responsible for the drafting and content of sentence guidelines. The Government has highlighted the importance of guidelines for corporate manslaughter to the SGC which aims to produce guidelines for new offences before these are brought into force wherever possible. Both the Government and the Home Affairs Committee will have an opportunity to comment on the content of any guidelines before they are published.

The Government agrees with the Committees that turnover may be relevant to sentencing but would be concerned if it were an overriding factor in any guidelines if, for example, that led to sentences which did not properly reflect the offending behaviour or take into account fully the defendant's ability to pay.

The Government also agrees with the Committees that in order to pass an appropriate sentence the courts should have information about a company's financial status and health and safety record. The Government is satisfied that the courts have sufficient authority to require this information from the parties involved in the case where necessary.

42. We believe that it is right in principle that prosecuting authorities should have the power in appropriate cases to ensure that companies do not try to evade fines by shifting assets. (Paragraph 270)

The Government recognises the Committees' concern that companies might seek to evade fines in this way. Clearly, a solvent company will remain liable to pay a fine regardless of whether assets have been moved. In the case of companies contemplating insolvency, a number of relevant measures exist. For example, any attempt to put assets out of the reach of creditors in anticipation of a winding-up may constitute a criminal offence under the Insolvency Act 1986 or possibly the Companies Act 1985. A liquidator is also provided with considerable powers under the 1986 Act to restore the position where assets have been transferred or sold for less than their market value, or where creditors have been preferred in anticipation of winding-up or administration. Liquidators and creditors may also ask a court to examine company officers where they have misapplied or retained company property or been guilty of any misfeasance or breach of duty. The disqualification provisions of the Company Directors' Disqualification Act 1986 may be used against directors and former directors where their culpability for the misconduct can be proved. To the extent that this issue needs revisiting, it is wider than the new offence itself and raises questions both about the scale of the problem to be tackled and proportionate ways of doing so. We are reluctant to widen the Bill to general questions of this nature.

43. We consider that remedial orders are unlikely to be frequently used in practice, as the Health and Safety Executive and local authorities are likely to have acted already. However, we believe they are an additional safeguarding power for cases where companies do not take appropriate action. We recommend that judges who do make use of this power should make full use of the expertise of the Health and Safety Executive and local authorities available to them. (Paragraph 275)

44. We recommend that the Government considers mechanisms for monitoring whether an organisation, including a Crown one, has complied with a remedial order and includes a provision for this in the Bill. (Paragraph 276)

45. We believe it is sensible to encourage directors of a company to take responsibility for ensuring their company complies with a remedial order. We therefore recommend that the Government amends the Bill in order to make it possible for directors to be charged with contempt of court if the company has failed to take the steps required by the court. (Paragraph 278)

The offence of corporate manslaughter is intended to complement existing health and safety legislation in encouraging safe working practices. Remedial orders, already available under health and safety law, are a valuable sanction against organisations which continue to flout health and safety laws. The Government is pleased that the Committees support the inclusion of remedial orders in the draft Bill, while accepting that they may be used infrequently. This will be because the appropriate enforcing body (often this will be the HSE or the local authority but another body may be more appropriate depending on the case, for example the Food Standards Agency) will already have been heavily involved with the safety procedures in the organisation where the death occurred. The Government is confident that judges will not impose remedial orders without first seeking advice from the relevant safety body and where by the time a case has reached the Crown court, the judge believes that a remedial order is still necessary, the enforcing body will already have a strong interest in ensuring the remedial orders set are complied with.

The Government will, however, look at whether the Bill would be improved by the addition of a procedural framework for remedial orders.

The Government agrees that remedial orders should be taken seriously by company directors. The Government also recognises the concern raised in the evidence presented to the Committees that the penalty for failure to comply with an order may in some circumstances be less expensive than complying with the order. The Government considers that the proposal to make directors liable for contempt of court where orders are not complied with would be both complicated (for example, it would not be appropriate to be able to proceed against any director and so provision would need to be made to identify which director ought be liable and on what basis) and contentious, in what is identified as a relatively marginal part of the Bill. The Government therefore considers a more expedient option is to reinforce the seriousness of failure to comply with an order by ensuring that such failures are always returned to the Crown court where an unlimited fine can be imposed.

46. We believe that it is important that Crown bodies do not escape sanction and that fines and remedial orders can serve a practical purpose in signalling culpability. (Paragraph 282)

The Government believes that the Crown should be subject to fines as the principle sanction for corporate manslaughter. There was strong support for this in the responses we received to our draft Bill and it is endorsed by the Committees. We recognise concern that fining a public body diverts resources away from the provisions of public services. However, we are also aware that the courts are alert to this issue and are able to set fines accordingly.

47. We share the disappointment of many that the Government has not included more innovative corporate sanctions in the draft Bill. We welcome the fact that the Government is now looking at the issue of alternative penalties but believe that the scope of this review should be widened to look at alternative sanctions for nonregulatory offences. Remedial orders and fines provide an inadequate range of sanctions for sentencing. It is not clear, for example, if remedial steps already taken by an organisation will be taken into account in assessing the level of a fine. There clearly would be difficulties if fines made a company bankrupt if it had already taken successfully implemented remedial orders. We therefore think a wider range of sanctions is essential. (Paragraph 287)

49. We believe the Government should be aiming towards implementing a wide package of sanctions for corporate manslaughter, so that courts have the flexibility to match sanctions to the broad range of cases that might come before them. (Paragraph 298)

The Government notes the Committees' disappointment that alternative sanctions to fines and remedial orders were not included in the draft Bill. However, the question of alternative sanctions for corporations is not limited to corporate manslaughter and proper consultation is necessary on the types of alternative sanctions that might be appropriate and when these would be used. This is a substantial piece of work in itself and, as the Committees pointed out, this is currently underway. The Better Regulation Executive is currently conducting a review of existing penalty systems for regulatory offences. A principal aim of this review will be to examine whether it would be appropriate to introduce more innovative sanctions for these offences, and if so to identify what those penalties might be. Whilst regulatory offences are the focus of this review, the BRE have indicated that they are willing to broaden the consultation (to be published this Spring) to ask respondents for their views on the wider application of innovative sanctions.

The BRE expect to publish their final report this Autumn and the Government will consider the possibility of applying innovative sanctions to the offence of corporate manslaughter in the light of their findings.

The Committees also considered the application of restorative justice to cases of corporate manslaughter. Restorative justice is already a possibility in these cases, and would remain so for the new offence. For example, judges have powers to defer sentencing pending specific reparative action on the part of the offender, which may be participation in a process of restorative justice. Restorative justice can also be recommended after sentencing. However, judges will need to consider the appropriateness of restorative justice for each case: it is a voluntary process and must be agreed to by both sides.

48. Irrespective of this dispute it is our view that the draft Bill should make provision for companies to be required to pay compensation. (Paragraph 293)

The Government agrees with the Committees that it should be possible for compensation orders to be made in appropriate circumstances. We are satisfied that the current law already provides for this under section 130 of the Powers of Criminal Courts (Sentencing) Act (2000). Through this the courts are empowered to make orders against 'persons', which includes both individuals and corporations. Therefore no additional provision is needed in the Bill to ensure companies may be required to pay compensation.

However, in corporate manslaughter cases assessments of loss are likely to be relatively complicated in nature which, as the courts have recognised, may therefore be more appropriate for the civil courts, who have the expertise to assess the extent of damages.

Chapter 13 Individual liability of directors

50. We do not believe it would be fair to punish individuals in a company where their actions have not contributed to the offence of corporate manslaughter and we therefore reject the argument that individuals in a convicted company should be automatically liable. However, we believe that if the draft Bill were enacted as currently drafted there would be a gap in the law, where individuals in a company have contributed to the offence of corporate manslaughter but where there is not sufficient evidence to prove that they are guilty of individual gross negligence manslaughter. (Paragraph 308)

51. The small number of directors successfully prosecuted for individual gross negligence manslaughter shows how difficult it is to prove the individual offence. Currently the only alternative would be to prosecute individuals for the less serious offence of being a secondary party to a health and safety offence. We believe that, just as the Government has taken the decision that when a company's gross management failing caused death it should be liable for a more serious offence than that available under health and safety legislation, so it should be possible to prosecute an individual who has been a secondary party to this gross management failing for a more serious offence also. We therefore recommend that secondary liability for corporate manslaughter should be included in the draft Bill. (Paragraph 309)

52. By analogy with the offence of causing death by dangerous driving the maximum term of imprisonment could be set at 14 years. (Paragraph 314)

53. We acknowledge that statutory health and safety duties could be introduced outside the Bill, but believe that since they might help clarify directors' duties with regard to corporate manslaughter law the Government should aim to introduce them either in the Bill, alongside the Bill, or as closely as possible afterwards. (Paragraph 320)

The Government is pleased that the Committees' report overall recognises the urgent need for a new and more effective way of making organisations liable for collective failings in the way their activities are managed. Prosecutions to date have demonstrated the difficulty in mounting prosecutions against corporations on the basis of the identification principle and the conduct of specific individuals. And evidence from the Health and Safety Commission to the Committees also identified that a large proportion of health and safety breaches arose from systemic failures in management systems rather than the actions of one individual. It is therefore vital that we develop and implement a new basis for holding organisations to account for manslaughter for gross corporate failures, which focuses on the way an organisation's activities are managed overall and which this legislation will provide.

Current offences including manslaughter and under health and safety laws already cover individuals who have acted recklessly or been grossly negligent and caused a death, as well as those who have contributed to health and safety failures. We do not consider that legislation designed to tackle a specific difficulty with corporate liability is the right place to review this framework for additional liabilities. And there are particular problems with seeking to address this issue through current tests for secondary liability. Generally, secondary liability seeks to cover those who support or encourage an offence, and who are equally guilty of the criminal behaviour, but who are separate from the main perpetrator. As such, the tests for secondary liability generally require that an accessory has a similar state of mind as the main offender or at least knew or intended that the offence would be committed. These tests, however, raise difficulties in the context of corporate manslaughter, where individuals' actions (or omissions) are likely to be a part of the overall management failure, rather

than separate from it. In particular, to be guilty as an accessory an individual would need to be aware of the picture of failing in the organisation, at least contemplate it being grossly negligent and act in a way that supported or sought to bring that about. However, it is likely that in these circumstances an individual charge of manslaughter would in any event be possible. Similar difficulties arise with the tests of consent or connivance[1], whilst enabling a person to be convicted on the basis of neglect would introduce a substantially lower threshold than is required either for the new corporate offence or for manslaughter.

However, the Government recognises the importance of strengthening individual responsibility and accountability for health and safety management. The Health and Safety Commission has recently asked the Health and Safety Executive to look at the effectiveness of the enforcement of current legislation against individuals, including section 37 of the Health and Safety at Work Act 1974. The Health and Safety Commission has also been evaluating the effectiveness and progress of current measures in place relating to directors' duties. Following discussion at the Commission's meeting in December 2005, they have asked the Health and Safety Executive to advise further and to report back in the Spring.

The Government also recognises that a conviction for corporate manslaughter will raise important questions about the overall management of a company. Existing legislation makes provision for directors to be disqualified in a number of circumstances, including where they have been convicted of an indictable (which includes a range of health and safety offences. This ensures that directors can be disqualified where they have contributed to serious management failings and in doing so committed an offence. The Government considers the existing legislation makes sensible provision to offer protection to the public and businesses from those who are unfit to run companies, but will look further at the interaction between this and the new offence.

[1] By contrast, these difficulties do not arise for the offences covered by the Terrorism Bill, which are not offences of management failure but relate to particular activities that a company might be engaged in.

Chapter 14 Investigation and prosecution

54. We agree that the investigation and prosecution of corporate manslaughter should remain the responsibility of the police and Crown Prosecution Service. However, the Home Office should consider whether the police might need further training in investigating and prosecuting the offence. (Paragraph 327)

The Government is pleased the Committees agree that the police and CPS should continue to be the prime bodies involved with investigation and prosecution for corporate manslaughter cases. Other bodies, often the HSE, will continue to play significant roles in investigations, which are often joint investigations. The Work-related Deaths Protocol sets out the principles for effective liaison between the parties responsible for investigation and prosecution of work-related death incidents, including the police, HSE and the CPS. As now, safety investigations by the transport Accident Investigation Branches will work in parallel to any criminal investigation, and protocols exist to manage the relationship between the investigations.

The Home Office will work with the police, nearer the time of implementation of this legislation, to ensure that training for homicide cases takes the new offence into account.

55. We have yet to be convinced that the police require additional powers to investigate corporate manslaughter effectively. The requirement in the Police and Criminal Evidence Act 1984 to obtain judicial authority for entering and searching premises is an important safeguard. However, there does appear to be an inconsistency in the powers of the police and those of the Health and Safety Executive. We therefore urge the Government to consider this issue further. (Paragraph 334)

The Government agrees with the Committees that there is not yet sufficient evidence to support the need for the police to have additional powers. The level of enforcement powers between HSE and the police reflect their different roles. The immediate need to ensure safety and to minimise any future risks to life, limb and property at the earliest possible opportunity fully merits the need for HSE to have powers around access to and seizing of material and compulsion to respond to questioning. As the HSE pointed out in evidence to the Committees, these powers are needed to enable them to act quickly. The police have existing powers to investigate crime, set out in the Police and Criminal Evidence Act 1984 together with safeguards and protections for the public to prevent arbitrary use of their powers. The investigation element is of priority but it does not have the same urgency as the prevention of risks to safety. However, the Government will keep the effectiveness of the investigative arrangements for work-related deaths under review.

56. We recommend that the Government remove the provision in clause 1(4) requiring the Director of Public Prosecution's consent before a prosecution can be instituted. (Paragraph 340)

The decision by the Director of Public Prosecutions whether or not to consent to a prosecution involves the same criteria that the CPS use in deciding whether or not to bring prosecutions: that there is sufficient evidence for there to be a reasonable prospect of a conviction and that bringing the proceedings is in the public interest.

Applications to the DPP for consent to bring corporate manslaughter charges would mean that independent consideration would be given to the evidence in the case and whether that evidence was capable of supporting a prosecution so that there would be a reasonable prospect of conviction. These are cases which

will often attract a high public profile and in which, given the tragic fatal circumstances, there will be a strong public interest to prosecute if there is sufficient evidence. Where the CPS are not themselves bringing a prosecution, we consider it appropriate that there is adequate consideration of the evidence on which a private prosecution is sought: where a case is based on evidence which is insufficient to provide a realistic prospect of conviction, the Government believes it is right to ensure that it does not proceed to court.

A decision by the DPP not to give consent to a prosecution could be subject to judicial review.

The Committees suggest that the high costs involved act as barriers to bringing private prosecutions. However, those costs do not distinguish between well-founded cases and ill-founded ones. The Government considers that ability to meet the costs should not be the determining factor in whether private prosecutions proceed, instead it should be on whether there is sufficient evidence and public interest in the proceedings. The Government also does not accept the evidence the Committees received from the Centre for Corporate Accountability that there could be conflicts of interests where the Crown is a defendant. The DPP is an independent position and decisions will be made on the facts of each case.

The Government therefore intends to retain the provision that proceedings for corporate manslaughter will require the consent of the DPP.

Chapter 15 Cost

57. We did not receive much substantial evidence to suggest that companies that currently have adequate health and safety arrangements in place would incur major costs when complying with this legislation. We recommend that the Government works with industry advisory bodies to try to educate industry about the offence and therefore minimise the cost of legal advice and training. (Paragraph 352)

It is the Government's intention that organisations which currently take their health and safety responsibilities seriously should not need to alter their practices in response to this offence. We do not wish to impose new regulatory burdens, to stifle entrepreneurial activity or to create a risk averse culture. In consulting on the draft Bill the Government sought further information about potential costs related to the offence. That the Committees, in common with the Government, did not receive substantial evidence of major costs for companies already complying with health and safety supports our assessment that such costs will not arise.

Because the new offence is clearly linked to existing standards of health and safety it does not create any new regulatory burdens. However, the Government does recognise that it is important for legislation such as this to be properly understood to ensure that it does not have unintended consequences, either in terms of unnecessary cost or risk aversion, for those organisations which do already take a conscientious approach to health and safety. For this reason the Government is in full agreement with the Committees that education about this offence is important and necessary.

The Government believes that the level of understanding in industry and the public sector has already improved as the Government has worked with umbrella organisations in developing the proposals. The Government will continue to work with industry bodies and public sector bodies to provide accurate information about how the offence will operate, and in particular that the standards which need to be met are those already set out in legislation for health and safety.

The Government has noted the evidence received by the Committees about potential gaps in the regulatory impact assessment in relation to local authorities. An updated assessment will be produced when the Bill is introduced to Parliament.

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